

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

ICSID Case No. UNCT/18/2

GRAMERCY FUNDS MANAGEMENT LLC,
AND
GRAMERCY PERU HOLDINGS LLC,

Claimants

— v. —

THE REPUBLIC OF PERU,

Respondent

**CLAIMANTS' STATEMENT OF REPLY
AND ANSWER TO OBJECTIONS
[CORRECTED]**

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TABLE OF ABBREVIATED TERMS

2000 Emergency Decree	Peruvian Government’s Emergency Decree N° 088-2000
2001 CT Decision	Constitutional Tribunal Decision dated March 15, 2001
2004 CT Decision	Constitutional Tribunal Decision dated August 2, 2004
2005 Congressional Report	2005 report by the Agrarian Commission of Congress
2011 Congressional Report	2011 report by the Agrarian Commission of Congress
2013 CT Order	Constitutional Tribunal Decision dated July 16, 2013
2013 Resolutions	Constitutional Tribunal Resolution dated August 8, 2013, and Constitutional Tribunal Resolution dated November 4, 2013
2014 Supreme Decrees	Supreme Decree N° 17-2014-EF dated January 17, 2014, and Supreme Decree N° 19-2014-EF dated January 21, 2014
ABDA	Land Reform Bondholders’ Association
August 2017 Supreme Decree	Supreme Decree N° 242-2017-EF dated August 19, 2017, and Supreme Decree N° 242-2017-EF (corrected) dated August 26, 2017
ATPA	Andean Trade Preference Act
ATPDEA	Andean Trade Promotion and Drug Eradication Act
BITs	bilateral investment treaties
CER-4	Amended Expert Report of Sebastian Edwards
CER-5	Second Amended Expert Report of Delia Revoredo Marsano de Mur
CER-6	Reply Expert Report of Sebastian Edwards
CER-7	Expert Report of Ambassador Peter Allgeier
CER-8	Expert Report of Prof. Rodrigo Olivares-Caminal
CER-9	Expert Report of Prof. Mario Castillo
CER-10	Expert Report of Alfredo Bullard
CPI	Consumer Price Index

CWS-3	Second Amended Witness Statement of Robert S. Koenigsberger
CWS-4	Reply Witness Statement of Robert S. Koenigsberger
CWS-5	Witness Statement of Robert Lanava
CWS-6	Witness Statement of Robert Joannou
CWS-7	Witness Statement of [REDACTED]
CWS-8	Witness Statement of [REDACTED] [REDACTED]
CWS-9	Witness Statement of [REDACTED]
Decree N° 653	Legislative Decree N° 653 of 1991 (also known as the Agricultural Sector Investment Promotion Act)
DGETP	<i>Dirección General de Endeudamiento y Tesoro Público</i>
February 2017 Supreme Decree	Supreme Decree N° 034-2017-EF dated February 28, 2017
GFLCP Report	German Forced Labor Compensation Program Report
GFM	Gramercy Funds Management LLC
GPH	Gramercy Peru Holdings LLC
ILC	International Law Commission
IOM Report	International Organization for Migration Report on Property Restitution and Compensation
INEI	National Institute of Statistics and Informatics
Land Reform	Peru's expropriation and redistribution of agrarian land, for which the Government issued Land Bonds as purported compensation
Land Bonds	Peruvian Agrarian Land Reform Bonds
Law N° 26207	1993 legislation expressly repealing the Fourth Transitory provision of Decree N° 653
Law N° 26597	1996 legislation providing, <i>inter alia</i> , that delivery of Land Bonds constituted fair compensation for expropriated land
MEF	Peru's Ministry of Economy and Finance
MFN	Treaty's Most-Favored-Nation Clause
NAFTA	North American Free Trade Agreement

NOI	Notice of Intent to Commence Arbitration
PARB	Peru Agrarian Reform Bond Company Ltd.
PO5	Procedural Order No. 5
PO6	Procedural Order No. 6
■	■
SEC	United States Securities and Exchange Commission
Treaty	United States-Peru Trade Promotion Agreement of February 1, 2009
USMCA	United States-Mexico-Canada Agreement
USTR	United States Trade Representative
VAT	Value-Added Tax
VCLT	Vienna Convention on the Law of Treaties

I.

INTRODUCTION

1. The Republic of Peru's ("*Peru*" or "*Respondent*") Statement of Defense cannot disguise the fact that its "Bondholder Process" is a scheme to wipe out Gramercy's holding in Peruvian Agrarian Land Reform Bonds (the "*Land Bonds*" or "*Bonds*") without paying the current value that its law indisputably requires. Peru's attempts to kick up dust through meritless objections to jurisdiction and admissibility, and its efforts to create uncertainty and ambiguity where there is none, cannot obscure the extraordinary lengths to which Peru has gone to deprive Gramercy of that value.

2. Much of Peru's Statement of Defense consists of vilifying Gramercy as a "hedge fund speculator" and suggesting that the business of Gramercy Funds Management LLC ("*GFM*") as an investment manager and Gramercy Peru Holdings LLC ("*GPH*") (collectively, "*Gramercy*" or "*Claimants*") somehow disqualifies them from the Treaty's protection and permits Peru to impose confiscatory and discriminatory measures. Derisive mischaracterization cannot change the fact that Gramercy is a U.S. investor with a qualifying investment of a kind the Treaty specifically lists, and is entitled to the rights the U.S.-Peru Trade Promotion Agreement ("Treaty") confers like any other U.S. investor, nor the fact that Peru's conduct has violated those rights and breached the Treaty.

3. While Peru's Statement of Defense is replete with such mischaracterizations, it studiously avoids addressing the pertinent facts that establish its Treaty-breaching misconduct. For example, Peru does not deny that it has an obligation to pay the current value of the Land Bonds. Peru also does not deny that, for years before and after Gramercy invested in the Land Bonds, Peruvian courts had calculated that current value by using the increase in the Consumer Price Index ("*CPI*") from the time of the original land expropriation plus interest. Peru has not seriously rebutted Prof. Edwards's calculation that, rigorously applying these well-established parameters, Gramercy's Land Bonds are now worth more than US\$1.8 billion, and Peru has not provided its own alternative computation of current value. It also does not dispute that the current value of the Land Bonds today must instinctively be significant, because they are intended to represent the value of land the size of Portugal that Peru expropriated nearly half a century ago and for which it still has fully not paid. Neither does Peru deny that its former Finance Minister, soon after leaving office in 2012, estimated the Land Bonds debt to be in the region of US\$4.5 billion, or that Deloitte conservatively estimated the value of the expropriated land to be approximately *US\$42.4 billion* as of 2015. **Doc. CE-533**, *Expreso, Constitutional Tribunal will order payment to 150,000 agrarian bondholders,*

September 21, 2012; **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR, p. 8; **Doc. CE-199**, Land Reform Bondholders Association’s Application before the Constitutional Tribunal, March 16, 2015, p. 5.

4. Peru also does not deny the facts demonstrating that, instead of honoring that current value, Peru in fact set about destroying it. Peru does not deny that it can afford to pay the Land Bonds’ CPI-updated current value. But beginning in early 2014, Peru established a so-called “Bondholder Process” that would not provide anything remotely close to what the Land Bonds are really worth, and which did not admit of any other recourse to obtain payment on the Land Bonds. Peru does not deny that, under the 2014 Supreme Decrees, Gramercy’s Land Bonds would be entitled to just *US\$861,000*—just *0.05%* of their actual value, and even that potential outcome may be illusory.

5. Additionally, while Peru repeatedly touts its Bondholder Process, it does not even attempt to defend the actual results of that “Bondholder Process.” The Ministry of Economy and Finance’s (“*MEF*”) own records reveal that only a tiny fraction of bondholders have survived to the financial valuation stage; that of those who did, many received paltry assessments of under \$1,000; and that after *five* years, just *five* bondholders have actually been paid, and that they received a grand total of just *\$65,000*. See **Doc. R-367**, Administrative Process Status Table, November 30, 2018, Tab “RD Pagos,” sum of cells H5-H8 and H11. Whether as a matter of instinct or empirical analysis, such an outcome is confiscatory, and it is not and cannot be fair or equitable.

6. Moreover, this wholesale decimation of the Land Bonds’s value is not the mere incidental result of Peru’s exercise of legitimate regulatory powers. Peru’s Bondholder Process was, from its conception, specifically intended to extinguish the Land Bonds debt without paying it. That “process” validated itself by reference to a Constitutional Tribunal decision that Peru procured through machinations and irregularities that defy the most basic standards. While Peru dissembles and seeks to shift attention from its misconduct through vague and misplaced allegations of “aggravation” against Gramercy and while it has wrongly withheld documents it was obligated to produce, the meaningful facts are now clearer than ever. Days before the Constitutional Tribunal was due to issue an order affirming the Constitutional Tribunal Decision dated March 15, 2001 (“*2001 CT Decision*”) and the well-established principle that the current value of the Land Bonds must be calculated using CPI plus interest, the Constitutional Tribunal met *ex parte* with then Finance Minister Luis Miguel Castilla and other MEF representatives to discuss what one Justice described as an “inter-institutional issue.” Minister Castilla spooked the justices with a false story about the allegedly devastating

budgetary impact that paying the Land Bonds at their CPI-updated current value would have, even though Peru objectively has ample resources to pay actual current value without adverse fiscal impact and admits as much in this arbitration. After this meeting, the agreed majority opinion was transmogrified with white-out, and in violation of the Constitutional Tribunal's own internal rules, into a phony dissent. Even if these grave procedural irregularities had not led to police investigation, criminal prosecution, and Congressional hearings—which they have—they would nevertheless make it impossible for Peru to justify its conduct by reference to the Constitutional Tribunal Decision dated July 16, 2013 (“*2013 CT Order*”). This conduct is part of Peru's treaty breaches, *not* a defense to these breaches.

7. Despite the 2013 CT Order's dubious provenance, Peru invoked it to create its Bondholder Process through succession of Supreme Decrees with nonsensical formulas that have no analytical basis or supporting documentation, and that have apparently been disavowed by their original authors. Peru has steadfastly refused to explain the bases for these opaque formulas and how they can satisfy the current value principle when they yield sums that are only a small fraction of current value—in Gramercy's case, less than one twentieth of one percent. Peru has never explained why it has shrouded these formulas in secrecy, refusing to pre-publish them or engage in widespread consultations about them with bondholders as both Peruvian law and relevant international standards require, or to acknowledge externally the gross errors in the formulas that it recognized internally. Peru also does not deny that it designed the Bondholder Process specifically so that Gramercy would be the last in queue for any payment.

8. Peru cannot defend this state of affairs by claiming that the Land Bonds were “worthless” before Gramercy invested in them, and that the Bondholder Process would have “imparted” value because Gramercy allegedly could have been entitled to receive a few million dollars more than what it paid for the Land Bonds a decade earlier according to Peru's incorrect estimate of Gramercy's acquisition cost. *Cf.* Statement of Defense, **R-34** ¶¶ 209, 215, 225. This defense turns reality on its head. The Land Bonds were plainly not “worthless;” Peru repeatedly recognized that they had substantial value, and indeed it created this Bondholder Process precisely because it thought they were worth *too much* and it did not want to honor that value. Moreover, the price Gramercy paid for its Land Bonds is no measure of their current value as Peruvian law requires, and no excuse for Peru's arbitrary, unfair, and discriminatory conduct.

9. Nor can Peru protest that its conduct is immune from this Tribunal's review because the Land Bonds belong to a “completely different historical era,” or because that “process” was established pursuant to a court order and various decrees. *Cf.* Statement of Defense, **R-34** ¶ 202. Peru concluded the Treaty, and gave U.S. investors like

Gramercy rights under it that it cannot escape by evoking a troubled period in its history. Moreover, Peru's Bondholder Process is not an artifact of some distant past but a very recent, and continuing, program to erase the commitments Peru made to bondholders like Gramercy. It is both this Tribunal's right and its duty to hold Peru accountable under international law.

10. In this Statement of Reply and Answer to Objections, Gramercy will address Peru's various objections and defenses, and show them to be meritless in each and every instance.

11. *First*, the Tribunal has jurisdiction over the dispute and Gramercy's claims are admissible. GPH unquestionably owns the Land Bonds, GFM unquestionably controls them, and hence together and separately they have "made" an investment in Peru; the Land Bonds are investments in the form of "bonds" and "public debt" of the kind expressly contemplated in the Treaty and there is no evidence the State Parties silently intended to exclude them and, to the contrary, there is abundant evidence they specifically meant to include them; Gramercy's claims are not time-barred because Peru's conduct that breached the Treaty and caused Gramercy's loss either occurred or came to light less than three years before Gramercy commenced the arbitration; Gramercy's claims do not fall outside the Tribunal's temporal jurisdiction because the challenged measures all occurred after the Treaty came into force; and Gramercy has not committed an abuse of process because both GPH and GFM were U.S. investors from the time they acquired the Land Bonds, and there was no restructuring for the sole purpose of inserting post-breach a protected U.S. national where none previously existed.

12. *Second*, Peru's mischaracterization of the facts and the law cannot disguise or exonerate its Treaty-breaching. Peru's 2014 Supreme Decrees constitute a substantial deprivation of the value of the Land Bonds for which Peru has not met any of the conditions of legality consistent with Article 10.7 of the Treaty; Peru's arbitrary, unjust, discriminatory, non-transparent and expectation-defying Bondholder Process falls below both the minimum standard of treatment under international law and the national treatment standard that Articles 10.3 and 10.5 of the Treaty require; Peru's imposition of a mandatory and exclusive Bondholder Process that bars the access to courts that Gramercy and all other bondholders had previously enjoyed by right deny Gramercy access to justice in violation of Article 10.5 of the Treaty and deprive Gramercy of effective means of asserting claims and enforcing its rights, in violation of Article 10.4 of the Treaty. *See Doc. CE-139*, Treaty, Arts. 10.3, 10.4, 10.5, 10.7.

13. *Finally*, Gramercy's right to full reparation under international law means that Peru must pay the intrinsic value of its Land Bonds, not just the price that Gramercy paid for them; Peru's

inconsequential criticisms of Prof. Edwards’s calculation of that intrinsic value do not undermine the validity of his approach, and Peru’s quantum experts do not offer an alternative calculation or defend Peru’s own formulas for calculating value; and contrary to Peru’s claims, Gramercy’s damages are neither “speculative” nor “remote.” *Cf.* Statement of Defense, **R-34** ¶¶ 301, 305. Moreover, alternative approaches to damages, including the approach into which Peru and its experts incorrectly attempt to shoehorn Gramercy, would likewise require Peru to pay Gramercy substantial compensation.

II.

THE TRIBUNAL HAS JURISDICTION OVER GRAMERCY’S CLAIMS AND THOSE CLAIMS ARE ADMISSIBLE

14. Peru raises a litany of jurisdictional objections to Gramercy’s claims, each of which is meritless. *See* Statement of Defense, **R-34** ¶¶ 160-216. In so doing, Peru largely ignores both the underlying facts of the case and the relevant treaty language, instead relying on inapposite decisions in other cases and conclusory assertions instead of evidence. As Gramercy demonstrated in its Statement of Claim, Gramercy satisfies all of the Treaty’s jurisdictional requirements. *See* Statement of Claim, **C-34** ¶¶ 135-144. In particular, contrary to Peru’s assertions, (1) GPH and GFM qualify as “investors” under the Treaty; (2) the Land Bonds are covered “investments” under the Treaty; (3) Gramercy has complied with the Treaty’s waiver and statute of limitations provisions; (4) Gramercy’s claims fall within the Tribunal’s temporal jurisdiction; and (5) Gramercy has not “abused” the “Treaty arbitration mechanism.”

A. The Tribunal Has Jurisdiction *Ratione Personae* Because Each of GPH and GFM Is a Qualifying Investor.

15. Peru’s objections to jurisdiction *ratione personae* fail because each of GPH and GFM is “an enterprise of a Party[] that . . . is making, or has made an investment in the territory of” Peru. *See* Statement of Claim, **C-34** ¶¶ 137-142; *see also* **Doc. CE-139**, Treaty, Art. 10.28 (definition of “investor of a Party”). Peru does not deny that the claimants are each “an enterprise of a Party.” Its objection that they nevertheless have not “made” an investment in the territory of Peru appears to be premised on the misguided claim that Gramercy has provided insufficient evidence of matters that are, however, irrelevant to the jurisdictional question at issue.

16. *First*, Peru does not appear to deny that GPH would have “made an investment” if it “owns” the Land Bonds. *See* **Doc. CE-139**, Treaty, Art. 10.28 (defining an “investment” as “every asset that *an investor owns or controls, directly or indirectly*”) (emphasis added); Expert Report of Professor W. Michael Reisman, December 14, 2018

(“Reisman, **RER-1**”) ¶ 64 (“[T]he Claimants still have to prove that they have made the alleged investment, *i.e.*, *acquired the Bonds*”) (emphasis added). Peru also does not deny that the Land Bonds are nominative debt instruments, that they were delivered to GPH and that GPH is in possession of them, that the endorsement on the rear of each Land Bond demonstrates that title has validly passed to GPH under Peruvian law, or that Gramercy has already produced into the record an audited inventory and images of all of its Land Bonds, including the endorsement demonstrating transfer. *See* Statement of Defense, **R-34** ¶¶ 63-66, 212-216. This was set out in detail in Mr. Koenigsberger’s witness statement and is further described in the accompanying statement of Mr. Lanava. *See* Second Amended Witness Statement of Robert S. Koenigsberger, July 13, 2018 (“Koenigsberger, **CWS-3**”) ¶¶ 37-40 (*citing* **Doc. CE-224A**, Deloitte, Report on Rear Image Photography Relating to Peruvian Agrarian Reform Bonds, January 12, 2017; **Doc. C-12**, Letter from Gramercy to the Tribunal, April 13, 2018); *see also* Witness Statement of Robert Lanava, May 21, 2019 (“Lanava, **CWS-5**”) ¶¶ 8-28. Additionally, even though a Notary Public’s certification of the signatures is not required for the bond transfers to be valid, most of the Land Bonds acquired by GPH include such certification on the rear, thereby providing additional certainty of the endorsement. There is no question that GPH “owns” the Land Bonds under Peruvian law. Expert Report of Alfredo Bullard, May 21, 2019 (“Bullard, **CER-10**”) ¶ 48.

17. Instead, Peru appears to question whether GPH truly “owns” the Land Bonds for purposes of the Treaty on the sole basis that Gramercy allegedly has not provided “evidence relating to the alleged Bond acquisition transactions,” by which it principally appears to mean “information about *the price purportedly paid*” for them. Statement of Defense, **R-34** ¶ 214 (emphasis added). But the price that Gramercy paid to acquire the Land Bonds has nothing to do with whether or not Gramercy “owns or controls” them.

18. Moreover, Peru’s objection that Gramercy did not disclose to Peru the “price” it paid for the Land Bonds is irrelevant and disingenuous. Peru admits Gramercy already provided it with *all* the purchase contracts for the Land Bonds through a local conciliation process and has therefore had them in its possession *since at least October 2011*. *See id.* ¶ 70, n. 98. Furthermore, Gramercy, through Peruvian counsel, also notified the Government of its various Bond purchases as early as 2009. **Doc. CE-340**, Gramercy’s Bond Acquisition Letters; **Doc. CE-490**, Letter from Gramercy to Peru, May 7, 2009. In any event, to put this meritless objection to rest once and for all, Gramercy has produced and is introducing into the record complete copies of all of its notarized purchase contracts and proof of its payment for the Land Bonds. *See* **Doc. CE-339**, Gramercy’s Bondholder Packages; *see also* Witness Statement of Robert Joannou, May 21, 2019 (“Joannou, **CWS-6**”) ¶ 7.

19. *Second*, Peru does not deny that GFM “controls” the Land Bonds through its control of GPH. *See* Statement of Defense, **R-34** ¶¶ 212-216. Instead, Peru appears to object that GFM has not proved that it “acquired” any Land Bonds itself. But ownership is not the only route to making an investment. The Treaty expressly provides, by speaking of ownership “or” control in the disjunctive, that *control* of an investment is enough for jurisdiction.

20. There can be no serious question that GFM controlled Gramercy’s investment in the Land Bonds. Control may be achieved through indirect majority ownership as well as other arrangements that constitute legal or *de facto* control. “Control” is defined as “[t]he direct or indirect *power to govern the management and policies* of a person or entity, whether through ownership of voting securities, by contract, or *otherwise; the power or authority to manage, direct, or oversee*[.]” **Doc. CE-718**, Black’s Law Dictionary, Definition of “Control” (emphasis added); *see also* **Doc. CE-716**, Oxford English Dictionary, Definition of “Control” (“the power to influence or direct people's behavior or the course of events” or “[d]etermine the behavior or supervise the running of”).

21. Accordingly, tribunals interpreting similar treaty language have repeatedly affirmed that either legal or factual control suffices for jurisdictional purposes. *See, e.g., International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award of January 26, 2006, **Doc. RA-77**, ¶ 106 (“Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or ‘*de facto*’ control is, in the Tribunal’s view, sufficient”); *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of July 28, 2015, **Doc. CA-197**, ¶ 324 (“Control of a company may be factual or effective (*de facto*) as well as legal.”); *see also Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability of September 12, 2014, **Doc. CA-158**, ¶¶ 509-530 (holding that claimant was “controlled” by French nationals even though they did not hold legal title to its shares at the relevant time).

22. There can therefore be no doubt that when an investor legally and factually controls an investment, it has “made” that investment as well. In *Mera Investment Fund Ltd. v. Republic of Serbia*, the treaty defined an investor as a legal entity “making investments in the territory of” the host State. *Mera Investment Fund Ltd. v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, November 30, 2018, **Doc. CA-140**, ¶ 61. The tribunal held that the claimant, an investment fund, was a qualifying investor because “making investments comprises more than the funding and acquisition of investments, but as well, the holding and management of investments.” *Id.* ¶ 107. The tribunal added that it “was not convinced” that “there is a requirement of

activity when determining the status of investor,” but that, in any event, such a requirement would be met because the investment firm “actively held and managed the investments.” *Id.* ¶¶ 106-107.

23. GFM has both legal and *de facto* control over Gramercy’s investment in the Land Bonds. Here again, Peru’s protest that Gramercy has failed to provide “information as to its corporate structure or Bond holding structure” is wrong and irrelevant. *Cf.* Statement of Defense, **R-34** ¶ 198. Peru does not and could not deny that GFM manages and controls GPH, and thus the Land Bonds, both in fact and in law. Under GPH’s Operating Agreement, GFM is the “Sole Manager” of GPH, which vests GFM with “exclusive power” to act on behalf of GPH and manage its affairs and entitles it, among others, to exercise all rights over the assets held by GPH and to designate GPH’s officers. **Doc. CE-165**, Amended Operating Agreement of GPH, December 31, 2011, Art. 3.1. While this alone is sufficient to demonstrate GFM’s full legal control of the investment, GFM also acts as the Investment Manager and makes all investment decisions for Peru Agrarian Reform Bond Company Ltd. (“**PARB**”), the entity which in turn holds a 100% membership interest in GPH. [REDACTED]

[REDACTED] **Doc. CE-165**, Amended Operating Agreement of GPH, December 31, 2011. GFM also acts as the Investment Manager for additional entities in PARB’s ownership chain. [REDACTED]

[REDACTED]

Upon assuming the role of Sole Manager in 2011, GFM also assumed all “rights, obligations, and duties” of Gramercy Investment Advisors LLC, the U.S. entity that served as GPH’s Sole Manager from 2006-2011. [REDACTED]

[REDACTED] *see also* **Doc. CE-165**, GPH Amended Operating Agreement, December 31, 2011. GFM has in fact exercised that power and directed Gramercy’s Land Bond activities, as Mr. Koenigsberger and Mr. Lanava explain. *See* Koenigsberger, **CWS-3** ¶ 3; Lanava, **CWS-5** ¶ 30; Statement of Claim, **C-34** ¶ 29. Additional information about holding structures *outside* of the GPH/GFM chain is irrelevant to the question whether GPH and GFM own or control the Land Bonds.

24. *Third*, Peru does not appear to deny that Gramercy made an investment “in the territory of” Peru, within the meaning of Article 10.28 of the Treaty, if the purchase “transactions took place in Peru.”

Cf. Statement of Defense, **R-34** ¶ 196; *see also* **Doc. CE-139**, Treaty, Annex 1.3 (“territory means: (a) with respect to Peru, the continental territory, the islands, the maritime areas and the air space above them, in which Peru exercises sovereignty and jurisdiction or sovereign rights in accordance with its domestic law and international law.”) That was, in fact, the case. *See* Statement of Claim, **C-34** ¶ 140.

25. Peru’s sole objection to whether the Land Bonds were an investment “in the territory of” Peru appears to be that Gramercy “*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.” Statement of Defense, **R-34** ¶ 196 (emphasis added). That is plainly not true. Gramercy has provided both testimonial and documentary evidence of its purchases, which Peru has not challenged. Mr. Koenigsberger testified that each of the individual purchase transactions and associated negotiations took place in Peru, and was paid for through bank transfers that made money available in Peru. *See* Koenigsberger, **CWS-3** ¶¶ 34-41. And Robert Lanava now provides even further testimonial detail about these transactions. Lanava, **CWS-5** ¶¶ 7-13. Each of the Land Bonds was endorsed and notarized in Peru, as is evident from the face of the Land Bonds themselves. *See* **Doc. CE-224A**; *see also* Lanava, **CWS-5** ¶ 9; **Doc. CE-340**, Gramercy’s Bond Acquisition Letters. The purchase contracts are already in Peru’s possession, and indeed Peru itself submitted them as evidence. *See* **Doc. R-266–Doc. R-270**; **Doc. R-272–Doc. R-290**; **Doc. R-292–Doc. R-295**. Just as there cannot be any doubt that Gramercy indeed acquired the Land Bonds, there also cannot be any doubt that Gramercy did so in Peru.

26. In this connection, Peru’s complaint that Gramercy has not demonstrated that it did not acquire its investment “through fraud” is both meritless and unavailing. *Cf.* Statement of Defense, **R-34** ¶ 197. The Land Bonds were issued, and Gramercy acquired them, in compliance with Peruvian law. *See* Reply Witness Statement of Robert S. Koenigsberger, May 21, 2019 (“Koenigsberger, **CWS-4**”) ¶ 38; Lanava, **CWS-5** ¶ 9; Bullard, **CER-10** ¶ 17. This is enough for purposes of jurisdiction. *See, e.g., Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, **Doc. RA-171**, ¶ 384 (“It is undisputed between the Parties that the bonds have been issued in Argentina in accordance with the relevant laws and regulations As such, they were made ‘in compliance with the laws and regulations of Argentina’ [within the meaning of the definition of investment]”). It is not for Gramercy to prove the negative, and it is not for Peru to allude to such grave matters in such a cavalier and irresponsible manner. Gramercy strongly denies any suggestion that it committed fraud, and if Peru wished to argue otherwise, it was incumbent on Peru to raise a properly articulated and substantiated objection in due time.

27. *Finally*, there is no basis for Peru’s claim that Gramercy cannot qualify as investor “simply by virtue of the fact that it is a hedge fund speculator.” Statement of Defense, **R-34** ¶ 216. Leaving aside the fact that Gramercy is not a “hedge fund speculator,” there is simply no support for such an exclusion in the Treaty. Contrary to Peru’s unexplained assertion, nothing in the Treaty’s “object and purpose” is irreconcilable with Gramercy’s “operating model,” either. *Cf. id.* Nothing in the Treaty excludes investment firms from the protections of Chapter 10 of the Treaty—whether in its preamble, in the denial of benefits clause in Article 10.12, the sector carve-outs for non-conforming measures in Article 10.13, or Article 10.2.3’s articulation of the investment chapter with Chapter 12 on “Financial Services.” In fact, the Treaty contemplates the opposite, by providing for example that investments may take the form of financial assets such as stocks, bonds, and debentures, by expressly defining the conditions in which U.S. companies would be denied the protections of the Treaty for which they otherwise qualify, and by addressing measures to regulate financial services but not containing a blanket exclusion on investment firms benefitting from the investment chapter. *See* Treaty, **Doc. CE-139**, Arts. 10.28, 10.2.3, 10.12.

28. Neither would it “invite[] abuse” to recognize that Gramercy is an investor like any other, as Peru claims. *Cf.* Statement of Defense, **R-34** ¶ 215. Gramercy is a U.S. company, with a qualifying investment in Peru. *See* **Doc. CE-165**, Amended Operating Agreement of GPH, December 31, 2011; **Doc. CE-493**, GFM Certificate of Formation, June 23, 2009; Koenigsberger, **CWS-4** ¶¶ 6, 35; Lanava, **CWS-5** ¶¶ 8-35. There is also nothing abusive or worrisome about the fact that sophisticated corporate investors, including Gramercy, structure their investments in a variety of ways. *See, e.g., Société Générale v. Dominican Republic*, LCIA Case No. UN 7927 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, September 19, 2008, **Doc. CA-183**, ¶¶ 37, 47 (holding that claimant’s participation in a financial investment through a “chain of interests” both upstream and downstream does not disqualify its investment from treaty protection, and that even if claimant’s investment were solely a management fee, that would not disqualify the interest under the broad treaty definition of investment); *Perenco* Decision on Remaining Issues of Jurisdiction and Liability, **Doc. CA-158**, ¶¶ 512, 526 (noting that “it is not unusual for foreign investors to use a variety of corporate vehicles to achieve the benefit of an investment” and refusing to adopt an unduly narrow reading of “control”). Unless the strictures of the express denial of benefits clause are met—which Peru has not even attempted to invoke, and could not in any event satisfy—it is impossible to deny the benefits of the Treaty to an otherwise qualifying investor, let alone “simply” by virtue of its line of business.

29. Indeed, Peru does not give a single example of any investment tribunal ever having denied jurisdiction *ratione personae*

“simply” by reason of the fact that the investor was a financial services company, investment manager, “hedge fund,” or similar. The closest Peru gets to such a proposition is Prof. Reisman’s claim that “the *Abaclat* award . . . was careful to highlight the fact that many of the bondholders were *pensioners* relying on this investment for their old age, or other retail investors who were not intending to sell the bonds,” and his conclusory statement that “[t]here is a difference” between such people and “hedge fund speculators.” Reisman, **RER-1** ¶ 68 (emphasis added). Although Prof. Reisman presents this supposed “difference” as the *Abaclat* tribunal’s conclusion, the passage he cites is in fact from the summary of *claimants’* arguments in that case. *See Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶ 238. In reality, the *Abaclat* tribunal drew no such distinction. To the contrary, it *upheld* its jurisdiction over the secondary purchasers of a more attenuated form of investment than Gramercy holds here—security entitlements derived from sovereign bonds, rather than physical bonds actually acquired and continually possessed on the breaching nation’s soil as in this arbitration—and reasoned straightforwardly that “to the extent that Claimants are holders of [the security entitlements at issue], they are to be considered ‘investors’ under the terms of the BIT and subject to the Tribunal’s jurisdiction *ratione personae*.” *Id.* ¶ 411. Moreover, here, the ultimate beneficial owners of the Land Bonds are also largely pension funds, strikingly similar in character to those in *Abaclat*. *Compare Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 18, 21, with [REDACTED]; [REDACTED]; Koenigsberger, **CWS-3** ¶ 10.

30. Peru’s attempts to vilify Gramercy so as to distract from the incontrovertible proof that Gramercy made an investment in the Land Bonds are thus both inappropriate and meritless.

B. The Tribunal Has Jurisdiction *Ratione Materiae* Because the Land Bonds Are Covered Investments Under the Treaty.

31. Peru’s principal objection to the Tribunal’s jurisdiction appears to be that the Land Bonds are not “investments” falling within the jurisdiction *ratione materiae* of the Treaty. *Cf.* Statement of Defense, **R-34** ¶¶ 195-211; Reisman, **RER-1** ¶¶ 43-49.

32. But Peru cannot overcome the hurdle of the express terms and context of the Treaty. Peru does not deny that the Treaty explicitly provides that “[f]orms that an investment may take” include “bonds” and “other debt instruments.” **Doc. CE-139**, Treaty, Art. 10.28 (definition of “investment”); *see also* Statement of Claim, **C-34** ¶ 137; *cf.* Statement of Defense, **R-34** ¶ 201. Peru also does not deny that the Treaty applies to “public debt.” *Cf.* **Doc. CE-139**, Treaty, Annex 10-F (“Public Debt”); *see also* Statement of Claim, **C-34** ¶ 138; *cf.* Statement of Defense, **R-34** ¶ 202. Indeed, Peru’s contemporaneous summary of the Treaty’s negotiation noted that its definition of investment “includes, *inter*

alia . . . debt instruments (including public debt, except for bilateral debt).” **Doc. CE-447**, 13th Round of the Andean-U.S. FTA Negotiations, November-December 2005, XI Investment Table, p. 55 (emphasis added). In addition to the ordinary meaning of these terms, Professor Rodrigo Olivares-Caminal, Professor of Banking and Finance Law at Queen Mary University of London, explains in his expert report that from a finance and economics perspective, the Land Bonds are both “bonds” and “public debt” and they have all the characteristics that those fields would expect of an investment. *See* Expert Report of Professor Rodrigo Olivares-Caminal, May 21, 2019 (“Olivares-Caminal, **CER-8**”).

33. Hence, the fact that Peru does not deny that the Land Bonds are “bonds,” “debt instruments,” or “public debt” should by itself be fatal to Peru’s objections. *Cf.* Statement of Defense, **R-34** ¶ 199; *see also* Statement of Claim, **C-34** ¶¶ 137-138. Peru’s objection thus rests on the counter-textual position that although the Land Bonds are plainly both “bonds” and part of Peru’s public debt, the Treaty must exclude these *particular* bonds, and that the drafters actually meant something much narrower than the words themselves conveyed. That proposition cannot succeed under axiomatic principles of treaty interpretation, and indeed is particularly untenable given the particular context of this Treaty, which neither Peru nor Prof. Reisman address. In addition to the crystal clear terms they used, Peru’s own contemporaneous account of the negotiations shows that the State Parties here specifically negotiated and deliberately agreed that the only kind of public debt excluded from the Treaty would be bilateral debt, *i.e.*, loans from the U.S. to Peru or *vice versa*. Further, the contemporaneous record makes clear that, at the time it was negotiating the Treaty, Peru was aware that it had issued Land Bonds that could have been acquired by U.S. investors—and indeed was embroiled in disputes with U.S. nationals whose land had been expropriated, including some U.S. persons who had been issued Land Bonds—and yet the State Parties did not exclude from the scope of the Treaty the Land Bonds or measures relating to Peru’s wide-scale expropriations under the Land Reform Act (the “**Land Reform**” or “**Agrarian Reform**”). *See, e.g.*, **Doc. CE-456**, Peru 2006 Report on Investment Disputes and Expropriation Claims, June 1, 2006, ¶ 11 (referencing “Claimant K”); **Doc. CE-482**, Peru 2008 Report on Investment Disputes and Expropriation Claims Update, August 13, 2008, p. [4] (referencing “Claimant E”); **Doc. CE-492**, Peru 2009 Report on Investment Disputes and Expropriation Claims Update, June 15, 2009, pp. [3]-[4] (referencing “Claimant D”). As Ambassador Peter Allgeier, a former Deputy U.S. Trade Representative until August 2009, confirms in his expert report, the inclusion of the Land Bonds as covered investments is consistent with U.S. negotiating approach and trade objectives and the documents contemporaneous to the negotiation of the Treaty. *See* Expert Report of Ambassador Peter Allgeier, May 21, 2019 (“Allgeier, **CER-7**”).

34. The Land Bonds thus fall within both the specific and the general definition of covered investments under the ordinary meaning of the Treaty's explicit terms read in context and in good faith and in the light of the Treaty's object and purpose. In addition, the circumstances of conclusion of the Treaty, as well as the treaty practice of the Parties in other instances, unquestionably confirm the conclusion that this Treaty cannot and should not be read to exclude the Land Bonds.

1. The Ordinary Meaning of “Bonds,” “Debt Instruments,” and “Public Debt” Confirms that the Land Bonds Are Covered Investments.

35. The parties agree that the Treaty must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“*VCLT*”), which reflects customary principles. *See* Statement of Defense, **R-34** ¶ 167, n. 368. Consistent with Article 31, the starting point of the analysis must be the “ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Treaty’s] object and purpose,” read in good faith. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, **Doc. 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”). The express terms of the Treaty are presumed to most faithfully reflect the State Parties’ intentions. *See, e.g.*, International Law Commission (“*ILC*”), Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, **Doc. CA-124**, pp. 220-221, ¶¶ 11-12 (“the text must be presumed to be the authentic expression of the intentions of the parties” and “the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them”).

36. Peru does not meaningfully address the ordinary meaning of the Treaty’s express reference to “bonds,” “debt instruments,” and “public debt,” all of which lead to the conclusion that the Land Bonds are covered investments. Instead, it relies on sources entirely outside the Treaty’s text and of dubious credibility to argue that the Treaty’s terms mean the opposite of what they say. None of these extraneous sources can displace the conclusion that the Land Bonds are covered by the ordinary meaning of the Treaty’s terms, in both the specific and the general definitions of “investment.”

(a) The Land Bonds Fall Within the Treaty’s Specific Definition of Investment Because They Are “Bonds,” “Debentures,” and “Public Debt.”

37. Peru does not appear to contest that Article 10.28 of the Treaty contains several terms that, on their ordinary meaning, would cover the Land Bonds. The Treaty defines investment as follows:

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: [...]

(c) *Bonds, debentures, other debt instruments, and loans;*^{12, 13}

¹² Some forms of debt, *such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment*, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

¹³ Loans issued by one Party to another Party are not investments.

Doc. CE-139, Treaty, Art. 10.28 (emphasis added).

38. The equally authoritative Spanish text provides as follows:

inversión significa todo activo de propiedad de un inversionista o controlado por el mismo, directa o indirectamente, que tenga las características de una inversión, incluyendo características tales como el compromiso de capitales u otros recursos, la expectativa de obtener ganancias o utilidades, o la asunción de riesgo. Las formas que puede adoptar una inversión incluyen: [...]

(c) *bonos, obligaciones, otros instrumentos de deuda y préstamos;*^{16, 17}

¹⁶ *Es más probable que algunas formas de deuda, como bonos, obligaciones y pagarés a largo plazo, tengan las características de una inversión*, mientras que es menos probable que otras formas de deuda, tales como reclamos de pago de vencimiento inmediato y como resultado de la venta de bienes o servicios, tengan estas características.

¹⁷ Los préstamos otorgados por una Parte a otra Parte no son considerados inversiones.

Doc. CE-139, Treaty, Art. 10.28 (emphasis added).

39. The ordinary meaning of “bond” is a “long-term, interest-bearing debt instrument issued by a corporation *or a governmental entity*, usually to provide a particular financial need.” **Doc. CE-718**, Black’s Law Dictionary, definition of “bond” (emphasis added); *see also* **Doc. CE-717**, Downes, John, *Dictionary of Finance and Investment Terms*, Barron’s, 2014, p. 76 (defining a bond as “any interest-bearing or discounted *government* or corporate security that obligates the issuer to pay the bondholder a specified sum of money, usually at specific intervals, and to repay the principal amount of the loan at maturity”) (emphasis added).

40. The ordinary meaning of “debt” is a “liability on a claim; a specific sum of money due by agreement or otherwise,” while the ordinary meaning of an “instrument” is a “written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate.” **Doc. CE-718**, Black’s Law Dictionary, definition of “debt”; **Doc. CE-718**, Black’s Law Dictionary, definition of “instruments.” In addition, in the Spanish version, “debentures” is rendered as *obligaciones* (“obligations”), which the *Abaclat* tribunal concluded included sovereign bonds and security entitlements derived from them. *See Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 355, 356 (holding that “the term ‘obligations’ is a broad term and can refer to any kind of contractual obligation,” but “put in the context of the further terms listed in lit. (c) such as ‘economic value’ or ‘capitalized revenue’ . . . [it] is to be read as referring to the financial meaning of these terms” and concluding that “the bonds . . . constitute ‘obligations’ and/or at least ‘public securities’ in the sense of Article 1(1) lit. (c) of the BIT”).

41. The Treaty also addresses “public debt” more specifically, making clear that public debt is included in the definition of “debt” with the *sole* exception of bilateral debt between the U.S. and Peru. *See* **Doc. CE-139**, Treaty, Art. 10.28, n. 13. Annex 10-F of the Treaty is titled “Public Debt” (in Spanish, “*deuda pública*”). By expressly carving out certain types of claims arising from the “default or non-payment of debt issued by a Party” or a “restructuring of debt,” Annex 10-F necessarily assumes that public debt falls within the Treaty’s definition of investment and could give rise to claims of breach. *See* Statement of Claim, **C-34** ¶ 138. The ordinary meaning of “public debt” is a “debt owed by a municipal, state, or national government.” *See* **Doc. CE-718**, Black’s Law Dictionary, Definition of “Debt.” Barron’s Dictionary of Investment Terms gives a similarly broad and straightforward definition: “borrowings by governments to finance expenditures not covered by

current tax revenues.” **Doc. CE-717**, Downes, John, *Dictionary of Finance and Investment Terms*, Barron’s, 2014, p. 586. The ILC has similarly observed, in its Commentary to a convention to which Peru is a signatory: “A ‘public debt’ is ‘an obligation binding on a public authority.’” ILC, Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries, 1981, **Doc. CA-122**, p. 77; *see also* Olivares-Caminal, **CER-8 ¶¶** 54-55.

42. At the time of the Treaty’s negotiation, Peru acknowledged that the Treaty’s broad definition of investments “includes, *inter alia* . . . debt instruments (*including public debt*, except for bilateral debt).” **Doc. CE-447**, 13th Round of the Andean-U.S. FTA Negotiations, November-December 2005, p. 55 (emphasis added); *see also* **Doc. CE-419**, 2nd Round of the Andean-U.S. FTA Negotiations, June 2004, p. 24 (at the outset of the negotiations, the “definition [of investment] proposed by the U.S. includes *public and private debt*.”) (emphasis added). The U.S. legislative history also makes clear that the definition of investment in this Treaty “*covers all forms of investment, including enterprises, debt, concessions, contracts, and intellectual property.*” *See* **Doc. CE-715**, USTR, Statement of Why the U.S.-Peru Trade Promotion Agreement is in the Interests of U.S. Commerce (emphasis added); **Doc. CE-476**, United States Senate Committee on Finance, Report 110-249, United States-Peru Trade Promotion Agreement Implementation Act, December 2007, p. 21 (same). As Amb. Allgeier describes, consistent with the U.S.’s negotiating approach, the single exclusion of bilateral debt was a deliberate compromise between the State Parties and was the subject of extensive negotiation. *See* Allgeier, **CER-7 ¶¶** 47-50; Section II.B.2 below.

43. The Land Bonds fall into each and all of these categories.

44. The Land Bonds are undoubtedly “bonds/*bonos*.” The Bonds are also undoubtedly “debt instruments/*instrumentos de deuda*.” Peru, after all, called them “*Bonos de la Deuda Agraria*”—in terms and from the moment of their creation, “Bonds of the Agrarian Debt.” *See, e.g.*, **Doc. CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Ch. II (“The Land Reform Debt”), Art. 173 (“The Executive is hereby authorized to issue . . . Land Reform Debt Bonds”); **Doc. CE-16**, Decree Law N° 22749, November 13, 1979 (providing for the full transferability of the *Bonos de la Deuda Agraria*); **Doc. CE-88**, Emergency Decree N° 088-2000, October 10, 2000 (establishing payment procedures for the *Bonos de la Deuda Agraria*); **Doc. R-483**, Supreme Decree N° 145-69-EF/CP, September 30, 1969 (authorizing the Ministry of Agriculture to issue *Bonos de la Deuda Agraria*, and providing that the Land Bonds shall detail the class, series, amount and date of issuance, number, term, annual interest, maturity date, and name of beneficiary); **Doc. R-484**, Supreme Decree N° 137-70-EF/CP, July 3, 1970 (authorizing the further issue of Class C *Bonos de la Deuda Agraria*).

45. As Prof. Olivares-Caminal explains, the Land Bonds exhibit all the features of a “bond” as that term is classically understood—at its most basic, an instrument acknowledging a debt and the obligation to pay it. *See* Olivares-Caminal, **CER-8** ¶¶ 26-39. The Land Bonds are also materially indistinguishable from other kinds of bonds issued by States, although the Treaty makes no such distinctions, and bonds can have a variety of characteristics. *Id.* ¶¶ 40-50.

46. The Land Bonds are also, by definition, “public debt/*deuda pública*,” because they are a debt of Peru. According to their foundational law, the Land Bonds “*will be guaranteed by the State without reservations whatsoever.*” **Doc. CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 175 (emphasis added). As Prof. Olivares-Caminal explains, bonds issued by a State are a form of public sector debt. *See* Olivares-Caminal, **CER-8** ¶¶ 19-81. And Peru itself repeatedly characterized the Land Bonds as public debt (“*deuda pública*”) from the outset of the Land Reform through to the 2013 CT Order, the 2014 Supreme Decrees, the 2017 Supreme Decrees, and numerous other laws, decrees, and pronouncements. *See* **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 19 (“since the *issuance of the public debt securities* referred to as ‘Land Reform Debt Bonds’ began in 1969”) (emphasis added); **Doc. CE-37**, Supreme Decree N° 17-2014-EF, January 17, 2014 (“the State expropriated land and other goods for the purpose of land reform, *payment for which was made mainly with Land Reform Bonds*”) (emphasis added); **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017 (referring to the Land Bonds as “*títulos*” or “*títulos de deuda*”); *see also* **Doc. CE-88**, Emergency Decree N° 088-2000, October 10, 2000, p. 1 (“WHEREAS . . . There are currently outstanding obligations to current and former landowners [whose property] was encumbered or expropriated during the aforementioned land reform process; It is advisable to arrange a solution . . . and *pay said debts*”) (emphasis added); **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR, p. 5 (“The Peruvian government, in acknowledgment of its obligation to the persons whose property was expropriated, created a committee by means of Supreme Decree N° 148 2001-EF, the mandate of which includes the task of calculating *the government’s debt* to the persons whose property was expropriated under the Land Reform”) (emphasis added); **Doc. CE-116**, Alejandro Toledo, President of Peru, Presidential Veto, April 19, 2006, p. 4 (“Regarding the recognition of the *Land Reform Debt*, it must be noted that granting some *recognition of debt* to those whose lands were expropriated by the Land Reform, for purposes of payment capacity and the necessary financing, involves *committing resources from future budgets*”) (emphasis added). The division of the MEF that is in charge of the Bondholder Process is the General Directorate of *Public Indebtedness* and Treasury (*Dirección General del Endeudamiento y Tesoro Público*). *See, e.g.*, **Doc. CE-275**, Supreme Decree

N° 242-2017-EF, August 19, 2017, Art. 2.1. The Land Bonds are included in Peru’s Annual Reports of Public Debt. *See, e.g.*, **Doc. CE-629**, MEF, Public Debt Annual Reports 2016, May 30, 2017; **Doc. CE-652**, MEF, Public Debt Annual Reports 2017, May 30, 2018. And Prof. Reisman acknowledges that the Land Bonds were the means by which Peru “would pay its debt” to landowners for its land reforms. Reisman, **RER-1** ¶ 40.

47. If the State Parties to the Treaty had intended to exclude the Land Bonds from any of these categories of investments which they otherwise satisfy, they would have done so expressly. As Amb. Allgeier explains, and Peru’s own summaries of the negotiations confirm, the Treaty was negotiated pursuant to the U.S.’s “negative list” framework, meaning that assets or measures would be included within a treaty’s scope unless they were explicitly excluded. Allgeier, **CER-7** ¶ 14; **Doc. CE-436**, 8th Round of the Andean-U.S. FTA Negotiations, March 14-18, 2005, p. 13; **Doc. CE-447**, 13th Round of the Andean-U.S. FTA Negotiations, November-December 2005, XI Investment Table, p. 55 (“The Chapter was negotiated under the principle of ‘negative list,’ *i.e.* obligations apply horizontally to all sectors of the economy, except in those where an expressed reservation based on an existing standard was stipulated . . . or in cases where the country assumes a ‘reservation in the future’ (i.e. it does not assume any obligation)”); *see also* Brown, Chester (ed.), *Commentaries on Selected Model Investment Treaties*, **Doc. CA-90**, pp. 808-809 (noting that Article 14 of the 2012 US Model BIT, corresponding to Article 10.13 of the Treaty and Article 14 of the 2004 US Model BIT, “reflects a ‘negative list’ approach according to which, subject to certain additional exceptions provided for in the main body of the agreement, a US BIT applies to all measures relating to investment except for any measures expressly carved out as NCMs [Non-confirming Measures],” and that “[i]t is the goal of the US Government to conclude BITs and FTAs that contain limited and narrowly tailored annex exceptions in order to ensure an open and stable predictable investment climate for US investors.”); *see also* Section II.B.2 below.

48. Accordingly, the Treaty expressly excludes certain assets and measures. For example, as noted above, footnote 13 of the English version of the Treaty expressly excludes bilateral sovereign debt, and footnote 15 expressly states that “[t]he term ‘investment’ *does not include* an order or judgment rendered in a judicial or administrative proceeding,” but neither says that the terms “investments,” “bonds,” or “public debt” do not include Land Bonds. **Doc. CE-139**, Treaty, Art. 10.28, n. 13, 15 (n. 17 and 19, in Spanish) (emphasis added). The Treaty also contains specific provisions and annexes whose very purpose is to exclude certain kinds of measures, sectors or sub-sectors. *Id.* Art. 10.13 (“Non-Conforming Measures”). There is no mention, however, in any of these exclusions of the Land Bonds or any measures related to them—even though both the Land Bonds and disputes related to them

were very much at issue between the State Parties at the time of the Treaty’s negotiations and signature. *See* Section II.B.2(b) below.

49. Peru does not engage with the ordinary meaning of any of these Treaty provisions, or with how that meaning relates to the characteristics of the Land Bonds here. *See* Statement of Defense, **R-34** ¶¶ 201-204. Instead, Peru misreads two of the footnotes in the definitions section of the investment chapter. Professor Reisman states, in passing and without explanation, that footnote 16 of the English text of the Treaty “would appear to exclude” Gramercy’s Land Bonds. *Cf.* Reisman, **RER-1** ¶ 42. Footnote 16 defines a “written agreement,” for purposes of the jurisdictional title; it does not purport to define an “investment” for purposes of jurisdiction *ratione materiae*, and it also does not exclude the Land Bonds even on its face. *Cf.* **Doc. CE-139**, Treaty, Art. 10.28, n. 16 (“[w]ritten agreement’ refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.”).

50. Peru also contends that footnote 12 of the Treaty “would be superfluous” if all forms of debt, including all bonds, had the characteristics of an investment. Statement of Defense, **R-34** ¶ 201. This conclusion is based on a highly counterintuitive misreading of footnote 12. The Treaty provides that investments may take the form of “bonds, debentures, other debt instruments and loans.” While bonds and debentures are reasonably specific and well-defined terms, the last category could be exceptionally broad. Footnote 12 addresses these various “forms of debt” and expressly places “bonds, debentures, and long-term notes” at the end of the spectrum that is “more likely” to present the characteristics of an investment. Footnote 12 thus addresses the different kinds of *debt*, not the different kinds of *bonds*. The footnote thus explains *why* bonds constitute investments—rather than disqualifying them from the explicit list of “forms that an investment may take” above the line. This is clear also from comparison with the kind of transactions that footnote 12 says are “less likely” to qualify as characteristics: “claims to payment that are immediately due and result from the sale of goods or services.” Although such claims are a form of debt, and may even be reflected in debt instruments or characterized as a loan, one could not say that they obviously have the characteristics of an investment as does a bond.

51. There is also nothing “striking” or “noteworthy” about the fact that footnote 12 provides an illustration of the kinds of debt that possess the characteristics of an investment, or the fact that the Treaty expressly identifies three such characteristics. Statement of Defense, **R-34** ¶ 201; Reisman, **RER-1** ¶ 28. On both counts, the language is identical to the U.S. Model BIT of 2004, on which the Treaty is based. *See* **Doc. CE-410**, U.S. 2004 Model BIT, Art. 1, n. 1. As Amb. Allgeier explains, the definition in the 2004 U.S. Model BIT was meant to be

broad, consistent with U.S. trade policy and any exclusions from it had to be specifically carved out. Allgeier, **CER-7** ¶ 26.

