In the matter of

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
Claimants

v.

The Republic of Peru
Respondent

(UNCT/18/2)

Statement of Defense of the Republic of Peru

14 December 2018

RUBIO LEGUÍA NORMAND
Lima

WHITE & CASE
Washington, D.C.

Statement of Defense of the Republic of Peru

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Statement of Defense of the Republic of Peru

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Statement of Defense of the Republic of Peru

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

I. Overview

2. The Republic of Peru respectfully requests that this proceeding be dismissed forthwith pursuant to the Peru-United States Trade Promotion Agreement (the "Treaty") and UNCITRAL Arbitration Rules (the "Rules"). Peru is a diligent participant in investment arbitration proceedings, a reliable partner of the United States and a fiscally responsible sovereign that has established a functioning process for the historic and lawful resolution of Peruvian agrarian reform bonds (the "Agrarian Reform Bonds"), for the benefit of all legitimate bondholders.

3. The case presented by Gramercy Funds Management LLC ("Gramercy Management") and Gramercy Peru Holdings LLC ("Gramercy Holdings," and together with Gramercy Management, "Claimants" or "Gramercy") fails to comply with the Treaty, demonstrate an entitlement to the benefits derived therefrom or prove any breach by Peru. Indeed, the Third Amended Notice of Arbitration and Statement of Claim dated 13 July 2018 ("Third Amended Notice") only underscores that Gramercy has violated the Treaty, disregarded the integrity of this proceeding, willfully withheld relevant and material evidence and disgraced the field of investment treaty disputes. It is Gramercy, not Peru, that has violated the object, purpose and requirements of the Treaty.

4. Instead of participating in a lawful bondholder process that is paying bondholders and which would allow Gramercy a significant recovery, Gramercy has engaged in a propaganda campaign that has prejudiced Peru, its people, other bondholders and the bilateral relationship with the United States, all in an effort to obtain returns to which Gramercy has no right, and could never have expected when it made its dubious decision to acquire these instruments. The profoundly speculative nature of Gramercy's conduct is evident in its contemporaneous admissions regarding the uncertain legal status and value of the bonds. The record reveals that Gramercy relied from the beginning on the hope that it could lobby its way to a change in law, or bully its way to a resolution in violation of applicable law.

5. **Gramercy Fails to Reveal Relevant Facts and Evidence.** Gramercy seeks US$1.8 billion based on mere scans of decades-old bearer bonds governed by and subject to Peruvian law, courts and authentication procedures, but it continues to hide evidence and evade the facts. Among other things, and as set out in Section II below:

- Gramercy fails to rebut the reality that the Agrarian Reform Bonds have unique historical origins that pre-date the Treaty by decades. They are old bearer instruments provided decades ago as compensation for land in Peru, in local

currency and subject to Peruvian law and jurisdiction. They were not offered publicly, listed on an exchange or issued into the U.S. market, and are not comparable to contemporary sovereign bonds. Years of currency changes and hyperinflation resulted in uncertainty as to the value of bonds and procedure for recovery. They were mired in uncertainty and ongoing dispute when Gramercy allegedly acquired them.

- Gramercy hides its representations to its own investors and "beneficial owners," as well as how it Gramercy revealed information such as how it solicited funds from pension funds and others, who those beneficial owners may be and what disclosures were made to them. It is telling that a one Gramercy document discovered by Peru emphasizes: "investors may lose all or a substantial portion of their investment."

- Gramercy hides the fact that a Gramercy entity entered into almost three hundred contracts to acquire Agrarian Reform Bonds in 2006 to 2008, and failed to produce the contracts to the Tribunal.

- Gramercy hides the fact that the purchase price for the bonds totals approximately US$ 31 million, and has failed to provide a shred of evidence demonstrating that it ever made payment of those purchase amounts.

- Gramercy admits that it could have recovered approximately US$ 34 million under the Peruvian bondholder process, i.e., more than that total amount of its hidden purchase contracts, unlike its prior position that it could not recover any meaningful amount under the available bondholder process.

- Gramercy admits that the Peruvian legal framework is sufficient for an acceptable resolution of this matter; that an authentication and registration procedure is necessary; and that it is comfortable with the forms of payment available to it under Peruvian law.

- Gramercy hides the fact that it has continued to fund the lobbying and propaganda machine that it built and armed through shell entities, smoke and mirrors to smear the Republic of Peru and its representatives through misinformation in an effort to harm its economic and political standing, at prejudice to Peru, its people and its relationship with the United States (the Non-Disputing Party to this proceeding) and multilateral organizations.

6. **Gramercy Fails to Establish Jurisdiction.** Despite bearing the burden of proof in this proceeding, Gramercy's has failed to satisfy even the most basic elements of a Treaty claim, highlighting the severe weakness of its case. Among other things, and as set forth in Section III below:

- Gramercy devotes only a handful of conclusory pages to the Treaty's fundamental requirements for covered investors/investments and preconditions to arbitration, without citation to any supporting legal authority – including a total disregard for highly relevant investment treaty jurisprudence.

- Gramercy failed to comply with mandatory preconditions to arbitration, failed to waive local proceedings, failed to observe temporal limitations, acted in abusive disregard of the international dispute mechanism, failed to demonstrate that it

made an investment in compliance with law and failed to demonstrate even that Claimants are qualified investors under the Treaty.

- Gramercy submits only purported scans of Bond certificates, with no authentication of the instruments, and no evidence of the purported transactions by which Gramercy allegedly acquired the Bonds in Peru or the price it paid for them (or to whom).

- Gramercy does not explain how the Bonds are beneficially held (or by whom, or the nationalities of the holders), with no explanation or supporting documentation as to how Gramercy may have marketed or sold its alleged interests to such parties (raising associated questions of standing and jurisdiction, among other issues).

- Gramercy even fails even to acknowledge the existence of cases that are relevant to the interpretation of the issues at hand, perhaps because they are so distinguishable.

7. **Gramercy Fails to Prove Its Claims.** Even assuming, contrary to the record, that Gramercy were an "investor" that made a covered "investment" and complied with the various other jurisdictional requirements of the Treaty, the fact remains that Peru has not breached any obligation under the Treaty. Among other things, and as set forth in Sections IV and V below:

- Gramercy is a lone fund that allegedly chose to acquire thousands of old bearer bonds related to potential domestic claims for speculative aims. The Treaty does not protect such mere speculation, and none of Peru's measures have contravened any Treaty obligation.

- Peru did not (1) expropriate Gramercy's alleged investment; (2) violate the minimum standard of treatment; (3) accord Gramercy less favorable treatment than Peruvian investors; or (4) deny Gramercy effective means to enforce its rights.

- Gramercy threatens due process, with little to no argumentation or expert support for its unusual billion-dollar international law claims under the Treaty, which could be highly prejudicial under the particular circumstances of this case, where the Parties engaged in a procedural battle over the importance of Gramercy filing a definitive Statement of Claim, and the express order of the Tribunal that Gramercy put forward all evidence, witnesses and experts on which it relies.

- Gramercy has failed even to properly conceptualize or explain the concept of compensation under the Treaty, and relies on a misguided expert report.

8. **The Republic of Peru Has Demonstrated Its Case.** In contrast to the dearth of arguments and evidence by Gramercy, and its choice to hide material evidence, Peru has established a strong case with broad evidentiary record submitted by important witnesses and major international experts. As set out throughout this submission:

- *Former Minister of Economy and Finance and Ambassador Luis Miguel Castilla* discusses the failed efforts to change Peruvian law related to the Agrarian Reform Bonds, the diligent steps to carry out the relevant court ruling and the aggravating and disrespectful conduct of Gramercy.

- *Vice Minister of Treasury Betty Sotelo* has decades of experience and first-hand knowledge of the history and status of the Agrarian Reform Bonds and describes the prior legal uncertainty of the Bonds and advances of the available bondholder process.

- *Professor Michael Reisman* of Yale University concludes that the Tribunal lacks jurisdiction *ratione materiae, ratione personae* and *ratione temporis*, and that Gramercy's claims are an abuse of process.

- *Peruvian law expert Oswaldo Hundskopf*, the Dean of the University of Lima Department of Law, focuses on the framework for the Agrarian Reform Bonds under Peruvian law and the application of the current value principle.

- *Claims Procedure Expert Norbert Wühler*, an expert in national and international claims processes, concludes that the available bondholder process is a viable mechanism well within the standards of accepted practices for claims processes, and which is functioning in a diligent manner.

- *Professor Pablo Guidotti*, an internationally recognized economist who served as Secretary of the Treasury of Argentina when it developed its contemporary Bonds program, addresses the unique characteristics of the Agrarian Reform Bonds, discusses Peru's demonstrated fiscal responsibility and lack of default and reveals the economic illogic of Gramercy's speculative conduct.

- *Quantum Experts Brent Kaczmarek and Isabel Kunsman* focus on the conceptual and practical errors in the report submitted by Gramercy's quantum expert, and demonstrate that the Peruvian framework and bondholder process function well and there is no basis for Gramercy's damages claims.

9. For all of the reasons set forth herein, Peru respectfully requests the dismissal of this proceeding and a full award of costs in favor of Peru.

II. Facts

A. A Fiscally Responsible Sovereign

10. The Republic of Peru has demonstrated over an extended period of time, over consecutive governments, through fat and lean years in the global economy, a commitment to macroeconomic stability and fiscal responsibility. This continues to be the case today, notwithstanding self-serving efforts by Gramercy to discredit and harm Peru, to the detriment of Peruvians, including holders of Agrarian Reform Bonds.

11. It was a hallmark moment for Peru and its people when the International Monetary Fund ("IMF") and World Bank Group elected to hold their Annual Meetings in Lima in October of 2015, at a site containing the Museum of the Nation harboring Peruvian cultural patrimony and a gleaming new spire housing the Bank of the Nation.

12. Thousands of international officials arrived in Lima for the meetings. World Bank President Jim Yong Kim stated, "[t]his country is a far more prosperous and just society

today than a generation ago. Over the past 10 years, Peru's GDP has increased at an average rate of over 6 percent each year."[1] IMF Managing Director Christine Lagarde declared:

> *Lima is the first Latin American city to host the Annual Meetings in almost 50 years. It has been a long time, but it also means that Peru is no longer the proverbial "country of the future" – it is the "country of the present."*[2]

13. Since establishing a stable macroeconomic foundation in the 1990s, Peru has achieved average annual growth of over five percent since 1993, and 5.4 percent since 2002.[3] Peru also consistently has been ranked among the freest economies in Latin America.[4]

14. Peru concurrently has earned a reputation for careful debt management and fiscal responsibility. Since resolving historical external debt issues in the 1990s, Peru has adopted a reliable approach to the management of external debt and achieved widespread praise for its reliability as an issuer of contemporary sovereign debt. Peru registered with the United States Securities and Exchange Commission ("SEC") as an issuer of debt securities in 2002, and it subsequently has made more than a dozen global bond offerings, under the watchful eyes of underwriters, lawyers, ratings agencies and the global markets.

15. Peru achieved investment grade status in 2008, when the principal credit ratings agencies each determined that it had earned an upgrade – "Peru Rocket Takes Off," declared *Latin Finance*.[5] As Standard & Poor's explained, the investment grade rating was "supported by the significant decline in Peru's fiscal and external vulnerabilities within a context of high and diversifying sources of growth with low inflation and strengthening macroeconomic fundamentals."[6] These agencies have rated Peru as investment grade and its outlook as "stable."[7] For example, Fitch affirmed Peru's sovereign rating, highlighting that "Peru's creditworthiness is underpinned by its established track record of macro policy credibility, consistency, and flexibility" and that "[s]uccessive Peruvian administrations have maintained credible economic policies."[8] More recently, Moody's balanced various factors, highlighting Peru's "proven track record and institutional arrangements that anchor fiscal

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[1] Jim Yong Kim, The Lessons of Carabayllo: Making Tough Choices, World Bank Group/IMF Annual Meetings, 9 October 2015 (Doc. R-528).

[2] Christine Lagarde, Brothers and Sisters, There is Much to Do, International Monetary Fund, 9 October 2015 (Doc. R-89).

[3] *Gross Domestic Product (Annual percent change)*, Central Reserve Bank of Peru, 2018 (Doc. R-479).

[4] *See 2018 Index of Economic Freedom, Peru*, The Heritage Foundation, 2018 (Doc. R-480).

[5] *Peru Rocket Takes Off*, LatinFinance, 28 February 2008 (Doc. R-1); *see also, e.g.*, Naomi Mapstone, *Peru welcomes investment grade rating*, Financial Times, 3 April 2008 (Doc. R-2); Walter T. Molano, *Peru Investment Grade: Finally!*, Latin Trade, 21 July 2008 (Doc. R-3).

[6] *See Standard & Poor's assigns investment grade to Peru on decline in fiscal and external vulnerabilities*, Andina, 14 July 2008, *available at* http://www.andina.com.pe/agencia/noticia-standard-poors-assigns-investment-grade-to-peru-on-decline-in-fiscal-and-external-vulnerabilities-184491.aspx; *see also Fitch Upgrades Peru to 'BBB-'; Outlook Stable*, Fitch Ratings, 2 April 2008 (Doc. R-4); *Rating Action: Moody's Upgrades Peru's foreign-currency ratings*, Moody's Investor Service, 19 August 2008 (Doc. R-5).

[7] Fitch Affirms Peru's FC IDR at 'BBB+'; Outlook Stable, Fitch Ratings, 23 March 2016 (Doc. R-6); Moody's upgrades Peru's rating from A3 to Baa2; outlook stable, Moody's Investor Service, 2 July 2014 (Doc. R-7); Peru Foreign Currency Ratings Affirmed at 'BBB+/A-2'; Outlook Remains Stable, Standard & Poor's, 28 August 2015 (Doc. R-8).

[8] Fitch Affirms Peru's FC IDR at 'BBB+'; Outlook Stable, Fitch Ratings, 23 March 2016 (Doc. R-6).

policy credibility," and included in its assessment, among other factors, Peru's "strong macro-fiscal framework that enhances policy credibility," and "the authorities' steadfast commitment to conservative fiscal management and macroeconomic stability."[9]

16. When Peru issued global bonds in 2015, demand exceeded supply four times over.[10] The markets similarly have continued to demonstrate confidence in Peru, including in connection with an issuance earlier in 2016, when Peru completed a successful issuance of global bonds.[11] The market responded favorably and the issuance yielded one billion Euros, reflecting the confidence of global markets in Peru and its stability and fiscal responsibility.

17. Leading ratings agencies and the market have continued to demonstrate high confidence in Peru. Standard & Poor's affirmed Peru's investment grade rating on 10 August 2016 and confirmed that the outlook for Peru remained "stable."[12] It stated that "ratings on the Republic of Peru reflect the country's track record of pragmatic and predictable policies and some progress on structural reforms over the past two decades through various political transitions."[13] Markets similarly have confirmed their confidence in Peru, with strong demand for Peruvian sovereign bonds[14] and a broad consensus that "Peru's creditworthiness remains sound."[15] More recently, Moody's confirmed its rating outlook, explaining "[t]he stable outlook on the rating reflects our view that upside and downside risks to Peru's credit profile remain balanced as the economy will continue to recover, fiscal performance will remain sound, and debt ratios will remain relatively stable, even as institutional strength challenges that hinder the efficient allocation of resources in the economy remain."[16]

18. As Professor Pablo Guidotti concluded, "Peru has been a success story in Latin America in terms of its economic management, commitment to macroeconomic stability and fiscal responsibility, as reflected in its success as an issuer of contemporary international sovereign bonds. Over twenty-five years, it has naturally built a solid reputation and outperformed comparative groups of countries in terms of economic growth, fiscal strength, low and sustainable public debt, and low and stable inflation, which has been reflected in a consistent improvement in Peru's credit ratings."[17]

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[9] Government of Peru – A3 Stable, Regular Update, Moody's Investor Service, 1 October 2018. (Doc. R-365).

[10] Peru successfully placed bonds with demand four times greater than supply, Gestión, 18 August 2015 (Doc. R-527).

[11] *See* Preliminary Prospectus Supplement Filed Pursuant to Rule 424(b)(5), Republic of Peru, 25 February 2016 (Doc. R-533); Peru realizes successful issuance of 14-year Global Bonds for € 1 billion in International Capital Markets, Ministry of Economy and Finance, 23 February 2016 (Doc. R-532).

[12] Republic of Peru Foreign Currency Ratings Affirmed at 'BBB+/A-2'; Outlook Remains Stable, S&P Global Ratings, 10 August 2016 (Doc. R-60).

[13] Republic of Peru Foreign Currency Ratings Affirmed at 'BBB+/A-2'; Outlook Remains Stable, Standard & Poor's Global Ratings, 10 August 2016 (Doc. R-60).

[14] Brexit drives demand for Peruvian sovereign bonds in international market, Andina, 10 August 2016 (Doc. R-535).

[15] Global Economics: Executive Briefing: Peru, Scotiabank, August 2016 (Doc. R-69).

[16] Government of Peru – A3 Stable, Regular Update, Moody's Investor Service, 1 October 2018. (Doc. R-365).

[17] Guidotti Pablo Guidotti (RER-4), ¶ 13 ("Peru has been a success story in Latin America in terms of its economic management, commitment to macroeconomic stability and fiscal responsibility, as reflected in its success as an issuer of contemporary international sovereign bonds. Over twenty-five years, it has naturally built a solid reputation and outperformed comparative groups of countries in terms of economic growth, fiscal strength, low and sustainable

19. As the Quantum Expert concludes, Peru's fiscal responsibility can likewise be observed with respect to the Agrarian Reform Bonds:

> Peru's implementation of the outstanding Agrarian Bonds payment process is consistent with its current sovereign credit ratings issued by the rating agencies. Notably, none of the Agrarian Bonds were or are rated by the credit ratings agencies, as the contingent liabilities they represent are simply too uncertain to rate.[18]

B. The Unique History of the Agrarian Reform Bonds

20. Agrarian reform bonds ("Agrarian Reform Bonds") are bearer instruments provided as compensation for land decades ago in Peru. They emerged as part of reforms adopted under Peruvian law almost half a century ago – long before the contemporary era of globalized macroeconomic policies, contemporary global bonds or contemporary investment treaties. The Agrarian Reform Bonds (1) arose under unique historical circumstances, (2) are readily distinguishable from contemporary global bonds and sovereign finance and (3) remained under a cloud of legal uncertainty at the time that a Gramercy entity alleged began to acquire such bonds.

1. Origins

21. The "Land Bonds," as Gramercy calls them (in this proceeding and through its vehicles of propaganda), relate to payments for land, subject to local law and courts. They are the product of a unique era in Latin American history which is not and cannot be subject to claims in this contemporary Treaty proceeding. During the 1960s, with international encouragement, Latin American governments adopted "agrarian reforms" to reallocate the structure for landholdings and economic activity in the agrarian sector, as an element of modernization and economic growth with broader distribution of property-holding as a foundation.[19] Implementation of agrarian reforms across the region was inconsistent and slow.[20]

22. Agrarian reform was also part of a broader range of economic issues of the era, including the relationships between states and investors. As 1969 approached, the government of Fernando Belaúnde Terry announced the resolution of an investor-state dispute with an American company related to the La Brea & Pariñas oil fields. At that time,

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public debt, and low and stable inflation, which has been reflected in a consistent improvement in Peru's credit ratings.").

[18] Report of Brent Kaczmarek and Isabel Kunsman, 14 December 2018 ("Quantum Expert"), ¶ 16. (RER-5).

[19] *See, e.g.*, Declaration of Punta del Este, Signed on August 17, 1961 by all members of the Organization of American States except Cuba. ("Therefore the countries signing this declaration in the exercise of their sovereignty have agreed to work toward the following goals during the coming years: [….] To encourage, in accordance with the characteristics of each country, programs of comprehensive agrarian reform, leading to the effective transformation, where required, of unjust structures and systems of land tenure and use; with a view to replacing latifundia and dwarf holdings by an equitable system of property so that, supplemented by timely and adequate credit, technical assistance and improved marketing arrangements, the land will become, for the man who works it, the basis of his economic stability, the foundation of his increasing welfare, and the guarantee of his freedom and dignity." (Doc. R-481).

[20] Frances M. Foland, *Agrarian Reform in Latin America*, Foreign Affairs, 1969, at 1 (Doc. R-11).

contemporary investment protection treaties did not exist and Latin American states had announced a resounding "no" to a new World Bank-based system for investor-state dispute settlement, as a World Bank official seconded to the nascent International Centre for Settlement of Investment Disputes ("ICSID") explained in an article of the era.[21]. Absent an international legal framework for resolution of the dispute, the matter was resolved through negotiations that resulted in the payment of compensation by the state in a deeply-questioned deal which prompted widespread consternation when final details became public.

23. Promptly thereafter, and not unlike political developments of the era elsewhere, a military government assumed control of the country. Led by General Juan Francisco Velasco Alvarado, the new government expropriated La Brea & Pariñas and soon set about a broad reform of agrarian land-holdings through the expropriation of land. As summarized by a future State Department official, "Peru's expropriation of the International Petroleum Company property in 1968 may turn out to have been the most important single event in U.S.-Latin American relations in the decade."[22] It became "a symbol of the crisis in relations between the United States and Latin America," as the *New York Times* described in an article dated 28 February 1969[23] – unlike the exceptionally positive relationship that Peru and the United States have since shared for many years.

24. The new government promulgated the Law of Agrarian Reform, Decree Law No. 17716, on 14 June 1969, a day that was dubbed the Day of the Campesino.[24] Other countries in the region adopted similar laws during that era, including Chile, and Venezuela.[25] The Agrarian Reform Law established a legal framework for Peru's agrarian reform through which the government would redistribute certain landholdings. The Agrarian Reform Law correspondingly authorized the Executive Power to issue the Agrarian Reform Bonds to compensate expropriated landholders.[26]

25. Over more than a decade, Peru redistributed more than 8.2 million hectares of land to over 360,000 beneficiaries, and adopted multiple Supreme Decrees authorizing the issuance of Agrarian Reform Bonds.[27]

26. As Dr. Hundskopf explains: "[d]uring the Agrarian Reform, a series of particular norms that regulated the issuance, value and transferability of the Agrarian Bonds

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[21] Paul C. Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 259 (1971) (Doc. R-40).

[22] William D. Rogers, *United States Investment in Latin America: A Critical Appraisal*, 11 VA. J. INT'L L. 246, 247 (1971) (Doc. R-41).

[23] Malcome W. Browne, *The Oil at Talara: Symbol of the U.S. Peruvian Dispute*, New York Times, 28 February 1969 (Doc. R-9); *see also* Paul L. Montgomery, *Peru Seizing All International Petroleum Assets*, New York Times, 7 February 1969 (Doc. R-10).

[24] Law Decree No. 17716, 14 June 1969, Final Disposition (Doc. RA-155).

[25] Frances M. Foland, *Agrarian Reform in Latin America*, Foreign Affairs, October 1969 (Doc. R-11).

[26] Law Decree No. 17716, 14 June 1969, Arts. 173-181 (Doc. RA-155).

[27] *See The Process of Agrarian Reform*, Ministry of Agriculture and Irrigation (Doc. R-552); Supreme Decree No. 145-69-EF/CP, 30 September 1969 (Doc. RA-233); Supreme Decree No. 137-70-EF/CP, 3 July 1970 (Doc. RA-234); Supreme Decree No. 189-70-EF, 5 August 1970 (Doc. R-235); Supreme Decree No. 129-71-EF, 12 October 1971 (Doc. RA-236); Supreme Decree No. 325-72-EF, 26 December 1972 (Doc. RA-237); Supreme Decree No. 121-73-EF, 19 June 1973 (Doc. RA-238); Supreme Decree No. 038-75-EF, 18 March 1975 (Doc. RA-239); Supreme Decree No. 266-82-EFC, 10 September 1982 (Doc. RA-240).

were promulgated."[28] Dr. Hundskopf also affirms that "[t]he Agrarian Bonds facially evidence its nominal value and the process for its payment."[29]

2. Characteristics

27. Consistent with their unique place in history and their targeted purpose of compensating landowners, the Agrarian Reform Bonds had very particular characteristics. By law, the Agrarian Reform Bonds had characteristics that are utterly different from contemporary global bonds and sovereign finance:[30]

- **Purpose**: Whereas contemporary global bonds are typically issued to raise capital for the sovereign, the Agrarian Reform Bonds were provided as compensation for land.
- **Marketing**: Whereas contemporary global bonds are marketed internationally, the Agrarian Reform Bonds were part of a domestic land reform program. Suffice it to say, Peru did not go on international road shows inviting foreign acquisition of Agrarian Reform Bonds.
- **Market Placement**: Whereas contemporary global bonds are listed on international exchanges to be globally traded, the Agrarian Reform Bonds were given to expropriated landowners, and were never listed on a stock exchange.
- **Denomination**: Whereas contemporary global bonds are often issued in foreign currency and otherwise structured to attract international purchasers, the Agrarian Reform Bonds were issued for in Soles Oro, the currency of Peru at the time.
- **Governing Law**: Whereas contemporary global bonds are often governed by foreign law, the Agrarian Reform Bonds are subject to Peruvian law.
- **Jurisdiction**: Whereas contemporary global bonds are often subject to foreign jurisdiction, the Agrarian Reform Bonds are subject to the jurisdiction of Peruvian courts.
- **Format**: Whereas contemporary global bonds are recorded electronically, the Agrarian Reform Bonds are bearer instruments, i.e., they are literally physical paper documents.

28. Professor Paul G. Mahoney highlighted the critical differences between contemporary sovereign bonds and the Agrarian Reform Bonds in a legal opinion for the Office of Public Debt of the Ministry of Economy and Finance during his tenure as the long-standing Dean of the University of Virginia School of Law, where he has also taught for more than 25 years with a focus on securities regulation, corporate finance and related issues, after

[28] Report of Oswaldo Hundskopf, 14 December 2018 ("Hundskopf"), ¶ 11 (RER-2).

[29] Hundskopf, ¶ 11 (RER-2).

[30] *See, e.g.,* Law Decree No. 17716, 14 June 1969, Arts. 173-181 (Doc. RA-155); *Government of Peru: FAQ on Peru's Bonos de la Deuda Agraria*, Moody's, 18 December 2015 (Doc. R-12).

leaving private practice in corporate and securities transactions, and clerking for Justice Thurgood Marshall of the U.S. Supreme Court.[31]

29. In his report submitted in the present proceeding, Dr. Guidotti explains:

> **Global Bonds:** International sovereign bonds of the contemporary era have characteristics that are structured by sovereigns and their advisers with the aim of reducing risks and attracting international investors. These global bonds issued in international capital markets emerged in Latin America in the 1990s and continue today subject to legal frameworks of authorizing laws and decrees related to the development of the economy with the aim of generating funds for State use. They typically are registered instruments issued through underwriters to institutional and retail purchasers and listed on stock exchanges. They are marketed by States through roadshows and structured to attract buyers. The Global Bonds feature terms designed to attract foreign investors, such as acceleration clauses, and denominations in foreign currency to protect against local inflation risk, as well as foreign governing law and dispute mechanisms.
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> **Agrarian Reform Bonds:** The Peruvian Agrarian Reform Bonds have different characteristics than Global Bonds. The Agrarian Reform Bonds originated in 1969 under a unique historical context. In contrast to Global Bonds, Agrarian Reform Bonds were crated to compensate individual landowners in Peru. They have a particular legal framework and they are physical instruments that were not issued on any capital markets or listed on any exchanges but were given to individual Peruvian landowners. Correspondingly, the Agrarian Reform Bonds were not the subject of any sovereign marketing by Peru and were not designed to attract foreign investors. The Agrarian Reform Bonds are subject to local law and provide for dispute resolution in local courts.[32]

30. The Quantum Expert similarly concludes:

> The Agrarian Bonds differ significantly from more modern sovereign bonds. Some of those differences include: that the bonds were issued for compensation of expropriated land, that the interest payment rates and maturities were established based on how the expropriated land had been exploited and not based on market conditions, and that the bonds do not have acceleration clauses or default interest[33]

31. Peru has actively encouraged foreign investment in contemporary sovereign bonds, engaging in roadshows and filing detailed prospectuses and supplements with the

[31] Legal Opinion of Paul G. Mahoney, 2016 ("Mahoney") (Doc. R-13).

[32] Guidotti, ¶ 13 (RER-4).

[33] Quantum ¶ 13 (RER-5).

SEC, for example.[34] Gramercy has not shown any of similar marketing with respect to the Agrarian Reform Bonds.

3. Uncertainties at the Time of Gramercy's Alleged Purchases

32. The legal status of the Agrarian Reform Bonds remained under a cloud of uncertainty for many years. After using the Agrarian Reform Bonds as compensation, and even before they reached maturity, economic dislocation, inflation and currency changes rendered their face value effectively worthless. Inflation grew from 9.5% in 1973 to 67.7% in 1979, and from 163.4% in 1985 to 7,481.7% in 1990.[35] Peru also changed currencies in 1985 and 1990, replacing the Sol de Oro with the Inti (1 Inti = 1,000 Soles Oro), and the Inti with the Nuevo Sol (1 Nuevo Sol= 1,000,000 Inti).[36]

33. Peru thereafter adopted wide-ranging reforms to reduce inflation, stabilize the economy and create a stable foundation for growth and development, as discussed further above. The Quantum Expert concludes, "Because the Agrarian Bonds' coupons were not protected from inflation, subsequent hyper-inflation in Peru left the Coupons worthless as of 1992."[37] In this context, the Agrarian Development Bank, the entity previously in charge of paying the Bonds, was liquidated.[38]

34. Dr. Hundskopf stated that "after the liquidation process, no entity assumed its obligations regarding the agrarian debt."[39] As the Quantum Expert concludes:

> [B]y that time the outstanding Agrarian Bonds were nearly worthless.
>
> From the issuance of the Agrarian Bonds until 1992, the MEF had transferred the funds required to service the Agrarian Bonds to the Agrarian Bank. Not all the funds the MEF transferred to the Agrarian Bank were disbursed for payment. Many of the Bondholders chose not to ever present any of their Coupons for payment, as evidenced by the unclipped coupons in the Gramercy Bonds with payment dates prior to May 1992. Meanwhile, some of the Bondholders that had initially presented their Coupons for payment, eventually stopped. This is not surprising because the hyperinflation and currency devaluations eventually eroded the value of the principal

[34] Ministry of Economy and Finance, Ministry of Economy and Finance will have a roadshow in Europe to meet with potential institutional investors, 15 October 2015 (Doc. R-529); Prospectus Supplement (to prospectus dated 18 August 2015), Republic of Peru, €1,100,000,000 2.750% Euro-Denominated Global Bonds Due 2026 (ISIN XS1315181708), 28 October 2015 (Doc. R-530).

[35] Annual Tables, Inflation (Annual Average percent change), Central Reserve Bank of Peru (Doc. R-554).

[36] *Table of Equivalencies*, Central Reserve Bank of Peru (Doc. R-555).

[37] Quantum ¶ 13 (RER-5).

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

[39] Hundskopf, ¶ 31 (RER-2).

and interest of the Agrarian Bonds such that any Coupon payments were nearly worthless.[40]

35. Over the following years, Bonds reached or were reaching the end of their tenor, prescription periods were running, and there was no agreement as to the proper method for determining the value of the Bonds.

36. Peru considered both legislative and judicial solutions, without reaching a resolution. Among other things, Peru adopted various norms relating to the Bonds reflecting alternative concepts for determining their current value, including:

- Law No. 653 (1991) provided that "[t]he value of the expropriated lands will be paid at their market value and in cash."[41]
- Law No. 26207 (1993) repealed Law No. 653.[42]
- Law No. 26597 (1996) provided that the Bonds should be paid according to their nominal value plus interest at the rate for each Bond.[43]
- Emergency Decree No. 088-2000 (2000) provided for the determination of the current value of the Bonds according to a dollarization method.[44]

37. As Vice Minister Sotelo states, "Following the end of the Agrarian Reform, there were holders of Agrarian Reform Bonds, some of whom made claims against the MEF in Peruvian courts, but there was no clear framework regarding its payment."[45]

38. On 16 December 1996, the College of Engineers of Peru (the "CIP") challenged the constitutionality of Law No. 26597 before the Constitutional Tribunal, arguing, among other things that that it was unconstitutional to value the Bonds according to their nominal value.[46] The Congress of Peru defended the constitutionality of paying the Bonds at their nominal value as provided by Law No. 26597. The Congress further highlighted that there was no evidence that the State, through the Agrarian Bank or its Liquidating Commission ever denied or delayed the payment of annuities corresponding to the Agrarian Reform Bonds.[47]

39. A partial but incomplete clarification emerged on 15 March 2001, when the Constitutional Tribunal issued a Sentence ("March 2001 Sentence") whereby it ruled on the constitutionality of Law No. 26597, holding, among other things, that it was unconstitutional

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[40] Quantum ¶¶ 39-40.

[41] Legislative Decree No. 653. 30 July 1991, Art. 15, Fourth Transitory Disposition (Doc. RA-196).

[42] Law No. 26207, 9 July 1993, Art. 3 (Doc. RA-295).

[43] Law No. 26597, 22 April 1996, Art. 2 (Doc. RA-256).

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

[45] Sotelo ¶ 19.

[46] Constitutional challenge of CIP, 16 December 1996, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[47] Answer of Congress to constitutional challenge of CIP, 19 February, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

to value the Bonds according to their nominal value.[48] The March 2001 Sentence did not establish a procedure for payment or a method for calculating the value of the Bonds. This remained the prevailing ruling under Peruvian law for the next twelve years.

40. Explaining its conclusion in two operative paragraphs, the Constitutional Tribunal's 2001 Sentence left open more questions than it answered. As Dr. Hundskopf explains, "[t]he Constitutional Tribunal in its sentence of 15 March 2001 established that the current value principle should be applied to the Agrarian Bonds without specifying the valuation criteria or the process for their payment."[49]

41. In this context, Peru recognized that Supreme Decree No. 148-2001-EF of 14 July 2001 states that the 2001 March Sentence invalidated any incompatible legal norms, and that it was necessary to assess its effect on Emergency Decree No. 088-2000, which, the Supreme Decree notes, was already being questioned by both the private and public sector. Accordingly, Peru created a commission composed of representatives of the State and the bondholder association ADAEPRA to propose measures to comply with the March 2001 Sentence.[50]

42. In February of 2004, the commission created pursuant to Supreme Decree No. 148-2001-EF issued a report that concluded that Emergency Decree No. 088-2000 contravened the March 2001 Sentence. The commission recommended the establishment of an administrative process to update the value of Agrarian Reform Bonds according to an Adjusted Consumer Price Index ("CPI") methodology and to issue 15-year Nuevo Sol denominated bonds with which to pay bondholders. The commission estimated that the total economic impact of its proposal would at most be US$ 1.2 billion.[51]

43. The commission's findings on the effects of the March 2001 Sentence were soon contradicted by the Constitutional Tribunal itself. In a sentence issued on 2 August 2004, the Constitutional Tribunal upheld the constitutionality of Emergency Decree No. 088-2000, finding that the dollarization method was an appropriate method of determining the current value of the Bonds.[52]

44. The uncertainties persisted. Following the new decision of the Constitutional Tribunal, Peru did not adopt the Adjusted CPI method or move forward with the creation an administrative procedure at that time.

45. At the end of March 2006, the Congress approved a new draft law that provided for the establishment of an administrative process run by the MEF, in which the value of Bonds would be updated by reference to Lima CPI, and bondholders would be able to exchange their Bonds for new 15-year Nuevo Sol denominated bonds.[53] The draft did not

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[48] Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 15 March 2001 (Doc. RA-165).

[49] Hundskopf (RER-2), ¶ 11.

[50] Supreme Decree No. 148-2001-EF, 14 July 2001, (Doc. RA-227).

[51] Letter of President of Commission created by Supreme Decree No. 148-2001-EF to MEF, 6 February 2004 (Doc. R-257).

[52] Constitutional Tribunal Sentence in Record No. 0009-2004-AI/TC, 2 August 2004, ¶ 11 (Doc. R-296).

[53] Bill for Law for Legal Security for the Physical Legal Sanitation of Lands Affected by the Agrarian Reform Process and the Actualization of the Payment of the Agrarian Debt, 27 March 2006 (Doc. R-497).

become law. On 19 April 2006, shortly after Peru's general election, the President of Peru sent a letter to the Congress with his observations on the draft.[54]

46. As Vice Minister Sotelo states, "The MEF was aware that there was no clarity regarding the Agrarian Reform Bonds, and conveyed this to others."[55] The state of uncertainty was addressed by the MEF in a report dated 17 July 2006. In response to a request for information from the Office of the Public Defender in connection with a public offer to purchase Bonds that had recently been made by the Gramercy Investment Fund, the MEF highlighted the lack of a legal framework that would enable knowing the rights and obligations derived from the Bonds and stated:

> Sobre el particular, hago de su conocimiento en primer lugar que aun está pendiente de aprobación por el Congreso de la República, el marco legal que establecería el tratamiento general de las obligaciones derivadas del proceso de reforma agraria, tema que por su complejidad e implicaciones, los Podered Legislativo y Ejecutivo han venido efectuando coordinaciones. [….] [T]ales derechos e intereses, así como los del Estado, respecto de las obligaciones derivadas del proceso de la Reforma Agraria, sólo opdrán determinarse cuando se cuente con el marco legal antes mencionado, y serán ejercidos acorde con dicho marco y otras normas que sean aplicables.[56]

47. The MEF maintained the same position over the course of several years, responding to requests for payment by explaining "the State's authorities, officials and public servants are subject to the Political Constitution of Peru and other laws of the legal system, and perform their duties within the powers that they have been conferred."[57]

48. As Ambassador Castilla, who arrived to the MEF in 2009 and became Vice Minister of Treasury in 2010 stated "no legal framework applicable to the Agrarian Reform Bonds existed."[58]

49. The foregoing highlights that there was no clear legal rule of the sort Gramercy now alleges existed. Indeed, as Peru previously has explained, this is evident from the fact that there were numerous attempts to establish a legal framework for the Agrarian Reform Bonds prior to 2013, none of which was successful. Between 2001 and 2011, at least nine different bills were introduced to the Congress of Peru on the issue of the Bonds, of

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[54] Letter No. 058-2006-PR from President of Peru to President of Congress of Peru, 19 April 2006 (Doc. R-498).

[55] Sotelo ¶ 25.

[56] Letter No. 077-2006-EF/75.01/DE from National Directorate of Public Indebtedness to Defensoria del Pueblo, 17 July 2006 (Doc. R-259).

[57] Letter No. 082-2010-EF/75.20 from National Directorate of Public Indebtedness, 20 October 2010 (Doc. R-505); *see also* Letter No. 004 from DGETP, 13 May 2011 (Doc. R-510); Letter No. 012 from DGETP, 20 May 2011 (Doc. R-512); Letter No. 013 from DGETP, 13 May 2011 (Doc. R-511); Letter No. 015 from DGETP, 1 June 2011 (Doc. R-514); Letter No. 016 from DGETP, 1 June 2011 (Doc. R-515); Letter No. 025 from DGETP, 3 June 2011 (Doc. R-516); Letter No. 026 from DGETP, 3 June 2011 (Doc. R-517); Letter No. 027 from DGETP, 3 June 2011 (Doc. R-518); Ministry of Economy and Finance, Answer to the Complaint, Record No. 42048-2008, 32nd Civil Court of Lima, 1 December 2008 (Doc. R-501); Ministry of Economy and Finance, Answer to the Complaint, Record No. 26422-2010, 32nd Civil Court of Lima, 15 February 2011 (Doc. R-507).