52. What *is* striking about the definition of investment, however, is that the Treaty contains an additional footnote to the sentence about bonds and debt instruments—footnote 13 in the English version—that is *not* in the US Model BIT. Footnote 13 provides that “[l]oans issued by one Party to another Party are not investments.” *Cf.* **Doc. CE-139**, Treaty, Art. 10.28 n. 13. Both Peru and Prof. Reisman entirely fail to address the significance of this provision. This footnote illustrates the deliberate compromise between Peru’s attempt during the negotiations to exclude *all* kinds of public debt (which would have excluded the Land Bonds) and the U.S.’s desire to include it. Allgeier, **CER-7** ¶ 26; *see also* Section II.B.2 below. By explicitly excluding this one kind of debt only—bilateral public debt—but not excluding any other kinds of debt of the State parties, the plain terms of Article 10.28 in the context of Annex 10-F confirm that the Land Bonds are covered investments.

53. Peru does not deny that the ordinary meaning of Article 10.28, footnotes 12 and 13, and Annex 10-F taken together is that public debt held by an investor—such as the Land Bonds—would be a covered investment. *Cf.* Statement of Claim, **C-34** ¶ 138; Statement of Defense, **R-34** ¶ 202. Indeed, Prof. Reisman admits that “one might argue that, the concept of ‘public debt’ in Annex 10-F of the U.S.-Peru Treaty could be construed to include the Agrarian Reform Bonds in the definition of investment under the Treaty” Reisman, **RER-1** ¶ 29.

54. Peru also does not even mention or discuss its own contemporaneous descriptions of the particularly broad nature of the Treaty’s plain terms. In its summary of the 13th negotiation round, Peru stated that the Treaty negotiations ultimately resulted in the adoption of a:

concept of investment [that] is broad and covers all forms of possible assets that an investor possesses or controls directly or indirectly in the country and that has as characteristics the fact that it commits capital or other resources, as well as the expectation of profit or assumption of risk. The definition contains an illustrative list that is not exhaustive and that includes, inter alia . . . debt instruments (including public debt, except for bilateral debt).

Doc. CE-447, 13th Round of the Andean-U.S. FTA Negotiations, p. 55 (emphasis added); *see also* Paolo Di Rosa, Dawn and Yamane Hewett, *The New 2012 U.S. Model BIT: Staying the Course*, Yearbook on International Investment

Law and Policy 2012-2013, 2014, **Doc. CA-105**, p. 604 (drafters of 2012 U.S. Model BIT refused to “accept[] proposals to exclude sovereign debt completely from the coverage of the BIT.”); Kantor, Mark, *Little Has Changed in the New US Model Bilateral Investment Treaty*, 27 ICSID Review 335, 2012 **Doc. CA-130**, pp. 361-363 (addressing the definition of “investment” in the Treaty, noting that “encompass[es] sovereign indebtedness and indebtedness of State enterprises”).

55. Peru’s contention that the Tribunal does not have jurisdiction on the plain terms of the Treaty thus reduces to Prof. Reisman’s remarkable assertion that these Land Bonds, which Peru itself has for decades acknowledged to be a public debt, somehow are not, because such a conclusion would “sit uncomfortably with the common understanding of ‘public debt’ in the investment context.” Reisman, **RER-1** ¶ 29; *see also* Statement of Defense, **R-34** ¶ 202. This argument, too, flouts axiomatic principles of treaty interpretation. Peru does not explain what public debt “in the investment context” means, or why that would be any different from the ordinary meaning of “public debt” in all other contexts. Peru also does not explain why it repeatedly called the Land Bonds “public debt” if they were not.

56. Instead, Peru and Prof. Reisman suggest that the notion of “public debt” in the Treaty should be defined not in accordance with the ordinary meaning of its terms in context read in good faith and in light of its object and purpose, but by reference to a user-generated student forum post and the mission statement of a now-defunct U.S. federal agency. *Cf.* Statement of Defense, **R-34** ¶ 202; Reisman, **RER-1** ¶ 29. There are many problems with this argument, not least of which the lack of any such limitation in the Treaty, the thoroughly unreliable and inapposite nature of the sources Peru invokes, and the fact that, even on their own terms, they would not exclude the Land Bonds in any event.

57. Peru and Prof. Reisman appear to have drawn their proposed meaning of “public debt in the investment context” from a self-published post hosted on the website www.economicdiscussion.net. *Cf.* Muley, Ritika, *Public Debt: Meaning, Classification and Method of Redemption*, **Doc. RA-184**. Although Peru has only extracted the text of this post, which it oddly introduced as a legal authority, the website on which it is hosted betrays its dubious provenance. *See* **Doc. CE-714**, Muley, Ritika, *Public Debt: Meaning, Classification and Method of Redemption*. This website carries no academic or professional affiliation. Like other websites that host user-generated content, it is not possible to browse this website or navigate to the post that Peru cites from its homepage; to find the post, one must locate it through a targeted search on a third-party search engine. This obscure website’s home page provides various

means for uploading content and invites visitors to: “*Share Your Knowledge on Economics. For Private Use Only!*,” explaining:

Our mission is to provide an online platform *to help students to discuss* anything and everything about Economics. This website includes study notes, research papers, essays, articles and other allied information *submitted by visitors like YOU*.

Id. (emphasis added).

58. The advertisement-laden post on which Peru and Prof. Reisman rely was “shared” by Ritika Muley (incorrectly referred to as “Ritika Motley” in both Peru’s Statement of Defense and Prof. Reisman’s opinion), although the identity and credentials of the author are nowhere to be found. It will come as no surprise that Amb. Allgeier confirms that this post does not represent the United States’ understanding of “public debt” in the context of the Treaty. Allgeier, **CER-7 ¶ 44**.

59. Little more need be said about the place of such an “authority” before this Tribunal. Yet, even on its own terms, it does not prove Peru’s case. The post proposes that public debt is “loans incurred by the government to finance its activities when other sources of public income fail to meet the requirements.” Muley, Ritika, *Public Debt: Meaning, Classification and Method of Redemption*, **Doc. RA-184**, p. 1. But it does not purport to argue that this is the *only* definition of public debt to the exclusion of others. Nor does it purport to define the meaning of public debt “in the investment context.”

60. Prof. Reisman maintains that this definition is supported by the alleged “U.S. Government’s understanding” of the term “public debt” as being “only instruments created to fund the Government in the absence of taxes or printing money,” which he bases *solely* on the description of responsibility for the now-defunct U.S. Bureau of Public Debt. *See* Reisman, **RER-1 ¶¶ 29-30**. This fares no better. Neither Prof. Reisman nor Peru provides any basis for why a description of the scope of operations of a former domestic agency would be relevant to a treaty text negotiated over 60 years after the agency was created, or how it could be what *both* State Parties intended by the term “public debt” in the context of an international investment. Ambassador Allgeier again confirms that neither this source nor the concept for which it allegedly stands formed part of the U.S.’s negotiating approach in treaty negotiations. Allgeier, **CER-7 ¶ 44**.

61. And again, even on its face, this obscure alternative source does not help Peru. The mission statement provides that “borrowing the money needed to operate the Federal Government” includes “the issuance of marketable Treasury securities.” Reisman, **RER-1 ¶ 29**

(citing U.S. Department of the Treasury, About: Bureau of the Public Debt, <https://www.treasury.gov/about/organizational-structure/offices/General-Counsel/Pages/bdp.aspx>). This definition, too, also does not purport to be exhaustive, or to define public debt “in the investment context.”

62. Most significantly, nowhere in the Treaty does it state that, in order to be a protected investment, the “public debt” in question must have been issued *only* in order “to operate” or “to fund the Government.” Cf. Statement of Defense, **R-34** ¶ 202; Reisman, **RER-1** ¶ 30.

63. Moreover, even if such requirements were read into the Treaty, that still would not disqualify the Land Bonds. Neither Peru nor Prof. Reisman explains why the Land Bonds did not “fund the Government,” or did not help to “operate the Government.” They plainly do. Peru does not explain what they funded, if *not* the Government. That was, of course, the very point of the Land Bonds or any other type of sovereign bond—to provide the government access to resources which it could not fund through current revenues. Peru issued them to pay for its widespread expropriation of agrarian land, which it undertook to further the Government’s “fundamental goal” of “provid[ing] to the less favored sectors of the population better standards of living . . . through the transformation of the country’s economic, social and cultural structures” and to “decisively contribute to building a broad market and providing the capital funds required for a quick industrialization of the country.” **Doc. CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Preamble, p. 1. Those are government operations, and the Land Bonds made available “the capital funds required” for them. Indeed, there is no economic difference between Peru issuing new bonds for money and using such money to pay compensation for expropriated land, as opposed to paying directly for the expropriated land directly with newly issued Land Bonds. Hence, the Land Bonds were very much an instance of the Peruvian Government borrowing the money needed to fund or operate the Peruvian Government in its land reform objectives.

64. Peru’s resort to such uncreditable and extraneous sources is indicative of the lengths to which it must go to justify its extraordinary reading of the Treaty in a way that runs counter to its plain text. This exercise cannot succeed. To the contrary, what Annex 10-F and footnote 13 confirm about public debt is that, if the State Parties intended to exclude certain kinds of assets—and especially certain kinds of public debt—from the Treaty’s coverage, they would have done so expressly. As the *Société Générale v. Dominican Republic* tribunal observed, “the Treaty broadly but non-exhaustively defines the term investment in a detailed manner and therefore expresses unequivocally the intent of the parties. If any restrictions had been intended, they would have been embodied in that article.” *Société Générale* Award on Preliminary Objections to Jurisdiction, **Doc. CA-183**, ¶ 32.

65. There is no warrant for usurping the State Parties' unequivocal expression of intent here. Despite Peru's attempts to derive alternative meanings from uncreditable sources, therefore, the Land Bonds are plainly "bonds" and "public debt" of the kind that the Treaty expressly includes.

(b) The Land Bonds Also Fall Within the Treaty's General Definition of Investment Because They Have the Characteristics of an Investment.

66. Peru also argues that, even if the Land Bonds are "bonds" or debt instruments of the kind explicitly listed in the Treaty, they should nevertheless *not* be considered covered investments because they do not possess the "characteristics of an investment." *Cf.* Statement of Defense, **R-34** ¶ 201. Thus, Peru reads the reference to "characteristics of an investment" to be a "qualification" attendant on the forms of investment expressly listed. *Id.*; Reisman, **RER-1** ¶¶ 25, 28. This interpretation turns the natural reading of the text on its head: the text, read in good faith, means that the forms of investment specifically listed *are* ones that typically possess the characteristics of an investment. *See* Allgeier, **CER-7** ¶¶ 36, 40. There would be little point to listing them otherwise.

67. Even if Peru's interpretation were correct, however, that would not exclude the Land Bonds, because they *do* present every one of the characteristics of an investment that the Treaty expressly identifies: the commitment of capital and resources, the expectation of gain and profit, and the assumption of risk. As a preliminary matter, these three characteristics are not mandatory, whether individually or collectively. Article 10.28 presents them as illustrative ("including such characteristics as"), and they are linked by the disjunctive "or." Allgeier, **CER-7** ¶ 36. Indeed, Prof. Reisman agrees that "[n]o one of these characteristics is alone decisive" and that a transaction need "not necessarily include all of the 'characteristics'" to qualify as an investment. Reisman, **RER-1** ¶ 28; *see also* Brown, Chester (ed.), *Commentaries on Selected Model Investment Treaties*, 2013, **Doc. CA-90**, p. 767 ("[t]he phrase 'including such characteristics as' indicates that the list is merely illustrative. In practice, most 'investments' will have at least two, if not all three, of these characteristics, though they need not in order to come within the scope of the definition.").

68. In this case, in any event, the Land Bonds meet *all* of these express characteristics, and there is no basis to require that they also meet other kinds of characteristics that the Treaty nowhere mentions.

69. *First*, there is no question that Gramercy committed capital when it acquired the Land Bonds. *See also* Section II.A above. Professor Reisman's unsupported assertions that Gramercy has "not offered any evidence, or even specific allegations, as to the contributions it allegedly made" are false. *See* Koenigsberger, **CWS-3** ¶¶ 38-42;

Statement of Claim, **C-34** ¶ 67; **Doc. R-266–Doc. R-270**; **Doc. R-272–Doc. R-290**; **Doc. R-292–Doc. R-295** (purchase agreements). No basis is offered, and none exists, for the assertion that Gramercy must “reveal[] the identity or nationality of the beneficial holders” of the Land Bonds or disclose “funding or compensation arrangements” related to the Land Bonds to have committed capital to acquire the Land Bonds for purposes of the Treaty. *Cf.* Reisman, **RER-1** ¶ 46.

70. *Second*, Gramercy had an expectation of gain or profit from investing in the Land Bonds, because it legitimately expected that Peru would honor their updated, current value. *See* Koenigsberger, **CWS-3** ¶¶ 34-35; Statement of Claim, **C-34** ¶¶ 66-67; *see also* Section III.B.1 below. Indeed, neither Peru nor Prof. Reisman appears to dispute that this criterion is satisfied. *Cf.* Statement of Defense, **R-34** ¶ 205; Reisman, **RER-1** ¶¶ 46-49. To the contrary, Gramercy’s expectation of gain appears to be the reason why Peru and Prof. Reisman describe it as a “hedge fund speculator.” *See* Statement of Defense, **R-34** ¶ 216 (*citing* Reisman, **RER-1** ¶¶ 68-69).

71. *Third*, Gramercy assumed risk in acquiring the Land Bonds. As the Public Debt Annex stipulates, “[t]he Parties recognize that the purchase of debt issued by a Party entails commercial risk.” **Doc. CE-139**, Treaty, Annex 10-F, ¶ 1. That was exactly the case here: while Peru’s obligation to satisfy the Land Bonds was firmly established, there was risk regarding exactly how and when Peru would satisfy this debt. *See* Koenigsberger, **CWS-3** ¶¶ 34-35. As the *OI European Group v. Venezuela* tribunal reasoned, “[i]t is doubtful that the characteristics have the same meaning in different types of investment; thus, for instance, the risk in a corporate investment is the possibility of obtaining benefits or incurring losses, while in an investment in public debt the risk is that the State will not pay—by all account two very different uncertainties.” *OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award of March 10, 2015, **Doc. CA-153**, ¶ 222, n. 215. When assessing risks associated with sovereign debt, the *Ambiente Ufficio* tribunal found that “given the risk of the host State’s sovereign intervention, a risk that became manifest in Argentina’s very default and restructuring, what is at stake [in purchasing bonds] is not an ordinary commercial risk.” *Ambiente Ufficio S.P.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of February 8, 2013, **Doc. RA-173**, ¶ 485 (footnote omitted). Similarly, in *Fedax*, the tribunal rejected the argument that there was no risk because “the very existence of a dispute as to the payment of the principal and interest evidences the risk that the holder of the notes has taken.” *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction of July 11, 1997, **Doc. RA-159**, ¶ 40.

72. Peru’s suggestion that purchasing the Land Bonds was risk-free because there was no risk “tied to the performance” of the Land Bonds is therefore both misguided and irrelevant. *Cf.* Statement of

Defense, **R-34** ¶ 205 (*quoting* Reisman, **RER-1** ¶ 48). The Treaty, in Annex 10-F, stipulates that the risk requirement is fulfilled with respect to “the purchase of debt issued by a Party,” which is exactly what the Land Bonds are. **Doc. CE-139**, Treaty, Annex 10-F, ¶ 1. Nowhere does the Treaty require any particular kind of risk. Nor does Peru articulate what it means by a risk in the “performance” of the Land Bonds, or explain why no such risk would exist here. The risk that Gramercy took in acquiring the Land Bonds is indistinguishable from the delay or default risks assumed by purchasers of other sovereign bonds. Moreover, Peru could hardly argue that purchasing the Land Bonds was risk-free. Professor Reisman’s bare assertion that the Land Bonds presented insufficient risk because the “value of the Bonds was at best uncertain” (Reisman, **RER-1** ¶ 48) is puzzling—surely such an asset would be more, not less, risky than one whose value was not as uncertain. *See, e.g., Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009, **Doc. RA-100**, ¶ 127 (“On its face, the purchase of a bankrupt company, for a small price, still carries a risk”).

73. *Fourth*, the Land Bonds are not disqualified from possessing these characteristics on the grounds that they were issued “through domestic judicial proceedings in the domestic currency of a developing country under domestic law, with recourse to domestic courts.” *Cf.* Statement of Defense, **R-34** ¶ 204 (emphasis added). Foreign investors would not need access to bilateral investment treaties (“*BITs*”) in the first place if all their investments were based on international law. Tribunals routinely deal with investments that are subject to domestic judicial proceedings and governed by domestic law, but are protected by investment agreements. If foreign investors had investment contracts governed by international law, they would not need BITs in the first place. *See, e.g., Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of September 16, 2015, **Doc. CA-165**, ¶ 255 (finding that Respondent breached BIT by expropriating mining investments governed by local law); *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of August 22, 2016, **Doc. RA-147**, ¶¶ 379, 410 (finding expropriation of mining concessions granted pursuant to local law). It is thus unclear on what basis Peru believes these requirements should be implied into the Treaty. There could be no objection that the Land Bonds are too “domestic” to qualify as an investment under the Treaty; the Treaty of course requires that the investment be “made . . . in the territory of” Peru. **Doc. CE-139**, Treaty, Arts. 10.28 (definition of “investor”), 1.3 (definition of “covered investment”).

74. Peru’s only source for this proposition is Prof. Reisman’s opinion. *Cf.* Statement of Defense, **R-34** ¶ 204, n. 459; Reisman, **RER-1** ¶¶ 39-40 (noting that the Land Bonds “were not offered to a broad range of international and domestic investors via a marketing campaign,” or “in a freely convertible currency,” or “governed by foreign laws,” or

“include forum selection clauses designating major international financial centers.”). Professor Reisman appears to intend these factors to distinguish the Land Bonds from “contemporary global sovereign bonds” considered in other international arbitration cases. *Cf.* Reisman, **RER-1** ¶ 39.

75. No such distinction can be made, however. In *Abaclat*, after having defined bonds more generally as “a debt, in which an interested party loans money to an entity (corporate or governmental),” the majority of the tribunal identified several subcategories of bonds, including “government bonds,” namely “[b]onds issued by governments in the country’s own currency.” *Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 11, 14 (emphasis added). The majority of the tribunal concluded that, regardless of the subcategory, bonds *in general* qualified as *obligaciones* in Spanish—rendered in this Treaty as “debentures” in English—that were protected under the Italy-Argentina BIT. *Id.* ¶¶ 355-356. In addition, Prof. Olivares-Caminal explains that there is no distinction in substance between what Peru presumably means by “contemporary global sovereign bonds” and the Land Bonds here. Olivares-Caminal, **CER-8** ¶¶ 37-50.

76. Moreover, neither Peru nor Prof. Reisman offers any explanation for why the presence or absence of such “domestic” touchpoints should be relevant to the interpretation of the Treaty text as a matter of international law. There is no support for Prof. Reisman’s blanket assertion that “a transaction that was intended to be concluded by Peruvian parties and, hence, [does] not qualify[] as an ‘investment’ under the Treaty.” Reisman, **RER-1** ¶ 42. Peru’s alleged *intent* as to the nationality of the people to whom the Land Bonds were delivered is irrelevant to their status as investments under the Treaty. Peru made the Land Bonds transferable, including to foreign investors, without stipulating any of the conditions Prof. Reisman now posits, and without expressly excluding them from the protection of investment treaties to which such foreign investors would be entitled. **Doc. CE-16**, Decree Law N° 22749 of November 13, 1979, Art. 5. Indeed, as the LeTourneau dispute shows, as a condition precedent for the U.S. to execute the Treaty, Peru was required to commit to solving claims of U.S. investors arising from the very same Agrarian Reform that created the Land Bonds. *See* Section II.B.2(b) below.

77. Furthermore, imposing the kinds of extraneous requirements that Peru suggests would disqualify from treaty protection the overwhelming majority of investments that would and should otherwise enjoy protection. For example, a U.S. investor who purchases a factory in Peru might well do so even if the seller (whether the State or a private party) did not offer it to a broad range of international and domestic investors via a marketing campaign, even if the transaction was in Peruvian *soles* and governed by Peruvian law, and even if did not include international forum selection clauses. Yet, there can be little question

that, if Peru thereafter expropriated the factory, no one would contend it was not an “investment” because of those local characteristics.

78. *Finally*, the Land Bonds also are not disqualified from possessing the characteristics of an investment on the grounds that they allegedly do not also contribute to Peru’s economic development (which they in any event do). *See* Statement of Defense, **R-34** ¶ 205; Reisman, **RER-1** ¶ 49. This condition, too, appears nowhere in the Treaty. That omission is intentional: the 2004 U.S. Model BIT, on which the Treaty is based, “does not specify that the asset must contribute to the economic development [of the host State], and the United States does not regard that as an element of the definition of ‘investment.’” Vandavelde, Kenneth J., *U.S. International Investment Agreements*, 2009, **Doc. CA-194**, p. 140. As Amb. Allgeier confirms, that was for good reason: any such requirement would have been highly subjective and difficult to prove, and would have been contrary to the United States’ desire to include the broadest possible range of U.S. investments. Allgeier, **CER-7** ¶ 36.

79. Neither can such a requirement be derived from arbitral “jurisprudence,” as Peru claims. Peru’s sole basis for attempting to impose such a tacit, additional, and mandatory criterion appears to be the 2001 decision in *Salini v. Morocco* and Prof. Reisman’s entirely unsupported assertions. *Cf.* Statement of Defense, **R-34** ¶ 205; Reisman, **RER-1** ¶¶ 44-45. Peru alleges that the Treaty “tracks closely” (Statement of Defense, **R-34** ¶ 205) the four elements articulated in *Salini*, but in fact the Treaty only “tracks” three of them—contribution of capital, expectation of profit, and assumption of risk. It does *not* include any minimum “duration” requirement, nor does it require a “contribution to the host State’s economic development.” *See Doc. CE-139*, Treaty, Art. 10.28. The *Salini* decision was issued years before the Treaty was signed. If the State Parties had wanted to incorporate it, they could very well have done so. They deliberately did not. *See* Allgeier, **CER-7** ¶ 36.

80. As Prof. Reisman himself has opined,

[i]n circumstances in which states-parties have defined which transactions will constitute an investment in their BIT, is there any institutional imperative for even applying the *Salini* test? One can find no such imperative in the ICSID structure and we would suggest that it is preferable to leave policy considerations to the contracting parties and to refrain from retrofitting Article 25(1) with a meaning which is not there, *a fortiori* to apply any of the *Salini* factors.

Reisman, W. Michael and Vinnik, Anna, *What Constitutes an Investment and Who Decides?*, in

Rovine, *Contemporary Issues in International Arbitration and Mediation*, 2011, **Doc. CA-168**, p. 69.

81. Professor Reisman’s reliance on a law student article and two cases from 2006—one of which he has elsewhere criticized as “puzzling”—for the suggestion that *Salini* constitutes “controlling law” is again telling. Cf. Reisman, **RER-1** ¶ 44, n. 34 (citing *Joy Mining* and *Jan de Nul*); but see Reisman, W. Michael and Vinnik, Anna, *What Constitutes an Investment and Who Decides?*, in Rovine, *Contemporary Issues in International Arbitration and Mediation*, 2011, **Doc. CA-168**, pp. 63, 66 (noting that the *Joy Mining* tribunal “relied on qualitative adjectives rather than analysis” with respect to the analysis of contribution, and, with respect to the tribunal’s analysis of risk, concluding that “[t]he reasoning here is puzzling”). In reality, Prof. Reisman’s observations in other articles are closer to the truth: “even when *Salini* is invoked, the degree of faithful adherence actually paid to itsi [sic] test is still unclear.” Reisman, W. Michael and Vinnik, Anna, *What Constitutes an Investment and Who Decides?*, in Rovine, *Contemporary Issues in International Arbitration and Mediation*, 2011, **Doc. CA-168**, p. 60. Instead, “as a review of decisions shows, there is no objective meaning to investment to be found in the Convention or to be gleaned from the jurisprudence applying it.” *Id.*; see also *id.* p. 69 (“there is a certain self-defeating tyranny in *Salini* and its progeny.”)

82. In fact, tribunals—including the *Abaclat* tribunal, as Prof. Reisman well knows, because in that case he was the expert hired by White & Case for the bondholder claimants—have on the whole rejected the idea that *Salini* imposes mandatory jurisdictional conditions. The *Abaclat* majority reasoned:

One approach would be to follow the *Salini* criteria and check whether the contribution made by Claimants fulfill all these requirements. However, and irrespective of the adequacy of the individual *Salini* criteria, the Tribunal finds that this would not be the right approach, for the following main reason.

If Claimants’ contributions were to fail the *Salini* test, those contributions—according to the followers of this test—would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants’ contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention’s aim, which is to encourage private investment while

giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina’s and Italy’s express agreement to protect the value generated by these kinds of contributions. In other words—and from the value perspective—there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because—from the perspective of the contribution—the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.

Abaclat Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 363-364.

83. Similarly, in *OI European Group*, the tribunal deemed “it is important to clarify that the required characteristics [contribution, duration, and risk] are merely guidelines: it is possible for an asset to be an investment even when it does not meet all the characteristics and vice versa.” *OI European Group* Award, **Doc. CA-153**, n. 215. Because the “*Salini* test was designed to discern whether or not a construction contract constitutes an asset, its usefulness in other situations is doubtful.” *Id.* This approach has been adopted by many other tribunals both before and since. *See, e.g., Ambiente* Decision on Jurisdiction, **Doc. RA-173**, ¶ 479 (“[T]he *Salini* criteria, if useful at all, must not be conceived of as expressing jurisdictional requirements *stricto sensu*.”); *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award of July 26, 2018, **Doc. CA-118**, ¶¶ 191-193 (rejecting the notion that the *Salini* criteria are both mandatory and cumulative, instead holding it “appropriate to defer to the State parties’ articulation of the meaning of ‘investment’ in their instrument of consent to arbitration, namely, the BIT. . . . This judgment as to which economic activities constitute investments should be given considerable weight and deference. A tribunal would need compelling reasons to disregard such a mutually agreed definition of investment”); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections of December 13, 2017, **Doc. CA-89**, ¶ 165 (under the similarly-worded

U.S.-Panama TPA, concluding, “in agreement with most previous decisions, that there is no inflexible requirement for the presence of *all* these characteristics [including contribution to the host State’s development], but that an investment will normally evidence most of them”); *Phoenix Action Award*, **Doc. RA-100**, ¶ 82 (holding that while “[t]here is nothing like a total discretion” to designate any kind of transaction as an investment, the tribunal also would not apply the *Salini* test, because “it considers that the *Salini* test is not entirely relevant and has to be supplemented”); *see also* Reisman, W. Michael and Vinnik, Anna, *What Constitutes an Investment and Who Decides?*, in Rovine, *Contemporary Issues in International Arbitration and Mediation*, 2011, **Doc. CA-168**, p. 66 (describing the treatment of duration in *Romak*, noting that the “[t]he tribunal took no account of the fact one part of Romak’s assignment stretched in its entirety to one and a half years, almost the length recommended by *Salini* for the duration of an ‘investment’); Schreuer, Christoph H., *The ICSID Convention: A Commentary*, 2009, **Doc. CA-178**, Art. 25, ¶¶ 153, 171 (“These features [of an investment] should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention,” and “The development in practice of a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. . . . To the extent that the ‘*Salini* test’ is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately.”).

84. Moreover, *Salini* is especially inapposite in this case, because it was issued in the entirely different context of jurisdiction under the ICSID Convention (which is not applicable here). Further, the *Salini* test’s scope and function have been whittled down over time by subsequent tribunals. For instance, in *White Industries*, the tribunal reasoned that the *Salini* test was “developed in order to determine whether an ‘investment’ had been made for the purposes of the ICSID Convention,” but because that case was not under the ICSID Convention, “the so-called *Salini* Test [criteria] . . . are simply not applicable here.” *White Industries Australia v. Republic of India*, UNCITRAL, Final Award of November 30, 2011, **Doc. CA-44**, ¶¶ 7.48-7.49. Similarly, in *Anglia Auto v. Czech Republic*, the SCC tribunal did “not deem it necessary to inquire into the question whether the requirements of a contribution, certain duration and an element of risk are met in this instance, given that the arbitration was brought under the SCC Arbitration Rules, not the ICSID Arbitration Rules under which the so-called *Salini* test has been developed in arbitral case law in relation to Article 25 of the 1965 ICSID Convention.” *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case No. V2014/181, Final Award of March 10, 2017, **Doc. CA-79**, ¶ 150.

85. The fact that the Treaty allows the investor a choice between an arbitration subject to the ICSID Convention or an *ad hoc* arbitration under the UNCITRAL Rules (which Gramercy has selected) cannot be

read to assimilate those two regimes and thereby dissolve the purpose of a choice altogether, as Prof. Reisman suggests in his opinion. Cf. Reisman, **RER-1** ¶ 43. In one published article, Prof. Reisman criticizes exactly this approach. See Reisman, W. Michael and Vinnik, Anna, *What Constitutes an Investment and Who Decides?*, in Rovine, *Contemporary Issues in International Arbitration and Mediation*, 2011, **Doc. CA-168**, p. 56 (with respect to a similar argument in *Romak*, stating that “[i]f the reason for importing the phantom term ‘investment’ into UNCITRAL Rules was to secure an identity [*sic*] of treatment in both instances, it is unlikely to succeed. In most BITs, the investor is entitled to choose from a range of decision options: there are many outcome-determinative differences between ICSID, UNCITRAL, *ad hoc* and national judicial procedures. It’s unrealistic to expect these various institutions [*sic*] to adjust their procedures to conform to ICSID”).

86. Even where other tribunals have referred to the *Salini* factors, or more broadly to an “objective” test of the inherent characteristics of an investment, as part of their analysis, they have rejected the “contribution to economy” prong of *Salini* as vague, difficult to prove, and irrelevant. In *Phoenix Action*, the tribunal held:

[T]he contribution of an international investment to the *development* of the host state is impossible to ascertain—the more so as there are highly diverging views on what constitutes ‘development’. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.

Phoenix Action Award, **Doc. RA-100**, ¶ 85 (emphasis in original); see also *id.* ¶ 114 (referring to the investor’s “economic activity in the host State” rather than contribution to economic development of the host State).

87. Other tribunals and commentators have echoed the basic elements of “contribution/duration/risk” but rejected any independent requirement of contribution to the host State’s economic development. See, e.g., Schreuer, **Doc. CA-178**, Art. 25, ¶ 173 (“A test that turns on the contribution to the host State’s development should be treated with particular care.”); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award of October 31, 2012, **Doc. CA-20**, ¶¶ 306-307 (the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable

owing to its subjective nature . . . What is important is the commitment of the investor and not whether he positively contributed to the economic and social development of the host State.”); *see also Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award of November 26, 2009, **Doc. CA-173**, ¶ 207 (“the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk”) (emphasis in original); *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award of April 9, 2015, **Doc. RA-179**, ¶¶ 360, 371 (by majority, assessing the “objective” test of “contribution, duration, risk”); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of May 16, 2018 **Doc. CA-136**, ¶ 199 (“In sum, the existence of an ‘investment’ requires a commitment or allocation of resources for a duration and involving risk”). Indeed, in the recent case of *Aven v. Costa Rica*, under the similarly worded DR-CAFTA, the tribunal did not even mention *Salini* or any requirement of contribution to the host State’s economic development in considering whether the claimants’ contributions of expertise were qualifying investments (and concluding that they were). *See David Aven et al. v. Republic of Costa Rica*, DR-CAFTA, Case No. UNCT/15/3, Final Award of September 18, 2018, **Doc. CA-102**, ¶¶ 254-258. Peru’s attempt to impose a mandatory extra-textual, *Salini*-type criterion of contribution to economic development is thus entirely misplaced.

88. In any event, even if the Tribunal were to consider additional characteristics beyond those identified in the Treaty, both the Land Bonds and Gramercy’s acquisition of them would qualify, because they do in fact contribute to Peru’s economic development and are of a sufficient duration.

89. Peru said so itself: the Land Reform Act of 1969 states that the Land Reform “will contribute to the Nation’s social and economic development.” **Doc. CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 1. Decree 22,749, which made the Land Bonds freely transferable and created a secondary market, confirms that trade in the Land Bonds creates value. **Doc. RA-193**, Decree Law N° 22749, November 13, 1979, Art. 5. For nine months, the Land Bonds were also tradable at the *mesa de negociación* of the Lima Stock Exchange, making them available to retail investors through an agent. *See Olivares-Caminal*, **CER-8** ¶ 79.

90. Furthermore, as Prof. Olivares-Caminal explains, just like any other State-issued bonds, Gramercy’s acquisition of the Land Bonds did contribute to Peru’s economic development. *See Olivares-Caminal*, **CER-8** ¶¶ 76-80. Gramercy injected tens of millions of dollars into the local economy, which had multiplier effects and created much-needed liquidity to stimulate further economic growth. *See Koenigsberger*,

CWS-4 ¶ 38. Moreover, there is no principled basis to consider that Land Bonds purchased on the secondary market are any less of an investment than those issued directly by the State. Olivares-Caminal, **CER-8** ¶ 79.

91. Further, Gramercy’s investment created an opportunity for Peru to resolve the impasse created by the fragmented nature of the bondholder pool and provided a catalyst for a global solution. As Mr. Koenigsberger attests, “sovereigns typically do not want to be in default on their obligations. They typically recognize that losing the trust of lenders and other investors is detrimental to the nation’s economy.” Koenigsberger, **CWS-3** ¶ 16. Gramercy’s acquisition of a meaningful stake in the Land Bonds brought some cohesion to an otherwise fragmented group of bondholders and would have allowed Peru to more easily restructure the Land Bond debt, as had happened in both Argentina and Nicaragua. *See id.* ¶¶ 9-19. The fact that Peru passed up this opportunity in favor of effectively repudiating the Land Bond Debt is of no matter here.

92. Gramercy’s investment in the Land Bonds also satisfies any “duration” consideration. The Treaty itself places “bonds” and “long-term notes” on the end of the spectrum of forms of debt that is “more likely” to present the characteristics of an investment. **Doc. CE-139**, Treaty, Article 10.28, n. 12. Peru does not appear to seriously dispute the proposition that the Land Bonds are of a sufficient duration. Its only objection is that Gramercy purchased them “in order to demand payments,” but this has nothing to do with whether the Land Bonds are an investment of sufficient duration. Statement of Defense, **R-34** ¶ 205. In some sense, bonds and other debt instruments, by their nature, ultimately entitle their holder to “demand payments.” The point is, however, that the Land Bonds are long-term instruments by nature, with a term of 20 to 30 years. *See Doc. R-483*, Supreme Decree N° 145-69-EF/CP of September 20, 1969, Art. 2. Moreover, Gramercy acquired them over a decade ago. This would qualify by any measure. Tribunals have generally held that a period of two to five years is sufficiently long to satisfy the duration criterion in *Salini*. In *Deutsche Bank*, for example, the tribunal assessed duration “in light of all the circumstances, and of the investor’s overall commitment” to conclude that a hedging contract met that requirement because the “Hedging Agreement commitment was for twelve months. Moreover, Deutsche Bank had already spent two years negotiating the Agreement. The fact that it was terminated after 125 days is irrelevant.” *Deutsche Bank Award*, **Doc. CA-20**, ¶¶ 303-304. Similarly, in *Fedax*, the tribunal concluded that promissory notes issued by Venezuela to a local company met the duration requirement because such type of notes “is not merely a short-term, occasional financial arrangement” and consists of “contracts needing to extend beyond the fiscal year in which they are made.” *Fedax Decision on Jurisdiction*, **Doc. RA-159**, ¶ 43.

93. The conclusion that the Land Bonds meet the inherent characteristics of an investment, however one chooses to articulate those characteristics, is illustrated by the analysis of the ICSID tribunals in the Argentine bonds cases—*Abaclat*, *Ambiente Ufficio*, and *Alemanni*—all three of which concluded that State bonds, and even more remote security entitlements derived from them, possessed the inherent characteristics of an investment. In *Abaclat*, after having rejected as a conceptual matter the application of the *Salini* criteria to limit what would otherwise qualify as an investment under the treaty, the majority of the tribunal reasoned:

The other approach consists in verifying that Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT. Thus the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT.

In this respect, there is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued. As mentioned above . . . this right is protected under Article 1(1) lit. (c) of the BIT.

Abaclat Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 365-366.

94. The tribunal also observed that the investments satisfied the alternative approach of considering if there was a contribution that extends over a certain period of time and involves some risk. *See id.* ¶¶ 370-371.

95. In *Ambiente Ufficio*, again after having rejected an interpretation of *Salini* as imposing mandatory jurisdictional requirements, the tribunal likewise found that the sovereign bonds and security entitlements derived from them “fulfill the criteria generally ascribed to the *Salini* test.” *Ambiente* Decision on Jurisdiction and Admissibility, **Doc. RA-173**, ¶¶ 482-487. The *Alemanni* tribunal agreed with the analysis of the *Abaclat* and *Ambiente Ufficio* tribunals, noting that the objection *ratione materiae* is not one “that need detain the Tribunal long.” *Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of November 17, 2014, **Doc. RA-178**, ¶ 296 (endorsing the reasoning in *Abaclat* and

Ambiente Ufficio, and noting that “[n]othing in the ICSID Convention itself presents an obstacle to considering that bonds are capable of constituting investments” and that sovereign bonds were even invoked in the negotiation of the Convention as an example of the kind of assets to which it could apply).

96. Thus, the Land Bonds also possess the “characteristics of an investment” within the meaning of the Treaty.

2. The Circumstances of the Conclusion of the Treaty Confirm that the Land Bonds Are Covered Investments.

97. In arguing that the Treaty’s clear terms mean something other than what they say, Peru omits any reference whatsoever to the circumstances of the Treaty’s conclusion or its preparatory work. *Cf.* Statement of Defense, **R-34** ¶¶ 201-204; Reisman, **RER-1** ¶¶ 24-42; VCLT, **Doc. RA-49**, Art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable”).

98. In fact, these supplementary means of interpretation confirm that the Land Bonds here are the kind of public debt that the State Parties deliberately agreed to include in the ambit of the Treaty. *First*, the negotiating history shows that the State Parties specifically considered and agreed that bilateral public debt is the only kind of public debt excluded from the Treaty. *Second*, the State Parties were aware of Peru’s pending disputes with U.S. investors who had received Land Bonds—which Peru had to solve as a pre-condition to enter into the Treaty—but still did not exclude the Land Bonds from the scope of the Treaty. *Finally*, the United States’ and Peru’s practice, in other treaties, of expressly excluding certain kinds of State debt confirms that, if they intended to exclude the Land Bonds, they would have done so expressly.

(a) The State Parties Specifically Negotiated the Inclusion of All Public Debt, Except Bilateral Debt, in the Treaty.

99. In addition to the plain text of the Treaty, Peru’s own summaries of the Treaty negotiations demonstrate that the Treaty covers all kinds of public debt with the *sole* exception of bilateral debt—which does not include the Land Bonds. As Prof. Reisman has acknowledged elsewhere, such clear evidence of the State parties’ intentions is relevant to the interpretation of the treaty. *See, e.g.*, Arsanjani, Mahnoush H. and Reisman, W. Michael, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in*

Investment Treaties, The American Journal of International Law, Vol. 104, No. 4, October 2010, **Doc. CA-80**, p. 604 (“*travaux* may be useful when a particular draft was discussed and clearly rejected”).

100. Peru and the United States specifically negotiated this point from the outset and through no fewer than 13 negotiation rounds. *See generally* **Docs. CE-416, CE-419, CE-421, CE-425, CE-428, CE-431, CE-433, CE-436, CE-438, CE-439, CE-441, CE-443, CE-447**, Rounds of the Andean-U.S. FTA Negotiations. This issue was immediately apparent because the State Parties’ model investment treaties had opposing approaches: while Peru’s Model BIT of 2000 expressly excluded State debt, the U.S. Model BIT of 2004 contained no such limitation on the kind of debt that would be covered. *Cf. Doc. CE-389*, Peru 2000 Model BIT, Art. 1.1 (“Investment *does not mean*: (a) a payment obligation, or granting of a loan *to the State or to a State-owned company*.”) (emphasis added). On the U.S. side, as Amb. Allgeier describes in his report, the United States’ negotiating approach was to adopt the “negative list” approach to the definition of investment—namely, a broad definition of investment with express exclusions—and deviations from the model treaty form required specific internal approval. *See* Allgeier, **CER-7 ¶¶ 17, 25, 38, 41**.

101. Hence, from the very first negotiation round, the Parties identified whether to include public debt as a key area of disagreement. *See Doc. CE-416*, 1st Round of the Andean-U.S. FTA Negotiations, May 18-19, 2004, p. 26 (“Interests without consensus were expressed on the following topics . . . Scope of the definition of investment (inclusion of public debt as investment”); **Doc. CE-419**, 2nd Round of the Andean-U.S. FTA Negotiations, June 14-18, 2004, p. 23 (subjects that were prioritized included the “definition of investment (including the topics of public and private debt”); **Doc. CE-421**, 3rd Round of the Andean-U.S. FTA Negotiations, July 26-30, 2004, p. 40 (the investment negotiation table included discussions of the “[t]reatment of public debt as investment”); **Doc. CE-428**, 5th Round of the Andean-U.S. FTA Negotiations, October 25-29, 2004, p. 32 (the Andean States described a list of 15 points of greatest sensitivity, including “the treatment of debt as investment”).

102. Consistent with its general approach, the U.S. “propose[d] an open definition that can be flexible and encompass distinct forms of investments that exist and that can be created in the future, referring to some of the most common characteristics of an investment.” **Doc. CE-419**, 2nd Round of the Andean-U.S. FTA Negotiations, June 14-18, 2004, p. 24. This definition “include[d] *public and private debt*.” *Id.* (emphasis added). In contrast, “[t]he Andean countries stated that they were not convinced of the benefits of including public debt within the scope of the FTA.” *Id.*

103. After many more negotiation rounds, Peru was unable to obtain the wholesale exclusion of State and State enterprise debt from the scope of protected investments. Peru's own summaries of the negotiations record the following:

- **Fifth negotiation round:** Peru reportedly “made a presentation of the draft Appendix on Public Debt that was distributed in the previous Round at San Juan,” in order to “clarify Peru’s concerns and interests in relation to the incorporation of the concept of public debt under the definition of investment and the application of the disciplines of section A and the dispute resolution mechanism,” to which the “United States was receptive.” **Doc. CE-428**, 5th Round of the Andean-U.S. FTA Negotiations, October 25-29, 2004, p. 32.
- **Sixth negotiation round:** the United States “presented a counter-proposal on the Appendix that specifies the treatment of public debt,” which led “to the conclusion that it does not meet the expectations of the Andean countries.” **Doc. CE-431**, 6th Round of the Andean-U.S. FTA Negotiations, November 29-December 5, 2004, p. 28. In response, “[t]he United States stated that it would soon be presenting new proposals for exchange packages taking into account the interests expressed by the Andean countries.” *Id.*
- **Seventh negotiation round:** Peru proposed to concede its “proposal to exclude state debt and state-owned enterprises from the definition” in order to obtain the “Annex on Restructuring Public Debt.” **Doc. CE-433**, 7th Round of the Andean-U.S. FTA Negotiations, February 7-11, 2005, p. 35.
- **Eighth negotiation round:** “The last proposal submitted by the United States was revised. During the discussion, the United States confirmed its agreement to exclude bilateral debt from the chapter’s coverage.” **Doc. CE-436**, 8th Round of the Andean-U.S. FTA Negotiations, March 14-18, 2005, p. 13.
- **Tenth negotiation round:** Peru concluded that “Public debt is no longer a sensitive issue for Peru, as the annex proposed by the U.S. *fully satisfies* the interests of the Ministry of Economy of Finance.” **Doc. CE-439**, 10th Round of the Andean-U.S. FTA Negotiations, June 6-10, 2005, p. 22 (emphasis added).
- **Twelfth negotiation round:** There was “positive progress” achieved among the pending negotiation tables, and the negotiation group on investments was one of them.” **Doc. CE-443**, 12th Round of the Andean-U.S. FTA Negotiations, September 19-23, 2005, p. 1.

- **Thirteenth negotiation round:** Peru itself concluded that the resulting “*concept of investment is broad* and covers all possible forms of assets that an investor owns or controls directly or indirectly in the country and that has as one of its characteristics the fact of committing capital or other resources, as well as the expectation of profits or the assumption of risk,” with an “illustrative, not limitative, list of elements” and that “include, among others . . . debt instruments (*including public debt*, except for bilateral debt).” **Doc. CE-447**, 13th Round of the Andean-U.S. FTA Negotiations, November 14-22 and December 5-7, 2005, p. 55 (emphasis added).

104. This detailed record of the Treaty negotiations—as reported by Peru itself—confirms that the Parties not only extensively discussed the issue of whether all kinds of public debt should fall within the scope of protected investments, but that they ultimately agreed that it would, with only one exception not applicable here. As a concession, Peru obtained footnote 13, which excludes bilateral public debt (and *only* bilateral public debt), and Annex 10-F, the “Public Debt” Annex, which provides more detail about public debt claims.

105. Thus, Peru’s own summaries of the negotiation of the treaty confirm that the Land Bonds are included in the definition of “public debt.”

(b) The State Parties Specifically Discussed Peru’s Pending Investment Disputes Arising Out of the Agrarian Reform.

106. That the State Parties also had in mind Peru’s expropriation disputes with U.S. investors resulting from the Land Reform when negotiating the Treaty, but made no exclusion of such claims, further rebuts Peru’s argument that the Treaty silently excludes the Land Bonds or any measures related to the Land Reform.

107. As Amb. Allgeier explains, Peru had to resolve ongoing disputes with U.S. nationals and companies affected by the Land Reform to even be eligible to negotiate the Treaty. That requirement was part of U.S. legislation, the Andean Trade Preference Act (“*ATPA*”), which established a unilateral U.S. trade preference program that granted duty-free treatment for nearly all U.S. imports from Andean states, including Peru, and was the basis for the U.S. to negotiate the Treaty. *See* Allgeier, **CER-7** ¶ 61. When the ATPA was renewed as the Andean Trade Promotion and Drug Eradication Act (“*ATPDEA*”), the legislation specified that the U.S. President could *not* designate a country as a beneficiary of the program:

[I]f such country . . . has nationalized, expropriated or otherwise seized ownership or

control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens . . . unless the President determines that: prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association[.]

ATPA, as amended by the ATPDEA, **Doc. CE-752**, 19 U.S.C.A. § 3202(c)(2)(A)-(C).

108. Hence, before Peru could negotiate the Treaty with the United States, Peru had to address certain Land Reform expropriation disputes with U.S. investors. In March 2004, when the United States Trade Representative (“*USTR*”) announced the initiation of negotiations with Colombia, the USTR took the position that it would refrain from initiating negotiations with Peru, pending follow-on steps regarding various investment disputes. In particular, the U.S. Administration noted that “[a]dequate payment to owners of agricultural lands expropriated by the Peruvian Government in the late-1960s and early-1970s is still at issue.” **Doc. CE-406**, First Report to Congress on the ATPA, April 30, 2003, p. 42.

109. Likewise, the U.S. Congress made it clear that any free trade agreement negotiations, as well as continued ATPDEA tariff benefits, would depend on the resolution of these disputes. For instance, in October 2004, the Chairman and Ranking Member of the House Subcommittee on the Western Hemisphere of the Committee on International Relations stated at a hearing before the committee that:

In my considered opinion, Peru and Ecuador need to know that we are prepared to hold off on further free trade negotiations until they can resolve these investment disputes and assure that American companies are treated in a fair and equitable manner. Quite frankly, maybe we need to also take a look at whether Peru and Ecuador deserve the trade benefits that the U.S. Congress granted under the Andean Trade Promotion and Drug Eradication Act. [Rep. Ballenger (R-NC)].

I will not support an Andean Free Trade Agreement that includes Peru unless these cases are resolved. I agree with the Chairman in his statement that the United States may need to reconsider benefits granted under the Andean Trade Promotion and Drug Eradication Act. I state these beliefs not simply for the sake of

resolving these cases or these issues, but to set a precedent for the respect for the rule of law for future United States companies that invest in Peru. [Rep. Menendez (D-NJ)].

Doc. CE-426, House of Representatives, 108th Congress, Second Session, Hearing before the Subcommittee on the Western Hemisphere of the Committee on International Relations, October 6, 2004, pp. [4-5]. *See also* Allgeier, **CER-7** ¶¶ 64-66,

110. In particular, one of the most longstanding disputes involved the claim by a U.S. company, LeTourneau, against the Government of Peru for the non-payment of compensation due to the 1969 expropriation of LeTourneau's property as a result of Peru's Land Reform. *See Doc. CE-355*, LeTourneau Foundation Discusses Claim Against GOP, January 25, 1977; *see also Doc. CE-442*, Another ATPDEA Dispute Near Resolution, September 16, 2005, ¶¶ 6-7; **Doc. CE-444**, Another ATPDEA Dispute Resolved, September 28, 2005, ¶ 4 ("Peru now has three of the original ATPDEA cases to contend with - - Engelhard, Princeton Dover and LeTourneau"). LeTourneau constructed roads in Peru between 1954 and 1968, and Peru compensated LeTourneau through grants of land. Subsequently, Peru's military government expropriated the land during the Land Reform program, leading LeTourneau to file suit in 1970. *See Doc. CE-453*, LeTourneau and GOP Reach Settlement After 35 Years, p. [2]. LeTourneau's dispute was one of nine disputes relating to expropriation that Peru needed to have resolved before the United States would agree to a free trade agreement. The U.S. Embassy in Lima confirmed in 2006 that "[t]he free trade agreement carrot was instrumental in generating a GOP [Government of Peru] settlement offer in this long-standing dispute." *Id.* p. [3]; *see also* Allgeier, **CER-7** ¶ 67, n. 67; **Doc. CE-461**, LeTourneau Receives Settlement, Case Closed, August 1, 2006; **Doc. CE-462**, Post's Active Trade Agreement Compliance Efforts, September 26, 2006, p. [3].

111. Only upon Peru's commitment and specific "roadmaps" for resolving these ongoing disputes was Peru able to join the negotiations for the Andean FTA. *See* Allgeier, **CER-7** ¶ 66; *see also Doc. CE-437*, Peru 2005 ATPDEA Eligibility Report, March 21, 2005, ¶ 10. Peru finally reached a settlement with LeTourneau on March 30, 2006, and the Treaty was signed two weeks later, on April 12, 2006. Peru's decision to finally compensate LeTourneau was the result of "Embassy and USTR advocacy, September 2002 ATPDEA commitment, [and] FTA pressure. Ray Le Tourneau [*sic*] wrote that outcome would have been impossible without Embassy and USTR." *See Doc. CE-462*, Post's Active Trade Agreement Compliance Efforts, p. [3]. This dispute demonstrates that Peru's Land Reform, and investor dissatisfaction

arising from it, were very much on the minds of both State Parties during the negotiation of the Treaty.

112. In light of these circumstances surrounding the Treaty's negotiations, Peru's suggestion that the Treaty should not apply to the Land Bonds because they "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 that they "have unique historical origins that pre-date the Treaty," cannot help Peru. *Cf.* Statement of Defense, **R-34 ¶¶ 5, 202**; Reisman, **RER-1 ¶ 31**.

113. To the contrary, Peru's objection only bolsters Gramercy's argument: the fact that the Land Bonds were issued before the Treaty was concluded confirms that, if the State Parties meant to exclude them, they could and should have done so expressly. Annex I to the Treaty sets out the "existing measures that are not subject to some or all of the obligations by" certain Treaty provisions. **Doc. CE-139**, Treaty, Annex I, Explanatory Notes, (1). In the case of Peru, its Annex I expressly excludes specific measures—such as Article 71 of the Peruvian Constitution and Decree N° 757 of November 13, 1991 (forbidding foreign persons from owning in whole or in part any title to land or water located within 50 km of the Peruvian borders, absent exceptions) or Article 15 of Law N° 26221 of August 19, 1993 (governing certain requirements for hydrocarbons exploration contracts in Peru)—from the scope of its national treatment obligations under the Treaty. *Id.*, Annex I-Peru-1, Annex I-Peru-1-21. Likewise, Annex II sets out the list of "specific sectors, subsectors, or activities for which that Party may maintain existing, or adopt new or more restrictive measures that do not conform with obligations imposed by" certain provisions in the investment chapter. *Id.*, Annex II, Explanatory Notes, (1). Peru's Annex II provides, for example, that "Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed after the date of entry into force of this Agreement involving: (a) aviation; (b) fisheries; or (c) maritime matters, including salvage." *Id.*, Annex II-Peru-1 (footnote omitted). Law N° 17716—which existed at the time of Treaty negotiations—does not appear in this Annex, however.

114. Thus, if Peru had intended for investment tribunals such as this one not to sit in judgment on any measures related to its "historical" Land Reform, then it should have availed itself of the Treaty mechanism designed for that very purpose, by adding those exceptions in the Annexes of non-conforming measures. But Peru did not do so then, and it cannot argue that it must be taken to have excluded any measures related to that Law now.

(c) The State Parties Specifically Excluded Public Debt in Other Treaties.

115. The fact that the Treaty would have expressly excluded the Land Bonds if that had really been the State Parties' intention is further confirmed by the fact that each of the United States and Peru in fact did exclude sovereign bonds and sovereign debt in their prior model investment agreements and investment treaties with other countries.

116. The 1994 US Model BIT and treaties concluded on that model expressly exclude sovereign debt by adding an explicit qualifier: "(ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, *in a company*." **Doc. CE-373**, 1994 U.S. Model BIT, Art. 1(d)(ii) (emphasis added); *see, e.g., Doc. CE-387*, U.S.-Bahrain BIT, Art. 1(d)(2) (same). That approach is also apparent in NAFTA, for example, which defines an investment as including "a debt security of an enterprise . . . *but does not include* a debt security, regardless of original maturity, *of a state enterprise*," and a "loan to an enterprise . . . *but does not include* a loan, regardless of original maturity, *to a state enterprise*," and further specifies that "investment *does not mean* . . . (j) any other claims to money that do not involve the kinds of interests set out in subparagraphs (a) through (h)." **Doc. CE-720**, NAFTA, Art. 1139 (emphasis added).

117. Peru's Model BIT of 2000 contains similar express exclusions of sovereign debt. Article 1.1 provides that an "Investment *does not mean*: (a) a payment obligation, or granting of a loan *to the State or to a State-owned company*." **Doc. CE-389**, Peru 2000 Model BIT, Art. 1.1 (emphasis added). Such exclusions appear in Peru's contemporaneous treaties with other countries. For instance, in both the Japan-Peru BIT and the Canada-Peru BIT, the Parties expressly specified that "for greater certainty: a loan to, or debt instrument issued by, a Contracting Party or a state enterprise thereof *is not an investment*." **Doc. CE-498**, Japan-Peru BIT, Art. 1.1 (emphasis added); **Doc. CE-448**, Canada-Peru BIT, Art. 1 (emphasis added).

118. As a result, the State Parties' decision not to expressly exclude State debts owned by investors from the scope of this Treaty confirms that the Land Bonds fall within the scope of protected investments.

3. The Treaty's Object and Purpose Does Not Compel a Different Conclusion.

119. In its efforts to rewrite the Treaty's plain terms in a manner directly contrary to its context, Peru places great weight on the Treaty's "object and purpose." *See, e.g.,* Statement of Defense, **R-34** ¶¶ 167 & n. 368, 202-205, 216; Reisman, **RER-1** ¶¶ 36-42. This argument of last resort must fail because it cannot overcome the plain language of the

Treaty; Gramercy’s acquisition of the Land Bonds is fully consistent with the Treaty’s object and purpose, when properly understood; and the circumstance that the Land Bonds were issued before the Treaty was concluded supports *including* them, not excluding them.

120. *First*, a treaty’s “object and purpose” cannot be used to override its plain terms. As the International Law Commission has cautioned, “the text must be presumed to be the authentic expression of the intentions of the parties,” and as the PCIJ has recognized, “it is not the function of [treaty] interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.” ILC, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, **Doc. CA-124**, pp. 220-221, ¶ 11; *see also* Gardiner, Richard, *Treaty Interpretation*, June 2015, **Doc. CA-115**, pp. 213, 218 (“One of the commonly mentioned sources of guidance on the object and purpose of a treaty is its preamble. However, in keeping with the approach of the Vienna rules generally, and their definition and use of context in particular, it is the whole text (and associated matter as indicated in article 31(2)) which is to be taken into account;” “[T]he substantive provisions [of a treaty] will provide the fuller indication of the object and purpose.”); Villiger, Mark E., *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), **Doc. CA-195**, p. 428 (an interpretation that accounts for a treaty’s object and purpose “finds its limits in the treaty text itself.”); Weeramantry, J. Romesh, *The General Rule on Treaty Interpretation in Treaty Interpretation in Investment Arbitration*, 2012, **Doc. CA-199**, ¶ 3.70 (noting that investment tribunals “have generally refrained from using this criterion to arrive at a meaning that contradicts or displaces the clear meaning of the treaty text.”); *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award of August 16, 2007, **Doc. RA-170**, ¶ 340 (“But while a treaty should be interpreted in the light of its objects and purposes, it would be a violation of all the canons of interpretation to pretend to use its objects and purposes, which are, by their nature, a deduction on the part of the interpreter, to nullify four explicit provisions”); *see also ADF Group v. United States*, ICSID Case No. ARB(AF)/00/1, Award of January 9, 2003, **Doc. CA-73**, ¶ 147 (“The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph . . . The general objectives of NAFTA . . . may frequently cast light on a specific interpretive issue; but [they are] not regarded as overriding and superseding the latter.”).

121. Even Peru’s expert Prof. Reisman has recognized that “[g]overnment representatives take extraordinary care in the crafting of international agreements”—especially true with respect to this Treaty, as discussed in Section II.B.2(a) above—and that “[i]f agreements are indispensable for longer-term cooperative behaviour, a corollary indispensability is the expectation that those agreements will be applied

faithfully.” Reisman, W. Michael, *Foreword* in Weeramantry, J. Romesh, *Treaty Interpretation in Investment Arbitration*, 2012, **Doc. CA-199**, p. vii; *see also Ecuador v. United States*, Expert Opinion of Prof. Reisman, **Doc. RA-15**, ¶ 3(a) (“The BIT is part of a species of treaties for the benefit of third parties in which there is special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries.”).

122. Hence, where the Treaty terms like “bonds” or “public debt” have a clear ordinary meaning in context and read in good faith, there is simply no scope to invoke vague notions of the Treaty’s “object and purpose” in order to argue that these terms mean the opposite of what they say.

123. *Second*, when understood in their full context, the specific parts of the preamble that Peru selectively quotes do not make Gramercy’s investment inconsistent with the object and purpose of the Treaty properly understood. Although Peru seizes on only a few aspects of the Preamble, *see* Statement of Defense, **R-34** ¶ 166, in full the Treaty’s Preamble states as follows:

STRENGTHEN the special bonds of friendship and cooperation between them and promote regional economic integration;

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

CREATE new employment opportunities and improve labor conditions and living standards in their respective territories;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable legal and commercial framework for business and investment;

AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement;

RECOGNIZE that Article 63 of Peru’s Political Constitution provides that “domestic and foreign investment are subject to the same conditions”;

AVOID distortions to their reciprocal trade;

FOSTER creativity and innovation and promote trade in the innovative sectors of our economies;

PROMOTE transparency and prevent and combat corruption, including bribery, in international trade and investment;

PROTECT, enhance, and enforce basic workers’ rights, strengthen their cooperation on labor matters, and build on their respective international commitments on labor matters;

IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;

PRESERVE their ability to safeguard the public welfare;

CONTRIBUTE to hemispheric integration and provide an impetus toward establishing the Free Trade Area of the Americas;

BUILD on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization and agreements to which they are both parties; and

RECOGNIZE that Peru is a member of the Andean Community and that Decision 598 of the Andean Community requires Andean countries negotiating trade agreements to preserve the Andean Legal System in relations between the Andean Community Member Countries under the Cartagena Agreement.

Doc. CE-139, Treaty, Preamble.

124. Peru’s attempt to superimpose each one of these considerations effectively as prerequisites for the application of the investment chapter is misguided. *See* Allgeier, CER-7 ¶¶ 54-55. As

Amb. Allgeier explains, the Treaty is not a simple bilateral investment treaty, but a much more comprehensive trade promotion agreement with 23 different chapters, only one of which concerns investments. The other chapters address a wide range of subjects, such as trade, customs barriers, tariffs, telecommunications, intellectual property, services, and other matters. Seeing these preambular provisions in full, and appreciating their context as part of a much wider Treaty going well beyond the protection of foreign investment, makes clear that particular terms in the preamble are very weak indicators of how to construe terms in the investment chapter whose ordinary meaning is otherwise clear on their face.

125. In particular, contrary to Prof. Reisman's bare assertions, nothing in the preamble of the Treaty disqualifies investments unless they contribute to "generating employment opportunities for sustainable economic growth, employment opportunities or improved labor conditions and living standards." Reisman, **RER-1** ¶ 49. For example, many of the Treaty's chapters, alone or in combination with others, aim to promote "broad-based economic development to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production," but this does not mean that every investment must clear this hurdle as a threshold requirement to qualify for protection. See Allgeier, **CER-7** ¶ 53. If so, it would produce an irrational result, in which virtually no investment would be protected under the Treaty. Similarly, many of the Treaty chapters reasonably might be considered, in the aggregate, to provide means to create new employment opportunities and improve labor conditions and living standards—especially the chapters that specifically address labor rights, trade, and services—but are not preconditions in the investment chapter. Any such requirement would have been unworkably vague, and would run contrary to the U.S.'s aim of protecting as many U.S. investments as possible and Peru's understanding that the "concept of investment is broad and covers all possible forms of assets." *Id.* ¶ 54; **Doc. CE-447**, 13th Round of Negotiations, p. 55. A more useful guide to at least the U.S.'s understanding of the Treaty's purpose would be the Trade Act, which sets out the conditions that a treaty has to meet to obtain Congress's assent. As the Trade Act made clear, the Principal Trade Negotiating Objectives included expanding the principle of national treatment, reducing restrictions regarding the transfer of investment-related funds, and establishing standards for expropriation and fair and equitable treatment, that were "consistent with United States legal principles and practice, including the principle of due process." **Doc. CE-404**, United States Trade Act of 2002.

126. Moreover, the Treaty's aim to "promote economic development" and "create new employment opportunities" in no way places the Land Bonds outside the category of protected investments. As Mr. Koenigsberger and Prof. Olivares-Caminal explain, Gramercy's acquisition of the Land Bonds allowed local bondholders to unlock value

that they may otherwise not have been able to realize. Cf. Koenigsberger, **CWS-4** ¶¶ 34, 41; Olivares-Caminal, **CER-8** ¶¶ 77-80; compare ██████, **CWS-7** ¶ 18 (“*recibir una suma global en efectivo era útil, incluso si dicho importe era tal vez significativamente menor de lo que yo hubiera podido eventualmente recuperar si me hubiese dispuesto a obtener una compensación del gobierno peruano.*”), with ██████, **CWS-9** ¶ 5 (“*[y]o he participado en este proceso y lo que el gobierno ha ofrecido pagarme por mis Bonos es un insulto.*”) and ██████, **CWS-8** ¶ 43 (“*la realidad es que ese procedimiento resultó ser, ni más ni menos, una estafa . . . me siento completamente traicionada y engañada por mi propio gobierno que, en mi opinión, puso una trampa a los bonistas, intentando privarlos de una compensación justa.*”).

127. Peru also cannot rely on a mischaracterization of the Treaty’s object and purpose to exclude the Land Bonds from being a protected investment because granting them Treaty protection would supposedly violate “parity between domestic and foreign investors.” Cf. Reisman, **RER-1** ¶ 41. While Peru relies on preambular language stating that “foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law,” Peru fails to recognize that this same preambular clause specifies that it applies only “where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement.” In fact, this clause reflects the *United States’* concern, as articulated in the Trade Act of 2002, that “foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States.” **Doc. CE-404**, United States Trade Act of 2002, Section 2102(b)(3); see also Vandeveld, Kenneth, U.S. International Investment Agreements, 2009, **Doc. CA-194**, p. 89 (explaining that this preambular language was added in the Peru, Colombia, Panama, and Korea FTAs because “[o]ne of the TPA negotiating objectives had been that foreign investors in the United States not receive greater protection than U.S. investors receive, but that objective had not been recognized explicitly in any BIT or FTA”); see also **Doc. CE-471**, Office of the United States Trade Representative, Summary of the United States-Peru Trade Promotion Agreement, p. 5 (“This preambular language does not impose any obligations on the United States or Peru beyond those set forth in the substantive provisions of the agreement”). In any event, this preambular clause cannot be interpreted so as to negate clear investment protections that the plain terms of the substantive provisions establish.

128. *Finally*, Peru’s and Prof. Reisman’s claims that the Land Bonds were issued many decades ago, “in a different historical era, with different policy, legal and economic underpinnings on the conduct of the State, long *before . . . the formation of the object and purpose* of the Treaty” do not articulate any particular legal theory to which these observations could lead. Cf. Statement of Defense, **R-34** ¶ 202; Reisman, **RER-1** ¶ 31 (emphasis added). Nothing in the Treaty qualifies its

application based on the “historical era” in which the investments were originally created. To the extent that Peru objects that the Treaty cannot apply to existing investments, any such argument is plainly untenable given the express language of Article 1.1.3. **Doc. CE-139**, Treaty, Art. 1.1.3 (“covered investment means, 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”) (emphasis added); *see also* **Doc. CE-450**, Advisory Committee for Trade Policy and Negotiations (ACTPN), Report on the U.S.-Peru Trade Promotion Agreement, February 1, 2006, p. 5 (the Treaty “enables binding third party arbitration for investor-state disputes not only for investments concluded after the agreement goes into effect, but also for many types of investments that pre-date the agreement.”). And of course, none of Peru’s historical observations affect Gramercy’s much more recent acquisition of the Land Bonds. Here, too, Peru’s argument would once again lead to absurd results. To reprise the earlier example of a factory acquired by a foreign investor, if a factory had been built in Peru in the 1970s, then acquired by a U.S. investor in 2006, and then unlawfully expropriated by Peru after the Treaty came into force, one plainly would not say that the factory was not an investment because it was built long before it was expropriated.

129. Consequently, the Treaty’s Preamble cannot overcome the conclusion that the Land Bonds are covered investments.

4. Other Investment Cases Do Not Compel a Different Conclusion.

130. Peru and Prof. Reisman invoke “relevant jurisprudence” concerning bonds and related financial instruments in support of the argument that the Treaty should be taken to mean the opposite of what it plainly says and was intended to say. *Cf.* Statement of Defense, **R-34** ¶ 200; Reisman, **RER-1** ¶¶ 19, 50-62. The “jurisprudence” to which Peru refers appears to be the decisions in *Fedax v. Venezuela* (1997) (which in fact found that State promissory notes were a covered investment), *Phoenix Action v. Czech Republic* (2009) (which did not involve bonds or State debt), and *Poštová Banka v. Hellenic Republic of Greece* (2015) (in which the treaty did not expressly refer to bonds or public debt). Peru does not, however, devote comparable attention to the three cases arising out of Argentina’s sovereign debt default—*Abaclat*, *Ambiente Ufficio* and *Alemanni*—all of which accepted that bonds and related investments were covered investments and that the bond and titleholders were covered investors. *Abaclat* Decision on Jurisdiction, **Doc. RA-171**; *Ambiente* Decision on Jurisdiction, **Doc. RA-173**; *Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction of November 17, 2014, **Doc. RA-178**.

131. Gramercy has no doubt that the Tribunal members will read the various decisions for themselves, and the following salient features of those cases illustrate that Peru’s attempt to invoke them in support of disqualifying the Land Bonds from the ordinary meaning in context of the Treaty cannot succeed.

132. In *Fedax*, the Netherlands-Venezuela BIT provided that “the term ‘investments’ shall comprise every kind of asset and more particularly though not exclusively: . . . (ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures; (iii) titles to money, to other assets or to any performance having an economic value.” *Fedax* Decision on Jurisdiction, **Doc. RA-159**, ¶ 31. The tribunal found that this language covered promissory notes issued by Venezuela to a local company and later endorsed to a Dutch company. *Fedax* therefore supports *Gramercy’s* case, not Peru’s.

133. Professor Reisman appears to place emphasis on the *Fedax* tribunal’s comment that “loans qualify as an investment within ICSID’s jurisdiction, as does, *in given circumstances*, the purchase of bonds.” *Id.* ¶ 29 (*citing* Schreuer, Commentary on the ICSID Convention, ICSID Review—Foreign Investment Law Journal, Vol. 11, 1996, **Doc. CA-179**, p. 372) (emphasis added); *cf.* Reisman, **RER-1** ¶ 51 (“The tribunal, however, added that qualifier for the purchase of bonds to be considered an investment: ‘in certain circumstances’”). In fact the *Fedax* tribunal was repeating the statement of Prof. Christoph Schreuer, in the first edition of his Commentary to the ICSID Convention, that “it would depend on the particular circumstances whether the extension of loans or the purchase of bonds will qualify as investments [under the ICSID Convention]. There is nothing that would exclude pure financial instruments in principle.” Schreuer, Christoph, Commentary on the ICSID Convention, ICSID Review—Foreign Investment Law Journal, Vol. 11, 1996, **Doc. CA-179**, p. 372. This statement on the general scope of “investment” under the ICSID Convention says precious little about why bonds should be excluded from the scope of a bilateral investment treaty that, like this Treaty, expressly includes bonds in the definition of investment. To the contrary, the *Fedax* tribunal refused to impose requirements extraneous to the treaty’s plain language, “not[ing] in particular that titles to money in this definition are not in any way restricted to forms of direct foreign investments or portfolio investment, as argued by the Republic of Venezuela.” *Fedax* Decision on Jurisdiction, **Doc. RA-159**, ¶ 32.

134. Furthermore, the *Fedax* tribunal’s invocation of the purpose of the promissory notes was in response to Venezuela’s argument that “Fedax N.V. does not qualify as an investor because it has not made any investment ‘in the territory’ of Venezuela,” not a requirement that it must fulfill in order to qualify as a protected investment. *Id.* ¶ 41. In this context, the tribunal found it important to determine whether “the funds made available are utilized by the beneficiary of the credit.” *Id.* The

tribunal assessed the “nature of the transactions involved” as part of this analysis and found that the promissory notes were issued under Venezuelan law, which “specifically governs public credit operations aimed at raising funds and resources ‘to undertake productive works . . .’” making it “apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest.” *Id.* ¶ 42. The tribunal found that there is “clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument,” as opposed to “investments that come in for quick gains and leave immediately thereafter – i.e. ‘volatile capital.’” *Id.* ¶ 43. That is precisely the case here, where the Land Bonds were issued under the Land Reform Act of 1969, which expressly provides that the Land Reform “will contribute to the Nation’s social and economic development,” and as explained above, helped meet Peru’s financial needs in pursuit of a fundamental public interest. *See Doc. CE-1*, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 1.

135. Finally, Prof. Reisman takes out of context the *Fedax* tribunal’s statement that it “acknowledged that financial transactions may sometimes fall on the borderline between proper investments and rapidly concluded commercial transactions.” Reisman, **RER-1** ¶ 51. The language to which Prof. Reisman cites is in fact a quote from another ICSID commentary. The following sentence in the *Fedax* award states that:

the characterization of transnational loans as ‘investments’ has *not* raised difficulty. The reason is twofold. First, it has been *assumed from the origin of the Convention that loans, or more precisely those of a certain duration* as opposed to rapidly concluded commercial financial facilities, *were included in the concept of ‘investment.’*

Fedax Decision on Jurisdiction, **Doc. RA-159**, ¶ 23 (*citing* Delaume, Georges, *ICSID and the Transnational Financial Community*, ICSID Review, 1986) (emphasis added).

136. Rather, the tribunal found that “loans qualify as an investment within ICSID’s jurisdiction, as does, in given circumstances, the purchase of bonds.” *See id.* ¶ 29. For the reasons described above, the tribunal found those circumstances to have been present.

137. *Abaclat* also found in favor of jurisdiction. The Italy-Argentina treaty at issue in *Abaclat* provided, in an unofficial English translation, that a covered investment “includes . . . (c) obligations [*obligaciones*], private or public titles or any other right to performances

or services having economic value, including capitalized revenues.” *Abaclat* Decision on Jurisdiction, **Doc. RA-171** ¶ 352 (“*obligaciones, títulos públicos o privados o cualquier otro derecho a prestaciones o servicios que tengan un valor económico, como también las ganancias capitalizadas*”). The treaty did not expressly mention “bonos,” as the Treaty does, but only “obligaciones,” which is a term expressly included in the Spanish version of the Treaty and translated in the English version as “debentures.” The claimants in *Abaclat* did not hold Argentine sovereign bonds, but rather security entitlements derived from those bonds and held by secondary purchasers. The question was whether those instruments fell within the definition of “obligaciones” (obligations) or “private or public titles” as those terms were used in the treaty. *See id.* ¶ 352.

138. Professor Reisman, again engaged through White & Case, was one of the claimants’ legal experts in support of finding jurisdiction. *See Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶¶ 135, 205; Reisman, **RER-1** ¶ 2. The tribunal, by majority, agreed that there was a qualifying investment, because *first*, the list of protected investments “cover[ed] an extremely wide range of investments, using a broad wording and referring to formulas such as ‘independent of the legal form adopted,’ or ‘any other’ kind of similar investment,” *Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶ 354; and *second*, the term “obligaciones” appeared in a clause listing financial instruments. Hence, the term was better translated as “referring to an economic value incorporated into a credit title representing a loan,” *i.e.* a “bond,” while the term “title” in Spanish and Italian would be more accurately translated into the English term of “security.” *Id.* ¶ 355.

139. Professor Reisman goes to some pains to distinguish *Abaclat*, presumably because of the positions he must have taken in that case in support of jurisdiction. Notably, neither he nor Peru’s counsel disclosed a copy of his opinion or a transcript of his testimony from that case. In fact, *Abaclat* is materially indistinguishable. Professor Reisman’s attempt to distinguish *Abaclat* on the basis that Argentina had sold bonds “to generate funds for the State for purposes of its economic development” is unavailing. *Cf.* Reisman, **RER-1** ¶ 56. Neither the nature of the bonds in each case, nor the purpose for which they were issued, are distinguishable. The *Abaclat* majority made no mention of the purpose for which Argentina issued the bonds in determining that bonds, in general, qualified as protected investments. *See Abaclat* Decision on Jurisdiction, **Doc. RA-171**, ¶ 356. Rather, the majority simply noted that the assets “constitute an instrument representing a *financial value held by the holder of the security entitlement* in the bond issued by Argentina,” which it viewed as falling within the broad definition of “investments” in the Argentina-Italy BIT. *Id.* ¶ 357 (emphasis added). In any event, the Land Bonds *do* make available funds for the purposes of the State’s economic development. *See Olivares-Caminal*, **CER-8** ¶¶ 76-78; Section II.B.1 above.

140. In *Ambiente*, the tribunal interpreted the same Italy-Argentina treaty and reached the same conclusion that it was “fully convinced that the bonds/security entitlements pertinent to the present case fall into the scope of the application of the list of investments laid down in Art. 1(1)(a)-(f) of the Argentina-Italy BIT.” *Ambiente* Decision, **Doc. RA-173**, ¶ 495. Rejecting Argentina’s argument, the tribunal found that “the distinction between bonds and security entitlements has no particular significance.” *Id.* ¶ 423. While the tribunal also assessed whether the bonds/security entitlements amounted to a protected investment under the ICSID Convention, it did so based on its own interpretation of the ordinary meaning of the term “investment” in Article 25 of the ICSID Convention and found that it “has no doubt that bonds/security entitlements such as those at stake in the present proceedings fall under the term ‘investment’ as used in Art. 25 of the Convention.” *Id.* ¶ 472. In response to Argentina’s invocation of the *Salini* test, the tribunal assessed those factors, which “while not constituting mandatory prerequisites for the jurisdiction of the Centre in the meaning of Art. 25 ICSID Convention, may still prove useful, provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner.” *Id.* ¶ 481. It then concluded that the assets did involve a substantial contribution, sufficient duration, operational risk, regularity of profits and returns, and a significant contribution to the development of the host country. *Id.* ¶¶ 482-487.

141. Likewise, in *Alemanni*, the tribunal endorsed the conclusions of the *Abaclat* and *Ambiente* majority. The *Alemanni* tribunal agreed that:

Nothing in the ICSID Convention itself presents an obstacle to considering that bonds are capable of constituting investments; the Tribunal notes in this regard that, when the Convention was under negotiation, sovereign bonds were actually used as an example of the potential breadth of the Convention’s reach in terms of what sorts of future dispute could be put before an ICSID tribunal.

Alemanni v. Argentina, ICSID Case No. ARB07/8, Decision on Jurisdiction and Admissibility of November 17, 2014, **Doc. RA-178**, ¶ 296.

142. As to the BIT, the tribunal agreed that neither of the parties’ translations of the BIT’s definition of “investment” could be read as “containing an implicit restriction that would rule out investments taking the form of bonds,” which was “powerfully reinforced by the fact that the whole construction” of that article that contained an illustrative, non-exhaustive list of examples that could qualify as investments and broad language as noted in *Abaclat*. *Id.*

143. If anything, the present case presents an even stronger case for jurisdiction than *Abaclat*, *Ambiente Ufficio* and *Alemanni*, because the Treaty here expressly states that “bonds” are a form of investment and expressly applies to all public debt except bilateral debt, and because Gramercy holds the physical Land Bonds themselves on Peruvian soil rather than security entitlements derived from them.

144. In contrast, *Poštová Banka* is inapposite here because of the materially different language of the applicable treaty at issue in that case. The Slovakia-Greece BIT did not expressly include “bonds” or “public titles or obligations” in the list of covered investments, restricted covered debentures to those “of a company,” and did “not contain any reference to ‘obligations’ or to ‘securities,’ much less to *public* titles or obligations.” See *Poštová Award*, **Doc. RA-179**, ¶¶ 285, 331; see also Reisman, **RER-1** ¶ 60 (acknowledging that the “Greece-Slovakia BIT only refers to debentures issued by companies and not by the state”). The tribunal relied heavily on the treaty’s “lack of reference to any sort of public indebtedness,” and concluded that the “express inclusion of debentures issued by companies and the omission of any other reference to bonds or to public obligations in the treaty must be given some meaning.” See *Poštová Award*, **Doc. RA-179**, ¶¶ 310, 331-332, 334, 340, 343. Neither the reasoning nor the outcome in *Poštová* can be transposed to this case, in which the applicable Treaty expressly covers “bonds,” “debentures,” and “other debt instruments” without restriction to debt of a company, expressly applies to “public debt” as a covered form of investment, and expressly stipulates that the purchase of State debt “entails commercial risk.” **Doc. CE-139**, Treaty, Art. 10.28 and Annex 10-F, ¶ 1.

145. Finally, *Phoenix Action* is inapposite because it did not involve whether bonds are covered investments, but whether the acquisition of shares in a company was an abuse of process. *Phoenix Action Award*, **Doc. RA-100**, ¶ 2. As discussed in Section II.E below, that case also does not support Peru’s argument that Gramercy committed an abuse of process here. Cf. Statement of Defense, **R-34** ¶¶ 189-194; Reisman, **RER-1** ¶¶ 76-86.

146. Hence, no amount of mischaracterization of past arbitral cases can support the extraordinary proposition that the Treaty or “general principles of international law” requires any type of bonds—including Land Bonds—to fulfill characteristics not specified in the Treaty in order to qualify as a protected investment.

* * *

147. As explained above, Peru’s irrelevant and ineffective distinctions and ignorance of its own statements as to the nature of the Land Bonds and the scope of the Treaty cannot negate the fact that Gramercy’s Land Bonds are “bonds” and “public debt” under canonical

rules of treaty interpretation; Peru's blindness to the Treaty's context and background cannot overcome the fact that the State Parties knowingly did not exclude the Land Bonds or Peru's Land Reform from this Tribunal's scrutiny; and Peru's mischaracterization of the Treaty's object and purpose and past arbitral cases cannot allow Peru to write into the Treaty additional requirements that deliberately do not figure in its plain text. Peru's objection that the Land Bonds are not covered investments therefore fails.

C. The Tribunal Has Jurisdiction *Ratione Voluntatis* and Gramercy's Claims Are Admissible Because Gramercy Complied with the Treaty's Preconditions to Arbitration.

148. Gramercy first submitted its claims to arbitration on June 2, 2016, amended that submission to include a revised formal waiver on July 18, 2016, and further amended that submission to confirm that it had withdrawn all existing Peruvian court proceedings—though none of these proceedings challenged the measures at issue in this arbitration—by August 5, 2016. Peru's objections that Gramercy has not complied with the conditions to its consent to arbitrate therefore fail because, *first*, Gramercy submitted valid waivers on June 2, 2016 and, even on Peru's case, at the latest by August 5, 2016—in both cases, long before the Tribunal was constituted; and *second*, on any view, less than three years had elapsed between Gramercy's submission of claims and its knowledge of both the breaches and the losses to which its claims relate.

1. Gramercy Provided a Valid Waiver on June 2, 2016, July 18, 2016, and Even on Peru's Case, by August 5, 2016.

149. Article 10.18.2 of the Treaty provides that:

No claim may be submitted to arbitration under this Section unless:

(b) the notice of arbitration is accompanied, (i) by the claimant's written waiver . . . of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16 [Submission of a Claim to Arbitration].

Doc. CE-139, Treaty, Art. 10.18.2.

150. Gramercy agrees with Peru that tribunals have interpreted this and similar language to require both a formal written waiver and a material waiver, namely, that the investor must also not initiate or continue such actions; however, Gramercy notes that the Treaty does not

textually require any *conduct* from the claimant beyond the provision of the written (*i.e.* formal) waiver. *Cf.* Statement of Defense, **R-34** ¶ 170.

151. In any event, contrary to Peru's objections, Gramercy fulfilled both components on June 2, 2016, July 18, 2016, and at the latest by August 5, 2016. *First*, Gramercy's June 2, 2016 waiver is consistent with the terms and purpose of the Treaty's waiver requirement, Peru does not deny that in any event Gramercy's July 18, 2016 and August 5, 2016 waivers were formally valid, and all of Gramercy's waivers were provided prior to the Tribunal's constitution. *Second*, GFM was never a party to any local proceedings; as of June 2, 2016 GPH was not a party to any local proceedings with respect to the measures alleged to constitute a breach of the Treaty; and as of August 5, 2018, GPH had withdrawn from all local proceedings altogether (including those *not* falling within the scope of the Treaty). Peru's heavy reliance on the decision of the tribunal in *Renco* is therefore misplaced, because that decision is neither legally binding on this Tribunal nor factually analogous.

(a) All of Gramercy's Waivers Were Formally Valid.

152. Gramercy's June 2, 2016 waiver was formally valid, notwithstanding the *Renco* decision, and in any event Peru does not deny that Gramercy's amended July 18, 2016 waiver was fully consistent with the *Renco* decision.

153. *First*, Gramercy fulfilled the formal component of the waiver requirement because the waiver in its initial Notice of Arbitration and Statement of Claim of June 2, 2016 is consistent with both the terms and purpose of the Treaty's waiver requirement. At that time, Gramercy provided the following waiver:

as required under Article 10.18.2(b) and 10.18.3, GPH and GFM each waives its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to" the measures alleged to constitute a breach referred to in Article 10.16, in particular the 2013 CT Order and the Supreme Decrees, except for proceedings for "interim injunctive relief," not involving "payment or monetary damages[,] before a judicial or administrative tribunal" of Peru, and except that, to the extent the Tribunal declines to hear any claims asserted herein on jurisdictional or admissibility grounds, GPH reserves the right to bring such claims in another forum for resolution on the merits.

Notice of Arbitration and Statement of Claim,
C-3, ¶ 233(h).

154. Gramercy appreciates that the *Renco* tribunal subsequently held that a waiver with an identical reservation did not meet the Treaty's formal requirements, because it held among other things that the Treaty requires claimants to waive proceedings "[a]fter the arbitration has concluded, whether or not the investor's claims are dismissed on jurisdictional or admissibility grounds or on the merits." *See The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction of July 15, 2016, **Doc. RA-146**, ¶¶ 82-83. By majority, the *Renco* tribunal also held that *Renco* could not unilaterally cure this defective waiver after the proceedings had been commenced. *See id.* ¶ 157. However, this decision is not binding precedent for this Tribunal, and Gramercy respectfully requests that the Tribunal consider the issue anew.

155. The Treaty does not provide any specific text that the formal waiver must meet. As the *Thunderbird* tribunal, constituted under the similarly-worded NAFTA, has recognized, provisions of this kind should not be interpreted in an overly formalistic or technical manner. *See Thunderbird Award*, **Doc. RA-77**, ¶ 117 ("The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings."); *see also* Pauker, Saar, *Admissibility of Claims in Investment Treaty Arbitration*, 2018, *Arbitration Int'l*, Vol. 34, No. 1, 2018, **Doc. CA-155**, p. 39 (criticizing the *Renco* majority's holding that a deficient waiver cannot be cured, noting that "[i]f the contracting States agree that a defective waiver is curable before *new* proceedings are initiated, why could it not be cured before the same tribunal?"). The purpose of the waiver requirement is to prevent concurrent litigation with respect to the same claims. Peru itself agrees that the Treaty's waiver requirement "is designed to prevent claimants from pursuing local litigation *in parallel with* an investment arbitration." Statement of Defense, **R-34** ¶ 170 (emphasis added); *see also Renco* Partial Award on Jurisdiction, **Doc. RA-146**, ¶ 84 (purpose of waiver 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.") (emphasis added). As the *Thunderbird* tribunal explained regarding NAFTA's similar provision, the waiver requirement has "a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either *give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct* or measure." *Thunderbird Award*, **Doc. RA-77**, ¶ 118 (emphasis added). The *Renco* tribunal also noted that tribunals interpreting waivers have held them invalid if they purport to carve out "certain domestic court proceedings

which cover the same ground as the measures being challenged in the arbitration.” *Renco* Partial Award on Jurisdiction, **Doc. RA-146**, ¶ 75 (emphasis added).

156. Gramercy’s waiver of June 2, 2016 is fully consistent with this objective. As quoted in full above, GFM’s waiver tracked the exact language acknowledged by both Peru and the *Renco* tribunal as compliant with the Treaty. See Notice of Arbitration and Statement of Claim, **C-3** ¶ 233(h).

157. Accordingly, there is no dispute between the Parties with respect to GFM’s June 2, 2016 waiver. The only issue is whether GPH’s June 2, 2016 waiver meets the Treaty’s standard. GPH’s reservation of rights “to the extent the Tribunal declines to hear any claims asserted herein on jurisdictional or admissibility grounds” does not pose the risk of concurrent litigation, or double recovery, or inconsistent findings on law or fact, because if the Tribunal declines to hear Gramercy’s claims, there would be no consideration of the challenged measures on the merits and no possibility for recovery; there would be neither “conflicting outcomes” nor “double redress.” There would also be no overriding prejudice to Peru: if the treaty tribunal were to decline jurisdiction, Peru could be adequately compensated by an award of costs.

158. On the other hand, requiring the claimant to irrevocably waive its ability to bring any kind of claim, even in the event that an international tribunal denies jurisdiction and never addresses the substance of the claims, would be highly prejudicial. It would have the fundamentally unfair effect of depriving the claimants of *any* remedy with respect to the challenged measures. As the *Ampal-American* tribunal concluded in the context of an abuse of process objection, a party cannot be faulted for simultaneously pursuing different dispute resolution options *until* one of the tribunals or courts agrees to exercise jurisdiction over the merits of the case. *Ampal-American v. Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, February 1, 2016, **Doc. RA-141**, ¶ 331 (“while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, *once jurisdiction is otherwise confirmed*, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals”) (emphasis added). In that case, since two arbitral tribunals had found jurisdiction with respect to the same interest in an investment, the tribunal instructed claimant to “cure the abuse here identified . . . to elect, in light of the present Decision which has otherwise confirmed the Tribunal’s jurisdiction” to choose one or the other proceeding. *Id.* ¶ 334.

159. *Second*, even if the Tribunal were to find that GPH’s June 2, 2016 waiver does not fulfill the requirements of Article 10.18.2. GPH subsequently submitted an unqualified waiver on July 18, 2016 that did not contain the reservation at issue in *Renco*. That waiver, submitted in

Gramercy's Amended Notice of Arbitration and Statement of Claim, stated as follows:

Finally, GPH hereby waives “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.” *Id.* Art. 10.18.2(b). Notwithstanding this waiver, GPH “may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of [Peru], provided that the action is brought for the sole purpose of preserving [GPH]’s rights and interests during the pendency of the arbitration.” *Id.* Art. 10.18.3.

Amended Notice of Arbitration and Statement of Claim, July 18, 2016, C-4 ¶ 233(h)-(i).

160. Peru does not deny that GPH’s amended waiver complies with Art. 10.18.2 of the Treaty. *See* Statement of Defense, **R-34** ¶¶ 174-175. Peru is wrong, however, to suggest that GPH’s amended waiver is ineffective. *Cf. id.* ¶ 172.

161. Contrary to Peru’s suggestion, the tribunal’s finding in *Commerce Group* does not support the proposition that a formally defective waiver can never be cured. In that case, the tribunal found that the waiver was materially invalid because claimants had not withdrawn qualifying proceedings, not that the waiver was formally invalid. *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award of March 14, 2011, **Doc. RA-113**, ¶ 115 (holding that the waiver was “invalid as it lacks effectiveness due to Claimants’ *failure to discontinue the proceedings* before El Salvador’s Court of Administrative Litigation of the Supreme Court”) (emphasis added); *see also Thunderbird Award*, **Doc. RA-77** ¶ 117 (“failure to meet such [a waiver] requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings”).

162. *Renco*, *Detroit International Bridge* and *RDC* are also distinguishable, because they do not involve amendment of formally defective waivers. *Cf.* Statement of Defense, **R-34** ¶¶ 170-177. Neither the award in *Renco* nor the United States’ submission as a non-disputing party support Peru’s claim that Gramercy’s submission of an amended waiver long before the Tribunal’s constitution is invalid.

163. In *Renco*, the claimants never submitted an amended waiver. Hence, the issue before the *Renco* tribunal as to whether a deficient waiver could be cured was very different from the one here: once it determined that the waiver was defective, the tribunal held that it could not *retroactively* validate years of proceedings without Peru's consent. It is in this context that the United States took the position that a "tribunal cannot itself remedy an ineffective waiver." *Renco* Second Non-Disputing Party Submission of the United States, **Doc. RA-138**, ¶ 16. The same factual scenario was at play in *Detroit International Bridge* and *RDC*. In *Detroit International Bridge*, the majority of the tribunal found that the claimant's amended waiver could not "retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction," and during which the claimant had an ongoing domestic litigation regarding the same measures as in the arbitration. *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction of April 2, 2015, **Doc. RA-137**, ¶¶ 320-321. Likewise, in *RDC*, the tribunal declined to "allow a defective waiver to be remedied" when "the Claimant has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure." *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction Under CAFTA Article 10.20 of November 17, 2008, **Doc. RA-97**, ¶ 61.

164. This issue, however, is simply not present here. Unlike in *Renco*, *Detroit International Bridge*, or *RDC*, Gramercy is not attempting to "cure" or "remedy" a defective waiver for the purpose of *retroactively* validating proceedings before the tribunal's decision. Rather, just days after the *Renco* decision was issued, while reserving its rights as to the import of the decision, Gramercy submitted an amended Notice of Arbitration and Statement of Claim with a waiver that was consistent with that tribunal's holding. *See* Claimants' Second Amended Notice of Arbitration and Statement of Claim, August 5, 2016, **C-5**. This was a year and a half before the Tribunal was even constituted, let alone before any proceedings took place.

165. Finding this amendment and resubmission insufficient to overcome whatever defects there might have been in the document issued just weeks prior would lead to an absurd result. It would imply that Gramercy would have had to formally withdraw and discontinue that arbitration and then begin a new one, a process that the Treaty does not expressly outline, or essentially lose all rights to recourse under the Treaty regardless of the fact that Peru suffered no prejudice.

166. *Finally*, regardless of the validity of Gramercy's June 2, 2016 waiver, Peru does not appear to deny that Gramercy's July 18, 2016 and August 5, 2016 waivers are formally valid. *Cf.* Statement of Defense, **R-34** ¶ 174. Thus, regardless of the Tribunal's decision on

Gramercy's earlier reservation of rights, on Peru's own case the waiver precondition to arbitration was satisfied as to GFM on June 2, 2016 and as to GPH by July 18, 2016, and by August 5, 2016 at the latest.

(b) All of Gramercy's Waivers Were Materially Valid.

167. Peru's argument that Gramercy failed to fulfill the "material" component of the waiver because it still has not withdrawn "Peruvian court proceedings concerning its alleged bondholdings" is wrong in both law and fact. *Cf.* Statement of Defense, **R-34** ¶ 175.

168. *First*, GFM has never been a party to any local proceedings involving the Land Bonds. In light of this fact, and that GFM provided an unqualified waiver on June 2, 2016, GFM has unquestionably complied with both the formal and material requirements of the waiver provision no later than June 2, 2016.

169. *Second*, the proceedings to which Peru appears to refer are seven proceedings relating to the original land expropriation, which were initiated by Peru and in which GPH had been substituted as a party several years prior when it purchased the Land Bonds. Gramercy acknowledges that in its original Notice of Arbitration and Statement of Claim of June 2, 2016, it represented having "hundreds of suits pending covering all of its Land Bonds." Notice of Arbitration and Statement of Claim, **C-3** ¶ 69; Koenigsberger, **CWS-1** ¶¶ 41-42. This statement was imprecise and subsequently rectified. In its later submissions and witness statements, Gramercy clarified that it was *eligible* to become party to hundreds of local proceedings upon purchase of the Land Bonds, and that it joined as a party in seven of those proceedings. *See* Third Amended Statement of Claim, **C-34** ¶ 72; Koenigsberger, **CWS-3** ¶ 42.

170. These proceedings, however, do not constitute proceedings "with respect to *any measure* alleged to constitute a [Treaty] breach," within the scope of the waiver in Article 10.28. *Cf.* **Doc. CE-139**, Treaty, Art. 10.28.2(b) (emphasis added). These proceedings predate, and do not challenge, the measures that Peru took to extinguish the value of the Land Bonds beginning with the 2013 CT Order and the subsequent Supreme Decrees. *See* Koenigsberger, **CWS-3** ¶ 42.

171. Hence, GPH had complied with the material element of the waiver by June 2, 2016, and with both the formal and the material elements of the waiver requirement no later than July 18, 2016.

172. *Third*, in any event, to avoid further distraction on this issue, GPH also voluntarily withdrew from each of the proceedings in which it had formally appeared by August 5, 2016, consistent with the procedure provided in Article 343 of the Peruvian Civil Procedure Code. *See* **Doc. CE-71**, Consolidated and Harmonized Text of the Code of Civil

Procedure, April 23, 1993, Art. 343. Although Peru seems to question whether GPH really did withdraw, it has no basis to doubt Mr. Koenigsberger's testimony to this effect. See Koenigsberger, *CWS-3* ¶ 42. The withdrawal petitions are now in the record as Exhibits **Doc. CE-600-Doc. CE-606**. See **Doc. CE-602**, Exp. 4233-2001 (withdrawal petition); **Doc. CE-600**, Exp. 0026-1973 (withdrawal petition); **Doc. CE-603**, Exp. 0161-1974 (withdrawal petition); **Doc. CE-604**, Exp. 0195-1978 (withdrawal petition); **Doc. CE-605**, Exp. 00258-1970 (withdrawal petition); **Doc. CE-601**, Exp. 03272-2007 (withdrawal petition); **Doc. CE-606**, Exp. 09990-2016 (withdrawal petition). This withdrawal procedure under Articles 340, 342, and 343 of Peru's Civil Procedure Code is exactly the procedure that, in *Renco*, Peru claimed *Renco* should have taken to fulfill the material waiver requirement. *Renco* Peru's Memorial on Waiver, **Doc. CE-581**, n. 116, 123. Gramercy submitted the last of these withdrawal petitions on August 5, 2016. All of these withdrawal petitions have been affirmed by the relevant courts. See **Doc. CE-741**, Resolución 83, Exp. No. 00258-1970-0-1706-JR-CI-01, August 8, 2016; **Doc. CE-742**, Resolución No. 35, Exp. 03272-2007-0-1706-JR-CI-10, August 8, 2016; **Doc. CE-743**, Resolución No. 28, Exp. 0161-1974-0-1706-JR-CI-03, August 9, 2016; **Doc. CE-744**, Resolución No. 51, Exp. 09990-2006-0-1706-JR-CI-09, August 9, 2016; **Doc. CE-745**, Resolución No. 45, Exp. 4233-2001-0-1706-JR-CI-07, August 10, 2016; **Doc. CE-746**, Resolución No. 10, Exp. 0026-1973-0-1706-JR-CI-10, August 10, 2016; **Doc. CE-747**, Resolución No. 11, Exp. 00195-1978-0-1706-JR-CI-10, August 10, 2016. In particular, in the proceeding in which Peru misleadingly implies GPH participated until December 2017, ostensibly based on the presence of GPH's name on a page of the court documents, the judge in fact approved GPH's withdrawal on August 8, 2016. See **Doc. CE-741**, Resolución 83, Exp. No. 00258-1970-0-1706-JR-CI-01, August 8, 2016. If for any inexplicable reason Peruvian courts have not updated the case captions to reflect GPH's withdrawals, that is of no moment for purposes of the Treaty: GPH, for its part, complied with any implied obligations it may have to materialize its waiver by taking all steps within its power to discontinue the proceedings, and did so by no later than August 5, 2016. Koenigsberger, *CWS-3* ¶ 42.

173. Therefore, by June 2, 2016, July 18, 2016—but even on Peru's case by August 5, 2016—each of GPH and GFM had submitted formally and materially valid waivers, and the conditions to jurisdiction in Article 10.18.2 are therefore met no later than such date.

2. Gramercy's Claims Are Not Time-Barred Because Gramercy Did Not Know that the Pleaded Breaches Had Occurred, or that It Had Incurred Loss, Until After the 2013 Resolutions.

174. Peru's argument that Gramercy has failed to comply with the three-year limitations period in Article 10.18.1, and that the Tribunal

therefore lacks “temporal jurisdiction,” fails because Peru mischaracterizes both the language of the Treaty and Gramercy’s claim.

175. Peru claims that “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.’” Statement of Defense, **R-34** ¶ 182 (emphasis added). In fact, Article 10.18.1 of the Treaty provides:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which *the claimant first acquired, or should have first acquired, knowledge of the breach* alleged under Article 10.16.1 *and knowledge that the claimant . . . has incurred loss or damage.*

Doc. CE-139, Treaty, Art. 10.18.1 (emphasis added).

176. Thus, the determinative factor is not the *occurrence* of the breach, but claimant’s actual or constructive *knowledge* of *both* the breach *and* the fact that it “has incurred” loss or damage resulting from it. Addressing the identical provision in NAFTA, the tribunal in *Resolute Forest Products* recently summarized the test as follows:

The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result. . . . [T]he specified conditions must be fulfilled: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know, or be in a position such that it should have known, of these facts.

Resolute Forest Products v. Canada, PCA Case No. 2016-13, Decision on Jurisdiction of January 30, 2018, **Doc. CA-170**, ¶ 153 (emphasis added).

177. Likewise, the *Mobil Investments* tribunal recently explained:

[T]he limitation period [under NAFTA] starts to run only when the investor or enterprise has not only acquired (or ought to have acquired) knowledge of the alleged breach but also has acquired (or ought to have acquired) knowledge that it has incurred loss or damage as a result. The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge

that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage. Moreover, the language of Article 1116(2) and Article 1117(2) is quite clear in requiring knowledge that loss or damage has been incurred. It is impossible to know that loss or damage *has been* incurred until that loss or damage actually has been incurred.

Mobil Investments Canada Inc. v. Canada, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of July 13 2018, **Doc. CA-142**, ¶¶ 153-154 (emphasis in the original); *see also Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Relation to Preliminary Motion, **Doc. CA-162**, ¶ 12.

178. As a result, it is not enough that the claimant suspected, or should have suspected, that it *might* suffer loss from particular State conduct later alleged to be a breach of the Treaty. While some tribunals have opined that “damage or injury may be incurred even though the amount or extent may not become known until some future time,” they have also acknowledged that a suspicion that something bad may happen does not suffice to trigger the three-year window. *See, e.g., Berkowitz (formerly Spence International Investments and others) v. Costa Rica*, ICSID Case No. UNCT/14/2, Interim Award (Corrected) of May 30, 2017, **Doc. RA-150**, ¶ 213; *Rusoro Mining Award*, **Doc. RA-147**, ¶ 217 (“what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear”); *but see Bolivarian Republic of Venezuela v. Rusoro Mining Ltd.*, Paris Court of Appeals, Judgment on Set Aside Application of January 29, 2019, **Doc. CA-86** (annulling on other grounds).

179. For instance, as the *Mobil Investments* tribunal explained:

To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained.

Mobil Decision on Jurisdiction, **Doc. CA-142**, ¶ 155.

180. The *Mobil* tribunal agreed with the investor that, although it knew of the complained-of measures when they were promulgated—outside the three-year window—the claimant “could not have had the requisite knowledge that it would incur loss or damage as a result of those Guidelines until the Canadian courts had finally disposed of its challenge to the Guidelines.” *Id.*

181. Similarly, in *Resolute Forest Products v. Canada*, the tribunal concluded that the claimant “did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach” because “it has not been established that it did actually suffer loss in this short period.” *Resolute Decision on Jurisdiction, Doc. CA-170*, ¶ 178. The tribunal found the claimant’s draft notice of intent referring to its market share having declined from 2012 to 2014 equivocal, because it “does not say anything specific about whether there was a decline in the first year,” of which only the first couple of months were before the relevant cut-off date, *id.* ¶ 169; claimant’s statement in a 2012 conference call that it was “impossible” for the reopening of the competitor’s mill “not to have an impact on the market” showed that the claimant expected to lose share, but this statement pre-dated the opening of the competitor mill, therefore “this was mere prediction, not an acknowledgement of loss already incurred,” *id.* ¶ 170; and while press articles from 2012 predicted the investor’s loss of market share, “[p]ress speculation and market predictions are no substitute for evidence of sales volumes and prices, or a clear acknowledgment of present loss.” *Id.* ¶ 178; *see also* Reisman, W. Michael and Sloane, Robert D., *Indirect Expropriation and its Valuation in the BIT Generation, Doc. CA-167*, p. 146 (“It would be destructive of the normative goals of BITs for the law to encourage foreign investors prematurely to claim that their investments have been expropriated and to resort to compulsory dispute resolution under the relevant BIT provision”).

182. Applying these standards, none of Gramercy’s claims fall foul of the three-year window—whether counted from its June 2, 2016 Notice of Arbitration (consistent with Article 10.16.4 of the Treaty), July 18, 2016, or even (on Peru’s case) from its last amended submission of claims on August 5, 2016. Because the earliest of the measures at issue—the 2013 CT Order, issued on July 16, 2013—falls within the three-year window on all but the August 5, 2016 waiver, but Peru does not dispute that the August 5, 2016 waiver is valid and Gramercy did not have knowledge of the irregularities leading to the issuance of the 2013 CT Order until years later, Peru’s argument (even if right) would not exclude any meaningful part of Gramercy’s case.