[58] Castilla ¶ 12.

which only two passed, and both were vetoed and, thus, did not become law. Further evidencing the persistent lack of a clear legal rule, these bills proposed a variety of methodologies to value the Bonds, including on the basis of nominal value, Adjusted CPI, CPI for the Lima Metropolitan area, and as dollarization.[59]

50. Mr. Hundskopf explains that "legislative efforts to clarify the law failed. "A hypothetical purchaser of Bonds in the mid-2006 to 2008 had no certainty as to how the current value principle would be applied or the legal framework within which the payment of the Agrarian Bonds would be performed or even if they were transferable."[60] This remained the case in the years that followed. Mr. Hundskopf explains that as a matter of Peruvian Law, there was not a definitive method for valuing the Agrarian Reform Bonds.[61]

51. According to the Quantum Expert, "[a]t the time Claimants acquired their interests, it was highly uncertain what those interests were worth because there was no clarity as to how the Outstanding Coupon Adjustment would be calculated and when the Adjustment would be made."[62]

C. Gramercy and the Alleged Purchases of the Bonds

52. Gramercy Management and Gramercy Holdings intervened in the history of the Agrarian Reform Bonds beginning over a decade ago, years before the Treaty came into force. Ironically, although highly critical of Peru, Gramercy has been unwilling, or unable, to explain or provide basic evidence regarding its own prior and ongoing conduct related to (1) its alleged acquisition of Bonds, (2) its participation in local judicial proceedings, (3) its attack campaign against Peru and (4) its failure to consult respectfully before launching this proceeding immediately prior to the presidential election in Peru.

53. "Gramercy is the only legal entity that acquired Land Bonds as an investment,"[63] according to its founder, who submitted an amended witness statement with the Second Amended Notice. The profoundly speculative nature of Gramercy's apparent decision to acquire Bonds is evident in an internal Gramercy memorandum from 2006, which emphasizes "the complexity surrounding the investment opportunity"[64] and correspondingly cites no other interested funds. It is thus little surprise that, a decade later, the international press has described Gramercy as "A Lone Hedge Fund," which seeks allies that "aren't

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[59] *See* Bills No. 578 / 2001-CR, 31 August 2001 (Doc. R-411); 7440 / 2002-CR, 27 June 2003 (Doc. R-414); 8988 / 2003-CR, 3 November 2003 (Doc. R-415); 10599 / 2003 / CR, 18 May 2004 (Doc. R-416); 11459 / 2004-CR, 24 August 2004 (Doc. R-418); 11971 / 2004-CR, November 2004 (Doc. R-419); 456 / 1006, 2 October 2006 (Doc. R-499); 3272 / 2008, 2008 (Doc. R-466); 3293 / 2008-CR, 21 May 2009 (Doc. R-502).

[60] Hundskopf (RER-2), ¶ 11.

[61] Hundskopf (RER-2), ¶ 11 ("[T]he Civil Code refers to different alternatives ("indexes of automatic readjustment that the Central Reserve Bank of Peru fixes, other currencies or to merchandise") and the Constitutional Tribunal had not mandated one in particular. It should be noted that the ruling of the Constitutional Tribunal of 15 March 2001 does not refer or require the application of the consumer price index (CPI) and this statistical method was not legally required. Even the Peruvian courts had used the US dollar several times as a criteria for updating debts.")

[62] Quantum ¶ 13.

[63] Second Amended Witness Statement of Robert S. Koenigsberger ("Amended Koenigsberger") ¶ 38.

[64] Memorandum from David Herzberg to Robert Koenigsberger ("2006 Memorandum"), at 1 (Doc. CE-114).

biting."[65] Perhaps that is why Gramercy instead has chosen to pay for allies including smaller ratings agencies, experts, lobbyists and more.

54. Despite the Treaty and applicable rules, basic information and evidence related to Gramercy's alleged bond acquisitions are still missing. Gramercy initially did not submit all of its alleged bonds or the documents through which it supposedly acquired them. In summary, Gramercy did not provide evidence as to how much it paid, why those amounts were rational and not exaggerated in the first place, or revealed fundamental related evidence. However this proceeding unfolds in the future, Gramercy can never change its failure to provide such fundamental information during consultations or in its multiple attempts to start the case.

1. Gramercy and Distressed Debt Speculation

55. Gramercy is an asset management firm founded in 1998 by Robert S. Koenigsberger,[66] and has a mission is "to exploit distressed investment opportunities in emerging markets."[67] In a memorandum dated 31 August 2010,[68] Gramercy explained the concept of distressed investment as follows:

> Distressed investing, at its most basic level, is a form of deep value investing typically with an event-driven element as well. Distressed investing can take many forms, although these days it is usually used in connection with distressed debt.[69]

56. Gramercy highlights that this strategy has inherent risks in emerging markets:

> [W]hile fundamental financial and economic analysis is again the starting point for assessing value, it merely tells the investor what they deserve to get, not what they can expect to get. Creditors will only get what they negotiate. Accordingly, the "process risk" analysis is exceedingly important as it is these elements that will determine recoveries…
>
> Although the lower certainty of the process can be a risk, especially to investors unfamiliar with the different cultural and jurisdictional issues, it typically manifests itself in things taking longer to resolve … or the investment being **a total write-off**. This risk goes up significantly if the underlying debt instruments are with much

[65] John Quigley and Ben Bartenstein, A Lone Hedge Fund Seeks Allies in $5.1 Billion Peru Bond Dispute, Bloomberg, 2 February 2016 (Doc. R-101); Gramercy seeks allies against Peru but does not appear to get any, El Comercio, 4 February 2016 (Doc. R-551).

[66] Gramercy Funds Management LLC, Brochure, March 29, 2018, pg. 4 (Doc. R-540).

[67] *Overview*, Gramercy Funds Management, 3 July 2016 (Doc. R-399).

[68] Robert L. Rauch, David Herzberg, Carlos Gomez, Larry Ge, *Distressed Debt Investing – An Overview*, 31 August 2010 (Doc. R-503).

[69] Robert L. Rauch, David Herzberg, Carlos Gomez, Larry Ge, *Distressed Debt Investing – An Overview*, 31 August 2010, pg. 1 (Doc. R-503).

> smaller companies, in local currency governed solely under local law, and so it is important to carefully consider the process risk elements before engaging in this.[70]

57. As Dr. Guidotti explains:

> This business model involves significant speculation with potentially significant upsides. The upside of such an investment can be summarized as the difference between the recovery value and the (low) purchase price paid for the distressed asset. Typically, the expected recovery value is closely related to the credit quality of the asset. Hence, investors in distressed assets usually involve themselves deeply in the analysis of the conditions that determine that an asset is distressed and the potential scenarios under which the credit quality of the asset may improve in the future.[71]

58. In soliciting commitments, Gramercy disclaims responsibility. For example, Gramery advised a U.S. pension fund that investors must be "willing to assume the risks involved with such an investment" and may "lose all or a substantial portion of their investment."[72] As Gramercy confirms in a 2018 brochure:

> There can be no assurance that the objectives associated with any of Gramercy's investment strategies will be met or that the Firm will achieve profitable results. Investments involve risk of loss, and clients **must be prepared to bear the loss of their entire investment**.[73]

2. Gramercy's Assessment of the Legal Status

59. Gramercy's own identification of the risks of distressed debt makes its own contemporaneous assessment of the Agrarian Reform Bonds all the more revealing. The story of how this lone fund decided to gamble on a speculative scenario dates back over a decade. Specifically, Gramercy states that it acquired over 9,700 Agrarian Reform Bonds between 2006 and 2008.[74] Gramercy today alleges that the "state of [Peruvian] law" was "abundantly clear"[75] when it acquired bonds. Indeed, Gramercy claims that its research at the time revealed a "clear legal rule" regarding the status of the Bonds and that payment would

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[70] Robert L. Rauch, David Herzberg, Carlos Gomez, Larry Ge, *Distressed Debt Investing – An Overview*, 31 August 2010, pg. 9-10 (emphasis added) (Doc. R-503).

[71] Guidotti ¶ 52.

[72] *See Investment Presentation to San Bernardino County Employees' Retirement Association – Gramercy Distressed Opportunity Fund*, Gramercy, 10 July 2012, 1 (Doc. R-71) ("The purchase of investments is suitable only for sophisticated investors for whom such an investment does not constitute a complete investment program and who fully understand and are willing to assume the risks involved with such an investment … The investments' performance may be volatile and investors may lose all or a substantial portion of their investment.")

[72] Peru's First Submission, ¶¶ 13-31 (R-20).

[73] Gramercy Funds Management LLC, Brochure, March 29, 2018, pg. 9 (emphasis added) (Doc. R-540).

[74] Third Amended Notice ¶¶ 63, 64, 68.

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

be "calculated using a Peruvian consumer price index, plus interest."[76] But the reality was different a decade ago, as discussed herein, and as underscored by the sole contemporaneous evidence of any due diligence by Gramercy, a plain-looking memorandum, with no corporate markings, dated 24 January 2006 (the "2006 Memorandum"):

- In its discussion of the "the complexity surrounding the investment opportunity," Gramercy's 2006 Memorandum highlighted that the Bonds "remain in arrears."[77]
- It stated that obtaining a court judgment and payment could take 10 years, but that there could be "some form of resolution."[78]
- It noted that "the process of transferring title and bonds is a bit complex," and underscores the importance of "first review[ing] the physical bonds."[79]
- It referred to "draft legislation," and notes that the issue of the updating the debt to current value is "further complicating matters."[80]
- It specified that there is a "discrepancy" as to the proper valuation method, stemming from the government's use of an "alternative inflation index" rather than CPI.[81]
- It indicated multiple alternative valuation scenario, with total valuations for *all* Bonds (not just those that Gramercy may have acquired) ranging from US$650 million to US$3 billion.[82] Gramercy today states that it holds 20 percent of the total Bonds, thus suggesting a range of US$130 million to US$650 million (though Gramercy in this arbitration seeks up to US$1.6 billion).
- It indicates that bondholders from whom Gramercy considered sourcing Bonds were willing "to sell at a low price" or at "40%" or "50%" of what the 2006 Memorandum called the total claim.[83]
- It does not mention the Treaty, which was not in force until years later.

60. Notably absent from the 2006 Memorandum is any mention of the dollarization method in Emergency Decree No. 088-2000 or the August 2004 Sentence which upheld it. Indeed, nowhere in the 2006 Memorandum did it say that the state of the law was clear.

[76] Amended Koenigsberger ¶ 33.

[77] 2006 Memorandum, at 1 (Doc. CE-114).

[78] 2006 Memorandum, at 2 (Doc. CE-114).

[79] 2006 Memorandum, at 2 (Doc. CE-114).

[80] 2006 Memorandum, at 4 (Doc. CE-114).

[81] 2006 Memorandum, at 3 (Doc. CE-114).

[82] 2006 Memorandum, at 4 (Doc. CE-114).

[83] 2006 Memorandum, at 5 (Doc. CE-114).

3. The Alleged Acquisitions

61. Despite repeated queries from Peru over time, Gramercy has failed to reveal to the Tribunal material information regarding its alleged acquisitions and holdings of Agrarian Reform Bonds, including among other things, ranging from its corporate and shell structure from 2006 to the present, to the manner in which it acquired the bonds, whether it can demonstrate any actual payments related to such acquisitions.

62. Most notably, Gramercy has provided no evidence that it ever legally purchased the Agrarian Reform Bonds it now claims to have in its possession, and it has not revealed, much less attached, almost three hundred contracts whereby it entered into agreements for the assignment of rights in Agrarian Reform Bonds. This is telling omission from a investment treaty Claimants, that is directly relevant to issues of jurisdiction, admissibility, merits and compensation (as well as costs), as indicated below. The relevance of such contracts is evident in the Chronology of Events submitted by Gramercy to the Tribunal, which omitted any mention whatsoever of material facts during the period from 2006 to 2008 when it alleged acquired Agrarian Reform Bonds, as indicated below in an updated chronology prepared by Peru based on extensive work to locate documents and consult with witnesses and experts.

Chronology of Key Events Related to Gramercy Acquisitions of Bonds, 2006-08 (including Events Excluded by Gramercy)

Date	Description of Event	Supporting Evidence
2001-2006	None of at least seven (6) draft bills related to the Agrarian Reform Bonds became law (excluded from Chronology by Gramercy)	Doc. R-411; Doc. R-414; Doc. R-415; Doc. R-416; Doc. R-418; Doc. R-419
January 24, 2006	Internal Gramercy memorandum assessing potential acquisition of Agrarian Reform Bonds; it is not included by Gramercy in its Chronology of Events (excluded by Gramercy)	CE-114
March 27, 2006	Congress approves the text of the bill contained in the 2005 Agrarian Commission Report. It does not become law.	Doc. R-497
April 9, 2006	General elections held in Peru	Doc. R-582
April 12, 2006	Peru signs the United States-Peru Trade Promotion Agreement with the United States.	Doc. R-591
April 17, 2006	Gramercy Peru Holdings LLC formed in Delaware; at some point around this time, Gramercy begins to solicit bonds (excluded by Gramercy)	Doc. R-557
April 19, 2006	President of Peru vetoes Agrarian Commission bill	Doc. CE-116

Date	Description of Event	Supporting Evidence
June 4, 2006	Run-off presidential election in Peru (excluded by Gramercy)	Doc. R-583
June 19, 2006	Gramercy Peru Holdings signs first of two contracts for assignment of rights to Agrarian Reform Bonds (excluded by Gramercy; Gramercy withheld mention or attachment of such contracts from the Tribunal)	Doc. R-584
July 12, 2006	Supreme Court holds that the Agrarian Reform Bonds should not be paid at their nominal value (mischaracterized by Gramercy).	Doc. RA-300
July 17, 2006	Peru's *Dirección Nacional del Endeudamiento Público* references Gramercy's offer to buy Agrarian Reform Bonds and confirms that there is no existing legal framework. (excluded from Chronology by Gramercy)	Doc. R-259
2006-2009	None of at least seven (3) draft bills related to the Agrarian Reform Bonds became law (excluded from Chronology by Gramercy)	Doc. R-499; Doc. R-466; Doc. R-502
2001-2006	None of at least seven (6) draft bills related to the Agrarian Reform Bonds became law (excluded from Chronology by Gramercy)	Doc. R-411; Doc. R-414; Doc. R-415; Doc. R-416; Doc. R-418; Doc. R-419

4. The Gramercy Bonds

63. In its initial Notice of Arbitration and its First and Second Amended Notices of Arbitration, Gramercy included the image of a single bond, together with an inventory of 9,773 bonds. On 13 April 2018 while the Parties were conferring about the procedural calendar and rules for the submission of evidence, among other things, Gramercy extemporaneously submitted into the record photographs of 9,655 Bonds together with a new inventory, i.e. 117 fewer Bonds bonds than in its original inventory.[84] The reason given by Gramercy for this discrepancy: "[a]fter careful assessment of the Land Bonds, Gramercy has removed a small number of bonds containing minor discrepancies, reducing the overall number of Land Bonds that are subject to its arbitration claim."[85]

64. Gramercy's supposedly "careful assessment," which it apparently did not undertake prior to bringing claims against Peru, failed to remove other Bonds with obvious "discrepancies." As the Quantum Expert explains:

[84] *See* Letter C-12 from Gramercy to the Tribunal, dated 13 Apr. 2018.

[85] *See* Letter C-12 from Gramercy to the Tribunal, dated 13 Apr. 2018.

> Scans of Bonds: Claimants submitted images of the 9,656 Gramercy Bonds that are the basis for their claim. From our review of these images and the underlying bond data used in Professor Edwards' calculation we found instances where the Coupons were damaged or ripped, the bond title was missing, some of the Coupons used in Professor Edwards' calculations were missing, and some or all the Coupons were detached from the bond title.[86]

65. Along with the photographs, Gramercy submitted "a report prepared by Deloitte & Touche LLP documenting the process by which Gramercy representatives photographed and inventoried the enclosed bond images (the "***Deloitte Report***")."[87] But whereas the Deloitte Report, states that "the Advisor photographed the Rear Image of each of the Bonds listed in the Inventory Schedule,"[88] the photographic files submitted by Gramercy have been modified to show images of both the front and back of the Bonds.

66. According to Gramercy, these images "provide additional [sic] documentation of Gramercy's ownership of the Land Bonds."[89] Even though Gramercy's own 2006 Memorandum acknowledged that "the process of transferring title and bonds is a bit complex,"[90] Gramercy has failed to submit any evidence of title in this proceeding. Merely holding of the Bonds is insufficient to show ownership. As Dr. Hundskopf explains that "[r]egarding the validity of the transfer of the Agrarian Bonds, we point out that it is necessary that the same has a transfer title that stipulates the conditions of the legal act and in turn, that the change of ownership of the bond is registered in the register of holders of the Agrarian Bonds that was in charge of the Agrarian Development Bank, established by Agrarian Reform Law. Being in such a way that one can have legal certainty regarding the validity of the transfer of the Agrarian Bonds."[91]

67. Moreover, even though Gramercy's own 2006 Memorandum underscored the importance of "first review[ing] the physical bonds,"[92] and Gramercy has several times recognized the importance of a verification process to identify authentic Bonds,[93] Gramercy has chosen not to submit its Bonds for authentication, nor has it provided any evidence of other taken steps to authenticate its Bonds. The Deloitte Report, on which Gramercy relies, specifically disclaims that any third party that uses the information contained therein does so "at their own risk" and states:

> [T]he Advisor does not express any certification, attestation, or opinion of any kind other than as explicitly set forth herein. This includes attestations on the authenticity of the Bonds inspected,

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[86] Quantum (RER-5), ¶ 14.

[87] *See* Letter C-12 from Gramercy to the Tribunal, dated 13 Apr. 2018.

[88] Report of Deloitte & Touche LLP, 12 January 2017 (CE-224A).

[89] *See* Letter C-12 from Gramercy to the Tribunal, dated 13 Apr. 2018.

[90] 2006 Memorandum, at 2 (Doc. CE-114).

[91] Hundskopf (RER-2), ¶ 27.

[92] 2006 Memorandum, at 2 (Doc. CE-114).

[93] See, e.g., Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47).

> validity of signatories or notaries present on the Bonds, or present valuation of the Bonds.[94]

68. As detailed below, Peru has an established procedure open to bondholders who wish to authenticate Agrarian Reform Bonds, which Gramercy has chosen to denounce. Notwithstanding Gramercy's waiver of 6 August 2016,[95] Peru has indicated in the past that Gramercy could submit Bonds for authentication in the established procedure.[96] Gramercy has not done so. Peru notes that the deadline for submitting Bonds for authentication is 19 January 2019.

5. The Missing Contracts for Acquisition of the Bonds

69. Gramercy so far has failed to provide even basic substantiation for its allegations that it purchased Agrarian Reform Bonds, much less its manner of doing so. Mr. Koenigsberger adds to the mystery in his uncorroborated Second Amended Witness Statement, by referring to "certificates that would provide value proportional to the size of any settlement with Peru," "notarized contract[s]," and "wire transfer[s]"[97] evidence of which Gramercy has failed to submit in this proceeding.

70. Notwithstanding Gramercy's continuing failure to provide basic details as to its alleged acquisition, Peru has discovered public deeds [*escrituras públicas*] of the referenced purchase contracts between Gramercy Holdings and apparent former bondholders.[98] The Quantum Expert has thus updated the Gramercy bond inventory with a Gramercy Acquisition Table that demonstrates the relationship between the Gramercy bonds and the underlying contracts, which Gramercy hid from the Tribunal.[99]

71. The contracts show that the purchase price agreed by Gramercy for its inventory of Agrarian Reform Bonds was US$ 31.2 million.[100] On the basis of its review of the purchase contracts hidden by Gramercy, the Quantum Expert states as follows:

> Purchase Prices and Payment of Purchase Prices: Based on a review of the Contracts, we estimate that Gramercy Peru entered into Contracts that total US$ 31.2 million to acquire interests in the 9,656 Gramercy Bonds between 2006 and 2008 for which Claimants now seek US$ 1.8 billion in compensation (approximately US$ 114 million plus exorbitant interest). Claimants' claim equates to an implied return of 5,674 percent.[101]

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[94] Report of Deloitte & Touche LLP, 12 January 2017 (CE-224A).

[95] See, e.g., Letter from Peru to Gramercy, 8 November 2017 (Doc. R-197).

[96] See, e.g., Letter from Peru to Gramercy, 8 November 2017 (Doc. R-197).

[97] Second Amended Statement of Robert S. Koenigsberger, ¶¶ 39-41.

[98] Conciliation Proceeding Records (Doc. R-266-270, 272-290, 292-295).

[99] Quantum, Appendix 6 - Gramercy Acquisition Table.

[100] Quantum, Appendix 6 - Gramercy Acquisition Table.

[101] Quantum ¶ 14.

72. Moreover, Gramercy has not provided any evidence that it completed actual payment of such amount as to each contract or bond, or whether there are any other agreements, side letters or understandings related to such payments or the proceeds of this proceeding. As the Quantum Expert concludes:

> From our review, we noted that for the Contracts related to at least 192 of the 9,656 Gramercy Bonds, it was unclear if the purchase price was contingent on the outcome of a potential settlement with Peru. Furthermore, we have not seen any documentation demonstrating actual payment of the purchase price amounts in the Contracts. Therefore, it is unclear if the terms in the Contracts were definitive or if they were subsequently changed.[102]

6. The Implications of Ongoing Uncertainties

73. Having failed to explain how it acquired Bonds, Gramercy also chooses not to advise the Tribunal of its attempts to demand payment following its alleged acquisition when the legal framework continued to be uncertain.

74. Gramercy's account of the background glosses over its actions during the many years after it allegedly acquired the Bonds. In a single paragraph, Gramercy states that it "continued to develop connections to the bondholder community," and in a single sentence Gramercy states that "[b]efore the 2013 CT Order Gramercy had sought to engage with the Peruvian Government about how the Land Bond debt could be restructured." In fact, Gramercy made various unsuccessful attempts to secure payment on the Bonds during this time:

75. ***Request for New Bonds***. In 2009, Gramercy Advisors wrote the President of Peru and proposed that Peru swap Gramercy's Bonds with new sovereign bonds.[103] Gramercy's proposal, however, was inconsistent with the legal framework in effect. According to a contemporaneous MEF report:

> It should be noted that under the current legal framework, it is only possible to update the value of the Agrarian Debt Bonds, in the judicial instance. In this regard, once the judgment that sets the updated value of these bonds acquires the status of res judicata, the State complies with the payment of this amount, subject to the provisions of the regulations.[104]

76. ***Conciliation Proceedings***. In 2010, Gramercy Peru Holdings began 28 extrajudicial conciliation proceedings against the MEF seeking payment for the Bonds.[105] Although the MEF participated in various conciliation hearings,[106] once again, Gramercy's

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[102] Quantum ¶ 14.

[103] Gramercy Letter to President of Peru, 7 May 2009 (Doc. R-261; A communication from Gramercy Advisors to the Congress dated 24 June 2009 that was included in a report of the Agrarian Commission of Congress likewise highlighted the importance of a new bond issuance. Agrarian Commission Report, 31 May 2011 (Doc. R-397).

[104] Report No. 073-2009-EF/75.20, 30 June 2009 (Doc. R-262) (translation by counsel).

[105] Conciliation Proceeding Records (Doc. R-266-270, 272-290, 292-295).

[106] Conciliation Proceeding Records (Doc. R-266-270, 272-290, 292-295).

request was inconsistent with the legal framework in effect. Gramercy's demand for payment was not viable, as a contemporaneous MEF report explained:

> [I]t becomes necessary to point out that to date there is no legal framework that has assigned to this National Directorate the function of payment of the Agrarian Bonds, which was formerly in charge of the ex- Agrarian Bank in Liquidation, nor any norm that establishes a procedure for the Public Administration to update these debts expressed in Soles Oro.[107]

77. ***Local Proceedings***. Although Gramercy has acknowledged that it engaged in various local judicial proceedings, it repeatedly has made contradictory and incomplete statements as to their nature and extent.

78. In its Notice of Arbitration, Gramercy alleged that, with respect to the Bonds it allegedly acquired, it had been "prosecuting cases in courts across Peru."[108] To date, the evidence produced by Gramercy as to such proceedings is an Expert Report dated 14 August 2014 seeking to calculate the current value of 44 Bonds. Gramercy does not indicate what portion of its alleged holdings was part of such proceedings, much less whether such proceedings are ongoing, nor does it reveal any of the other proceedings in which it has participated over the years.

79. To leave no doubt, Gramercy specified in its original Notice of Arbitration: "Gramercy is a party to hundreds of legal proceedings in Peru."[109] In its Second Amended Notice, however, Gramercy changed and rewrote its allegations, newly stating that "GPH became eligible to apply to become a party to these legal proceedings," and ultimately "initiated applications in seven of these Peruvian local proceedings."[110] It also alleged that "GPH submitted petitions to withdraw in all seven of those legal proceedings."[111] Gramercy has not substantiated its assertions nor has it indicated what bonds have been subject to these proceedings. According to a resolution of the Superior Court of Lambayeque, Gramercy Peru Holdings was withdrawn from the judicial proceeding in Lambayeque involving the lone bond on 10 August 2016, [112] five days after Gramercy's Second Amended Notice.

80. Even though Peru raised this issue in its Response over two years ago, Gramercy has failed to clarify or provide any update on the status of its participation in the local proceeding. In fact, court records in local proceedings suggest that Gramercy Peru Holdings remained or remains a party to multiple local proceedings. For example, Gramercy Peru Holdings was as a party in two proceedings until 10 August 2016, i.e. 5 days after

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[107] Report No. 092-2010-EF/75.20, 15 October 2010 (Doc. R-504) (translation by counsel).

[108] Notice of Arbitration ¶ 209; *see also* Koenigsberger ¶ 42 (stating that Gramercy "became a party to hundreds of legal proceedings in Peru seeking judgments compelling payment").

[109] Notice of Arbitration ¶ 136; Koenigsberger ¶ 42.

[110] Third Amended Notice ¶ 157; Second Amended Koenigsberger ¶ 42.

[111] Third Amended Notice ¶ 157; Second Amended Koenigsberger ¶ 42.

[112] Resolution No. 10 in Third Civil Court of Lambayeque in Record No. 026-1973, 10 August 2016 (Doc. R-70).

Gramercy's Second Amended Notice.[113] In another, it continued to be listed as a party at least as late as 22 December 2017.[114]

7. Further Failed Attempts to Change Peruvian Law

81. By the start of 2011, Peru was facing increasing requests for payment of the Agrarian Reform Bonds.[115] A new election cycle had begun, but the same uncertainties that had existed five years earlier continued. Proposals were developed to resolve the uncertainty in both the executive and legislative branches of the State. As Vice Minister Sotelo states, "In 2011, at the time of another election year (as had been the case in 2006), there was an effort to adopt a new law to clarify the status of the Bonds, and it never became law."[116]

82. In March 2011, the Minister of Economy anticipated that the MEF would be sending a draft law to Congress regarding the Agrarian Reform Bonds.[117] The following month, on the basis of an Emergency Decree issued in advance of the elections,[118] the MEF retained Mr. Bruno Seminario as a financial consultant to assess methodologies to calculate the current value of the Agrarian Reform Bonds.[119] Mr. Seminario analyzed the Adjusted CPI method considered in 2004 by the commission established created pursuant to Supreme Decree No. 148-2001-EF, but found that dollarization was a preferable alternative.[120] Using Mr. Seminario's report, the MEF prepared a draft law to establish a legal framework for paying the Agrarian Reform Bonds at a current value calculated through the dollarization method.[121] As Ambassador Castilla states "it was never submitted to Congress and never became law"[122]

83. On 31 May 2011, days before the second round of the presidential election, the Agrarian Commission in Congress agreed to submit to a vote another draft law, which would have paid bondholders with new bonds using the Lima CPI to calculate the current value of the Bonds.[123] Following statements by the President that he would send the bill back

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[113] Resolution No. 10 in Third Civil Court of Lambayeque in Record No. 026-1973, 10 August 2016 (Doc. R-70); Resolution No 11 in Third Civil Court of Lambayeque Record No. 00195-1978-0-1706-JR-CI-10, 10 August 2016 (Doc. R-536).

[114] Record No. 00258-1080-0-1706-JR-CI-01 in First Civil Court of Lambayeque, Resolution No. 92, 22 December 2017 (Doc. R-539).

[115] Castilla ¶ 25; Registration Statement under Schedule B of the U.S. Securities Act with the U.S. Securities and Exchange Commission, 8 June 2011 (Doc. R-300); America Economia, Biggest bank in Peru starts claim against government of this country, 23 December 2010 (Doc. R-558).

[116] Sotelo ¶ 29.

[117] Castilla ¶ 16.

[118] Castilla ¶ 19; Emergency Decree No. 012-2011, 31 March 2011 (Doc. RA-259).

[119] Castilla ¶ 20; Sotelo¶ 29; Ministerial Resolution No. 286-2011-EF.75, 18 April 2011 (Doc. RA-260); Consulting Contract between MEF and Luis Bruno Seminario de Marzi, 13 April 2011 (Doc. R-509).

[120] Actualization of the Agrarian Reform Bonds, Report of Bruno Seminario, 2011 (Doc. R-297).

[121] Castilla ¶¶ 21-23; Report No. 004-2011-EF/52.04, 5 November 2010 (Doc. R-506).

[122] Castilla ¶ 23.

[123] Agrarian Commission Report, 31 May 2011 (Doc. R-513).

if it were ever approved by the Congress, it was never put to a vote.[124] As Ambassador Castilla recalls: "The legal status of the Agrarian Reform Bonds remained unchanged and uncertain."[125]

84. On 4 October of 2011, the CIP[126] petitioned the Constitutional Tribunal to execute the March 2001 Sentence by ruling on the methodology that should be used to calculate the current value of the Bonds.[127] Neither the Executive nor Judicial Branches of the Peruvian Government were parties to the proceeding. When the MEF sought to participate,[128] the Constitutional Tribunal ruled that it could not put in an appearance.[129]

85. Minister of Economy Castilla stated in 2012:

> As we currently are in the process, I would say that it is not appropriate to make statements on the issue as the Constitutional Court must deliberate and do what corresponds to it.[130] (Annex 11).

86. The Minister conveyed the same thing at a meeting with UBS, who, unbeknownst to him, was coordinating with Gramercy:

> I stated that the issue was being addressed by the Constitutional Tribunal and that we would wait for a decision. The meeting was not represented to me as focusing on Gramercy or being on behalf of Gramercy, and I do not recall discussing Gramercy at the meeting.[131]

D. The Legal Resolution

87. Years of longstanding legal uncertainty ended in 2013, when the Constitutional Tribunal issued a series of rulings for the resolution of the agrarian reform bonds for the benefit of bondholders. Specifically, the Constitutional Tribunal mandated an administrative process for bondholders and a method for determining the Bonds' current value. Further to that mandate, Peru has established, implemented and is advancing a process to pay bondholders.

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[124] Castilla ¶ 23; La República, Alan García will observe the Bill on Paying the Agrarian Reform Bonds, 21 July 2011 (Doc. CE-164).

[125] Castilla ¶ 23.

[126] Whether the execution petition was duly authorized by the CIP was itself questioned. Execution petition for Agrarian Reform Bonds was not initiated by College of Engineers of Peru, Gestion, 17 July 2013 (Doc. R-522).

[127] CIP Petition, 4 October 2011 in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[128] MEF, Petition to join, 5 July 2013, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[129] Constitutional Tribunal, Decision of 12 July 2013, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[130] CT Would demand the Government pay the agrarian reform Bonds, Peru 21, 11 February 2012 (Doc. R-301); Castilla ¶ 28.

[131] Castilla ¶ 29.

1. The Constitutional Tribunal Resolution

88. On 16 July 2013, the Constitutional Tribunal, issued a Resolution (the "July 2013 Resolution") that resolved the legal status of the Agrarian Reform Bonds. Gramercy repeatedly pointed to this pivotal date as the turning point for the legal status of the Agrarian Reform Bonds; indeed, only when it filed its third flawed Notice of Arbitration did Gramercy try to invent an argument that it did not have timely knowledge of the ruling, an allegation undermined by the record.

89. The July 2013 Resolution resolved uncertainties pending since the March 2001 Sentence, which had held that Peru was required to make payment of the Bonds at their current value, but which had not fixed the procedure or methodology for doing so.[132] Correspondingly, the July 2013 Resolution (i) mandated a process for paying bondholders and (ii) established parameters for the appropriate method for determining the current value of the Bonds.

90. Regarding the establishment of a process for bondholders, the Constitutional Tribunal mandated that Peru establish an administrative process, regulated by Supreme Decree, to pay holders of the Agrarian Reform Bonds. In particular, the July 2013 Resolution required procedures to verify the authenticity of the instruments and the identity of holders, calculate the current value of Bonds, and determine the form of payment, which potentially could be in cash, land, or bonds.[133]

91. Regarding the methodology for calculating the current value of the Bonds, the Constitutional Tribunal recognized various alternatives, considering formulas on the basis of (i) dollarization, (ii) CPI, and (iii) indexing.[134] The Constitutional Tribunal rejected the CPI method because, among other things, it considered that CPI is not a realistic measure during periods of severe economic crisis, insofar as it "disconnects from the economic reality because it ceases to represent what economic entities consume or save."[135]

92. Ultimately, the Constitutional Tribunal held that the so-called "dollarization" method should be applied, concluding that it is the most appropriate for several reasons, including that the U.S. Dollar is safe-haven currency in times of hyperinflation,[136] and the legal precedent of Urgency Decree No. 088-2000,[137] as well as the potential budgetary impact of other methods that might make payment impracticable.[138]

93. The July 2013 Resolution resolved the uncertainties with respect to the Bonds that had persisted since the 2001 Sentence. As Dr. Hundskopf explains: "[t]he Constitutional Tribunal explained in more detail its foundations in 2013 than what happened in its original sentence in 2001, which, as has been seen, had created uncertainties due to its failure to define a valuation criteria."[139] In addition, Dr. Hundskopf explained that "[t]he

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[132] Constitutional Tribunal Sentence in Record No. 022-96-I/TC, 16 July 2013, ¶ 17 (Doc. R-213).

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

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

[135] July 2013 Resolution ¶ 23 (Doc. RA-213).

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

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

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

[139] Hundskopf (RER-2), ¶ 107.

Constitutional Tribunal in its resolution of 16 July 2013 enforced its 2001 sentence and established dollarization as methodology to update the value of the Agrarian Bonds and the processes that the Executive Power should implement to cancel the debt in the administrative instance. The resolution was coherent under Peruvian law with the application of the current value principle to the Agrarian Bonds as well as the jurisprudence of the Constitutional Tribunal."[140]

94. The day after the Constitutional Tribunal issued the July 2013 Resolution, Gramercy declared publicly that it gave Peru's government "huge wiggle room."[141] In the days and weeks immediately following, the Constitutional Tribunal's decision was the subject of criticism, including because it was perceived as being too favorable to Gramercy and the Banco de Credito del Peru: "this sentence would serve mainly not to repair the "victims of the agrarian reform" but to benefit two large companies that have been buying bonds at a ville price to pocket millions in sums now."[142] Magistrate Urviola's impartiality was questioned given his ties to BCP, which he previously had represented for over two decades.[143]

95. Belying Gramercy's baseless suggestion that "President Humala's administration [was] in league with certain members of the Constitutional Tribunal," the July 2013 was seen as "a defeat for President Ollanta Humala,"[144] and high level officials were vocal in their criticism of the July 2013 Resolution, including, among others:

- Minister of Agriculture, Milton von Hesse: "I am surprised that the CT has pronounced itself in such a specific and operative way on an issue about the constitutional validity of the rules that were given in the 90s on the payment of the agrarian debt. (...) personally I would not have expected a ruling of that type from the CT."[145]

- Minister of the Environment, Manuel Pulgar Vidal: "The ruling shows what the limit of the court is, it was at a time when it should establish the debt update, which was in execution by the 2001 ruling, but went further and established forms of payment. Is that its role?"[146] "The Tribunal was completely wrong."[147]

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[140] Hundskopf (RER-2), ¶ 11.

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

[142] The Tremendous Court and the Agrarian Reform Bonds, Carlos Monge - Los Andes, 19 July 2013 (Doc. R-560). BCP later clarified that it had come into possession of its agrarian reform Bonds not through speculation but as payment for debts during the agrarian reform. The BCP assures that it only holds less than 0.6% of the agrarian bonds, Gestión, 30 July 2013 (Doc. R-561).

[143] Urviola favored its employer the BCP, Roman Nacionalista, 25 July 2013; Magistrate Urviola later recuses himself from deciding issues relating to the agrarian reform bonds in subsequent matters. See Letter from Magistrate Urviola to Constitutional Tribunal, 11 November 2014, in Constitutional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[144] CT orders the government to enforce judgment on payment of agrarian bonds, Peru 21, 16 July 2013 (Doc. R-562).

[145] Executive criticizes the Constitutional Tribunal for agrarian bonds judgement, Peru 21, 18 July 2013 (Doc. R-308).

[146] Manuel Pulgar-Vidal: Constitutional Tribunal confused its role with agrarian bonds judgement, Gestion, 17 July 2013 (Doc. R-307).

- Minister of Justice, Daniel Figallo: "[the Constitutional Tribunal] exceeded," and that the State should file a request to "annul or revise that decision."[148] "We believe that (the CT) should not have done that because there are different ways to carry out this process. [....] It is not that the State does not want to pay the debt, but that this must be according to law."[149]

96. Minister Castilla's statements indicated that the MEF was "studying the decision responsibly."[150]

97. On 26 July 2013, the MEF filed a request [*recurso de reposición*] seeking that the Constitutional Tribunal declare the July 2013 Resolution without effect. The request highlighted, among other things, that July 2013 Resolution prejudiced the MEF, which would be required to implement the Constitutional Tribunal's mandate, without the MEF having had the opportunity to be heard in the proceedings.[151]

2. The Validity and Confirmation of the Resolution

98. The July 2013 Resolution by the Constitutional Tribunal was and remains binding and applicable under Peruvian law. Nothing has changed this fact as a matter of law or otherwise.

99. The Constitutional Tribunal plainly had a difficult task in resolving the issue of the Agrarian Reform Bonds given the many years of legal uncertainty. In this context, and as is often the case in the United States and elsewhere, the vote was split. Three magistrates voted in favor of the final ruling (Magistrates Urviola, Eto Cruz, and Alvarez Miranda) and three against (Magistrates Vergara Gorelli, Mesia Ramirez and Calle Hayen). Mag. Urviola, as President of the Constitutional Tribunal, cast the deciding vote.[152]

100. Gramercy states that the July 2013 Resolution was "tainted by forgery" involving liquid paper.[153] According to publicly available information, a magistrate decided to vote in favor of the Constitutional Tribunal's final resolution,[154] and his signature on another draft was correspondingly removed by a clerk of the court, who is subject of a proceeding involving the Peruvian State as an aggrieved party.[155] The proceeding is ongoing.

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[147] Government of Peru upset with court decision ordering payment of old bonds, Reuters, 17 July 2013 (Doc. R-563).

[148] Government seeks annulment of agrarian bonds judgment, Peru 21, 24 July 2013 (Doc. R-310).

[149] Ministry of Justice questions functions of Constitutional Tribunal, Peru 21, 28 July 2013 (Doc. R-564).

[150] Castilla: We studied judgment on agrarian bonds "with a lot of responsibility," Peru 21, 18 July 2013 (Doc. R-309).

[151] MEF, Recurso de reposicion, 7 August 2013, in Constitucional Tribunal Record No. 00022-1996-PI/TC (Doc. R-462).

[152] July 2013 Resolution, Report (Doc. RA-240).

[153] Third Amended Notice ¶ 12.

[154] Constitutional Tribunal Resolution in Record No. 00022-1996-PI/TC, 8 August 2013, ¶ 7 (Doc. RA-215).

[155] Criminal Claim against Oscar Diaz in Record No. 119-2015, 12th Criminal Prosecutor of Lima, 20 November 2015 (R-14).