183. Peru’s simplistic argument that the “cornerstone of [Gramercy’s] claims is the Constitutional Tribunal Resolution of 16 July 2013,” and that therefore the simple issuance of this decision marks the beginning of the three-year window, fundamentally mischaracterizes

both the facts and the nature of Gramercy’s claims. *Cf.* Statement of Defense, **R-34** ¶ 183, *see also id.* ¶ 188 (“the three-year prescription period . . . began to run on 13 [*sic*] July 2013”). While Peru seizes on Gramercy’s statement, two and a half years ago, that Gramercy “first acquired constructive or actual knowledge of Peru’s breaches *on* or after July 16, 2013, the date of the 2013 CT Order” (*cf.* Statement of Defense, **R-34** ¶ 184, *citing* Claimant’s Notice of Arbitration and Statement of Claim, June 2, 2016, **C-3**, ¶ 233(c) (emphasis added)), it does not actually grapple with the substance of Gramercy’s claims. That statement was made in the context of demonstrating that Gramercy’s original Notice of Arbitration of June 2, 2016 was timely. While the word “on” might have been an infelicitous choice of language in the circumstances, Gramercy should not be held hostage to it. As is clear from the reference to “*constructive or actual*” knowledge and “*on or after*” July 16, 2013, the statement was intended to convey that even in a worst case scenario Gramercy could not possibly have had knowledge, whether actual or constructive, of any breaches before the 2013 CT Order had even been issued. This statement was also corrected in Gramercy’s August 5, 2016 Amended Statement of Claim. *See* Claimant’s Second Amended Notice of Arbitration and Statement of Claim, August 5, 2016, **C-5** ¶ 233(c). Moreover, the statement says nothing about when Gramercy acquired knowledge that it had incurred loss or damage.

184. In any event, following Peru’s specific objection, this pleading is the first opportunity Gramercy has to address this issue in detail and to brief its application to each of Gramercy’s claims, which Gramercy here does.

185. *First*, an indirect expropriation by definition does not “occur” until there has been a substantial deprivation of value. As the *Resolute Forest Products* tribunal reasoned:

Breaches of Articles 1102(3) [of NAFTA, national treatment] and 1105(1) [unfair and inequitable treatment] occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).

Resolute Forest Products Decision on Jurisdiction, **Doc. CA-170**, ¶ 154.

186. Hence, the *Resolute Forest Products* tribunal rejected Canada's argument that the claimant had knowledge of the alleged expropriation at the time the State implemented the complained-of measures (supporting a competing local paper mill) in 2011 and 2012, finding instead that the claimant could not have known of the expropriation until October 2014, when the decision was made to close the paper mill in which claimant had invested. *Id.*, ¶¶ 161, 163.

187. Here, Gramercy's expropriation claim posits that "[t]he Supreme Decrees Destroy the Value of the Land Bonds." *See, e.g.*, Statement of Claim, C-34 Section V.A.1. While the 2013 CT Order and the 2013 Resolutions are predicates to the 2014 Supreme Decrees, that breach as pleaded could not have "occurred" until the 2014 Supreme Decrees were issued, because these are the first measures that purported to implement the 2013 CT Order and the 2013 Resolutions by imposing an exclusive formula for determining current value that would have made the Land Bonds worthless.

188. Neither did Gramercy know, from the mere issuance of the 2013 CT Order, that Peru would later implement it in a way that made its Land Bonds worthless and thus that an expropriation would occur. As Mr. Koenigsberger has testified and contemporaneous exchanges illustrate, even as it purported to endorse dollarization instead of CPI, the majority opinion in the 2013 CT Order did not explain how many of the key issues that would ultimately determine the value of the Land Bonds would be resolved, and it deferred implementation to further steps by the Government within six months. *See* Koenigsberger, CWS-1 ¶¶ 55-56; Koenigsberger, CWS-2 ¶¶ 54-56; *see also* Doc. CE-544 Email from Jose Cerritelli to Robert Koenigsberger, July 16, 2013, p. [1] ("The devil is in the details of what the government will do in the next six months to comply with this ruling" and Gramercy would not get "full answers until the government proposes a method to implement this ruling"); Doc. CE-545, Email from Jose Cerritelli to Robert Koenigsberger, July 17, 2013, p. 1 (conveying uncertainty of the effects of the 2013 CT Order); Doc. CE-734, Email from Robert Koenigsberger to Jose Cerritelli, July 16, 2013 (expressing confusion about the 2013 CT Order); Doc. CE-544, Email from Jose Cerritelli to Robert Koenigsberger, July 16, 2013, p. 1 ("I have to find out what's in [the 2013 CT Order] and what it means"); Doc. CE-736, Email from Bob Joannou to Jose Cerritelli *et al.*, September 25, 2013 (scheduling a phone call to discuss lingering questions arising from the 2013 CT Order); Doc. CE-545, Email from Jose Cerritelli to Robert Koenigsberger, July 17, 2013, p. [1] ("The Tribunal left important details of the terms of the debt settlement open to negotiations and subject to interpretation by the executive."). As a result, after the 2013 CT Order, Gramercy sought to engage with the Government because "it ha[d] not yet identified the means to resolve the problem" posed by the Land Bonds, but the Government told it to wait for the implementing measures. Doc. CE-185, Letter from Gramercy to President of the Council of Ministers and

Minister of Economy and Finance, pp. 2-3; Koenigsberger, **CWS-4** ¶ 30. Despite the 2013 CT Order, and until the 2014 Supreme Decrees, Gramercy believed that it could avoid a “confiscatory” outcome. *See* Koenigsberger, **CWS-2** ¶ 42. **Doc. CE-737**, Email from Jose Cerritelli to Robert Koenigsberger *et al.*, October 9, 2013, p. [2] (“[w]e expect that with the proper valuations being issued in the lower expropriation courts, and the tribunal [*sic*] statements to us [the bondholders] that they intend to clarify and fix the problems with the valuation formula will allow us to prevent the imposition of a confiscatory valuation formula for the settlement of our agrarian bonds debt”); *see also* **Doc. CE-738**, Email from Jose Cerritelli to Bob Joannou *et al.*, October 9, 2013 (relaying uncertainties about the effects of the 2013 CT Order, noting that “[t]he resolution so far as it was issued and as it still stands today, is not very clear and it’s relatively vague about the key factors involved in calculating the NPV of the claim”).

189. Nor could Gramercy be charged with constructive knowledge of the expropriatory effect of the 2013 CT Order. A dollarization-based approach itself would not inevitably have decimated the value of the Land Bonds. In fact, as Prof. Edwards explains, if dollarization were applied in a coherent and economically rational fashion, it can result in a value that is relatively close to CPI updating. Amended Expert Report of Sebastian Edwards, **CER-4** ¶ 12. It was only in January 2014, when Peru issued the Supreme Decrees, that Peru implemented the dollarization method in a way that made the Land Bonds worthless. *Cf.* Statement of Claim, **C-34** ¶ 19. Indeed, Peru would no doubt have objected that it would have been premature to file an arbitration claim immediately after the 2013 CT Order, because that Order on its face said that it would have to be implemented within six months; indeed, if the MEF had produced a reasonable dollarization-based approach consistent with a valuation under CPI, this arbitration may never have been brought.

190. *Second*, for similar reasons, Gramercy did not know that it had been denied the minimum standard of treatment, or that it had incurred loss as a result, until well after the 2013 CT Order. While the precise moment at which a violation of the minimum standard of treatment occurs is difficult to pinpoint in circumstances like these, later measures that are the implementation of that decision, as well as the later revelation of the circumstances that led to it, are key elements of Peru’s overall failure to provide that treatment here.

191. Thus, it was only after the 2013 Resolutions and the 2014 Supreme Decrees—with their nonsensical, value-destroying formulas without any alternative recourse—that it became apparent both that Peru would completely frustrate Gramercy’s legitimate expectation that it would receive the properly updated current value of its Land Bonds, and that Peru would do so through arbitrary, discriminatory, and idiosyncratic conduct that lacked due process. *See, e.g.*, Statement of

Claim, C-34 ¶¶ 180, 188, 193, 196-197, 207; Koenigsberger, CWS-4 ¶¶ 28-30.

192. In addition, Gramercy could not have had knowledge that it had suffered a loss as a result of Peru’s unfair and inequitable conduct until well after August 5, 2013, because only after the 2013 Resolutions and the 2014 Supreme Decrees were issued did it become clear that Peru’s measures would destroy the value of the Land Bonds. Cf. Koenigsberger, CWS-2 ¶¶ 57-58; *see also* Section III.B below.

193. With respect to the 2013 CT Order in particular, Gramercy did not know of the illegalities and irregularities leading to its issuance until much later. Gramercy had heard rumors about the white-out some time in late 2014, but it was not until January 2015 that the story of the white-out first broke in the Peruvian press. **Doc. CE-197**, *Gestión, La Deuda Agraria y el Dr. Liquid Paper*, January 28, 2015; Koenigsberger, CWS-4 ¶¶ 27-28. The secret meetings with Roy Gates and the Government’s false pretenses of budgetary disaster did not emerge until August 2015, when Justice Eto testified to the Peruvian prosecutor that some studies had been done—although if that is true, it would mean they have been improperly withheld by Peru in this arbitration—on how using CPI to pay the Land Bonds would “impact to the Peruvian budget.” **Doc. CE-28**, Statement to the Criminal Prosecutor’s Office of Gerardo Eto Cruz, August 28, 2015, Question 6; *see also* Statement of Claim, C-34 ¶ 86. The prosecutor did not even file initial criminal charges against Oscar Díaz until November 20, 2015. **Doc. CE-213**. Indeed, further details about these irregularities are continuing to emerge to this day, as the ongoing investigations and criminal proceedings continue to unfold in Peru. *See Doc. CE-675*, Transcript of the Hearing by the Sub-commission of Constitutional Accusations, January 9, 2019, p. 38 (Javier Velásquez stating that the criminal proceeding against Oscar Díaz is “in progress,” and Oscar Díaz confirming that “he is the defendant”).

194. *Third*, Gramercy also did not know that it would be deprived of due process or an effective means of redress from the face of the 2013 CT Order itself. *See* Koenigsberger, CWS-4 ¶¶ 17-19. To the contrary, in 2004 the CT upheld dollarization as constitutional only because it was presented as an alternative, “which the bondholder has the option to accept or reject.” **Doc. CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004, ¶ 7. The CT’s new position on this only became clear when it issued not one but two so-called “clarifications”, through the August 8, 2013 and November 4, 2013 Resolutions. *See Doc. CE-180*, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013; **Doc. CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013. Both of them fall within the three-year window, since even on Peru’s case, that window opened on August 5, 2013. These Resolutions foreclosed recourse to the Peruvian courts and imposed what was essentially a mandatory cram-down. As a result, Gramercy could not

have had actual or constructive knowledge of this particular breach of the minimum standard of treatment or of this failure to provide effective means of redress until *after* August 8, 2013.

195. *Fourth*, Peru’s creation of the Bondholder Process can also be analyzed as a composite act, which occurs only “when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.” International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **Doc. CA-46**, Art. 15. Peru itself stresses the indivisible nature of the various measures, speaking of “*the Bondholder Process implemented by the Supreme Decrees pursuant to the Constitutional Tribunal resolution,*” and defends throughout its Statement of Defense that “Bondholder Process.” Statement of Defense, **R-34** ¶¶ 274-279; *see also id.* ¶¶ 4, 110-123, 291-292 (emphasis added). On such an approach, Peru’s breach is the establishment of that Bondholder Process as a whole, and this did not occur until at least the 2014 Supreme Decrees.

196. *Fifth*, with respect to national treatment, Gramercy again could not have had actual or constructive knowledge of Peru’s breach until the 2014 Supreme Decrees, which introduced for the first time the provision that legal entities who have acquired the Land Bonds for “speculative” purposes would be last in payment. *See* Statement of Claim, **C-34** ¶ 128. This category of bondholders was not referenced in the 2013 CT Order. *Compare* **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013 *with* **Doc. CE-37**, Supreme Decree N° 17-2014-EF, Art. 19(7). Accordingly, Gramercy’s national treatment claim cannot be time-barred, either.

197. *Finally*, even if Peru were right, the most it could achieve would be that it would not be admissible to argue that the 2013 CT Order on its face and in and of itself was a breach of Article 10.5 of the Treaty. But that does not achieve much, because it would not shield from the Tribunal’s scrutiny the circumstances behind the issuance of the 2013 CT Order that came to light only later, the 2013 Resolutions, the 2014 Supreme Decrees, any of the other measures premised on the 2013 CT Order—in effect, the entire Bondholder Process—or any of Peru’s subsequent conduct.

198. Hence, Gramercy’s claims are not time-barred under Article 10.28.

D. The Tribunal Has Jurisdiction *Ratione Temporis* Because Gramercy’s Claims Do Not Require Retroactive Application of the Treaty.

199. Peru’s objection that the Tribunal lacks temporal jurisdiction because Gramercy’s claims “are predicated on significant acts and facts

that took place long before the Treaty entered into force” is misguided in law and wrong in fact. *See* Statement of Defense, **R-34** ¶¶ 179-181; Reisman, **RER-1** ¶¶ 70-72, 90. Article 10.1.3 of the Treaty provides that, “[f]or greater certainty,” the investment 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, which the Parties agree is February 1, 2009. **Doc. CE-139**, Treaty, Art. 10.1.3. This is merely the reflection of the general principle of non-retrospective application of treaties in Article 28 of the Vienna Convention. *See* VCLT, **Doc. CA-121**, Art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”).

200. However, this principle has no application here, and merely illustrates Peru’s “kitchen sink” approach to meritless jurisdictional objections.

201. *First*, as a factual matter, Gramercy does not claim that Peru breached the Treaty through “any act or fact that took place . . . before the date of entry into force of the Treaty.” All of Gramercy’s claims of breach arise out of Peru’s measures, beginning in 2013 and later, to extinguish the value of the Land Bonds. Thus, for example, Gramercy’s expropriation claim is based on Peru’s extinguishment of Gramercy’s entitlement to updated current value through the 2013 CT Order, the 2013 CT Resolutions and the Supreme Decrees, which in turn were premised on the 2013 CT Order. *See* Statement of Claim, **C-34** ¶¶ 150-154. Gramercy’s minimum standard of treatment claim is based on the irregularities and illegalities surrounding the issuance of the 2013 CT Order (which did not occur until 2013 and of which Gramercy only learned in 2015 and whose full extent is still developing), the August and November 2013 Resolutions, the MEF’s issuance of the Supreme Decrees in January 2014 and other later conduct. *Id.* ¶¶ 172-214. Finally, Gramercy’s effective means claim is likewise based on Peru’s 2013 CT Resolutions and the 2014 Supreme Decrees, and its national treatment claim is also based on the 2014 Supreme Decrees. *Id.* ¶¶ 225-238; *see also* Section III.C.

202. *Second*, Peru’s repeated reference to a “dispute” about payment of the Land Bonds between Peru and the bondholders decades before Gramercy even invested thoroughly confuses the applicable legal principles. *Cf.* Statement of Defense, **R-34** ¶¶ 180-181. Jurisdiction under this Treaty is not determined by the arising of a dispute but by claims submitted and measures challenged. This Treaty provides that *claims* that may be submitted for arbitration are, as relevant here, claims “that the respondent has breached . . . an obligation under Section A,” and that the Treaty “applies to *measures* adopted or maintained by a Party relating to” a protected investor and investment. **Doc. CE-139**,

Treaty, Arts. 10.1.1, 10.16.1(a)(i)(A) (emphasis added). *Ex hypothesi*, there cannot be a breach of an obligation under Section A until that obligation comes into force for the relevant Party. Hence, the relevant analysis is whether Gramercy’s claims are based on “measures,” as defined in the Treaty, that are alleged to breach an obligation under the Treaty, and whether those measures are an “act or fact that took place or any situation that ceased to exist before the date of entry into force”—*not* whether, as Peru alleges, the “essence of the dispute itself” pre-dates the Treaty. *Cf.* Statement of Defense, **R-34** ¶ 181. Tribunals addressing this question under the similarly worded NAFTA have thus repeatedly confirmed that there can be no breach of NAFTA until it comes into force, and therefore that the question of temporal jurisdiction over prior acts simply does not arise. *See, e.g., Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award of October 11, 2002, **Doc. CA-34**, ¶ 68 (“The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach”); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Interim Decision on Preliminary Jurisdictional Issues of December 6, 2000, **Doc. CA-111**, ¶ 62 (“Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal’s jurisdiction does not extend, before that date”).

203. *Third*, even if the time when a dispute arose were remotely relevant, it could in any event only refer to the time when a qualifying dispute arose *between these parties* to the arbitration. The axiomatic definition of a dispute in international law is a “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” *Mavrommatis Palestine Concessions*, P.C.I.J., Judgment No. 2, Series A, Objections to the Jurisdiction of the Court, August 30, 1924, **Doc. CA-138**, p. [4], Section I., ¶ 19. There was, again *ex hypothesi*, no investment dispute *between Gramercy and Peru* about Peru’s measures to deprive Gramercy of the value of its investment until *after* Gramercy invested and *after* the complained-of measures occurred. And in any event, even if Peru’s failure to pay the value of the Land Bonds were somehow legally relevant, that is not a “situation that ceased to exist” before 2009, and this Treaty (unlike others) does not contain an exclusion clause providing that it will not apply in relation to disputes having arisen before its entry into force.

204. *Finally*, the fact that there are acts and facts that predate the Treaty that are relevant to Peru’s breaches does not make those breaches fall outside the Tribunal’s temporal jurisdiction. *Cf.* Statement of Defense, **R-34** ¶¶ 180-181 (stating that pre-Treaty acts “form the foundation of the Treaty breaches alleged” and the breaches “are deeply rooted in” a historical dispute). Tribunals can and should take into account the factual background against which the complained-of measures took place in assessing the merits of claims that those measures breached the Treaty—but that does not disqualify those measures from

the Tribunal's temporal jurisdiction. *See, e.g., Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, **Doc. CA-42**, ¶ 66 (“it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point *after* its entry into force”) (emphasis in original); *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award of July 31, 2007, **Doc. CA-133**, ¶ 84 (“events or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date”); *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927 (UNCITRAL), Award on Preliminary Objections to Jurisdiction of September 19, 2008, **Doc. CA-183**, ¶ 87 (“The tribunals in *MCI*, *Feldman* and *Mondev*, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for ‘purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after’”).

205. Unsurprisingly, therefore, the cases that Peru cites to argue that Gramercy's claims fall outside the Treaty's temporal jurisdiction are inapposite. *Cf.* Statement of Defense, **R-34** ¶¶ 178-188 (*citing Berkowitz Interim Award, Doc. RA-150* and *Mondev Final Award, Doc. CA-34*). In *Berkowitz*, the claimant sought to bring claims for expropriation for acts that occurred prior to the Treaty's entry into force, alleging that Costa Rica's continued failure to compensate for the prior expropriation constituted separate breaches. The tribunal found that it lacked temporal jurisdiction because the post-entry into force actions were merely “a compilation of acts and steps taken or to be taken by the Government,” and not “orders or other regulatory measures imposing legal consequences on the Claimants.” *Berkowitz Interim Award, Doc. RA-150*, ¶ 240. That is clearly not the case here: Gramercy does not argue that the breach is Peru's failure to compensate for the original expropriation of the *land*; as discussed above, the breach arises from Peru's scheme starting in 2013 and 2014 to extinguish the Land Bonds, without actually paying current value. *Id.* Peru also invokes *Mondev*, but in that case, the tribunal in fact acknowledged that events prior to the entry into force of an obligation may be relevant in determining whether a State has subsequently committed a breach, but that “it must still be possible to point to conduct of the State after that date which is itself a breach.” *Mondev Award, Doc. RA-62*, ¶ 70. Here, Gramercy has clearly “point[ed] to conduct of the State” after the Treaty's entry into force that constitutes a breach, including the 2013 CT Order, the 2013 Resolutions, and the Supreme Decrees. *Id.*

206. This jurisdictional objection, too, is therefore both misconceived and misguided. The Tribunal has temporal jurisdiction over Gramercy's claims.

E. Gramercy Has Not Abused Its Right to Arbitration.

207. Peru's objection that Gramercy's claims are inadmissible because Gramercy committed an "abuse of the Treaty arbitration mechanism" fails because its premise is fundamentally misconceived. Statement of Defense, **R-34** ¶ 189. Under the *Phoenix Action* decision, on which Peru bases this argument, an abuse of process can occur if a claimant engaged in corporate restructuring whose sole purpose was to obtain artificial access to treaty protection that did not otherwise exist. Cf. *Phoenix Action Award*, **Doc. RA-100**, ¶ 93; see also *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of December 17, 2015, **Doc. RA-140**, ¶ 584; *Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of June 10, 2010, **Doc. CA-207**, ¶ 205.

208. But that is not the case here. Gramercy neither acquired nor restructured its investment for the sole purpose of obtaining access to a treaty mechanism that it would otherwise not have for a dispute that had already arisen at the time Gramercy made its investment. The *Phoenix Action* doctrine is therefore entirely inapplicable on these facts, and the high standard for finding an abuse of process is nowhere near met.

209. First, the standard for abuse of process is high. See, e.g., *Philip Morris Award on Jurisdiction*, **Doc. RA-140**, ¶ 539 ("it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high"). As the *Chevron* tribunal stated:

in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process.

Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award of December 1, 2008, **Doc. RA-98**, ¶ 143.

210. In order to prove an abuse of process, Peru would have to demonstrate that, on an objective basis, based on all circumstances of the case, Gramercy "modif[ied] the structure of its investment for the sole purpose of gaining access to [treaty] jurisdiction, after damages have

occurred” and “change[d] the structure of [the] company complaining of measures adopted by a State for the sole purpose of acquiring an [international treaty] claim that did not exist before such change.” *Phoenix Action Award*, **Doc. RA-100**, ¶ 92; *see also Philip Morris Award on Jurisdiction and Admissibility*, **Doc. RA-140**, ¶ 539 (“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.”) (emphasis added).

211. *Second*, Gramercy did not acquire its investment in the Land Bonds with the “sole purpose” of bringing an arbitration claim against Peru. This is the critical question for any claim of abuse of right. *See, e.g., Aven Final Award*, **Doc. CA-102**, ¶¶ 225-247 (“each and every cited case turns on whether or not [the relevant objectionable conduct] occurred for the *sole purpose* of gaining benefit from a Treaty’s provisions”) (emphasis in original); *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Case V2013/153, Award of July 12, 2016, **Doc. CA-127**, ¶ 696 (“The Arbitral Tribunal does not doubt that the fact of organizing an investment *with the only purpose* of benefitting from the protection of an international treaty to which it was not entitled, in order to protect itself from an existing or foreseeable dispute, is a case of unacceptable forum shopping that justifies the denial of the jurisdiction”) (emphasis added); *Phoenix Action Award*, **Doc. RA-100**, ¶¶ 43, 92-93, 142-144.

212. But that is not the case here. Mr. Koenigsberger has testified extensively about the reasons for Gramercy’s investment. Gramercy is an investment firm. It acquired an investment; it did not purchase a Treaty claim. In Mr. Koenigsberger’s words, Gramercy’s principal investment strategy was to serve as a “catalyst” for the fair restructuring of the Land Bond debt through negotiations with the Government, a strategy that Gramercy had successfully pursued in the past in Nicaragua and other places. Koenigsberger, **CWS-3** ¶¶ 11-19, 34-35, 42-47, 70; *see also Doc. CE-730*, Email from Jose Cerritelli to Scott Seaman *et al.*, May 23, 2008 (describing Gramercy’s strategy of “propos[ing] to [Peru] a restructuring under the same terms as those in the law passed by [C]ongress in 2006”); **Doc. CE-731**, Email from Jose Cerritelli to Scott Seaman *et al.*, May 23, 2008 (“Our strategy calls for continuing to source in Peru to build a large enough position that the gov’t can use as an anchor bloc to negotiate a restructuring solution”). Gramercy’s contemporaneous documents, including its financial statements, show Gramercy’s expectation as of 2012—years after it invested—that it could still settle the debt through a negotiated solution. [REDACTED]

[REDACTED]

[REDACTED] And if one considers the timing of the investment, Gramercy

began investing in Peru in 2006, many years before both Peru’s breaches of the Treaty and Gramercy’s February 2016 notice of intent, which it even then sent reluctantly and out of necessity to protect against the Treaty’s statute of limitations. *See* Koenigsberger, **CWS-3** ¶¶ 37, 44-56; Koenigsberger, **CWS-4** ¶¶ 6, 30-32; *see also* **Doc. CE-729**, Email from Jose Cerritelli to David Herzberg, January 24, 2006 (describing a preference for a legislative solution “because we believe that a mediocre settlement is better than a successful lawsuit”); **Doc. CE-749**, Email from Jose Cerritelli to David Herzberg, January 24, 2006 (“the road for a settlement with the government is wide open”). Peru has offered no proof whatsoever—nor could it—that Gramercy was so prescient that it bought the Land Bonds in 2006 “solely” to bring an arbitration claim in 2016 under a Treaty ratified in 2009, based on measures Peru took in 2013 and 2014.

213. Moreover, just because Peru had not yet paid the Land Bonds at the time Gramercy bought them does not mean the dispute at issue in this arbitration had already arisen. *Cf.* Statement of Defense, **R-34** ¶ 189 (claiming the abuse of process consists of the fact that “the essence of Gramercy’s case—*i.e.*, a dispute over valuation and payment of the Land Bonds—had *already* arisen and was subject to *ongoing* legal proceedings in Peru at the time of Gramercy’s alleged investment”). While Peru had not paid all of the outstanding Land Bonds debt, at the time Gramercy bought the Land Bonds, it had the legitimate expectation based on the existing legal framework that Peru would honor them by paying current value or at least that Gramercy would be able to initiate and participate in Peruvian court proceedings to seek current value on its Land Bonds like so many other bondholders. *See* Section III.B.1. The measures that prompted this dispute did not occur until many years later, after Peru frustrated Gramercy’s expectations and eradicated its rights through the 2013 CT Order, 2013 CT Resolutions, and 2014 Supreme Decrees. *See, e.g.,* *Isolux Award*, **Doc. CA-127**, ¶ 704 (“*En este arbitraje, el origen del conflicto se encuentra en las leyes del 27 de diciembre de 2012 y el Real Decreto-Ley del 1 de febrero de 2013 que, según la Demanda de Arbitraje, violaron los Artículos 10 y 13 TCE. La “trigger letter” mandada al Reino de España es del 13 de marzo de 2013. Resulta claro, que el conflicto es posterior a la restructuración discutida y a la colocación de la inversión en una sociedad holandesa*”) (footnotes omitted); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections of June 1, 2012, **Doc. CA-154**, ¶ 2.109 (the complained-of breach “became known to the Claimant only . . . on 11 March 2008; and that, also as such, it was not known or foreseen by the Claimant before 13 December 2007 [when it restructured its investment] as an actual or specific future dispute with the Respondent under CAFTA”). *Cf. Phoenix Action Award*, **Doc. RA-100**, ¶¶ 92, 95, 136 (holding that the “timing of the investment is the first factor to be taken into account,” and finding it abusive when claimants invested “after damages have occurred,” “once the acts which the investor considers are

causing damages to its investment have already been committed,” or “all the damages claimed by [claimants] had already occurred”).

214. Therefore, the facts of this case simply bear no resemblance to the kinds of machinations at issue in *Phoenix Action*, which involved inserting a new holding company with a protected nationality into the ownership chain after the impugned measures had already caused the alleged damage to the investment and just two months before filing a claim, and where the redistribution of assets occurred within a family of host-State nationals; or in *Levy and Grencitel*, which involved transfer of shares to a covered claimant one day before enactment of a measure claimants knew was imminent; or in *Philip Morris v. Australia*, which involved a restructuring after Australia announced major tobacco control regulations and just five months before it filed its claim. *Cf.* Statement of Defense, **R-34** ¶ 191, n. 425; Reisman, **RER-1** ¶¶ 76-86. Rather, this case bears resemblance to *Tidewater v. Venezuela*, where the tribunal found that a pre-existing dispute between the parties was different from the expropriation dispute submitted to arbitration, and that the expropriation was not foreseeable at the time of claimant’s restructuring two months prior because the expropriatory measure “was introduced without warning.” *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction of February 8, 2013, **Doc. CA-189**, ¶ 196. Likewise, in *Pac Rim*, the tribunal found that claimant could not have foreseen its dispute with respondent at the time of its restructuring, since it learned of the complained-of *de facto* ban on mining only three months thereafter. *Pac Rim* Decision on Jurisdiction, **Doc. CA-154**, ¶ 2.109. In Gramercy’s case, at the time the U.S. entities invested in the Land Bonds, there was no breach of the Treaty, no damage to the investment, and no dispute between Gramercy and Peru. This alone would be dispositive of Peru’s objection.

215. *Third*, Gramercy has also not engaged in any “corporate restructuring” after it acquired its investment with the sole purpose of “securing access to an [investor-State arbitration mechanism] that would otherwise be unavailable,” as Prof. Reisman postulates. Reisman, **RER-1** ¶ 77. At no point did Gramercy restructure its investment in the Land Bonds so as to introduce a U.S. claimant where none previously existed in the ownership chain. Since the acquisition of the Land Bonds, GPH has always remained a Delaware limited liability company and has always directly owned the Land Bonds. *See* Lanava, **CWS-5** ¶¶ 32-35. While GFM became the investment manager for the entirety of Gramercy’s position in the Land Bonds in 2012 after Gramercy decided to retire two legacy companies—Gramercy Investment Advisors LLC and Gramercy Advisors, LLC—that formerly directly or indirectly managed Gramercy’s investments in the Land Bonds, all of these entities were U.S. enterprises under the Treaty and the legacy companies had identical ownership as GFM at the time of retirement, and all three companies were organized as Delaware LLCs. *See id.* ¶¶ 26-28; *see also*

operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”). The whole point of investment treaties is to induce investment based on the protections they provide, in other words, with those treaties in mind. It would make the entire system of investment treaties ineffective if it were otherwise.

217. Accordingly, Peru’s abuse of process objection has no merit either, and Gramercy’s claims are admissible.

III.

PERU HAS BREACHED ITS OBLIGATIONS UNDER THE TREATY

218. Peru’s concerted campaign to extinguish its Land Bonds debt without actually paying it (1) constitutes an unlawful indirect expropriation of Gramercy’s investment, in violation of Article 10.7 of the Treaty; (2) fails to accord Gramercy the minimum standard of treatment under international law, in violation of Article 10.5 of the Treaty; (3) deprives Gramercy of effective means to assert claims and enforce its rights, in violation of the most-favored-nation obligation under Article 10.4 of the Treaty; and (4) constitutes treatment less favorable than the treatment that Peru accorded to Peruvian nationals, in violation of Article 10.3 of the Treaty.

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

219. Peru expropriated Gramercy’s investment in the Peruvian Land Bonds by imposing a mandatory and exclusive Bondholder Process that deprives Gramercy’s Land Bonds, which are worth over US\$1.8 billion, of substantially all of their value.

220. Ample authority, which Peru seeks to mischaracterize but cannot avoid, confirms that depriving an investment of substantially all its value constitutes an indirect expropriation under the Treaty. Given the law’s clarity, Peru rests its defense to Gramercy’s expropriation claim on its inaccurate but highly revealing contentions that Gramercy’s Land Bonds were intrinsically “worthless” and that Peru’s Bondholder Process therefore “functions effectively to *impart* value.” Statement of Defense, **R-34 ¶¶** 205, 219, 225 (emphasis in original).

221. Once these fundamental mischaracterizations fall away and Gramercy’s Land Bonds are accorded their true intrinsic value, Peru has no real answer to Gramercy’s showing that the Bondholder Process represents a substantial deprivation of the Bonds’ value and is thus

tantamount to a taking. Peru has likewise not complied with any of the conditions that the Treaty requires for such a taking to be lawful.

1. Peru's Supreme Decrees Destroyed the Value of Gramercy's Land Bonds.

222. Peru has not rebutted Gramercy's showing that its measures caused a substantial deprivation of the value of Gramercy's Land Bonds and thus constitute an indirect expropriation of its investment.

223. Instead, Peru resorts to two fictions. *First*, it claims that the Land Bonds were “worthless” when Gramercy purchased them and that they would have remained worthless “absent Peru's measures to offer compensation” through its Bondholder Process. Statement of Defense, **R-34** ¶¶ 219, 225. *Second*, it claims that “the Bondholder Process functions effectively to *impart* value on Land Bonds that are worthless on their face.” Statement of Defense, **R-34** ¶ 225 (emphasis in original).

224. There is no factual or legal basis for either of these fictions. To the contrary, (i) the Land Bonds had enormous value before Peru's unlawful measures; and (ii) Peru's measures substantially deprived Gramercy of that value by imposing formulas that would allow Gramercy to recover, at most, a tiny fraction of the Land Bonds' real value.

(a) The Land Bonds Had Substantial Value.

225. By claiming that the Land Bonds were “worthless” when Gramercy purchased them, Peru essentially argues that the consistent jurisprudence of its own courts affirming the current value principle and the constitutional right to property is meaningless.

226. But it cannot ignore the indisputable and unquestioned determination by its own Constitutional Tribunal, from as early as 2001, that Peru has to pay the Land Bonds not at their face value, according to which they would be essentially worthless, but at the current value of their principal, plus interest. The Constitutional Tribunal has unequivocally affirmed this “current value” principle at least three times—in 2001, 2004, and again in 2013 even as it purported to calculate that value differently. **Doc. CE-11**, 2001 CT Decision, “Foundations” Section, ¶ 7 (affirming Government's obligation to pay Land Bonds consistent with “current value principle inherent in property”); **Doc. CE-107**, 2004 CT Decision, “Foundations” Section, ¶¶ 16-17 (affirming bondholders' rights under Article 70 of Constitution “to receive just compensation that includes compensation for any potential harm caused as a result of being deprived of their property via an expropriation proceeding” and their right to enforce that right in court); **Doc. CE-17**, 2013 CT Order, “Resolution” Section, ¶ 2 (“[T]he payment of the land reform debt bonds, plus interest, [must] be governed by the

current value principle”). As the Constitutional Tribunal recognized, anything less than current value would be an “expropriation without payment of the fair value” contrary to the Peruvian Constitution’s protection of the right of property. **Doc. CE-11**, 2001 CT Decision, “Foundations” Section, ¶ 1; *see also* Expert Report of Professor Mario Castillo, May 21, 2019 (“Castillo, CER-9”) ¶ 39.

227. Since the 2001 CT Decision, Peru has consistently affirmed the validity of the principle enunciated by that decision, namely that paying the Land Bonds at anything less than their current value would be confiscatory and thus unconstitutional. The Peruvian courts, including the Supreme Court, have been unanimous on this question. Congress has made repeated attempts to pass comprehensive legislation implementing it. And even the MEF itself, in the Supreme Decrees that created the Bondholder Process, has had to acknowledge the continued vitality of the current value principle even as it has subverted it in practice.

228. *First*, in the wake of the 2001 CT Decision, numerous bondholders brought claims before Peruvian courts seeking the updated current value of their Land Bonds, with interest. As far as Gramercy is aware—and as Peru has not disputed—those courts uniformly upheld those claims. *See, e.g.*, **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File N° 31548-2001, May 4, 2006; **Doc. CE-119**, Fifth Civil Court of Trujillo, Expert Report, File N° 303-72, November 6, 2006; **Doc. CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File N° 652-07, June 14, 2007, “Foundations” Section, ¶ 5 (noting that the Constitutional Tribunal has “declared with binding effect” that the Land Bonds must be updated according to “the current value principle inherent to the right to property”); **Doc. CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File N° 01898-2007, August 14, 2008, “Foundations” Section, ¶ 9 (“[S]ince said bonds have not been paid, it is admissible per the decision of the Constitutional Tribunal to update them at current value in accordance with the current value principle.”); **Doc. CE-142**, Specialized Civil Court of Pacasmayo, Expert Report, File N° 163-1973, December 18, 2009, p. 4 (Land Bonds debt “that was depreciated by the massive inflation that led to our currency being changed [twice] . . . must be updated at a constant value.”); **Doc. CE-148**, Civil Court of Pacasmayo, Resolution, Case File N° 163-73, January 29, 2010 (approving and ordering payment of the “current value” of Land Bonds plus interest). Records from the Ministry of Agriculture reveal that from 2009 to 2015, the Ministry paid six rulings related to the Land Bonds in a total amount of approximately 86 million soles or nearly US\$27 million. **Doc. CE-592**, Memorandum N° 550-2016-MINAGRI-OGA from Ministry of Agriculture and Irrigation in Response to Request filed under the Access to Public Information Law.

229. When the MEF and the Ministry of Agriculture appealed these assessments they were rebuffed by the Supreme Court, which

affirmed that the lower courts were acting consistently with the 2001 CT Decision.

230. In a 2006 decision, for example, the Supreme Court affirmed the ruling of the First Mixed Chamber of the Superior Court of Justice for Ica, and expressly confirmed that the Land Bonds had to be paid at their current value, not nominal value. **Doc. CE-14**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006, “Whereas” Section, ¶ 6. The Court explained that because the Land Bonds “represent the mechanism for paying the land reform debt in the form of fair compensation, they cannot be paid at face value” and that paying them at their nominal value would, “due to the inflationary process and the legal currency changes,” not “reflect the value for which they were issued.” *Id.* “Whereas” Section, ¶ 15.

231. The following year, the Supreme Court affirmed the decision of the Superior Court of Lima, Fifth Civil Chamber, which had recognized the current value principle. **Doc. CE-128**, Supreme Court, Constitutional and Social Law Chamber, Cassation Ruling N° 2146-2006-LIMA, September 6, 2007. The Supreme Court confirmed that “the Current Value Principle is applicable and the Nominal Value Principal is not” and declared that “the debt must be assessed according to the Current Value Principle embodied in Article 1236 of the Civil Code – i.e., according to the economic indexes in effect on the date of payment.” *Id.* “Whereas” Section, ¶ 5. The Supreme Court explained that because “the [nominal] value of said bonds is not consistent with the actual value of the expropriated land” it would be “confiscatory” to pay them at their nominal value. *Id.* It explained that a payment of less than current value would “not perform the compensatory function of constituting a fair expropriation compensation.” *Id.*

232. In 2010, the Supreme Court similarly affirmed the decision of the Superior Court of Lima, Second Civil Chamber. **Doc. CE-15**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1958-2009, January 26, 2010. The Supreme Court held that the Second Civil Chamber had correctly ruled that the nominal value principle was “not applicable” to the Land Bonds and that, in doing so, it had “correctly applied” the 2001 CT Decision. *Id.* The Supreme Court rejected the MEF’s appeal because it was “in reality an attempt to reopen a debate that has been sufficiently settled by the lower courts” and confirmed that “the plaintiff must be paid the updated value of the bonds.” *Id.*

233. *Second*, Congress took seriously the current value principle confirmed by the 2001 CT Decision and made efforts to implement it. To that end, Congress appointed an Agrarian Commission, which it charged with “calculating the government’s debt to the persons whose property was expropriated under the Land Reform.” **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and

N° 11971/2004-CR, p. 5, ¶ 10. In its 2005 Congressional Report, the Agrarian Commission affirmed that the Land Bonds were “commitments to pay a current value debt, given the compensatory nature of the payment owed by the government.” *Id.* p. 19. The Report explained that the Government was obligated *first* to “neutraliz[e] or eliminat[e] the effect of inflation” and ensure that “the purchasing power of the debt . . . remain[s] the same” by “restating the original debt in today’s nuevo[s] soles,” and *second* to “pay[] interest on the updated debt to reflect the opportunity cost of the debt . . .” *Id.* pp. 32-33.

234. Although President Toledo ultimately vetoed the bill that arose from the Agrarian Commission’s work, he affirmed, when announcing his veto, that “the Constitutional Tribunal has ruled in favor of preserving the purchasing power of the debt rather than maintaining its present value.” **Doc. CE-116**, Alejandro Toledo, President of Peru, Presidential Veto, April 19, 2006, p. 2. He likewise acknowledged that any law that sought to pay the Land Bonds on their original terms in violation of the constitutional right to property, as expressed in the 2001 CT Decision, would be “unconstitutional.” *Id.* p. 5.

235. In 2011, when the Agrarian Commission made a second attempt to pass legislation implementing the 2001 CT Decision, it once again reaffirmed the current value principle. **Doc. CE-160**, Opinion of the Agrarian Commission of Congress on Draft Bills N°s 456/2006-CR, 3272/2008-CR and 3293/2008-CR, June 16, 2011, p. 16.

236. *Finally*, even the 2013 CT Order, the 2013 CT Resolutions and the MEF’s Supreme Decrees paid lip service to the current value principle.

237. In the 2013 CT Order, the Constitutional Tribunal purported to “enforce[e]” the 2001 CT Decision and ordered that “the payment of the land reform debt bonds, plus interest, [must] be governed by the current value principle.” **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013.

238. The Constitutional Tribunal affirmed this principle again in its subsequent Resolutions. *See* **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, “Whereas” Section, ¶ 5 (explaining that the 2001 CT Decision “forbade the nominal payment of the land reform bonds . . . but also acknowledged that the only way to properly pay the land reform bonds was with regard to the current value principle”); *id.* (claiming that the 2013 CT Order did not “alter[]” the 2001 CT Decision but “is precisely attempting to facilitate compliance with the obligation that was established in [the 2001 CT Decision]”); **Doc. CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, “Whereas” Section, ¶ 8 (“This Tribunal must reiterate that under no circumstances can the

process of adjusting the debt lead to a result based on the *nominal value principle*) (emphasis in original).

239. Even the MEF's Supreme Decrees invoked the current value principle. See **Doc. CE-37**, Supreme Decree N° 17-2014-EF, Arts. 11.1, 13 (stating the “purpose of this administrative procedure is to determine the current value of the debt arising from the Land Reform Bonds, including interest”); **Doc. CE-269**, Supreme Decree N° 034-2017-EF, February 28, 2017, “Whereas” Section (acknowledging that “the current value principle govern[s]” the Land Bonds); **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017, “Whereas” Section (same).

240. There can thus be no doubt that the current value principle was—and continues to be—the law of the land and that the Land Bonds have an inherent value that is different from, and greater than, their “worthless” nominal value. Castillo, **CER-9** ¶¶ 91-93.

241. Peru cannot escape the effects of the current value principle by claiming that the term “current value” was so “uncertain” as to be essentially meaningless. Cf. Statement of Defense, **R-34** ¶ 303. Current value has a well understood and reasonably precise meaning in Peruvian law and jurisprudence. See, e.g., Castillo, **CER-9** ¶¶ 26-27; Second Amended Expert Report of Delia Revoredo Marsano De Mur, July 13, 2018 (“Revoredo, **CER-5**”) ¶¶ 17. As described in greater detail in Section III.B.1 below, Peru’s Congress and its courts shared a common and well founded understanding that it meant updating the debt’s principal by reference to Peruvian CPI, and then adding compensation for the time value of the money that the bondholders should have received earlier. For example, in the 2005 Congressional Report the Agrarian Commission explained that the Peruvian Civil Code required that “current value debts shall be updated in accordance with the Reserve Bank correction factors” and that “debt instruments expressed in local currency” had to be updated using CPI, which it noted “is the official factor applied by the State to the national accounts.” **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR p. 14. It observed that CPI was already being employed both by “[t]he judges of the Republic,” who were “ordering that experts update the value of the debt instruments using this index,” and by the Ministry of Agriculture, which “applied the CPI to update the debts being challenged in court arising from judicial expropriations under the Land Reform.” *Id.* p. 14. The Agrarian Commission’s draft bill, which Congress subsequently passed, required that the Land Bonds “be updated by applying the Consumer Price Index for Metropolitan Lima . . . using the date of issuance of the supreme decree of expropriation as the reference date for the calculation” and that the updated principal “shall be subject to default interest beginning on the date on which the State

stopped the payments.” **Doc. CE-115**, Land Bonds Bill dated March 27, 2006, Art. 8.

242. Indeed, the current value concept was not too uncertain for court-appointed experts in a case involving 44 of Gramercy’s Land Bonds to assess their current value at just under 640 million *soles de oro*, or about US\$250 million. **Doc. CE-342**, Fifth Civil Court of Chiclayo, File N° 09990-2006-0-1706-JR-CI-09, Accounting Expert Report, August 14, 2014; *id.*, Resolution N° 45, Oct. 3, 2014; *see also* Koenigsberger, **CWS-4** ¶ 13.

243. It should come as no surprise that these Land Bonds are highly valuable. After all, Peru issued them as compensation for the expropriation of land the size of Portugal—which has been conservatively estimated to be worth US\$42.4 billion—and a substantial portion of the debt remains unpaid, with interest accruing for decades. *See* Statement of Claim, **C-34** ¶ 34. The Agrarian Commission’s 2005 Congressional Report estimated the total amount of debt owed at that time to be “4.312 billion nuevo[s] soles, which is approximately US\$1.232 billion.” **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR, p. 35 (emphasis in original). In 2012, former Finance Minister Ismael Benavides reportedly estimated that the Land Bonds were worth around US\$4.5 billion. **Doc. CE-533**, Expreso, Constitutional Tribunal Will Order Payment to 150,000 Agrarian Bondholders, September 21, 2012.

244. Even the dubious July 2013 CT Order disproves Peru’s allegation that the Land Bonds were otherwise “worthless” until the Bondholder Process “imparted” value on them. As Gramercy recounts in greater detail in Section III.B below, the Constitutional Tribunal’s decision was not animated by a desire to impart value on an otherwise worthless asset, but precisely the opposite. While recognizing that CPI updating was “usually applied for updating debts,” the Constitutional Tribunal abandoned it based on the MEF’s representation that it would trigger a US\$18.5 billion payment that would “generate severe impacts on the Budget of the Republic, to the point of making impracticable the very payment of the debt” **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, “Whereas” Section, ¶ 25; *see also* **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, “Whereas” Section, ¶ 14 (acknowledging that CPI is “usually applied for updating debts”). In other words, the entire Bondholder Process has as its genesis not breathing value into worthless bonds, but finding a way not to pay that value because it was so large. **Doc. CE-17**, 2013 CT Order, “Whereas” Section, ¶ 25.

(b) Peru Has Substantially Deprived Gramercy of the Value of Its Investment.

245. Peru's Bondholder Process substantially deprived Gramercy of the value of its Land Bonds.

246. The Constitutional Tribunal's August 2013 Resolution directed the MEF to implement a payment process and provided that the process would be mandatory for all bondholders. *See* **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, "Whereas" Section, ¶ 16, "Rules" Section, ¶ 4.d. As of January 2014, then, when the MEF issued its first set of Supreme Decrees, the only recourse Gramercy had in Peru for payment of the Land Bonds was through that exclusive "Bondholder Process."

247. The formula in the 2014 Supreme Decrees was intellectually indefensible. Peru's own documents reveal that the Government itself was aware that the formula was deeply flawed, that the consultant who created it fundamentally revised it in a subsequent letter, and that a second expert whom the MEF retained likewise criticized it. *See* **Doc. R-354**, Letter from Bruno Seminario to *DGETP*, June 2, 2016; **Doc. R-355**, The Actualized Value of the Agrarian Reform Bonds, Carlos Lapuerta, August 21, 2016; Peru's Quantum Expert Report, **RER-5** ¶ 65; *see also* Section III.B.2 below. But the effect of the formula was crystal clear: it offered Gramercy, subject to a whole series of procedural traps and delays, a mere US\$861,000—just 0.05% of the Land Bonds' actual value.

248. If this is not a substantial deprivation of value tantamount to expropriation, it is hard to see what would be. Peru will recall another instance in which its conduct was found to be unlawful despite causing a smaller deprivation of value: in *Tza Yap Shum* the tribunal found Peru liable for expropriation when the challenged measures caused the investor's net sales to fall by 96%. *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award of July 7, 2011, **Doc. CA-40**, ¶¶ 161, 170.

249. Peru's only response appears to be that there has been no "total" deprivation of value and that, under the subsequent 2017 Supreme Decrees, Gramercy may have been entitled to receive more than it paid for the Land Bonds. *Cf.* Statement of Defense, **R-34** ¶¶ 218, 224. Both of these excuses are misconceived.

250. *First*, it is inherent in the axiomatic description of indirect expropriation as a measure "*equivalent to*" a taking that it is not in fact a taking, but effectively amounts to one. *Cf.* **Doc. CE-139**, Treaty, Art. 10.7.1 Accordingly, tribunals uniformly recognize that depriving the investor of a "substantial" part of the value of the investment is expropriatory. *See, e.g., Tza Yap Shum* Award, **Doc. CA-40**, ¶ 144 ("the

recognized standard of an indirect expropriation is the total *or substantial* deprivation of the value of the investment” (emphasis added)); *AIG Capital Partners Inc. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of October 7, 2003, **Doc. CA-4**, ¶ 10.3.1 (deprivation “in whole *or in significant part* of the use or reasonably to be expected benefit of property” (emphasis added)); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of November 8, 2010, **Doc. CA-6**, ¶ 408 (“to establish an indirect expropriation,” investor must “demonstrate that the investment has been deprived of a *significant part of its value*” (emphasis added)).

251. In contrast, Peru offers no support at all for its conjecture that a measure that deprived the investor of all but the most minuscule of fractions of value is incapable of constituting an expropriation. Peru’s reliance on *LG&E v. Argentina* and *Total v. Argentina*, in which claimants alleged they had suffered 90% and 86% deprivation of value, respectively, does not help Peru. *Cf.* Statement of Defense, **R-34** ¶ 224; *see also LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006, **Doc. CA-31**; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, **Doc. RA-112**. Neither case is apposite here. The *LG&E* tribunal’s decision did not, as Peru misleadingly suggests, turn on a finding that the deprivation was not sufficiently *significant*, but rather that the deprivation was not *permanent*. The tribunal noted that even though the claimants’ shares “may have fluctuated during the economic crisis,” the effect “has not been permanent.” *LG&E Energy Corp.* Decision on Liability, **Doc. CA-31**, ¶¶ 198-200. Here, in contrast, there is no question that the deprivation is permanent: once the bondholders submit to the Bondholder Process, they trade in their Land Bonds and must live with the payout that the process determines. *Total v. Argentina* is likewise inapposite because, among other things, the treaty there required “dispossession,” which the claimant had not shown, and the impact on the investment was less severe than in the present case. *Total v. Argentina* Decision on Liability, **Doc. RA-112**, ¶ 193.

252. *Second*, Peru cannot invoke the 2017 Supreme Decrees to save itself from its indirect expropriation. After commencing arbitration on the basis of the MEF’s 2014 Supreme Decrees, the Bondholder Process and any amendments to it were not actually available to Gramercy. The Bondholder Process and the Treaty’s arbitral process are both exclusive processes that require waivers of the right to pursue claims elsewhere. *See Doc. CE-139*, Treaty, Art. 10.18(2)(b); **Doc. CE-275**, Supreme Decree N^o. 242-2017-EF, August 19, 2017, Final Supplemental Provisions.

253. Because it was a condition of the Bondholder Process that participants renounce the right to pursue claims elsewhere, Gramercy could not have entered that process without sacrificing its Treaty rights.

See **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017, Final Supplemental Provisions, Provision N° 1 (providing that “[t]he administrative procedure regulated in this Regulation is incompatible with judicial updating of the debt corresponding to the Land Reform Bonds”).

254. In any event, having commenced the arbitration, Gramercy could not join the Bondholder Process. When Gramercy commenced this arbitration over the 2014 Supreme Decrees, it had to provide the waivers that Peru insisted are required under the Treaty. These waivers prevent Gramercy from “initiat[ing] or continu[ing] before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach [of the Treaty].” **Doc. CE-139**, Treaty, Art. 10.18.2(b).

255. Even without resolving the open question whether the Bondholder Process, including its administrative challenge provisions, involved an “administrative tribunal” conducting a “proceeding with respect to [Peru’s illegal] measures,” the waiver would prevent Gramercy from taking advantage of the limited judicial review that the Bondholder Process allows. See, e.g., **Doc. CE-180**, Constitutional Tribunal Resolution, File N° 00022-1996-PI/TC, August 8, 2013, “Whereas” Section, ¶ 16 (providing that bondholders may “fil[e] a judicial action in the event of arbitrariness in the course of the procedure before the Executive Branch”); **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017, Art. 7.4 (providing that if the MEF does not authenticate the Land Bonds, they will be returned “without prejudice to the filing of any legal actions as might apply”); *id.* Arts. 9.2, 14.2, 17.7 (providing for administrative challenge procedures under the General Administrative Procedure Act). Because Gramercy did not have access to the only safeguard that this process offered, the full process was not open to Gramercy and the compensation offers contained in the 2017 Supreme Decrees were thus never actually available to it.