The magistrate has confirmed that his vote was properly counted in favor of the final ruling.[156]

101. Without here taking any position on that investigation, which remains ongoing, and reserving all of its rights to enforce it criminal laws within its national territory, Peru notes that prosecutors have been conducting an investigation into the clerk of the court, Mr. Oscar Arturo Diaz Muñoz, for the alleged falsification of public documents.[157] Prosecutors have taken declarations from three of the magistrates that served on the Constitutional Tribunal at the time of the July 2013 Resolution.[158] Based on this investigation, the prosecutors have decided to charge Mr. Diaz and are seeking a prison sentence of three years.[159]

102. The criminal investigation does not call into question the validity of the July 2013 Resolution, which has already been confirmed by the Constitutional Tribunal. The charge relates to the falsification of the dissenting vote, not the July 2013 Resolution itself. As the charging documents expressly state:

> It is worth pointing out that in the present case there is no discussion as to the form, or questioning of the merits resolution (whether or not it deserved the 48-hour deadline for casting its singular vote), given that at this time the said tribunal has already decided as to it, given which the only thing under discussion and subject to analysis in the present case is the alteration of Magistrate Carlos Mesia's alleged dissenting vote […][160]

103. Moreover, the Constitutional Tribunal itself has determined that the alleged actions by the clerk do not affect the "essential content" of the July 2013 Resolution,[161] which has subsequently been confirmed in other resolutions.[162] As Dr. Hundskopf explains "[t]he 2013 resolution continues being of mandatory compliance. The Constitutional Tribunal has confirmed its validity, including in auxiliary resolutions in August and November of 2013."[163] Dr. Hundskop further explains that "[e]ven if it is determined that there criminal liability existed for the facts denounced, such decision is independent of the validity of the resolution issued by the Constitutional Tribunal, which the State is obliged to comply with and respect the provisions of the Constitutional Tribunal as guarantor of democracy. It should be noted that the alleged adulteration of the signature is related only to the singular vote of a

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[156] Testimony of Gerardo Eto Cruz in Record No. 119-2015, 28 August 2015, ¶ 22 (CE-28).

[157] Mr. Diaz Muñoz was originally accused by Mr. Augusto Pretel on 30 March 2015. See CE-30. Mr. Pretel has also made accusations against Magistrate Urviola before Peru's Congress, on which Peru will not comment further at this time.

[158] Submission of Thirty-Sixth Criminal Provincial Prosecutor of Lima, Public Ministry, Record No. 436-2015, 23 April 2018 (Doc. R-565).

[159] Submission of Thirty-Sixth Criminal Provincial Prosecutor of Lima, Public Ministry, Record No. 436-2015, 18 May 2018 (Doc. R-566).

[160] Submission of Thirty-Sixth Criminal Provincial Prosecutor of Lima, Public Ministry, Record No. 436-2015, ¶ 12.5, 23 April 2018 (Doc. R-567).

[161] Submission of Thirty-Sixth Criminal Provincial Prosecutor of Lima, Public Ministry, Record No. 436-2015, ¶ 2.5, 23 April 2018 (Doc. R-567).

[162] See, infra.

[163] Hundskopf (RER-2), ¶ 11.

magistrate and not to the decision on the merits of the decision to enforce the sentence, thus there is no reason why the decision should be declared null, and consequently without legal effects further to a possible criminal decision, which as we know cannot order the Constitutional Court to modify its decision.[164] Gramercy fails to mention that there has been additional complaints by bondholders that the July 2013 Resolution improperly created a framework for paying Gramercy, to which some bondholders object.

104. Contrary to Gramercy's baseless suggestion that "President Humala's administration [was] in league with certain members of the Constitutional Tribunal," both President Humala and the Congress stated publicly that it would be inappropriate for the Constitutional Tribunal to rule on the CIP's execution petition.[165] In response the President of the Constitutional Tribunal stated that "we do not act in accordance with what the President wants."[166]

105. Despite this, Gramercy suggests that the Constitutional Tribunal's decision was the result of a an "an eleventh-hour intervention by the Humala administration," and refers to "a meeting between Chief Justice Urviola, Minister of the Economy Luis Miguel Castilla, and the President of the Council of Ministers Juan Jiménez on July 10, 2013."[167] Ambassador Castilla's Declaration does not support this allegation, and he wxplains that his comments at the time were consistent with prior comments.

> My comments to the press at this time were consistent with my prior comments:
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> We have to be responsible and aware of the importance of not doing anything that harms a constitutional concept that is the budget balance; then I am confident that the balance will prevail in the ruling that will be given and we will be respectful of the instances and of the failures that have to be fulfilled .... and I will reiterate what he has said: we are very responsible for any event that has an impact on the national treasury, the treasury and the public treasury and we are scrupulously compliant of the rulings we have.[168]

[164] Hundskopf (RER-2), ¶¶ 114-115.

[165] On 9 July 2013, the Congress of Peru called for the inadmissibility of the action, and for magistrates that had represented any financial entity holding agrarian bonds to recuse themselves. [Comunicado Oficial del Congreso de la Republica. Congress, Communication, Congress of Peru requests inadmissibly of request for payment of the agrarian reform Bonds to the Constitutional Tribunal (Doc. R-559). On 9 July 2013, the President of Peru stated in an interview that the Constitutional Tribunal should abstain from ruling on the issue of the agrarian reform bonds. Complete Interview of Ollanta Humala Tasso by the journalist José María Salcedo of Radio Programas del Perú, 9 July 2013 (Doc. R-34).

[166] We don't act based on what the President likes, Peru 21, 11 July 2013 (Doc. R-521).

[167] Third Amended Notice of Arbitration and Statement of Claim ¶¶ 16, 83.

[168] Castilla ¶¶ 32-33.

106. Gramercy does not mention that its lawyers Mario Seoane and Isaac Huamanlazo visited the Constitutional Tribunal and met with the magistrates on at least five occasions in the first half of 2013.[169]

3. The Confirmation of the July 2013 Resolution

107. The Constitutional Tribunal has confirmed and clarified the July 2013 Resolution on several occasions:

- The Constitutional Tribunal issued a Resolution (the "August 2013 Resolution") rejecting two petitions to revoke the July 2013 Resolution (*recurso de reposición*) filed by the Ministry of Economy and Finance and Congress. Among other things, the Constitutional Tribunal confirmed the allocation of votes in the prior decision.[170]

- The Constitutional Tribunal also clarified the scope of the July 2013 Resolution for judicial proceedings, holding that the dollarization methodology for calculating the current value of the Bonds would apply going forward, but not in cases where there already had been a valuation with *res judicata* effect.[171]

- The Constitutional Tribunal issued a resolution on 4 November 2013 clarified certain procedural matters.[172]

108. The Constitutional Tribunal has not overturned the July 2013 Resolution, and it remains valid and binding. Mr. Hundskopf states that "[t]he 2013 resolution continues being of mandatory compliance."[173]

109. It should be noted that Gramercy has made an eleventh-hour attempt to refocus its claims on the August and November Resolutions as a way to avoid prescription issues. Gramercy's original Notice of Arbiration and Statement of Claim, dated 2 June 2016, Gramercy focused its claims on the 2013 Resolution ("Peru's Treaty Breaches … First, in July 2013, the Constitutional Tribunal issued a new decision…."[174] And its "Treaty

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[169] Constitutional Tribunal, Visitor Registry, 2013, at the following dates 16 January 2013, 22 March 2013, 15 November 2013, 3 October 2013, 18 September 2013, 26 June 2013, 29 April 2013, 16 August 2013, 24 June 2013, 14 August 2013 (Doc. R-467).

[170] August 2013 Resolution ¶ 7 (Doc. R-215).

[171] August 2013 Resolution ¶ 3 (Doc. R-215).

[172] Constitutional Tribunal Resolution in Record No. 0002-1996-PI/TC, 4 November 2013, ¶¶ 2-4, 8 (Doc. R-216).

[173] Hundskopf (RER-2), ¶ 11.

[174] Notice of Arbitration and Statement of Claim, 2 June 2016, ¶¶ 10-11; *see also* Letter from Gramercy to Peru, 17 May 2016 (Doc. R-64) ("Gramercy left no doubt that it considered that "time [was] running out" to file its claim."); Notice of Intent to Commence Arbitration ("[t]he Government's intentions [not to honor its obligation to pay the updated value of the Land Bonds] became apparent on July 16, 2013, the date the Constitutional Tribunal issued the 2013 CT Decision."); see also draft tolling agreement provided by Gramercy to Peru on 28 March 2016 (Doc. R-568) ("WHEREAS, a dispute between Gramercy and Peru has arisen concerning certain alleged actions and conduct, events or circumstances (collectively, the "Actions") related or in connection with Gramercy's position in bonds issued by Peru pursuant to Decree Law N° 17716, also known as the Land Reform Act (hereinafter the "Land Reform Bonds"), including but not limited to the July 16, 2013 Ruling by Peru's Constitutional Tribunal issued in File No 00022-1996-PI/TC and the Ministry of Economy and Finance's Supreme Decrees 017-2014-EF and 019-2014-EF.").

Breaches" section did not include any reference to any subsequent decisions by the Constitutional Tribunal. However, once Gramercy was forced to file its Second Amended Notice of Arbitration and Statement of Claim on 5 August 2013 given its failure to properly comply with the Treaty's waiver requirements in its initial filings, Gramercy sought to shift its focus from the July Resolution to two subsequent Constitutional Tribunal resolutions in August and November 2013 of lesser relevance in order to seek to evade the time bar under Treaty Article 10.18. For example, Gramercy added these subsequent decisions of to its "Treaty Breaches" section along with additional references to the subsequent decisions across its brief.[175]

E. The Bondholder Process

1. Legal Framework

110. Pursuant to applicable law, Peru has established, implemented, and is continuing to advance a process for the payment of legitimate holders of the Agrarian Reform Bonds (the "Bondholder Process").[176] The objective of Peru, and its Ministry of Economy and Finance ("MEF"), has been and is to carry out the July 2013 Resolution of the Constitutional Tribunal, in accordance with Peruvian law, and to make correspondingly reasonable payments to holders of authentic Agrarian Reform Bonds. As Dr. Wühler concludes, the Constitutional Tribunal "provided a sufficient foundation to allow the subsequent elaboration of a procedural framework for the Bondholder Process."[177] Accordingly, as Ambassador Castilla states, "[a]fter the Constitutional Tribunal confirmed its resolution, the MEF took steps to implement it."[178]

111. In compliance with the July 2013 Resolution, the MEF developed Supreme Decrees setting forth the regulations for the Bondholder Process. For each draft decree, the DGETP prepared a report addressing the background and applicable framework, which was then assessed by the MEF's Office of Legal Advisors, which issued its own reports on the legality of the drafts. In addition, reasons for each decree were included in an explanatory statement (*exposición de motivos*) and corresponding aide memoire.[179] As Ambassador Castilla states, "[t]he MEF continued to base its steps on the ruling of the Constitutional Tribunal. The DGETP developed regulations for a procedure to pay bondholders and a draft supreme decree, which were reviewed by the MEF Office of the General Counsel. [....] The MEF acted in good faith in developing and adopting the Decrees."[180]

112. In reports dated 17 January 2014, the General Directorate of Indebtedness and the Treasury ("DGETP") highlighted that this was further to the mandate of the

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[175] Peru's First Submission on Procedure Safeguards, 1 June 2018, Annex on Incidents of Aggravation.

[176] *See* Supreme Decree No. 017-2014-EF, 17 January 2014, as modified by Supreme Decree No. 019-2014-EF, 21 January 2014 (Doc. RA-16,17).

[177] Wühler ¶ 6.

[178] Castilla ¶ 39.

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

[180] Castilla ¶¶ 43-47.

Constitutional Tribunal,[181] and MEF's Office of the General Counsel highlighted the "*carácter mandatorio*" of the July 2013 Resolution,[182] as well as the "binding and non-appealable nature of the judgments of the CT."[183]

113. Accordingly, on 18 January 2014, Peru issued Supreme Decree 017-2014-EF approving the administrative regulations for the Bondholder Process, open to all holders of Agrarian Reform Bonds not involved in judicial proceedings on the Bonds,[184] and, on 21 January 2014, Peru issued Supreme Decree No. 019-2014-EF, to broaden the scope of the Bondholder Process with respect to bonds for which some of the coupons had been clipped.[185]. Annex 1 to Supreme Decree Nº 017-2014-EF, and Supreme Decree Nº 019-2014-EF, set out parameters for implementing the methodology contemplated by the Constitutional Tribunal.[186] The mathematical formulas for the actualization set forth in Annex 1 to Supreme Decree Nº 017-2014-EF were from a report prepared by consultant Bruno Seminario, who previously had advised the MEF on potential actualization scenarios.[187]

114. In 2016 DGETP began the process of preparing a draft supreme decree with supplemental provisions anticipated by Supreme Decree No. 017-2014-EF, including a reconfirmation of the actualization formulas, which at that point had not been applied to any participating bondholders.[188] As Vice Minister Sotelo explains:

> On 15 April and 27 May 2016, DGETP prepared reports on the status of the implementation of the administrative process that indicated it would be prudent to have a consultant reconfirm the actualization methodology taking into account the advances in the implementation of the administrative process. Accordingly, DGETP contacted two independent experts with respect to the methodology for calculating the current value of the bonds. The first expert was a domestic expert who had prepared a prior report in 2011, and concluded that two precisions were appropriate with respect to the methodology. The second expert was an international expert who reviewed the methodology, including these precisions and concluded it to be reasonable because it preserves the value of the bonds, and consistent with economic theory.[189]

115. In response to MEF's query, Mr. Seminario confirmed that the concepts and guidelines in his report continued to be valid, and noted two "*precisiones*" to the formulas set

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[181] Report No. 014-2014-EF/52.04, Office of Public Debt of the Ministry of Economy and Finance,17 January 2014, ¶¶ 13-14 (Doc. R-15).

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

[183] Report No. 055-2014-EF/42.01, Ministry of Economy and Finance, 17 January 2014, ¶¶ 3.8 (Doc. R-16).

[184] Supreme Decree No. 017-2014-EF, 17 January 2014 (Doc. RA-16).

[185] Supreme Decree No. 019-2014-EF, 21 January 2014 (Doc. RA-17).

[186] See Annex 1 to Supreme Decree No. 017-2014-EF and Supreme Decree No. 019-2014-EF (Doc. RA-16, 17).

[187] Actualization of the Agrarian Reform Bonds, Report of Bruno Seminario, 2011 (Doc. R-297).

[188] Report No. 115-2016-EF, 27 May 2016 (Doc. R-352).

[189] Sotelo ¶ 37.

forth in his prior conclusions.[190] In a separate report for the MEF assessing Mr. Seminario's methodology, international economic and financial consultant Carlos Lapuerta stated that there was an ambiguity in Supreme Decree No. 019-2014-EF as a result of an "error tipográfico" caused by a missing asterisk in the annex to Mr. Seminario's original report. Mr. Lapuerta went on to confirm that while there could be other, more complex, methodologies, "el método propuesto por el Profesor Seminario es razonable y muestra una indudable sencillez."[191]

116. As anticipated by Supreme Decree No. 017-2014-EF,[192] Peru issued Supreme Decree No. 034-2017-EF on 28 February 2017. Supreme Decree No. 034-2017-EF further defined the latter steps of the Bondholder Process by including provisions on form of payment and precisions to the Annex containing the methodology for determining the current value of the bonds, as well as on the relevant processing times. It also created a working group to assist with the implementation of the procedure for determining the different payment methods.[193]

117. The prior regulations for the Bondholder Process were consolidated by Peru in a Unique Actualized Text ("TUA"), which was approved pursuant to Supreme Decree No. 242-2017-EF on 19 August 2017.[194] Among other things, the TUA made precisions to the actualization methodology, specifying the date to which the value of Bonds is to be actualized, and specifying that price parity should be determined from the Central Bank of Peru.

118. With respect to the regulations adopted by Peru, Dr. Wuhler concludes:

> The Ministry had to create an entirely new mechanism based on the specific characteristics of the instruments and the Tribunal ruling. The development of such mechanism is a process in and of itself, and the series of decrees reflect that process which established administrative procedures followed by confirmation of payment methods. The resulting regulations are sufficiently precise and comprehensive, and, in my opinion, provide a sufficiently clear and detailed framework for the implementation and execution of the Bondholder Process in a manner that is predictable, consistent, transparent and offers sufficient due process to bondholders.[195]

119. Moreover, Dr. Wuhler considers that the "regulatory framework for the Bondholder Process comports with established practices for claims procedures because it

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

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

[192] Supreme Decree No. 017-2014-EF Record, 17 January 2014 (Doc. RA-16).

[193] Supreme Decree No. 034-2017-EF Record, 27 February 2017 (Doc. RA-22).

[194] Supreme Decree No. 242-2017-EF Record, 18 August 2017 (Doc. R-23). On 26 August 2017, Peru issues an Errata with respect to Supreme Decree No. 242-23017-EF to correct a typographical error. See. Errata to Supreme Decree No. 242-2017-EF Record, 26 August 2017 (Doc. R-359).

[195] Wühler (RER-3), ¶ 6.

derives from a ruling of the Constitutional Tribunal of Peru and subsequent regulatory steps developed to establish a framework for the procedure."[196]

2. Procedure

120. Further to the mandate of the Constitutional Tribunal, and the implementing Decrees, the Bondholder Process consists of distinct administrative procedures, including the following sequential steps:[197]

- **Authentication**: Holders of Agrarian Reform Bonds may request a verification of the authenticity of their Bonds by an expert forensic analysis (peritaje grafotécnico). To this end, the Dirección Ejecutiva de Criminalística ("DEC") has established a laboratory with specialized optical equipment for authenticating Bonds.[198] This involves detailed analysis of the Bonds' physical and graphical characteristics (printing, signatures, numbering, borders and shields, etc.), as well as a comparison to authentic bonds of comparable series, denomination and date. If the DEC determines that an instrument is an authentic Agrarian Reform Bond, the bondholder is notified so that it may continue with the registration procedure. If the DEC determines that an instrument is not an authentic Agrarian Reform Bond, the Bond is returned to the bondholder.

- **Registration**: Holders of authentic Agrarian Reform Bonds may file a request to be registered as legitimate bondholders together with supporting documentation accrediting the bondholder's identity and acquisition of the Agrarian Reform Bonds. For example, in the case of Agrarian Reform Bonds acquired by purchase or assignment, the holder must submit a legalized copy of the purchase or assignment agreement. DGETP determines whether a bondholder qualifies as a legitimate bondholder or not, and issues a Directorial Resolution to that effect.

- **Actualization**: Registered bondholders may request that DGETP calculate the current value of their Bonds in accordance with the methodology mandated in the July 2013 Resolution. In accordance with the Constitutional Tribunal's methodology, DGETP determines the current value of the Bonds, and issues a Directorial Resolution to that effect.

- **Determination of Payment Method**: Supreme Decree 017-2014-EF provides that once the current value of their Agrarian Reform Bonds has been calculated, legitimate bondholders may select from a menu of options for receiving that the payment to be determined by the MEF. DGETP finalizes the Bondholder Process by issuing a Directorial Resolution that establishes the payment method and the timeline for payment.

121. Dr. Norbert Wühler, an international expert in claims procedures, concluded that "[t]he structure of the Bondholder Process is logical, understandable and in keeping with

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[196] Wühler (RER-3), ¶ 6.

[197] *See* Supreme Decree No. 017-2014-EF, 17 January 2014, as modified by Supreme Decree No. 019-2014-EF, 21 January 2014 (Doc. RA-16, 17).

[198] Report No. 098-2015-EF/52.04, Office of Public Debt of the Ministry of Economy and Finance, 07 July 2015, ¶¶ 4-7 (Doc. R-17).

accepted international processes for claims procedures."[199] Moreover, he elaborates that, "[t]he procedures for each of the stages are structured in a rational way, and priority is accorded to categories of beneficiaries based on objective grounds. Bondholders need only follow the instructions at each stage until payment. There is an appropriate gatekeeping step of authentication, to avoid fraud in connection with these old paper instruments."[200]

122. The Quantum Expert concludes:

> We find that the regulations implementing the July 2013 CT Decision reflected a series of steps aimed at properly implementing the decision, and provide sufficient guidance for the State and Bondholders to understand the method for bringing to current the outstanding face value of the Agrarian Bonds Coupons, and establishing a procedure to do so. Peru resolved the historical issue of the Agrarian Bonds with a global resolution available to legitimate Bondholders with authenticated bonds.[201]

123. It is telling that the Section VIII of the Edwards Report referenced by Professor Wühler [202] appears to have been a late addition to the previous version of the version of his report from 2016. It does not provide analysis or evidence to support its conclusion. Mr. Edwards is an economist but not an expert in claims processes. He thus relies on sovereign debt restructurings that are largely incomparable to a Bondholder Process based on instruments with specific historical origins and legal requirements.

3. Implementation and Payment

124. Hundreds of bondholders have participated in the Bondholder Process, thousands of Bonds have been authenticated and bondholders are now advancing beyond the authentication phase and the registration phase to the phase for actualization of the value of their bonds and designation of method of payment. Peru has been developing and implementing the next phase of the process as always anticipated. Participating bondholders are entitled to file requests for reconsideration or appeal after receiving any Directorial Resolution, in accordance with Peru's Law of Administrative Procedure.

125. Gramercy has refused to participate in the Bondholder Process. In addition to its apparent participation in myriad local judicial proceedings, Gramercy Holdings was a signatory to a petition to the Constitutional Tribunal challenging the July 2013 Resolution and the Bondholder Process. Specifically, the petition of 16 March 2015 requested, *inter alia*, that the Supreme Decrees be modified to a CPI methodology.[203] By a vote of 5-1, the Constitutional Tribunal rejected the petition. According to the Constitutional Tribunal it was

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[199] Wühler (RER-3), ¶ 6.

[200] Wühler (RER-3), ¶ 6.

[201] Quantum ¶ 14.

[202] Wühler (RER-3), ¶ 6 ("The Edwards Report is incorrect to conclude that: 'The MEF's Process for Compensating Bondholders has been Extremely Protracted and Lacking in Transparency.' That conclusion is unproven and the Edwards Report relies on examples of sovereign debt restructurings rather than on claims procedures and the practice of the Bondholder Process.").

[203] ABDA Petition in Record No. 0022-1996-PI/TC, 16 March 2015, at 1-2 (Doc. CE-199).

premature to allege that the Bondholder Process is inconsistent with the July 2013 Resolution given that the State had yet to be applied by the State.[204]

126. As Mr. Wuhler explains: "The efficacy and efficiency of the Bondholder Process are sound and consistent with international practice, and there is no indication of discriminatory treatment in the way that the stages of the procedure have been carried out."[205] He concludes as follows:

> A review of the file of a sample bondholder, detailed in this report, indicates the effectiveness of the procedure. Data provided by the Ministry of Economy and Finance as of 30 November 2018 demonstrates the effectiveness of the procedure as a whole:
>
> • Authentication Phase: The Ministry has received 393 cases totalling 11,174 bonds. It has reviewed 327 cases totalling 10,690 bonds, which are 96% of all bonds presented, and authenticated 303 total cases involving 10,494 bonds.
>
> • Registration Phase: From the total authenticated cases, the Ministry has received 170 cases seeking registration and reviewed 119 cases, with 117 of those cases registered, 2 cases rejected, 8 in process and 43 awaiting further information.
>
> • Actualization Phase: From the total registered cases, the Ministry has received 69 cases and reviewed 50 cases, with 44 cases actualized, 19 in process and 6 awaiting further information.
>
> • Payment Phase: From the total actualized cases, the Ministry has received 16 cases, and completed resolutions for 11 cases, 5 of which have been paid and 6 of which are in the process of being paid, leaving 5 pending cases in this phase.

4. The Potential Recovery That Was Available to Gramercy

127. By Gramercy's own admission, were Gramercy Peru Holdings to participate in the Bondholder Process, and pass through the routine authentication and registration processes, it would receive US $33.57 million for its Bonds.[206] i.e., *more* than the purchase prices in the contracts for acquisition that Gramercy hid from the Tribunal. The Quantum Expert confirms:

> Scans of Bonds: Claimants submitted images of the 9,656 Gramercy Bonds that are the basis for their claim. From our review of these images and the underlying bond data used in Professor Edwards' calculation we found instances where the Coupons were damaged or ripped, the bond title was missing, some of the Coupons used in

[204] Constitutional Tribunal Decision in Record No. 0022-1996-PI/TC, 7 April 2015 (Doc. CE-40).

[205] Wühler (RER-3), ¶ 6.

[206] Third Amended Notice, ¶ 3.

> Professor Edwards' calculations were missing, and some or all the Coupons were detached from the bond title.[207]

F. Gramercy Conduct

128. Unable to accept that no windfall is forthcoming, Gramercy resorted to other tactics.

1. The Gramercy Attack Campaign against Peru

129. Gramercy has made barely-veiled threats and public attacks seeking to tarnish the reputation of a respected State. It was the international press that first called Gramercy's conduct a campaign, emphasizing over many months that Gramercy is "waging a campaign to make Peru pay off," (*Wall Street Journal*),[208] and "seeking to stir up a revolt," and "add pressure on the government" (*Bloomberg*)."[209]

130. Peru consistently has invited and sought a respectful approach despite Gramercy's negative campaign. As Peru commented to Gramercy earlier this year:

> *If Gramercy's intention is to manage consultations effectively, the aforementioned conduct is counterproductive; if Gramercy's intention is to manage a dispute effectively, it is not doing so; if Gramercy has other intentions, it should divulge them.*[210]

131. The Gramercy attack campaign has continued nonetheless. Indeed, a lobbying campaign was always part of Gramercy's contemplated strategy. Even before it ever acquired any Bonds, Gramercy considered in 2006 (an election year in Peru) that a "potential strategy would be to lobby a congress representative to call for a vote between the elections in April and the inauguration at end of July," to take advantage of a "this lame duck period" in Peru.[211]

132. A decade later, Gramercy elevated its strategy to an international scale, targeting the 2016 election year in Peru. It has aligned diverse elements of the pressure practices that have become commonplace for such funds. A recent article in the Huffington Post focuses on "The Vultures' Vultures: How a New Hedge Fund Strategy is Corrupting Washington," citing "mercenary campaigns" by hedge funds: "What makes the hedge fund pressure campaign distinctive is the ambivalence, or even nihilism, that lies behind the public policy suggestions. Hedge funds want whatever policy outcome will make their leveraged

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[207] Quantum ¶ 15.

[208] Matt Wirz, *Hedge Fund Challenges Peru on Land Bonds*, The Wall Street Journal, 15 January 2016 (Doc. R-97).

[209] John Quigley and Ben Bartenstein, *A Lone Hedge Fund Seeks Allies in $5.1 Billion Peru Bond Dispute*, Bloomberg, 2 February 2016 (Doc. R-101).

[210] Letter from Peru to Gramercy, 25 April 2016 (Doc. R-51).

[211] 2006 Memorandum, at 3 (Doc. CE-114).

bet pay off…. The same playbook applied to entire countries … amplifies the threat exponentially."[212]

i. **Lobbying**: Beginning in 2015, Gramercy enlisted multiple lobbyists in the United States in an effort to pressure Peru to disregard applicable law and bend to Gramercy's demand for a preferential payout. Among other things:[213]

- Gramercy enlisted multiple Washington-based lobbyists including the Podesta Group, the Daschle Group (affiliated with Baker Donelson Bearman Caldwell & Berkowitz) and, more recently, McClarty Associates, involving multiple individuals spanning those groups, at the least.

- To structure and shield this arrangement, Gramercy's counsel retained the Podesta Group and the Daschle Group, which collectively disclosed income of over half a million dollars for 2015 and the first quarter of 2016 for work related to "international finance issues" and activities directed, collectively, at the U.S. Trade Representative, Senate, House of Representatives, Department of State and Department of Agriculture. The Embassy of Peru in Washington subsequently has been approached on this issue by staffers from the U.S. Trade Representative and House of Representatives.

- The relevant lobbying disclosure forms only tell part of the story. The registration form for each firm lists Gramercy Funds Management LLC as an affiliated organization, but the other forms do not. Nor do the forms indicate all individuals involved in related activities such as press relations and attempts to lobby the Embassy of Peru to the United States. Among other examples, the Podesta Group states externally that it acts on behalf of a group called the Peruvian-American Bondholders for Justice ("PABJ") and undertakes activities such as issuing press statements, contacting journalists and maintaining a web site.[214]

ii. **Negative Ratings:** Later in 2015, apparently unable to enlist the big three ratings agencies, Gramercy obtained material with which to smear Peru with from less-regarded ratings agencies. Among other things, Gramercy turned

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[212] Ryan Grim and Paul Blumenthal, The Vultures' Vultures: How a New Hedge Fund Strategy is Corrupting Washington, Huffington Post, 13 May 2016 (Doc. R-233).

[213] Lobbying Registration, LD-1, House Identification 311100508 and Senate Identification 31680, 17 June 2015 (Doc. R-21); Lobbying Report, LD-2, House Identification 31110508 and Senate Identification 31680-1007565, 20 July 2015 (Doc. R-22); Lobbying Report, LD-2, House Identification 31110508 and Senate Identification 31680-1007565, 20 October 2015 (Doc. R-23); Lobbying Registration, LD-1, House Identification 308730279 and Senate Identification 5153, 23 October 2015 (Doc. R-24); Lobbying Report, LD-2, House Identification 308730279 and Senate Identification 5153-1006043, 20 January 2016 (Doc. R-25); Lobbying Report, LD-2, House Identification 308730279 and Senate Identification 5153-1006043, 20 January 2016 (Doc. R-26); Lobbying Report, LD-2, House Identification 308730279 and Senate Identification 5153-1006043, 19 April 2016 (Doc. R-27); Lobbying Report, LD-2, House Identification 31110508 and Senate Identification 31680-1007565, 20 January 2016 (Doc. R-28); Lobbying Report, LD-2, House Identification 31110508 and Senate Identification 31680-1007565, 20 April 2016 (Doc. R-29).

[214] See, e.g., PABJ Calls on Peru to Make Dean Mahoney's Report Publicly Available, PR Newswire, 14 June 2016 (Doc. R-134).

to Egan Jones,[215] a smaller ratings agency that follows an investor-pays rating model[216] and previously was banned from issuing official ratings on asset-backed and government securities as part of a settlement with US regulators who alleged it had mislead regulators and violated rules prohibiting conflicts of interest.[217] Egan-Jones, apparently paid by Gramercy, bases a key part of its analysis on a report by a self-interested "expert" and overlooks applicable legal and procedural issues.[218] Another investor-funded ratings agency publicly released ratings on Peru that were "solicited by an investor whose identity remains, and will be kept, unknown to the general public,"[219] and lists as its sole "[m]ain source" the Gramercy-connected web site www.bonosagrarios.pe.[220]

iii. **Negative Reports**: Early in 2016, Gramercy began to rely on reports from a law professor and an economics professor to cite the dubious ratings reports in unbalanced, negative reports which were timed for release just prior to Gramercy's filing of "Notice of Intent." It commissioned and publicly disseminated a legal opinion by Professor John C. Coffee (the "Coffee Opinion"), which inaccurately accuses Peru of violating U.S. securities law in connection with its issuance of global bonds.[221] As discussed in further detail below, this was a baseless attempt to pressure Peru. Gramercy also has submitted a report by Arturo Porzecanski, who (in contrast to prior comments about Peru[222]) issued a paper critical of Peru relying on the Egan Jones assessment and the Coffee Opinion mere days before the submission of the Notice of Intent.[223] On the day the Notice of Arbitration was submitted, Mr. Porzecanski moderated an event on the Bonds with the participation of Professor Coffee and a Gramercy representative, who distributed copies of Gramercy's filing and other materials.[224]

iv. **Intervention in Bondholder Organizations**: Gramercy also has infiltrated and aligned the message of purportedly distinct bondholder organizations.

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[215] See Third Amended Notice ¶ 164; Egan-Jones Assigns A First-time Rating Of "BB" To The Republic Of Peru's International Bonds, Egan-Jones Ratings Company, 17 November 2015 (Doc. CE-22).

[216] *Federal Reserve & Academic Studies*, Egan-Jones Ratings Company (Doc. R-136).

[217] *Egan-Jones Is Given SEC Ratings Ban*, The Financial Times, 22 January 2013 (Doc. R-30).

[218] See, e.g., Sovereign Rating Analysis: Republic of Peru, Egan Jones, at 6-7 (Doc. CE-22).

[219] *Peruvian Agrarian Bonds*, HR Ratings, 27 October 2016 (Doc. R-31).

[220] *Peruvian Agrarian Bonds*, HR Ratings, 27 October 2016 (Doc. R-31).

[221] *See* Legal Opinion of Professor John C. Coffee, 11 January 2016; John Quigley and Ben Bartenstein, *A Lone Hedge Fund Seeks Allies in $5.1 Billion Peru Bond Dispute*, Bloomberg, 2 February 2016 (Doc. R-101).

[222] *For Uruguay, it is convenient to stay as far as possible away from Argentina*, El Observador, 2 September 2014 ("We highlight countries that took advantage of the favorable situation and carried out necessary structural reforms and sound macroeconomic policies: Colombia , Chile and Peru . . . . They have also been slowed by lower prices for its exports but do not suffer from major macroeconomic imbalances or vulnerabilities. These . . . are the South American countries with the best economic prospects , even in a scenario of turbulence for the eventual rise in interest rates in the US and increased risk aversion by foreign investors.") (Doc. R-77).

[223] Arturo C. Porzecanski, *Peru's Selective Default: A Stain on Its Creditworthiness*, 28 January 2016, at 12–13 (Doc. CE-219).

[224] *Home: Markets: Peru*, EMTA (Doc. R-570).

The press has reported how Gramercy established the U.S.-based PABJ,[225] which issues press releases through one of the Gramercy lobbyists.[226] Gramercy's erstwhile representative in Peru is now the spokesperson of ABDA.[227] It is particularly telling that the press statements and web sites of these organizations amplify the Gramercy legal strategy, even pushing critiques of Peru that are both unrelated to the interests of Peruvian bondholders and could even harm them.[228]

v. **Public Relations**: Over the past year, Gramercy has used all the elements of its attack machine to attempt to generate continuous negative press to damage Peru. Including during the 2015 annual World Bank and IMF meetings in Lima last October,[229] and the World Bank and IMF 2016 Spring meetings in Washington, DC.[230] Gramercy retained public relations firms ASC Advisors and Llorente & Cuenca, which have managed the issuance of diverse negative information into the press, together with Gramercy and other lobbyists and representatives.[231] The press operation apparently even has extended to rewriting the well-known Wikipedia web site's entry on the Agrarian Reform Bonds, as a "PR firm hired to edit Wikipedia"[232] used online identities established for purposes of deception (known as "sockpuppets")[233] including in the weeks that followed Gramercy's filing of its "Notice of Intent."[234]

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[225] See Hedge fund pressures Peru to pay defaulted agrarian bonds, Peru Reports, 13 October 2015 (Doc. R-570).

[226] PABJ Calls on Peru to Make Dean Mahoney's Report Publicly Available, PR Newswire, 14 June 2016 (Doc. R-134).

[227] *Know What Is Happening With The Agrarian Bonds in Peru*, America Economia, 5 April 2016 ("[A]ccording to Mario Seoane, spokesperson of the *Asociación de Bonistas de la Deuda Agraria* (ABDA)") (Doc. R-116). Indeed, Gramercy authorized the transfer of its files to Mr. Seoane. *See* Correo electrónico de Jose Cerritelli to Frank Boyle, 7 August 2009 (Doc. R-32).

[228] *See, e.g., Peru Sold $3 billion of Debt in 2015 Based Upon "Materially Misleading" Prospectuses*, Business Wire, 19 June 2016 (repeating Coffee's assertions about "discrimination against foreign creditors and creditors who purchased in the secondary market" in statements by ABDA) (Doc. R-99).

[229] See US Hedge Fund Threatens Peru With Law Suit Over Debt, BBC, 9 October 2015 (Doc. R-90).

[230] *See Flyers*, PABJ, 16 April 2016 (Doc. R-33).

[231] *US Fund Notifies Intent Peru arbitration Agrarian Bonds*, RPP Noticias, 2 February 2016 ("The notice shows that 'Gramercy is willing to enforce their international rights and be liable to Peru by the deplorable conduct that the government has demonstrated to the case of the Bonds of Agrarian Reform' said the lawyer through a statement agency Llorente & Cuenca in Lima.") (Doc. R-100).

[232] Sockpuppet Investigation, Sherlock400, Wikipedia (Doc. R-34).

[233] *Sockpuppet*, Wikipedia (Internet) (Doc. R-35).

[234] On 5 April 2016, Wikipedia determined through a review process that a user called "PagoJusto" was a suspected "sockpuppet." PagoJusto edited Wikipedia's page on "Agrarian Reform Bonds" on approximately ten distinct occasions. PagoJusto's edits after Gramercy's first Notice included the addition that the "State has for decades evaded its constitutional obligation to pay fair value for the expropriated land," and that "[h]istory thus establishes a pattern of Government mistreatment of the bondholders' rights." PagoJusto's edits included the addition of a section on the Coffee Opinion, without mentioning that it was commissioned by Gramercy. Another "sockpuppet" user, ChicaPeruana, was also found to be hiding its true location, and the only edit ever made by ChicaPeruana is to the Wikipedia page on a Managing Director of Gramercy Funds Management. *Sockpuppet Investigation, Sherlock400*, Wikipedia (Doc. R-34); *Agrarian Bonds in Peru: Revision History*, Wikipedia (Doc. R-36).

133. Gramercy has used the mechanism is has constructed to amplify its contorted messaging through numerous incidents of aggravation, seeking to force Peru to change its laws and seeking to undermine the Peruvian bondholder procedure. Instead of relying on the Treaty proceeding it elected to file as the forum to resolve its dispute with Peru, Gramercy has disrespected designated channels of communication, aggravated the dispute and demonstrated utter disdain for the integrity of the Treaty proceeding and the Treaty-established role of the non disputing party. The following are a few examples of the incidents of aggravation undertaken by Gramercy to date against Peru.

i. **The IMF/World Bank Meetings in Lima:** As Gramercy had contemplated even before allegedly acquiring any bonds, Gramercy pursued a lobbying strategy that involved key elements of its attack mechanism. Specifically, in June 2015, PABJ, recently having been establishing by Gramercy,[235] proceeded to give away tickets to a September 2015 soccer match in Washington between Peru and the United States and distribute propaganda.[236] In October 2015, Peru hosted the 2015 annual IMF/World Bank fall meetings, the Financial Times reported that, "[a] US hedge fund is ratcheting up its campaign [link to PABJ website] to convince Peru to repay $5bn of long-defaulted 40-year-old bonds by threatening to sue the country under a free-trade agreement with the US."[237] Asked how Gramercy was "ramping up the campaign," the Financial Times reporter tweeted "PABJ, funding groups, meetings, etc." and linked to a "ramped up" PABJ website.[238]

ii. **The Embassy in Washington:** Gramercy targeted the Embassy of Peru in Washington through correspondence and lobbying. In late 2015, Gramercy began sending threatening correspondence to the Embassy of Peru to the United States, asserting deadlines for the Embassy to respond to a one-sided recitation of arguments. Gramercy copied the letter to eighteen U.S. government officials, all of whom belonged to parts of the U.S. government that Gramercy-affiliated lobbyists disclosed they were lobbying.[239] The Embassy responded by suggesting that "Gramercy consider an approach that is truly constructive and respectful or Peru and its laws and procedures," and reminding Gramercy of appropriate channels of contact.[240] Gramercy subsequently sent a letter received 1 February 2016 emphasizing that it was copying numerous government officials, a list which had grown longer since the prior correspondence.[241] In its response, the Embassy said:

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[235] *See* PABJ Certificate of Incorporation, 29 June 2015 (Doc. R-81).

[236] *Sign Up*, PABJ Website, 25 July 2015 (Doc. R-82); Private photograph of PABJ propaganda at Peru vs. U.S. soccer match, 4 September 2015 (Doc. R-85).

[237] Robbin Wigglesworth, *Hedge fund pressures Peru to pay back 40-year-old debt*, Financial Times, 7 October 2015 (Doc. R-88); *see also* Paul Kilby and Davide Scigliuzzo, *Peru will stick to local law in debt dispute: Finance Minister*, Reuters, 11 October 2015 (Doc. R-92) (quoting James Taylor as stating: "The Supreme Decree issued by Peru last year is a complete repudiation of the debt cleverly wrapped in the cloth of a resolution.").