256. Failing to limit the scope of this arbitration to the decrees and the formula that pre-dated Gramercy’s waivers and the commencement of this arbitration would permit Peru to keep changing the rules of the game even during the course of the arbitration. After all, Peru can issue decrees and other types of regulations any time it wishes, without notice, and without any restrictions on their content—just as it has already done repeatedly so far. Indeed, just three days before the original due date for Gramercy’s Reply submissions, Peru published a novel directorial resolution associated with the Bondholder Process, which approves a directive purporting to authorize Peru to pay bondholders the amounts assessed through that Process with new bonds, rather than with cash. **Doc. CE-697**, Directorial Resolution N° 023-2019-EF/52.01, May 8, 2019 (published May 11, 2019); **Doc. CE-698**, Directive Approved by Directorial Resolution N° 023-2019-EF/52.01,

May 8, 2019 (published May 11, 2019). There is nothing stopping Peru from issuing yet more resolutions or even a new Supreme Decree tomorrow changing the valuation formula yet again so as to reduce Gramercy's notional recovery, even below what would have been afforded under the 2014 Supreme Decrees—or, indeed, to alter the formula to increase recovery with the comfort of knowing that Gramercy is ineligible to participate. Neither this Tribunal nor Gramercy should be made hostage to Peru's whim or forced to spend time and resources analyzing a rotating set of decrees, from which Gramercy can no longer benefit.

257. Furthermore, Peru cannot rely on the 2017 Supreme Decrees as a defense to Gramercy's expropriation claim because they had the same expropriatory intent as the 2014 Supreme Decrees. After Gramercy initiated arbitration, Peru not only refused to engage with Gramercy but publicly declared that it did not “owe [Gramercy] anything,” that “[w]e know what to do,” and expressed the intention to “sweep [the Land Bonds] under the rug.” Koenigsberger, **CWS-4 ¶ 31** (citing **Doc. CE-595**, Wigglesworth, Robin, *Peru hits back at US hedge fund over \$1.6bn claim*, Financial Times, June 2, 2016, p. [3]; **Doc. CE-266**, Llanos-Small, Katie, *Peru's PPK: 'I don't think we owe [Gramercy] anything'*, LatinFinance, August 22, 2016, p. [1]); see also Section III.B.2(a) below.

258. In any event, the February 2017 formula was so inscrutable that not even Peru can say what value it could have offered Gramercy. Nor can the August 2017 formula relieve Peru of its Treaty breach. No one knows what Peru would have actually paid Gramercy under that Decree, or in what form, or when. Peru steadfastly refused repeated requests to provide that information, Peru's quantum experts have not offered their own computation, and Peru has failed to produce any documents “calculat[ing] or estimat[ing] the value of . . . Gramercy's bonds” under its own interpretation of the formula despite committing to do so. See Procedural Order No. 6 (“**PO6**”), Annex A, Request 10. The appeals that the bondholders have filed against the MEF's assessments likewise reflect serious concerns about the Process's lack of transparency and application of the Decrees. See, e.g., **Doc. CE-341.056**, Appeal (Redacted) of November 29, 2017 (complaining about “lack of transparency and due motivation” and alleging that the MEF has failed to “explain[] the proper support of said update; as well as the methodological formulas that allow calculating the present value to be reached”); **Doc. CE-341.057**, Appeal (Redacted) of December 5, 2017 (noting that “[t]he accrued interests of the bonds have been omitted from the debt calculation” and complaining that the MEF has failed to “attach[] the technical report that supports the calculation made”); **Doc. CE-341.061**, Appeal (Redacted) of September 7, 2018 (complaining that “the fact of modifying the regulations in the middle of the administrative procedure, causes uncertainty and insecurity”).

259. Moreover, even on the best case scenario, assuming everything in Peru’s convoluted process had gone Gramercy’s way and Peru honored 100% of Gramercy’s Land Bonds, the maximum amount that Peru claims it might have paid was about US\$33.57 million. Statement of Defense, **R-34** ¶ 311. Only up to 100,000 soles—US\$30,000—of this would be paid in cash and the rest in some form of payment to be specified by Peru if and when it chose to do so. **Doc. CE-269**, Supreme Decree N° 034-2017-EF, Arts. 6(c), 7. That amount—even without discounting for partial or delayed payment of the kind Peru authorized itself to impose—is just 2% of the Land Bonds’ real current value: a similarly minuscule, if faintly bigger, fraction than what the formula in the 2014 Supreme Decrees would offer. Hence, there is no reason to believe that Gramercy would have been any better off than the five unfortunate bondholders who mistakenly trusted their Government, submitted to the Bondholder Process, and so far received in the aggregate a mere *US\$65,000*. See **Doc. R-367**, Administrative Process Status Table, November 30, 2018, Tab “RD Pagos,” sum of cells H5-H8 and H11. In light of those facts and Peru’s singling out of “speculative” investors for less favorable treatment, it is implausible that the MEF would have paid Gramercy anything like the US\$33.57 million Peru claims in this arbitration, and the fact is that Peru has never offered even this paltry amount to Gramercy.

260. Ultimately, Peru cannot brighten this bleak picture by claiming that the August 2017 Supreme Decree “impart[ed]” value because Gramercy would allegedly receive “approximately US\$2.39 million more” than it paid for the Land Bonds or because payment of the legally-required value of the Land Bonds would allegedly “generate a return of 5,674 percent.” Statement of Defense, **R-34** ¶¶ 225-226. In fact, Gramercy’s actual cost of investing was much greater, involving substantial transaction costs during the acquisition period, and significant ongoing expenditures for storage, security and insurance (see Joannou, **CWS-6** ¶¶ 7-8), an amount that would be even greater if inflation were taken into account. More importantly, the current value of the Land Bonds is not the same as the price that Gramercy paid for them, and the return on investment that the Land Bonds’ current value would imply does not affect what the Land Bonds’ current value actually is. See Section IV below. Moreover, Peru’s argument has absurd implications. The reason why bondholders welcomed a payout, even at a steep discount to the current value of the Land Bonds, is Peru’s own wrongful failure to pay them. ██████████

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██████████ Peru cannot use its own recalcitrance in its favor.

261. Accordingly, Peru has substantially deprived Gramercy of the value of its investment, which under the Treaty constitutes an expropriation.

2. Peru Cannot Show That Its Expropriation of Gramercy's Investment Was Lawful.

262. Peru has failed to demonstrate that it has fulfilled any of the requirements for a lawful expropriation under Article 10.7.1. *See Doc. CE-139*, Treaty, Art. 10.7.1.

263. *First*, Peru has not demonstrated that its measures served a legitimate public purpose as required under Article 10.7.1(a) of the Treaty. *Id.* Art. 10.7.1(a).

264. The evidence clearly shows that Peru could have paid the CPI-updated value of the Land Bonds. Professor Edwards proved that in his first report. Edwards, **CER-4** ¶ 291. Peru's own quantum experts have now conceded that Peru "has the fiscal capacity to repay the Agrarian Bonds." Quantum Expert Report, **RER-5** ¶ 155. Even Moody's, the rating agency that Peru hired to rate its new bonds, confirmed, when asked to opine on "the effect of the [Land Bonds] on Peru's fiscal accounts" that "[e]ven under a worst case scenario, using the CPI-based methodology, the liability would represent less than 2.6% of GDP. Spread out over a number of years, the payouts *would not materially affect the sovereign's fiscal dynamics or its creditworthiness.*" **Doc. CE-21**, Elena H. Duggar and Mauro Leos, *Government of Peru FAQs on Peru's Bonos de al Deuda Agraria*, Moody's Investors Service, Issue In-Depth, December 18, 2015, p. 3 (emphasis added).

265. Indeed, Peru has now conceded that the justification it gave for its measures when it issued them—namely, the allegedly devastating impact that the payment of the CPI-updated value of the Land Bonds would have on Peru's budget—was not only unsupported by any actual analysis or evidence but actually *false*. The MEF itself has confirmed that no "[e]stimates, calculations, technical studies, or other documents . . . regarding potential impacts on the public budget" were ever carried out by the MEF. *See Doc. CE-18*, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014, pp. 1-2. Similarly, Peru has represented to this Tribunal—by volunteering to produce documents but failing to do so—that it has no "documents, including presentations, studies, calculations, and estimates of the impact of the value of the total Land Bond debt outstanding on Peru's budget." PO6, Annex A, Request 1.

266. In addition, as Peru no doubt appreciates, the desire to protect its resources is not an excuse for a Treaty breach—even if there had been a legitimate budgetary crisis, as the PCIJ and a PCA tribunal have affirmed in the case of State-to-State debt. *See Russian Claim for Interest on Indemnities*, PCA Award of Nov. 11, 1912, **Doc. CA-175**, ¶¶ 4, 6 (holding that Turkey could not evade its responsibility for moratory interest "by pleading its character of public power and the political and financial consequences of this responsibility," and that even

though “Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness, combined with domestic and foreign events (insurrections, wars) which forced it to make special disposition of a large part of its revenues,” this did not rise to the level of *force majeure* sufficient to justify non-payment); *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1929 P.C.I.J. (ser. A) No. 20–21, Judgment No. 15, July 12, 1929, **Doc. CA-94**, p. 120 (“The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its [debt] obligations.”); *Case Concerning the Payment of Various Serbian Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20-21, Judgment No. 14, July 12, 1929, **Doc. CA-95**, pp. 39-40 (“It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State[.]”). Indeed, if States could excuse themselves from their international law obligations simply by invoking imaginary budget concerns, investment protection and the entire investment treaty regime would be meaningless.

267. Nor can the public interest that Peru now asserts justify its confiscatory measures. Peru argues that the Bondholder Process is justified because it allegedly “resolve[d] a longstanding issue from a unique period in the history of Peru.” Statement of Defense, **R-34** ¶ 240. Peru thus argues that the “[r]esolution 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.” *Id.*

268. Regardless of whether the resolution of uncertainty is a legitimate interest that can justify an expropriation, Peru has not shown that the measures it took were necessary to advance that interest or that they were “proportional to the public interest presumably protected thereby.” *Tecmed Award*, **Doc. CA-42**, ¶ 122; *see also Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006, **Doc. CA-83**, ¶ 311 (there has to be a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”). Peru could have resolved the “Agrarian Land Bonds issue” without eviscerating the value of Gramercy’s investment—it could just as well have resolved the Land Bonds by paying their CPI-updated current value, as its budget allowed it to do and as the Peruvian courts and Congress had, until then, repeatedly confirmed Peru should do.

269. Indeed, given the Bondholder Process’s very low participation rate and challenge-triggering results, Peru could have achieved far greater certainty by paying Gramercy and its fellow bondholders what they were actually entitled to receive. Had Peru put in place a process for giving bondholders the true value of the Land Bonds that would have fulfilled Peru’s alleged goal of resolving the uncertainty

around the Land Bonds in a way that was consistent with Peru's obligations under the Treaty and Peru's Constitution and laws.

270. To the contrary, the nature of Peru's measures and the manner in which they were carried out confirms that Peru was not simply seeking a "[r]esolution of the Agrarian Reform Bonds issue" but was interested in extinguishing the debt without paying current value. As described in greater detail in Section III.B.3 below, the contemporaneous documentary record confirms that the very impetus for these measures was the desire to avoid at long last paying current value. In other words, the eradication of the Land Bonds' value was not an "incidental consequence" of some legitimate regulatory action "designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment." *Cf. David R. Aven v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, Sept. 18, 2018, **Doc. CA-102**, ¶ 404; **Doc. CE-139**, Treaty, Annex 10-B, ¶ 3(b). It was the very purpose of those measures in the first place.

271. Especially in light of that fact, Peru's insistence 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," is therefore particularly inapt and simply false as a matter of law. Statement of Defense, **R-34** ¶ 243. Such deference would effectively protect any government action from scrutiny. As the tribunal in *ADC v. Hungary* explained, a State's right to regulate its domestic affairs "is not unlimited and must have its boundaries," and "the rule of law, which includes treaty obligations, provides such boundaries." *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Doc. CA-2**, ¶ 423; *see also* Section III.B.3(b) below.

272. *Second*, Peru has not demonstrated that its measures were non-discriminatory as required under Article 10.7.1(b) of the Treaty. *See Doc. CE-139*, Treaty, Art. 10.7.1(b). Peru claims that all of its measures "applied in [a] non-discriminatory fashion to all bondholders – and not in a manner that targeted Gramercy or its alleged investment" are belied by the facts. *Cf.* Statement of Defense, **R-34** ¶ 245.

273. Peru has not denied that the MEF intended to single Gramercy out for differential treatment when it provided, in the Supreme Decrees, that investors whose Land Bonds were "acquired with speculative ends" should be paid last. **Doc. CE-37**, Supreme Decree N° 17-2014-EF, Art. 19(7); *see also Doc. CE-275*, Supreme Decree N° 242-2017-EF, August 19, 2017, Art. 18(7); Statement of Claim, **C-34** ¶¶ 221-22; *cf.* Statement of Defense, **R-34** ¶ 288. Nor has it produced any evidence of a single other bondholder that would fit this category or any internal documents which would otherwise shed light on its intentions. *See* PO6, Annex A, Document Request No. 15 (committing to produce "documents or reports by the MEF assessing which category

of payment Gramercy would fit into under [the Supreme Decrees], how many other entities would fall under that category, and the nationality of each such entity” but failing to produce any such documents).

274. To the contrary, Peru’s repeated and consistent reference to Gramercy as a “speculative” investor in its Statement of Defense as well as comments by its own President leave no doubt that this was the intent. *See, e.g.*, Statement of Defense, **R-34** ¶¶ 4, 7, 8, 53, 59, 205, 206, 216, 217, 220, 227, 238, 243, 249, 257, 259, 260, 284, 293, 311 (describing Gramercy’s investment as “speculative” more than twenty times); *id.* ¶ 291 (arguing that “Gramercy appears to speculate” that the Supreme Decrees single Gramercy out for differential treatment but not denying that the MEF intended Gramercy to be classified as a “speculative” investor); **Doc. CE-266**, LatinFinance, Peru’s PPK: ‘I don’t think we owe [Gramercy] anything’-Exclusive, August 22, 2016 (Peru’s then-President, Pedro Pablo Kuczynski declaring that Peru does not “owe [Gramercy] anything . . . These folks think they can buy something for a cent and make 100. It doesn’t work that way . . . [W]e’re not stupid. *We know what to do.*” (emphasis added)).

275. *Third*, Peru has not demonstrated that its expropriation was accompanied by prompt, adequate, and effective compensation as required under Article 10.7.1(c) of the Treaty. *See Doc. CE-139*, Treaty, Art. 10.7.1(c). An offer to pay less than one twentieth of one percent of Gramercy’s Land Bonds’ actual value—or even the 2% purportedly on offer in the latter Supreme Decrees—is not, by any measure, adequate or effective. *See, e.g., Rusoro Award, Doc. RA-147*, ¶ 407 (holding that State’s offer to pay less than what treaty required was not made in good faith and therefore expropriation was unlawful).

276. Moreover, Peru has not even attempted to show that it has offered Gramercy “prompt” compensation. Peru claims that if only Gramercy had participated in the “Bondholder Process,” it would have received some compensation. Statement of Defense, **R-34** ¶ 311. But it fails to note that five years into the process only a small handful of the bondholders who have chosen to participate in this process have been paid. Hundreds more have failed to progress past the earliest stages, and because the system is designed to place Gramercy last there is no certainty about when, if ever, Gramercy would have been paid.

277. *Finally*, Peru has not demonstrated that the expropriation was in accordance with due process of law or that it was consistent with the minimum standard of treatment as required under Article 10.7.1(d). *See Doc. CE-139*, Treaty, Art. 10.7.1(d). As described in greater detail below, Peru’s measures violate not only basic due process and principles of Peruvian law, but they fall far below the minimum standard of treatment under customary international law.

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

278. As Gramercy explained in its Statement of Claim, Peru's course of conduct and unlawful acts, including the machinations around the 2013 CT Order, the 2013 CT Resolutions, and the subsequent Supreme Decrees, both separately and in combination, violated the minimum standard of treatment in myriad ways. In particular, Peru violated Gramercy's legitimate expectations, acted arbitrarily and unjustly, and failed to provide due process rising to the level of a denial of justice.

279. Each of these notions present different dimensions of the minimum standard of treatment. The minimum standard of treatment is not delimited by a single definitive test, and is not constrained by a legal straight jacket. The Tribunal's task is to assess, on the facts taken as a whole, whether Peru's conduct complied with the Treaty standard. *See, e.g., William Ralph Clayton, et al. v. Canada*, (PCA) Case No. 2009-04, UNCITRAL (NAFTA), Award on Jurisdiction and Liability of March 17, 2015, **Doc. CA-13**, ¶¶ 453-454 (government regulatory approval process that was "unwinnable from the outset" breached international minimum standard); *see also Murphy Exploration Partial Award*, **Doc. CA-144**, ¶ 292 (finding Ecuador's increase of its participation in claimant's profits to 99% violated claimant's legitimate expectations that the basic terms of its contract "would not change except within the confines of the law and pursuant to a negotiated, mutual agreement between contractual partners"); *Lemire Decision on Jurisdiction and Liability*, **Doc. CA-29**, ¶ 417 (Ukraine's "practice that certain licenses for radio broadcasting were issued directly by the executive branch of Government, without transparency or publicity and without meeting the requirements of or following the procedures established" under the law and the legalization of this de facto situation was arbitrary).

280. Peru's conduct here was, quite plainly, unjust and grossly wrong. Peru's conduct transformed an indisputable legal obligation to pay the current value of the Land Bonds, which had been issued as partial compensation for expropriating lands the size of Portugal and given constitutional status, into an opportunity to extinguish this longstanding debt by paying virtually nothing, and did so through devious means including deceit, violation of its own processes and laws, arbitrary and irrational edicts, a total lack of transparency in critical respects, and a reversal of the prior legal framework. This is exactly the type of conduct that the minimum standard of treatment prohibits. For example, the tribunal in *Clayton/Bilcon* found that a government review board breached the minimum standard of treatment when it conducted an environmental assessment that was inconsistent with the framework upon which the investor relied and that it made its decision without adequate information. *See William Ralph Clayton, et al. v. Canada*, (PCA) Case

No. 2009-04, UNCITRAL (NAFTA), Award on Jurisdiction and Liability of March 17, 2015, **Doc. CA-13**, ¶¶ 446-454. Additionally, in *Occidental v. Ecuador*, the tribunal found that Ecuador’s change in the tax regime upon which the claimant relied was conducted “without providing any clarity about its meaning and extent,” in violation of the obligation to afford fair and equitable treatment. *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, Final Award of July 1, 2004, **Doc. CA-35**, ¶ 184.

281. Peru barely defends any of the substance of these claims. Remarkably, it still has not produced a single witness, whether fact or expert, to justify its Supreme Decrees or defend them as providing current value. Instead, it simply points to its Bondholder Process and encourages the Tribunal to exercise “deference”—by which it appears to mean not to question its conduct at all. Yet, that is precisely what the Treaty not only authorizes but mandates the Tribunal to do. The Treaty will not abide Peru’s attempt to elevate form over substance. And when viewed substantively, any process that purports to pay current value for an unprecedented land expropriation—but that after five years has attracted participation from less than ten percent of the outstanding debt, paid out a mere five claims for a grand total of *US\$65,000*, and provoked at least a dozen appeals from bondholders who now realize that the Government has effectively fooled them into submitting to a second expropriation—cannot satisfy the Treaty standard.

1. Peru’s Conduct Violated Gramercy’s Legitimate Expectations.

282. Peru has failed to rebut Gramercy’s evidence that when it invested in the Peruvian Land Bonds it did so with the legitimate expectation that it would receive the CPI-updated current value of its Land Bonds, with interest, and that it would have access to the Peruvian courts to enforce its rights under the Land Bonds. That expectation was firmly grounded in abundant and objective evidence about Peru’s endorsement of CPI as the method to update debts of value, including by its courts, its legislature, and high ranking members of the executive branch.

283. However, in 2013 and 2014, Peru completely reversed these basic and elementary parameters. Instead of CPI, plus interest, and access to courts, Peru imposed dollarization, provided no compensatory interest, and barred further access to its courts, instead channelling all claims into its mandatory and value-destroying “Bondholder Process.”

284. This fundamental alteration of the legal framework governing Gramercy’s investment, and thus foreclosing of any prospect of relief by prohibiting bondholders’ access to the courts, violates Gramercy’s legitimate expectations and is a breach of the minimum standard of treatment.

(a) **Gramercy Invested with the Legitimate Expectation That It Would Receive the CPI-Updated Current Value of the Land Bonds with Interest and That It Would Have Access to the Peruvian Courts.**

285. Peru does not dispute that Gramercy’s legitimate expectations are protected under Article 10.5 of the Treaty, which obligates Peru to treat Gramercy “in accordance with customary international law, including fair and equitable treatment and full protection and security.” **Doc. CE-139**, Treaty, Art. 10.5. While Peru claims that “[n]umerous tribunals . . . have cautioned against an overly-broad application of the concept,” it does not dispute that the protection of legitimate expectations is the “dominant element” of fair and equitable treatment. *Cf.* Statement of Defense, **R-34** ¶¶ 252-253 (assuming for the sake of argument, but not disputing, that legitimate expectations are the dominant element of the fair and equitable treatment obligation); *see CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005, **Doc. CA-15** ¶ 284 (“[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”).

286. Nor does it deny, as Peru’s expert Prof. Reisman has written, that the minimum standard of treatment is “an evolving concept,” “whose contents overlap” with or are “congruent with” the fair and equitable treatment standard as it has been interpreted by international investment tribunals. Reisman, W. Michael, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID Rev. 616 (2015), **Doc. CA-169**, pp. 618, 623-625; *see also Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008, **Doc. CA-9**, ¶ 592 (“[T]he actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”); *Murphy Exploration & Production Company International v. The Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award of May 6, 2016, **Doc. CA-144**, ¶ 208 (noting that “[t]he international minimum standard and the treaty standard continue to influence each other” and that “these standards are increasingly aligned”).

287. Investment tribunals have held that the State’s obligation to act transparently demands that “the legal framework for the investor’s operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework.” *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final

Award of November 12, 2010, **Doc. CA-26**, ¶ 285. The State’s obligation to provide stability likewise “means that the investor’s legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected.” *Id.* ¶ 285; *see also Tecmed Award*, **Doc. CA-42**, ¶ 154 (“The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations”).

288. The investor is “entitled to rely” on “the host State’s international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State.” *Murphy* Partial Final Award, **Doc. CA-144**, ¶ 248. While legitimate expectations are, in some cases, derived from specific representations made to the investor, an investor may also hold legitimate expectations “based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.” *Id.* These expectations, too, need to be protected. *See Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, **Doc. CA-39**, ¶ 329 (claimant bank had a reasonable expectation to be entitled to “consistent and even-handed” treatment despite absence of an “explicit assurance” from the government”); *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, Final Award of July 1, 2004, **Doc. CA-35**, ¶ 191 (finding that the “relevant question” is whether the “legal and business framework meets the requirements of stability and predictability under international law”); *see also Murphy Exploration & Production Company-International v. Republic of Ecuador*, UNCITRAL, Partial Final Award of May 6, 2016, **Doc. CA-144**, ¶ 248.

289. Thus, when an investor has invested in reliance on a particular legal framework, “[t]he abrogation of these specific guarantees violates the stability and predictability underlying the standard of fair and equitable treatment.” *LG&E Energy Corp.* Decision on Liability, **Doc. CA-31**, ¶ 133; *see also Murphy* Partial Final Award, **Doc. CA-144**, ¶ 281 (finding violation of fair and equitable treatment obligation when “[t]he business and legal framework that existed at the time [the investment was made]” have been “fundamentally, and prejudicially, changed”); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award of December 24, 2007, **Doc. CA-8**, ¶ 307 (finding that Argentina “violated the principles of stability and predictability inherent to the standard of fair and equitable treatment” when it “entirely altered the legal and business environment by taking a series of radical measures . . . in contradiction with the established Regulatory Framework, as well as

the specific commitments represented by Argentina, on which BG relied when it decided to make the investment”). The investor is also entitled to expect that the State will “use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.” *Tecmed Award*, **Doc. CA-42**, ¶ 154. Even in times of crisis, States are not permitted to “completely dismantl[e]” the legal framework upon which an investor relied in making its investment. *LG&E Decision on Liability*, **Doc. CA-31**, ¶ 139.

290. Peru does not engage with any of the evidence Gramercy provided about the legitimate expectations it had when it made its investment. In its Statement of Claim, Gramercy demonstrated that it made its investment in the Peruvian Land Bonds with the legitimate expectation that it would be able to redeem those Land Bonds for their CPI-updated current value, with interest, and that it would be able to seek judgments enforcing its rights under the Land Bonds before the Peruvian courts. *See* Statement of Claim, **C-34** ¶¶ 155-157, 183-187. Gramercy’s founder and Chief Investment Officer, Robert Koenigsberger testified at length about why Gramercy decided to invest in the Land Bonds and why it believed Peru was a safe place to invest. *See* Koenigsberger, **CWS-3** ¶¶ 20-42. Gramercy likewise exhibited a contemporaneous memorandum summarizing the results of Gramercy’s due diligence and some of the objective evidence on which it relied in making its investment decision. *See generally* **Doc. CE-114**, Memorandum from David Herzberg to Robert Koenigsberger, January 24, 2006 (“*Herzberg Memo*”).

291. In its Statement of Defense, Peru does not attempt to discredit this evidence or dispute that it accurately reflects some of Gramercy’s expectations when it made its investment. While Peru cites no less than four different times to Mr. Koenigsberger’s statement that, when Gramercy invested, “there was not yet any consensus” about precisely how the Land Bonds would be paid (Statement of Defense, **R-34** ¶¶ 180, n. 405, 232, 258, 303), it does not dispute or contest Mr. Koenigsberger’s testimony that Gramercy invested in the Land Bonds believing that “the Land Bonds were a valid obligation of the Peruvian State, and [that] they had to be paid at current value, calculated using a Peruvian consumer price index, plus interest” and that Gramercy expected that “it would be able to go to court to seek judgments enforcing its rights under the Land Bonds.” Koenigsberger, **CWS-3** ¶¶ 33, 42. As Mr. Koenigsberger amplifies in his Reply Witness Statement, “when Gramercy decided to invest in the Land Bonds, we did expect the Land Bonds had genuine value, to be calculated using CPI plus interest. Our due diligence had revealed what we considered to be very firm qualitative and quantitative bases for this expectation.” Koenigsberger, **CWS-4** ¶ 2.

292. Peru does not dispute the facts that Mr. Koenigsberger identified as the “quantitative bases” of Gramercy’s expectations. Peru does not dispute that when Gramercy invested it had been conclusively determined that the “Government was legally required to pay the Land Bonds at current value.” Koenigsberger, **CWS-3** ¶ 34. It does not dispute that Gramercy invested knowing that “Peru had successfully settled outstanding debt on multiple occasions” and “was trying to present itself as a country that encouraged foreign investment and that actively promoted its fiscal responsibility and commitment to honor its debts.” *Id.* ¶¶ 24-25. And it does not dispute that Gramercy invested knowing that Congress was actively considering legislative solutions to the Land Bonds debt and that it would be “eligible to become a party, upon application, to . . . legal proceedings in Peru seeking judgments compelling payment on the Land Bonds.” *Id.* ¶¶ 31, 42.

293. Peru seeks instead to discredit Gramercy’s legitimate expectations by claiming that the current value principle was not sufficiently certain or specific to give rise to a legitimate expectation. While recognizing, as it must, that the 2001 CT Decision “*established* that the current value principle *should be applied* to the Agrarian Bonds,” Peru alleges that the 2001 CT Decision “left open more questions than it answered” and produced a “legal vacuum” by failing to “specify[] the valuation criteria or the process for their payment.” Statement of Defense, **R-34** ¶ 40 (emphasis added); Hundskopf, **RER-2** ¶¶ 11, 66. That accusation ignores the abundant evidence, from the years leading up to, and continuing after, Gramercy’s investment.

294. When the Constitutional Tribunal declared that the Land Bonds had to be paid at current value, there could be no question what this meant. As Dr. Castillo observes, “[a]lthough the 2001 CT Decision did not explicitly reference CPI, the use of [CPI] was implicitly required by the current value principle” because “CPI is the criterion or parameter that, from a purely objective perspective, allows the value of the obligation to remain constant over time.” Castillo, **CER-9** ¶ 21(vi).

295. While uncertainties remained—for example concerning when payment would occur, whether it would be through legislation or the courts, what process might be established, and certain details about the calculation of interest in particular—the basic elements were well established, namely CPI plus interest.

296. While Peru dismisses the Herzberg Memo for allegedly failing to expressly state “that the state of the law was clear” (Statement of Defense, **R-34** ¶ 60), it does not dispute the accuracy of any of the facts reported in the memo, including that (i) “[t]he validity of [the Land Bonds’ debt] ha[d] been ratified by both the Supreme Court and the [Constitutional Tribunal] which ha[d] ruled that the government must settle these claims”; (ii) the Constitutional Tribunal had “ruled that it is unconstitutional to treat land reform debt as nominal value claims” and

that the Land Bonds “ha[d] to be paid at [their] real value, adjusted for inflation”; (iii) “bondholders ha[d] won all lawsuits since the constitutional tribunal decision was published, including in the supreme courts,” and that the Constitutional Tribunal had affirmed bondholders’ “right to go to court to demand the payment of their claims, adjusted for inflation, plus the interest mandated by law”; (iv) there was “draft legislation . . . moving forward” in Congress; and (v) CPI was “the official measure of inflation in Peru . . . created by law [and] . . . used by law to adjust the national accounts and the annual budget” and “[was] being used in all administrative and judiciary instances.” **Doc. CE-114**, pp. [1], [2], [3].

297. Although Peru wishes to ignore these facts, it certainly cannot deny their truth or that they provide the basis for Gramercy’s legitimate expectations.

298. *First*, Peru does not dispute that it was settled law when Gramercy invested in the Land Bonds that bondholders were entitled to receive the current value of their Land Bonds, with interest. *See* Section III.A above. In 2001, the Constitutional Tribunal held that paying bondholders anything less than the updated current value of their Land Bonds would violate the constitutional right to property. The 2001 CT Decision was grounded in established principles of Peruvian law that require that obligations of value—including compensation for expropriation, which is what the Land Bonds represent—must be updated to current value to correct for inflation and must be subject to interest to compensate for the loss of opportunity. *See* Castillo, **CER-9** ¶¶ 21(viii), 48-57, 63, 69-73. Every branch of the Peruvian Government affirmed this principle and Peru continues to acknowledge its validity to this day. *See* Statement of Claim, **C-34** ¶¶ 183-184.

299. *Second*, Peru does not dispute that when Gramercy made its investment, bondholders were bringing claims before Peruvian courts and were uniformly receiving valuations of CPI plus interest. In May and November 2006, for example, the Fourteenth Civil Court of Lima and the Fifth Civil Court of Trujillo, respectively, upheld expert reports updating the value of Land Bonds using CPI and providing for interest. **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File N° 31548-2001, May 4, 2006; **Doc. CE-119**, Fifth Civil Court of Trujillo, Expert Report, File N° 303-72, November 6, 2006. And on July 12, 2006, the Peruvian Supreme Court confirmed that Land Bonds had to be updated using the daily adjusted index established by the Central Reserve Bank of Peru, which is calculated by the Central Bank using the CPI for Metropolitan Lima, with interest “at the rate agreed upon on each bond.” **Doc. CE-14**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006, “Whereas” Section, Fifth. Echoing the Constitutional Tribunal, the Supreme Court held: “Considering that said bonds represent the mechanism for paying the land reform debt in the form of fair compensation, they cannot be paid at

face value because—due to the inflationary process and the legal currency changes—they no longer reflect the value for which they were issued.” *Id.*, “Whereas” Section, Fifteenth.

300. *Third*, Peru does not dispute that in the wake of the 2001 CT Decision, Congress appointed an Agrarian Commission with the express mandate of implementing the 2001 CT Decision and that, after several years of study and consultation with relevant stakeholders, it issued a report and a draft bill directing that the Land Bonds should be “updated by applying the Consumer Price Index for Metropolitan Lima . . . using the date of issuance of the supreme decree of expropriation as the reference date for the calculation” and applying “default interest beginning on the date on which the State stopped the payments.” **Doc. CE-115**, Land Bonds Bill, March 27, 2006, Art. 8. In its Report, the Commission noted the importance of both “neutralizing or eliminating the effect of inflation,” and “paying interest on the updated debt to reflect the opportunity cost of the debt.” **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR, p. 32.

301. *Fourth*, Peru does not dispute that immediately prior to Gramercy’s investment, the Peruvian Government reached a long-awaited settlement with another U.S. company, LeTourneau, concerning unpaid land reform debt. Gramercy was aware of this settlement, including the fact, as the Herzberg Memo reports, that “[t]he agricultural ministry recently paid some land expropriation claims (*LeTourneau*) using [CPI].” **Doc. CE-114**, Herzberg Memo, p. 3. As Amb. Allgeier explains, and the contemporaneous documents show, this settlement was specifically intended by Peru to demonstrate to the United States Government that it was committed to protecting the rights of U.S. investors and the resolution of this claim was a predicate for the signing of the Treaty. Allgeier, **CER-7** ¶ 68.

302. *Fifth*, Peru does not dispute that CPI is an official government index that is specifically designed and widely, if not universally, used to do precisely what the current value principle requires: to correct for inflation and for the loss of purchasing power *in Peru*. It is thus the most direct and best measure for calculating the updated value of the Land Bonds. Indeed, even Dr. Hundskopf recognizes that CPI is used in the “financial system sector” and in “tax regulation.” Hundskopf, **RER-2** ¶ 79. And Dr. Hundskopf’s own authority confirms that CPI is Peru’s most “popular and utilized” economic indicator and that it is “one of the most effective tools to anticipate the effects of inflation in the economy.” Benavides, Eduardo, *El cumplimiento de prestaciones dinerarias en el Código Civil peruano in Themis: Revista de Derecho*, 1998, **Doc. RA-209**, p. 180.

303. Indeed, the Government has a consistent practice—dating back long before the 2001 CT Decision—of using CPI to make inflation adjustments. For example, Peru’s tax authority uses CPI to update the value of taxable bases, deductions, and back taxes; the Superintendent of Markets and Securities uses CPI to calculate minimum capital requirements for mutual funds; and Congress has decreed that pension payments should be updated using CPI. *See, e.g.*, **Doc. CE-365**, Decree N° 510, Final Disposition, February 10, 1989, Art. 2 (tax units to be updated using CPI for Metropolitan Lima); **Doc. CE-90**, Supreme Decree N° 064-2002-EF, April 9, 2002, Art. 5(1) (tax debt to be updated using CPI for Metropolitan Lima); **Doc. CE-132**, Supreme Decree N° 024-2008-EF, February 13, 2008, Art. 2 (tax debt to be updated using CPI for Metropolitan Lima); **Doc. CE-376**, Decree N° 816, April 21, 1996, Art. 79 (tax debt to be updated using CPI for Metropolitan Lima); **Doc. CE-394**, Law N° 27344, September 7, 2000 (tax debt to be either updated using CPI for Metropolitan Lima or subject to an annual valuation of 6%, whichever is less); **Doc. CE-369**, Resolution N° 543-92-EF-94.10.0-CONASEV, December 14, 1992 (minimum amount of net equity to be updated using CPI for Metropolitan Lima); **Doc. CE-384**, Supreme Decree N° 004-98-EF, January 21, 1998 (monthly pension payments to be updated using CPI for Metropolitan Lima).

304. *Finally*, Peru does not dispute that when Gramercy made its investment, Peru had a well-known commitment to, and a proven track record of, promoting foreign investment and fiscal responsibility, including a history of successfully restructuring defaulted sovereign debt. Koenigsberger, **CWS-3** ¶¶ 23-25. In fact, in its Statement of Defense Peru touts its commitment to encouraging and protecting foreign investment and notes that “Peru currently has earned a reputation for careful debt management and fiscal responsibility” and that it 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.” Statement of Defense, **R-34** ¶ 14; *see also id.* ¶¶ 15-19.

305. Peru had actively solicited foreign investment for years, including by entering into the Treaty, which, once it entered into force, would provide important protections to U.S. investors. *See* Statement of Claim, **C-34** ¶¶ 45-47. Domestic Peruvian law likewise provided special protections for investors. **Doc. CE-67**, Legislative Decree N° 662, August 29, 1991, “Whereas” Section (stating Peru’s intention to “create a favorable environment for foreign investment,” “to remove the obstacles and restrictions to foreign investment,” and to “grant a legal stability regime to foreign investors by recognizing certain guarantees that ensure the continuity of established rules”); **Doc. CE-68**, Legislative Decree N° 757, November 8, 1991, Art. 1 (stating Peru’s intention to encourage investment “in all economic sectors and under all business and contractual forms”).

306. Gramercy also relied on these protections and representations in making its investment. *See* Statement of Claim, **C-34** ¶¶ 63-67. Gramercy could legitimately expect that Peru was a country whose Government was committed to honoring its obligations, paying its debts, and upholding the rule of law and that Peru would act consistently with the established jurisprudence of the country’s highest court. As Mr. Koenigsberger testifies in his Reply Witness Statement:

Looking back at the various times the Peruvian authorities held the Land Bonds were a valid obligation, the widespread use of CPI in Peru to calculate the current value of its obligations, the reiterated acknowledgment of the importance of compensating bondholders’ cost of opportunity, as well as Peru’s economic growth and investment-grade rating, only confirms that our analysis of Peru and its economy was correct. So, at least as a factual matter, Gramercy expected Peru would pay the current value of the Land Bonds, adjusted for inflation using CPI, plus interest. And, if Peru failed to pay the Land Bonds on those terms, we knew that, like other bondholders, we could initiate or participate in proceedings in Peruvian courts to demand fair compensation.

Koenigsberger, **CWS-4**, ¶ 12.

307. Peru’s argument that Gramercy cannot rely on Peru’s efforts “to attract foreign investment—through treaties, contemporary global bond issuances, or otherwise,” because such assurances allegedly “have nothing to do with the domestic Agrarian Reform Bonds” is both unsupported and indefensible. Statement of Defense, **R-34** ¶ 257. Tribunals have repeatedly held that an investor need not show “an explicit assurance” in order to establish “reasonable expectations [that it will] be entitled to protection” under a treaty. *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, **Doc. CA-39**, ¶ 329. Instead, an investor “may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.” *Murphy Exploration & Production Company-International v. Republic of Ecuador*, UNCITRAL, Partial Final Award of May 6, 2016, **Doc. CA-144**, ¶ 248 (Although “[s]pecific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations,” they are “not necessary for legitimate expectations to exist.”).

308. Nor can the fact that the Land Bonds were allegedly never specifically “marketed” to foreign investors preclude Gramercy from benefitting from the protections available to foreign investors.

Cf. Statement of Defense, **R-34** ¶¶ 27, 29, 256. The Treaty does not limit its protections to those investments that have been specifically “marketed” to foreign investors. Such a limitation would severely restrict the protections of the Treaty, since most assets are not marketed specifically to foreign investors and may not even be marketed at all. Because the Land Bonds were freely alienable, because there was no impediment to foreigners purchasing them, and because the Treaty expressly included “bonds” and “public debt,” Gramercy had no reason to expect that the Land Bonds would not be protected by the Treaty.

309. Peru has not put forward any evidence that Gramercy could instead have expected that the Government would impose a mandatory payment system that provided for dollarization and no interest, and that foreclosed access to the courts. To the contrary, Peru’s efforts to undermine the legitimacy of Gramercy’s expectations only further confirm their validity.

310. *First*, the one exception that Peru cites to the consistent use of CPI to update the Land Bonds—the Constitutional Tribunal’s 2004 Decision upholding the Emergency Decree N° 088-2000 (“**2000 Emergency Decree**”)—only proves the rule.

311. As an initial matter, Peru does not explain the Emergency Decree’s relevance to the post-2001 landscape since it was issued prior to the Constitutional Tribunal’s 2001 CT Decision affirming the current value principle’s application to the Land Bonds.

312. Moreover, in 2004, when the Constitutional Tribunal had to decide on the constitutionality of the 2000 Emergency Decree, it did not “uph[o]ld dollarization as an appropriate method for determining the current value of the Bonds,” as Peru misleadingly alleges. Statement of Defense, **R-34** ¶ 229; *see also id.* ¶¶ 43, 60. As a matter of fact, the Constitutional Tribunal gave no actual consideration to the question whether dollarization in general, or the Emergency Decree’s specific approach to it, provided current value. The case turned instead on the fact—as the MEF emphasized in its defense before the tribunal—that the Emergency Decree “[did] not seek to force anyone to accept this method of payment, but rather merely offer[ed] it *as an option*.” **Doc. CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004, ¶ 7 (emphasis added). The Constitutional Tribunal upheld the Decree on that basis, concluding that it did not violate the constitutional right to property because it did not “*seek to preclude the possibility of going to court*” and did not “interfere” with pending proceedings but “merely constitute[d] an ‘alternative’ to [court proceedings].” *Id.* (emphasis added).

313. In any event, even this “option” for bondholders, which “did not seek to preclude the possibility of going to court,” offered a dollarization methodology that accorded the Land Bonds much more

value than the Supreme Decrees that the MEF later imposed as mandatory in 2014 and 2017. *Id.* In particular, the 2000 Emergency Decree (i) provided for dollarization at the time of issuance, rather than the time of default, and could thus more fully correct for the effects of inflation; and (ii) provided for “an annual interest rate of . . . 7.5% up to the month immediately prior to the date the calculation was made, compounded annually,” while the 2014 and subsequent Decrees applied interest at the rate of short-term U.S. Treasury bonds. **Doc. CE-88**, Emergency Decree N. 088-2000, Art. 5(a). As a result, even that Emergency Decree methodology would accord Gramercy’s Land Bonds more than *180 times* the value the 2014 Supreme Decrees assessed. Edwards, **CER-6** ¶ 76.

314. Hence, the 2004 CT Decision reinforces rather than undermines the legitimacy of Gramercy’s CPI expectations. As Mr. Koenigsberger explains, this example “confirmed for Gramercy that it would always have a right to receive a current value on its Land Bond in Peruvian courts based on a CPI methodology even if Peru proposed a dollarization method.” Koenigsberger, **CWS-4** ¶ 8.

315. *Second*, Peru’s allegation that there was a “persistent lack of a clear legal rule” in the wake of the 2001 CT Decision because Congress allegedly introduced “at least nine different bills . . . propos[ing] a variety of methodologies to value the Bonds,” is contradicted by the very documentary record Peru cites. *See* Statement of Defense, **R-34** ¶ 49; *see also* ¶ 229.

316. Out of the nine bills Peru has exhibited, five *explicitly provide for CPI-updating*. *See* **Doc. R-418**, Bill N° 11459/2004-CR, August 24, 2004, Arts. 7-8 (draft bill providing for updating of Land Bonds using CPI and payment of default interest which is calculated based on updated principal of debt); **Doc. R-419**, Bill N° 11971/2004-CR, November 2004, Art. 8 (draft bill providing for updating of Land Bonds using adjusted CPI); **Doc. R-499**, Bill N° 456 / 2006, October 2, 2006, Art. 8 (Land Reform Bond Debt Swap bill providing for updating of Land Bonds using adjusted CPI and applying interest rate on face of Bonds); **Doc. R-466**, Bill N° 3272/2008-CR, 2008, Art. 7 (draft bill providing for updating with CPI for Metropolitan Lima and payment of default interest starting from the date when the State ceased payment); **Doc R-502**, Bill N° 3293/2008-CR, May 21, 2009, Arts. 7-8 (draft bill providing that value of Land Bonds should be updated using CPI for Metropolitan Lima and interest based on the updated debt amount). Three others are concerned with aspects of the Land Bonds other than valuation, such as what the statute of limitations should be for bondholder claims. *See* **Doc. R-411**, Bill N° 578/2001-CR, August 31, 2001, Art. 1 (draft bill providing that Land Bonds are not subject to statutory limitations; does not mention valuation methodology); **Doc. R-415**, Bill N° 8988/2003-CR, November 3, 2003, Art. 3 (draft bill providing that bondholders can use Land Bonds to offset financial debts;

does not mention valuation methodology); **Doc. R-416**, Bill N° 10599/2003-CR, May 18, 2004, Art. 2 (draft bill proposing to amend 2000 Emergency Decree to allow bondholders to use their Land Bonds to offset financial debts does not mention valuation methodology). If anything is to be gleaned from the draft bills, it is more confirmation of CPI's prevalence.

317. The only bill that mentions any valuation methodology other than CPI adjustment is Bill N° 7440/2002-CR, which was introduced by a single member of Congress on June 27, 2003. *See* **Doc. R-414**, Bill N° 7440/2002-CR, June 27, 2003, Art. 1. While that draft bill, which apparently did not progress, contemplated using dollarization to update the value of the Land Bonds, it also expressly recognized that there were serious questions about whether dollarization was consistent with the 2001 CT Decision. The bill noted that Emergency Decree 088-2000, which had provided for dollarization, was being “questioned in light of the [2001 CT Decision]” and that the Agrarian Commission would soon be issuing a proposed law consistent with the 2001 CT Decision and would decide on the compatibility of the 2000 Emergency Decree with the 2001 CT Decision. *See id.*, “Legal Background of Bill” Section.

318. In the months following the introduction of draft Bill N° 7440/2002-CR, any uncertainty concerning the constitutionality of Emergency Decree 088-2000 was settled: As Peru admits in its Statement of Defense, in February 2004, the Agrarian Commission “concluded that Emergency Decree No. 088-2000 contravened the March 2001 [Decision].” Statement of Defense, **R-34** ¶ 42 (*citing* **Doc. R-257**, Letter from President of the Commission Created by Supreme Decree N° 148-2001-EF to the Ministry of Economy and Finance, February 6, 2004). The Agrarian Commission identified several requisites for compliance with the 2001 CT Decision, which included “utilizing the Consumer Price Index as the model for updating the Agrarian Reform Debt.” **Doc. R-257**, Letter from President of the Commission Created by Supreme Decree No. 148-2001-EF to the Ministry of Economy and Finance, February 6, 2004. In May 2005, the Agrarian Commission issued its final report, which concluded that CPI should be applied to update the value of the Land Bonds. **Doc. CE-12**, p. 14. Although it was ultimately vetoed by President Toledo, he affirmed the Government's obligation to “preserv[e] the purchasing power of the debt.” **Doc. CE-116**, Alejandro Toledo, President of Peru, Presidential Veto, April 19, 2006, p. 2. Thus, at the time of Gramercy's investment any alleged “uncertainty” about the whether the Land Bonds should be updated using dollarization or CPI had been resolved.

319. Indeed, in 2006-2008, during the time when Gramercy was actively making purchases of the Land Bonds, three different bills were introduced in Congress and every one of them provided for CPI updating at the date of issuance and compensatory interest. *See* **Doc. CE-160**, Opinion of the Agrarian Commission of Congress on Draft Bills

N°s 456/2006-CR, 3272/2008-CR, and 3293/2008-CR, June 16, 2011, Introduction, Art. 8.

320. *Finally*, none of the court decisions Dr. Hundskopf cites as alleged examples of “Peruvian courts . . . implement[ing] . . . the United States Dollar as the criterion for updating debts of value under section 1236 of the Peruvian Civil Code” are of any relevance to Gramercy’s expectations. *Cf.* Hundskopf, **RER-2** ¶ 79. None are Land Bonds cases and all but one pre-date the 2001 CT Decision. In fact, three of the decisions apply a version of the Civil Code that was repealed in 1996 and are thus entirely irrelevant. *See* Sentencia de Corte Suprema CAS No. 336-97 Callao, April 23, 1998, **Doc. RA-214**; Sentencia de Corte Suprema CAS No. 972-97 Lima, October 29, 1998, **Doc. RA-215**; Sentencia de Corte Suprema CAS No. 3031-99 Lima, July 25, 2000, **Doc. RA-216**.

321. The remaining two decisions do not concern the updating of debt but address instead the unrelated question whether litigants should be permitted to express their damages claims in U.S. Dollars, rather than in local currency. *See* Sentencia de Corte Suprema CAS No. 2171-99 ICA, July 5 2000 **Doc. RA-217**; Sentencia de Corte Suprema CAS No. 1632-06 Lima, May 31 2007, **Doc. RA-218**.

322. The simple and compelling fact is that from the CT 2001 Decision through the time of Gramercy’s last Land Bond purchase in 2008, Peru has not identified *a single case* in Peruvian courts in which the court determined current value by any approach other than CPI. The Peruvian courts’ uniform use of CPI to update the Land Bonds after the 2001 CT Decision is unmistakable evidence that, when the Constitutional Tribunal said that the Land Bonds should be paid at current value, there was no question what that meant.

(b) Subsequent Events Confirmed the Legitimacy of Gramercy’s CPI Expectation.

323. After Gramercy invested in the Land Bonds, Peru continued to affirm its obligation to pay the Land Bonds at their current CPI-updated value, further confirming the legitimacy of Gramercy’s expectations.

324. *First*, Peruvian courts continued to hold that the Land Bonds had to be updated to current value using CPI. *See, e.g., Doc. CE-128*, Supreme Court, Constitutional and Social Law Chamber, Cassation Ruling N° 2146-2006-LIMA, September 6, 2007, “Whereas” Section Sixth (Peruvian Supreme Court holds that the Constitution, the Civil Code, and the 2001 CT Decision all impose an obligation on the Government to pay the current value of the Land Bonds, updated using CPI); **Doc. CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File N° 652-07, June 14, 2007, First, Fifth,

and Seventh Considerations and Decision (Superior Court upholds an expert report that updates the value of Land Bonds using CPI); **Doc. CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File N° 01898-2007, August 14, 2008, First, Ninth, and Tenth Considerations (Superior Court upholds the Trial Court’s ruling approving an expert report that updates the value of Land Bonds using CPI); **Doc. CE-142**, Specialized Civil Court of Pacasmayo, Expert Report, File N° 163-1973, December 18, 2009, Expert Examination, Section 3 (expert report updating the value of Land Bonds using CPI); **Doc. CE-15**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1958-2009, January 26, 2010 (Peruvian Supreme Court holds that the Constitution, the Civil Code, and the 2000 CT Decision all impose an obligation on the Government to pay the current value of the Land Bonds using CPI); **Doc. CE-148**, Civil Court of Pacasmayo, Resolution, Case File N° 163-73, January 29, 2010, “Whereas” Section, Sixth, Decision (Civil Court upholds an expert report that updates the value of Land Bonds using CPI).

325. Indeed, Gramercy itself made progress in court. In one case, the court-appointed valuation experts applied CPI and compound interest. They valued just 44 of Gramercy’s Land Bonds at a total of approximately US\$250 million. Koenigsberger, **CWS-4**, ¶ 13; **Doc. CE-342**, Fifth Specialized Civil Court, Expert Report, File N° 09990-2006-0-1706-JR-CI-09, August 26, 2014.

326. *Second*, in 2011, the Agrarian Commission reopened the Lands Bonds question and issued a new report once again recommending the use of CPI to adjust the value of the Land Bonds for inflation, plus compound interest. *See Doc. CE-160*, Opinion of the Agrarian Commission of Congress on Draft Bills N°s 456/2006-CR, 3727/2008-CR and 3293/2008-CR, June 16, 2011, Section V, Art. 8. Article 8 of the Land Reform Bond Debt Swap Bill that the Commission proposed provided that the debt should be updated using the CPI for Metropolitan Lima and that it should accrue interest at the rate provided on the face of the Land Bonds, compounded annually. *See id.* Unlike the various draft bills Peru has cited, which were proposed but never passed, the Permanent Commission of Congress approved the Land Reform Bond Debt Swap Bill. **Doc. CE-162**, Congress of Peru, Permanent Committee, Debate Transcript, July 18, 2011, p. 61. Although the bill was never signed into law, it represented the most serious and credible legislative initiative to resolve the Land Bonds debt.

327. This consistent and objective evidence confirms that there is no basis for Peru’s argument that Gramercy could not have had a legitimate expectation of CPI plus interest at the time it invested.

(c) Peru’s 2014 Bondholder Process Fundamentally Reversed the Legal Framework and Frustrated Gramercy’s Legitimate Expectations.

328. Peru’s Bondholder Process completely reversed the legal framework that Gramercy relied on in making its investment. It is contrary to the established jurisprudence of Peru’s own courts, it deprives Gramercy of the current value to which Peru repeatedly affirmed Gramercy is entitled, and it forecloses Gramercy’s opportunity to realize its current value in Peru’s courts.

329. This reversal began with the 2013 CT Order and crystalized with the 2014 Supreme Decrees and came as “a big surprise” to Gramercy. Koenigsberger, **CWS-4** ¶ 17. Prior to the 2013 CT Order, it was universally agreed that the Land Bonds had to be updated using CPI plus interest. Indeed, prior to the MEF’s eleventh-hour intervention, the Constitutional Tribunal itself was poised to issue a decision directing that the Land Bonds should be updated using the Metropolitan Lima CPI, plus interest. *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, Mesía “Dissent,” ¶¶ 22-25. Through the MEF’s improper influence, however, the Constitutional Tribunal reversed course and issued a decision that declared that CPI-updating was “unaffordable,” and directing that the Land Bonds should be updated through dollarization and the interest rate applied to U.S. treasury bonds. *See id.*, Urviola “Majority,” ¶ 23.

330. The Constitutional Tribunal’s August 8, 2013 Resolution further upset the previously settled legal framework. In that Resolution, the Constitutional Tribunal declared that whatever dollarization process the Government put in place would be “mandatory” and that “henceforth the claims for payment of said debt may only be raised through the [new bondholder] procedure, and not through a judicial action.” **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, ¶ 16, Rule N° 4.d. Mr. Koenigsberger testifies:

Just like that, Gramercy was stripped of its right to initiate or participate in proceedings in Peruvian courts to demand current value for the Land Bonds. Until then, we thought that we had a chance of getting a reasonable outcome in the lower courts, removed from the more politicized pronouncements of the Constitutional Tribunal.

Koenigsberger, **CWS-4** ¶ 22.

331. It was only after the 2014 Supreme Decree, however, that Gramercy fully understood the true nature and extent of the Government’s reversal. Mr. Koenigsberger explains:

Some months after [the 2013 CT Resolutions], it got much worse. On January 17, 2014 and January 21, 2014, the MEF issued the 2014 Supreme Decrees, which established an administrative procedure for the payment of the Land Bonds. These 2014 Supreme Decrees were the decrees that contained, for the very first time, the formula for calculating the current value of the Land Bonds using a dollarization method [U]pon further review, we realized after many weeks that the practical effect of the 2014 Supreme Decrees was to produce a value for the Land Bonds that was a very small fraction of the value they would have had under the CPI method and which we could have won in local Peruvian court proceedings.

Koenigsberger, **CWS-4** ¶¶ 25, 27 (internal citations omitted).

332. This is the kind of fundamental reversal of position that supports a finding of a violation of fair and equitable treatment and a breach of the minimum standard of treatment. *See, e.g., Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL, Final Award of July 1, 2004, **Doc. CA-35**, ¶ 184 (finding violation of fair and equitable treatment standard when “the framework under which the investment was made and operates has been changed in an important manner”); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, **Doc. CA-8**, ¶ 307 (finding that “Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment” when it “entirely altered the legal and business environment . . . in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment”); *Murphy Exploration* Partial Final Award, **Doc. CA-144**, ¶ 281 (finding violation of fair and equitable treatment standard when the “business and legal framework that existed at the time the investors agreed to the Participation Contract had fundamentally, and prejudicially, changed.”).

333. Gramercy’s expectation that the Government would act consistently with its own law and not abandon established legal principles does not amount to an expectation of “a frozen legal framework” as Peru claims. Statement of Defense, **R-34** ¶ 258; *see also id.* ¶ 253. As the tribunal in *Occidental v. Ecuador* recognized, the unexpected change in the legal framework, when paired with the wrongful and unexplained application of the law, can give rise to a breach of fair and equitable treatment. *Occidental* Final Award, **Doc. CA-35** ¶¶ 181 184.

334. The cases Peru cites only confirm that governments do not have unlimited discretion to change their laws and that they must have a legitimate basis for altering the legal framework or reversing commitments and assurances on which the investor has relied. For example, Peru cites *Continental Casualty Company v. Argentine Republic* for the proposition that governments deserve deference. See Statement of Defense, **R-34** ¶ 244, n. 552. But the tribunal in that case merely stated that a government has a right to “change its legislation *as time and needs change*” especially “in *case a crisis* of any type or origin ar[i]se[s].” *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of September 5, 2008, **Doc. RA-95**, ¶ 258 (emphasis added). Peru, of course, has not offered any evidence of any crisis or change in circumstance that would warrant such a complete reversal. Indeed, Peru has conceded that there was no actual basis for the false budgetary threat on which the 2013 CT Order was premised.

335. Similarly, Peru cites to *Parkerings v. Lithuania* for the proposition that the State has “the right and privilege to exercise its sovereign legislative power.” Statement of Defense, **R-34** ¶ 254 (quoting *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of September 11, 2007, **Doc. RA-87**, ¶ 332). But the tribunal in that case affirmed the investor’s “right to a certain stability and predictability” and stated that the State is prohibited from “act[ing] unfairly, unreasonably or inequitably in the exercise of its legislative power.” *Parkerings Compagniet AS* Award, **Doc. RA-87**, ¶¶ 332-333. An investor who has “exercised due diligence” and whose “legitimate expectations [are] reasonable in light of the circumstances,” the tribunal explained, has “a right of protection of its legitimate expectations.” *Id.* ¶ 333.

336. Here, there can be no doubt that Peru reversed the legal framework that Gramercy relied on when it made its investment, and that Peru’s Bondholder Process has violated Gramercy’s legitimate expectations in breach of its Article 10.5 Treaty obligations.

2. Peru’s Insistence that It Created a “Process” Can Neither Mask Nor Redeem Its Arbitrary and Unjust Conduct.

337. Peru’s defense to Gramercy’s claims that its arbitrary and unjust measures violated the minimum standard of treatment rests entirely on its “Bondholder Process.” See Statement of Defense, **R-34** ¶ 251. Peru argues that the Process is a “transparent, detailed, and carefully regulated procedure grounded in Peruvian law, fundamental due process, and international best practices,” which is “comprehensive” and “methodical” and provides bondholders with a “clear legal framework for payment of the Bonds.” See *id.* ¶¶ 251, 274.

338. Yet, Peru’s own evidence demonstrates that its “Process” is not a defense to, but the *very basis* for, Peru’s violation of the minimum

standard of treatment. In particular, the “Process” centers on the valuation formulas established in Peru’s successive Supreme Decrees—formulas that were apparently enacted without *any* actual analysis or reasoning, as would be expected and indeed required for a legitimate governmental action of this magnitude, and which are on their face logically deficient and even nonsensical. More broadly, simply pointing out that a process exists is not itself a defense where that process cannot satisfy the minimum standard. Here, not only does Peru’s “Process” fail to comport with *either* domestic law or international best practices, or to provide due process or transparency, but when viewed in its entirety, it is also simply unjust. After *five* years, only *five people* have actually been paid, and have collectively received a grand total of *US\$65,000*.

339. In short, Peru’s actions in establishing and implementing the Bondholder Process are the very essence of arbitrary and unjust conduct. The evidence here demonstrates that Peru acted “for reasons that are different from those put forward by the decision maker” and “not based on legal standards,” and engaged in conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic.” *Cf. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of January 14, 2010, **Doc. CA-29**, ¶ 262; *Tza Yap Shum Award*, **Doc. CA-40**, ¶¶ 187-188, 192; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (NAFTA) Award of April 30, 2004, **Doc. CA-43**, ¶ 98. Taken together, Peru’s conduct thus falls below the minimum standard of treatment that the Treaty and international law require on any articulation of those standards.

(a) Peru Fails to Rebut that Its Formulas for Deriving the Value of the Land Bonds Are Arbitrary, Economically Nonsensical, and Devoid of Any Rational Justification.

340. Despite their centrality to Gramercy’s claims, Peru has done nothing to rebut Gramercy’s evidence that its Supreme Decree formulas are irrational, illogical, unfounded, and expropriatory. Peru has introduced not one but two current or former employees of the MEF as fact witnesses, as well as a Peruvian legal expert, an expert in “national and international claims programs,” and quantum experts, all of whom purport to opine about the legitimacy of the Bondholder Process. *See generally* Sotelo, **RWS-1**; Castilla, **RWS-2**; Hundskopf, **RER-2**; Wuhler, **RER-3**; Quantum Expert Report, **RER-5**. Yet not one of these witnesses even attempts to defend the valuation formulas themselves, much less provide any reasons explaining the basis for their implementation, or how they comport with the current value principle. Further, despite agreeing to do so, Peru failed to produce *any* documents demonstrating the MEF’s underlying reasoning for adopting each formula. *See* PO6, Annex A, Requests 10-12. The record thus demonstrates either the Government’s complete disregard of its duties

and violation of its own administrative law, or a cover-up in violation of Peru's disclosure obligations in this arbitration, or both.

341. *First*, the minimal documentary materials concerning the 2014 Supreme Decree formula make these deficiencies abundantly clear. Peru's sole explanation for its 2014 formula is that it was "from a report prepared by consultant Bruno Seminario" in 2011. *See* Statement of Defense, **R-34** ¶ 113. Mr. Kaczmarek and Mrs. Kunsman similarly state that "the SD 17-2014 Formula was based on the MEF's consultations with the economist Bruno Seminario . . . that had developed on a theoretical basis the formulas to determine the Outstanding Coupons Adjustment in accordance with the July 2013 CT Decision." *See* Quantum Expert Report, **RER-5** ¶ 63. Peru has offered no other explanation or documentation relating to its adoption of the formula. *See* **Doc. R-316**, Report N° 011-2014-EF/52.04 from DGETP to the Head of the Office of the General Counsel, January 14, 2014, pp. [2], [5] (stating that the draft formula is based on the CT's instruction of dollarization, without any further explanation).

342. The fact that Dr. Seminario's report is presented as the sole basis for the 2014 Supreme Decrees is fatal to Peru's case. Dr. Seminario's original report, and his formula, predate the 2013 CT Order by two years. It is thus impossible that the Seminario formula could have been developed "in accordance with the July 2013 CT Order," as Peru claims. Quantum Expert Report, **RER-5** ¶ 65; *see generally* **Doc. R-297**, Actualización de los Bonos de la Deuda Agraria, Bruno Seminario, May 1, 2011; *see also* **Doc. CE-732**, Oficio N° 385-2011-EF/75.22, April 6, 2011; **Doc. CE-733**, Letter from Luis Bruno Seminario de Marzi to Betty Sotelo Bazán, April 8, 2011; **Doc. CE-514**, Luis Bruno Seminario de Marzi, Work Plan, April 27, 2011; **Doc. CE-515**, Luis Bruno Seminario de Marzi, Initial Comments, April 29, 2011. Rather, the evidence shows Dr. Seminario was engaged for a different purpose: to (i) analyze the updating methodology the Agrarian Commission proposed in 2011 and verify its conclusions "in accordance with the valuation principle" in the 2001 CT Decision, "and with fiscal sustainability"; and (ii) propose "other alternatives" for updating the debt. *See* **Doc. R-509**, Consulting Contract between MEF and Luis Bruno Seminario de Marzi, April 13, 2011, Clauses 2.1, 2.2.

343. Moreover, even if Peru seized on Dr. Seminario's 2011 report to invent its 2014 formula, nowhere has it shown that it gave any substantive consideration to how that formula would actually operate when applied to bondholders. Peru even acknowledged that the formula was "solely theoretical." *See* **Doc. R-341**, Report N° 069-2016-EF.52.04 from DGETP to Vice Minister of Finance, April 15, 2016, ¶ 22. Peru does not appear to have consulted Dr. Seminario himself before actually implementing the formula. Peru failed to produce any documents from July 2013 to January 2014 between the MEF and Dr. Seminario "regarding the updating formula for calculating the value of the Land

Bonds adopted in Supreme Decrees N° 017-2014-EF and N° 019-2014-EF,” despite being required to do so. *See* PO6, Annex A, Request No. 13. In fact, if Peru’s production is to be credited, Peru appears to have adopted the formula without ever testing its effect on *any* actual bonds, as it did not produce any documents from July 2013 to January 2014 that “apply[] the formula adopted under Supreme Decrees N° 17-2014-EF and N° 19-2014-EF to calculate or estimate the value of any specific Land Bonds.” *See* PO6, Annex A, Request No. 10.

344. The mere fact that Peru claims to have relied on an external report does not in itself absolve the Peruvian Government’s officers and departments from satisfying themselves that that advice was not demonstrably inadequate—particularly where, as here, the formula was incontrovertibly and manifestly wrong. Professor Edwards identified fundamental, conceptual flaws and errors in the formula. The formula’s parity exchange rate multiplies the average official exchange rate in the year of the last clipped coupon by the quotient of the change in the Peru and U.S. CPI between 1950 and 1984. Edwards, **CER-4** ¶¶ 189-201. The result of this flawed exchange rate is that the formula essentially reduces to $x = x^2$, yet as Prof. Edwards explained, “[i]t is mathematically impossible for a unit of value to be equivalent to the same unit of value squared.” Edwards, **CER-4** ¶¶ 205-206. The formula’s use of a short-term U.S. Treasury rate is also “entirely inappropriate” as it fails to “represent the relevant opportunity cost for those who hold long-term and defaulted Peruvian securities.” *Id.* ¶ 215. In addition, by converting from U.S. dollars back to *Soles de Oro* using the nominal average exchange rate for 2013, instead of the date of payment, bondholders are unprotected from any loss of currency value from 2013 onwards. Taken together, these flaws demonstrate that the formula “has no basis in economics and yields arbitrarily low valuations that are entirely disconnected from the true updated value of the Land Bonds,” reducing the worth of the Land Bonds to less than one twentieth of one percent of their value under the CPI method. *Id.* ¶¶ 72, 211.

345. The limited and incomplete documentary record Peru has now had to disclose fully vindicates Gramercy’s criticisms of the formula. Gramercy pointed out some of these fundamental flaws as early as April 21, 2014, in a letter to the MEF. *See*, **Doc. CE-190**, Letter from Gramercy to the President of the Council of Ministers and the Minister of Economy and Finance, April 21, 2014. ABDA and other bondholders (including Gramercy) elaborated on them in detail in the March 16, 2015 application to the CT. **Doc. CE-199**, Land Reform Bondholders Association’s Application before the Constitutional Tribunal, March 16, 2015, ¶¶ 6, 9, 64, 147. And yet the MEF apparently did nothing about these severe problems with its formula, and did not even have the courtesy to respond.

346. In February 2016, however, Gramercy filed its Notice of Intent, which again noted the flaws with the Supreme Decree formula,

including its “flawed and artificially high ‘parity exchange rate,’” and announced its intention to initiate arbitration against Peru “should the Parties prove unable to find an amicable, mutually agreeable solution to the dispute.” Notice of Intent, **C-1** ¶¶ 37, 54. Faced with the risk that it would have to defend its irrational Decrees in a neutral international arbitration forum, in May 2016, Peru again retained Dr. Seminario to review the 2014 Supreme Decree formula. *See* **Doc. CE-593**, Letter from the MEF to Bruno Seminario, May 13, 2016 (asking for Dr. Seminario’s consultation on updating the Land Bonds).

347. In June 2016, Dr. Seminario reported to the MEF that after reviewing his original work, he had to substantially change two fundamental conclusions. *See* **Doc. R-354**, Letter from Bruno Seminario to DGETP, June 2, 2016; *see also* Edwards, **CER-6** ¶¶ 87-90. In June 2016 the MEF or another Government department appears to have calculated the total value of all 282 bonds assessed under the 2014 formula equaled only 47,310 *soles*, or a little over US\$14,000—for bonds with a face value of over 14.6 million *Soles de Oro*. *See* **Doc. CE-589**, *Estimación de la Actualización de la Deuda de los BDA en Custodia Decreto Supremo N° 019-2014-EF*. Yet, at the same time that it internally acknowledged that its valuation formula yielded results that significantly undervalued the Land Bonds, Peru continued to publicly defend its Bondholder Process as fair and reasonable. *See, e.g.*, **Doc. CE-265**, Ministry of Economy and Finance Press Release, June 2, 2016, p. [1] (responding to Gramercy’s claims by stating that “[t]he Ministry of Economy and Finance duly established an administrative procedure open to legitimate bondholders” which “provides for the authentication and registration of the agrarian reform bonds, as well as their valuation and payment”).

348. Meanwhile, Peru in fact retained a second expert, Carlos Lapuerta, an economist at The Brattle Group, to review Dr. Seminario’s calculations. Dr. Lapuerta also promptly confirmed that there were serious flaws and inconsistencies in the original Seminario Report. *See generally* **Doc. R-355**, *The Actualized Value of the Agrarian Reform Bonds*, Carlos Lapuerta, August 21, 2016; *see also* **Doc. CE-740**, Contract N° 083-2016-EF/43.03/SAU, August 3, 2016; **Doc. CE-739**, Response from Carlos Lapuerta to Request for Budget Proposal for Contract No. 083-2016-EF/43.03/SAU, July 19, 2016. In particular, Dr. Lapuerta noted that Dr. Seminario’s “formula does not conform to the calculation of the parity rate in Annex 2 of the Seminario Report,” and that the “Seminario Report uses an asterisk, ‘*’ in the initial submission of the methodology to indicate the use of a U.S. price index stated in *soles* instead of dollars,” which was then omitted from the paragraph of the report “recommending a concrete formula.” **Doc. R-355**, *The Actualized Value of the Agrarian Reform Bonds*, Carlos Lapuerta, August 21, 2016, ¶¶ 22, 23. So, in other words, Dr. Seminario had proposed an erroneous formula, and the formula he intended to propose yielded results different from those he reported. Dr. Lapuerta’s

charitable description of Dr. Seminario’s formula as being of “undoubted simplicity” cannot mask this fundamental error. *See id.*

349. In fact, as Prof. Edwards explains, Dr. Seminario’s formula for deriving parity exchange rates for dollarization yield a parity rate that is *700 times lower* than the estimated annual parity exchange rates for the same time period (1950 through 1982) that Mr. Seminario reported in Annex 2 of the same report. Edwards, **CER-6** ¶ 83. Professor Edwards demonstrates this discrepancy by calculating the parity exchange rate for 1982 and comparing it to that reported under Seminario’s Annex 2:

<i>Parity Exchange Rate Seminario Reported in Annex 2 (1982)</i>	<i>Parity Exchange Rate Seminario’s Formula Actually Yields (1982)</i>
829 soles oro per U.S. dollar	589,317 soles oro per U.S. dollar

Id.

350. In short, Gramercy explained in its Statement of Claim that the 2014 Supreme Decree formula was erroneous, irrational, and nonsensical. *See* Statement of Claim, **C-34** ¶¶ 198, 203. Peru’s disclosure has now confirmed—through contemporaneous disavowals from the very experts on which Peru claims to have relied—that Gramercy was absolutely right. Peru has not produced any witnesses to rebut Prof. Edwards’s description of the formula’s manifest shortcomings. Indeed, Peru has not even attempted to justify the substance of its 2014 Supreme Decree formula—the operative valuation formula at the time over 75% of participating bondholders submitted to the “Bondholder Process,” and at the time Gramercy submitted its claims to arbitration—either within this arbitration or outside it. *See* **Doc. R-367**, Administrative Process Status Table, November 30, 2018, Formato A (showing 306 of 398 cases submitted prior to February 28, 2017). Peru has not rebutted Prof. Edwards’s contention that it “severely understates” the value of the Land Bonds, and has not contested his conclusion that application of the 2014 formula would result in a value of less than one million dollars for Gramercy’s Land Bonds—2% of even what *Peru* now wrongly claims to be “current value,” and less than one one twentieth of a percent of their actual current value. *See* Edwards, **CER-4** ¶¶ 211, 250; *Cf.* Statement of Defense, **R-34** ¶ 123. Instead, as noted, Peru’s expert and fact witnesses, including Peru’s quantum expert and the MEF witnesses, have simply avoided altogether any analysis of the seminal 2014 formula, its effect, or whether it indeed provides “current value.” *See, e.g.*, Hundskopf, **RER-2** ¶¶ 125-137; Quantum Expert Report, **RER-5** ¶¶ 63-64; Sotelo, **RWS-1** ¶ 34; Castilla, **RWS-2** ¶ 47. Peru has also not called either of the two “independent experts” it consulted, Dr. Seminario or Dr. Lapuerta, to testify about the formula.

The only conclusion is that the formula at the very heart of Peru’s Bondholder Process is arbitrary. *See, e.g., Doc. CA-40, Tza Yap Shum Award*, ¶ 192 (the term “arbitrariness” “*sugiere una decision basada no en justicia, derecho o razón sino en preferencia personal o esencialmente un capricho o ejercicio ilimitado del poder*”).

351. *Second*, Peru cannot rebut the fact that its February 2017 Supreme Decree was equally arbitrary. As is now clear, by at least mid-2016 Peru knew that its existing formula was unworkable. *See, e.g., Doc. R-354*, Letter from Bruno Seminario to DGETP, June 2, 2016; *Doc. CE-589, Estimación de la Actualización de la Deuda de los BDA en Custodia Decreto Supremo N° 019-2014-EF*. Yet instead of disclosing that fact and honestly considering its implications for the Seminario method, Peru attempted to address these serious issues surreptitiously, presenting substantive rewriting as a “clarification” which “d[id] not modify the conceptual aspects of the methodology for the update of the Land Reform Bonds.” *Doc. CE-269*, Supreme Decree N° 034-2017-EF, February 28, 2017, “Whereas” Clause, Art. 2.

352. Peru’s first such attempt at “clarification” failed miserably. The “clarifications” offered no underlying algebra or even an explanation for the revisions. They merely asserted that U.S. CPI should be “expressed in soles oro,” even though, as Prof. Edwards explains, “the U.S. CPI is, by definition, a price index. As such, the U.S. CPI cannot be expressed in soles oro (or U.S. dollars or any other currency for that matter). It simply does not make sense to express U.S. CPI in soles oro.” Edwards, *CER-4* ¶ 221. The “clarifications” also did not specify whether one or both references to U.S. CPI in the parity exchange rate formula should be “expressed in soles oro,” just as they failed to specify whether the calculation of the exchange rate index should begin in 1950 or, rather, the first year of non-payment on the coupons. Edwards, *CER-6* ¶ 95. Indeed, it is so impossible to interpret what the February 2017 Supreme Decree was intended to mean that none of the *six* different interpretations Prof. Edwards considered—which yielded a range of values for Gramercy’s Land Bond portfolio of US\$5.57 million to US\$2.62 billion—turned out to be what the MEF had apparently intended. Edwards, *CER-6* ¶ 97; Edwards, *CER-4* ¶ 235.

353. And yet again—other than the two reports by Dr. Seminario and Dr. Lapuerta—Peru provides no basis whatsoever for how it came up with its nonsensical “clarifications” to the 2014 Supreme Decrees formula, or why the MEF adhered to the “conceptual aspects” of Dr. Seminario’s methodology when they had been conceived of on the basis of such fundamental errors. *See Doc. CE-269*, Supreme Decree No. 034-2017-EF, February 28, 2017, art. 2. Peru has likewise not explained why it refused to respond in substance to Gramercy’s March 1, 2017 letter that contained the most modest request that Peru provide “[c]omplete versions of the formulas (for bonds with both clipped and unclipped coupons) that result from the clarifications made by Supreme

Decree No 34,” “the definition showing how the term IPC^{EEUU} is to be ‘expressed in Soles Oro as set forth in Article 2.1 of Supreme Decree No. 34,’” and “[t]he definition of the term TC_0 appearing in Article 2.2 of Supreme Decree No 34.” See **Doc. CE-270**, Letter from Gramercy’s Counsel to Peru’s Counsel, March 1, 2017. Peru was thus imposing a Bondholder Process revolving around an updating formula but would not, or perhaps could not, even disclose that formula to Gramercy and other bondholders. A government act that has no legitimate basis, that is nonsensical on its face, and that the government cannot or will not explain, is paradigmatically arbitrary. See *Waste Management II Award*, **CA-43** ¶ 98 (finding that the minimum standard of treatment is infringed by State conduct that is “unjust or idiosyncratic” and involves a “lack of transparency and candour in administrative process”).

354. *Third*, in addition to the illusory purported justifications of its prior Decrees, Peru has produced absolutely no justification whatsoever for the formula contained in its August 2017 Supreme Decrees.

355. Peru agreed—and therefore was obligated—to produce, among others (i) “[a]ny reports or other documents created by the MEF or third parties consulted by the MEF concerning [the 2017 Supreme Decrees], including documents explaining the rationale for amending the prior Decrees, the rationale for the formulas in each amended Decree, any economic analysis of either amended Decree, and any additional reports prepared by the DGETP”; (ii) “[a]ny reports, communications, or other documents in the Government of Peru’s possession estimating or assessing the potential cost or value of Gramercy’s Land Bonds in connection with the development of the revised formulas contained in [the 2017] Supreme Decrees”; and (iii) “[a]ny reports, draft reports, communications, and other documents” exchanged among the Government, Dr. Seminario, and Dr. Lapuerta “regarding the updating formula for calculating the value of the Land Bonds adopted in [the 2017] Supreme Decrees.” PO6, Annex A (Requests 11-13).

356. However, Peru has produced no such documents. The only document it did produce reveals that it is not plausible that no responsive documents exist. Peru produced a lone document from June 2017 stating that it recommended yet another “review” of the February 2017 formula, “in order to mitigate or eliminate any variant interpretations that could eventually give rise to the possibility of the administered parties filing appeals before the MEF on purely formal as against substantive grounds.” See **Doc. R-392**, DGETP Report No. 124-2017-EF/52.04 from DGETP to Vice Minister of Finance, June 7, 2017, Section II.1. But Peru has not produced even a single document from that “review,” and certainly nothing explaining or justifying the valuation formula that it issued two months later. According to Peru’s record, then, and if the completeness of its production is to be credited, the August 2017 formula appears to have materialized from *thin air*—despite the fact that the

formula is a “radical departure” from the previous formulas that reflects “wholesale revisions to the calculation,” and that Peru itself recommended a “review.” See Edwards, **CER-4** ¶¶ 171, 175.

357. Unlike the other two formulas, it cannot even superficially claim to flow from Dr. Seminario or Dr. Lapuerta—as Prof. Edwards explains, the methodology of the formula is distinct from the methodologies proposed by Dr. Seminario and Dr. Lapuerta. See Edwards, **CER-6** ¶ 109.

358. The idea that there would be no analysis whatsoever for this substantial revision of the formula affecting thousands of bondholders, when Peru knew all prior formulas had been seriously deficient, is simply not credible. However analyzed, it is fatal to Peru’s case. In light of Peru’s failure of production, the Tribunal should infer that any analysis Peru did conduct would reveal that the reasons underlying the amendment were illegitimate and intended to extinguish the debt without paying current value. See PO6 ¶ 31. The only other explanation is that Peru actually conducted *no* analysis in constructing this wholly new formula—an explanation that is implausible at best, and in any event would *still* demonstrate that Peru’s conduct was arbitrary. See *Lemire* Decision on Jurisdiction, **Doc. CA-29** ¶ 262 (“Arbitrariness has been defined as ‘founded on prejudice or preference rather than on reason or fact’”); *Waste Management II* Award, **Doc. CA-43** ¶ 98 (“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic,” “as might be the case with . . . a complete lack of transparency and candour in an administrative process”).

359. Peru’s intent to extinguish the debt—and particularly *Gramercy’s* claims—is not, however, solely the subject of inference: public officials, including Peru’s former president, have stated this plainly both publicly and privately. In 2016, for example, then-President Kuczynski announced plainly that Peru did not “owe [Gramercy] anything,” and said “[w]e know what to do” to deal with Gramercy. **Doc. CE-266**, LatinFinance, *Peru’s PPK: ‘I Don’t Think We Owe [Gramercy] Anything’-Exclusive*, August 22, 2016. And in October 2018, Peruvian bondholder ██████████ met with officials from the MEF’s *Dirección General de Endeudamiento y Tesoro Público* (“DGETP”) to protest the petty sum the Bondholder Process had provided her. She testifies that, towards the end of the meeting, one of the MEF officials

told me that he understood my case, that he knew the valuation was unfair, and that he was very sorry about what was happening, but that he had no choice but to follow orders. He told me that they had to comply with the formula approved by

the MEF and that, as a complaint by Gramercy against the Peruvian Government was pending, they could not make any modifications to the formula, because, if they did, the Government would have to pay Gramercy applying that same modification.

360. Such statements leave little doubt as to the government's true motivation. However, one thing is certain: the reasons underlying the August 2017 amendment are not those Peru misleadingly articulates in its brief, in an attempt to minimize the drastic changes implemented in the August 2017 formula. Peru says the new decree was merely intended to “consolidate[]” the “prior regulations,” and to “ma[k]e precisions to the actualization methodology”, but the changes were much more substantial than that. *See* Statement of Defense, **R-34** ¶¶ 116-117. Peru also implies that the 2014 Supreme Decrees “anticipated” further changes to the valuation formula. *Id.* The record disproves this justification. What the 2014 Supreme Decrees actually “anticipated” was potential elaboration on the “payment options”—not on the core valuation formula. *Compare* **Doc. R-16**, Report N° 055-2014-EF/42.01, Ministry of Economy and Finance, Art. 3.10, p. 6 (“the procedure has been established that the indexation of the principal due, in foreign currency, is applied, adding a yield, according to what is described in Annex 1 that is an integral part of the Regulation”) *with id.* (“[t]he MEF . . . will define the [payment] options from which Agrarian Land Reform bondholders will be able to choose one or a combination of the payment options.”).

361. *Finally*, Peru's sole attempt to defend the substance of these formulas is to say that they are economically “viable.” Statement of Defense, **R-34** ¶ 273. This argument is simply irrelevant, and does nothing to rebut Gramercy's claims that the process is both arbitrary and unjust. Whether or not the formulas are “viable” is irrelevant to whether they appropriately provide current value. Moreover, Peru's Quantum Expert Report—the only evidence Peru cites in support of this statement—does not in fact provide even this minimal endorsement. *See id.* ¶ 273 (*citing* Quantum Expert Report, **RER-5** ¶¶ 61-66). Rather, Mr. Kaczmarek and Mrs. Kunsman simply narrate the various “implementation” steps taken by the MEF along with the MEF's own stated justifications, without providing any independent analysis or opinion as to the merits of the formulas. *See* Quantum Expert Report, **RER-5** ¶¶ 61-66. In fact, the strongest endorsement that they appear to offer is that the 2017 formula is “functional[],” but like Dr. Lapuerta's conclusion that Dr. Seminario's formula was wrong but “simple,” this does not address the major substantive deficiencies in question. *See id.* ¶ 15(e). As Prof. Edwards explains, however,

The issue, however, is not whether the August 2017 MEF Formula “functions” insofar as it can be implemented, but whether the logic underpinning the formula is sensible. After all, a formula could accurately compute current value by, for example, using CPI and a real rate of return, as I have shown—but then arbitrarily multiply by zero. That formula would be entirely “functional” in that the math can be done and produce zero as a result, but it would be a completely arbitrary and invalid process. As I discussed in the Amended Edwards Report, the August 2017 MEF Formula likewise is not sensible, and the Quantum Report does not argue otherwise or even attempt to defend that formula.

Edwards, CER-6 ¶ 122.

362. Peru’s complete failure to provide *any* reasoned basis for its various formulas leads to only one logical conclusion: there was simply no legitimate justification for these critical government acts which had significant consequences on not only Gramercy’s investment, but also on the rights of thousands of bondholders. The Supreme Decrees were signed by the President and the Minister of Finance, and purported to implement a decision of the Constitutional Tribunal, Peru’s highest constitutional court. Their designation of a valuation formula was guaranteed to affect the rights of thousands of bondholders, most of them Peruvian citizens, including by closing off existing rights of access to courts. The Constitutional Tribunal had acknowledged that, irrespective of the precise method used, the updated land bond debt “will amount to a fairly large figure, which will undoubtedly generate an inevitable fiscal impact.” **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013 ¶ 29. Yet despite the magnitude of this decision, Peru appears to have issued five Supreme Decrees and three primary valuation formulas without *any* internal analysis, assessment, or reasoning whatsoever. Further, if Peru’s response to Gramercy’s document requests is to be credited, Peru appears to have issued each Decree and formula in finished form, without any prior drafts to be reviewed or commented upon. This is simply unbelievable, or if true, irresponsible, and cannot by any standard provide a legitimate basis for such an important governmental act. Rather, this is the very essence of arbitrary conduct, and falls below the minimum standard of treatment that the Treaty requires.

**(b) Peru Fails to Rebut that its Unilateral
“Process” Provides No Due Process or
Transparency.**

363. As noted above, Peru’s primary defense to Gramercy’s claims rests almost entirely on the *existence* of the process and its repeated assertions that, in certain formal respects, it is “comprehensive,” “methodical,” “organized,” and “detailed.” See Statement of Defense, **R-34** ¶¶ 274-279. Yet as Prof. Olivares-Caminal, an expert on sovereign debt, explains, and as is abundantly clear from Peru’s own evidence, “the process has been a failure.” Olivares-Caminal, **CER-8** ¶ 18. It has failed on the most basic of measures: in terms of participation, in terms of efficiency, in terms of transparency, and in terms of the ability to deliver just outcomes to its participants. See Olivares-Caminal, **CER-8** ¶ 83. As such, it also violates the minimum standard of treatment.

364. *First*, Peru’s main line of defense with respect to the Bondholder Process itself is its insistence that it is consistent with international best practices for “claims mechanisms.” See Statement of Defense, **R-34** ¶ 278. This argument is misplaced and inaccurate.

365. To begin with, the testimony of Peru’s “international claims” expert, Dr. Wühler, is inapposite to the issues in dispute here. He assesses the Bondholder Process against his experience in “national and international *claims programs*”—*i.e.*, things like restitution and compensation programs in post-Second World War Germany and the Sierra Leone Reparations Program. Expert Report of Norbert Wühler, December 14 2018 (“Wühler, **RER-3**”) ¶¶ 2, 4, 6. That is simply the wrong comparison. Programs of that nature typically arise in drastically different contexts from the Bondholder Process. These claims programs are commonly designed to “help redress cases of gross and serious violations of human rights in the wake of conflict or authoritarian rule.” Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, 2008, **Doc. CA-152** p. 1. In this context, they often face “insurmountable constraints” such as extreme scarcity of human and financial resources, deficiencies in rule of law, or incapacity of domestic judicial systems. See de Greiff, Pablo, *Justice and Reparations in: The Handbook of Reparations* (2006), **Doc. CA-103**, pp 456-457; Falk, R., *Reparations, International Law, and Global Justice: A New Frontier in: The Handbook of Reparations*, 2006, **Doc. CA-110**, pp. 483, 491–496; Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, 2008, **Doc. CA-152**, pp. 1, 10. They also commonly feature complex assessments regarding compensation due for extreme human trauma like death or bodily injury in circumstances that “make it difficult, and sometimes impossible, for victims to provide the necessary information to prove their eligibility or to substantiate their claim.” **Doc. R-631**, Niebergall, H., *Overcoming Evidentiary Weaknesses in Reparation*

Claims Programmes in: Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, 2009, p. 149. Moreover, the quantity of claims that these programs must resolve generally exceed the 393 claims in the Bondholder Process by orders of magnitude. *Id.* p. 147. For example, the International Organization for Migration Report on Property Restitution and Compensation (“**IOM Report**”) that Dr. Wühler co-authored surveys ten claims programs with claims ranging from approximately 7,300 to 2.6 million. **Doc. R-629**, Niebergall, H. and Wühler, N. *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, International Organization for Migration, 2008, pp. 8–9, Table 1. None of these contextual factors apply to the Bondholder Process, making Dr. Wühler’s analogy inapt. See Olivares-Caminal, **CER-8 ¶ 83**.

366. However, even if international war and human rights reparations programs were analogous to Peru’s payment of its sovereign bonds, the Bondholder Process fails to live up to international standards even in this context, for three principal reasons:

- The Bondholder Process does not comport with the standards of *consultation and transparency* reflected in the authorities on which Dr. Wühler relies. As the German Forced Labor Compensation Program Report (“**GFLCP Report**”) that Dr. Wühler cites and co-edited puts it, “[a] careful design and *inclusive process* of developing a reparations program are *essential* for the later acceptance of reparation payments by all stakeholders and for generating an effect of reconciliation and legal closure.” **Doc. R-635**, Saathoff, G. *et al.*, *The German Compensation Program for Forced Labor: Practice and Experiences*, 2017, p. 13 (emphasis added); *see also id.* pp. xiii, 6, 40; Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, 2008, **Doc. CA-152**, pp. 15-16 (setting forth the “many reasons for incorporating *participatory processes* in the design and implementation of reparations programmes” including enhanced information-gathering, victim buy-in, strength, and capacity) (emphasis added). As the IOM Report that Dr. Wühler co-authored similarly explains, best practices dictate that claims programs “need to be *preceded by consultations with victim and civil society groups*.” **Doc. R-629**, Niebergall, H., and Wühler, N., *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, International Organization for Migration, p. 2 (emphasis added). It is widely recognized that claimants should be involved in framing and waging the policy debate about a claims or reparations program, including in defining the program policies, its implementation, and the amount of compensation due, and that stakeholder engagement is a prevailing standard for

a successful process. *See, e.g.,* Correa, Cristián *et al.*, *Reparations and Victim Participation: A Look at the Truth Commission Experience*, **Doc. CA-98**, pp. 11–23; *id.* pp. 6, 15 (describing prior reparations process in Peru which included, among others, consultation, coordination, and the approval of local NGOs and victim groups); Niebergall, Heike and Wühler, Norbert *International Support for Reparation Processes and the Palestinian Refugee Issue*, Chatham House, February 2012, **Doc. CA-147**, p. 14; Final Report of the Truth and Reconciliation Commission, 2003, Section 2.2 Comprehensive Program of Reparations, Subsection 2.2.3.2 Participatory approach, **Doc. CA-160**; Correa, Cristián, *Reparations in Peru*, International Center for Transitional Justice, June 2013, **Doc. CA-97**, pp. 15–17. For similar reasons, it is widely recognized that reparations processes must ensure transparency “with regard to *all aspects of the process* so that the programme not only be fair and unbiased, but also be perceived as such in all respects.” **Doc. R-629**, Niebergall, H., and Wühler, N., *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, International Organization for Migration, p. 3 (emphasis added); *see also* Holtzmann, H.M. and Kristjánsdóttir, E. (eds.), *International Mass Claims Processes: Legal and Practical Perspectives*, 2007, **Doc. CA-120**, p. 369. Peru has not even attempted to demonstrate that it has met these requirements, instead asserting that no consultations with bondholders were required, and remaining stubbornly non-transparent about the justification of the formulas and about informing bondholders in advance what recovery they could receive. *See* Statement of Defense, **R-34 ¶ 277**.

- The Bondholder Process also falls far short of what Holtzmann and Kristjánsdóttir term “[t]he twin requirements of all Mass Claims Processes”—namely, “*swift justice and due process.*” Holtzmann, H.M. and Kristjánsdóttir, E. (eds.), *International Mass Claims Processes: Legal and Practical Perspectives*, 2007, **Doc. CA-120**, p. 263 (emphasis added). These shortcomings are particularly glaring because the quantity of claims in the “mass claims” processes to which Dr. Wühler refers is generally significantly greater than those involved in the Bondholder Process, nor are there other contextual factors that might justify deviations from these typically high standards. *See, e.g.,* **Doc. R-631**, Niebergall, H., *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes* in: *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, 2009, pp. 147-148 (explaining that the factors which “have forced claims administrators to balance individual justice concerns . . . with the necessity to bring a just solution to all victims within an acceptable timeframe” include massive

numbers of claims in the tens of thousands and financial and human resource constraints). Process in this context typically includes a “presumption in favour of leaving [the right to access courts] *untouched or as uncurtailed as possible*”—a right which the Bondholder Process in fact *severely* curtails. See Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, 2008, **Doc. CA-152**, p. 36 (emphasis added); see also Falk, R., *Reparations, International Law, and Global Justice: A New Frontier in: The Handbook of Reparations*, 2006, **Doc. CA-110**, p. 485; Pellonpää, M., *Due Process in Mass Claims in The Protection of Human Rights at the Beginning of the 21st Century*, **Doc. CA-157**, pp. 113, 116-117 (stating that right of access to court is only justified where necessary to comply with international law obligations *and* there is some other justification, such as massive numbers of claims). Further, the examples Dr. Wühler cites confirm that there is simply no justification for the delays that have been characteristic of the Bondholder Process, as discussed below. To give just one example, the UNCC—which featured 2.6 million claims—required panels to complete the consideration of most claims submitted within six months, and twelve months only for certain “unusually large or complex” claims. See Wühler, Norbert, *The United Nations Compensation Commission: A New Contribution*, *Journal of International Economic Law*, Vol. 2, 1999, **Doc. CA-201**, Introduction, p. 265. Peru’s resolution of only five claims in five years pales in comparison.

- Crucially, the Bondholder Process does not comply with the *full reparation* standard that is the prevailing valuation methodology in most of the claims processes that Dr. Wühler cites. See, e.g., **Doc. R-629**, Niebergall, H., and Wühler, N., *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, International Organization for Migration, p. 182 (“as a general rule, internationally-recognized principles of valuation serve as an important reference for the calculation of compensable losses”); *id.* pp. 199-200; *id.* p. 212 (describing use of standard of “full and effective compensation” for dispossessed property owners); Report and Recommendations Made by the Panel of Commissioners Concerning Part Three of the Third Installment of “F3” Claims, S/AC.26/2003/15, **Doc. CA-191** ¶ 220 (describing the UNCC’s use of the full reparation standard “contemplated by Articles 31 and 35 of the ILC articles, and the principles established in the [*Factory at*] *Chorzów* case”). The Handbook on Reparations chapter that Dr. Wühler cites recognizes that, even in a mass claims context, deviation from the full reparation standard must typically be justified by severe constraints such as “scarcity of resources of the sort that makes it

unfeasible to satisfy, simultaneously, the claims of all victims and of other sectors of society that in fairness, also require the attention of the state” or acute deficiencies in rule of law. *See* de Greiff, Pablo, *Justice and Reparations in: The Handbook of Reparations* (2006), **Doc. RA-103**, pp. 456-457; *see also* Falk, R., *Reparations, International Law, and Global Justice: A New Frontier in: The Handbook of Reparations*, 2006, **Doc. CA-110**, pp. 483, 491–496 (describing “limiting condition” that may justify deviations from full reparation standard as inability to pay, remoteness in time, the magnitude of the harm, inability to identify the responsible party, and the unavoidability of selective implementation). As discussed above, the Bondholder Process utterly fails to live up to this standard, without any legitimate justification for doing so, since the evidence is clear that Peru can easily afford to honor the Land Bond debt at its CPI-updated current value. *See* Section III.B.3(a) below.

367. In contrast, there is an international benchmark against which Peru’s treatment of its Land Bond sovereign debt can be measured. It is not war reparations and claims processes, but it is, rather straightforwardly, how nations generally treat their sovereign debt, especially when they seek to restructure it. *See* Olivares-Caminal, **CER-8** ¶¶ 93-95. Unsurprisingly, the Bondholder Process does not fulfill any of the basic requirements of a legitimate debt restructuring either.

368. As Prof. Olivares-Caminal explains, “the bondholder process is inconsistent with international standards and best practices of conciliation, transparency, good faith, and the rule of law with respect to sovereign debt—as evidenced by the vanishingly low rates of participation and ultimate resolution of the Land Bond debt.” *Id.* ¶ 83. Contrary to international best practices, it lacks both widespread creditor engagement—typically above 90% in a successful restructuring, whereas here the Bondholder Process attracted less than 10% by value of the outstanding Land Bonds—and the consent of bondholders. *Id.* ¶¶ 117-123. Instead of transparency, Peru “has been remarkably opaque about the process by which the formulas for compensating the bondholders have been developed.” *Id.* ¶ 125.

369. Peru’s process similarly fails to live up to the principles of good faith, impartiality, respect for the rule of law, and fair and equitable treatment. As Prof. Olivares-Caminal notes, “Peru’s imposition of a unilateral haircut without consultation with creditors (not even with representative creditors) is neither indicative of good faith nor conducive to gaining the support of a critical mass of creditors. This lack of constructive dialogue suppresses the possibility of reaching an amicable resolution.” *Id.* ¶ 129.

370. Peru’s failure to comply with these requirements is not simply a technical matter. Rather, its wholesale failure to provide transparency and to consult with bondholders is a crucial component in perpetuating its arbitrary and unfair conduct.

371. As Prof. Olivares-Caminal explains,

Transparency is critical to mitigate the power differential between the debtor State and the creditor. Even though the creditor holds the legal entitlement, the State holds the pen in drafting laws and regulations that govern the implementation of that entitlement. Creditors must be able to know that efforts exist to resolve outstanding claims and how the inputs into those claims processes are being developed.

Id. ¶ 125.

372. In other words, transparency is a fundamental aspect of any creditor procedure not just for transparency’s sake, but because it restrains the state from forcing creditors into a one-sided, unilateral process, and because it increases creditor confidence to participate in the procedure. It also, crucially, provides creditors with the opportunity to observe and understand the basis under which the state intends to settle the outstanding claims—allowing for creditors to provide input, object, or decline to participate when that basis is shown to be inadequate, incorrect, or unfair. As Prof. Olivares-Caminal notes, this kind of consultation and engagement with creditors is essential to comply with international best practices. *Cf. id.* ¶ 140.

373. Here, Peru’s total lack of transparency with respect to its valuation formulas was crucial to its ability to continue perpetuating their value-deflating effects—and its public misrepresentations about the “integrity” of the process. As described above, Gramercy and other bondholders repeatedly attempted to engage Peru with respect to the serious flaws in each of its formulas, only to be completely rebuffed by Peru—even as Peru internally recognized the validity of these complaints. Within weeks and months of each formula, Gramercy and other bondholders quickly recognized their deficiencies, and sought confirmation and explanations from Peru, to no avail. *See, e.g., Doc. CE-190*, Letter from Gramercy to the President of the Council of Ministers and the Minister of Economy and Finance, April 21, 2014; *Doc. CE-270*, Letter from Gramercy’s Counsel to Peru’s Counsel, March 1, 2017. Hence, Peru’s Bondholder Process falls far short of the relevant international standards.

374. *Second*, Peru’s insistence that the Bondholder Process complies with Peruvian law is similarly ineffective.

375. As a preliminary matter, compliance with Peruvian law is of course irrelevant to whether Peru complied with the Treaty standard. *See* U.N. International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), **Doc. CA-46**, Commentary to Art. 3 (“conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful” (*citing S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1, Judgment, August 17, 1923)).

376. However, Peru is also simply wrong. As Dr. Bullard, Professor of civil law and other courses at La Católica del Perú and former President of the Tribunal for Defense of Competition and Protection of IP at INDECOPI, explains, the Supreme Decrees and the Bondholder Process fail to comply with Peruvian law for three principal reasons. *See generally* Bullard, **CER-10**.

377. The Supreme Decrees fail to satisfy Peruvian law’s “legality” principle because Peru did not comply with the legal formalities required by law, including, among others, by failing (*i*) to provide a statement of reasons that clearly explains and justifies the normative proposal formulated, (*ii*) to pre-publish the draft regulations to give stakeholders an opportunity to voice their concerns regarding the draft regulation; (*iii*) to provide a cost-benefit analysis showing the impact of decrees in general and compared to alternatives; and (*iv*) to have the MEF’s Legal Office conduct a serious legal review of the draft regulation to ensure it complied with the mandatory framework. *See* Bullard, **CER-10** ¶¶ 137-155.

378. The Supreme Decrees also fail to satisfy the “reasonability” principle because Peru did not establish that the regulation was necessary, adequate, and proportional, as required by Peruvian law. *See* Bullard, **CER-10** ¶¶ 157, 166, 173. In particular, Peru “did not provide a reasonable explanation as to how the Bondholder Process would fairly compensate bondholders and, at the same time, successfully liquidate the half-century-old agrarian debt;” “did not explain why it considered the Bondholder Process to be the least burdensome process to bondholders or why the specific valuation formula that was included in Annex 1 was essential for paying the agrarian bonds;” and never conducted a “real cost-benefit analysis to show that the benefits related to the 2014 Supreme Decree[s] outweigh[ed] the social costs.” *See id.*

379. In any event, Peru also “failed to prepare and submit the Multisectorial Commission a Regulatory Quality Analysis Report for any of the Supreme Decrees,” which under Peruvian law independently invalidates the Supreme Decrees. *See* Bullard, **CER-10** ¶ 208.

380. Thus, as Dr. Bullard explains, “the four Supreme Decrees under analysis are illegitimate” “because the Peruvian Government has not met its burden to prove that the Supreme Decrees comply with the

formal requirements established by the legality principle,” “because the Peruvian Government has not met its burden to prove that the Supreme Decrees comply with the sub-principles making up the reasonableness principle: adequacy, necessity and proportionality,” and “because the Peruvian Government has not met its burden to prove that the Supreme Decrees were included in a Regulatory Quality Analysis which was then submitted to the Multisectoral Commission for approval.” Bullard, **CER-10** ¶ 18.i.

381. Had Peru *actually* complied with “Peruvian law, due process, and international best practices” (Statement of Defense, **R-34** ¶ 251), and consulted with bondholders *prior* to publishing the formulas, or published a draft version of the Decrees for public comment as required under Peruvian law, it is inconceivable that the formulas would have passed muster—bondholders would have identified the readily apparent flaws, as they did in reality, and Peru would have had the opportunity to improve and correct the formula before publication. *See* Olivares-Caminal, **CER-8** ¶¶ 126-128; Bullard, **CER-10** ¶ 91. As Dr. Bullard explains,

there is clearly a need to give the affected sectors and the population in general an opportunity to participate in the process—which goes hand in hand with the idea of a robust *ex ante* control of the quality of law and regulations. as this: (i) ‘improves the normative quality and reduces the risk of non-intended consequences [...], allows the identification of the best implementation mechanisms [and] legitimizes the pre-published draft regulation, as it involves the citizens in the normative process.’

Bullard, **CER-10** ¶ 91 (*quoting* **Doc. CE-547**, Ministry of Justice and Human Rights, Regulatory Quality and Publishing Projects Guide, 2016, p. 20).

382. That Peru did not do so—and that it continued to exclude bondholders even as it amended the formula multiple times and internally acknowledged that bondholder criticisms were justified—suggests that publication of a real, rigorously vetted formula that would provide current value was not Peru’s intention at all.

383. Indeed, Peru’s conduct *after* publication of its first two formulas makes this abundantly clear. In each case, as described above, bondholders raised criticisms that the record now reveals Peru knew to be entirely correct. *See* Section III.B.2.a above. Yet Peru continued not only to stonewall and exclude bondholders from consultations, but actually continued to publicly defend and extoll the existing, deeply

flawed process, effectively attempting to entice additional bondholders to join or continue the process under false pretenses. Rather than diligently consulting with bondholders or allowing public debate, Peru instead continued to pretend that the formulas were correct—even as behind closed doors it took steps to abandon them. This is the opposite of transparency, and far below what the minimum standard of treatment—and even Peruvian law—requires. *See Waste Management II Award, Doc. CA-43* ¶ 98 (stating that a “complete lack of transparency and candour in an administrative process” violates the minimum standard of treatment).