[238] @RobinWigg (Robbin Wigglesworth), Tweet, 7 October 2015 (Doc. R-87).

[239] *See* Letter from Gramercy to the Embassy of Peru, 23 December 2015 (Doc. CE-216).

[240] *See* Letter from the Embassy of Peru to Gramercy, 19 January 2016 (Doc. R-43).

[241] *See* Letter from Gramercy to the Embassy of Peru, 29 January 2016 (Doc. CE-256).

[T]his Embassy invites Gramercy, and calls on you, to stop the direct and indirect campaign aimed at damaging Peru's reputation and financial stature. While Gramercy or its advisors may have used such a campaign in different circumstances not relevant to Peru, it is at odds with constructive dialogue and with procedures established by law and the Treaty. Under the Treaty, the role of the United States in relation to an investment dispute is as "Non-Disputing Party," making a campaign before numerous U.S. officials, and beyond, even less appropriate.[242]

Meanwhile, the Daschle Group had approached the Embassy and continued to do so with respect to the agrarian reform bonds, initially concealing but later disclosing that it acted for Gramercy, and PABJ published the Coffee Opinion obtained by Gramercy.[243]

iii. **The Notice of Intent, Consultations and Threats**: After its initial Notice of Intent, Gramercy flagrantly flouted and flexed its capacity to turn its attacks off and on, depending on its level of satisfaction with consultations. Following Gramercy's first Notice of Intent dated 1 February 2016, Gramercy representatives gave statements to the press,[244] which also published the Coffee opinion.[245] After the Special Commission informed Gramercy that it was the established channel of communication,[246] Gramercy and its affiliates continued to seek contact with other Peruvian officials, including at a road show in New York.[247]

Peru nonetheless engaged in consultations with Gramercy pursuant to the Treaty. During these consultations, Gramercy underscored its control over the media campaign, by stating that "Gramercy is open to refraining from taking other actions including affirmative steps to publicize the land bond issue at other upcoming events."[248] Gramercy also indicated that its Notice of Arbitration would "provide grist for the media mill," and that to abstain from filing it "would require a tolling agreement to suspend time counting against the 3-year statute of limitations in Article 10.18(1) of the TPA."[249] When Peru informed Gramercy that the scope of its proposal was excessive

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[242] Letter from the Embassy of Pery to Gramercy, 18 February 2016 (Doc. R-107).

[243] *See* ABDA, *Peru Sold $3 billion of Debt in 2015 Based Upon "Materially Misleading" Prospectuses*, Businesswire, 19 January 2016 (Doc. R-99) ("Professor Coffee's letter in its entirety can be found at: http://perubonds.org/resource/analysis-of-perus-bond-prospectuses-filed-with-the-u-s-securities-and-exchange-commission-sec").

[244] Robbin Wigglesworth, *Gramercy files $1.3bn claim against Peru*, Financial Times, 2 February 2016 (Doc. R-103).

[245] John Quigley and Ben Bartenstein, *A Lone Hedge Fund Seeks Allies in $5.1 Billion Peru Bond Dispute*, Bloomberg, 2 February 2016 (Doc. R-101).

[246] Letter from Peru to Gramercy, No. 022-2016-EF/CE.36, 15 February 2016 (Doc. R-44).

[247] ABDA, Peru Hides $5 Billion Land Bond Default and Misleads International Investors While Promising "Great Opportunities" in Road Show, PR Newswire, 9 March 2016 (Doc. R-114).

[248] *See* Letter from Gramercy to Special Commission of Peru, 28 March 2016 (Doc. R-47).

[249] Letter from Gramercy to Special Commission of Peru, 28 March 2016 (Doc. R-47).

and invited a new version, Gramercy replied that, "Gramercy and others will be resuming their efforts to focus attention on the land bonds issue."[250]

Gramercy followed through. During the 2016 annual IMF/World Bank spring meetings, Gramercy lobbyists[251] distributed PABJ pamphlets calling out Peru's Minister of Finance by name,[252] and PABJ issued a press release "demanding answers" from the Minister.[253] On 18 April 2016, Gramercy told Peru: "Gramercy offered to – and did – reduce certain efforts to focus public attention on the Government's treatment of the land bonds at an international meeting." Days later, during the United Nations General Assembly meeting in New York in April 2016, PABJ issued a press release (on which a Podesta Group lobbyist was listed as the point of contact) that "demands answers" from the President of Peru.[254]

iv. **The Initial Notice of Arbitration and Peruvian Elections:** Gramercy rejected consultations and timed the filing of its Notice of Intent to gain attention at the time of the Peruvian presidential elections. Having rejected good faith invitations to participate in further consultations, Gramercy filed its Notice of Arbitration on 2 June 2016, just prior to Peru's run-off election for President. The same date of the Notice of Arbitration, three days before Peru's run-off election, Gramercy's counsel, Gramercy's Managing Partner and a Gramercy-aligned expert appeared at an event at the headquarters of the Emerging Markets Traders Association, during which Gramercy distributed its filing and highlighted particular evidence, also made available on the PABJ website.[255] It is no wonder Gramercy refused consultations: it would have disrupted its previously planned press opportunity. According to a published account of the meeting: "On the 17th floor of a glimmering office tower on Manhattan's Madison Avenue, men in dark suits picked over a catered spread, munching on shrimp cocktail and sharing war stories…. Billed as a panel discussion, the gathering quickly became an attack on the government of Peru."[256] Also on that day, the Special Commission requested that Gramercy that White & Case LLP direct its communications to White & Case LLP.[257] Nonetheless, in the following days, an attorney at the Peruvian law firm representing Gramercy, using a university email address and, without revealing his professional connection, requested that Peru provide

[250] Email from Gramercy to Special Commission of Peru, 13 April 2016 (Doc. R-117).

[251] Photograph of John Anderson of Podesta Group distributing PABJ Flyers, 16 April 2016 (Doc. R-172).

[252] *Flyer*, PABJ, 16 April 2016 (Doc. R-33).

[253] PABJ, PABJ Demands Answers From Peruvian Finance Minister Alonso Segura Regarding the Agrarian Reform Bond Scandal While He Attends the IMF World Bank Meetings in Washington, D.C., PR Newswire, 13 April 2016 (Doc. R-119).

[254] PABJ, PABJ Demands Answers From Peruvian President Ollanta Humala Regarding the Agrarian Reform Bond Scandal While He Attends the UN General Assembly Special Session in New York, PR Newswire, 22 April 2016(Doc. R-122).

[255] EMTA Special Seminar: The Peru Land Reform Bond Case, EMTA (Doc. R-129).

[256] Chris Hamby, *How Big Banks Bled a Tiny Island Nation*, Buzzfeed News, 31 August 2016 (Doc. R-144).

[257] Letter from Peru to Gramercy, No. 061-2016-EF/CE.36, 2 June 2016 (Doc. R-57).

documents pertaining to the Bondholder Process and to the bills and description of services of Peru's counsel.[258]

v. **The Government Transition and Third Notice of Arbitration**: *Gramercy sought to lobby the incoming Peruvian government and pressure publicly.* As early as 2006, Gramercy had contemplated a lobbying strategy taking advantage of moments of political transition.[259] The new Peruvian administration assumed power on 28 July 2016. In the previous weeks, Gramercy PABJ, and ABDA had issued press releases taking issue with Peru's Response to the Notice of Arbitration,[260] and Gramercy had filed an amended Notice of Arbitration. On 5 August 2016, Gramercy filed a third Notice of Arbitration, at which point it considered that "all conditions have been met for the formation of an arbitration agreement between Gramercy and Peru and the claims set forth in the Notice have been properly submitted to arbitration."[261] Meanwhile, Gramercy sought inroads with Peru's incoming government. The president of McLarty Associates told the press, "[o]ur principal task has been to make sure the new [Peruvian] administration … was aware of this issue and was baking it into their going forward plans."[262] Responding to questions about Gramercy in an interview with Latin Finance, Peru's newly elected President said, "[t]hey've hired lobbyists, they're making a big fuss. And we're not stupid."[263] Consistent with Peru's position articulated before and after with respect to Gramercy's claims in this Treaty proceeding,[264] the President stated, "I don't think we owe them anything."

vi. **The Evolving Campaign and Sovereign Finance:** Gramercy continued various efforts to interfere with Peru's contemporary sovereign bond program, which relates to bonds that are wholly distinct from the agrarian reform bonds, affirmatively attempting to harm Peru and its people. On 20 September 2016, counsel for Gramercy wrote to Peru's underwriters in connection with a new sovereign debt offering announced that day.[265] Attaching the Coffee Opinion previously commissioned by Gramercy, and without mentioning the Bondholder Process, Gramercy purported that Peru

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[258] *See* Letters from Estudio Rodrigo attorney to Ministry of Economy and Finance, 6 and 7 June 2016 (Doc. R-132) (Doc. R-133).

[259] *See* Memorandum from David Herzberg to Robert Koenigsberger, 24 January 2006, at 3 (CE-114) ("[o]ne potential strategy would be to lobby a congress representative [that] may be willing to call for a vote knowing that he/she will be leaving congress within weeks and has little to lose.").

[260] Castilla ¶ 72; PABJ, PABJ Calls on Peru to Make Dean Mahoney's Report Publicly Available, PR Newswire, 14 June 2016 (Doc. R-134); ABDA, Ministry of Economy and Finance (MEF), hides evidence that presumably invalidates international demands for Agrarian Bonds, PR Newswire, 20 June 2016 (Doc. R-135); Gramercy Funds Management, Gramercy Once Again Responds to False Accusations Contained in Peru's Response on Land Bonds, PR Newswire, 6 July 2016 (Doc. R-138).

[261] Letter from Gramercy to Peru, 5 August 2016 (Doc. R-143).

[262] Steven Mufson, *$1.6 billion – or just about nada*, The Washington Post, 11 September 2016 (Doc. R-145).

[263] Katie Llanos-Small, *Peru's PPK: 'I don't think we owe [Gramercy] anything' – Exclusive*, Latin Finance, 22 August 2016 (Doc. R-62).

[264] Response of the Republic of Peru (R-1), 6 September 2016, ¶ 113.

[265] Email from Gramercy counsel to Bank of America, 20 September 2016 (Doc. R-146).

had "disavow[ed] the Land Reform Bonds," which, according to Gramercy "puts the credibility of the country at issue with respect to other debt obligations."[266]

Shortly thereafter, Peru's Minister of Economy and Finance traveled to Washington, DC to participate in the IMF/World Bank annual meetings. At one event, for instance, he was approached by a McLarty Associates representative who provided a business card with a handwritten note soliciting a meeting. In light of the foregoing, Peru requested that Gramercy and its representatives respect the proceeding its chose to commence under the Treaty and channel its communication and conduct accordingly.[267] That letter, to which Gramercy did not respond, stated:

> *[T]he Republic of Peru has requested on repeated occasions that the Gramercy entities and their representatives respect appropriate channels of communication. Peru considers that Gramercy has disregarded this request and continued to aggravate the circumstances of this dispute, as set forth in a long record of communications and pleadings. It is inappropriate for Gramercy representatives to continue engaging in conduct such as approaching officials at private and public events and locations, attempting to arrange meetings, and other such conduct. For the avoidance of doubt, certain other representatives who have acted in this matter arte copied as a professional courtesy.*[268]

The efforts to interfere with Peru's sovereign finance continue. On its website, for instance, PABJ tells potential sovereign bond investors to "[b]e wary of investing in Peru through their outstanding and future sovereign bond issues."[269] PABJ does not mention that all three principal credit ratings agencies rate Peru's foreign and local currency debt as investment grade and its outlook with a stable outlook.[270]

The Parties signed a Consultation Protocol dated 18 November 2016 establishing established a Consultation Period, which lasted through 28 February 2017.[271] While there are many things that Peru might say about exchanges during this period, Peru refrains from doing so because the Consultation Protocol expressly provides that "communications and interactions by and among the parties, and information exchanged in connection with the Amicable Consultations during the Consultation Period following this Protocol is confidential and shall not be admissible in any forum for any purpose." Whether Gramercy may claim that it downshifted its negative campaign during this time, it is clear that the perpetual-motion

[266] Email from Gramercy counsel to Bank of America, 20 September 2016 (Doc. R-146).

[267] Letter from Peru to Gramercy, 6 October 2016 (Doc. R-149).

[268] Letter from Peru to Gramercy, 6 October 2016 (Doc. R-149).

[269] Stakeholders: Potential Sovereign Bond Investors, PABJ Website (Doc. R-223).

[270] *Credit Ratings*, Ministry of Economy and Finance (Doc. R-225).

[271] *See* Consultation Protocol signed 11 November 2018 (Doc. R-153); Amendment, 23 January 2017 (Doc. R-156); Second Amendment, 22 February 2018 (Doc. R-157).

machines continued: the digital media, the misinformation and the lobbying, including continued spending on lobbyists and movements in Washington.[272]

vii. **The Teamsters Issue and Aftermath**: Following the change of government in Washington in 2017, the campaign took a new turn centered on the evolving political discourse in Washington and relying on statements by misinformed unions. As it continued to advance the Bondholder Process, Peru issued Supreme Decree No. 034-2017-EF on 28 February 2017 with respect to further steps with respect to the Bondholder Process, as anticipated.[273] On 1 March 2017, after the Consultation Period, Peru advised Gramercy that it remained open to without prejudice consultations to discuss the latest advances in the Bondholder Process, and, in the absence of a framework for such consultations, proposed to proceed with the appointment of the presiding arbitrator.[274]

In the context of the continued progress of the Bondholder Process, on 29 March 2017, the President of the International Brotherhood of Teamsters, a major labor union, sent a letter to the Ambassador of Peru and copied the President of the United States and others in his administration.[275] According to Mr. Hoffa: "America can no longer allow countries that take advantage of our large domestic market to get away with defaulting on their debts." The letter does not purport that the Teamsters or its members are actual bondholders. According to Mr. Hoffa, "[m]any of our pension funds are holding defaulted Peruvian land bonds through various investment vehicles." POLITICO published a copy of the Teamsters letter,[276] a version that was not a copy of the delivered document and does not have any official receipt stamps.[277] Journalists had received the Teamster letter from Gramercy representatives, but Gramercy maintained its lack of transparency toward Peru. When asked to confirm if the bonds referenced by the Teamsters were the same bonds as those allegedly held by Gramercy, Gramercy's counsel clearly replied: "No comment." Notably the Embassy responded to Mr. Hoffa, emphasizing the close relationship between Peru and the United States and the fact that Peru has established a procedure for the authentication and payment of the bonds. The Embassy states:

The Embassy takes note that this appears to be the first time that you or your organization have communicated with us regarding this matter, that you have chosen to copy in the first instance the President of the United States and other senior officials and that your letter appears to have been provided to the press. The Embassy

[272] Lobbying Disclosures, Podesta Group (Doc. R-155); (Doc. R-170).

[273] *See* Response of the Republic of Peru, 6 September 2016 ¶ 42 (R-1).

[274] Letter from Peru to Gramercy, 1 March 2017 (Doc. R-159).

[275] Letter from International Brotherhood of Teamsters President James P. Hoffa to Embassy of Peru, 24 March 2017 (Doc. R-163).

[276] Peru was told that Politico received the letter from Gramercy's representatives.

[277] Adam Behsudi, *Labor union calls out Peru over land bond dispute*, Politico, 11 April 2017 (Doc. R-165). c.f. Letter from International Brotherhood of Teamsters President James P. Hoffa to Embassy of Peru, 24 March 2017 (Doc. R-163).

is pleased to have provided you with relevant information, which has also been made available to the mentioned government authorities.[278]

Peru did not distribute the letter, nor did it ever receive any response or acknowledgment. During the 2017 annual IMF/World Bank spring meetings, PABJ featured quotes from the Teamsters letter on hired mobile billboards to drive around Washington, DC,[279] as well as on PABJ flyers that Gramercy lobbyists distributed during meetings at the U.S. Chamber of Commerce in which Peru's Minister of Economy and Finance was participating,[280] which were also attended by Gramercy and its lobbyists who sought to question the Minister on the issue of the agrarian reform bonds. The Teamsters letter has continued to be cited and relied up as part of the attack campaign, and extracts are featured prominently on the PABJ website.[281]

viii. **The Further Politicization of the Dispute:** While Peru was advancing the Bondholder Process, Gramercy intensified its efforts to politicize the dispute and involve U.S. officials. When Peru invited Gramercy to a meeting following the issuance Supreme Decree No. 242-2017-EF,[282] Gramercy refused to agree to a consultation protocol similar to the one used by the Parties in November 2016, insisting that it had to be able to "report about the meeting to, among others, representatives of the U.S. Government."[283] The meeting went forward, but was limited by the lack of a simple without prejudice protocol. Following this meeting, Gramercy wrote the President of Peru, copying U.S. Members of Congress, and stated that "[w]e have pledged to certain Member of Congress to keep them abreast of our negotiations."[284] Following a letter from the Office of the President of Peru—copied to those same Members of Congress as a courtesy—that confirmed the designated and preferred channel of communication,[285] Gramercy again wrote the President of Peru, again copying the Members of Congress, calling out Peru's counsel by name ten times, and again seeking direct negotiations with the president "or other appropriate representatives of the Peruvian Government."[286]

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[278] Letter from the Embassy of Peru to International Brotherhood of Teamsters President James P. Hoffa, 18 April 2017 (Doc. R-163).

[279] Mobile Billboards in Washington, DC, Haunt Peru over Agrarian Land Bond Default, PR Newswire, 24 April 2017 (Doc. R-173).

[280] *Flyer*, PABJ, 16 April 2016 (Doc. R-33); Flyer - Peru Defaults. Rating Agencies Ignore it, PABJ, 21 April 2017 (Doc. R-171).

[281] Stakeholders: U.S. Pensioners & Nonprofits, PABJ Website (Doc. R-224).

[282] *See* Letter from Peru to Gramercy, 18 September 2017 (Doc. R-186).

[283] Email from Gramercy to Peru, 21 September 2017 (Doc. R-190).

[284] Letter from Gramercy to President Kuczynski, 29 September 2017 (Doc. R-192).

[285] Letter from the Office of the President of Peru to Gramercy, 16 Oct 2017 (Doc. R-194).

[286] Letter from Gramercy to President of Peru, 29 September 2017 (Doc. R-192).

ix. **The OECD Issue:** At the end of 2017, the campaign accelerated, with new efforts to impede Peru's entry into the OECD, despite the prejudice to Peru and its citizens. On 17 November 2017, PABJ twitter account @PeruLandBonds[287] launched with the tweet "Peruvian American Bondholders for Justice Fights for Peruvians, Americans, and pension funds."[288] Shortly thereafter, PABJ and ABDA disseminated a report arguing that Peru's prospective OECD accession should to be put on hold. The report had been commissioned by PABJ and ABDA,[289] and was sent to the OECD by them and six other signatories.[290] An article that is linked on PABJ's website explains: "[t]he plan goes something like this: bondholders intend to put pressure on the OECD, with whatever help they can get from [the U.S. government], to force the OECD to make Peru pay up or lose the opportunity to join the OECD."[291] On 6 December 2017, Peru wrote the Secretary General of ICSID requesting that the designation of the president of the Tribunal in light of the lack of resolution through consultations and the aggravation of the circumstances.[292] Notably, Gramercy's counsel linked Peru's entry into the OECD with Gramercy's aggravation of the dispute: Asked if Gramercy would stop aggravating the dispute, Gramercy's representative stated that Gramercy would stop "when Peru stops seeking membership in the OECD."

x. **The Tribunal Order and the Permanent Campaign:** Even after the constitution of the Tribunal and the Tribunal's communication A-11, the negative campaign against Peru continues. As the Parties engaged in procedural discussions, the campaign continued. In March and April of 2018, Teamsters representatives published columns addressing the agrarian reform bonds, using Gramercy's term "land bonds" and continuing to cite the Teamster issues of a year before, with no mention of the Embassy's diligent response.[293] PABJ tweeted links to those articles,[294] and linked back to a PABJ press release mentioning the same old Teamsters article.[295]

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[287] This was a new account, different from the preexisting @LandBonds account.

[288] @PeruLandBonds (PABJ), Tweets, 17 November 2017 to 1 June 2018 (Doc. R-199).

[289] PABJ, New Report from Peruvian-American Bondholders for Justice (PABJ) says Peru not ready for Membership in the OECD, PR Newswire, 4 December 2017 (Doc. R-204).

[290] Letter from PABJ, ABDA and others to Secretary-General of OECD, 3 December 2017 (Doc. R-203). In a letter to the OECD, the First Prime Minister of Peru noted that "[t]his is the latest step in a negative campaign orchestrated by a U.S.-based fund that is seeking to force Peru to change its laws and pay it an exorbitant amount." *See* Letter from Peru to Secretary General of OECD, No. 264-2017-PCM/DPCM, 5 December 2017 (Doc. R-205). In a non-denial by Mr. Carlos Anderson—without disclosing his erstwhile position at Gramercy—said that Gramercy had not sent the report to the OECD, but did not address the relationship between Gramercy and PABJ or ABDA. *See* Agrarian Bondholders: "*We don't want an amount, but rather an updated methodology*", Gestion, 6 December 2017 (Doc. R-206).

[291] Matthew Boyle, 'Globalist of the Year': Trump Allies Seek POTUS Help to Stop Mexico's NAFTA Negotiator from Screwing American Workers Again, This Time Through Peru, Breitbart, 1 March 2018 (Doc. R-211).

[292] *See* Letter from Peru to ICSID, 6 December 2017 (Doc. R-207).

[293] Nick Nardi, *Hard day's work deserves fair* pension, LimaOhio, 24 March 2018 (Doc. R-212); Dennis Hower, President, Teamsters Local 773, *Peru's default on bonds hurting union retirees*, Lehigh Valley Opinion, 16 April 2018 (Doc. R-214).

Even after the Tribunal's Procedural Order No. 5, Gramercy's negative campaign against Peru has continued. For example, on 25 September 2018, Gramercy's expert, Sebastián Edwards, making statements about Peru in a public event.[296]

PABJ continues to urge U.S. policymakers to "Stand up for your constituents," "end U.S. aid to Peru," and "[e]nd the U.S.-Peru Free Trade Agreement," arguing that the United States "should not have a trade pact with a country that is flagrantly stealing from American citizens."[297] Concurrently, a high-profile strategist of a political action committee linked to a lobbyist, as discussed in Peru's Submission, published an op-ed in *The Hill* that joins many strands of Gramercy's campaign: accusing Peru of "default," citing the Teamsters, referencing the termination of treaties, calling Peru's application to the OECD "untenable," and saying that the U.S. "must pressure the Peruvian government to pay the land bonds in full — with no exceptions."[298]

Even in the face of the Tribunal's decision set forth in communication A-11, the Gramercy campaign continues, as lobbying and messaging are ongoing. Even in the days immediately prior to this Submission, the Gramercy-created PABJ continued to recycle and repost the Teamster and OECD issues,[299] as Gramercy's campaign continues.

2. The Attack on Peruvian Sovereign Finance

134. Having primed the attack machine against Peru, Gramercy put it into full operation in an effort to undermine Peru's sovereign finance and harm Peru and its people.

135. The Coffee Opinion accuses Peru of intentionally violating U.S. securities law by making material misstatements regarding the Agrarian Reform Bonds in connection with its 2014 and 2015 issuances of U.S. dollar- or Euro-denominated global bonds, and concludes that the SEC could sue or take other actions against Peru. It is hyperbolic. It relies on suspect sources. It too-conveniently tracks Gramercy's allegations. It is legally wrong.

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[294] Tweet by @PeruLandBonds, 25 March 2018, at 9; Tweet by @PeruLandBonds, 26 March 2018, at 8; Tweet by @PeruLandBonds, 23 April 2018, at 5; Tweet by @PeruLandBonds, 25 April 2018, at 4-5 (Doc. R-199).

[295] Dennis Hower, President, Teamsters Local 773, *Peru's default on bonds hurting union retirees*, Lehigh Valley Opinion, 16 April 2018 (Doc. R-214).

[296] In addition, while Gramercy's agents continuing its attacks against Peru on social media following A-11, since the Tribunal issued Procedural Order No. 5, many of the publicly available attacks, such as those on social media, have ceased. For example, while PABJ tweets 231 times between since creating its twitter account on 17 November 2017 and 1 August 2018 (or approximately 23 tweets a month), the vast majority of which attack Peru, it hasn't tweeted since Procedural Order No. 5. *See* @PeruLandBonds (PABJ), Tweets, 1 June 2018 – 14 December 2018 (Doc. R-576).

[297] Stakeholders: U.S. Policymakers, PABJ Website (Doc. R-222).

[298] Ed Rollins, *Trump, don't let Peru rip off American workers*, The Hill, 13 May 2018 (Doc. R-218).

[299] @PeruLandBonds (PABJ), Tweets, 17 November 2017 to 1 June 2018 (Doc. R-199).

In fact, a Moody's analysis from December 2015 that explicitly took into account the Agrarian Reform Bonds reaffirmed Peru's investment grade rating.[300]

136. It is undisputable that Peru already had made disclosures as to the Agrarian Reform bonds as part of its Global Bond issuances. As an example, in 2014 Peru disclosed:

> *During 2010, there was an increase in the volume of administrative and judicial claims filed against Peru in connection with the payment of amounts due in respect of the bonds issued by Peru pursuant to the Agrarian Reform Law. In accordance with a resolution issued by the Peruvian Constitutional Court in 2013, the executive branch enacted a by-law regulating an administrative procedure through which the debt corresponding to the Agrarian bonds can be brought to present value.*[301]

137. Peru has continued to make appropriate disclosures and the market conduct shows that the Coffee Opinion did not gain traction. Data reported by Bloomberg show that "Peru's foreign debt has returned 0.9 percent since Jan. 11, when John Coffee, the lawyer hired by Gramercy, issued his opinion. That's compared with a 0.9 percent drop for notes from the rest of Latin America."[302]

138. Moreover, for the avoidance of doubt following Gramercy's dissemination of the Coffee Opinion, and in addition to its routine and diligent work with external counsel and the careful oversight of lenders, other lawyers, rating agencies and market observers, the Peruvian Office of Public Debt obtained an independent report from Paul G. Mahoney, an expert in securities law and Dean of the University of Virginia School of Law.

139. In his opinion, Professor Mahoney explains that "Peru's use of local law and procedures for payment on the Agrarian Bond … is not relevant to holders of the global bonds, which were issued under foreign law with Peru's consent to suit in foreign courts."[303] Professor Mahoney concludes that the Coffee Opinion is incorrect and fails to account for the key distinctions between the Agrarian Reform Bonds and contemporary sovereign bonds.[304] Some of his key conclusions are as follows:

> *1. The Global Bonds are distinct from the Agrarian Bonds. The Global Bonds are issued by Peru in the international markets in foreign currency, governed by foreign law, subject to the jurisdiction of foreign courts, and registered under the securities regulatory regime of the United States.*
>
> *2. The Agrarian Bonds were not issued in respect of borrowed money, but as compensation to Peruvian citizens for takings of land. They are domestic obligations of Peru payable in local currency,*

[300] Government of Peru, FAQ on Peru's Bonos de la Deuda Agraria, Moody's, 18 December 2015 (Doc. R-12).

[301] Prospectus Supplement, Republic of Peru, 3 November 2014, at 24 (Doc. R-571); Prospectus Supplement, Republic of Peru, 20 March 2015, at 24 (Doc. R-572).

[302] John Quigley and Ben Bartenstein, *A Lone Hedge Fund Seeks Allies in $5.1 Billion Peru Bond Dispute*, Bloomberg, 2 February 2016 (Doc. R-101).

[303] Mahoney at 13 (Doc. R-13).

[304] Mahoney, at 4-5, 9-10 (Doc. R-13).

governed by local law, and subject to local judicial jurisdiction and procedure.

3. Payment of the Agrarian bonds in accordance with their original terms is not possible because the currency in which they were denominated no longer exists. Peru has established an administrative procedure to process claims for payments on the Agrarian Bonds, in which Gramercy may participate. Gramercy and certain other holders of the Agrarian Bonds object to the procedure and the valuation method.

4. The U.S. securities laws impose civil liability on certain persons with respect to certain untrue statements and omissions contained in a registration statement or prospectus or made in connection with the purchase or sale of a security. In each case, the untrue statement or omission must be "material." Courts have interpreted a fact as "material" if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.

5. Any failure to disclose the full particulars of the legal and valuation disputes regarding the Agrarian Bonds is not material to an investment in the Global Bonds. The information is not quantitatively material. Moody's Investors Service ("Moody's") has concluded that these disputes do not affect Peru's willingness or ability to pay either its Global Bonds or its other domestic debt. The information is also not qualitatively material to investors purchasing Global Bonds. Unlike holders of the Agrarian Bonds, these investors have contracted around the risks of local currency, law, and jurisdiction. The disagreements between Peru and holders of the Agrarian Bonds accordingly involve issues that could not arise with respect to the Global Bonds. Information about a risk to which the Global Bond purchaser is not subject is not material.

6. The Coffee Opinion ignores these critical distinctions between the Agrarian Bonds and the Global Bonds. Its analogy to Argentina's disclosure practices ignores an important distinction between Argentina and Peru: Argentina defaulted on indebtedness for money borrowed in international markets, which would be material to investors in its subsequent global bond offerings.[305]

140. Since the date of Gramercy's Notice of Arbitration, a Gramercy lobbyist issued inaccurate claims that Peru had "resisted multiple requests from the media to make Dean Mahoney's report publicly available."[306] It has newly emerged that a Gramercy lawyer has sought protected and privileged information from Peru including the Mahoney report by invoking transparency legislation, without revealing his affiliation with Gramercy

[305] Mahoney, at 4-5 (Doc. R-13).

[306] PABJ Calls on Peru to Make Dean Mahoney's Report Publicly Available, PR Newswire, 14 June 2016 (Doc. R-134).

or using his professional contact information. In addition, colleagues of Dean Mahoney at the University of Virginia were targeted with negative material.

3. The Treaty Consultations and Arbitration Process

141. With its campaign machine assembled, Gramercy set out to invent a negative record to justify its filing of a Treaty-based "Notice of Intent," and has continued to act with disregard for Treaty consultations and procedure by seeking to litigate in the media.

142. **Precursors**: Among other steps, Gramercy carried out its campaign in the United States.[307] The Daschle Group approached the Peruvian Embassy in Washington, DC over a period of months with respect to the Agrarian Reform Bonds, only disclosing in response to an Embassy query that it was acting for Gramercy. Concurrently, Gramercy sent a letter to the Embassy making scarcely veiled threats and asserting a deadline for the Embassy to respond to a one-sided recitation of arguments. Gramercy copied the letter to eighteen U.S. government officials, all of them within the scope of the lobbying filings that Gramercy-affiliated lobbyists had filed that year. The Embassy responded by suggesting that "Gramercy consider an approach that is truly constructive and respectful or Peru and its laws and procedures." In its next letter, Gramercy upped the ante and emphasized at the outset that the correspondence was being copied to numerous U.S. (and Peruvian) government officials, a list which had grown longer since the prior correspondence. The Embassy received this letter on 1 February 2016, and subsequently responded by way of a letter which Gramercy failed to submit.[308]

143. **The Notice of Intent**: On 1 February 2016, having teed up the next step of its attack campaign, Gramercy submitted to Peru its preliminary "Notice of Intent" and loudly announced its complaint to the world.[309] Peru responded with a respectful statement acknowledging and disagreeing with Gramercy's demands.[310]

144. **Peru's Good Faith Consultations**: Given that Gramercy chose to trigger a Treaty-based dispute, Peru promptly invited and continuously engaged with Gramercy, seeking respectful consultations over a period of months, acting through the legally established Special Commission that Represents the State in International Investment Disputes.[311] Peru received representatives of Gramercy,[312] communicated by telephone and in

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[307] Gramercy asserts that it was "rebuffed" by Peru and refers to a supposed meeting with the Minister of Economy and Finance in May 2015. Third Amended Notice ¶ 119. In fact, the supposed "meeting" was a Gramercy representative approaching the Minister at an event in New York.

[308] Letter from Peru to Gramercy, 18 February 2016 (Doc. R-45).

[309] Gramercy Funds Management, Gramercy Funds Management Files US $1.6 Billion Claim against Peru for Violations of the U.S.-Peru Trade Promotion Agreement, PR Newswire, dated 2 June 2016 (Doc. R-128).

[310] Peru advances Agrarian Reform Bonds Payment Process and Acknowledges Dispute Notice, dated 2 June 2016 (Doc. R-130).

[311] Law Establishing the State's Coordination and Response System in International Investment Disputes, Law No. 28933, 14 December 2006 (Doc. R-297).

[312] The Special Commission and Gramercy first met on 1 March 2016 at the offices of the Special Commission. *See* Letter from Peru to Gramercy, No. 036-2016-EF/CE-36 dated 22 March 2016 (Doc. R-46). Peru will not address the subject matter of this meeting, as it was subject to an agreement between the Parties that it be without prejudice.

writing,[313] invited information on key issues and tabled a proposed agreement for consultations that would have given the parties additional time for consultations, all to no avail.[314]

145. **Gramercy's Conduct**: Notwithstanding Peru's consultation efforts, Gramercy did not reciprocate:

- Gramercy did not consistently respect proper channels.[315]

- Gramercy did not clarify its vague representations as to the Gramercy entities involved, the alleged acquisition of the Bonds, or the number and terms of the Bonds at issue, despite repeated requests.[316] Gramercy never provided a copy of a single Bond or showed any evidence of its holdings, suggesting it "might simply be distracting and overwhelming,"[317] (Even now Gramercy has shown only one, lone bond).

- In return for continuing consultations, Gramercy sought to impose an overbroad waiver of its rights as to "*any* applicable statute of limitations, laches and other possible time-bars and defenses," as to "*any and all* disputes, claims or causes of action, *known or unknown*." Despite allegedly having invested in Bonds subject to the law and jurisdiction of Peru, Gramercy insisted that the agreement should be subject to the law and jurisdiction of New York, and that the English should prevail.[318]

- Gramercy threatened to publicize "serious allegations" about Peru and "specific individuals" that would "provide grist for the media mill for a long time" if Peru did not agree to the overbroad waiver of its rights, but, if Peru agreed, Gramercy said it was "open to refraining from taking other actions including affirmative steps to publicize the land bond issue."[319]

146. **Troubling Incidents:** Gramercy followed through on threats against Peru, even as Peru continued to seek constructive dialogue. On 12 April 2016, Peru informed Gramercy that the scope of the draft agreement was excessive, and invited a new version. The very next morning, Gramercy informed Peru that they would be resuming their efforts to

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[313] Letter from Peru to Gramercy, No. 022-2016-EF/CE.36, 15 February 2016 (Doc. R-44); Letter from Peru to Gramercy, No. 036-2016-EF/CE.36, 22 March 2016 (Doc. R-46); Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47); Letter from Peru to Gramercy, No. 041-2016-EF/CE.36, 12 April 2016 (Doc. R-48); Letter from Peru to Gramercy, No. 042-2016-EF/CE.36, 14 April 2016 (Doc. R-49); Letter from Gramercy to Peru, 18 April 2016 (Doc. R-50); Letter from Peru to Gramercy, No. 045-2016-EF/CE.36, 25 April 2016 (Doc. R-51); Letter from Peru to Gramercy, No. 055-2016-EF/CE.36, 27 May 2016 (Doc. R-52); Letter from Gramercy to Peru, 30 May 2016 (R-53); Letter from Peru to Gramercy, No. 57-2016-EF/CE.36, 31 May 2016 (Doc. R-54); Letter from Peru to Gramercy, No. 060-2016-EF/CE.36, 1 June 2016 (Doc. R-55); Letter from Gramercy to Peru, 2 June 2016 (Doc. R-57).

[314] *See* Letter from Peru to Gramercy, No. 022-2016-EF/CE-36, 15 February 2016 (Doc. R-44).

[315] Despite being informed that the proper channel was the Special Commission, Gramercy and its representatives continued seeking alternative contacts in Lima, and the Embassy.

[316] *See, e.g.*, Letters from Peru to Gramercy, 22 March 2016 (Doc. R-46); 25 April 2016 (Doc. R-51).

[317] Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47).

[318] *See* Letter from Peru to Gramercy, No. 036-2016-EF/CE.36, 22 March 2016 (Doc. R-46).

[319] *See* Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47).

focus public attention on the Bonds.[320] By that time, a Gramercy-paid lobbying firm had already begun sending missives to journalists to attend an event that the Peruvian Minister of Economy and Finance would be attending at the 2016 IMF/World Bank Group Spring Meetings in Washington, DC.[321] Even as Gramercy had an active and respectful channel of communications with the Peruvian State, including the Ministry of Economy and Finance, the flyer crudely announced "questions" for the Minister, and was handed among others, to IMF Managing Director Christine Lagarde (who rightly had spoken highly of Peru at the previous IMFA/World Bank Group meetings in Lima six months earlier, as discussed above). It also was aligned with negative statements targeting the President on a trip to the United Nations in New York.

147. **Peru's Invitations for Respectful Conduct:** Peru repeatedly advised Gramercy that its conduct was counterproductive, and invited respect to advance the consultations. Among diverse other examples:

- "May I invite Gramercy to consider an approach that is truly constructive and respectful of Peru and its laws and procedures."[322]
- "Gramercy is encouraged to suspend its negative campaign and avail itself of [appropriate] channels."[323]
- "[W]e invite again your collaboration in the adoption of necessary measures to avoid the continuing aggravation of the circumstances and to facilitate an environment for friendly consultations."[324]
- "Regarding this unconstructive conduct, we invite you to continue with the management of our consultations."[325]
- "[W]e invite Gramercy to confirm the cease and desist of its campaign against Peru from now on."[326]
- "We invite you again, to confirm that Gramercy repudiates its questionable tactics and that it will participate consistently and respectfully in the friendly consultations."[327]

148. Gramercy never disavowed its campaign. Referring to the "free press," Gramercy said its campaign "is a legitimate course of action to protect our rights."[328] But as

[320] Peru continues to reserve the right to produce the entire record of communications related to consultations between the Parties in the context of the Treaty proceeding.

[321] APJ had previously tweeted the flyers. *See Flyers*, PABJ, Twitter Feed, 13 April 2016 (Doc. R-37).

[322] Letter from Ambassador of Peru to Gramercy, 19 January 2016 (Doc. R-43)

[323] Letter from Peru to Gramercy, 18 February 2016 (concluding its correspondence by communicating with Gramercy, in light of "the disrespectful and inaccurate content of the prior correspondence, and inviting "an approach that is truly constructive and respectful," including through use of proper channels for communications for treaty-based disputes.") (Doc. R-45).

[324] Letter from Peru to Gramercy, No. 036-2016-EF/CE.36, 22 March 2016 (Doc. R-46).

[325] Letter from Peru to Gramercy, No. 036-2016-EF/CE.36, 22 March 2016 (Doc. R-46).

[326] Letter from Peru to Gramercy, No. 042-2016-EF/CE.36, 14 April 2016 (Doc. R-49).

[327] Letter from Peru to Gramercy, No. 045-2016-EF/CE.36, 25 April 2016 (Doc. R-51).