384. Indeed, this total lack of transparency and consultation stands in sharp contrast to Peru’s most robust previous attempt to resolve the Land Bond debt—namely, the Agrarian Commission created by Supreme Decree No. 148-2001. *See Doc. CE-399*, Supreme Decree N° 148-2001-EF, July 14, 2001. This process envisioned bondholder participation from the outset: Supreme Decree No. 148-2001 provided that the Commission itself would be made up of two representatives from the MEF, two representatives from the Ministry of Agriculture, and a representative of bondholder organization ADAEPRA. *See id.*, Art. 2. The Agrarian Commission itself, when preparing its 2005 and 2011 reports and opinions, solicited comments and opinions from a variety of stakeholders, including bondholder representatives and organizations, and bondholders took part in task forces preparing draft legislation. *See, e.g., Doc. CE-12*, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR N° 11459/2004-CR, and N° 11971/2004-CR; *Doc. CE-160*, Opinion of the Agrarian Commission of Congress on Draft Bills N°s 456/2006-CR, 3727/2008-CR and 3293/2008-CR, June 16, 2011. The result of this process was the Agrarian Commission’s recommendation to adopt the Land Reform Bond Debt Swap Bill, which would have provided for CPI updating. *See id.* pp. 16, 18, Art. 8; Statement of Claim, *C-34* ¶ 69. This process, of course, abruptly came to a halt when President García announced that he would veto the bill over Congress’s approval. *See* Statement of Claim, *C-34* ¶ 71. By contrast, the MEF’s “alternative” to the Land Reform Bond Debt Swap Bill—apparently based on Dr. Seminario’s opinion, which summarily rejected the Agrarian Commission’s proposed method only *eleven days* after he was engaged—was not subject to any similar exhaustive process or democratic participation, and indeed never submitted to Congress. *See* Statement of Claim, *C-34* ¶ 70; Castillo, *RWS-2* ¶¶ 19-23; *see also Doc. CE-515*, Bruno Seminario, Initial Comments, April 29, 2011.

385. *Finally*, Peru’s defense of the Bondholder Process—and that of its experts—rests *entirely* on formal process alone, ignoring altogether the effect and outcome of the process, and obscuring the reality faced by individuals that have gone through it.

386. For example, Dr. Hundskopf concludes that Supreme Decrees, and by implication the process they created, were lawful simply because “they were published” and “were not declared illegal or unconstitutional by the competent authorities,” without considering in any detail either the substance of the Decrees or the process that produced them. Hundskopf, **RER-2** ¶ 123. Dr. Wühler, similarly, appears to base his conclusion that the process “offer[s] sufficient due process to the bondholders,” primarily on ease of use, observing that the bondholders “need only follow the instructions at each stage until payment” and notes that the bondholders have “the possibility to seek clarifications by email, telephone or in person.” Wühler, **RER-3** ¶¶ 16, n. 15, 18. He similarly concludes that the process is “sufficiently transparent” because “Peru is conveniently providing on the MEF’s website a web portal that includes access to the relevant forms, along with basic information, such as frequently asked questions and a user-friendly brochure.” *Id.* ¶¶ 76-77. The two MEF witnesses likewise defend the Bondholder Process without considering the actual substance of the process or how it operates in real life. *See, e.g.*, Sotelo, **RWS-1** ¶¶ 43-45; Castilla, **RWS-2** ¶ 47. Indeed, by Peru’s estimation, the mere fact that the Bondholder Process *exists* should be sufficient to satisfy the Tribunal—and any of Peru’s detractors—that it is responsibly handling the Land Bond debt, and that no further inquiry is needed. *See* Statement of Defense, **R-34** ¶¶ 278-279, 292-293, 298; **Doc. CE-279**, Ministry of Economy and Finance, Press Release, February 2, 2016; **Doc. CE-265**, Ministry of Economy and Finance Press Release, June 2, 2016; **Doc. CE-280**, Ministry of Economy and Finance, Press Release, July 5, 2016.

387. But this completely sidesteps the real issue, which is that there is no transparency about the manner in which the valuations are calculated, and no ability for bondholders to have even a broad estimate of how their Land Bonds will be valued under the process—as the bondholders who have proceeded through the process have confirmed. [REDACTED]; *see* Section III.B.2(c) below.

388. In reality, by creating a series of arbitrary and unjust formulas behind closed doors, by denying bondholders the right of meaningful—indeed any—participation or consultation, Peru “manifestly violate[d] the requirements of consistency, transparency, even-handedness and non-discrimination,” by subjecting bondholders to a lengthy and unpredictable process that produces unjust outcomes, Peru carried out its procedure in “wilful disregard of due process and proper procedure”; and by failing to provide any information whatsoever to bondholders in relation to either the valuation methodology or its effect on their claims, Peru evidenced a “complete lack of transparency and candour in an administrative process.” *See, e.g.*, *Saluka Investments Partial Award*, **Doc. CA-39** ¶ 307; *Lemire Decision on Jurisdiction*, **Doc. CA-29** ¶ 262; *Waste Management II Award*, **Doc. CA-43** ¶ 98. As Peru’s own expert, Prof. Reisman, has noted, this obligation of

“transparency and consistency” is integral to the fair and equitable treatment obligation, which he observes has been “elevat[ed] . . . to the status of ‘customary international law.’” *See* Reisman, W. Michael and Rocio Digón, *Eclipse of Expropriation?* in *Contemporary Issues in International Arbitration and Mediation*, 2008, **Doc. CA-206**, p. 41.

(c) Peru Fails to Rebut that the Bondholder Process Leads to Demonstrably Unjust Outcomes.

389. Finally, the Bondholder Process violates the minimum standard of treatment because it is simply unjust. The outcomes and experiences of participants make clear that, far from being a “process for the payment of legitimate [bond]holders” (*see* Statement of Defense, **R-34** ¶ 110), the Bondholder Process serves as a mechanism to discourage and eliminate claims.

390. Peru’s own statistics with respect to the bondholder process belie its claims that the process has been a “success.” *See, e.g.*, Wühler, **RER-3** ¶ 85 (“In the Bondholder Process as a whole, the success rate has been quite high”). This begins with an obvious metric for a successful restructuring: participation. Peru has attempted to characterize Gramercy as a lone holdout, intent on disrupting the process for other participants. But in fact, the participation rate is very low: it has attracted bondholders owning less than 10% of the outstanding principal. *See* Olivares-Caminal, **CER-8** ¶ 83. This is far less than the 90+% participation rate of most successful restructurings. *See id.* ¶ 123.

391. Of bondholders that do participate, the MEF has found that the overwhelming majority of bonds—93.9%—are authentic, demonstrating that nearly all participants have legitimate claims. *See Doc. R-369*, Administrative Process Summary Slide, November 30, 2018; Olivares-Caminal, **CER-8** ¶ 141. However, despite having a seemingly high prospect for success, there is a dramatic drop off for the next phase, registration. *Less than half* of the bonds submitted to the process have proceeded to this phase. *See Doc. R-369*, Administrative Process Summary Slide, November 30, 2018 (showing 170 of 393 total cases submitted to registration phase). In other words, the process is so slow, difficult, or disengaging that over 50% of the authentic bonds simply drop out.

392. As the process moves to the third phase, updating—ostensibly the very heart of the process—the drop off is even more stark: only 69 of the 393 cases had progressed to this point as of November 2018, nearly five years after institution of the process. *See Doc. R-369*, Administrative Process Summary Slide, November 30, 2018. And of the 44 who have completed this phase, only *five* bondholders have actually been paid. *See Doc. R-369*, Administrative Process Summary Slide, November 30, 2018.

393. Thus, five years after the system was first put into place, and three years after Peru publicly announced that “bondholders are presently reaching the last phase of the process, and the Ministry of Economy and Finance is duly implementing the final phase of the procedure as anticipated,” only *five* bondholders have received a payment. And the total amount that the *five* individuals have received in the aggregate is a meager *US\$65,000*. See **Doc. R-367**, Administrative Process Status Table, November 30, 2018, Tab “RD Pagos”; **Doc. CE-279**, Ministry of Economy and Finance, Press Release, February 2, 2016.

394. According to the 2005 Congressional Report, the estimated total amount of debt owed at that time was “4.312 billion nuevos soles (1.232 billion dollars).” See **Doc. CE-12**, p. 8. In 2012, former-Minister of Finance Ismael Benavides estimated the total debt at roughly US\$4.5 billion dollars. **Doc. CE-533**, *Expreso*, *Constitutional Tribunal Will Order Payment to 150,000 Agrarian Bondholders*, September 21, 2012. In December 2015, Moody’s estimated the “worst case scenario” of the total debt under CPI at US\$5.1 billion. See **Doc. CE-21**, Moody’s Investors Service, FAQs on Peru’s Bonos de la Deuda Agraria, December 18, 2015. This means that by the end of 2018, the payments Peru had made through its faulty administrative procedure corresponded to less than *0.0015%* of the total debt, as estimated by one of Peru’s own former ministers.

395. Peru claims that the “effectiveness” of its Bondholder Procedure is evident from the experience of one unnamed “sample bondholder, and suggests that this idiosyncratic example inoculates the entire procedure from criticism. See Statement of Defense, **R-34** ¶ 126. However, Peru has now been compelled to divulge more comprehensive data about the process, and individual bondholders whom the Process has victimized have now come forward, and they expose the truth that the Bondholder Process is “effective” only at extinguishing claims, not at paying them.

396. The experiences of [REDACTED] and [REDACTED] are far more common than that of Peru’s “sample bondholder.” They are two of 44 bondholders—out of 393 total—who have made it through the “updating” phase of the Bondholder Process and received a valuation of their bonds. [REDACTED] **R-369**, Administrative Process Summary Slide, November 30, 2018. The vast majority of even this subset of bondholders—all but five—have still not been paid. See **R-367**, Administrative Process Status Table, November 30, 2018; **R-369**, Administrative Process Summary Slide, November 30, 2018. Both [REDACTED] and [REDACTED] submitted to the Process within months of the 2014 Supreme Decrees. [REDACTED] [REDACTED] After waiting over four or nearly three and a half years, respectively, both finally received an updated value of their Bonds, only to find that the valuation received amounted to a mere

fraction of the current value they expected. [REDACTED]
[REDACTED]

397. For example, [REDACTED] received a valuation of only 222.23 *soles*, or about US\$67.00 for her Land Bonds, which her father had received when the Peruvian government expropriated her grandfather's farm in 1973. [REDACTED] This amounts to *less than a dollar* per hectare of the expropriated land—granted 35 years after the expropriation. *See id.* ¶ 35. Similarly, [REDACTED], received a valuation of 791.15 *soles*—roughly US\$240—for his Land Bonds, which he had received in exchange for the Government's expropriation of his 56 hectare-farm in 1975. [REDACTED] Upon receiving this valuation, [REDACTED] described his reaction as follows:

I could not believe it. It had been three years and eight months since I started the MEF's administrative procedure and more than forty years had elapsed since I lost my land. When I started the procedure, I imagined that the government would pay me a fair value for the Bonds. Offering to pay me 791.15 soles for my Bonds was a joke.

[REDACTED]

398. Both [REDACTED] and [REDACTED] appealed these decisions. [REDACTED] Both appeals were summarily rejected within days of a meeting with the MEF. [REDACTED]
[REDACTED]

399. The effects of these decisions have been devastating. As [REDACTED] describes,

The Government's failure to pay adequate compensation for the land it expropriated from my grandfather, and for the life project that they took away from us, has haunted my family for three generations (or even four, if I were to include my children, who are now helping me try to move things forward). The MEF's valuation of my Land Bonds is definitively not consistent with the claims that the Government has made about its alleged intention to pay bondholders the updated value of their bonds. Having adhered in good faith to the procedure implemented by the MEF, I finally thought that I would be able to obtain some justice for my late grandfather and father and put this matter to rest. However, the truth is that the

procedure turned out to be nothing but a scam. I feel completely betrayed and deceived by my own Government, which, in my opinion, has set up a trap for bondholders, seeking to deprive them of fair compensation.

██████████

400. Peru's own evidence, in combination with evidence Peru reluctantly produced about the results of the Bondholder Process, demonstrates that this bleak picture is not an anomaly—rather, the experiences of ██████████ and ██████████ are typical. Of the 44 bondholders that have received an updated valuation—39 of whom remain unpaid—many have received a similarly depressed valuation. While some of these bondholders have been assessed values in the US\$100,000 to US\$200,000 range (which are likely still dramatically undervalued), many have been assessed only a few hundred dollars, and some less than US\$100. *See, e.g., R-367*, Administrative Process Status Table, November 30, 2018 (Case Nos. 2, 25, 23, 22, 16, 48, 44, 17, 82, 74, 47, 50, 59, 100, 151, 219, 186, 198, 176, 86). One bondholder, whose Land Bonds were issued in exchange for a 300-hectare piece of land that now houses an airport, claims to have been assessed only 9,680 *Soles de Oro* (approximately US\$2,904). **Doc. CE-671**, MEF Resolution, November 19, 2018. Another bondholder is only due to receive 1,386.01 *Soles de Oro* (approximately US\$415.80) for “(three) properties that together have an approximate surface of 5,000 hectares,” and he laments that “it cannot be deemed logical by any means that a hectare of land, including buildings and dwellings may be assessed with a value of LESS THAN ONE SOL.” **Doc. CE-641**, Appeal to the MEF, November 28, 2017. Nearly half of these bondholders have appealed their resolution and challenged the valuation results, claiming that the values they have been assessed are not only inadequate but actually confiscatory. *See e.g., Doc. CE-640*, Appeal to the General Director of Indebtedness and Public Treasury, November 13, 2017 (arguing that the Resolution has not considered the right to property that has an inviolable character that the state guarantees especially in relation to fair payment of the agrarian bonds); **Doc. CE-672**, Acknowledgment of Receipt of Official Resolution, November 30, 2018 (describing the updated calculation of the Land Bonds as “unreal, irrational, unfair, unjust, discriminatory, arbitrary and under-valued”); **Doc. CE-656**, Value Update Appeal of a Ruling, August 21, 2018 (attacking the MEF Resolution for not providing significant reasoning behind its valuation); **Doc. CE-642**, Summary Lodge of Appeal, December 1, 2017 (stating that “the administrative process has been a deception”); and **Doc. CE-658**, Petition for Consideration, August 24, 2018 (arguing that the amount of 438.25 soles for 17 Land Bonds, unless there is an accounting error in its calculation, is completely unreal and implicates a confiscation contrary to Article 70 of the Constitution).

401. These results are simply deplorable, and reflect the arbitrary and unjust nature of Peru’s conduct. The result to which the challenged State conduct leads is an additional indicator of its arbitrariness, and forms part of the necessarily fact-dependent analysis that the minimum standard of treatment requires. *See Tza Yap Shum Award, Doc. CA-40, ¶ 219* (“*Una indicación adicional de la arbitrariedad en el accionar de la SUNAT, aun cuando sea en retrospectiva, resulta de examinar los resultados de su proceder. Los resultados tanto para el contribuyente como para la SUNAT misma fueron abrumadoramente negativos.*”); *see also id. ¶ 225*. Nowhere in Peru’s assertions about the “process” does Peru engage with any of these compelling facts. A process that leads to such results cannot possibly be just or fair, and falls below the minimum standard of treatment that international law and the Treaty require.

3. Peru Fails to Rebut that the 2013 CT Order Only Heightens, and Does Not Justify, the Arbitrariness and Injustice of the Bondholder Process.

402. Peru cannot defend its Bondholder Process by saying that it derived from the 2013 CT Order, to which the Tribunal must fully defer. That decision cannot excuse Peru’s conduct, including because it is itself arbitrary and unjust and it embodies the kind of violation of “the principle of due process embodied in the legal systems of the world” that Article 10.5 of the Treaty specifically contemplates constitutes a denial of justice.

403. Instead of denying the circumstances in which the 2013 CT Order came about, Peru appears to claim that these circumstances are not serious enough, or that Gramercy has no standing to complain about them. *Cf. Statement of Defense, R-34 ¶¶ 263-268*. Peru’s attempts to both minimize its conduct and shield it from this Tribunal’s evaluation cannot succeed.

(a) Peru Does Not Deny that the 2013 CT Order Was Based on a False Premise and Tainted by Violations of Due Process and Procedure.

404. As Gramercy explained in its Statement of Claim, the 2013 CT Order arose from a remarkable set of circumstances. Following a petition by the Engineer’s Bar Association seeking enforcement of the 2001 CT Decision ordering the government to pay the bonds at current value, the CT deliberated for nearly *two years*. *See Statement of Claim, C-34 ¶ 81*. By early July 2013, the majority of the Tribunal’s justices endorsed a draft decision prepared by the Rapporteur, Justice Eto, which utilized a CPI updating methodology consistent with well-established principles and practice. *See id.*

405. Then over the course of two days from July 10, 2013 through July 12, 2013—only a week before the scheduled replacement of

five of the six sitting justices on July 17, 2013—multiple meetings took place between executive representatives and the Tribunal members. *See id.* ¶¶ 81-82. According to Justice Eto’s recent testimony before Congress, at what he described as a “historic” meeting, MEF representatives informed the justices that endorsing the CPI approach would result in a liability of *18.5 billion dollars*—a fantasy figure without any apparent support. *See Doc. CE-675*, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, p. 35. According to Justice Eto:

The opinion that was originally going to be issued would have meant paying US\$ 4.5 billion, which, with interest and everything would have come to 18.5 billion dollars. Therefore, obviously what the Tribunal did was to back a principle known as the “principle of pro-government interpretation.” According to this principle, every constitutional court must favor the State and not the litigant in budgetary matters.

Doc. CE-675, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, p. 32.

406. This scare tactic worked just as the MEF had intended. Following these meetings, despite not being the Rapporteur, Chief Justice Urviola provided Justice Eto with an alternative draft rejecting CPI in favor of dollarization, in a complete about-face from the last nearly two years of deliberations. Statement of Claim, **C-34** ¶ 86; **Doc. CE-28**, Statement to the Prosecutor’s Office of Gerardo Eto Cruz, August 28, 2015 (stating that “Chief Justice Urviola brought us an alternate draft . . . and asked me to sign”).

407. This draft was then presented to the remaining Justices on July 16, 2013—the day the CPI decision was to have been signed by the two remaining Justices who had previously supported it, and just one day before the term was set to expire. Statement of Claim, **C-34** ¶ 86. Justice Mesía requested the 48 hours required under the Constitutional Tribunal’s rules of procedure to prepare a dissent. *Id.* ¶ 87. Yet instead of abiding by its own rules, the Constitutional Tribunal issued the decision that very same day.

408. And it did so in extremely suspect and possibly criminal fashion. In particular, the previous *majority* CPI decision, already signed by two justices, was altered with white out correction fluid to transform it into a supposed “dissent” from Justice Mesía. *Id.* ¶ 88. Then, announcing a tie based on the existence of the “dissent” and three votes in support of the new dollarization decision, Chief Justice Urviola issued a casting vote in favor of dollarization. *Id.* ¶ 89.

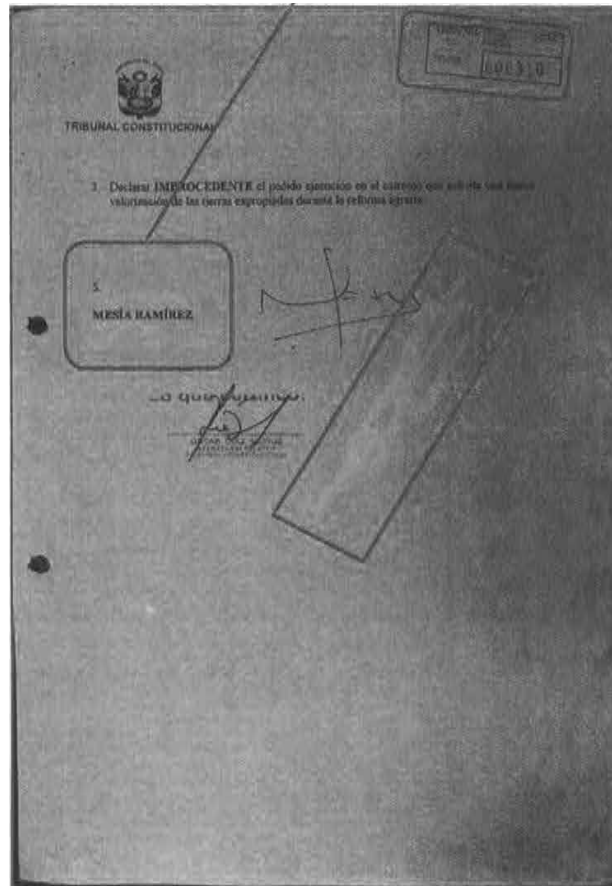
409. The “majority” dollarization decision had only been introduced to the other justices earlier that same day, constituted a radical departure from the existing approach under Peruvian law, and had not been meaningfully debated by the Justices or subjected to countervailing opinions. But, with the assistance of white-out and hurried procedural gamesmanship, and based on the MEF’s false scare tactics, it became the Constitutional Tribunal’s putative decision.

410. To summarize, the timeline of events in the days and weeks surrounding the 2013 CT Order—also described in detail in Gramercy’s Statement of Claim—is as follows:

<i>Date</i>	<i>Event</i>
June 2013	Justice Eto, submits to full bench draft order upholding bondholders’ claims and requiring payment using CPI. <i>See</i> Statement of Claim, C-34 ¶ 81 .
On or about July 9, 2013	Six sitting justices discuss draft order. Four justices: Eto, Mesía, Alvarez, and Urviola (Chief Justice), endorse it. Mesía and Eto sign and initial every page. <i>See</i> Statement of Claim, C-34 ¶¶ 81, 86 .
July 9, 2013	President Humala publicly warns CT to “abstain from issuing rulings on sensitive issues . . . such as, for example, the land reform bond[s].” <i>See</i> Statement of Claim, C-34 ¶82 ; Statement of Defense, R-34 ¶ 104 , n. 165
July 10, 2013	Chief Justice Urviola defends Constitutional Tribunal’s independence but acknowledges that the President’s advisors had visited the CT in regard to Land Bonds case. <i>See</i> Statement of Claim, C-34 ¶ 82 ; Doc. CE-289 , Radio Programas del Perú, Justice Urviola Responds to Humala, July 10, 2013.
July 10, 2013	Urviola meets Minister of Economy, Luis Miguel Castilla, and the President of the Council of Ministers Juan Jiménez. <i>See</i> Statement of Claim, C-34 ¶ 83 .
On or about July 10-12, 2013	CT has “historic” meeting at MEF; hears that CPI updating would cost Peru US\$18.5 billion. <i>See</i> Doc. CE-675 , Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, p. 35.
July 11, 2013	Castilla publicly expresses confidence that CT would act with “responsibility” and would not harm the country’s fiscal balance (<i>citing</i> Doc. CE-291 , Andina, Minister of Economy Confident that CT Will Act with Deliberation Regarding Land Reform Debt, July 11, 2013). <i>See</i> Statement of Claim, C-34 ¶ 84 ; Statement of Defense, R-34 ¶ 105 .

- Late evening July 11, 2013** Humala’s advisor Roy Gates meets with Urviola at the CT. *See* Statement of Claim, **C-34** ¶ 85; **Doc. CE-27**, Register of visitors to the Constitutional Tribunal, July 11, 2013, p. 2.
- July 12, 2013** Urviola provides Eto with “alternate draft,” rejecting CPI in favor of dollarization, and asks him to sign new draft and present it to other Justices as if Eto had been its author. **Doc. CE-28**, Statement to the Criminal Prosecutor’s Office of Gerardo Eto Cruz, August 28, 2015, Question 6; Statement of Claim, **C-34** ¶ 86.
- July 16, 2013** Eto submits draft order for discussion. Urviola and Alvarez join the opinion. Mesía does not, expresses his disagreement with this new draft opinion and demands 48 hours to review the draft and write a dissent. Urviola denies Mesía’s request. Instead, that afternoon someone transforms the original majority opinion endorsing CPI into Mesía’s purported dissent—by erasing with white-out correction fluid Eto’s signature from every page and the signature blocks, as well as by replacing “the Ruling of the Constitutional Tribunal” with the “Dissenting Opinion of Justice Mesía Ramírez.” **Doc. CE-25**, Institute of Legal Medicine and Forensic Sciences, Expert Report N° 12439 - 12454/2015, pp. 5, 10-29.
- With Mesía’s manufactured “dissenting opinion,” Urviola declares a 3-3 tie and, as Chief Justice, casts a second and “tie-breaking vote.” *See* Statement of Claim, **C-34** ¶¶ 86-89.
- July 16, 2013** Urviola appears on nightly talk show defending the Order. He concedes that he had been in contact with the MEF and claims that there were economic studies and interactions with economic consultants showing that CPI would have created a budgetary imbalance and that dollarization was a more appropriate methodology. *See* Statement of Claim, **C-34** ¶ 90.

411. Peru does not deny the majority of these extraordinary facts. Nor could it: the record of misconduct is well established, and has been the subject of multiple criminal proceedings and a congressional investigation in Peru. And the images do not lie. The use of white out is clearly apparent in images from the official forensic report:



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

412. Instead, Peru attempts to minimize the effects of this misconduct, arguing that “[i]t should be noted that the alleged adulteration of the signature is related only to the singular vote of a magistrate and not to the decision on the merits . . . thus there is no reason why the decision should be declared null.” Statement of Defense, **R-34** ¶¶ 100-103. Peru also seeks to bury the issue by arguing that it has “taken steps . . . to address the alleged improprieties.” *Cf. id.* ¶ 268. Yet, Peru’s local investigations—which include a three-year recommended prison sentence against the clerk of the court, as Peru acknowledges—cannot absolve its conduct. To the contrary, they merely confirm that the conduct in question was highly irregular, and possibly criminal. *See id.* ¶ 101.

413. The one point Peru does attempt to vigorously contest—whether representatives of the MEF met with members of the Constitutional Tribunal prior to the issuance of the revised decision—is simply not credible in light of the record. *Cf.* Statement of Defense,

R-34 ¶ 105 Both Justices Eto and Urviola have spoken publicly about these meetings, including under oath in testimony before Peru’s Congress. *See Doc. CE-675*, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019; Statement of Claim, **C-34** ¶ 90. Indeed, Peru claims Minister Castilla “does not remember” the meeting—a meeting Justice Eto described as “historic”—but does not deny that it took place, or what was said. *Cf.* Statement of Defense, **R-34** ¶ 267. And indeed Minister Castilla acknowledges that he met with Justice Urviola “during my tenure as Minister,” though he states that “I do not recall a particular meeting with him and the Prime Minister on July 10, 2013.” *See* Castilla **RWS-2** ¶ 32. The Justices’ descriptions of the meeting also make clear that it served a clear purpose: to instill upon the Justices an irrational fear that imposing CPI would result in a budgetary burden that the nation simply could not bear—a fear that is reflected in the ultimate decision, and indeed is stated as the primary basis for rejecting CPI. *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, “Whereas” Section, ¶ 25.

414. Again, Peru’s failure to produce the relevant studies or presentations on this point—despite having agreed to produce, among others, “[a]ny documents, including presentations, studies, calculations, and estimates of the impact of the value of the total Land Bond debt outstanding on Peru’s budget . . . prepared by or for the Government of Peru and provided directly or indirectly to the Constitutional Tribunal (“CT”), any of its justices, or employees in relation to File N° 00022-1996-PI/TC prior to the issuance of the July 2013 CT Order,”—should lead to an inference that the MEF’s figures were not accurate or responsible and were presented to scare the CT to reject CPI updating. *See* PO6, Annex A, Request 1 (emphasis added).

415. Thus, far from excusing Peru’s arbitrary conduct in connection with the Supreme Decrees and Bondholder Process, the 2013 CT Order in fact compounds that conduct, as that Decision was itself arbitrary and unjust in both substance and process.

416. *First*, gross judicial impropriety of this kind qualifies as a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety,” and thereby violates “the principle of due process embodied in the principal legal systems of the world,” within the meaning of Article 10.5 of the Treaty. *See Doc. CE-139*, Treaty, Art. 10.5; *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award of June 26, 2003, **Doc. CA-32** ¶ 132; *Mondev Award*, **Doc. CA-34** ¶ 127. Peru cannot minimize this extraordinary set of circumstances by simply denying that the 2013 CT Order is “clearly improper and discreditable” or that it cannot be explained “by any factual consideration or any valid legal reason.” *Cf.* Statement of Defense, **R-34** ¶ 265.

417. In *Flughafen*, the tribunal found that a decision of Venezuela’s Supreme Tribunal constituted a denial of justice because the decision lacked legal reasoning grounded in the existing legal framework to justify its adoption, the reasons provided were “manifestly insufficient,” and its true objective was actually to advance a policy of the central government. Cf. Statement of Claim, **C-34** ¶¶ 212-213; *Flughafen Zürich A.G. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of April 4, 2016, **Doc. CA-25** ¶¶ 698, 707-708.

418. The 2013 CT Order manifests all of these qualities. As described above, the 2013 CT Order sharply departed from the “existing legal framework,” both in the “legal reasoning” and substance of the decision, which ignored years of precedent establishing CPI as the correct updating methodology, and in the manner of its implementation, which violated the Constitutional Tribunal’s own internal rules and included serious procedural irregularities. See Sections III.B.1(c), III.B.3(a) above. The Constitutional Tribunal’s ostensible reasons behind its decision—namely, that Peru could not afford to pay the Land Bond debt if calculated under CPI, and that CPI is inaccurate during times of hyperinflation—were also clearly “manifestly insufficient,” in that they were both simply untrue. As the record now makes clear, and as explained in detail below, there is no question that Peru was able to pay the outstanding debt. See also Section III.A.2 above. And Prof. Edwards explained, without rebuttal, why the Constitutional Tribunal’s stated concern about hyperinflation is “not rational.” Edwards, **CER-4**, ¶¶ 67-68. Further, as Justice Eto’s testimony to Congress made clear in describing the MEF’s influence over the Constitutional Tribunal on this “inter-institutional issue,” the true objective was “to advance a policy of the central government”—in particular, devaluing the total Land Bond debt and providing the government with the means of extinguishing it altogether. See, e.g., **Doc. CE-675**, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, pp. 35-36.

419. To gauge the magnitude of this impropriety, imagine if the same thing happened with an international arbitration tribunal. After the case has been fully submitted, the tribunal nears the end of its deliberations and is preparing to award the claimant a substantial amount. Then the tribunal holds an *ex parte* meeting with the respondent’s ministry of economy and finance, at which it presents false information about the economic effects on respondent of issuing the award in claimant’s favor. The tribunal president then takes the draft majority award signed by its members and uses white out to transform it into a dissent by one of them, issuing a brand new award favoring the respondent on the very same day. It is inconceivable that such conduct would be upheld, or that anyone could seriously argue that this process is consistent with international law.

420. *Second*, even as Peru attempts to minimize its role in the white-out scandal, it does not deny that the central motivating premise of

the 2013 CT Order, and the driving force behind the Constitutional Tribunal’s change of heart—that Peru could not afford to pay the current value of the Land Bonds if they were updated using CPI—was false.

421. Peru does not even try to defend the notion that it could not pay. It has confirmed that no “[e]stimates, calculations, technical studies, or other documents . . . regarding potential impacts on the public budget” were ever carried out by MEF. *See* **Doc. CE-18**, Ministry of Economy and Finance, Memorandum N° 447-2014-EF/52.04, October 15, 2014, p. [2]. It has also failed to produce any “estimates of the impact of the value of the total Land Bond debt outstanding on Peru’s budget,” despite the fact that Justices of the Constitutional Tribunal have repeatedly confirmed that such estimates exist. PO6, Annex A, Request No. 1; *see* **Doc. CE-675**, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019. Peru has even acknowledged internally that—as late as mid-2016—it was unable to estimate the value of the outstanding debt (as opposed to the overall original debt), making clear that it had not seriously attempted to calculate the potential budgetary impact resulting from repayment. *See* **Doc. R-352**, Report N° 115-2016-EF 52.04 from DGETP to the Vice Minister of Finance, May 27, 2016, ¶ 9. Yet there is really no question that Peru could pay. Professor Edwards amply demonstrated this fact, without contradiction. Edwards, **CER-4** ¶ 282. In December 2015, Moody’s rating agency concluded that, with respect to the Land Bonds, “even under a worst case scenario, using the CPI-based methodology, the liability would represent less than 2.6% of GDP. Spread out over a number of years, the payouts would not materially affect the sovereign’s fiscal dynamics or its creditworthiness.” *See* **Doc. CE-21**, Moody’s Investors Service, FAQs on Peru’s Bonos de la Deuda Agraria, December 18, 2015; *see also* Olivares-Caminal, **CER-8** ¶ 98. And indeed, Peru now *admits* it had the means to pay: Peru’s own quantum experts concede that Peru “has the fiscal capacity to repay the Agrarian Bonds.” Peru Quantum Expert, **RER-5** ¶ 155.

422. Thus, the 2013 CT Order—and the entire Bondholder Process premised upon it—were measures “taken for reasons that are different from those put forward by the decision maker” and “inflict[] damage on the investor without serving any apparent legitimate purpose” and therefore arbitrary. *Cf. Lemire* Decision on Jurisdiction and Liability, **Doc. CA-29**, ¶ 262 (*citing* *EDF Award*, **Doc. CA-21**, ¶ 303).

423. *Third*, neither Peru nor its expert, Dr. Hundskopf, meaningfully rebuts the evidence of Justice Revoredo that the 2013 CT Order violated basic principles of Peruvian law as well as the Constitutional Tribunal’s own procedural rules. *See* Statement of Claim, **C-34** ¶ 213; Second Amended Expert Report of Delia Revoredo Marsano De Mur, July 13, 2018 (“Revoredo, **CER-5**”) ¶¶ 23, 40-54. While Dr. Hundskopf does not challenge the basic premise that the 2013 CT Order could not modify the original decision—and, in fact, agrees with Justice

Revoredo that the 2013 CT Order was not a “manipulative judgment” (see Hundskopf, **RER-2** ¶ 98; accord Revoredo, **CER-5** ¶ 45)—he defends the 2013 CT Order on the basis that it “does *not* say that the state can pay less than fair value.” Hundskopf, **RER-2** ¶ 102. As Prof. Castillo demonstrates, however, Dr. Hundskopf is wrong: the 2001 CT Decision required application of the current value principle; by devising a *sui generis* dollarization method that uprooted the standard CPI method used to update obligations of value in Peru, the 2013 CT Order is thus inconsistent with the very decision it purported to enforce. Castillo, **CER-9** ¶ 107. Dr. Hundskopf’s own reasoning, which relies on the Constitutional Tribunal’s balancing of Peru’s obligation to pay the Land Bonds’ updated value against the Peruvian State’s fiscal concerns, confirms that Justice Revoredo and Prof. Castillo are right to say that the 2013 CT Order detracted from the current value principle. See Hundskopf, **RER-2** ¶ 105. Moreover, Dr. Hundskopf fails directly to address the substance of Justice Revoredo’s opinion that the casting vote was improper in the circumstances, where there had effectively been no tie, and instead simply reiterates that, in the case of a potential tie, the Chief Justice is entitled to a casting vote. See *id.* ¶¶ 108–112; compare Revoredo, **CER-5** ¶¶ 54–64 with **Doc. CE-735**, Constitutional Tribunal, Comment to Minutes, July 16, 2013 (Justice Calle Hayen formally noting that he “did not understand how there could have been a tie”). And Dr. Hundskopf simply does not address at all the Constitutional Tribunal’s failure to afford Justice Mesía the 48 hours to which he was entitled to review the new draft decision and pen a dissent. See Statement of Claim, **C-34** ¶ 87. Ultimately, Dr. Hundskopf is content half-heartedly to defend the 2013 CT Order simply because “there is no other decision made by the Constitutional Tribunal that has left such resolution without legal effect.” Hundskopf, **RER-2** ¶ 97.

424. Peru’s assertion that the Constitutional Tribunal “confirmed the validity of its Resolution in subsequent decisions” is irrelevant because those subsequent decisions—the 2013 Resolutions—also does not supply any valid basis for the 2013 CT Order. Cf. Statement of Defense, **R-34** ¶ 266; but see **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013; **Doc. CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013. Instead these Resolutions merely show that CT *remained* under the irrational fear the Government had instilled, not that the Government did not instill it.

425. Thus, the 2013 CT Order was arbitrary for the additional reason that it was “taken in disregard of due process and proper procedure.” See, e.g., *Lemire* Decision on Jurisdiction and Liability, **Doc. CA-29**, ¶ 262 (collecting cases).

426. *Fourth*, against this background, Peru’s argument that its conduct could not be arbitrary or unjust because the Tribunal owes “deference” to the Constitutional Tribunal’s 2013 CT Order “as to

matters of Peruvian law” is both inapposite and wrong. *See* Statement of Defense, **R-34** ¶¶ 266 (“It is not for an international tribunal . . . to second-guess those determinations by Peru’s highest court under Peruvian law”), 272 (“the conclusions of Peru’s highest court as to matters of Peruvian law are subject to significant deference”).

427. As a preliminary matter, the defects in the Constitutional Tribunal’s decision and the process by which it was issued are not properly analysed “of Peruvian law” to which any deference could attach. In fact, the premise that the Government could not afford to pay the value of the Land Bonds under the CPI method is the sort of factual conclusion that the Constitutional Tribunal by the nature of its limited jurisdiction is not supposed to make. *See* Statement of Claim, **C-34** ¶ 210; Revoredo, **CER-5** ¶¶ 50-52; *Tecmed Award*, **Doc. CA-42**, ¶ 122.

428. Whatever deference may attach to the State’s regulation of its internal affairs, however, it necessarily finds its limits in arbitrary, discriminatory, and idiosyncratic conduct of the kind at issue here. As the Tribunal in *TECO v. Guatemala* explained,

deference to the State’s regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process. . . . [I]t is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.

TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award of December 19, 2013, **Doc. CA-187**, ¶¶ 482, 492, 493.

429. Other tribunals have, similarly, repeatedly reaffirmed that a State’s exercise of its sovereign right to regulate “is not unlimited and must have its boundaries.” *ADC Award*, **Doc. CA-2**, ¶ 423; *see also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of October 5, 2012, **Doc. CA-150**, ¶ 529; *Tza Yap Shum Award*, **Doc. CA-40**, ¶¶ 147-148. In the words of the *Tatneft* tribunal, “deference cannot stand in the way of safeguarding treaty standards of protection.” *Oao Tatneft v. Ukraine*, UNCITRAL, Award on the Merits of November 27, 1998, **Doc. CA-149**, ¶ 480. Otherwise, investor protections would be “rendered meaningless.” *Foresight Luxembourg Solar 1 S.A. .L., et al. v. The Kingdom of Spain*, SCC Case No. 2015/150, Final Award of November 14, 2018, **Doc. CA-113**, ¶ 364.

430. This basic principle holds true in cases involving decisions by a State's judicial organs, including its highest courts. As the tribunal in *Burlington v. Ecuador* explained,

while international tribunals should certainly consider decisions rendered by national courts, they are not bound by them. The purpose of investment arbitration is neutral adjudication of a dispute by a tribunal independent from both parties. If the international tribunal adjudicating the dispute were bound by the decision of an organ that forms part of one of the parties to the dispute, this purpose would be seriously jeopardized, if not defeated.

Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability of December 14, 2012, **Doc. RA-124**, ¶ 410.

431. Moreover, where, as here, a court acts in concert with the political branches in accordance with their political agenda, it is not entitled to any heightened deference. Based on the sequence of events and evidence that later came to light, the MEF influenced the CT's decision. Indeed, when the white-out scandal first broke, press articles detailed the series of events described above, including a late night visit by the President's advisor, Roy Gates, described the decision as a direct result of the MEF's influence on Chief Justice Urviola and its instructions to lay the groundwork for the MEF to issue a value-destroying dollarization formula, and described the white-out process in detail:

The "zero formula" was sponsored by Urviola with a new draft resolution at the session of July 16, 2013. Urviola, Álvarez and Eto voted in favor. The latter withdrew his signature from the original draft and adhered to the imposition of the MEF. Judge Mesía objected to this situation because the new draft was presented that day, there had not been time to study it and evaluate it. Urviola, under pressure from the government, ordered a vote. That same afternoon the resolution, with three votes in favor, was already on the website of TC and officially publicized for the approval of the government. Urviola . . . authorized the proposal that Mesía had signed together with Eto, the signature of Eto was erased with white out, which introduced terms that were not authorized by Mesía, to pretend that it was his singular vote. Urviola supplanted the vote of Mesía.

See **Doc. CE-197**, *Gestión, La Deuda Agraria y el Dr. Liquid Paper*, January 25, 2015.

432. While such a news report may sound questionable, Justice Eto remarkably corroborated key elements of this report when he gave sworn testimony that:

There was at some point *a historic meeting in the Ministry of Economy*, with the entire Constitutional Tribunal, because *that is an inter-institutional relationship and this is an inter-institutional issue*; and they explained the impact of the debt. And *the Minister of Economy himself* told us that that was the amount of the official debt as I more or less remember: 4.5 billion was the basic debt without interest and with interest, arrears, etc. it might reach the stratospheric amount of 18.5 billion.

Doc. CE-675, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, pp. 35-36 (emphasis added).

433. Justice Eto thus confirmed that the entire Constitutional Tribunal transported itself to attend an *ex parte* meeting at the MEF; that at the meeting Minister Castillo himself lectured the Constitutional Tribunal about a fictitious financial crisis if the Tribunal proceeded at last to require the State to pay the bondholders current value; far from seeing this meeting as compromising their integrity or independence, they treated it as an “inter-institutional issue” that was part of their “inter-institutional relationship”; and that as a consequence of this cross-branch cooperation the Constitutional Tribunal, or at least three of its Justices, contrived to purposely devalue the debt in accordance with the “principle of pro-government interpretation.” *Id.* at 32.

434. As if that were not enough, Constitutional Tribunal Justices have betrayed some of the political motivations behind their abrupt reversal, stating publicly that they viewed it as their responsibility to “defend” Peru from having to pay what it actually owed to bondholders. Chief Justice Urviola put an even finer point on it in his recent Congressional testimony, urging the Congress to put an end to its investigation by asking them to consider

the enormous damage that you would do to Peru with a decision that only sought to favor the *vulture funds* that have bought the bonds at a bargain price . . . we will not allow it and I think that this Congress cannot allow it.

Doc. CE-675, Transcript of Hearing, Sub-Commission of Constitutional Accusations, January 9, 2019, p. 13 (emphasis added).

435. In these extraordinary circumstances, there can be no doubt that the 2013 CT Order was not just the product of political interference from the MEF aided by misinformation about the fiscal impact, and not just the product of bizarre irregularities and illegalities, but also malice directed squarely at Gramercy. Thus, Peru cannot evade responsibility for its wrongful conduct by attempting to shield its actions behind the “deference” sometimes afforded to national courts. In crucial moments, when three of its justices chose to abandon their independence as guardians of individual rights, and cooperate with the government, and then use white-out and violate their internal rules to push out a groundless decision to “defend” the country, they were no longer acting like a court. As in *Flughafen*, the true objectives of the 2013 CT Order were to advance a policy of the central government. *Flughafen* Award, **Doc. CA-25** ¶¶ 698, 707-708.

436. *Finally*, Peru’s attempt to base the legality of its Bondholder Process on the 2013 CT Order obscures one crucial omission: the Supreme Decrees, on their face, fail to even comply with the 2013 CT Order’s objectives, flawed as those objectives were.

437. Even as the Constitutional Tribunal Justices erroneously concluded that CPI would “mak[e] impracticable the very payment of the debt,” and sought to depress the Land Bonds’ value, they demonstrated no desire to eradicate the Land Bonds’ value entirely. Quite the contrary: the Constitutional Tribunal explicitly acknowledged “that regardless of the option to be used in the process of quantifying the land reform debt, it will *amount to a fairly large figure*, which will undoubtedly generate an inevitable fiscal impact.” *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 29 (emphasis added). They cited this conclusion as the basis for granting the MEF flexibility in establishing payment terms, *i.e.*, establishing payments over time and in forms other than cash. However, they do not suggest that this impact could serve a legitimate basis for *devaluing* the debt, rendering the MEF’s subsequent destruction of value through its Supreme Decree formulas at odds with the decision itself. Paying *five* people *US\$65,000* is nothing like the “rather big figure” having “an inevitable fiscal impact,” and hence cannot be the kind of dollarization the Constitutional Tribunal anticipated.

438. Further, the Constitutional Tribunal explicitly relied on Emergency Decree 88-2000 as precedent in authorizing its choice of dollarization over CPI. *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 21. Yet as Professor Edwards explains, the 2014 Supreme Decree formula yields a value that is *182 times smaller* than

that of the MEF’s prior Emergency Decree 88-2000. Edwards, **CER-4** ¶ 76.

439. Similarly, the 2013 CT Order itself did not appear to envision the MEF’s formula as a mandatory cram-down. Instead, it provides that the MEF “may establish that the bondholders agree with the State on other payment formulas, according to current law.” *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 29. This approach is in tension with that taken by the MEF in its Supreme Decrees, which provide no opportunity for bondholders to suggest an alternative to the MEF’s payment formulas, and indeed even require the mandatory application of the MEF’s formula in ongoing judicial proceedings. *See, e.g., Doc. CE-37*, Supreme Decree N° 17-2014-EF; *Doc. CE-38*, Supreme Decree N° 19-2014-EF.

440. Indeed, the formula itself also does not appear entirely consistent with the 2013 CT Order, which defines the updating method as using the “conversion of the unpaid principal into United States dollars as of the date of default on the payment of the coupons of the bond, plus the interest rate of United States Treasury bonds.” *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 25. However, the 2013 CT Order requires more than just updating—it requires the Supreme Decree formula to include “the updated amount of the land reform debt bonds, *plus the interest.*” *See id.* ¶ 28 (emphasis added). As Prof. Edwards explains, the U.S. Treasury Bond rate applied in the MEF formula is entirely inappropriate as an *interest rate*, as it does not adequately account for opportunity cost. Edwards, **CER-4** ¶ 215. And the 2013 CT Order itself makes clear that it considered the U.S. treasury bond rate as part of the *updating method*—*i.e.*, the method used to account for inflation—but that it would still separately require interest to account for opportunity cost and thus fully compensate bondholders. *Cf. Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, ¶ 25 *with id.* ¶ 28.

441. As such, in addition to all of the other the reasons described above, the Bondholder Process cannot be explained away as simply implementation of the 2013 CT Order for the simple reason that it fails to do so in a manner that is consistent with the Order itself.

(d) Peru’s Mischaracterization of the Law Does Not Make Gramercy’s Claim Inadmissible.

442. Rather than rebutting Gramercy’s evidence of the fundamental procedural defects in the 2013 CT Order, Peru argues that Gramercy does not have standing to bring a claim arising from the 2013 CT Order because it was not a party to the Constitutional Tribunal proceeding, has allegedly not “exhausted local remedies” against that decision, and has “boycotted” the Bondholder Process. *See* Statement of Defense, **R-34** ¶¶ 219, 250, 263-264.

443. These objections are reductionist, inapposite, and wrong. Peru's objection seeks to reduce Gramercy's Article 10.5 claim to a claim that the 2013 CT Order was wrong as a matter of Peruvian law, so as to argue that only a named litigant should be allowed to challenge that wrong outcome. That approach is misguided for three reasons: Peru does not answer Gramercy's case that Peru prevented Gramercy from having *access* to the courts in the first place; the 2013 CT Order undoubtedly affected Gramercy's rights in any event because it had *erga omnes* effect and led to the creation of the exclusive Bondholder Process; and given Peru's manipulation of the 2013 CT Order, there could be no prospect of effective further "remedies" against the Constitutional Tribunal in any event.

444. *First*, Peru mischaracterizes Gramercy's case, which goes beyond the invalidity of the 2013 CT Order on its own terms. Gramercy does not claim that it has been subjected to unjust treatment by the courts *as a litigant*, but that Peru—through the totality of the Bondholder Process—deprived bondholders like Gramercy of any access to the courts in the first place. As Prof. Jan Paulsson notes in his treatise on denial of justice, "once one accepts . . . that states have an obligation to maintain a decent and available system of justice, it simply cannot be accepted that the state should be freed from its obligation by the simple expedient of preventing or perverting the judicial process by executive or legislative fiat." Paulsson, Jan, *Denial of Justice in International Law*, 2005, **Doc. CA-156**, p. 46.

445. That is exactly what Peru has done here. The 2013 CT Order, along with the 2013 Resolution, made what would become Peru's flawed Bondholder Process the only available procedure for bondholders to trade in their defaulted debt, while simultaneously shutting the courthouse doors to them. *See* Statement of Claim, **C-34 ¶¶ 130-134**. Peru's argument that the Constitutional Tribunal confirmed its own ruling in the 2013 Resolutions (*cf.* Statement of Defense, **R-34 ¶¶ 107-109**) only makes matters worse. The 2013 Resolutions only served to further aggravate the effects of the 2013 CT Order, and to pave the way for the subsequent Supreme Decrees, by declaring that whatever procedure the MEF came up with would be exclusive. *See* **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013; **Doc. CE-183**, Constitutional Tribunal, Resolution, File N°00022-1996-PI/TC, November 4, 2013; *see also* Statement of Claim, **C-34 ¶¶ 101-106**. The 2014 Supreme Decrees, in turn, required a withdrawal of all claims in order to participate, and similarly provided that the valuation methodology must also be applied in ongoing judicial proceedings.

446. A State can obviously be internationally responsible for denying a claimant access to a judicial remedy—whether conceived of as a customary international law doctrine of denial of justice, or an express treaty right to the minimum standard of treatment and fair and equitable

treatment. *See, e.g.*, Paulsson, Jan, *Denial of Justice in International Law*, 2005, **Doc. CA-156**, p. 134 (“The right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice. Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect.”); *see also* Brownlie, Principles of Public International Law, **Doc. CA-91**, pp. 506-507 (“Denial of justice exists when there is a denial, unwarranted delay or *obstruction of access to courts*, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”) (emphasis added); **Doc. CE-398**, *Mondev v. United States*, Counter-Memorial on Competence and Liability of the United States, pp. 43-44 (noting that “a court’s actions may constitute a ‘procedural’ denial of justice, i.e., a *foreigner may be wrongly denied access to a tribunal* or the tribunal may act in such an unfair or in such a dilatory fashion that no justice is forthcoming” (citing Sohn, Louis B. & Baxter, Richard R., *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), **Doc. CA-184**, Art. 6 (Denial of access to a tribunal or administrative authority)) (emphasis added); Schwebel, Stephen M., *The United States 2004 Model Bilateral Investment Treaty and Denial of Justice in International Law*, in *International Investment Law for the Twenty-First Century*, 2009, **Doc. CA-180**, p. 520 (“[A] denial of justice . . . essentially refers to the failure of a State to accord an alien *access to its courts*, or to accord the alien *due process in those courts*”) (emphasis added).

447. Peru’s reliance on *Arif v. Moldova*, its sole authority for the proposition that “a denial of justice claim ‘can only be successfully pursued by a person that was denied justice through court proceedings in which it participated as party,’” is thus misplaced. *Cf.* Statement of Defense, **R-34** ¶ 263 (emphasis in original). The allegations in *Arif* did not concern a denial of *access* to courts, but deficiencies in specific court decisions such as a lack of legal basis for a decision in the Civil Procedure Code of the respondent State. *See Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of April 8, 2013, **Doc. RA-128**, ¶¶ 446, 455. The claimant in that case had also argued that there could not be a denial of justice unless it had raised treaty claims in the local forum. *Id.* ¶ 430. Moreover, Peru’s selective quotation of that decision is misleading. The tribunal held that “[c]onversely to a free-standing claim for denial of justice which can only be brought by a person that has participated in the national court proceedings, the standard of fair and equitable treatment also protects the foreign shareholder in a local company.” *Id.* ¶ 438. Leaving aside the questionable premise that only a named litigant can argue denial of justice under international law—which is contrary to the ICJ’s holdings in, among others, *ELSI*—even the *Arif* tribunal recognized that a standard of *treatment* covers a broader range of claimants.

448. *Amto* is also factually distinguishable, among other things because the tribunal found that claimant was not in fact denied access to the courts. *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award of March 26, 2008, **Doc. RA-91**, ¶ 78. With respect to the legal principle, however, *Amto* supports Gramercy’s position: the tribunal recognized that denial of justice “include[s] both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts).” *Id.* ¶ 75 (emphasis added).

449. Peru’s objection thus fails because denial of justice by denying access to the courts—what has been called a procedural denial of justice—is necessarily without regard to whether the affected claimant was a named party to a particular, impugned judicial proceeding.

450. *Second*, the proposition that even a substantive denial of justice can occur only if the claimant itself was a named litigant is wrong as a matter of law and principle. In *ELSI*, a chamber of the International Court of Justice allowed the United States to bring a claim of arbitrary conduct on behalf of American investors arising out of Italy’s conduct affecting their investment company. *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. Rep. 15, July 20, 1989, **Doc. CA-107**. The litigant in the domestic proceedings was not the U.S. investors and not even the local subsidiary itself, but rather the subsidiary’s trustee in bankruptcy. The chamber noted that “the way in which the matter was pleaded before [local courts] was not for [the American investors] to decide but for the trustee.” *Id.* ¶ 59.