Peru informed Gramercy, "[t]his issue is unrelated to freedom of expression, but it is linked with an environment conducive to friendly consultations, as well as the unnecessary aggravation of the dispute."[329]

149. **Gramercy's Invented Ultimatum**: After Gramercy continued pushing an overbroad tolling agreement, Peru proposed a "Consultation Agreement" providing for a five-month consultations period, during which the Treaty's three year statute of limitations-type period would be suspended and the parties would refrain from aggravating the dispute.[330] Gramercy refused and suddenly demanded that Peru obtain a "legal opinion from the Attorney General, or a decree from the President or the Council of Ministers" confirming the authority of a lawfully designated representative within two days.[331] Peru nonetheless continued to seek collaboration, offering yet another reasonable draft,[332] which Gramercy again rebuffed, this time even rejecting language that it previously had accepted, even including the name of the agreement.[333] Peru made an invitation to Gramercy to proceed without closing the door.[334] ¨

150. Despite Peru's ongoing efforts to consult, Gramercy presented its Notice of Arbitration on Thursday, 2 June 2016. The runoff Presidential elections in Peru were that weekend. Gramercy's filing alleged no facts that required the filing to be undertaken at that time as a legal matter. Gramercy immediately issued a press release alleging selective default by Peru,[335] which they notably did not state in their simultaneous Notice of Arbitration. Gramercy's counsel and related experts spoke at a pre-arranged event in New York, where Gramercy distributed copies of the "Notice of Arbitration."[336] It is telling that the record now reveals that Gramercy and its representatives had lined up the event for that exact date at least a month before.

151. Gramercy's negative campaign is ongoing and, whatever Peru states or does, appears likely to continue. Peru reserves the right to amplify its comments herein, and to provide further evidence if this proceeding advances.

152. **Gramercy's Failed Launch of Its Treaty Proceeding**: Based on Gramercy's conduct leading to its submission of 2 June 2016, Peru again requested that Gramercy respect the established channels and cease its attack campaign and aggravation of the circumstances.[337] Gramercy did not do so. As noted by the President of Peru, "[t]hey've

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[328] Letter from Gramercy to Peru, 28 March 2016 (Doc. R-47).

[329] Letter from Peru to Gramercy, No. 045-2016-EF/CE.36, 25 April 2016 (Doc. R-51); *see also Reflejos del Nuevo MEF*, Caretas 14 July 2016 (Doc. R-63) (Minister of Economy and Finance explaining that in Peru; "No operamos bajo amenazas.").

[330] Letter from Peru to Gramercy, No. 055-2016-EF/CE.36, 27 May 2016 (Doc. R-52).

[331] Letter from Gramercy to Peru, 30 May 2016 (Doc. R-53).

[332] Letter from Peru to Gramercy, No. 57-2016-EF/CE.36, 31 May 2016 (Doc. R-54).

[333] Letter from Gramercy to Peru, 1 June 2016 (Doc. R-56).

[334] Letter from Peru to Gramercy, 1 June 2016 (Doc. R-55).

[335] Gramercy Funds Management Files US $1.6 Billion Claim against Peru for Violations of the U.S.-Peru Trade Promotion Agreement, PR Newswire, 2 June 2016 (Doc. R-128).

[336] Home: Markets: Peru, EMTA (Doc. R-570).

[337] *See* Letter from Peru to Gramercy, 2 June 2016 (Doc. R-57).

hired lobbyists, they're making a big fuss."[338] Meanwhile, having noisily filed its 2 June submission just prior to the election, Gramercy then stealthily filed two subsequent submissions, its 18 July Amended Notice and its 5 August Second Amended Notice. Having chosen to attempt to commence a Treaty proceeding, Gramercy was slow to put aside its noisy approach and focus on the concrete steps involved in respecting the procedure under the Treaty.

153. **Further Consultations**: Peru and Gramercy entered into a Consultation Protocol dated 11 November 2016, which established a Consultation Period that lasted until 28 February 2017.[339] Among other things, the Consultation Protocol provides:

> Communications and interactions by and among the Parties during the Consultation Period are without prejudice to the positions, rights, and defenses of the Parties, and information exchanged in connection with the Amicable Consultations during the Consultation Period following this Protocol is confidential and shall not be admissible in any forum for any purpose.

154. Gramercy has repeatedly violated the Consultation Protocol. For example, both Gramercy's Third Amended Notice and the Second Amended Witness Statement of Robert S. Koenigsberger violate this clear proscription by describing and characterizing communications and interactions among the Parties during the Consultation Period.[340] The statements are inaccurate, abusive and grossly out of a context which would, once again, reveal a different reality from the cartoonish tales that Gramercy creates. Such references are inadmissible and should be disregarded by the Tribunal and stricken from the record. Peru could say various things about the conduct of Gramercy during the Consultation Period, but refrains from so doing in light of the agreed Consultation Protocol, and reserves all rights with respect to Gramercy's violations.

155. Notwithstanding its filing of the arbitration and Peru's repeated requests that Gramercy respect channels of communication, Gramercy continued seeking to engage with Peru through other channels, and bizarrely persisted in alleging that Peru was willing to "negotiate" a settlement amount with Gramercy, repeatedly seeking to invent a record about "negotiations" as if to pacify an observer, trigger a milestone for paymen, invent a talking point or lay a trap. In fact, Peru consistently focus on "consultations" as contemplated by the Treaty, and wrote Gramercy following the issuance of Supreme Decree No. 242-2017-EF.[341] Peru had no intention of giving Gramercy special treatment, but rather to determine whether Gramercy might yet participate in the Bondholder Process and recover millions of dollars.

156. Following an initial negative reaction,[342] Gramercy began seeking a meeting and began asserting that the President of Peru had told a U.S. Congressman that Peru would

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[338] Katie Llanos-Small, Peru's PPK: 'I don't think we owe [Gramercy] anything' – Exclusive, Latin Finance, 22 August 2016 (Doc. R-62).

[339] Consultation Protocol signed 11 November 2016 (Doc. R-153); Amendment, 23 January 2017 (Doc. R-156); Second Amendment, 22 February 2017 (Doc. R-157).

[340] Third Amended Notice of Arbitration and Statement of Claim, 13 July 2018, ¶ 121 (C-34); Second Amended Witness Statement of Robert S. Koenigsberger, 13 July 2018, ¶ 71 (CWS-3).

[341] See Letter from Peru to Gramercy dated 21 August 2017 (Doc. R-180).

[342] Email from Gramercy to Peru, 22 August 2017 (Doc. R-575).

negotiate a settlement with Gramercy.[343] In fact, during the summer of 2017, Gramercy had tried to co-opt a U.S. Congressman as an end-run around the established channels of communication; he and Mr. Koenigsberger himself were again respectively informed that the proper channel was Peru's counsel.[344]

157. Gramercy grossly mischaracterizes the circumstances of the 21 September 2017 meeting. Peru had no intention of giving Gramercy special treatment or negotiating a separate settlement with Gramercy. Even while maintaining the possibility of Treaty consultations, Peru expressed "concerns regarding the tone and content" of Gramercy's communications,[345] and continued to register its disagreement with Gramercy's communications, which Peru stated were "inaccurate, manipulative and presumptuous."[346] After the meeting, Peru reconfirmed the appropriate channels of communication,[347] and, referring to the Bondholder Process, yet again reiterated that "Peru had suggested and remains open to consultations with Gramercy to discuss without prejudice how to realize value with respect to Agrarian Reform Bonds pursuant to the latest advances in the procedure."[348]

158. Faced with continuing aggravation by Gramercy and the lack of resolution through consultations, on December 6, 2017, it was Peru that took the initiative and requested that the Secretary General of ICSID proceed with the designation of the presiding arbitrator in accordance with Article 10.19 of the Treaty.[349]

159. **Gramercy's Continuing Conduct during the Treaty Proceeding**: Peru has addressed Gramercy's aggravation in prior submissions to the Tribunal, which issued Procedural Order No. 5 on 29 August 2018 ordering the Parties to "abstain from any action or conduct that may result in an aggravation of the dispute."[350] The decrease in certain aspects of the aggravation campaign following the Tribunal's order only underscore Gramercy's

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[343] Email from Gramercy to Peru, dated 31 August 2017; Letter from Gramercy to Peru dated 11 September 2017 (Doc. R-181).

[344] See Email from Presidency of Peru dated 10 August 2017 (Doc. R-574).

[345] See Letter from Peru to Gramercy dated 7 September 2017 (Doc. R-182).

[346] See Letter from Peru to Gramercy 14 September 2017 (Doc. R-184); Emails from Peru to Gramercy, 21 September 2017 (Doc. R-190).

[347] Letter from the Office of the President of Peru to Gramercy, No. 354-2017-DP/SG, 16 October 2016 (Doc. R-194).

[348] Letter from Peru to Gramercy, 8 November 2017 (Doc. R-197).

[349] Letter from Peru to the Secretary General of ICSID, 6 December 2017 (Doc. R-207).

[350] *See, e.g.* @PeruLandBonds (PABJ), Tweet, 30 July 2018 ("We demand government accountability and repayment of land bonds!"); 19 July 2018 ("Peru and Ecuador are strengthening their ties, but can #Peru be trusted after letting down other partners like the #US for decades?"); 16 July 2018 ("The Peruvian Government finally showed a willingness to discuss a teacher's strike that started June 18.When will they show a willingness to pay the land bonds?"); 2 July 2018 ("The New Peruvian administration has been in power for months now. Where is the movement on #landbonds?"); 23 May 2018 ("The Peruvian government stopped making payments on the Agrarian Reform Bonds in the late 1980s, and in 1992 it liquidated the Agrarian Bank, which was responsible for paying the bonds. Why is the government still refusing to pay?). *See e.g.* @Expropiado2016, Tweet, 17 August 2018 ("ADAEPRA to Martin Vizcarra… Mr. President, you know there is corruption at MEF. If as of this date you have not decided resolving against corruption it is because your information comes exclusively from your advisors"); "*Ramón Remolina [ABDA President]: Comptroller should audit corruption in the agrarian bonds*," Expreso, 27 August 2018 ("This shows that if President Vizcarra speaks to us about corruption, he should recognize that corruption at MEF exists"). *See* @PeruLandBonds (PABJ), Tweets, 1 June 2018 – 14 December 2018 (Doc. R-576).

control over its aggravation machine. At the same time, Gramercy continues to pay lobbyists,[351] and activity has continued in this regard. Peru reserves all rights with respect to Gramercy's conduct as the Gramercy campaign and disregard for the Treaty persist.

III. Jurisdiction And Admissibility

A. Burden Of Proof, Due Process, And Integrity Of The Proceeding

160. The Statement of Claim makes no mention of Gramercy's burden of proof. Yet, it is a fundamental principle of international law and arbitral practice that Gramercy must prove all elements of its case – including as to the jurisdictional requirements of the Treaty,[352] the substantive claims alleged under the Treaty,[353] and any alleged damages.[354] It is indisputable that a "claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration."[355]

161. Gramercy cannot meet its burden through mere allegations or representations by counsel, but rather "*must adduce evidence* of the facts on which they base their claims to succeed."[356] Indeed, "it is important to keep in mind that the burden of proof is not necessarily satisfied by simply producing evidence"; rather, "a party having the burden of

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[351] See Lobbying Report, LD-2, House Identification 308730279 and Senate Identification 5153-1006043, 18 July 2018 (Doc. R-578); Lobbying Report, LD-2, House Identification 438530003 and Senate Identification 401104684-36, 20 July 2018 20 July 2018 (Doc. R-579); Lobbying Report, LD-2, House Identification 308730279 and Senate Identification 5153-1006043, 22 October 2018 (Doc. R-580); Lobbying Report, LD-2, House Identification 438530003 and Senate Identification 401104684-36, 22 October 2018 (Doc. R-581).

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

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

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

[355] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013 (RA-130) ¶ 179.

[356] *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award dated 23 April 2012 (RA-119) ¶ 148 (emphasis added); *see also Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction dated 30 June 2011 (RA-115) ¶ 105 ("The Tribunal is not content to leave this to inference and considers that this must be determined *on the basis of evidence* rather than counsel's representation.") (emphasis added); *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award dated 2003 (RA-64) at 152 (holding, with respect to jurisdictional requirements, that "a Claimant party, requesting arbitration on the basis of the Treaty, [must] provide[] the necessary *information and evidence* concerning the circumstances of ownership and control") (emphasis added).

proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof."[357]

162. It is equally well established as a matter of international law and due process that each Party has an equal right to present its case – including a full and fair opportunity to respond to evidence presented by the other Party.[358] Adherence to such requirements precludes the use of "guerilla tactics," including "withholding evidence until late in the arbitration" to prevent an opposing Party from having "sufficient time to review the evidence and prepare an appropriate defence."[359] Preventing undue surprise through a prohibition on strategically delayed argument and evidence also ensures an orderly, efficient procedure.[360]

163. The governing UNCITRAL Rules expressly confirm these requirements as to the burden of proof,[361] the submission of evidence,[362] and the Parties' equal right to be heard through a fair and efficient procedure.[363]

164. Further to these fundamental principles, the Tribunal established during the 4 May 2018 conference that an efficient procedure required that it "frontload" the calendar – and, in particular, that each Party must "put all cards on the table as soon as possible" by

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[357] *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction dated 1 Feb. 2016 (RA-141) ¶ 219 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329 (1953) (RA-48)).

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

[359] GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION (Horvath and Wilsk, eds., 2013) (RA-126) 14.

[360] *See, e.g.*, Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration (2017) (RA-46), at 162 ("The vast majority of [UNCITRAL] cases begin with an exchange of comprehensive written submissions [which are] essential to determining the issues between the parties and defining their scope."); *id.* at 164 ("[F]rom the perspective of efficiency . . . it is highly desirable that the statement of claim set out a fully [sic] factual and legal case . . . . In this way, the parties join cases early on and surprises are avoided, which is helpful to the process."); *id.* at 166 (confirming that UNCITRAL Rules are designed "to crystallize the disputed issues at the first possible opportunity, and concomitantly to avoid surprise tactics leading to inorderly pleadings and delay later"); (ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶ 6-49 (4th ed. 2004) (RA-68) (observing that written submissions in arbitration serve, *inter alia*, "to identify the facts and arguments in support of the parties' positions" and to "inform[] the members of the arbitral tribunal, and the other party, of the parties' respective cases so that there will be no surprises at the hearing").

[361] UNCITRAL Arbitration Rules 2013 (RA-125), Art. 27(1) ("Each party shall have the burden of proving the facts relied on to support its claims or defence.").

[362] UNCITRAL Arbitration Rules 2013 (RA-125), Art. 20(2) (requiring that the statement of claim "shall include" a "statement of the facts supporting the claim," the "points at issue," the "relief or remedy sought," and the "legal grounds or arguments supporting the claim"); *id.* Art. 20(3) (requiring that "[a] copy of any contract or other legal instrument out of or in relation to which the dispute arises . . . shall be annexed to the statement of claim"); *id.* Art. 20(4) (requiring that the "statement of claim should, as far possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them").

[363] UNCITRAL Arbitration Rules 2013 (RA-125), Art. 17(1) ("[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.").

submitting all argument and evidence "at the first opportunity."[364] Procedural Order No. 1 thus requires that the Statement of Claim "include as attachments *all* documents in possession, custody, or control of Claimants, on which the Claimants wish to rely."[365] Underscoring this requirement, the Order further provides that, "[a]bsent leave from the Tribunal for good cause, *no new argument* shall be presented, and *no new evidence* shall be attached [to the Reply], except if required to rebut arguments and evidence submitted by the Respondent."[366]

165. Notwithstanding all of the foregoing, Gramercy's Third Amended Notice of Arbitration and Statement of Claim, like its prior submissions, remains woefully inadequate, including as summarized at the outset of this submission and detailed below. The limited nature of Gramercy's submission reinforces Peru's longstanding objections that Gramercy has failed to substantiate numerous elements required to meet its burden of proof – and, further, that by all appearances, Gramercy is withholding key evidence, arguments, and expert support to dump into the record at a later stage, at great prejudice to Peru and the integrity of this proceeding. Peru reserves all rights in this regard.

B. Object And Purpose Of The Treaty

166. The Treaty entered into force on 1 February 2009, providing certain protections for lawful and legitimate investments and arbitration for disputes arising thereunder, subject to prerequisites and conditions. Focused on its own self-interests, Gramercy fails to take into account, or even address, the fundamental objectives that Peru and the United States resolved to achieve in concluding the Treaty, as stated in its Preamble, including, for instance, promoting "broad-based economic development," ensuring a "predictable legal and commercial framework" for business and investment, agreeing that foreign investors are "not hereby accorded greater substantive rights with respect to investment protections than domestic investors," and preserving the ability to "safeguard the public welfare."[367] Such goals are in keeping with Peru's development and the investment program established and maintained by Peru for over two decades.

167. In accordance with the universally accepted rule of treaty interpretation set forth in Article 31(1) of the Vienna Convention on the Law of Treaties – which Gramercy fails to take into account, or even address – these fundamental objectives are integral to interpreting the Treaty.[368]

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[364] No recording or transcript of the 4 May 2018 telephonic procedural conference is available. The quoted remarks were made by the President of the Tribunal, as recorded in counsel's notes taken during the call. The other two members of the Tribunal confirmed their agreement with the approach articulated by the President.

[365] Procedural Order No. 1 dated 29 June 2018, ¶ 9(i) (emphasis added).

[366] Procedural Order No. 1 dated 29 June 2018, ¶ 12 (emphasis added).

[367] Treaty (CE-139), Preamble.

[368] *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (RA-49), Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *id.*, Art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .").

C. Gramercy Did Not Comply With Mandatory Preconditions To Arbitration

168. Consent is the cornerstone of jurisdiction. Article 10.18 of the Treaty, titled "Conditions and Limitations on Consent of Each Party," provides mandatory preconditions that a claimant must meet in order to establish a Contracting Party's consent to arbitrate under the Treaty. Failure to do so is fatal to a claim. Indeed, the only other case brought to date under the Treaty, *Renco Group v. Republic of Peru*, was dismissed at a preliminary stage because the claimant failed to satisfy Article 10.18 requirements, as detailed below.[369] In *Renco*, the Contracting Parties confirmed their agreement that "failure . . . to comply with the conditions and limitations on consent in Article 10.18 . . . results in lack of consent by the Party and the concomitant lack of jurisdiction of the tribunal with respect to that claim."[370] The tribunal ruled accordingly.[371]

169. It has been observed that "[s]ubmitting a claim under a treaty is not a trivial matter. There is a responsibility when the arbitration mechanism is set in motion and the counterparty is forced to respond to the claim against it. The decision to resort to the arbitration procedure must be taken in all seriousness and full awareness of its implications."[372] Gramercy, nonetheless, chooses to treat the Treaty requirements as an afterthought, and outlines its purported compliance with Article 10.18 in cursory form in the final pages of its brief – while withholding relevant information.[373] As with any other jurisdictional element, Gramercy bears the burden of proving that it has met these requirements.[374] In fact, Gramercy has failed to satisfy two: waiver and prescription. Accordingly, Peru has not consented to arbitrate this dispute, and the Tribunal has no jurisdiction.

1. Failure To Waive Local Litigation Proceedings

170. The Treaty conditions the State's consent to arbitrate on a well-established waiver requirement, contained in a number of other treaties, that is designed to prevent claimants from pursuing local litigation proceedings in parallel with an investment arbitration.[375] Article 10.18.2 provides that "no claim may be submitted to arbitration . . .

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[369] *See generally The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21).

[370] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-138), ¶ 15.

[371] *See, e.g.*, *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 73 ("Compliance with Article 10.18[] is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction.").

[372] *Isolux Corsán Concesiones S.A. v. Republic of Peru*, ICSID Case No. ARB/12/5 (formerly *Elecnor S.A. and Isolux Corsán Concesiones S.A. v. Republic of Peru*), Procedural Order No. 2, Discontinuance of the Proceeding, 8 August 2013 (RA-40) ¶ 22.

[373] *See* Third Amended Notice of Arbitration and Statement of Claim ¶ 259.

[374] *See, e.g.*, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Submission of the United States of America, 11 March 2016 (RA-143) ¶ 7 (stating, with respect to identical preconditions under the DR-CAFTA, that, "because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18[] the claimant must prove the necessary and relevant facts").

[375] *See, e.g.*, *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-146) ¶ 84 ("Renco, Peru and the United States all agree that the object and purpose of Article

unless" a claimant submits, with its notice of arbitration, a written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party . . . any proceeding with respect to any measure alleged to constitute a [Treaty] breach."[376] The waiver requirement has both a formal component (*i.e.*, submission of a written waiver) and a material component (*i.e.*, abstaining from continuing or commencing local proceedings).[377] A claimant's failure as to either requirement negates the State's offer to consent to arbitrate under the Treaty. Indeed, the consequence of a failed waiver is that the claim *was never submitted to arbitration*.[378]

171. Peru and the United States agree on the importance, and key elements, of the waiver requirement, as reflected in the Contracting Parties' submissions in *Renco v. Peru*:

- "The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure . . . ."[379]

- "Without an effective waiver, there is no consent from the respondent, which is necessary for a tribunal to assume jurisdiction."[380]

- "Compliance with Article 10.18 entails both formal and material requirements. . . . If all formal and material requirements are not met, the waiver shall be deemed ineffective and will not engage the respondent's consent to arbitration under the Treaty, and the tribunal will lack jurisdiction."[381]

10.18(2)(b) is to protect a respondent State from having to litigate multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent determinations of fact and law by different tribunals"); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award, 26 Jan. 2006 (RA-77) ¶ 118 (confirming same in relation to a similar waiver provision in NAFTA).

[376] Treaty (CE-139), Art. 10.18.2(b) (emphasis added).

[377] *See, e.g.*, *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 60; *see also Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (RA-113) ¶ 84 (confirming same with respect to identical waiver requirement in the DR-CAFTA).

[378] *See, e.g.*, *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 158 ("This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever."); *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance With Article 10.20.5 of the DR-CAFTA dated 31 May 2016 (RA-144) ¶ 174 ("Under the ordinary meaning of this provision, a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Thus, a Notice of Arbitration that is unaccompanied by a valid waiver *does not constitute a claim* pursuant to the provisions of Chapter Ten.") (emphasis added).

[379] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 5 (quotation and citation omitted).

[380] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 6.

[381] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 7.

- "[T]he waiver must be in writing and must be clear, explicit and categorical," and accompany the notice of arbitration.[382]

- "Compliance with Article 10.18 requires that the claimant . . . act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a breach" of the Treaty.[383]

- "[A] claim can be submitted, and the arbitration can properly commence, only if a claimant submits an effective waiver."[384]

- "The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent . . . . [A] tribunal itself cannot remedy an ineffective waiver."[385]

- "The Parties' common, concordant, and consistent positions constitute the authentic interpretation of Article 10.18 . . . ."[386]

172. The critical nature of the Treaty's waiver requirement was confirmed in the *Renco* tribunal's partial award on jurisdiction, which dismissed the claims based on Renco's faulty waiver. Specifically, with respect to the formal requirement, Renco had qualified its waiver by reserving its rights as to proceedings in other fora, "[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds."[387] The tribunal ruled that this was an impermissible deviation from Article 10.18. Although Renco argued that any waiver defect was a mere issue of "form," and could be cured by withdrawing the reservation in an amended notice,[388] the tribunal disagreed. Accordingly, the tribunal observed that "Renco's reservation of rights is not 'superfluous,' as Renco contends," the defect "goes to the heart of the Tribunal's jurisdiction," and "Renco cannot unilaterally cure its defective waiver."[389] The *Renco* ruling is consistent with other cases decided under the NAFTA and DR-CAFTA, which have comparable provisions on waiver.[390]

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[382] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶¶ 8-9 (quotation and citation omitted).

[383] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 9.

[384] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 16.

[385] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States, 1 September 2015 (RA-139) ¶ 16.

[386] *The Renco Group v. Republic of Peru*, Third Non-Disputing Party Submission of the United States, 11 October 2015 (RA-139) ¶ 8.

[387] *See The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 58.

[388] *See The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶ 127.

[389] *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (RA-21) ¶¶ 118, 138, 160.

[390] *See, e.g.*, *Detroit International Bridge Company v. Canada* (PCA Case No. 2012-25, Award on Jurisdiction, 2 Apr. 2015 (RA-137) ¶ 340 (dismissing claims because "[t]he lack of a valid waiver preclude[s] the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprive[s] the Tribunal of the very basis of its existence."); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17), Award, 14 Mar. 2001 (RA-113) ¶ 115 (confirming absence of consent to

173. Here, Gramercy has not complied with the formal and material components of the waiver requirement under Article 10.18.

174. *First*, as to the formal waiver requirement, Gramercy made the same fundamental mistake as the claimant in *Renco*. In its Notice of Arbitration and Statement of Claim dated 2 June 2016, Gramercy provided a qualified waiver that purported to reserve its rights as to claims in other fora "to the extent the Tribunal declines to hear any claims asserted herein on jurisdictional or admissibility grounds."[391] Later, in its Amended Notice of Arbitration and Statement of Claim dated 18 July 2016 – *i.e.*, three days after the *Renco* decision – Gramercy attempted to cure this defect by removing the reservation of rights from its waiver.[392] Gramercy also included a revised waiver, again without a reservation of rights, in its Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016, together with a letter to Peru stating that Gramercy had "taken note" of the *Renco* decision and revised its waiver accordingly.[393] Gramercy further stated in its 5 August letter that it "considers that, at the latest as of today's date, all conditions have been met for the formation of an arbitration agreement between Gramercy and Peru and the claims set forth in the Notice have been properly submitted to arbitration."[394]

175. *Second*, even assuming that Gramercy satisfied the formal component through its amended and unqualified waiver, it has not met the material component because it has failed to show that it withdrew from all Peruvian court proceedings concerning its alleged bondholdings. In this respect as well, Gramercy has attempted to amend its position in successive submissions. In its Notice of Arbitration and Statement of Claim, Gramercy stated that "Gramercy is a party to *hundreds* of legal proceedings in Peru."[395] Gramercy made the same representations in its Amended Notice of Arbitration of Statement of Claim.[396] Beginning with its Second Amended Notice of Arbitration and Statement of Claim in August 2016, however, Gramercy drastically revised this allegation to suggest instead that, "[a]fter investing, GPH became *eligible* to apply to become a party to" these hundreds of proceedings, but instead only "initiated applications in *seven* of these Peruvian local proceedings seeking to secure current value on some of its Bonds."[397] Gramercy also

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arbitrate if the waiver is invalid); *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5 dated 17 Nov. 2008 (RA-97) ¶ 61 (same).

[391] Notice of Arbitration and Statement of Claim dated 2 June 2016, ¶ 233(h).

[392] *See* Amended Notice of Arbitration and Statement of Claim dated 18 July 2016, ¶ 233(h)-(i).

[393] *See* Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016, ¶ 233(h)-(i); Letter from Gramercy to Peru dated 5 August 2016 (RA-59).

[394] Letter from Gramercy to Peru dated 5 August 2016 (RA-59). In its most recent submission, Gramercy did not attempt to update or revise its waiver, but rather stated that it had "previously waived" its rights with respect to local proceedings. Third Amended Notice ¶ 259(h)-(i).

[395] Notice of Arbitration and Statement of Claim dated 2 June 2016, ¶ 136 (emphasis added); *see also* Witness Statement of Robert S. Koenigsberger dated 2 June 2016 ¶ 42 ("[A]fter investing, Gramercy became a party to hundreds of legal proceedings in Peru seeking judgments compelling payment on the Land Bonds that Gramercy had acquired.").

[396] *See* Amended Notice of Arbitration and Statement of Claim dated 18 July 2016, ¶ 136.

[397] Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016, ¶ 136 (emphasis added); *see also* Amended Witness Statement of Robert S. Koenigsberger dated 5 August 2016, ¶ 42 (stating that "GPH became eligible to become a party, upon application, to such legal proceedings in Peru," and that "GPH petitioned to substitute itself as a party in place of the original bondholder in seven of those local proceedings"). Gramercy

represented, in that submission and again in its 5 August 2016 letter to Peru, that it had "submitted petitions to withdraw in all seven of those legal proceedings."[398]

176. In fact, based on available information, it appears that Gramercy has *not* withdrawn from all local proceedings. The circumstances lack clarity because Gramercy has provided shifting explanations and, as with other elements of its case, has withheld the evidence necessary to substantiate its allegations. Gramercy has not submitted even basic court docket information or documents that would allow for validation of the "hundreds" of proceedings, the "seven" proceedings, or Gramercy's "petitions" to withdraw from any such proceedings. Instead, it has relied solely on bare allegations in its briefs and corresponding, unsupported testimony in the witness statements of Gramercy principal Robert Koenigsberger. Through its own efforts, however, Peru has discovered that, in at least one proceeding (as one example), Gramercy Peru Holdings appears not to have submitted a petition to withdraw, and indeed was still identified as a party to the proceeding in court filings at least as late as 22 December 2017 – well over a year after Gramercy purportedly waived its rights with respect to all Peruvian proceedings.[399]

177. Gramercy thus has failed to meet its burden of establishing compliance with the material waiver component. Indeed, available evidence suggests that Gramercy has not complied. On that basis, even if Gramercy's amended waiver on 5 August 2016 did satisfy the formal component, Gramercy still has not complied with the Article 10.18 waiver requirements – and, accordingly, has not submitted its claims to arbitration.

2. Failure To Observe Temporal Limitations

178. The Treaty also conditions the State's consent to arbitrate on prescription requirements that serve to delineate the scope of Treaty coverage and prevent undue delay in recourse to dispute mechanisms.[400] Article 10.1.3 provides 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 the Treaty on 1 February 2009.[401] In addition, under Article 10.18.1, "[n]o claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the [Treaty] breach alleged . . . and knowledge that the claimant . . . has incurred loss or damage."[402] Gramercy's claims run afoul of the Treaty's temporal limitations in both respects.

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maintains this position in its most recent filing. *See* Third Amended Notice ¶ 157; Second Amended Witness Statement of Robert Koenigsberger dated 13 July 2018 ¶ 42.

[398] Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016, ¶ 136; Letter from Gramercy to Peru dated 5 August 2016 (RA-59).

[399] *See* Record No. 00258-1080-0-1706-JR-CI-01 in First Civil Court of Lambayeque, Resolution No. 92, 22 December 2017 (Doc. R-539).

[400] *See, e.g.*, *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (RA-150) ¶ 208 (stating that similar temporal limitations under the DR-CAFTA are a "legitimate legal mechanism to limit the proliferation of historic claims," reflecting the "policy choice of the parties to the treaty").

[401] Treaty (CE-139), Art. 10.1.3.

[402] Treaty (CE-139), Art. 10.18.1.

179. *First*, Gramercy has not complied with Article 10.1.3 because its claims are predicated on significant acts and facts that took place long before the Treaty entered into force. Such acts and facts "*cannot* . . . form the *foundation* of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach"; indeed, "[t]o be justiciable, a breach that is alleged to have taken place within the permissible period . . . must, if it has *deep roots* in pre-entry into force or pre-critical limitation date conduct, be *independently actionable*."[403] Gramercy addresses Article 10.1.3 in a single sentence, where it states that "Gramercy's claims in this arbitration are based on acts by Peru – including the July 2013 CT Order and the Supreme Decrees – that took place after February 1, 2009."[404] This is an artificially narrow – and incorrect – view.

180. In fact, the Treaty breaches alleged by Gramercy are deeply rooted in a dispute over valuation and payment of the Agrarian Reform Bonds that arose decades before the Treaty entered into force. As detailed above, the Bonds remained under a cloud of legal uncertainty for many years: the face value of the Bonds had been rendered effectively worthless by inflation and currency changes in the 1970s and 1980s; bondholders stopped collecting coupon payments within that timeframe; the Agrarian Development Bank, through which all payments on the Bonds were made, was liquidated in 1992; Peru considered various solutions, without resolution; and stakeholders pursued actions to collect payments under the Bonds in Peruvian court, including, but not limited to, a constitutional challenge initiated in 1996. Gramercy was aware of these critical, longstanding acts and facts, and indeed specifically accounted for them when deciding to make its alleged investment.[405] As Peru's international law expert, Professor Reisman, observes, Gramercy "acknowledge[s] that, before their alleged acquisitions, *they were aware of the preexisting (and ongoing) dispute* as to the valuation and payment of the Agrarian Reform Bonds, including various bondholder proceedings in Peruvian courts."[406]

181. This case did not, as Gramercy suggests, materialize with the Constitutional Tribunal's 2013 Resolution. Rather, significant acts and facts that form the foundation of the Treaty breaches alleged – indeed, the essence of the dispute itself – considerably predated the entry into force of the Treaty. As Professor Reisman therefore confirms, "[j]urisdiction *ratione temporis* is lacking under Article 10.1 of the Treaty because the acts or facts lying at the heart of Gramercy's claims took place decades before the Treaty entered into force," and in fact Gramercy "purchased bonds that were already embroiled in disputes to which the

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[403] *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (RA-150) ¶ 253 (applying identical provision under the DR-CAFTA) (emphasis added); *see also Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 (RA-62) ¶ 70 ("The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.") (applying similar provision under the NAFTA).

[404] Third Amended Notice ¶ 144.

[405] *See, e.g.*, Memorandum from David Herzberg to Robert Koenigsberger, 24 Jan. 2006 (CE-114) (providing assessment of Bonds and noting, *inter alia*, that they had not been paid in years, and that there were "long and hard fought legal battles" in Peruvian courts); Third Amended Notice ¶ 66 (discussing January 2006 due diligence memorandum); Second Amended Witness Statement of Robert Koenigsberger dated July 13, 2018 ¶¶ 29-31, 34 (discussing due diligence memorandum and stating that "[t]he Land Bonds were a debt that needed to be paid, but there was not yet any consensus about how that would actually happen").

[406] Reisman ¶ 11 (emphasis added).

Government was a party."[407] Accordingly, Gramercy's claims do not meet the requirements of Article 10.1.3, Peru has not consented to arbitrate them, and the Tribunal does not have jurisdiction.

182. *Second*, even if the only relevant measures for prescription purposes are, as Gramercy argues, those beginning in July 2013, Gramercy has violated the requirements of Article 10.18.1 because it purports to have submitted claims to arbitration more than three years after the alleged Treaty breaches occurred. As an initial matter, Article 10.18 requires that no more than three years may pass between the time of an alleged breach and the time when a claim is "submitted to arbitration." Gramercy, however, has not submitted its claims to arbitration because it has not complied with the Treaty's waiver requirements, as detailed above.

183. Even if, for the sake of argument, one were to accept Gramercy's unilateral 5 August 2016 declaration that "at the latest as of today's date . . . the claims set forth in the Notice have been properly submitted to arbitration,"[408] Gramercy has failed to comply with the prescription period, because it alleges that the cornerstone of its claims is the Constitutional Tribunal Resolution of 16 July 2013. More than three years elapsed between 16 July 2013 and the submission of Gramercy's allegedly compliant waiver on 5 August 2016, and, thus, even accepting *arguendo* Gramercy's statement that its claims were validly submitted to arbitration as of 5 August 2016, and even accepting its allegation that the measure it challenges is not the non-payment of the Bonds as of the 1990s but, instead, the 16 July 2013 Constitutional Tribunal Resolution, its claims are time barred.

184. Here, as with waiver, Gramercy's positions have shifted over time in an attempt to obfuscate Gramercy's non-compliance with Article 10.18, including its statements that:

- "The Government's intentions [not to honor an alleged obligation to pay updated value of the Bonds] became apparent on July 16, 2013, the date the Constitutional Tribunal issued the 2013 CT Decision."[409]
- "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."[410]
- "[T]hough Gramercy acquired knowledge of the 2013 CT Order's existence on July 16, 2013, it did not acquire constructive or actual knowledge of Peru's

[407] Reisman ¶ 88; *see also id.* ¶¶ 69-70.

[408] Letter from Gramercy to Peru dated 5 August 2016 (RA-59). In its most recent submission, Gramercy did not attempt to update or revise its waiver, but rather stated that it had "previously waived" its rights with respect to local proceedings. Third Amended Notice ¶ 259(h)-(i).

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

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

breaches until after August 5, 2013. Therefore, the submission of Gramercy's claim falls within the statute of limitations set forth in Article 10.18.1."[411]

185. As its briefs reflect, Gramercy knew of the 16 July 2013 Resolution as of the date of issuance, and also was aware of its implications for the Article 10.18 prescription requirements. In fact, Gramercy previously attempted to secure from Peru a broad waiver of rights related to this Article through a tolling agreement.[412] In the course of communications with Peru related to this issue in 2016, Gramercy left no doubt that it considered that "time [was] running out" to file its claim, and in particular with respect to the fact that "Gramercy's claim includes allegations concerning the Constitutional Tribunal's July 2013 decision."[413] On 1 June 2016, Gramercy stated that "it appears that time has run out," and "Gramercy cannot wait any longer"[414] – and filed the Notice of Arbitration the next day, further undermining its current claims that its amended August submission was timely.

186. Even amidst its shifting positions, Gramercy's admission in August 2016, and again in July 2018, that "*Gramercy acquired knowledge of the 2013 CT Order's existence on July 16, 2013*"[415] is fatal to Gramercy's claims. Gramercy's attempt to qualify this decisive admission by stating that it "did not acquire constructive or actual knowledge of Peru's breaches until after August 5, 2013"[416] – offered in one conclusory sentence, without explanation, substantiating evidence, or supporting legal authority – provides no exemption from the mandatory prescription limits. Indeed, Gramercy's statement is demonstrably false: on 17 July, the day after the Resolution, Gramercy complained in the press that the Resolution created "huge wiggle room" for a "smaller payment" than "expected," and an expert for a Gramercy-affiliated bondholder organization stated that "creditors might try to sue Peru in a foreign or international court."[417]

187. In any event, it is well established, as tribunals have confirmed with respect to comparable treaty provisions, that "the limitation clause does not require full or precise knowledge of the loss or damage," and instead "is triggered by the *first appreciation* that loss or damage *will be (or has been) incurred*," which "starts the limitation clock ticking."[418] As

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[411] Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016 ¶ 233(c); *see also* Third Amended Notice ¶ 233(c) (same).

[412] *See, e.g.*, Letter from Gramercy to Peru dated 28 March 2016, Draft Tolling Agreement ("WHEREAS, a dispute between Gramercy and Peru has arisen concerning certain alleged actions and conduct, events or circumstances (collectively, the "Actions") related or in connection with Gramercy's position in bonds issued by Peru pursuant to Decree Law N° 17716, also known as the Land Reform Act (hereinafter the "Land Reform Bonds"), including but not limited to the July 16, 2013 Ruling by Peru's Constitutional Tribunal issued in File No 00022-1996-PI/TC and the Ministry of Economy and Finance's Supreme Decrees 017-2014-EF and 019-2014-EF.") (R-47).

[413] *See* Letter from Gramercy to Peru, 17 May 2016 (R-64).

[414] Letter from Gramercy to Peru, 1 June 2016 (R-56).

[415] Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016 ¶ 233(c) (emphasis added); *see also* Third Amended Notice ¶ 233(c) (same).

[416] Second Amended Notice of Arbitration and Statement of Claim dated 5 August 2016 ¶ 233(c); Third Amended Notice ¶ 233(c).

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

[418] *Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 ¶ 213 (emphasis added); *see also id.* (confirming that its articulation of the prescription standard is in accord with "the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials*); *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May

even its more recent filings reveal, in order to avoid the fact that its claims arise out of a dispute that is decades old, Gramercy has framed its claims as hinging upon the July 2013 Resolution, which established the legal framework and valuation methodology upon which all subsequent measures also challenged by Gramercy were based. Professor Reisman observes that Gramercy "seems to make a distinction without a difference: what could constitute knowledge of the existence of the decision without knowing its most essential ingredient, the method of valuation of the bonds?"[419] Indeed, Gramercy's "first appreciation" of any alleged Treaty breach or alleged damages necessarily coincided with its knowledge of the Resolution's existence.

188. Accordingly, Gramercy's purported submission of claims in August 2016 falls outside the three-year prescription period that began to run on 13 July 2013. Professor Reisman accordingly confirms that "[j]urisdiction *ratione temporis* is lacking under Article 10.18 because . . . Gramercy's claim is time-barred: it was submitted to arbitration more than three years after the Claimants knew, or should have known, of the Treaty breach alleged and the loss or damage resulting therefrom."[420] Gramercy has not met, and cannot meet, its burden to prove otherwise.[421] Once again, Gramercy has violated the requirements of Article 10.18, Peru has not consented to arbitrate the dispute, and the Tribunal has no jurisdiction.

D. Gramercy Abuses The Treaty Arbitration Mechanism

189. The fact that the essence of Gramercy's case – *i.e.*, a dispute over valuation and payment of the Agrarian Reform Bonds – had *already* arisen and was subject to *ongoing* legal proceedings in Peru at the time of Gramercy's alleged investment also reveals an abuse of the Treaty arbitration mechanism requiring dismissal of the claims.

190. Professor Reisman explains that "tribunals have become sensitive to the potential misuse of the protections afforded by international investment arbitration and, in a number of cases, have dismissed claims on the ground of abuse."[422] These decisions, he observes, have tended to focus on "corporate restructuring undertaken primarily as a means of securing access to an [investor-State treaty arbitration mechanism] that would otherwise be unavailable."[423]

2016 (RA-144) ¶ 194 ("[I]n order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined.").

[419] Reisman ¶ 72.

[420] Reisman ¶ 89; *see also id.* ¶¶ 71-73; *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (RA-144) ¶ 192 (holding that, "as a consequence" of the claimant submitting claims beyond the prescription period, "the Tribunal would have no jurisdiction to hear the Claimant's claims").

[421] *See, e.g.*, *Corona Materials v. Dominican Republic*, ICSID Case No. ARB/AF/14/3, Submission of the United States, 31 May 2016, 11 March 2016(RA-143) ¶ 7 (with respect to identical waiver and prescription provisions under the DR-CAFTA, confirming that, "because the claimant bears the burden to establish jurisdiction under Chapter Ten . . . the claimant must prove the necessary and relevant facts (i.e., the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period").

[422] Reisman ¶ 77.

[423] Reisman ¶ 77.

191. In *Philip Morris v. Australia*, for example, the tribunal canvassed jurisprudence[424] and concluded that "abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a *specific foreseeable dispute*."[425] The tribunal also observed that "an abuse of right might also exist in the case of restructuring in respect of an *existing dispute*."[426] That was precisely the case in *Phoenix Action v. Czech Republic*, where the tribunal held that "timing of the investment" is relevant, and found that the claimant had "bought an 'investment' that was already burdened with [] civil litigation as well as [] problems with the tax and customs authorities."[427] The tribunal thus concluded:

> The evidence indeed shows that the Claimant made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was *not made in order to engage in national economic activity*, it was *made solely for the purpose of getting involved with international legal activity*. The unique goal of the 'investment' was to *transform a pre-existing domestic dispute into an international dispute* subject to ICSID arbitration under a bilateral investment treaty. . . . If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. . . . It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under [investment treaties].[428]

192. The *Phoenix Action* decision, in which the tribunal dismissed the arbitration for lack of jurisdiction,[429] is highly relevant here.

193. As Professor Reisman notes, the timeline of this case demonstrates that Gramercy was well aware "that domestic bondholders were embroiled in a prolonged dispute with the Government regarding the valuation and method of payment for the Agrarian Reform Bonds at the time that Gramercy chose to make its alleged investment."[430] Further, Gramercy specifically alleges that the Treaty was among "specific and general assurances"

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[424] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015 (RA-140) ¶¶ 540-553.

[425] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015 (RA-140) ¶ 539 (emphasis added); *see also* Reisman ¶¶ 76-86 (discussing *Philip Morris* and finding that it, and similar cases, support the conclusion that Gramercy has abused the Treaty arbitration process).

[426] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015 (RA-140) ¶ 539 (emphasis added).

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

[428] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶¶ 142, 144 (emphasis added).

[429] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶¶ 144-145.

[430] Reisman ¶ 84.

purportedly made by Peru that "were *essential* in Gramercy's decision to purchase the Land Bonds."[431] Robert Koenigsberger likewise testifies that the signing of the Treaty in April 2006 "*reassure[ed] Gramercy* that it would – given that ratification of the Treaty was expected to occur – enjoy the protection of the Treaty over its investment in the Land Bonds."[432] Indeed, a mere five days after the signing of the Treaty, Gramercy constituted Claimant Gramercy Peru Holdings LLC.[433] During that time, Gramercy also was engaged in lobbying efforts in Peru to promote new legislation that would advance the issue of payment of the Bonds. A few weeks later, in June 2006, Gramercy began its alleged acquisitions of the Bonds.

194. Thus, unlike certain cases involving abuse of process or abuse of rights, Gramercy did not merely *re*structure its investment to take advantage of otherwise unavailable treaty dispute mechanisms for a foreseeable dispute. Indeed, its conduct is more egregious, and in line with the circumstances in *Phoenix Action*: Gramercy *structured* and *made* its alleged investment – at the outset, specifically with the Treaty in mind – in order "to transform a pre-existing domestic dispute into an international dispute" subject to international arbitration.[434] Professor Reisman confirms that "the same logic of the foreseeability test would appear to be applicable in the present case, where the purchase of bonds which were already subject to prolonged and ongoing disputes was made when the Treaty, with its procedural opportunities for U.S. nationals, was concluded and would soon come into force."[435] Indeed, Gramercy "purchased bonds designed for compensating owners of land in the process of land reform and not as vehicles of international investment, to avail itself of the avenue of international arbitration to profit."[436] As a result, "Gramercy's initiative is an abuse of the arbitral process."[437] Accordingly, Gramercy's claims must be dismissed, on either jurisdictional or admissibility grounds.[438]

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[431] Third Amended Notice ¶ 187 (emphasis added).

[432] Second Amended Witness Statement of Robert Koenigsberger dated July 13, 2018 ¶ 24 (emphasis added).

[433] *See* Second Amended Witness Statement of Robert Koenigsberger dated July 13, 2018 ¶ 36 (stating that Gramercy Peru Holdings was constituted on 17 April 2006).

[434] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶ 144.

[435] Reisman ¶ 82.

[436] Reisman ¶ 90.

[437] Reisman ¶ 90.

[438] *See, e.g.*, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015 (RA-140) ¶ 588 (ruling that "the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute" because "the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights"); *see also Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 Jan. 2015 (RA-135) ¶¶ 181, 195 (ruling that "the Tribunal is precluded from exercising jurisdiction over this dispute" due to an abuse of process, while reasoning that "the characterization of the abuse of process objection as a jurisdictional or as an admissibility issue can be left open in the present case," because, "[u]nder the circumstances of this dispute, such differentiation is . . . a distinction without a difference, in the sense that it would have no impact on the outcome").

E. Gramercy Did Not Make An "Investment" Under The Treaty

195. The Treaty provides substantive protections and dispute resolution mechanisms only with respect to "covered investment[s]."[439] Whether Gramercy's alleged holdings in Agrarian Reform Bonds constitute such an "investment" within the meaning of the Treaty is thus a threshold question, for which Gramercy bears the burden of proof.[440] Nonetheless, Gramercy devotes less than two pages to the issue – offering mere conclusory statements that are devoid of supporting evidence, reference to basic principles of Treaty interpretation, or citation to relevant international jurisprudence. Professor Reisman confirms that Gramercy has committed "a serious omission of relevant and material information and evidence."[441] In so doing, Gramercy denies Peru the opportunity to test fully its claims, including as to the following prerequisites to jurisdiction, among others.

196. **In Peru.** Gramercy alleges that its "investment" meets the requirement of being "in [Peru's] territory" because it was made through "a series of direct purchases," as part of which Gramercy "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," after payment "through bank transfers."[442] Gramercy, however, offers no evidence of the alleged transactions, including purchase contracts, bank payment transfer records, or other documents showing that the transactions took place in Peru. Instead, Gramercy relies solely on electronic images of unauthenticated bearer Bonds.

197. **In Compliance with Law.** Gramercy has failed to demonstrate that it made its alleged investment in compliance with law, as required for an investment to merit Treaty protection as a fundamental matter of international law.[443] Indeed, Gramercy's withholding of material evidence raises questions as to whether it concluded *bona fide* purchase transactions in a manner that complied with applicable law (for example, not committed through fraud). Peru reserves all rights with respect to this requirement and any attendant jurisdictional or admissibility issues, particularly in view of Gramercy's lack of transparency to date.

198. **Owned or Controlled.** Gramercy alleges that its holdings in the Bonds are "owned or controlled, directly or indirectly, by Gramercy."[444] In this manner, and throughout its submission, Gramercy conflates the two Claimants and treats their respective roles as one

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[439] Treaty (CE-139), Art. 10.1.1; *see also id*. Art. 1.3 (defining "covered investment" as, "with respect to a Party, an investment, as defined in Article 10.28 (Definitions), 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").

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

[441] Reisman ¶ 46.

[442] Third Amended Notice ¶ 140.

[443] *See, e.g.*, *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award dated 10 Dec. 2014 ¶ 467 (RA-305); *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 Oct. 2006 ¶¶ 136, 157-183 (RA-306); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 Oct. 2013 ¶ 390 (RA-307).

[444] Third Amended Notice ¶ 139 (internal quotation and citation omitted).

unified "investment."[445] According to Gramercy, however, Gramercy Peru Holdings was the entity involved in the Bond acquisitions and is the "titleholder" of the Bonds; Gramercy Funds Management does not own but instead "controls" Gramercy Peru Holdings and the Bonds. Beyond this, Gramercy has not provided basic information as to its corporate structure or Bond holding structure during the relevant time periods – even as it alludes to Gramercy Funds Management "predecessors [that] have controlled Gramercy's investment" and "other affiliated entities that maintain direct and indirect ownership in GPH,"[446] as well as "institutional investors" that "beneficially own[]" the Bonds.[447]

199. Rather than substantiate such basic jurisdictional elements, Gramercy presumes that, because the words "bonds," "debt instruments," and "public debt" appear in the Treaty, the Agrarian Reform Bonds are subject to Treaty protections. Gramercy argues in one short paragraph, without elaboration, that its alleged investment "plainly satisfies" the Treaty requirements because Article 10.28 "explicitly includes 'bonds' as a form of covered investment," and Annex 10-F "explicitly envisions that 'public debt' may give rise to a claim under the Treaty."[448]

200. To the contrary, as Professor Reisman explains, the Treaty presents "seemingly simple definitions" that "are attended by qualifications, requiring the tribunal seized with the case to engage in an interpretive exercise."[449] A proper interpretation of the Treaty language in full context, also informed by relevant jurisprudence, demonstrates that the Bonds are not "investments" within the meaning of the Treaty.

1. Treaty Language In Context

201. The Treaty, unlike certain other treaties, does not enumerate the forms of a covered investment in a closed list. Instead, it offers certain examples of "[f]orms that an investment *may take*," subject to the qualification that it "*has the characteristics* of an investment."[450] Professor Reisman finds it "striking" that the definition includes this qualifying language ("characteristics of an investment") both in the main text and in footnote 12, which states that "[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services,

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[445] *See, e.g.*, Third Amended Notice ¶ 5 (alleging that "Gramercy Funds Management LLC and Gramercy Peru Holdings LLC invested in over 9,600 Land Bonds").

[446] Third Amended Notice ¶¶ 28-29, 139.

[447] Letter from Gramercy to Peru, 29 January 2016 (R-43). Indeed, the one corporate document that Gramercy appears to have submitted into the record, a December 2011 "Operating Agreement" for Gramercy Peru Holdings, reveals that Gramercy Peru Holdings is 100% owned by an entity called Peru Agrarian Reform Bond Company, Ltd.; Gramercy Peru Holdings was previously 100% owned by an entity called Gramercy Emerging Markets Fund; Gramercy Funds Management did not assume its alleged control until 2011, years after all of the alleged Bond acquisitions; and Gramercy Peru Holdings was previously controlled by an entity called Gramercy Investment Advisors LLC. Amended and Restated Limited Liability Operating Agreement of Gramercy Peru Holdings LLC dated 31 December 2011 (CE-165). Rather than offering transparency as to the structure and role of these various entities within Gramercy's alleged ownership and control of the Bonds, Gramercy instead has opted to withhold all material evidence and information.

[448] Third Amended Notice ¶ 138.

[449] Reisman ¶ 25.

[450] Treaty (CE-139), Art. 10.28 (emphasis added); *see also* Reisman ¶¶ 26-28.

are less likely to have such characteristics."[451] He confirms that "the words '*more likely* to have the characteristics of an investment', in the first footnote, reinforce that the drafters thought that some 'bonds, debentures, and long-term notes' might be *less likely* to have 'the characteristics of an investment.'"[452] This footnote would be superfluous – and, indeed, would contradict the main text definition – if all forms of "debt," including all "bonds," satisfied the requirements of Article 10.28. It is plain from the text that this cannot be true.

202. Annex 10-F on "Public Debt" also lends no support to Gramercy's superficial argument that the Bonds are an "investment" simply because Article 10.28 says "bonds." Such a reading, Professor Reisman explains, is inconsistent with "the common understanding of 'public debt' in the investment context: '*loans incurred by the government to finance its activities when other sources of public income fail to meet the requirements*.'"[453] In marked contrast, the Agrarian Reform Bonds were not created to fund the Government, but to compensate landowners in Peru for expropriated land, and thus fall outside the scope of "public debt" covered by Annex 10-F. Indeed, the Agrarian Reform Bonds "emerged in a completely different historical era, with different policy, legal and economic underpinnings of the conduct of the State, long before the development of contemporary investment treaties or contemporary sovereign debt, or the formation of the object and purpose of the Treaty."[454] Accordingly, as Professor Reisman confirms, the Agrarian Reform Bonds "*share[] only the name 'bond' with the contemporary global instruments used to fund Government action*."[455]

203. Reference to the object and purpose of the Treaty, pursuant to universally accepted rules of treaty interpretation,[456] further underscores that the Agrarian Reform Bonds do not constitute an "investment" under Article 10.28. The Treaty's object and purpose, as reflected in the Preamble – which Gramercy ignores entirely – includes promoting "broad-based economic development," ensuring a "predictable legal and commercial framework" for business and investment, agreeing that foreign investors are "not hereby accorded greater substantive rights with respect to investment protections than domestic investors," and preserving the ability to "safeguard the public welfare."[457] Professor Reisman confirms:

> The alleged purchase of the Agrarian Reform Bonds by Claimants with the hope of collecting larger payments than will be given to

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[451] Treaty (CE-139), Art. 10.28 n.12.

[452] Reisman ¶ 28 (emphasis in original).

[453] Reisman ¶ 29 (quoting Ritika Motley, *Public Debt: Meaning, Classification and Method of Redemption*, http://www.economicsdiscussion.net/debt-2/public-debt-meaning-classification-and-method-of-redemption/17472 (RA-184)) (emphasis added) Reinforcing this understanding, for example, is the U.S. Treasury Department's Bureau of Public Debt, which describes itself as "responsible for borrowing the money needed to operate the Federal Government and accounting for the resulting debt," which is done "by the issuance of marketable Treasury securities, such as Treasury bills and Treasury bonds." U.S. Department of the Treasury, *About: Bureau of the Public Debt*, *available at* https://www.treasury.gov/about/organizational-structure/offices/General-Counsel/Pages/bpd.aspx (last accessed 14 December 2018) (RA-185); *see also* Reisman ¶¶ 29-30 (addressing same).

[454] Reisman ¶ 31.

[455] Reisman ¶ 40.

[456] *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (RA-49), Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *id.*, Art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . ."); *see also* Reisman ¶¶ 35-36.

[457] Treaty (CE-139), Preamble; *see also* Reisman ¶¶ 35-42 (addressing Treaty Preamble).

> domestic holders of these bonds can hardly be said to contribute to the economic development of Peru, nor to parity between domestic and foreign investors. *Indeed, the transaction that the Claimants present as an 'investment' in the Agrarian Reform Bonds is inconsistent with these objects and purposes of the Treaty*. It is difficult to square a putative investor's speculation in this developing country's 'distressed property' with promoting broad-based economic development, reducing poverty, ensuring parity between domestic and foreign investors, or preserving the public welfare. In this respect, the express objects and purposes of the Treaty confirm that the Agrarian Reform Bonds do not fall within the category of investments protected by the Treaty.[458]

204. Gramercy's one-paragraph treatment of Article 10.28 and Annex 10-F is incomplete and incorrect. Neither the ordinary meaning of the Treaty text, nor the object and purpose as set forth in the Treaty Preamble, supports Gramercy's claim that the Agrarian Reform Bonds – issued decades ago through domestic judicial proceedings in the domestic currency of a developing country under domestic law, with recourse to domestic courts, to pay debt to landowners and not generate funds for Government use[459] – are "investments" eligible for Treaty protections as understood and agreed by the Contracting Parties.

2. Jurisprudence On "Investment"

205. Gramercy's cursory allegations also ignore relevant international jurisprudence on the definition of "investment." As part of a detailed review of cases, Professor Reisman explains that the four-part test for "investment" articulated by the tribunal in *Salini v. Morocco*[460] "has become the basis of analysis by many investment treaty tribunals."[461] In fact, the Treaty "tracks closely"[462] the elements of the *Salini* test:

- **Contribution of Money or Assets.** This *Salini* factor is reflected in the Treaty's requirement of a "commitment of capital or other resources."[463] Gramercy has failed to show that it satisfies the requirement, including because Gramercy did not reveal the purchase contracts, bank transfer documents, or indeed any evidence or information substantiating payment or other contribution of assets. This is a "serious omission of relevant and material information and evidence."[464]

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[458] Reisman ¶ 41 (emphasis added); *see also id.* ¶ 42 ("Nor is there any justification to deem a transaction that was intended to be concluded by Peruvian parties and, hence, not qualifying as an 'investment' under the Treaty, as *converted* into an investment for purposes of the Treaty by transmitting the instrument to a subsequent foreign holder or a subrogatee who acquires, by virtue of its nationality, more rights, vis-à-vis Peru than the subragator or transferor itself has: *nemo plus iuris ad alium transferre potest quam ipse habet.*") (emphasis in original).

[459] *See* Reisman ¶¶ 39-40.

[460] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (RA-161)..

[461] Reisman ¶ 44.

[462] Reisman ¶ 45.

[463] Treaty (CE-139), Art. 10.28; *see also* Reisman ¶ 46.

[464] Reisman ¶ 46.

- **Duration.** This *Salini* factor is reflected in footnote 12 to Article 10.28, which states that "[s]ome forms of debt" such as "long-term notes" are "more likely to have the characteristics of an investment," while other forms "such as claims to payment that are immediately due" are "less likely to have such characteristics."[465] Gramercy has failed to show that it satisfies the requirement, including because its purchase of the Bonds in order to demand payments does not constitute duration as contemplated under *Salini* or the Treaty.[466]

- **Risk.** This *Salini* factor is reflected in the "the assumption of risk" as a "characteristic[] of an investment" under Article 10.28.[467] Gramercy has failed to show that it satisfies the requirement. Professor Reisman confirms that "[t]he kind of risk envisioned by this requirement is risk tied to the performance of an investment itself."[468] Here, in contrast, at the time of Gramercy's alleged investment, the Bonds' value "was at best uncertain" – indeed, they were worthless on their face – and Gramercy purchased with the speculative hope that the Government would pay more. Such circumstances are different from the notion of investment risk as contemplated under *Salini* or the Treaty.[469]

- **Contribution to Host State's Economic Development.** Considering, *inter alia*, the Treaty's object and purpose as set forth in the Preamble, Professor Reisman confirms that "the Treaty also requires the presence of *Salini*'s fourth element, a contribution to the economic development of the host State."[470] Gramercy has failed to show that it satisfied the requirement. Indeed, Gramercy has not demonstrated that the purchase of Agrarian Reform Bonds "constitutes or relates to any 'economic development' at all, and none specifically in terms of generating employment opportunities for sustainable economic growth, employment opportunities or improved labor conditions and living standards."[471]

206. Additional relevant jurisprudence on "investment" which Professor Reisman examines includes *Phoenix Action v. Czech Republic*.[472] As noted above, the tribunal in that case ruled that the claimant had committed an abuse by buying an "investment" that was "already burdened" with litigation and regulatory issues – which, the tribunal determined, constituted an attempt "to transform a pre-existing domestic dispute into an international dispute."[473] It also addressed whether that economic operation constituted an "investment" under the applicable treaty, including in view of the *Salini* framework. The *Phoenix Action* tribunal concluded that investment treaties are "*not deemed to protect* economic transactions undertaken and performed with *the sole purpose* of taking advantage of the rights contained

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[465] Treaty (CE-139), Art. 10.28 n.12; *see also* Reisman ¶ 45.

[466] Reisman ¶ 47.

[467] Treaty (CE-139), Art. 10.28.

[468] Reisman ¶ 48.

[469] Reisman ¶ 48.

[470] Reisman ¶ 49.

[471] Reisman ¶ 49.

[472] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100); *see also* Reisman ¶ 50.

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

in such instruments, without any significant economic activity, which is the *fundamental prerequisite of any investor's protection*."[474] Accordingly, and for much the same reason that Gramercy's claims are an abuse of the Treaty mechanism, its alleged speculative investment in the Bonds to pursue compensation under the Treaty, and with no contribution to Peru's economic development, does not constitute an "investment" under the Treaty.

3. Jurisprudence On Contemporary Sovereign Debt

207. Gramercy's cursory allegations also ignore international jurisprudence on contemporary sovereign debt that is relevant to the "investment" analysis. Professor Reisman conducts a detailed assessment of this jurisprudence, which includes, among others, *Abaclat v. Argentina* and *Poštová Banka v. Hellenic Republic*.[475] Both cases examined the eligibility of contemporary sovereign bonds for investment treaty protections, and thus provide a useful point of comparison to Gramercy's unfounded efforts to apply Treaty protections and mechanisms to the historic Agrarian Reform Bonds.

208. The *Abaclat* tribunal ruled that Argentine sovereign bonds purchased by individual Italian nationals prior to Argentina's 2001 default constituted "investments" under the Argentina-Italy BIT.[476] Key findings driving that decision included:

- The BIT "cover[ed] an extremely wide range of investments," contained a "residual clause" encompassing "any right of economic nature," and was "not drafted in a restrictive way";[477]
- "Argentina embarked on an ambitious effort to restructure its economy in order to encourage growth and reduce debt and inflation";[478]
- "Issuing sovereign bonds was one of the pillars" of this campaign;[479]
- "Argentina intended to develop a diversified market by issuing bonds in the international financial markets";[480]
- "Argentina placed over US$ 186.7 billion in sovereign bonds across both domestic and international capital markets," which included 179 bonds, 97% of which were denominated in foreign currencies;[481]

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[474] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RA-100) ¶ 93 (emphasis added).

[475] *See* Reisman ¶¶ 51-62.

[476] *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, 4 August 2011 (RA-171) ¶ 707.

[477] *Id.* ¶ 354.

[478] *Id.* ¶ 43.

[479] *Id.* ¶ 44.

[480] *Id.* ¶ 47.

[481] *See id.* ¶ 50.

- "The 83 bonds allegedly purchased by Claimants are governed by the laws of different jurisdictions, were issued in different currencies, and listed on various international exchanges";[482]

- "There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic development";[483]

209. Thus, as Professor Reisman confirms, "*all* of the characteristics of the contemporary global bonds at issue in *Abaclat*" stand "in marked contrast to Peru's Agrarian Reform Bonds."[484] Dr. Guidotti likewise confirms the fundamental differences between the Bonds and contemporary sovereign debt, including the Argentine bonds.[485]

210. In *Poštová Banka v. Hellenic Republic*, on the other hand, the tribunal found that Greek Government Bonds ("GGBs") did *not* constitute an "investment" under the Slovakia-Greece BIT, and denied jurisdiction over the dispute. Key findings included:

- The Slovakia-Greece BIT is "significantly different from" the "wide language" of the Argentina-Italy BIT;[486]

- "Sovereign debt, as indebtedness of a sovereign State, has special features and characteristics. First, it is clearly a *method of financing government operations*, from investments in infrastructure to ordinary government expenditures. Second, it is *a key instrument of monetary and economic policy*";[487]

- "An investment, in the economic sense, is linked with a process of *creation of value*, which distinguishes it clearly from . . . a subscription to sovereign bonds which is [] a process of *exchange of values i.e.* a process of providing money for a given amount of money in return";[488]

- "Claimants have not argued that the money Poštová Banka paid for the GGB interests, even if considered as ultimately benefitting Greece, was used in economically productive activities";[489]

- "[T]he element of contribution to an economic venture and the existence of the specific operational risk that characterizes an investment under the objective approach are not present here."[490]

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[482] *Id.* ¶ 51.

[483] *Id.* ¶ 378.

[484] Reisman ¶ 56 (emphasis added).

[485] Guidotti ¶¶ 12-21.

[486] *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Final Award, 9 April 2015 (RA-179) ¶¶ 304-305.

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

[488] *Id.* ¶ 361 (emphasis added).

[489] *Id.* ¶ 363.

[490] *Id.* ¶ 371.

211. *Poštová Banka* demonstrates that even contemporary sovereign debt, traded on international markets and held by various foreign investors, may not constitute an "investment" eligible for investment treaty protection. Indeed, the tribunal's conclusions that sovereign public debt is "a method of financing government operations," that the purchase of bonds "exchange[s]" rather than "creat[es]" value and is not economically productive, and that investment "risk" for purposes of treaty analysis is distinguishable from regular commercial risk of non-payment, underscore that the Agrarian Reform Bonds also lack the necessary characteristics to constitute an "investment" under the Treaty.[491]

F. Gramercy Is Not An "Investor" Under The Treaty

212. Article 10.28 provides that an "investor" under the Treaty must be "a national or 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."[492] The Treaty thus ties the definition of "investor" to the existence of an "investment." Because the Agrarian Reform Bonds are not an "investment," neither Claimant can meet the "investor" requirement, as Professor Reisman confirms.[493]

213. Even assuming for the sake of argument that the Bonds did constitute an "investment," Gramercy fails to meet the jurisdictional requirements for an "investor" on several additional grounds, including the following.

214. *First*, the Treaty requires that, to constitute an "investor," each Claimant must be a U.S. enterprise "that attempts through concrete action to make, is making, or has made an investment." In other words, as Professor Reisman confirms, "the Claimants still have to prove that they have made the investment, i.e., acquired the Bonds complying with all of the formalities involved. This they have not done."[494] In particular, as detailed above, Gramercy has withheld significant material information and evidence relating to the alleged Bond acquisition transactions, including the purchase contracts, documentation of payment (via wire transfer or other means), or indeed any information about the price purportedly paid (individually or cumulatively).

215. *Second*, Gramercy also has not shown that Claimant Gramercy Funds Management made any alleged investment, as the Treaty requires. Rather, as noted, Gramercy itself alleges that Gramercy Funds Management had *no* role in the alleged Bond acquisitions. In fact, a corporate document submitted by Gramercy indicates that Gramercy Funds Management did not even assume its alleged control of Gramercy Peru Holdings until 31 December 2011, years after all alleged acquisitions were complete.[495] Thus, with no alleged direct or indirect ownership in the Bonds, and no alleged involvement in the Bond acquisitions, Gramercy Funds Management has made virtually no showing of any "concrete action" with respect to the making of the investment that could qualify it as an "investor." Indeed, the suggestion that an entity not otherwise qualifying as an "investor" could become

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[491] *See* Reisman ¶¶ 60-61 (addressing *Poštová Banka* and contrasting Agrarian Reform Bonds).

[492] Treaty (CE-139), Art. 10.28.

[493] Reisman ¶ 63.

[494] Reisman ¶ 64.

[495] *See* Amended and Restated Limited Liability Operating Agreement of Gramercy Peru Holdings LLC dated 31 December 2011 (CE-165).

one simply by entering into a management contract, years after the fact, with an entity alleged to have made the investment – as Gramercy alleges with respect to Gramercy Funds Management – has no basis in the Treaty and invites abuse.

216. *Third*, Gramercy also does not qualify as a protected "investor" simply by virtue of the fact that it is a hedge fund speculator, as Professor Reisman confirms.[496] As he observes, "[t]here is a clear difference between those original bondholders targeted and attracted by a government marketing campaign," as in *Abaclat v. Argentina*, "and hedge fund speculators buying distressed financial instruments on often informal secondary markets."[497] Indeed, the speculative nature of Gramercy's alleged investment – and Gramercy's entire operating model – runs counter to the object and purpose of the Treaty.[498]

IV. Merits

217. Even assuming, contrary to the record, that Gramercy were an "investor" that made a covered "investment" and complied with the various other jurisdictional requirements of the Treaty, the fact remains that Peru has not breached any obligation under the Treaty. As detailed below, Peru did not (1) expropriate Gramercy's alleged investment; (2) violate the minimum standard of treatment; (3) accord Gramercy less favorable treatment than Peruvian investors; or (4) deny Gramercy effective means to enforce its rights. Gramercy is a lone fund that allegedly chose to acquire thousands of old bearer bonds related to potential domestic claims for speculative aims. The Treaty does not protect such mere speculation, and none of Peru's measures have contravened any Treaty obligation.

A. Peru Did Not Expropriate Gramercy's Alleged Investment

218. Gramercy alleges that Peru indirectly expropriated its alleged investment in violation of Article 10.7 of the Treaty through the 2013 Constitutional Tribunal Order, the 2013 Resolutions, and the 2017 Supreme Decrees.[499] Through these measures, Gramercy claims, Peru purportedly "destroy[ed]" the value of Gramercy's holdings in Agrarian Reform Bonds, and violated alleged "reasonable expectations" that Peru would pay the Bonds at current value calculated using CPI.[500] According to Gramercy, the expropriatory nature of the measures is reinforced by the fact that they allegedly serve no legitimate public purpose and are discriminatory.[501] In each such respect, Gramercy's claim for indirect expropriation is fundamentally flawed and must be rejected.

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[496] Reisman ¶¶ 68-69.

[497] Reisman ¶ 68.

[498] Reisman ¶ 41 ("It is difficult to square a putative investor's speculation in this developing country's 'distressed property' with promoting broad-based economic development, reducing poverty, ensuring parity between domestic and foreign investors, or preserving the public welfare. In this respect, the express objects and purposes of the Treaty confirm that the Agrarian Reform Bonds do not fall within the category of investments protected by the Treaty.").

[499] Third Amended Notice ¶ 149.

[500] Third Amended Notice ¶ 146.

[501] Third Amended Notice ¶¶ 159-169.

219. *First*, the 2013 Constitutional Tribunal Resolution and subsequent measures could not have expropriated Gramercy's alleged investments because they did not substantially deprive Gramercy of the value of their claimed bond holdings – let alone completely destroy the value, as Gramercy alleges. Rather, the challenged measures established a current valuation and payment procedure for instruments that otherwise remain worthless on their face. Indeed, the measures about which Gramercy complains would have allowed Gramercy to actually receive more than it appears to have paid for the Bonds if it had not boycotted the Bondholder Process.

220. *Second*, Gramercy's claims to an alleged "reasonable expectation" of payment of the Agrarian Reform Bonds at current value using CPI are plainly contradicted by the record – including Gramercy's own contemporaneous due diligence report and representations in this proceeding, which instead confirm that Gramercy was aware that it was making a speculative investment under circumstances of longstanding legal uncertainty.

221. *Third*, Peru's measures served a legitimate public purpose; the Constitutional Tribunal expressly ruled, and subsequent measures reaffirmed, that resolution of the historic Bond question required adherence to the State's sovereign prerogatives (and constitutional obligations) to promote the general welfare and ensure fiscal security. The measures also are non-discriminatory; Gramercy has been offered, and has refused, treatment equal to that given to all Peruvian bondholders.

1. Peru Did Not Substantially Deprive Gramercy Of The Value Of Its Alleged Investment

222. Gramercy does not (and could not) claim a direct expropriation. Its indirect expropriation claim, moreover, is subject to the particular requirements of Annex 10-B of the Treaty, as Gramercy acknowledges.[502] Annex 10-B states that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[503] In addition, the Annex provides that the analysis for an indirect expropriation claim "requires a case-by-case, fact-based inquiry" that considers a number of factors, including "the economic impact of the government action."[504] The Treaty further specifies that "*the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred*."[505]

223. Consistent with the terms of the Treaty, it is well established that the impact of measures must reach a substantial level of severity in order to constitute an indirect expropriation under international law. Gramercy thus concedes that "[i]nternational 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."[506] As the tribunal in *Electrabel v. Hungary* further explained, an investor claiming indirect expropriation must "establish the *substantial, radical, severe, devastating or fundamental*

[502] *See* Third Amended Notice ¶ 148.

[503] Treaty (CE-139), Annex 10-B ¶ 1.

[504] Treaty (CE-139), Annex 10-B ¶ 3.

[505] Treaty (CE-139), Annex 10-B ¶ 3(a)(i) (emphasis added).

[506] Third Amended Notice ¶ 151 (citing various cases).

deprivation of its rights or the *virtual annihilation*, effective neutralisation or *factual destruction* of its investment, its value or enjoyment."[507] A mere reduction in economic value is not enough to establish an indirect expropriation, as the Treaty expressly states[508] and investment treaty jurisprudence reaffirms.

224. In *LG&E v. Argentina*, for example, the investor claimed a 90% loss in the value of its local company's holdings.[509] The tribunal found that "the State adopted severe measures that had a certain impact . . . especially regarding the earnings that the Claimants expected," but nonetheless concluded that there had not been an expropriation, including because the measures had not effected an "almost complete deprivation of the value."[510] Similarly, in *Total v. Argentina*, the claimant alleged an 86% loss, but the tribunal rejected the claim because the claimant "ha[d] not shown that the negative economic impact of the Measures has been such as to deprive its investment of all or substantially all its value."[511] The tribunal reinforced that a deprivation rising to the level of expropriation "requires . . . a *total loss of value* of the property such as when the property affected is *rendered worthless*."[512] In contrast, the cases on which Gramercy relies all involved total loss of the investment.[513]

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[507] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 Nov. 2012 (RA-123) ¶ 6.62 (emphasis added); *see also, e.g., Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 Sept. 2007 (RA-88) ¶ 285 (requiring that "the value of the business has been virtually annihilated"); *National Grid Plc v. Argentine Republic*, UNCITRAL, Award dated 3 Nov. 2008 (RA-96) ¶ 149 (requiring that measures result in the "neutralization, radical deprivation, and irretrievable loss, inability to use, enjoy, or dispose of the property"); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 (CA-42) ¶ 116 (requiring that measures cause the "economic value of the use, enjoyment or disposition of the assets or rights affected by the . . . action [to be] neutralized or destroyed"); *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award dated 15 Nov. 2004 (RA-71) ¶¶ 123-133 (requiring a "full deprivation of the benefit of property rights").

[508] Treaty (CE-139), Annex 10-B ¶ 3(a)(i).

[509] *LG&E Energy Corp, LG&E Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 Oct. 2006 (CA-31) ¶ 177.

[510] *LG&E Energy Corp, LG&E Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 Oct. 2006 (CA-31) ¶¶ 198-200.

[511] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability dated 27 Dec. 2010 (RA-112) ¶¶ 185, 196; *see also, e.g., Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 Dec. 2012 (RA-124) ¶ 456 (rejecting claimant's argument that a 99 percent tax on windfall profits constituted an expropriation because "the investment preserved its capacity to generate a commercial return").

[512] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability dated 27 Dec. 2010 (RA-112) ¶ 195 (emphasis added).

[513] *See AIG Capital Partners Inc. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award dated 7 Oct. 2003 (RA-67) ¶ 10.3.3(a) (where the State cancelled a residential construction project and forcibly removed contractors from the site, rendering the "practical and economic use of the Project Property . . . *irretrievably lost*") (emphasis added); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 Nov. 2010 (RA-109) ¶¶ 408-409 (where all payments under claimant's agreements had been seized, depriving them of "*all remaining economic value*") (emphasis added); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 (RA-86) ¶¶ 7.5.28-7.5.34 (highlighting that this was "not a case where the value of a claimant's investment had simply been diminished," but rather claimants were "radically deprived of the economic use and enjoyment of their concessionary rights"); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 (RA-65) ¶¶ 115-117 (where non-renewal of a government permit closed the claimant's landfill permanently); *CME Czech Republic B.V. (Netherlands) v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 (RA-58) ¶¶ 591-607 (where the State's actions and omissions destroyed the "legal basis ('the safety net') of the Claimant's investment" and

225. Here, there has been no such destruction of the value of Gramercy's alleged holdings in the Bonds, let alone the "mathematical certainty" of a "devastating economic impact" that Gramercy claims.[514] In fact, Gramercy acknowledges that the Bonds "are worthless if accorded only their face value."[515] That is how Gramercy's alleged investment would have remained, absent Peru's measures to offer compensation. Further, notwithstanding Gramercy's efforts to conceal the details of its acquisitions, the Quantum Expert has determined that Gramercy appears to have paid US$31.18 million for its claimed bondholdings. Under the applicable formula for compensation available under the Bondholder Process, as Gramercy itself acknowledges, Gramercy would receive US$33.57 million for its alleged holdings.[516] Thus, the Bondholder Process functions effectively to *impart* value on Bonds that are worthless on their face, and Gramercy would receive an approximately US$2.39 million more than it paid if it were to participate in the Bondholder Process.[517]

226. In other words, Gramercy has not suffered *any* deprivation in the value of its investment. Gramercy's claim thus boils down to a complaint that it wishes its investment could generate a return of 5,674 percent if Peru had instead adopted Gramercy's preferred method for calculating compensation.[518] That is not a valid basis for an expropriation claim. Indeed, tribunals routinely have rejected claims alleging reduced profits or allegedly insufficient returns as a basis for indirect expropriation. In *Philip Morris v. Uruguay*, for example, the claimant argued that it had suffered an expropriation because its investment "could have been significantly *more* profitable" absent the introduction of new regulations.[519] The tribunal rejected the claim, holding that, "[a]s confirmed by investment treaty decisions, a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriatory character on the measure."[520] Numerous other tribunals agree.[521]

227. Gramercy complains that the compensation made available to all bondholders through the Bondholder Process does not enable it to obtain the speculative

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therefore its "commercial value"); *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011 (RA-116) ¶ 162 (where the State's actions impeded the investor's ability to continue operating its company).

[514] *See* Third Amended Notice ¶ 150.

[515] Third Amended Notice ¶ 8.

[516] Third Amended Notice ¶ 3.

[517] *See* Quantum ¶ 110.

[518] *See* Quantum

[519] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016 (RA-145) ¶ 285 (emphasis in original) (internal quotations omitted).

[520] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016 (RA-145) ¶ 286.

[521] *See, e.g., EnCana Corporation v. Ecuador*, LCIA Case (UNCITRAL), Award dated 3 February 2006, (RA-78) ¶ 174 (denying expropriation claim where, "although the EnCana subsidiaries suffered financially from the denial of VAT and the recovery of VAT refunds wrongly made, they were nonetheless able to continue to function profitably"); *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL Case, Interim Award dated 26 June 2000, (RA-56) ¶¶ 100-101 (denying expropriation claim where alleged interference with business might have have "resulted in reduced profits for the Investment, it continue[d] to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales").

return it has calculated for its Bonds. The Treaty, however, does not protect mere speculation; nor does it entitle Gramercy to compensation exponentially higher than every other bondholder. Gramercy has suffered no substantial deprivation of its alleged investment that could give rise to a valid expropriation claim.

2. Gramercy Had No Legitimate Expectations

228. Annex 10-B of the Treaty further directs that the indirect expropriation analysis account for "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."[522] Such interference is entirely absent here because Gramercy could not have had *any* reasonable expectation that the Agrarian Reform Bonds would be paid at current value calculated using CPI as of the date of issuance, as Gramercy alleges.[523]

229. Gramercy resorts to significant mischaracterizations to arrive at its unfounded claims that "the legal framework governing" the Bonds during Gramercy's alleged acquisitions in 2006 to 2008 "required the Government to pay the Land Bonds at current value" – in particular, using CPI to calculate that value – and that the 2013 Constitutional Tribunal Order and later measures "eviscerated the legal framework under which Gramercy invested."[524] The record establishes otherwise, as further detailed above, including:

- The legal status of the Agrarian Reform Bonds remained under a cloud of uncertainty for decades.
- In March 2001, the Constitutional Tribunal Sentence held that it was unconstitutional to value the Bonds according to nominal value, but did not establish a method for calculating current value or a procedure for payment.
- In August 2004, the Constitutional Tribunal Sentence upheld dollarization as an appropriate method for determining the current value of the Bonds.
- From 2001 to 2011, at least nine different bills were introduced to the Congress on the issue of the Bonds, proposing a variety of valuation methodologies. Only two bills passed. Both, however, were vetoed – one just weeks before Gramercy began its alleged acquisitions in June 2006 – and thus never became law.

230. Accordingly, at the time of Gramercy's alleged Bond purchases from 2006 to 2008, *considerable uncertainties concerning the potential for payment persisted* – including as to the value of the Bonds, the procedure for making payments, who was entitled to payment, and who was required to pay.

231. This uncertainty is reflected in Gramercy's own contemporaneous 2006 due diligence memo, which highlighted, *inter alia*:

- The "*complexity* surrounding the investment opportunity";

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[522] Treaty (CE-139), Annex 10-B ¶ 3(a)(ii).

[523] Gramercy presents a fuller formulation of its expectations argument as part of its minimum standard of treatment claim under Article 10.5. *See* Third Amended Notice ¶ 156. Peru likewise will respond in greater detail on the expectations issue in its Article 10.5 analysis.

[524] Third Amended Notice ¶¶ 156, 158.

- That obtaining a court judgment and payment could take ten years, but that there might be "some form of resolution" down "the road";
- That "*draft* legislation" was under consideration in Congress;
- That the issue of updating to current value was "*further complicating matters*";
- That there was a "*discrepancy*" as to the proper valuation method, stemming from the government's use of an "alternative inflation index" rather than CPI;
- That proposed potential values for *all* Bonds using various valuation scenarios ranged from US$650 million to US$3 billion.[525]

232. Thus, at the time of its alleged acquisitions, Gramercy was well aware that complexities and risks surrounded the Agrarian Reform Bonds, including with respect to valuation and procedures for payment. This is reinforced in the written testimony of Gramercy's founder, Robert Koenigsberger, where he explains that Gramercy's due diligence confirmed that "[t]he Land Bonds were a debt that needed to be paid, *but there was not yet any consensus about how that would actually happen*," and "[t]he Government was legally required to pay the Land Bonds at current value, *but had no plan regarding how to do so*."[526]

233. In fact, Gramercy's entire "business model involves significant speculation," as Dr. Guidotti explains.[527] Gramercy understands, and openly advertises, the inherent uncertainties involved.[528] In its own publications, Gramercy warns, for example:

- "There can be no assurance that the objectives associated with any of Gramercy's investment strategies will be met or that the Firm will achieve profitable results. Investments involve risk of loss, and *clients must be prepared to bear the loss of their entire investment*."[529]
- "[T]he *lower certainty* of the process [of distressed investment in emerging market] can be a risk, especially to investors unfamiliar with the different cultural and jurisdictional issues, [and] it typically manifests itself in *things taking longer to resolve . . . or the investment being a total write-off*. This *risk goes up significantly* if the underlying debt instruments are . . . in local currency governed solely under local law, and so it is important to carefully consider the process risk elements before engaging in this."[530]
- "Most emerging markets restructurings take place outside of a judicial proceeding. Accordingly, while fundamental financial and economic analysis is again the starting point for assessing value, it merely tells the investor what they deserve to get, *not what they can expect to get*."[531]

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[525] 2006 Memorandum, at 1-4 (CE-114) (emphases added).

[526] Koenigsberger ¶ 34 (emphasis added).

[527] Guidotti ¶ 50.

[528] *See id*. ¶¶ 50-54.

[529] Gramercy Funds Management LLC, Brochure, 29 March 2018, at 9 (emphasis added) (R-540).

[530] Gramercy, Distressed Debt Investing – An Overview, 31 August 2010, at 10 (R-577).

[531] *Id*. at 9 (R-577).

234. With respect to the Agrarian Reform Bonds, the Peruvian bondholders who allegedly sold their Bonds to Gramercy no doubt also accounted for that uncertainty when choosing to accept Gramercy's purchase price, which offered a fraction of the value that Gramercy now claims was an "abundantly clear . . . legal obligation."[532] Indeed, as the Quantum Expert confirms, "[i]f there had been any clarity as to what the Outstanding Coupons Adjustment Scheme would have been at that time, the bondholders would have sold the Agrarian Bonds at a higher price."[533] This further explains why Gramercy has been at such pains to conceal information about its alleged Bond acquisitions – including the price paid to bondholders who understood, just as Gramercy understood, that valuation of the Bonds was anything but certain.

235. Gramercy also alleges that Peru violated the "expectation that it could go to Peruvian courts and seek judgments enforcing its rights" under the Bonds.[534] In fact, Gramercy's repeatedly shifting stories as to the extent of its involvement in local court proceedings leave considerable uncertainty as to what Gramercy might have expected from Peruvian courts. In any event, Gramercy's claim that Peru "foreclosed" the possibility of recourse to Peruvian courts is without merit.

236. The August 2013 Resolution included an express reservation that the Bondholder Process "does not prevent land reform bondholders from filing a judicial action in the event of arbitrariness in the course of the procedure before the Executive Branch."[535] Indeed, in a brief submitted to a Peruvian court in October 2014, Gramercy argued that the Resolutions lacked any binding effect on judicial proceedings.[536] Further, the Supreme Decrees specifically afford due process protections by providing for judicial recourse, as well as an administrative challenge procedure, in certain instances for holders participating in the Bondholder Process.[537] Dr. Hundskopf confirms the availability of recourse to judicial and administrative recourse under the Bondholder Process.[538] By choosing to boycott the process altogether, Gramercy has deprived itself of the opportunity to test the bondholder process and any subsequent judicial review.

237. Ultimately, moreover, Gramercy concedes that it withdrew from local proceedings "[i]n connection with this arbitration" – thus reflecting Gramercy's own strategic choice to purse alleged Treaty rights in this arbitration in lieu of seeking any redress in

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[532] *See* Third Amended Notice ¶ 156.

[533] Quantum ¶ 123.

[534] Third Amended Notice ¶ 157.

[535] August 2013 Resolution (CE-180) ¶ 16 & Rule 4(d).

[536] Petition by Gramercy Peru Holdings LLC before Third Civil Court of Lambayeque in Record No. 026-1973, 14 October 2014 (R-38).

[537] *See, e.g.*, Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (CE-275), Art. 2.2 ("Natural persons, legal entities or undivided estates that maintain a dispute over the ownership of such Bonds, must seize, beforehand, the Judicial Power for the recognition of their right."); *id*. Art. 7.4 (providing that, if the authentication process does not confirm authenticity of the Bonds, "the Custodian Agent will return it to the individual, without prejudice to initiate any other applicable legal actions"); Arts. 9.2, 14.2, 17.7 (establishing recourse to administrative challenge procedure).

[538] *See* Hundskopf (RER-2) ¶¶ 131-132.

Peruvian court.[539] Accordingly, Gramercy itself foreclosed whatever options it once might have expected to pursue in Peruvian courts.

238. The legal framework in place at the time of Gramercy's alleged acquisitions, together with Gramercy's own contemporaneous assessment, thus confirms that Gramercy could not have had any "reasonable expectation" that it would recover payment under the Bonds at current value calculated using CPI, let alone CPI as of the date of issuance. Rather, Gramercy recognized the risks and inherent uncertainty surrounding the Bonds – and chose to purchase them anyway. The Treaty does not protect speculative expectations, and the absence of any "reasonable investment-backed expectations" here confirms the absence of an expropriation.[540]

3. Peru's Measures Serve A Legitimate Public Interest And Apply Without Discrimination To All Bondholders

239. Annex 10-B of the Treaty states that the expropriation analysis is to account for "the character of the government action."[541] The Annex expressly affirms that, "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives . . . do not constitute indirect expropriation."[542] Indeed, the Contracting Parties agree that one object and purpose of the Treaty is to "Preserve their ability to safeguard the public welfare."[543] Here, Peru's measures serve a legitimate public interest and apply without discrimination to all bondholders.

240. Gramercy alleges that "Peru's measures here are not merely the incidental consequences of some legitimate regulatory actions," but rather are "expressly aimed at reducing the value of the Land Bonds comprising Gramercy's investment."[544] This turns reality on its head. As detailed above, the framework established under the July 2013 Constitutional Tribunal Order and subsequent measures clearly mandated, for the first time, a procedure and valuation methodology for Peru to pay all legitimate holders of Agrarian Reform Bonds, which otherwise had been rendered valueless pieces of paper by hyperinflation decades before. Thus, Peru's measures serve to resolve a longstanding issue from a unique period in the history of Peru. Resolution of the Agrarian Reform Bonds issue was, in and of itself, a legitimate public interest for Peru and its citizens to whom the Agrarian Reform Bonds were granted. Gramercy's suggestion that the measures instead "are geared toward expropriating particular alien property interests"[545] has no basis in fact or law.

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[539] Third Amended Notice ¶ 157; *see also id.* ¶ 259(h)-(i) (stating that GFM and GPH both waived any right to continue local proceedings).

[540] *See* Treaty (CE-139), Annex 10-B ¶ 3(a)(ii).

[541] Treaty (CE-139), Annex 10-B ¶ 3(a)(iii).

[542] Treaty (CE-139), Annex 10-B ¶ 3(b). The Treaty identifies "public health, safety, and the environment" as examples of such objectives. *Id.* It further provides, however, that, "[f]or greater certainty, the list of 'legitimate public welfare objectives' in this subparagraph is not exhaustive." *Id.* n.20.

[543] Treaty (CE-139), Preamble.

[544] Third Amended Notice ¶ 161 (quotation and citation omitted).

[545] Third Amended Notice ¶ 160 (quotation and citation omitted).

241. In addition, as Gramercy acknowledges,[546] the Constitutional Tribunal expressly invoked specific public welfare objectives in its 2013 rulings, where it applied constitutional principles and concluded that Bond payments could not thwart the State's fundamental obligations to all Peruvians. This included, *inter alia*, the State's duty under Article 44 of the Constitution "'to promote the general welfare, which is based on justice and on the overall and sustainable development of the Nation,' which entails addressing a series of basic services (that satisfy a series of fundamental rights of all Peruvians)";[547] and "the principles of balance, sustainability and budgetary progressiveness, contained in Articles 77 and 78 of the Constitution, bearing in mind that it is financially impossible to make a payment of this nature and magnitude in a single sum without impacting fiscal resources, and consequently the basic services for the poorest population of our country."[548]

242. Likewise, when implementing the Bondholder Process, the Executive Branch repeatedly confirmed the importance of protecting those same public welfare objectives, while at the same time resolving the long-outstanding issue of payment of the Bonds.[549]

243. Gramercy challenges Peru's plainly stated public welfare objectives on the basis that the Constitutional Tribunal "cited no evidence" for its consideration of constitutional fiscal principles, the MEF "ha[d] conducted no analysis to support" the use of dollarization over CPI, and "[m]ultiple experts" opine that "Peru *is* able to support the debt, even valued using the CPI method."[550] In fact, the Constitutional Tribunal expressly found support for its dollarization determination in a prior Decree issued by the Executive, including the MEF.[551] More fundamentally, Gramercy's criticism ignores the fact that State determinations as to a legitimate public interest, and measures appropriate to protect that interest, are not subject to second-guessing in international proceedings – let alone by a lone speculative investor.

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[546] *See* Third Amended Notice ¶ 161.

[547] Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Whereas Clause ¶ 25; *see also id.* ("An elemental criterion for balancing these two obligations (to pay the land reform debt and to promote the general welfare) leads us therefore to avoid giving an absolute preference to one over the serious sacrifice that could occur with respect to the other.").

[548] Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Whereas Clause ¶ 29; *see also* Constitutional Tribunal Resolution dated 8 August 2013 (RA-261), Whereas Clause ¶ 3 (confirming that the July Order established "guidelines . . . which, bearing in mind both the bondholders' property rights and the balanced budget principle, aim to provide a definitive and constitutionally appropriate solution to the land reform bond payment problem"); *id.* ¶ 15 ("[T]his Tribunal established the requirement to *balance* the obligation to pay the land reform bonds (and the right to property underlying said obligation) against the State's ability to fulfil other priority obligations, especially those of a social nature that could be affected.") (emphasis in original).

[549] *See, e.g.*, Report No. 014-2014-EF/52.04, Office of Public Debt of the Ministry of Economy and Finance, 17 January 2014, ¶ 14 (Doc. R-15) ("[T]aking into account i) guidelines indicated by the Constitutional Court regarding the payment of the updated value of the Agrarian Reform Bonds . . . and iii) that the amount of the debt to be paid is consistent with the parameters of fiscal balance for the national economy, it is deemed appropriate to consider the issuance of another supreme decree to implement the procedure for the determination of the payment methods."); Report No. 055-2014-EF/42.01, Office of Public Debt of the Ministry of Economy and Finance, 17 January 2014, ¶¶ 3.3 (MEF Office of General Counsel confirming "the MEF, based on the principles of fiscal balance and financial sustainability, as well as on fiscal rules and the multiannual macroeconomic framework, shall define the options" for payment, and that MEF also "maintain[] an appropriate management of the public assets").

[550] Third Amended Notice ¶¶ 163-164 (emphasis in original).

[551] Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Whereas Clause ¶ 25 ("[T]he method of conversion to United States dollars has legal precedent in Emergency Decree No. 088-2000."); *see also* Emergency Decree No. 088-2000 dated 10 Oct. 2000 (RA-226) (implementing dollarization method and signed by Minister of Economy and Finance, among other officials).

244. Tribunals regularly emphasize the "*high measure of deference* that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[552] In *Saluka v. Czech Republic*, for example, the tribunal confirmed that a State "enjoy[s] a margin of discretion in the exercise of that responsibility," and that a tribunal must "accept the justification given" for State action "[i]n the absence of *clear and compelling evidence*" that it "erred or acted otherwise improperly."[553] Thus, the proper inquiry is not whether the Constitutional Tribunal should have adopted alternative solutions under Peruvian law, or whether the State could have afforded to implement a different valuation method, but rather whether Gramercy has provided clear and compelling evidence that the public interest invoked was prextextual and the challenged measures were improper. Gramercy has not made such a showing – and cannot.

245. The cases on which Gramercy relies are not even remotely relevant because they involve circumstances in which a State cited pretextual or *post hoc* public interest justifications after the fact for measures that were plainly targeted at harming the investment of a specific investor.[554] Here, by comparison, Peru implemented generally-applicable measures, further to contemporaneously cited public welfare objectives, to provide

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[552] *S.D. Myers Inc. v. Gov't of Canada*, UNCITRAL, Partial Award dated 13 Nov. 2000 (RA-57) ¶ 263 (emphasis added); *see also, e.g., Continental Casualty Company v. Argentina Republic*, ICSID Case No. ARB/03/9, Award dated 5 Sept. 2008 (RA-95) ¶ 181 ("[T]his objective assessment must contain a *significant margin of appreciation* for the State applying the particular measure.") (emphasis added); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award dated 26 Jan. 2006 (RA-77) ¶ 127 ("[G]overnments have a *particularly wide scope* of regulation reflecting national views on public morals . . . it has a *wide discretion* with respect to how it carries out such policies by regulation and administrative conduct.") (emphasis added).

[553] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 (RA-79) ¶¶ 272-273 (emphasis added); *see also Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 (RA-65) ¶ 122 (holding that "the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values").

[554] *See ADC Affiliate Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 (RA-80) ¶¶ 262-285, 429-433 (ruling that the State made "half-hearted *ex post facto* attempt[s] at justification" for a decree voiding contract to operate and manage airport, and that there was no "genuine interest of the public"); *Abengoa S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award dated 18 Apr. 2013 (RA-129) ¶¶ 618-619 (concluding the "artificial nature" of a decision to cancel hazardous facility operating license was "obvious" because "it is not in dispute that the Plant had all the necessary environmental authorizations" and "there is no evidence that the Plant might have entailed a public health risk"); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 (RA-65), ¶¶ 147-149 (holding that resolution denying renewal of operating permit was not justified by public interest, including because "operation of the Landfill never compromised the ecological balance, the protection of the environment or the health of the people"); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award dated 31 Oct. 2012 (RA-122), ¶¶ 521-523 (holding that it was "a not typical case of regulatory action" because "the entire value of [the] investment was expropriated for the benefit of Sri Lanka itself," and the measures "were not legitimate regulatory actions"); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 (RA-84) ¶ 273 (rejecting public interest rationale because decree was the "culminat[ion]" of a year-long process, to cancel contract and "reduce the costs to Argentina" with "no evidence of a public purpose"); *see also* Third Amended Notice ¶¶ 160162, 166-168 (citing and discussing above-mentioned cases). Two other cases cited by Gramercy also are irrelevant; one involved a State that had expressly stated its purpose to nationalize an entire industry, and the other affirmed the legitimacy of the State's public interest. *See Phillips Petroleum Co. Iran v. Iran*, Iran-US Claims Tribunal Case No. 425-39-2, Award dated 29 June 1989 (RA-52) ¶ 97 ("[W]here the effects of actions are consistent with a policy to nationalize a whole industry and to that end expropriate 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"); *James and Ors v. United Kingdom*, ECHR App. No. 8793/79, Judgment dated 21 Feb. 1986 (RA-50) ¶¶ 46-49, 70, 72 (rejecting expropriation claims while confirming State's "margin of appreciation" for addressing public interest needs and ruling that public interest for leasehold reform legislation was appropriate).

compensation to *all* holders of Agrarian Reform Bonds without discrimination. Indeed, the Constitutional Tribunal's July 2013 Order directed that it "shall be applied *to the benefit of all bondholders* with outstanding claims on their bonds,"[555] and all subsequent measures accordingly applied in non-discriminatory fashion to all bondholders – and not in a manner that targeted Gramercy or its alleged investment for unfair treatment, based on nationality or otherwise, as detailed below.

246. Finally, Gramercy's allegation that the measures were not "proportional" to the public interest at issue likewise is irrelevant, because it is based on the fundamentally flawed predicate that the State "destroyed" the value of the Bonds. As addressed above, that simply is not the case. Gramercy's expropriation claim must fail.

A. Peru Did Not Violate The Obligation To Accord The Minimum Standard Of Treatment

247. Article 10.5 provides, in relevant part, that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment."[556] It further specifies that, "[f]or greater certainty," this "prescribes the customary international law minimum standard of treatment," and "[t]he concept[] of 'fair and equitable treatment' . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights."[557]

248. Gramercy alleges that Peru violated Article 10.5 because it (i) contravened legitimate expectations after "encouraging" Gramercy to invest under a "robust legal framework" that purportedly "promis[ed]" payment of the Bonds at current value; (ii) deprived Gramercy of its "right" to payment through a denial of justice; and (iii) "evad[ed]" payment through "arbitrary and unjust" court decisions and regulatory measures.[558] In each respect, Gramercy's claim is unfounded and must be dismissed.

249. *First*, Gramercy never had legitimate expectations. Peru did not make any commitment to pay the Agrarian Reform Bonds at Gramercy's preferred speculative CPI valuation, whether as part of Peru's legal framework governing foreign investment, or as part of its various efforts over decades to resolve the historic and unique Bond issue. Gramercy made a speculative investment at a time of longstanding legal uncertainty, as its own contemporaneous assessments and testimony in this proceeding underscore.

250. *Second*, Peru did not commit a denial of justice through the 2013 Constitutional Tribunal proceeding – to which Gramercy was not a party and thus has no standing to challenge. The Constitutional Tribunal rendered its July 2013 Resolution in accordance with Peruvian law, repeatedly validated that Resolution in subsequent decisions, and the sole magistrate whose vote purportedly was "forged" has expressly confirmed his

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[555] Constitutional Tribunal Resolution dated 16 July 2013 (RA-286), Resolution 3 (emphasis added).

[556] Treaty (CE-139), Article 10.5.1.

[557] Treaty (CE-139), Article 10.5.2; *see also* Treaty (CE-139), Annex 10-A ("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.").

[558] Third Amended Notice ¶ 180.

vote in favor of the Resolution. None of Gramercy's unfounded allegations meets the demanding burden required under the denial of justice standard.

251. *Third*, Peru has not "evaded" payment through arbitrary or unjust measures. Just the opposite: the Bondholder Process implemented by Supreme Decree pursuant to the Constitutional Tribunal Resolutions established, for the first time, a clear legal framework for payment of the Bonds – pursuant to a transparent, detailed, and carefully regulated procedure grounded in Peruvian law, fundamental due process, and international best practices. Gramercy's various efforts to impugn the legitimacy of the Bondholder Process and the measures giving rise to it are baseless. Gramercy has suffered no violation of the minimum standard of treatment, and instead seeks to obtain preferential treatment through this arbitration.

1. Gramercy Had No Legitimate Expectations

252. Gramercy argues that the "dominant element" of fair and equitable treatment is "the notion of legitimate expectations."[559] Even assuming for the sake of argument that were accurate, the absence of any legitimate expectations in this case underscores the absence of any violation of Article 10.5.

253. According to Gramercy, legitimate expectations entitle an investor to "rely on th[e] legal framework as well as on representations and undertakings made by the host state."[560] Numerous tribunals, however, have cautioned against an overly-broad application of the concept, and have emphasized that an investor must have received *specific* promises or guarantees that the State would not make changes to the legal framework existing at the time the investment was made. An investor is not entitled to a frozen regulatory framework. As the tribunal in *EDF v. Romania*, for example, held:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.[561]

254. The tribunal in *Parkerings v. Lithuania* likewise underscored that "[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power"; "[i]t is

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[559] Third Amended Notice ¶ 178 (quoting *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 (RA-79) ¶ 302).

[560] Third Amended Notice ¶ 181 (quoting *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award dated 12 Nov. 2010 (RA-110) ¶ 285).

[561] *EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 Oct. 2009 (RA-103) ¶¶ 217.

evident that not every hope amounts to an expectation under international law"; and, "[a]s a matter of fact, any businessman or investor knows that laws will evolve over time."[562]

255. Gramercy pins its hopes on "assurances" purportedly made by Peru in two sources: (i) "general representations" as to "a stable and transparent framework" to encourage foreign investment; and (ii) "commitments" under Peruvian law to pay the Bonds at current value using CPI.[563] Neither such alleged assurance could give rise to legitimate expectations.

256. *First*, Gramercy misleadingly focuses on efforts by Peru to attract *foreign* investment, including through the ratification of treaties and the publication of prospectuses for the sale of contemporary Global Bonds on international markets.[564] Indeed, Gramercy repeatedly conflates the Agrarian Reform Bonds and Peru's Global Bonds, notwithstanding fundamental differences between the two. As detailed above and in the expert report of Dr. Pablo Guidotti, the Agrarian Reform Bonds "are readily distinguishable from contemporary global bonds and sovereign finance" – including, *inter alia*, because the Bonds were distributed through Peruvian judicial proceedings to compensate for land redistribution in Peru, were not marketed or issued in international capital markets, are denominated in Peruvian currency, are governed by Peruvian law, and are subject to the sole jurisdiction of Peruvian courts.[565]

257. Peru's efforts to attract foreign investment – through treaties, contemporary global bond issuances, or otherwise – have nothing to do with the domestic Agrarian Reform Bonds. Further, any such "general representations," entirely removed from the Bonds themselves, are insufficient to give rise to legitimate expectations.[566] Gramercy's attempt to manufacture expectations out of them, for its speculative investment in these decades-old Peruvian instruments, is unfounded.

258. *Second*, Gramercy fares no better with the "commitments" as to the Agrarian Reform Bonds that it claims to have relied on under Peruvian law. No investor is entitled to a frozen legal framework, even where that framework is established and clear. Here, there was no such framework in place at the time of Gramercy's alleged investment. Rather, as detailed

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[562] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 Sept. 2007 (RA-87) ¶¶ 332, 334; *see also id.* ¶ 332 ("A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about [an] amendment brought to the regulatory framework existing at the time an investor made its investment.") *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability dated 27 Dec. 2010 (RA-112) ¶ 120 ("[I]t is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect.").

[563] Third Amended Notice ¶¶ 183, 186.

[564] *See, e.g.*, Third Amended Notice ¶¶ 41-47, 186.

[565] Guidotti ¶¶ 15-19.

[566] *See, e.g., PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award dated 19 Jan. 2007 (RA-83) ¶ 243 ("True enough, the whole [] policy was built on the premise that foreign investments would be needed, encouraged and welcome, but this was a matter of general policy that did not entail a promise made specifically to the Claimants about the success of their proposed project."); *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award dated 5 Sept. 2008 (RA-95) ¶ 261 (ruling that "general legislative statements engender reduced expectations, especially with competent major international investors"); *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 (RA-117) ¶¶ 392, 394 (rejecting State's "aggressive[] target[ing] [of] foreign investors" as a basis for legitimate expectations, and further ruling that the tribunal "cannot consider that any rule or even clear commitment embodied in a general piece of legislation or regulation . . . is in itself a special commitment towards the foreign investors").

above, the state of the law reflected decades of uncertainty, along with various ongoing legislative, executive, and judicial efforts – at times conflicting – to lend clarity. As noted, Gramercy itself concluded at the time, *inter alia*, that there was "complexity surrounding the investment opportunity," that "draft legislation" was under consideration, and that there was a "discrepancy" as to possible applicable valuation methods.[567] Likewise, Gramercy confirms in this proceeding that "there was not yet any consensus" about how payment of the Bonds "would actually happen," and that Peru "had no plan regarding how to do so."[568]

259. Gramercy's own words underscore that Peru did not make a "commitment" to holders of Agrarian Reform Bonds that payment would be made at current value using CPI (let alone as of the date of issuance, as Gramercy prefers). Indeed, court decisions in proceedings not involving Gramercy, draft legislative measures, and executive vetoes hardly constitute specific "commitments" giving rise to legitimate expectations. Each such instance now relied upon by Gramercy, moreover, involved steps by Peru to resolve the historic and long-outstanding matter of the Bonds – and *not* to encourage or induce new investment in those old instruments. Peru certainly never encouraged speculative investment by foreign investors.

260. Ultimately, moreover, Peru did not "abruptly chang[e] course,"[569] as Gramercy alleges. Instead, the Bondholder Process implemented pursuant to the 2013 Resolutions and subsequent Supreme Decrees established, for the first time, a clear framework for the payment to legitimate holders of the Bonds. Any purported expectations that Gramercy claims to have had as to an alternative framework were inherently speculative, and not reasonable or legitimate as required to sustain an Article 10.5 claim.

2. Gramercy Did Not Suffer A Denial of Justice

261. Gramercy alleges that a "deeply tainted judicial process"[570] leading to the July 2013 Constitutional Tribunal Resolution constitutes a denial of justice. Gramercy fails to mention, however, that the standard for a denial of justice is exacting – and requires elements that Gramercy could not possibly meet. As the tribunal in *Chevron v. Ecuador*, drawing on widely-cited authorities, recently confirmed:

> [T]he standard for denial of justice . . . '[i]s a *demanding* one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. *A denial of justice implies the failure of a national system as a whole to satisfy minimum standards*.'[571]

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[567] 2006 Memorandum, at 1-4 (CE-114) (emphases added).

[568] Koenigsberger ¶ 34 (emphasis added).

[569] Third Amended Notice ¶ 181.

[570] Third Amended Notice ¶¶ 208-211.

[571] *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 (RA-152) ¶ 8.36 (emphasis added) (quoting *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award dated 23 April 2012 (RA-119) ¶ 273).

262. It is fundamental that an international tribunal cannot act as a "supranational appellate court" sitting in judgment on the decisions of national courts under national laws.[572] Rather, a tribunal instead must strongly presume that courts acted properly and accept their conclusions – *even if erroneous* as a matter of local law – absent proof of a serious deficiency in the entire judicial system rising to the level of an international law violation.[573] Gramercy's denial of justice claim, entirely divorced from this deferential standard, is fatally flawed in several respects.

263. *First*, Gramercy has no standing to bring the claim; it could not have suffered a denial of justice because it was not a party to the judicial proceeding it seeks to challenge. The minimum standard of treatment under Article 10.5, which includes "the obligation not to deny justice," applies only with respect to "covered investments" – and thus not to investments of unrelated third parties.[574] Indeed, a denial of justice claim "can only be successfully pursued by a person that was denied justice through court proceedings *in which it participated as party*"[575] – or, at minimum, in which its local investment vehicle participated as a party. Neither circumstance is present here. It is undisputed that the proceedings before the Constitutional Tribunal were brought by the College of Engineers of Peru, a Peruvian entity; Gramercy merely "followed" those proceedings.[576] Accordingly, Gramercy cannot bring a denial of justice claim based on purported shortcomings in those proceedings.

264. *Second*, even assuming that Gramercy did have standing to bring a denial of justice claim, it failed to satisfy the prerequisite exhaustion of local remedies. It is well established that the "exhaustion of local remedies is a required substantive element of a claim for denial of justice."[577] A claimant must "first proceed[] through the judicial system that it purports to challenge, and thereby allow[] the system an opportunity to correct itself," before it may challenge that system at the international level.[578] Here, Gramercy did not and could

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[572] *Apotex Inc. v. United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility dated 14 June 2013 (RA-131) ¶ 278; *see also, e.g., Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (RA-128) ¶ 441 ("[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts."); *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 (RA-62) ¶ 136 (holding that "[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State").

[573] *See, e.g., Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 (RA-152) ¶ 8.41 ("A claimant's legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly."); *Helnan Int'l Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB05/19, Award dated 3 July 2008 (RA-92) ¶ 106 ("An ICSID Tribunal will not act to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law. . . .").

[574] *See* Treaty (CE-139), Articles 10.5.1, 10.5.2(a).

[575] *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013 (RA-128) ¶ 435 (emphasis added).

[576] *See, e.g.*, Koenigsberger ¶ 50.

[577] *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, UNCITRAL, Interim Award dated 1 Dec. 2008 (RA-98) ¶ 235 (emphasis omitted).

[578] *Apotex Inc. v. United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility dated 14 June 2013 (RA-131) ¶ 282.

not exhaust judicial remedies because it was not a party to the relevant proceedings. Gramercy's ineligibility even to *attempt* to meet the exhaustion requirement underscores that it has no standing to bring a denial of justice claim.

265. *Third*, even assuming that Gramercy did have standing and did exhaust judicial remedies, its allegations regarding the Constitutional Tribunal proceeding *still* could not sustain a denial of justice claim. The denial of justice standard requires "*exceptionally outrageous or monstrously grave breaches* of municipal law [where] . . . it must be shown that one can no longer explain the sentence rendered *by any factual consideration or any valid legal reason*."[579] A claimant must "prove objectively that the impugned judgment was clearly improper and discreditable, with the failure by the national system as a whole to satisfy minimum standards."[580] Gramercy does not, and cannot, make such a showing.

266. Gramercy alleges that the July 2013 Resolution exceeded the Constitutional Tribunal's jurisdiction, was based upon an unsupported factual premise and not properly reasoned, and did not comply with applicable procedures.[581] To the contrary, as Peruvian law expert Dr. Hundskopf explains, the Constitutional Tribunal had the competence to issue its Resolution and ruled in accordance with Peruvian law (including its own prior jurisprudence), and any alleged defects would not be sufficient to invalidate the Resolution.[582] Further, the Constitutional Tribunal itself confirmed the validity of its Resolution in subsequent decisions. In other words, the Resolution was supported by defensible, and indeed valid, factual considerations and legal reasons, and hardly reflects "exceptionally outrageous or monstrously grave breaches of municipal law."[583] It is not for an international tribunal, let alone Gramercy, to second-guess those determinations by Peru's highest court under Peruvian law.

267. Gramercy also alleges that the July 2013 Resolution followed a "mysterious visit" by government officials and was "surprisingly consistent" with the recommendations of a MEF advisor.[584] These allegations likewise do not rise to the level of a denial of justice violation – and, in any event, are baseless. Minister Castilla does not recall that any such meeting took place (although Gramercy's own lawyers did have ten documented visits to the Constitutional Tribunal in 2013); both the Administration and Congress publicly stated that it would be inappropriate for the Constitutional Tribunal to even rule on the petition; and the President of the Constitutional Tribunal publicly stated that "we do not act in accordance with what the President wants."[585] Later, after it was issued, officials responded with criticism of

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[579] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 83 (2005) (RA-72) (emphasis added); *see also Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (RA-128) ¶ 442 ("[A] denial of justice is engaged if and when the judiciary has rendered final and binding decisions after *fundamentally unfair and biased* proceedings or which *misapplied the law in such an egregiously wrong way*, that no honest, competent court could have possibly done so.") (emphasis added).

[580] *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 (RA-152) ¶ 8.40 (internal quotations omitted).

[581] Third Amended Notice ¶ 210.

[582] Hundskopf (RER-2) ¶ 11.

[583] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 83 (2005) (RA-72).

[584] Third Amended Notice ¶ 210.

[585] Conferencia de Prensa convocada por Urviola sobre los dichos de Humala. https://peru21.pe/opinion/actuamos-funcion-le-guste-presidente-115013.

the Resolution, further undermining Gramercy's unfounded claim that the Administration somehow was "in league" with members of the Constitutional Tribunal.

268. Gramercy also alleges that the 2013 Resolution "critically depended on a forged 'dissent'" that was "manufactured" using white-out.[586] This allegation also is misleading and unfounded. As detailed above, one magistrate on the Constitutional Tribunal decided to vote in favor of the final Resolution, and his signature on another draft was correspondingly removed by a clerk of the court. That magistrate has since confirmed that his vote was properly counted in favor of the final ruling, and the Constitutional Tribunal has confirmed the Resolution's validity. In addition, the Attorney General's office has brought charges against the clerk for his violation of applicable procedure. This underscores that the validity of the July 2013 Resolution itself is not in question – and, further, that Peru has taken steps, pursuant to Peruvian law, to address the alleged improprieties. Gramercy thus has failed to "prove objectively" that the Resolution was "clearly improper and discreditable, with the failure by the national system as a whole."[587] Indeed, the evidence repudiates any such allegation.

269. Finally, and consistent with the proper functioning of the Peruvian courts, it is noteworthy that Gramercy raises no complaint as to the local proceedings in which it did participate. Just the opposite: Gramercy states that it "was progressing well" with claims on the Agrarian Reform Bonds in Peruvian court until it unilaterally chose to withdraw those claims in favor of this arbitration.[588] This further repudiates Gramercy's claim that it was denied justice as a matter of international law through an allegedly tainted Peruvian judiciary.

3. Peru's Measures Were Non-Arbitrary, Just, And In Accordance With Due Process

270. Gramercy alleges that the Constitutional Tribunal Resolutions, Supreme Decrees, and Bondholder Process implemented pursuant to those measures are "arbitrary" and "unjust," in violation of the minimum standard of treatment.[589]

271. Gramercy acknowledges that, under the widely-accepted *Waste Management v. Mexico* formulation, a violation of the minimum standard of treatment requires a showing of conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – 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."[590] As the *AES v. Hungary* tribunal similarly observed, "[i]t is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, *manifestly unfair or unreasonable (such as would shock, or at least surprise a*

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[586] Third Amended Notice ¶¶ 210-211.

[587] *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 (RA-152) ¶ 8.40 (internal quotations omitted).

[588] Third Amended Notice ¶ 157.

[589] Third Amended Notice ¶¶ 194-207.

[590] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 (RA-69) ¶ 98; *see also* Third Amended Notice ¶ 177 (quoting same).

sense of juridical propriety) . . . that the standard can be said to have been infringed."[591] In *Biwater Gauff v. Tanzania*, also cited with approval by Gramercy, the tribunal confirmed that this "threshold is a high one."[592] Gramercy's claim fails to meet this high threshold.

272. *First*, Gramercy alleges that the Constitutional Tribunal's reasons for rejecting the CPI valuation method were "objectively wrong and had no evidentiary foundation," and that, even by issuing the July 2013 Resolution, the court acted outside its competence and in violation of procedure.[593] As with the denial of justice standard, however, the conclusions of Peru's highest court as to matters of Peruvian law are subject to significant deference in assessing the minimum standard of treatment; indeed, even if the Constitutional Tribunal had erred under Peruvian law, this alone could not give rise to a breach of the Treaty.[594] Further, as detailed above, the Constitutional Tribunal was, in fact, competent to issue the Resolutions, and did so in accordance with Peruvian law.[595] Likewise, Gramercy's allegation that the Resolution "lacked the votes necessary to have been approved"[596] is without merit. The Resolution was decided with the necessary votes, the magistrate whose decision purportedly was "forged" has confirmed his approval vote, and the Resolution remains valid and binding under Peruvian law.

273. *Second*, Gramercy alleges that the compensation formulas included as part of the Supreme Decrees for valuation of the Agrarian Reform Bonds are "completely nonsensical" and "made up out of thin air."[597] To the contrary, the formulas were adopted as part of an administrative procedure implemented in accordance with Peruvian law, further to the parameters established by the 2013 Resolutions, as Dr. Hundskopf confirms.[598] Further, the Quantum Expert explains that the compensation formulas are economically viable and reasonable, establishing a valuation for payment of the Bonds' unclipped coupons, adjusted for inflation from when the coupons could or should have been presented for payment.[599] Indeed, the Quantum Expert concludes that Gramercy's own purported valuation formula, as

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[591] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated 23 Sept. 2010 (RA-108) ¶ 9.3.40 (emphasis added); *see also, e.g.*, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 dated 29 May 2003 (RA-65) ¶ 154 (ruling that a State breaches its obligation to provide fair and equitable treatment where the State's conduct "shocks, or at least surprises, a sense of juridical propriety") (internal quotations omitted).

[592] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 (RA-93) ¶¶ 597-599; *see also* Third Amended Notice ¶ 176 (quoting *Biwater Gauff* ¶ 592); *British Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award dated 16 Jan. 2013 (RA-127) ¶ 227 (accepting the *Waste Management* formulation of the standard as "the correct approach" and confirming that this is a "high threshold"); *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 (RA-136) ¶¶ 442-444 (noting that the *Waste Management* formulation is "particularly influential" and concluding that "[a]cts or omissions constituting a breach must be of a serious nature").

[593] Third Amended Notice ¶¶ 196-197.

[594] *See, e.g.*, *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 (RA-152) ¶ 8.41.

[595] *See* Hundskopf (RER-2) ¶ 11.

[596] Third Amended Notice ¶ 197 (quoting Revoredo ¶¶ 40-41).

[597] Third Amended Notice ¶ 198 (quotations and citations omitted).

[598] Hundskopf (RER-2) ¶ 11.

[599] See Quantum ¶¶ 61-66.

proposed by Professor Edwards, is "nonsensical."[600] Professor Edwards' valuations are fundamentally flawed because, *inter alia*, they essentially rewrite the terms of the Bonds to include inflation, and other adjustments and guarantees, that were not in the original terms of the instruments, and calculate for compensation of expropriated land which Gramercy never owned.[601]

274. *Third*, Gramercy alleges that the issuance of the Supreme Decrees in 2014 and 2017 was "chaotic and non-transparent."[602] To the contrary, the issuance of each Supreme Decree entailed a comprehensive, methodical process, per Peruvian law:

- **Evaluation and Recommendation.** DGETP, the MEF agency responsible for the Bondholder Process, prepared a detailed Report evaluating the background and legal framework for the Bonds, the Constitutional Tribunal Resolutions, and providing recommended draft Decree text to implement the Resolutions. The DGETP materials also included an Aide Memoire and Statement of Reasons.

- **Legal Confirmation.** The MEF's Office of General Counsel prepared a detailed Report assessing the DGETP evaluation and recommended Decree text, and confirming that the Decree complied with all applicable laws and Resolutions.

- **Authorization.** All of the foregoing were presented to the President and relevant Ministers for review, authorization, and final signature.

- **Publication.** The final, signed Supreme Decree was published in the Official Gazette "El Peruano" for public review and transparency.

275. Further, as these contemporaneous MEF documents confirm, the issuance of each Supreme Decree from January 2014 to August 2017 served a specific, reasoned purpose:

- **Supreme Decree No. 017-2014-EF.** Established the parameters of the Bondholder Process, per the requirements of the 2013 Resolutions. Provided that payment options would be confirmed once a minimum number of legitimate bondholders had registered, thus enabling the MEF to assess the impact of Bond payments on the fiscal balance and financial sustainability.

- **Supreme Decree No. 019-2014-EF.** Amended the Bondholder Process to include registration of Bonds for which some coupons had been clipped, thus broadening the scope of Bondholders eligible to participate in the Process.

- **Supreme Decree No. 034-2017-EF.** As anticipated, established options for payment through the Bondholder Process, and created a Working Group to assist with implementation of payment procedures. Following MEF consultations with leading economic experts, included refinements to valuation methodology to eliminate earlier ambiguity resulting from an "error tipográfico."

- **Supreme Decree No. 242-2017-EF.** Consolidated the prior Supreme Decrees in a single, unified text in order to clarify the Bondholder Process for all

[600] Quantum ¶ 147.

[601] Quantum ¶¶ 16, 134.

[602] Third Amended Notice ¶ 200.

stakeholders. Refined valuation methodology, specifying the date as to which the value of Bonds is to be actualized and that price parity should be determined by the Central Bank.

276. Accordingly, as the contemporaneous evidence of the development, authorization, and implementation of each Supreme Decree confirms, the process was comprehensive, reasoned, and organized – in full compliance with applicable Peruvian law and procedures. Further to the Constitutional Tribunal's 2013 Resolutions, the Supreme Decrees ended years of longstanding legal uncertainty as to the Agrarian Reform Bonds, and established a Bondholder Process for the authentication and payment of Bonds at current value. Dr. Wühler concludes as a matter of international best practices that the Supreme Decrees are precise, comprehensive, and provide a sufficiently clear framework for implementation and execution of the Bondholder Process.[603]

277. Nonetheless, Gramercy also complains that Peru took purportedly "erratic steps without consulting any of the bondholders."[604] Gramercy's suggestion that consultations with bondholders were required as part of this domestic administrative and regulatory process has no basis in Peruvian law – but, rather, reflect Gramercy's ongoing efforts to conflate the Agrarian Reform Bonds with contemporary global bonds.

278. *Fourth*, Gramercy alleges that the Bondholder Process "strip[s] bondholders of all rights," including in particular by "requiring them to waive their right to seek relief in other fora," granting the Government discretion to determine payment amount and form, and mandating a payment order between different categories of bondholders.[605] Each of these complaints is unfounded. In fact, the Bondholder Process conforms with both Peruvian law and international best practices for claims mechanisms:

- **Due Process.** Participation in the Bondholder Process requires that a bondholder with claims pending in court, with no decision yet rendered, withdraw those claims in order to be paid through the Process. Dr. Wühler confirms that "[e]xclusivity is a common feature of mass claims mechanisms."[606] As he further observes, "the Bondholder Process is not entirely exclusive."[607] Rather, in proceedings where a court has rendered a decision but not yet set a valuation, the bondholder obtains payment through that judicial process, subject to the Bondholder Process valuation methodology.[608] Also, critically, the Bondholder Process preserves the due process rights of participating bondholders to seek recourse through, at various stages, litigation and administrative appeals.[609] Dr. Wühler concludes that "the provisions in the Bondholder Process regarding

[603] *See, e.g.*, Wühler ¶ 6.

[604] Third Amended Notice ¶ 202.

[605] Third Amended Notice ¶ 206.

[606] Wühler ¶ 64; *see also id.* ¶ 66 ("[M]any claims mechanisms require the claimants to sign a waiver by which they undertake not to seek the same remedy in a judicial or any other forum in the event they succeed in the claims process.").

[607] Wühler.

[608] Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Final Complementary Provisions First and Second.

[609] *See, e.g.*, Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23).

exclusivity are in line with, and less rigid than, the standard practice of comparable programs."[610]

- **Payment Options.** The Bondholder Process offers bondholders the *choice* of four payment options (sovereign bonds, land owned by the State, cash, or investment in State sectors), or a combination of the four.[611] Each bondholder's choice is subject to confirmation of viability by DGETP, through a transparent procedure that Dr. Wühler observes is the "most participative" aspect of the Bondholder Process.[612] He further concludes that, "by offering a choice . . . the Bondholder Process is responsive to the needs and wishes of the applicants," presenting "a distinct advantage for the beneficiaries which is hardly found to such an extent in other claims mechanisms."[613]

- **Payment Order.** Further to the 2013 Resolutions, applying fundamental constitutional principles, the Bondholder Process implements a reasonable and transparent payment order (for cash payments only) that prioritizes original bondholders and the elderly, natural persons over juridical entities, and non-speculative investors over speculative investors.[614] Dr. Wühler confirms that "[m]any claims programs have introduced categories of claimants and beneficiaries that are to receive priority treatment, both in processing and the receipt of payments or other benefits," and that "[p]rovisions on prioritization such as those in the Bondholder Process are common in mechanisms of a similar nature and not inconsistent with international practice."[615]

279. In other words, the Bondholder Process implemented by the Supreme Decrees pursuant to the Constitutional Tribunal Resolutions offers a transparent, detailed, and organized system – grounded in Peruvian law, international best practices, and fundamental due process principles – for bondholders to receive payment for their Bonds. Gramercy's misguided efforts to depict the Bondholder Process as "draconian" and in "bad faith"[616] have no basis in fact or law, and cannot give rise to a violation of the minimum standard of treatment obligation under Article 10.5 of the Treaty. Ultimately, moreover, Gramercy's allegations as to the Bondholder Process have no bearing on any purported "treatment" that its alleged investment has received, because Gramercy unilaterally opted to boycott the Process and instead to seek preferential treatment in this arbitration proceeding.

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[610] Wühler ¶ 65.

[611] *See* Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 16.

[612] Wühler ¶ 55; *see also* Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 17.

[613] Wühler ¶ 55.

[614] *See* Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 18; *see also* Hundskopf ¶ 128; Constitution of the Republic of Peru, Art. 4.

[615] Wühler ¶¶ 68, 70.

[616] *See, e.g.*, Third Amended Notice ¶¶ 206-207.

B. Peru Did Not Accord Gramercy Less Favorable Treatment Than It Accorded National Investors

280. Article 10.3 of the Treaty provides, in relevant part, that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors."[617] Gramercy alleges that Peru violated this obligation "[b]y placing the only known foreign legal entity that owns Land Bonds last in line for payment."[618] According to Gramercy, Peru accorded it less favorable treatment than it accorded Peruvian investors because, under the payment structure established in the Supreme Decrees, legal entities that acquired the Agrarian Reform Bonds for "speculative purposes" are to be paid after other bondholders.[619] Gramercy's national treatment claim is without merit and must be dismissed because it cannot meet two fundamental requirements.

281. *First*, Gramercy is not "in like circumstances" with all Peruvian holders of Agrarian Reform Bonds. Gramercy's claim that it is a comparable investor to any Peruvian national holder of the Bonds, without distinction, is unfounded – and, indeed, refuted by the Supreme Decrees themselves, which confirm a number of distinct categories of bondholders, and structure the order of cash payments accordingly, further to legitimate public interests under Peruvian law.

282. *Second*, even when compared to disparate Peruvian bondholders, Gramercy has not been accorded less favorable treatment, let alone less favorable treatment arising from its nationality. The Supreme Decrees do not reflect *de jure* or *de facto* discrimination of any kind, but rather implement a transparent and properly reasoned structure of cash payments consistent with requirements of Peruvian law and international best practices. Gramercy was free to participate equally with all other holders in the Bondholder Process, but instead chose to boycott it.

1. Gramercy Is Not "In Like Circumstances" With All Peruvian Holders Of Agrarian Reform Bonds

283. Article 10.3 expressly provides that the national treatment obligation applies only with respect to "treatment" accorded Peruvian nationals that are "in like circumstances" with Gramercy. Gramercy suggests that it is "like" all Peruvian holders of Agrarian Reform Bonds because the Land Reform Act of 1969 did not distinguish between bondholders for purposes of payment, and Decree Law No. 22749 of 1979 provided for free transferability, "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."[620] This misses the point entirely.

284. The "treatment" forming the alleged basis for Gramercy's Article 10.3 claim is neither the Land Reform Act nor Decree Law No. 22749, but rather the cash payment structure ordered by the 2013 Constitutional Tribunal Resolutions and established under the Supreme Decrees. Accordingly, the point of comparison for purportedly "like" bondholders

[617] Treaty (CE-139), Art. 10.3.1; *see also id.* Art. 10.3.2 (providing national treatment as to "covered investments").

[618] Third Amended Notice ¶ 215.

[619] Third Amended Notice ¶ 221.

[620] Third Amended Notice ¶ 220.

is treatment under the Resolutions and Supreme Decrees, and not decades-old laws from the Agrarian Reform process – long before Gramercy made its alleged speculative acquisitions.

285. Further, the "like circumstances" assessment is fact-specific, and generally requires closely analogous circumstances. It is well established that a claimant is not "like" host State nationals merely because they invest in the same category of assets or in the same field. In *Champion Trading v. Egypt*, for example, the tribunal ruled that the claimant's cotton trading company could not be compared to local cotton traders because the locals bought through a State system at fixed prices (and thus were eligible for different compensation under local law), while the claimant instead "opt[ed] to trade on the free market" (and thus was not eligible).[621] In *Rusoro v. Venezuela*, the tribunal found that the State "ha[d] adopted an official policy, differentiating between small scale, traditional miners and large companies and offering additional support and less stringent requirements to small miners."[622] The tribunal concluded that "[t]hus [claimant] (and other large miners) and small scale miners are not 'in like circumstances,' and the difference in treatment is justified by valid policy reasons."[623] In each case, the tribunal found that the treatment accorded by the State was driven by differences between the claimant and local investors unrelated to nationality – and notwithstanding their participation in the same area of investment – and denied the national treatment claim.

286. Here, as authorized and directed by the 2013 Resolutions, the Supreme Decrees explicitly establish different categories of bondholders, thus refuting Gramercy's claim that it and all other holders of Agrarian Reform Bonds are alike for purposes of Article 10.3.[624] As noted above, Dr. Wühler confirms that "[m]any claims programs have introduced categories of claimants and beneficiaries that are to receive priority treatment, both in processing and the receipt of payments or other benefits."[625] These distinctions between different categories of bondholders underscore that holders of Agrarian Reform Bonds are not all "in like circumstances."

287. Ultimately, moreover, Gramercy must demonstrate that any alleged difference in treatment between investors is *nationality based*.[626] The categorization of

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[621] *Champion Trading Co. & Ameritrade Int'l, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award dated 27 Oct. 2006 (RA-82) ¶¶ 154-155; *see also id.* ¶ 156 ("Since the Arbitral Tribunal came to the conclusion that the companies were not in a like situation, it does not need to analyze the other requirements which prohibit discrimination on the grounds of nationality.").

[622] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 Aug. 2016 (RA-147) ¶ 563.

[623] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 Aug. 2016 (RA-147) ¶ 563; *see also, e.g.*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (RA-102) ¶ 416 (concluding that small-scale local contractors were not "like" the claimant, a company in the business of large infrastructure projects, due to differences in "expertise and experience of the contractors . . . . which was reflected in the higher rates charged by Bayindir, [and] played a role in the expectations that [the State highway authority] formed with respect to each contractor").

[624] *See* Supreme Decree No. 017-2014-EF dated 18 Jan. 2014, Art. 19 (RA-16); Supreme Decree No. 242-2017-EF dated 19 Aug. 2017 (RA-23), Art. 18 (applying same payment order for cash payments).

[625] Wühler ¶ 68.

[626] *See, e.g.*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (RA-102) ¶ 387 (holding that the purpose of a national treatment provision "is to provide a level playing field between foreign and local investors"); *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 (RA-66) ¶ 139 (confirming that the national treatment obligation is "direct[ed] only to nationality-based discrimination and . . . proscribes only

bondholders is not. It is well established that there can be no breach of a national treatment obligation where purportedly differential treatment is justified by a plausible, non-discriminatory government policy. For example, as the tribunal in *GAMI v. Mexico* reasoned:

> The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.[627]

288. Here, the structure for cash payments ordered by the Constitutional Tribunal and implemented by the Supreme Decrees reflects a legitimate policy decision by Peru, pursuant to fundamental constitutional principles, to make reasonable distinctions between various bondholders – including the elderly and the young, original and non-original holders, individuals and legal entities, and legal entities acquiring under different circumstances. Such prioritization is in accordance with Peruvian law, which includes "special protections" for certain categories of citizens, including the elderly and those with advanced illnesses – as expressly provided under the Constitution and confirmed by Dr. Hundskopf.[628]

289. Similar to *Champion Trading* (where, for purposes of compensation, local law distinguished between traders purchasing through a State system or on the free market) and *Rusoro* (where, for purposes of State support, local law distinguished between small-scale and large-scale operators), valid distinctions exist in this case between the various categories of bondholders. The State regulated accordingly pursuant to Peruvian law and legitimate public interests. Gramercy has no basis for its sweeping claim, without distinction, that it is "'in like circumstances' with Peruvian bondholders,"[629] nor to claim that the categories themselves reflect discriminatory treatment.

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demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome"); *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 Nov. 2010 (RA-109) ¶ 426 ("It is necessary first and foremost to establish that a government action or inaction has discriminated between domestic and foreign investors, i.e., that it has accorded 'less favourable' treatment to foreign as opposed to domestic investors.").

[627] *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award dated 15 Nov. 2004 (RA-71) ¶ 114.

[628] Hundskopf ¶ 127; *see also* Resolution of the Constitutional Court dated 16 July 2013 ¶ 29 (applying prioritization criteria "in consideration of criteria of equity, and taking into account the special constitutional protection provided in Article 4 of our Constitution"); Constitution of the Republic of Peru, Art. 4 ("The community and the State extend *special protection* to children, adolescents, mothers, and the elderly . . . .") (emphasis added).

[629] *See* Third Amended Notice ¶ 220.

2. Peru Did Not Accord Gramercy Less Favorable Treatment

290. Even assuming that the disparate categories of Peruvian bondholders somehow were all "in like circumstances" with each other and with Gramercy, Peru has not accorded Gramercy any less favorable treatment as compared to those bondholders.

291. Gramercy has not alleged (and cannot allege) that the Supreme Decrees constitute a form of *de jure* discrimination. Indeed, the Supreme Decrees make no mention of nationality, Peruvian or otherwise, and drawing legitimate distinctions in bondholder categories is permitted. Instead, Gramercy appears to speculate that the Supreme Decrees constitute a form of *de facto* discrimination because, "[t]o Gramercy's knowledge, the last category – targeting entities that purchased Land Bonds for 'speculative purposes' – does not apply to any domestic legal entities."[630] Absent any evidence even of *de facto* discrimination under the Supreme Decrees, Gramercy claims that a 10 February 2016 letter from a member of Congress to the MEF reflects an alleged discriminatory intent to deny Gramercy the right to payment.[631] That letter, in fact, demonstrates just the opposite. The letter to the MEF, dated years after the 2013 Resolutions and the 2014 Supreme Decrees, objects that Gramercy has been extended the *same* treatment as the original holders of Agrarian Reform Bonds whose land was expropriated.[632] Thus, contrary to Gramercy's claims, the letter actually reinforces the non-discriminatory nature of the Bondholder Process, as implemented under the Supreme Decrees.

292. Significantly, Gramercy has not even attempted to allege any way in which the prioritization of cash payments under the Bondholder Process has benefitted Peruvian bondholders over Gramercy. In fact, any purportedly less favorable treatment arising under the payment structure is, at most, merely hypothetical because Gramercy has refused to participate in the Bondholder Process. Any adverse effects purportedly arising from non-payment to Gramercy are the result solely of Gramercy's own choice to boycott that process, and not any measure by Peru. On that basis, too, the national treatment claim must be rejected.

293. Gramercy unilaterally and speculatively injected itself into a domestic bond scenario, and now claims unfair treatment because it is the only foreign investor. Gramercy has been offered, and has refused, treatment that is equal to that given to Peruvian bondholders – hundreds of whom have already participated in the Bondholder Process. By boycotting the Bondholder Process in favor of arbitration, Gramercy actually demands preferential treatment rather than equal treatment. That is not what the national treatment provision protects. Gramercy's claim under Article 10.3 must be dismissed.

C. Peru Accorded Gramercy Effective Means to Enforce Its Alleged Rights, And Continues To Do So

294. Gramercy alleges that Peru violated an obligation to accord Gramercy "effective means" to enforce its rights, based on language in a 1994 Peru-Italy treaty which it

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[630] Third Amended Notice ¶ 222.

[631] Third Amended Notice ¶ 223 (citing Letter from President of the Audit Commission to the MEF dated 10 Feb. 2016 (CE-220)).

[632] *See* Letter from President of the Audit Commission to the MEF dated 10 Feb. 2016 (CE-220).

seeks to import via the Treaty's MFN clause in Article 10.4.[633] According to Gramercy, Article 10.4 permits it to invoke this provision from the Peru-Italy treaty, and Peru violated the effective means requirement by denying Gramercy effective recourse in local courts and in the Bondholder Process.[634] Gramercy's claim is unfounded and must be dismissed.

295. *First*, Gramercy ignores the plain meaning of Article 10.4, which specifies that each Contracting Party "shall accord" to investors and investments "treatment no less favorable than that it accords, *in like circumstances*," to investors or investments of non-Party States.[635] As one tribunal recently held, limiting language in an MFN clause such as "in like circumstances" (or, in that case, "similar situations") prohibits the importation of substantive protections from third-Party treaties, because the "standards of protection included in other investment treaties create legal rights for the investors concerned . . . [and] such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.'"[636] Thus, "[i]t follows that, given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties."[637] Indeed, the United States has expressly confirmed that limitation in other instances.[638] Further, even if Gramercy were not prohibited outright from importing a standard of treatment from the Peru-Italy BIT, it still would be required to demonstrate that Peru has accorded more favorable treatment to Italian investors

[633] Third Amended Notice ¶ 225.

[634] Third Amended Notice ¶¶ 233-236.

[635] Treaty (CE-139), Arts. 10.4.1 & 10.4.2 (emphasis added).

[636] *Ickale Inşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (RA-142) ¶ 329.

[637] *Ickale Inşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (RA-142) ¶ 329. In *White Industries v. India*, a case cited by Gramercy in which an MFN clause was used to import an effective means obligation, the applicable treaty's MFN clause contained no such limitation of scope. *See White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award dated 30 Nov. 2011 (RA-118) ¶ 11.1.1.

[638] *See, e.g.*, *Methanex Corp. v. United States of America*, UNCITRAL, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation dated 26 Oct. 2001 (RA-59) at 9 ("Methanex fundamentally misconstrues the nature of Article 1103's provision for most-favored-nation treatment . . . . Article 1103 addresses not the law applicable in investor-State disputes, but the *actual 'treatment'* accorded with respect to an investment of another Party as compared to that accorded to other foreign-owned investments. *Article 1103 is not a choice-of-law clause.* Instead, it provides that each NAFTA Party shall accord investors and their investments of other NAFTA Parties 'treatment no less favorable than that it accords, in like circumstances,' to investors or their investments.") (emphasis added); United States-Mexico-Canada Agreement, signed 30 Nov. 2018 (RA-153), Art. 14.D.3 n.22 (confirming, with respect to an identical MFN provision, that "the 'treatment' referred to . . . *excludes provisions in other international trade or investment agreements* that establish international dispute resolution procedures *or impose substantive obligations*" and instead "*only encompasses measures* adopted or maintained by the other Annex Party") (emphasis added); *see also Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (RA-73) ¶ 195 ("It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into.").

"in like circumstances" with Gramercy.[639] As with the national treatment analysis, this requires a comparative, fact-specific analysis.[640] Gramercy has made no such showing.

296. *Second*, Gramercy ignores that the Contracting Parties expressly agreed under Article 10.5.2 "not to deny justice in criminal, civil, or administrative adjudicatory proceedings,"[641] thus obviating the need for the seldom-used effective means standard. Tribunals have confirmed that effective means "overlap[s] significantly with the prohibition of denial of justice."[642] Notably, moreover, the *Chevron v. Ecuador* tribunal explained that the effective means clause originated in the treaty practice of the United States. Such provisions "arose in U.S. treaty practice at a time when disagreement existed among publicists about the content of the right of access to the courts of the host state," and was "thus created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice."[643] The provision "was later deleted from the U.S. Model BIT when U.S. drafters deemed that other BIT provisions and customary international law provided adequate protection and that a separate treaty obligation was no longer necessary," including as shown by "the express reference to denial of justice in the formulation of the fair and equitable treatment standard"[644] – as is the case with Article 10.5.2 of the Treaty. Gramercy's attempt to import an outdated and discarded effective means standard through the MFN clause thus violates the clear intent and agreement of the Contracting Parties.

297. *Third*, even if Gramercy were permitted recourse to the effective means clause in the Peru-Italy treaty, any such alleged obligation would concern the judicial system as a whole. The clause states that each Contracting Party "shall provide effective means of *asserting claims and enforcing rights* with respect to investments."[645] Tribunals interpreting similarly-worded provisions have confirmed that this "is the language of adjudicatory proceedings" and "not the language of non-adjudicatory administrative" proceedings.[646] Further, such language may obligate the State to "provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases."[647] Here, Gramercy's claim does not concern the effectiveness of the Peruvian judiciary as a whole;

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[639] *See, e.g., Ickale Inşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (RA-142) ¶¶ 328-329 ("[T]he MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a 'similar situation' to that of the investments of investors of third States; in such a situation, there is *de facto* no discrimination. . . . Investors cannot be said to be in a 'similar situation' merely because they have invested in a particular State . . . .").

[640] *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (RA-102) ¶ 389.

[641] Treaty (CE-139), Art. 10.5.2(a).

[642] *Chevron v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits dated 30 Mar. 2010 (RA-106) ¶ 242.

[643] *Chevron v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits dated 30 Mar. 2010 (RA-106) ¶ 243.

[644] *Chevron v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits dated 30 Mar. 2010 (RA-106) ¶ 243.

[645] Peru-Italy Treaty on the Promotion and Protection of Investments of 1994 (RA-54) (emphasis added).

[646] *See, e.g., Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated 25 Aug. 2014 (RA-133) ¶ 9.70 ("The Tribunal determines that the plain meaning of [the effective means provision] does not apply to non-adjudicatory proceedings, such as the administrative decision of the FDA as a regulator . . . . The wording 'asserting claims and enforcing rights' is the language of adjudicatory proceedings. It is not the language of non-adjudicatory administrative decision-making. . . and if it had been intended by the BIT's Contracting Parties to bear this broader meaning, it would have been necessary to add further unambiguous wording.").

[647] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award dated 26 Mar. 2008 (RA-91) ¶ 88.

indeed, Gramercy acknowledges that it effectively "assert[ed] claims" in local court proceedings until it chose to withdraw those claims in favor of this arbitration. Rather, Gramercy challenges the outcome of the 2013 Constitutional Tribunal proceedings in particular. That is outside the scope of the effective means standard. In any event, for the reasons set forth above in the denial of justice analysis, Gramercy lacks standing to challenge those proceedings because it was not a party to them, and the Constitutional Tribunal's ruling was proper as a matter of Peruvian law and cannot give rise to an international law breach.

298. *Fourth*, even if Peru were under an obligation to accord effective means for Gramercy to enforce its alleged rights through the Bondholder Process, Peru has done so and continues to do so. The Bondholder Process ensures due process and accords legitimate holders of Agrarian Reform Bonds effective means to enforce their rights in accordance with both Peruvian law and international best practices, as detailed above. In addition, the Supreme Decrees specifically provide avenues for both judicial and administrative appeal in certain circumstances as part of the Bondholder Process. Thus, by choosing to boycott the Bondholder Process, Gramercy has deprived itself of the opportunity to enforce its alleged rights under the Bonds. Peru has not deprived Gramercy of effective means or otherwise committed any purported violation of its Treaty obligations, under Article 10.4 or otherwise.

V. Compensation

A. Gramercy's Damages Are Speculative and Were Not Caused by Peru

299. Investment treaty tribunals have continuously observed that Claimants bear the burden of proving their damages with reasonable certainty, *i.e.*, that the damages calculation must rely on a rational basis, and damages must be not merely possible but probable, and not too speculative or uncertain.[648] Claimants also must prove that Respondent's actions were the proximate cause of their alleged damages.[649]

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[648] *See, e.g.*, *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum dated 22 May 2012 (RA-120) ¶ 439 (applying the "standard of *reasonable certainty* to determine whether the Claimants have established their case with respect to the amount of damages incurred") (emphasis added); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 (RA-121) ¶ 269 (finding that claimant's claim of lost profits was "speculative," and that the tribunal would base its assessment only on "known quantities"); *Amoco Int'l Finance Co. v. Islamic Republic of Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189, Award No. 310-56-3 dated 14 July 1987 (RA-51) ¶ 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well. . . . It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award dated 21 Oct. 2002 (RA-63) ¶ 173 ("[A] claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote."); *see also* MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, vol. III 1837 (1942) (RA-47) (resubmitted) ("[I]n order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible.") (emphasis in original). The United Nations Compensation Commission ("UNCC") also applied "reasonable certainty" as the standard of proof for the quantum of damages under international law. *See* Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992: Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, U.N. Doc. S/AC.26/1992/9 dated 6 Mar. 1992 (RA-53) ¶

300. Rather than proving their damages claim according to these well-established standards, Claimants glibly cite to the general principle of reparation set forth in the *Chorzów Factory* case and Article 31 of the International Law Commission's Articles on State Responsibility,[650] which is not a standard for proving damages. Even the decisions cited by Gramercy apply the standards discussed above for proving damages.[651]

301. Claimants fail to meet their burden to prove their US$ 1.80 billion damages claim because their damages calculation is completely speculative and Peru's alleged actions are not the proximate cause of Claimants' purported damages.

302. From 2006 to 2008, Gramercy allegedly acquired interests in certain Agrarian Bonds that had previously been held by private Peruvian citizens, some of which had already been partially paid.[652] The Agrarian Bonds are different from modern international sovereign bonds.[653] In particular, the Agrarian Bonds are not protected from inflation because they are denominated in Peruvian currency, have fixed interest rates, and do not have acceleration clauses or default interest.[654] Consequently, subsequent hyper-inflation in Peru after the Agrarian Bonds were issued to landowners left the Agrarian Bond coupons worthless.[655]

303. According to Peru's Quantum Expert, based on the record thus far, Claimants entered into contracts representing a total purchase price of $31.2 million to acquire interests in 9,656 Agrarian Bonds, and have not proven that anything was paid at all.[656] At the time Claimants acquired their interests, it was highly uncertain what those interests were worth because there was no clarity on how the outstanding coupons on the Agrarian Bonds

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19 ("In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained *with reasonable certainty*") (emphasis added).

649 *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award dated 21 Nov. 2007 (RA-89) ¶ 282 ("a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury"); *see also* MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, vol. III 1766 (1942) (RA-47) (noting the requirement of causation for damages and commenting that "the absence of liability is frequently described in terms of 'non-proximateness,' 'indirectness,' or 'remoteness' of the loss suffered"); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) (RA-60), Art. 31, cmt. 10 ("[R]eference may be made to losses "attributable to (the wrongful) act as a 'proximate cause,' or to damage which is 'too indirect, remote, and uncertain to be appraised,' [] a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity.'").

650 Claimants' Statement of Claim ¶ 239.

651 Claimants' Statement of Claim ¶ 241; *see Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 (RA-114) ¶ 246 ("[I]t is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty . . . Claimant . . . needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award dated 24 Dec. 2007 (RA-90) ¶ 428 ("Damages that are '*too . . . uncertain to be appraised*' are to be excluded.") (quoting *Trail Smelter* arbitration, 3 R.I.A.A. 1931 (1938, 1941)) (emphasis in original).

652 Quantum ¶ 51; Edwards ¶ 42.

653 Guidotti ¶¶ 15-20; Quantum ¶¶ 31-32.

654 Quantum ¶¶ 13(c), 31-32; Guidotti ¶¶ 18, 36, 38.

655 Quantum ¶¶ 13(c), 40, 44 & Fig. 1; Edwards ¶ 27.

656 Quantum ¶¶ 15(d), 104.

("Coupons") would be calculated and when.[657] Gramercy's own founder and Chief Investment Officer, Mr. Koenigsberger, recognized this uncertainty: "[t]he Land Bonds were a debt that needed to be paid, but there was not yet any consensus about how that would actually happen."[658] As Peru's Quantum Expert further explains, through the purchase of the 9,656 Agrarian Bonds, *Gramercy, in effect, purchased a right for a payment for the outstanding coupons to be quantified at an undetermined future date based on an undetermined calculation methodology*.[659] Indeed, there were no other buyers for these Agrarian Bonds at the time Claimants acquired them precisely because the amount and timing of the payment the holders of the Coupons would receive was uncertain.[660]

304. In light of this uncertainty, Claimants' expectations could not exceed the circumstances of the Agrarian Bonds at the time of they purchased the bonds, *i.e.*, the price they paid, compensation in Peruvian currency, subject to Peruvian law, and an uncertain compensation amount based on an undetermined methodology.[661] Claimants claim of US$ 1.8 billion in compensation for alleged (but unproven) investments related to 9,656 Agrarian Bonds is *manifestly speculative*. The fact that Claimants' claim equates to an implied return of 5,674 percent[662] underscores the speculative and uncertain nature of their damages claim.

305. Further, Gramercy's damages are remote, *i.e.*, not proximately caused by Peru's actions establishing the Bondholder process in 2013 and thereafter. There is no causal link between Gramercy's damages calculation and Peru's alleged breaches. Rather, the damages claim is based on what Gramercy *believes* should be a different calculation of payment on the outstanding Coupons.[663]

306. Claimants' request for compensation is grounded on the expert report of Sebastian Edwards. Professor Edwards' report further underscores the speculative nature of Claimants' damages because he purports to calculate compensation of the basis of *his personal interpretation* of the 2001 Constitutional Tribunal decision. Specifically, he does this by essentially rewriting the terms of the Agrarian Bonds to include inflators and other adjustments/guarantees that were not in the original terms of the instruments, and assuming that Claimants acquired these "improved" financial instruments at the time of their original issuance.[664] As Peru's Quantum Expert concludes, in doing so, Professor Edwards has calculated the wrong thing and done it in the wrong manner.[665]

307. More specifically, the methodology Professor Edwards employs to calculate Claimants' alleged damages neither follow from Claimants view on how compensation

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[657] Quantum ¶¶ 13(e), 74; Guidotti ¶ 19.

[658] Witness Statement of Robert S. Koenigsberger, ¶ 34; *see also* Memorandum from David Herzberg to Robert Koenigsberger, 24 January 2006, pp. 3,4, **(CE-114)** ("Further complicating matters is the issue of deuda total actualizada en nuevos soles (the total updated debt denominated in nuevos soles); Quantum ¶¶ 15(a), 82.

[659] Quantum ¶¶ 13(e), 83.

[660] Quantum ¶ 15(a).

[661] Quantum ¶¶ 15(a), 73-76; Guidotti ¶¶ 55, 60-61.

[662] Quantum ¶ 15(d).

[663] Quantum ¶¶ 134, 140.

[664] Edwards ¶¶ 72-77; Quantum ¶¶ 16(a), 128, 134.

[665] Quantum ¶¶ 16(a), 127, 133.

should be calculated, nor does it follow from Claimants claims of liability.[666] Professor Edwards seeks to calculate the wrong thing—compensation for the expropriated land, something Gramercy never owned—instead of the fair market value of the outstanding Coupons as of 2013.[667]

308. Professor Edwards's calculations also imply that Peru is required to rewrite the terms of the Agrarian Bonds from their issuance date even though payments were being made at least until 1992 under those terms.[668] This approach is nonsensical. At the time of issuance of the Agrarian Bonds in 1968, Peru would not have known what inflation would be in the future and did not agree to protect bondholders from inflation risk.[669] Peru would not have been able to ever make the payments in accordance to Professor Edwards's scenario since his calculation is based on the CPI as of a future date.[670] Moreover, based on the terms of the Agrarian Bonds, the principal would be paid in annual installments over the term of each bond, along with interest on the outstanding principal that remained, and not on the year of issuance as Professor Edwards calculations imply.[671]

309. Peru's Quantum Expert concludes as follows:

> Claimants' request for compensation is based on the expert report of Professor Edwards. In his report, Professor Edwards purports to calculate compensation of the basis of his personal interpretation of the 2001 Constitutional Tribunal decision ("2001 CT Decision"). He does this by essentially rewriting the terms of the Agrarian Bonds to include inflators and other adjustments/guarantees that were not in the original terms of the instruments, and assuming that Claimants acquired these "improved" financial instruments at the time of their original issuance. In doing so, Professor Edwards has calculated the wrong thing and done it in the wrong manner. The methodology Professor Edwards employs to calculate Claimants' alleged damages neither follows from Claimants view on how compensation should be calculated, nor from Claimants' claims of liability. Professor Edwards seeks to calculate the wrong thing—compensation based on his personal interpretation of the 2001 CT Decision—instead of the fair market value of the outstanding Coupons of the Gramercy Bonds as of 2013 before the alleged breaches took place.[672]

310. The claims alleged in this case indicate that Claimants were purportedly deprived of their investment in or about 2013.[673] Peru's Quantum Expert explains that, if we assume that is the case, the proper measure of compensation would be the fair market value of Claimants' interest on the day before the alleged deprivation, brought forward to today's

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[666] Quantum ¶¶ 127, 133.

[667] Edwards ¶¶ 49-50; Quantum ¶¶ 16(a), 126-132.

[668] Edwards ¶ 72; Quantum ¶¶ 16(c), 134.

[669] Guidotti ¶¶ 18, 36; Quantum ¶¶ 16(c), 76, 139.

[670] Quantum ¶¶ 16(c), 139.

[671] Edwards ¶ 72; Quantum ¶¶ 16(c), 139.

[672] Quatum ¶ 16(a).

[673] Claimants Statement of Claim ¶¶ 150, 152.

date.[674] Fair market value is the price a hypothetical willing buyer and hypothetical willing seller would agree upon at the alleged deprivation date.[675] Such an analysis would incorporate relevant indicators of value from that time, including the prices that Claimants paid a few years earlier and any evidence of other purchases or sales.[676] Professor Edwards did not perform such an analysis or make any such calculation. However, he does agree the Agrarian Bonds were worthless in 1992 and that any compensation thereafter became a matter of legislative will, not finance or economics.[677]

311. As discussed above, the compensation formulas set forth by Peru were reasonable under the circumstances. Peru ultimately agreed to pay the outstanding Coupons adjusted for inflation from when the coupons could or should have been presented for payment.[678] Peru has resolved the historical issue of the Agrarian Bonds and under the final formula, Gramercy would have been entitled to receive $33.57 million for their acquisition had they submitted the bonds for payment through the process established by Peru, assuming all of Gramercy's bonds were deemed authentic and Gramercy was deemed to be a legitimate owner of the bonds.[679] Given the speculative nature of Claimants' acquisition and how little Claimants paid in 2006-2008, this was a reasonably expected outcome (or within the range of reasonably expected outcomes) given the uncertainties that existed prior to 2013.[680]

B. Gramercy Is Not Entitled To Interest

312. Gramercy contends that it is entitled to interest in order for "full reparation," and that such interest must be compound interest.[681] It has failed to prove its request for interest and its contention is meritless. It is particularly notable, in a case subject to a three year prescription period, that Gramercy claims of a breach as of 16 July 2013, yet seeks interest as the principal element of its claim. Indeed, Gramercy seeks US$ 114 million, plus, incredibly, almost US$ 1.7 billion in interest.

313. Gramercy is not entitled to any interest, simple or compound because, as discussed above, its damages claim is speculative and Peru did not cause its claimed damages.[682]

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[674] Quantum ¶¶ 16(b), 124.

[675] Quantum ¶¶ 116, 119.

[676] Quantum ¶¶ 16(b), 122-124.

[677] Edwards ¶ 27.

[678] Quantum ¶¶ 15(e), 57-58.

[679] Quantum ¶¶ 15(e), 110.

[680] Quantum ¶ 15(e).

[681] Claimants' Statement of Claim ¶¶ 248-249.

[682] *See, e.g., Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 Nov. 2007 (RA-89) ¶ 296 (rejecting request for compound interest and noting that "no uniform rule of law had emerged in international arbitral practice as to the applicability of simple or compound interest in any given case"); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Award dated 17 Feb. 2000 (RA-55) ¶ 103 ("the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case").

C. Peru Is Entitled To Full Arbitration Costs And Expenses

314. Peru is entitled to *full* arbitration costs and expenses – with interest – as a result of Gramercy's bad faith conduct. Specifically, as part of its litigation strategy to increase the value of the distressed assets that it purchased, Gramercy engaged, and continues engaging, in an ongoing campaign aimed at harassing and harming Peru. Gramercy's attacks on Peru necessitated Peru spending additional time and resources seeking a procedural order on non-aggravation to stop Gramercy's bad conduct, and the Tribunal spending additional time and resources considering the matter and ultimately issuing a Procedural Order No. 5. Gramercy's bad faith is further evidence by its bringing this international arbitration and claiming US$ 1.8 billion in damages – an implied return of *5,674 percent* on the approximately US$ 31 million amount the contractually established purchase price amount for Agrarian Bonds in contracts that Gramercy hid from the Tribunal (and even more than that, until such time as Gramercy proves what payments it *actually* made for the bonds) – rather than following the Bondholder process established by Peru pursuant to which it apparently could have recovered approximately US$ 34 million..

315. Under the circumstances, the full arbitration costs and expenses of Peru in this arbitration should be charged against Gramercy, pursuant to the Tribunal's authority under Articles 40 and 42 of the UNCITRAL Arbitration Rules. For example, the Phoenix Action tribunal held that "the initiation and pursuit of this arbitration [was] an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention."[683] The tribunal thus ordered the claimant in that case to bear all of ICSID's costs and all of the respondent's legal fees and expenses, observing that the respondent, like Peru in this case, was "forced to go through the process and should not be penalized by having to pay for its defense."[684] Similarly, the *Cementownia* tribunal ordered the claimant to pay all of the respondent's costs because of the procedural misconduct.[685]

316. Peru will submit a statement of its fees and costs at an appropriate time. Peru reserves its rights to seek all further relief against Gramercy at the appropriate time. Such relief includes, without limitation, enforcing Procedural Order No. 5, which requires, inter alia, that Gramercy respect its duty of non-aggravation and "abstain from any step that might antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, as well as from events that threaten to interfere unduly with the parties' ability to present positions in the arbitration, or the tribunal's ability to fashion meaningful relief at the close of the case,"[686] and enforcing the Consultation Protocol dated 11 November 2016, as amended, including by striking from the record all statements by Gramercy in violation thereof.[687]

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[683] *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009 (RA-100) ¶ 151; *see also Nova Scotia Power Incorporated (NSPI) v. Bolivarian Republic of Venezuela*, UNCITRAL, Award on Costs dated 30 Aug. 2010 (RA-298) ¶¶ 19, 20, 38, 39 (ordering the claimant to bear the total costs of the arbitration and awarded legal fees to Venezuela, finding there was no reasonable basis for splitting the costs of arbitration).

[684] *Phoenix Action v. Czech Republic* ¶¶ 151-152.

[685] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey,* ICSID Case No. ARB(AF)/06/2, Award dated 17 Sep. 2009 (RA-299) ¶¶ 159, 177-179 (finding claimant had "caused excessive delays and thereby increased the costs of the arbitration," and that there thus was "an accumulation of liabilities – abuse of process and procedural misconduct")

[686] Procedural Order No. 5, ¶ 60.

[687] Consultation Protocol signed 11 November 2016 (Doc. R-153).

VI. Relief Requested

317. For all the reasons set forth above, Peru respectfully requests that the Tribunal:

- Dismiss Gramercy's claims in their entirety;
- Award Peru such further and other relief as the Tribunal may deem appropriate, including with respect to the conduct and circumstances discussed herein; and
- Award Peru all costs incurred in connection with this proceeding.

Respectfully submitted,

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14 December 2018