451. As Peru acknowledges, investment tribunals have also recognized that a claimant may bring a denial of justice claim arising out of a domestic court proceeding to which it was *not* a named party. *Cf.* Statement of Defense, **R-34** ¶ 263 (acknowledging that denial of justice could arise where the “local investment vehicle participated as a party.”); *see also* Paulsson, Jan, *Denial of Justice in International Law*, 2005, **Doc. CA-156**, p. 104. Several arbitration cases involving local subsidiaries confirm this principle. In *Azinian v. Mexico*, the U.S. claimants sued in international arbitration for harm allegedly done to their Mexican investment company. *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of November 1, 1999, **Doc. CA-82**. The tribunal in *Alghanim v. Jordan* also anticipated this situation. *Alghanim, Doc. RA-151*, ¶ 334. The NAFTA tribunal in *Mondev v. United States* did not question the standing of a Canadian parent company to bring a claim of denial of justice arising out of a U.S. state court decision against the claimant’s U.S. subsidiary. *See Mondev Award*, **Doc. CA-34**, ¶¶ 1, 126. The tribunal in *Dan Cake v. Hungary* found a denial of justice where a Hungarian court refused to convene a hearing and deprived the local company, in which the claimant held shares, the chance to avoid the sale of its assets and demise as a legal person. *Dan Cake S.A. v.*

Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability of August 24, 2015, **Doc. CA-101**, ¶¶ 145-154.

452. While the factual scenarios that have reached investment tribunals so far have typically involved a vertical relationship between the local litigant and the international claimant, they are all consistent with the broader rationale that non-parties have standing to bring international claims for denial of justice when their rights are affected by proceedings to which they are not party. Consistent with these decisions of international courts and tribunals, the real question is therefore not who was the named party to the litigation, but whether the relevant local process constitutes *treatment* of the investor that could engage a treaty standard like Article 10.5.

453. That is undoubtedly the case here. The 2013 CT Order affects Gramercy's rights even if it was not a named litigant. Here again, formalism cannot trump substance. Decisions of the Constitutional Tribunal have *erga omnes* effect. See Peruvian Code of Constitutional Procedure, **Doc. CA-159**, Art. 81 (“*Las sentencias fundadas recaídas en el proceso de inconstitucionalidad . . . [t]ienen alcances generales*”); *id.* (“*Las sentencias del Tribunal Constitucional en los procesos de inconstitucionalidad . . . tienen autoridad de cosa juzgada, por lo que vinculan a todos los poderes públicos y producen efectos generales desde el día siguiente a la fecha de su publicación.*”). Peru could not possibly deny that the 2013 CT Order affected the rights of all bondholders in determining that the current value of all Land Bonds would be calculated in a particular way. The 2013 CT Order says so in terms and that was, of course, its very purpose. Cf. **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013, “Has Resolved” Section, ¶ 2 (“The updating method set forth in foundation 25 shall be applied to the benefit of *all bondholders* with outstanding claims on their bonds, in their condition as persons whose property has been expropriated, heirs, or assignees”) (emphasis added).

454. *Finally*, Peru's claim that Gramercy has not exhausted local remedies against the 2013 CT Order is entirely inapt. The issue is the failure of the system as a whole to provide access to justice, not just the inherent merits or otherwise of a particular judgment. The purpose of the exhaustion of remedies rule is to allow the respondent State an opportunity to redress the wrongs of its judiciary. See, e.g., Shaw, *International Law* (2003), **Doc. CA-182**, p. 730 (“[T]he purpose of the rule is . . . to enable the state to have an opportunity to redress the wrong that has occurred within its own legal order.”). In a case like this—where the State is so intent on depriving a class of investors of the value of their investment that its executive interferes with the procedures of its highest constitutional court in such extraordinary ways—the notion that Gramercy cannot challenge the decision because it was not a named party, or that it should be required to exhaust unspecified additional remedies so as to afford Peru an opportunity to correct the very outcome

that the State deliberately caused, is nonsensical. *See also Rupert Joseph Binder v. Czech Republic*, UNCITRAL Final Award of July 15, 2011, **Doc. CA-85**, ¶ 451 (“[W]hen a set of decisions or procedures in relation to the same investor (or class of investors) or in relation to the same issue reveals a state of a manifestly defective judicial or administrative process, *irrespective of whether all local avenues for redress have been pursued* the test will be met.”) (emphasis added); *Dan Cake Decision on Jurisdiction and Liability*, **Doc. CA-101**, ¶ 154 (finding a denial of justice and rejecting the objection that there were any local remedies which ought to have been exhausted where “[t]he absence of any reasonably available further recourse against the Court order is such that, in the circumstances of this case, the breakdown must be treated as ‘systemic’”).

455. Moreover, Peru’s abstract argument that Gramercy should have first exhausted local remedies fails even to identify what local remedies Gramercy could have exhausted as a practical matter. The Constitutional Tribunal is, after all, Peru’s highest constitutional court, whose decisions are not subject to any further appeal in Peru.

456. Furthermore, Gramercy has already been shut out of the Peruvian process when it attempted to avail itself of what might have been construed as a local remedy. In 2015, Gramercy joined ABDA, Peru’s leading bondholder association, and 100 other individual bondholders in seeking clarification of the 2013 CT Order. *See* Statement of Claim, **C-34** ¶ 104. The bondholders, including Gramercy, submitted a detailed petition, including expert reports from a former Peruvian Minister of Finance, prominent Peruvian economists, and a U.S. professor who is a highly esteemed authority on macro-economics. *Id.* The petition and reports proved and explained in detail the flaws in the formula, which the documents produced in this case now prove were entirely valid. The Constitutional Tribunal dismissed the case in a mere *three weeks*, and without even receiving opposition, for lack of “social representativeness.” *See* Statement of Claim, **C-34** ¶ 117; **Doc. CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013, “Whereas” section, ¶ 8.

457. There is therefore no question that the 2013 CT Order is “final and binding” and cannot “be corrected by the internal mechanisms of appeal,” in the words of the *Arif v. Moldova* tribunal on which Peru itself relies. *See Arif Award*, **Doc. RA-128**, ¶ 443. There is simply no further recourse available to be exhausted.

458. Peru also attempts to obscure the fact that there can be no meaningful further prospect of relief for Gramercy in the local courts by claiming that Gramercy “boycotted” the Bondholder Process, and is therefore not entitled to complain about it. Statement of Defense, **R-34** ¶ 219. This argument is both circular and perverse. Gramercy has not submitted to the Bondholder Process precisely because it is a violation of

the Treaty, and because it was required to waive and discontinue all other proceedings relating to the same measures in order to commence this arbitration. If Gramercy had submitted to the Process, Peru would no doubt complain that it had elected a fork in the road and could not then bring Treaty claims.

C. Peru Has Deprived Gramercy of Effective Means to Assert Claims and Enforce Its Rights in Breach of Article 10.4 of the Treaty.

459. Peru’s argument that its obligation to accord most-favored-nation treatment in Article 10.4 of the Treaty silently excludes certain kinds of treatment—in particular, Peru’s obligation to provide investors with effective means to enforce their rights—is wrong as a matter of law. Moreover, Peru does not even grapple with the striking factual evidence that has now come to light about the outcome of its “Bondholder Process.” Rather than providing effective means to enforce them, that process has eviscerated bondholders’ rights.

1. Peru Cannot Import into Article 10.4 Limitations from Other Treaties or Other Cases to which the State Parties Here Did Not Agree.

460. For the reasons Gramercy explained, Peru breached the MFN clause in the Treaty by failing to provide Gramercy effective means to enforce its rights while offering such protection to Italian investors under the Italy-Peru BIT. *See* Statement of Claim, **C-34** ¶¶ 225-238. Peru’s principal defense is that Article 10.4 of the Treaty should be read to exclude treatment that is provided to third party nationals under investment treaties, because the United States has expressly said so in relation to *other* treaties, and because the investment tribunal in *İçkale v. Turkmenistan* reached this conclusion in interpreting the Turkey-Turkmenistan treaty. *Cf.* Statement of Defense, **R-34** ¶ 295. Neither of these attempts to rewrite the language of the Treaty can succeed.

461. *First*, Peru does not deny that the plain terms of the Treaty are broad enough to cover substantive protections offered in Peru’s other investment agreements. Article 10.4 of the Treaty provides that Peru “shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” **Doc. CE-139**, Treaty, Art. 10.4. On its plain terms, “treatment” “with respect to . . . management” of an investment covers the granting of substantive protections under investment treaties. For instance, when interpreting a similar MFN clause that applied to “treatment” “as regards [the investor’s] management, maintenance, use, enjoyment, or disposal of their

investments,” the *Suez & Vivendi v. Argentina* tribunal found that “treatment” meant “rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.” *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of August 3, 2006, **Doc. CA-186**, ¶ 57. The tribunal further concluded that “maintenance” of an investment “includes the protection of an investment.” *Id.*

462. Peru does not and cannot deny that the effective means obligation is a form of “rights and privileges” granted to protected investors under the Peru-Italy BIT. It also cannot deny that allowing an investor to enforce rights or claims relating to investments is a form of protecting the investment, and thus relates to the “management” of an investment. Therefore, the plain terms of Article 10.4 show that the MFN standard applies to substantive provisions, and in particular the effective means provision, found in other Peruvian treaties.

463. The ordinary meaning of “in like circumstances” also does not exclude the scenario of third party investors who enjoy better investment treaty protections than Peru grants U.S. investors under the Treaty. There is no basis on the plain language of the Treaty to exclude *de jure* preferential treatment and require *de facto* preferential treatment. As the ILC noted in its 2015 Report on MFN clauses, “[t]he question arises whether in fact the inclusion of the qualification of ‘in like circumstances’ adds anything to an MFN clause,” since the *ejusdem generis* principle already limits MFN clauses to the same subject-matter and “in respect of those in the same relationship with the comparator.” See International Law Commission, Final Report of the Study Group on Most-Favoured-Nation Clause (2015), **Doc. CA-126**, ¶ 72; see also International Law Commission, Draft Articles on Most-Favoured-Nation Clauses with Commentaries, **Doc. CA-125**, Arts. 9-10 (enshrining the principle of *ejusdem generis*). Foreign investors are “in like circumstances” if both are protected investors who are granted investment protections under an investment treaty.

464. That is precisely the approach that the tribunal endorsed in *Bayindir*, which Peru itself invokes. Cf. Statement of Defense, **R-34** ¶ 295. In that case, the MFN clause guaranteed “treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.” *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of August 27, 2009, **Doc. RA-102**, ¶ 386. As Peru argues, the tribunal engaged in a “fact specific” inquiry to determine whether *Bayindir* was in a “similar situation” as other foreign investors in order to assess whether claimant’s expulsion from a project constituted the establishment of preferential treatment for other investors. *Bayindir* Award, **Doc. RA-102**, ¶ 389. However, Peru omits the fact that the

tribunal *also* found that this MFN clause, which applied “in similar situations,” allowed claimant to “import” an FET provision from another investment treaty into the BIT, which had none, because “[t]he ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries.” *Id.* ¶ 157. Likewise, in *Euram v. Slovakia*, the tribunal reasoned that:

the Claimant in the present case is not making a claim for relief for an alleged breach of the MFN clause but is arguing that the effect of that clause is that it is entitled to the benefit of higher standards of protection provided for in other treaties. Accordingly, it is not a matter of comparison with the actual treatment accorded to a specific third State investor, but of comparison between the standard of treatment guaranteed to a group of investors by one treaty and the standard of treatment guaranteed to another group of investors by another treaty.

European American Investment Bank AG (EURAM) v. The Slovak Republic, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012, **Doc. CA-108**, ¶ 435.

465. Hence, as Andrew Newcombe and Lluís Paradell note:

In principle, determining the appropriate comparator where the treatment in question is that under a third state IIA is straightforward. The MFN clause will apply where any third state investment or investor is entitled to more favourable treaty protections than those afforded to an investment or investor under the basic treaty. In these cases, *the fact that any third state investors or investments are or could be entitled to more favourable treaty protections is sufficient to put the investors or investments in like circumstances for the purpose of applying the MFN clause.*

Newcombe, Andrew and Paradell, Lluís, *Most-Favoured-Nation Treatment*, in *Law and Practice of Investment Treaties: Standards of Treatment*, 2009, **Doc. CA-146**, §5.20 (emphasis added).

466. UNCTAD makes the same observation:

The comparison test has in practice worked differently depending on what claimants were seeking from the MFN clause. When claimants were seeking better treatment, whether material or effective, such as in the cases referred to above, tribunals have compared treatment amongst two foreign investors who are in identical circumstances. But when claimants have invoked the MFN treatment clause in order to attract the benefits of ISDS or substantive protection provisions from third treaties, *tribunals have been satisfied with the mere fact that the claimant qualifies as an “investor”* under the basic treaty and have not gone into actually comparing the investor with another foreign investor from a third country.

United Nations, UNCTAD Series on Issues in International Investment Agreements II, Most-Favoured-Nation Treatment, **Doc. CA-192**, pp. 63-64.

467. Therefore, the fact that an Italian investor is entitled to more favorable treaty protection under the Italy-Peru BIT is sufficient to put Gramercy in “like circumstances” and to trigger the Treaty’s MFN standard.

468. Moreover, the Treaty here contains additional language which confirms this conclusion on the ordinary meaning of Article 10.4. The clearest evidence that the State Parties here did not intend to exclude third state investment treaties from the scope of treatment that could trigger the MFN clause is footnote 2 to the English version of Article 10.4. That footnote expressly states that “treatment” for purposes of Article 10.4 “does not encompass dispute resolution mechanisms . . . that are provided for in international treaties or trade agreements.” **Doc. CE-139**, Treaty, Art. 10.4, n. 2. But that footnote does not exclude from the scope of qualifying “treatment” *other* kinds of protections “that are provided for in international treaties or trade agreements.”

469. This footnote was proposed by the United States in response to the *Maffezini* decision, which had applied the MFN provision to dispute resolution provisions in the context of an investor-state arbitration, several years before the start of the Treaty’s negotiations. See **Doc. CE-416**, 1st Round of the Andean-U.S. FTA Negotiations, May 18-19, 2004. But even before *Maffezini*, tribunals and international courts had, for decades, applied MFN clauses in treaties of friendship, commerce and navigation, as well as modern investment treaties, to import substantive protections, including protections relating to the administration of justice. See Vandeveld, **Doc. CA-194**, p. 412

(“modern FCNs . . . required each party to afford nationals and companies of the other party with MFN and national treatment with respect to access to courts of justice, administrative tribunals, and agencies in pursuit and defense of their rights”). In the seminal case of *Ambatielos* of 1956, the arbitral commission found that the substantive protection of the right to administration of justice was part of the MFN treatment offered under the Anglo-Greek Treaty of Commerce and Navigation of 1886. *Ambatielos, Greece v. U.K.*, Judgment, 1952 I.C.J. 28, **Doc. CA-78**, p. 107; *see also Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005, **Doc. RA-73**, ¶ 215 (noting that *Ambatielos* “relates to provisions concerning substantive protections in the sense of denial of justice in the domestic courts”); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of January 31, 2006, **Doc. RA-164**, ¶ 112 (“The Tribunal will observe that in [*Ambatielos*], Greece invoked the most-favored-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated ‘in accordance with ‘justice’, ‘right’, and ‘equity’”). This longstanding historical context confirms that had the Parties to the Treaty intended to preclude the application of MFN treatment to substantive provisions, they could and would have done so expressly, including in the specific footnote that addresses this very question.

470. Thus, the State Parties to this Treaty clearly had in mind the question of which provisions of other international agreements could constitute “treatment” that triggers Article 10.4, and they deliberately did not exclude effective means obligations, or anything else apart from dispute resolution. As the *MTD v. Chile* tribunal recognized in interpreting express carve-outs from the MFN clause in the treaty before it, *expressio unius est exclusio alterius*. *See, e.g., MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, **Doc. CA-143**, ¶ 104 (“the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. *A contrario sensu*, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause”).

471. Such a conclusion is also consistent with the United States’ negative list negotiating approach and trade objectives of ensuring broad protection for U.S. investments abroad. *Cf. Allgeier*, **CER-7**, ¶¶ 13-15. It is not for this Tribunal to seek to impose a silent limitation in the kind of “treatment” that triggers Article 10.4 that the State Parties themselves did not see fit to include when they deliberately directed their minds to it.

472. *Second*, in contrast, Peru’s argument that, despite their plain meaning, the “treatment” and “circumstances” to which Article 10.4 refers contain a silent limitation as to the kinds of treatment that could qualify has no basis in principles of treaty interpretation. Peru appears to derive this limitation from (1) the United States’ submissions as respondent in the *Methanex* case under NAFTA, (2) a footnote to the 2018 United States-Mexico-Canada Agreement (“*USMCA*”), (3) the plurality opinion of the tribunal in *Ickale v. Turkmenistan*, which addressed a different treaty, and (4) the fact that this Treaty also contains an express reference to denial of justice in Article 10.5. *See* Statement of Defense, **R-34** ¶¶ 295-296, n. 637-638.

473. But none of these extraneous considerations can possibly establish either “the clear intent” or the “agreement of the Contracting Parties” to *this* Treaty, as Peru claims. *Cf.* Statement of Defense, **R-34** ¶ 296. None of these elements fit anywhere within the Vienna Convention framework on the interpretation of treaties. The United States’ arguments as respondent in *Methanex* under NAFTA are of little relevance, not least because NAFTA does not contain the equivalent of footnote 2 to the Treaty expressly excluding dispute resolution mechanisms *but not other* provisions of international agreements. *See* Statement of Defense, **R-34** ¶ 295, n. 638 (*citing Methanex 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 of October 26, 2001, p. 9); *compare* **Doc. CE-720**, NAFTA, Art. 1103 *with* **Doc. CE-139**, Treaty, Art. 10.4.2, n. 2. As Professor Schreuer notes, “[a] unilateral assertion of the disputing party, on the meaning of a treaty provision, made in the process of ongoing proceedings is of limited value. Such a statement will be perceived as self-serving since it is probably determined by the desire to influence the tribunal’s decision in favour of the state offering this interpretation.” Schreuer, Christoph & Weiniger, Matthew, *A Doctrine of Precedent?*, Oxford Handbook of International Investment Law, **Doc. CA-177**, p. 1199.

474. Likewise for the differently worded footnote in the new USMCA, which is not at all “identical” as Peru claims but expressly excludes “substantive obligations” from investment treaties, where the Treaty here does not. *See* USMCA, **Doc. RA-153**, Art. 14, n. 22. One could not possibly accept Peru’s argument that express exclusions in a multilateral treaty negotiated by the United States 15 years later and to which Peru is not even a party can be superimposed on the Treaty text that the United States and Peru in fact agreed.

475. To the contrary, the fact that the 2018 USMCA expressly excludes the existence of “substantive obligations” in other agreements from the kind of treatment that triggers the MFN clause only bolsters Gramercy’s argument that the Treaty here is different, and that if the

State Parties to the Treaty intended any limitations to the scope of the MFN clause, they would have expressly stated them.

476. *Third*, whatever its merits on its own terms, the *İçkale* decision does not determine how this Tribunal should interpret this Treaty. The Turkey-Turkmenistan BIT at issue in *İçkale* did not contain the kind of express carve-out for “dispute resolution mechanisms,” but not *other* provisions, of “international agreements.” See *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of March 8, 2016, **Doc. RA-142**, ¶ 326. The fact that the tribunal in that case held that the MFN clause at issue there, without the kind of express carve-out the Treaty contains here, did not allow it to import substantive protections from a second treaty that were not contained in some form in the basic treaty, is neither binding in and of itself, analogous in its reasoning, nor reflective of any kind of consensus in arbitral practice. Indeed, *İçkale* itself features two partially dissenting opinions, albeit ostensibly on other grounds. Many tribunals have reached the opposite conclusion on this very issue, including the tribunal in *ATA v. Jordan* in which Peru’s legal expert Prof. Reisman was a member of the unanimous panel. See *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, **Doc. CA-81**, ¶ 125, n. 16; see also *Daimler v. Argentina*, ICSID Case No. ARB/05/1, Award of August 22, 2012, **Doc. CA-19**, n. 376; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of October 2007, **Doc. CA-174**, ¶¶ 131-132; *Al-Warrag v. Indonesia*, Final Award of December 15, 2014, **Doc. CA-5**, ¶ 551; *EDF v. Argentina*, ICSID Case No. ARB/03/23, Award of June 11, 2012, **Doc. CA-21**, ¶ 931.

477. In fact, the only case directly to address the application of an effective means obligation through a MFN clause was *White Industries v. India* and it allowed that claim. See *White Industries Award*, **Doc. CA-44**, ¶ 11.2.1; see also Statement of Claim, **C-34** ¶ 227. Peru’s only answer to this case is to attempt to distinguish it, in a footnote, on the grounds that the treaty there did not contain a “limitation of scope” of “like circumstances.” Cf. Statement of Defense, **R-34** n. 637. But as noted above, that does not affect the principle, or serve to import a limitation on what kinds of “circumstances” qualify as being like circumstances, which the Treaty’s text nowhere contains.

478. *Finally*, the fact that the Treaty expressly mentions denial of justice also does not create a silent limitation on the nature of the “treatment” contemplated by the MFN clause. Cf. Statement of Defense, **R-34** ¶ 296. Contrary to Peru’s argument, the importation of the effective means standard would not “violate the clear intent and agreement of the Contracting Parties” (*id.*) because the very purpose of the MFN clause is precisely to incorporate better standards of treatment from other investment agreements. As the *White Industries* tribunal reasoned in rejecting the same argument, invoking substantive protections from a third party treaty “does not ‘subvert’ the negotiated

balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.” *White Industries*, **Doc. CA-44**, ¶ 11.2.4; *see also Le Chèque Déjeuner v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, March 3, 2016, **Doc. CA-131**, ¶ 162 (“The self-evident purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT. The purpose of such a clause is to ensure that there will be no discrimination between foreign investors”); *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction of July 3, 2013, **Doc. CA-114**, ¶ 54 (“it is in the nature of an MFN clause to be used to displace a treaty provision deemed less favorable in favor of another clause”).

479. Gramercy’s claim is thus fully consistent with the *ejusdem generis* limitation on MFN clauses. *See* International Law Commission, Draft Articles on Most-Favoured Nation Clauses with Commentaries (1978), **Doc. CA-125**, Arts. 9-10 (“Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause”). Gramercy is not seeking to import an entirely alien substantive obligation, but a better and more protective articulation of an existing protection: the minimum standard of treatment, which includes the obligation to provide access to justice. Peru does not contest that the effective means standard is encompassed within the fair and equitable treatment standard. *Cf.* Statement of Defense, **R-34** ¶ 296. As the *Chevron* tribunal recognized, “a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law.” *Chevron* Partial Award, **Doc. CA-12**, ¶ 244.

480. Neither can one draw any conclusion from the fact that the United States historically negotiated express effective means provisions in its treaties, as Peru claims. *Cf.* Statement of Defense, **R-34** ¶ 296. Not including a standalone effective means provision but at the same time not expressly excluding it from the scope of the MFN clause—which this Treaty does for other matters—is entirely consistent with an intent that U.S. investors benefit from the effective means protection.

481. Peru cannot therefore avoid its obligation to provide Gramercy effective means of enforcing its rights by attempting to read into the Treaty more extra-textual limitations inconsistent with its plain terms, object and purpose, and circumstances of its conclusion.

2. Peru’s Mischaracterization of the Bondholder Process Cannot Rebut Its Effects.

482. Peru’s conclusory assertions that it complied with the effective means standard because “the Constitutional Tribunal’s ruling

was proper as a matter of Peruvian law and cannot give rise to an international law breach” and that the “Bondholder Process ensures due process” do not suffice. *Cf.* Statement of Defense, **R-34** ¶¶ 297-298.

483. Peru does not and cannot defend the outcome of its Bondholder Process, which is anything but “effective.” The facts speak for themselves. As noted above, after *five* years, all that process has achieved is to award just \$65,000 to just *five* bondholders—with hundreds more stuck in the Kafkaesque perambulations of its various gateways. *See* **Doc. R-367**, Administrative Process Status Table. Any system that awards in the order of 0.0015% of what the State itself estimated it owed more than ten years ago cannot, by any measure, be “effective.” *See* Section III.B above.

484. Moreover, the August 2013 CT Resolution and the 2014 Supreme Decrees indisputably denied GPH the ability to continue pursuing current value in Peruvian civil courts. At the time, GPH had seven cases active. One of them, the Pomalca case, had made great progress in the Fifth Civil Court of Chiclayo. On August 26, 2014, the court-appointed public accountants submitted to the court a joint expert report that applied CPI and compound interest, valuing 44 of Gramercy’s Land Bonds at a total of approximately US\$250 million. *See* **Doc. CE-342**, Fifth Specialized Civil Court, Expert Report, File N° 09990-2006-0-1706-JR-CI-09, August 14, 2014; Koenigsberger, **CWS-4** ¶ 13.

485. Following the 2013 CT Order, the August 2013 CT Resolution clarified that the Bondholder Process was the exclusive method of valuing the Land Bonds, which the Supreme Decrees reiterated as they implemented a dollarization approach. **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, “Whereas” Section, ¶ 16; *see also* Statement of Claim, **C-34** ¶ 102. Accordingly, Peru’s measures deprived Gramercy of the most basic form of effective means to assert claims and enforce its rights, *i.e.*, continued normal access to the country’s civil court system, which as explained above had consistently vindicated bondholders’ rights to CPI-updated value plus interest. *See* Section III.B.1.

486. In light of these facts, all of Peru’s attempts to minimize or eviscerate the meaning of providing “effective means to assert claims and enforce rights” cannot succeed.

487. *First*, just like with other Treaty violations, the fact that a particular court decision allegedly complies with local law does not insulate it from scrutiny under the Treaty, and the various decisions and decrees that created the Bondholder Process did *not* comply with Peruvian law in any event. *Cf.* Statement of Defense, **R-34** ¶ 297; *see generally* Bullard, **CER-10**; *see also* VCLT, **Doc. CA-121**, Art. 27 (“A

party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

488. *Second*, Peru’s argument that an effective means claim must “concern the judicial system as a whole” and that “the outcome of the 2013 Constitutional Tribunal proceedings . . . is outside the scope of the effective means standard” is both wrong and misplaced. *Cf.* Statement of Defense, **R-34** ¶ 297. Gramercy’s claim *does* involve the system “as a whole,” and not just the 2013 CT Order on its face. Contravening the 2001 CT Decision and the current value principle, the Constitutional Tribunal chose a dollarization method for valuing the Land Bonds on the basis of arguments that had no support in the evidence on the record and called on the executive to implement a bondholder process, *see* Section III.B.3; the August 2013 CT Resolution confirmed that the Bondholder Process was the exclusive mechanism to value the Land Bonds and that Gramercy no longer had the right to litigate the issue in local courts, *see* **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, “Whereas” Section, ¶ 16, “Rules” Section, ¶ 4.d; the MEF then issued Supreme Decrees on the basis of the 2013 CT Order that was issued under irregular circumstances and with no apparent support for its reasoning and no consultation with bondholders, *see* **Doc. CE-37**, Supreme Decree N° 17-2014-EF, **Doc. CE-38**, Supreme Decree N° 19-2014-EF; and the Constitutional Tribunal refused to review a challenge against the 2014 Supreme Decrees brought by over a hundred of bondholders through ABDA, even though they raised objections that have now been proven valid beyond doubt, including clear mathematical errors that the MEF itself was forced to acknowledge. **Doc. CE-199**, Land Reform Bondholders Association’s Application before the Constitutional Tribunal, March 16, 2015 ¶¶ 6, 9, 64, 147. Together, this evidences how Peru’s judicial system—“as a whole”—failed to provide effective means to all bondholders.

489. Moreover, and in any event, Peru is wrong to suggest that consideration of the system as a whole must be carried out to the exclusion of the outcome of that system in any given individual case. In fact, while Peru selectively quotes *Amto* to argue that an effective means claim must necessarily relate to the judicial system as a whole, *cf.* Statement of Defense, **R-34** ¶ 297, the *Amto* tribunal itself found, when interpreting the ECT’s effective means provision, that:

The Tribunal considers that ‘effective’ is a systematic, comparative, progressive and practical standard. It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. *Individual failures might be evidence of systematic inadequacies*, but are not themselves a breach of Article 10(12).

Amto Award, **Doc. RA-91**, ¶ 88 (emphasis added).

490. The *Chevron* tribunal commented on this reasoning and noted that “[w]hile such a dichotomy can theoretically be made, *one cannot fully divorce the formal existence of the system from its operation in individual cases*. The *Amto v. Ukraine* tribunal appears to acknowledge this in the second sentence of the passage above.” *Chevron* Partial Award, **Doc. CA-12**, ¶¶ 246-247 (emphasis added). Hence, the *Chevron* tribunal concluded that while the effective means provision “clearly requires that a proper system of laws and institutions be in place, *the system’s effects on individual cases may also be reviewed*.” *Id.* (emphasis added). Under this framework, the *Chevron* tribunal looked at Ecuador’s delay in resolving claimants’ court proceedings for over 13 years and concluded that “the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow cases to proceed . . . makes the delay in the seven cases undue and amounts to a breach of the BIT by the Respondent for failure to provide ‘effective means.’” *Id.* ¶ 262.

491. Likewise, in *Petrobart*, the tribunal did not assess respondent’s “judicial system as a whole” when it found that the respondent violated its effective means obligation under the ECT. *Petrobart v. Kyrgyz Republic*, Award, **Doc. RA-74**, p. 75. In that case, respondent’s Vice Prime Minister sent a letter to a court to seek assistance in deferring the enforcement of a judgment that claimant had obtained against a company and that the court had already agreed to enforce. *Id.* The court subsequently granted the deferral of the enforcement on the express basis of the request letter, which barred claimant from enforcing the judgment against the company, which subsequently declared bankruptcy. *Id.* Based on these facts, the tribunal concluded that the Vice Prime Minister’s letter “violated . . . the Kyrgyz Republic’s obligation” to “ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments.” *Id.* p. 77.

492. Gramercy’s case is analogous to *Petrobart*. Just like the respondent in *Petrobart*, Peru destroyed any meaningful avenue for Gramercy to enforce its rights in the Land Bonds when it interfered with the proceedings leading up to the 2013 CT Order, and imposed an exclusive Bondholder Process that took away Gramercy’s right to legal recourse and is structurally incapable of providing the current value of the Land Bonds. *See* Sections III.1 and III.2. Peru cannot disingenuously argue in response that “Gramercy acknowledges that it effectively ‘assert[ed] claims’ in local court proceedings until it chose to withdraw those claims in favor of this arbitration,” when the reason Gramercy had to withdraw from local proceedings in the first place was Peru’s unilateral revocation of Gramercy’s rights to go to domestic court, which Gramercy had no option but to challenge through this arbitration. *Cf.* Statement of Defense, **R-34** ¶ 297.

493. *Third*, Peru cannot rely on its Bondholder Process to claim that it has fulfilled its obligation to provide effective means. *Cf.* Statement of Defense, **R-34** ¶ 298. The Bondholder Process merely implements the arbitrary formula and priority order established under the Supreme Decrees, but provides no opportunity to litigate the value of the Land Bonds, let alone to secure current value, as was possible in Peru’s civil courts. This mechanism is therefore no substitute for the right to legal recourse that Gramercy had prior to Peru’s erratic measures.

494. Furthermore, Peru’s assertion that the Bondholder Process allows “avenues for both judicial and administrative appeal” does not advance its case. *Cf.* Statement of Defense, **R-34** ¶ 298. The *proceso contencioso administrativo* available under Peruvian law does not allow a claimant to challenge the validity of the valuation formula or the exclusive process imposed under the Supreme Decrees. Rather, this recourse is limited to challenges against the Supreme Decrees’ application in a particular case and to reviewing the record already submitted during the Bondholder Process. *See Doc. CE-696*, Law N° 27584, Art. 27. To date, bondholders—including ██████████ and ██████████—have also not been able to challenge the outcome of the Bondholder Process through a constitutional *amparo* action. ██████████

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495. The appeals process provided under the Supreme Decrees also does not provide a meaningful avenue to enforce the bondholders’ rights to obtain current value. As explained above, both ██████████ and ██████████ did try appeal to the MEF’s determination that their Land Bonds were worth only US\$67 and US\$240, respectively, only to see their appeals rejected almost immediately on the basis that the valuation had gone exactly according to the procedure and formula set forth in the Supreme Decrees, and that it was outside of the DGETP’s jurisdiction to determine whether the process itself, or the questionable 2013 CT Order, complied with Peruvian legal principles. *See* Section III.B.2(c) above. It thus remains the case that bondholders like Gramercy still cannot enforce their right to obtain current value for the Land Bonds. *See* Statement of Claim, **C-34** ¶¶ 233-235.

496. *Finally*, Peru’s reliance on *Apotex* to argue that the effective means standard “does not apply to non-adjudicatory proceedings, such as

the administrative decision of the FDA as a regulator” is simply inapt here. *Cf.* Statement of Defense, **R-34** ¶ 297 (*citing Apotex Award, Doc. RA-133, ¶ 9.70*). In *Apotex*, claimant complained of the US Food and Drug Administration’s failure to provide the investor an opportunity to be heard when passing the administrative decision imposing an import alert on claimant’s products. *Id.* The tribunal declined to apply the effective means provision in that case, finding that “administrative decision of the FDA as a regulator on the Import Alert” was not an adjudicatory proceeding intended to be covered under the effective means provision. *Id.* Here, however, Peru’s interference with Gramercy’s judicial proceedings and right to legal recourse via the imposition of an exclusive process clearly falls within the ambit of adjudicatory proceedings to which the effective means standard applies.

497. Peru’s mischaracterization of the Treaty language and studied ignorance of the lamentable reality of its Bondholder Process cannot defeat its breach of Article 10.4 by failing to provide Gramercy effective means to assert claims and enforce its rights with respect to its investment in the Land Bonds.

D. Peru Has Granted Gramercy Treatment Less Favorable than Peruvian Nationals in Breach of Article 10.3 of the Treaty.

498. In its Statement of Claim, Gramercy argued that Peru had violated Article 10.3 of the Treaty (“National Treatment”) to the extent the Supreme Decrees’ reference to investors who acquired Land Bonds for “speculative ends”—the category that Peru placed at the very bottom of the hierarchy for payment—was interpreted to cover Gramercy. *See* Statement of Claim, **C-34** ¶¶ 215-224; **Doc. CE-37**, Supreme Decree N° 17-2014-EF, Art. 19 (creating seven categories of bondholders in descending levels of priority: (i) individuals who are original bondholders, or their heirs, and who are at least 65 years old; (ii) individuals who are original bondholders, or their heirs, but are younger than 65 years old; (iii) individuals who are non-original bondholders, but are at least 65 years old; (iv) non-original bondholders who are younger than 65 years old; (v) legal entities who are original bondholders; (vi) legal entities that are non-original bondholders, but have acquired the bonds as partial payment of legal obligations; and finally, (vii) “legal entities that are non-original holders of Land Reform bonds that were acquired with speculative ends”); *see also* **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017, Art. 18. By deliberately creating a system which deliberately places Gramercy in the position to receive a treatment less favorable than every other bondholder—the vast majority of whom are Peruvian nationals—Peru has violated its obligation of national treatment under Article 10.3 of the Treaty.

499. In response, Peru has not denied this interpretation of the 2014 Supreme Decrees. Nor has it produced documents showing how

else it intended that hierarchy to operate, or who else besides Gramercy it intended to assign to the lowest rank of the recovery ladder. *See* PO6, Annex A, Request No. 15. To the contrary, in its Statement of Defense it in fact reprises the accusation that Gramercy is a “speculator” or engages in “speculation in this developing country.” *See, e.g.*, Statement of Defense, **R-34** ¶¶ 4, 7, 216; Reisman, **RER-1** ¶ 41. These comments are consistent with the disdain expressed by former President Kuczynski and Chief Justice Urviola. *See* Section III.B.3 above. Peru thus effectively admits that it deliberately placed Gramercy—the only known foreign legal entity to hold any Land Bonds—at the back of the line, in a category to which it alone belongs.

500. In light of that admission, none of Peru’s purported defenses to its violation of the national treatment standard can succeed. There can be no doubt that creating a system that deliberately discriminated against Gramercy, as compared to Peruvian bondholders, constitutes treatment “less favorable than that [Peru] accords, in like circumstances, to its own investors.” **Doc. CE-139**, Treaty, Art. 10.3.1. There can also be no doubt that such treatment is “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of” the Land Bonds. *Id.*

501. Peru cannot escape liability for its discrimination by arguing that such treatment is “at most, merely hypothetical because Gramercy has refused to participate in the Bondholder Process.” *Cf.* Statement of Defense, **R-34** ¶ 292. The 2014 Supreme Decrees’ systemic discrimination against Gramercy by placing it at the bottom of any queue for payment constitutes a violation of the Treaty. **Doc. CE-37**, Supreme Decree N° 17-2014-EF, Art. 19. Gramercy need not “participate” in that illusory queue to prove that it is so. Gramercy has demonstrated, that compared to domestic investors in “like circumstances”—*i.e.*, Peruvian national holders of Land Bonds—it has been treated less favorably, because Peru has prioritized those national bondholders over Gramercy.

502. Peru’s attempts to “refute[]” Gramercy’s showing that it is “in like circumstances” with domestic bondholders by invoking the mere fact that the Supreme Decrees create categories of bondholders cannot help Peru. Statement of Defense, **R-34** ¶ 286 (“[T]he 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.”). Likewise, the only “objective grounds” that Dr. Wühler invokes to justify the national bondholders’ priority is the 2014 Supreme Decrees themselves. *See* Wühler, **RER-3** ¶¶ 6, 70. It is absurd to argue that a bondholder is not in like circumstances for the sole reason that the State has decided to discriminate against it. If discrimination were self-justifying in the way Peru alleges, Article 10.3 of the Treaty would be meaningless.

503. The fact that Peru is unable to point to anything other than the Supreme Decrees themselves to demonstrate the legitimacy of its discrimination disproves its claim that there is any rational basis for the distinction. *Cf.* Statement of Defense, **R-34** ¶ 288. Peru must show that there is “a reasonable nexus” between this discrimination and “a rational government polic[y]” that does “not otherwise unduly undermine the investment liberalizing objectives of [the Treaty].” *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2 of April 10, 2001, **Doc. CA-37**, ¶ 78. It has failed to do so. In fact, even the MEF’s own Legal Department noted that the DGETP “does not develop the foundation for the prioritization order” in the Supreme Decrees, and merely invokes the 2013 CT Order. **Doc. R-984**, Ministry of Economy and Finance, General Office of Legal Affairs, Report No. 055-2014-EF-42.01.

504. But Peru’s reliance on the 2013 CT Order and the constitutional protection of vulnerable classes like the elderly and terminally ill does not go far enough, because it does not justify Peru’s discrimination between so-called “speculative” investors—by which it does not deny that it really means Gramercy—and allegedly non-speculative, non-vulnerable investors. The fact is that under the Supreme Decrees, even Peruvian bondholders who do *not* fall within the protected classes of “children, adolescents, mothers, and the elderly in situation of abandonment,” “creditors over the age of sixty-five,” and “creditors in an advanced or terminal stage of their illness” will be paid before Gramercy. *Cf.* Hundskopf, **RER-2** ¶ 128 n. 96. Categories four, five, and six—namely (iv) non-original bondholders who are younger than 65 years old; (v) legal entities who are original bondholders; and (vi) legal entities that are non-original bondholders, but have acquired the bonds as partial payment of legal obligations—do not correspond to vulnerable classes of bondholders, but still receive preferential treatment over Gramercy.

505. Peru can therefore neither deny nor justify its deliberate discrimination against Gramercy as compared to other similarly situated Peruvian bondholders, and cannot rebut that it has violated Article 10.3 of the Treaty.

IV.

GRAMERCY IS ENTITLED TO SUBSTANTIAL DAMAGES

506. Under customary international law’s standard of full reparation, the Tribunal should issue an award ordering Peru to pay the full intrinsic value of the Land Bonds, which Professor Sebastian Edwards calculated to be approximately US\$1.8 billion as of May 31, 2018, and which continues to grow.

507. Peru does not deny that the law requires full reparation if this Tribunal finds for Gramercy on liability. Moreover, other than raising

inconsequential criticisms and minor discrepancies, Peru’s quantum experts do not engage with the substance of Prof. Edwards’s report and his application of the CPI Method. Nor do they defend the MEF’s arbitrary and nonsensical parity exchange rate formulas.

508. Accordingly, only an award of the Land Bonds’ full intrinsic value will restore Gramercy to the same position it was in before Peru’s Treaty violations. Any lesser award would undercompensate Gramercy, leaving it worse off than it was before Peru’s illegal actions, and unjustly reward Peru.

509. Gramercy’s damages are neither “completely speculative” nor “remote,” as Peru asserts. *See* Statement of Defense, **R-34 ¶¶** 301, 305. To the contrary, they are both proven and a direct consequence of Peru’s treaty breaches. Indeed, Gramercy’s quantum case is based on a clear legal entitlement to the current value of the Land Bonds and interest on the unpaid principal—an entitlement which Peru, through its illegal actions, eviscerated. Because Gramercy was unlawfully deprived of that legal entitlement, under the full reparation standard, *that* entitlement is what should be restored.

510. In the alternative, Gramercy is entitled to the minimum compensation that it would have secured, on a balance of the probabilities, in Peruvian court proceedings—a path that had been available, and which Gramercy had pursued, until Peru wrongfully prevented the further normal conduct of those proceedings in favor of the exclusive Bondholder Process. On that view, Gramercy’s Land Bonds were worth, at the very least, US\$842 million as of May 31, 2018, and which also continues to grow.

511. Furthermore, Peru is incorrect to contend that Gramercy’s recovery should be limited to the “fair market value” of its Land Bonds, ostensibly determined based on the amount Gramercy paid to acquire those bonds over a decade ago. *Cf.* Statement of Defense, **R-34 ¶¶** 303, 307, 310.

512. *First*, the notion of *market* value—understood as the price at which bonds trade—cannot apply to assets which, like the Land Bonds, embody unconditional claims to payment. If an issuer defaults, bondholders are not stuck with the heavily discounted price at which they could sell bonds to third parties in a hypothetical transaction; they are instead entitled to enforce a payment obligation on the terms agreed or imposed by law. Moreover, to reduce Gramercy’s recovery by the risk that Peru would not honor its debt improperly rewards Peru for its own malfeasance and contravenes the general principle that a State cannot benefit from its own wrongs. For all of these reasons, applying a “fair market value” standard here would not be fair at all.

513. *Second*, even if the Tribunal were to value Gramercy’s damages by reference to market value, Peru’s suggestion that damages should be measured with reference to the price paid to acquire the Land Bonds over ten years ago is obviously flawed. It ignores that the intrinsic value of the Land Bonds, which provides the starting point for the market’s pricing of those bonds, continued to grow due to updating and interest accrual. It also disregards subsequent developments that significantly increased the market’s perception of the Land Bonds’ value up until the date of Peru’s Treaty breaches. The best evidence of the Land Bonds’ fair market value at around the time Peru repudiated its obligations—in the form of Gramercy’s internal valuations and contemporaneous transactions involving third parties—suggests that, even under the inapplicable fair market value standard, Gramercy would be entitled to over US\$550 million of damages, which is the Land Bonds’ properly calculated fair market value on the eve of the 2014 Supreme Decrees.

A. Gramercy Is Entitled to an Award of Its Land Bonds’ Full Intrinsic Value Under Peru’s Constitution and Laws.

514. As established in Gramercy’s Statement of Claim, customary international law requires full reparation for breaches of international obligations. *See* Statement of Claim, **C-34** Section VI.A. That standard was articulated in the *Chorzów Factory* case, which mandates that “reparation must, as far as possible, wipe out all the consequences of the illegal act.” *Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, Claim for Indemnity-The Merits, September 13, 1928, **Doc. CA-23**, ¶ 125; U.N. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), **Doc. CA-46**, Art. 36; *id.* Art. 31 (setting forth the requirement of “full reparation”). The *Chorzów Factory* case further clarifies that reparation shall preferably take the form of “[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.” *Id.*

515. On the facts of this case, full reparation requires that Gramercy be awarded an amount of damages equal to the full intrinsic value of its Land Bonds, which, as of May 31, 2018, stood at approximately US\$1.8 billion, and which continues to grow. *See* Edwards, **CER-4** ¶ 14.

516. Although Peru faults Gramercy for allegedly “glibly” citing the seminal *Chorzów Factory* case, it does not say one word to challenge the application of the full reparation standard as the correct measure of Gramercy’s damages. *See* Statement of Defense, **R-34** ¶ 300. Nor could it. There is no question that the full reparation standard applies to Peru’s unlawful expropriation of Gramercy’s investment and to its other Treaty breaches.

517. Peru instead asserts that Gramercy has failed to meet its burden of proof on quantum, arguing that “[Gramercy’s] damages calculation is completely speculative and Peru’s alleged actions are not the proximate cause of [Gramercy’s] purported damages.” *Id.* ¶ 301. These arguments—which in reality echo Peru’s case on liability rather than the specific quantum issues that are before this Tribunal—fail on their own terms.

518. *First*, as discussed in detail in Sections III.A.1 and III.B.1 above, Gramercy invested in Land Bonds that entitled it—under Peruvian law—to payment by Peru of the debt’s current value plus interest. Gramercy’s damages claim is thus not “too speculative or uncertain,” as Peru alleges. *See id.* ¶ 299. It is instead grounded on a clear legal entitlement, the value of which Prof. Edwards has calculated through a cogent economic analysis. Should the Tribunal find for Gramercy on liability, it will have recognized that entitlement; as a result, Peru must thus be held to pay for having unlawfully deprived Gramercy of it.

519. It is of no use for Peru to reproach Gramercy for seeking what Peru judges is an outsized return on investment and loosely to label Gramercy’s damages claim, on that basis, as being “*manifestly speculative*.” Statement of Defense, **R-34** ¶ 304 (emphasis in original). Peru’s own authorities recognize that “[a]ny investment . . . includes a speculative element.” *Amoco Int’l Finance Co. v. Islamic Republic of Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189 (1987), **Doc. RA-51**, ¶ 224. Yet there is nothing speculative about Gramercy’s *damages claim*.

520. Being the Land Bonds’ owner, Gramercy was entitled to, and legitimately expected to receive, the Land Bonds’ current value, plus interest. *See* Section III.B.1 above. As Prof. Castillo explains in his report, under Peruvian law, for obligations subject to the current value principle, like those contained in the Land Bonds, “there is only one value.” Castillo, **CER-9** Section IX. That value is an amount of money which, if awarded today, would fully preserve the purchasing power that the Land Bonds had when they were issued (*see id.* ¶ 73)—an amount that Prof. Edwards has properly calculated using CPI, a direct measure of purchasing power. *See* Edwards, **CER-6** ¶¶ 16-30. It is also undisputed under Peruvian law that, in addition to updating for inflation, a claimant is entitled to interest. *See* Castillo, **CER-9** ¶¶ 58-63. And Prof. Edwards has explained why that component must entail an award of compound interest at a rate that compensates bondholders for their forgone investment opportunities, which he has calculated, conservatively, as the real rate of return on debt in Peru. *See* Edwards, **CER-6** ¶¶ 31-52. In response, Peru’s quantum experts have not seriously challenged Prof. Edwards’s application of the CPI method, and the five sentences included in Peru’s Statement of Defense on the topic of interest merely assume a conclusion by stating that “Gramercy is not entitled to any interest . . . because . . . its damages claim is speculative.” *See* Statement

of Defense, **R-34** ¶¶ 312-313. In short, Gramercy has proved its damages case through proper expert testimony, and Peru has said nothing to rebut that testimony.

521. Tellingly, Peru offers no legal support for its claim that Gramercy’s damages are “too speculative,” and its use of the term “speculative” does not comport with how international tribunals use it in the damages context. See Statement of Defense, **R-34** ¶ 299, n. 648. Indeed, the authorities cited by Peru all deal with the situation where a claimant seeks to recover future damages (typically in the form of lost profits) that are deemed too uncertain to estimate reliably. 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 of May 22, 2012, **Doc. RA-120**, ¶ 438 (“Future damages . . . must only be proved with *reasonable certainty*”); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, **Doc. RA-121**, ¶ 269 (“[G]iven the past performance of [the business], the claim of lost profits is speculative”); Marjorie M. Whiteman, *Damages in International Law*, Vol. III (1942), **Doc. RA-47**, p. 1837 (“[P]rospective profits must not be too speculative, contingent, uncertain, and the like.”); *Amoco Award*, **Doc. RA-51**, ¶ 230 (“The calculation of the revenues expected to accrue over a long period of time in the future . . . opens a large field of speculation due to the uncertainty inherent in any such projection”). Each of these cases and authorities, in other words, is concerned with the quality of the available evidence and the reliability of projections on which lost profit awards are based.

522. But this is not a case in which, to quote again from Peru’s cited authorities, the Tribunal needs to engage in the “quantification of loss of future profits” or grapple with the “challenges [in estimating those profits] in start-up situations where there is little or no relevant track record.” *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award of October 21, 2002, **Doc. RA-63**, ¶ 173. To the contrary, here, the value taken from Gramercy is readily ascertainable: Peru eviscerated specific claims to value that the Land Bonds—a protected investment—physically embodied. The extent of Gramercy’s damages is hence not subject to speculation; it is known.

523. *Second*, Peru’s unlawful actions are no doubt the direct and proximate cause of Gramercy’s damages. Prior to the 2013 CT Order and the 2014 Supreme Decrees, Gramercy owned debt instruments that obligated the Government to pay—consistent with the current value principle—the equivalent, as of May 31, 2018, of US\$1.8 billion. Peru’s conduct in violation of the Treaty—including, most notably, the imposition of an exclusive Bondholder Process with a nonsensical valuation formula—eviscerated that entitlement, effectively extinguishing the value of Gramercy’s Land Bonds. See Section III.A above.

524. Peru’s assertion that “[t]here is no causal link between Gramercy’s damages calculation and Peru’s alleged breaches” is puzzling. *See* Statement of Defense, **R-34** ¶ 305. It appears to be premised on the notion that “Professor Edwards’s calculations . . . rewrite the terms of the Agrarian Bonds” by updating their value. *Id.* ¶ 308; *see also id.* ¶ 302 (stating that “the Agrarian Bonds are not protected from inflation”). While Peru may wish that it could simply read away the current value principle in this manner, Peru’s Constitutional Tribunal definitively established, in 2001, that Peru had to pay the Land Bonds at their current value, *not* the nominal value that the Land Bonds’ express terms would have provided. **Doc. CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, Mar. 15, 2001; *see also* Castillo, **CER-9** ¶ 107 (explaining that “the 2001 decision did nothing more than recognize that, by its very nature, the obligation contained in the Land Bonds was an obligation of value and that the value principle should therefore be applied”). As Prof. Edwards explains, “any ‘rewriting’ of the bonds’ terms to add ‘inflaters’ and ‘adjustments/guarantees’ was thus imposed by the Constitutional Tribunal under Peruvian law.” Edwards, **CER-6** ¶ 16. Professor Edwards has accordingly calculated the current value of the Land Bonds’ unpaid principal, plus an interest rate that compensates bondholders for their forgone investment opportunities. *See* Edwards, **CER-4** ¶¶ 51-56; *see also* Edwards, **CER-6** ¶¶ 31-52. That approach is entirely consistent with Gramercy’s legal entitlement under Peruvian law.

525. Peru and its Quantum Experts attempt to argue that “[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.” Statement of Defense, **R-34** ¶ 51 (*quoting* Quantum Expert Report, **RER-5** ¶ 13). But this argument conflates uncertainty as to the extent of Peru’s obligations under the Land Bonds with uncertainty as to whether Peru would fully comply with those obligations. There was undoubtedly uncertainty as to the latter, but there was no uncertainty that Peru was obligated to pay current value—as the Constitutional Tribunal had ruled in 2001—plus the compensatory interest required as a matter of course under Peruvian law. *See* Section III.B.1 above.

526. Clearly, by depriving Gramercy of its legal entitlement to current value, Peru’s breaches have directly and proximately caused Gramercy’s loss of that value and hence its damages.

* * *

527. In sum, full reparation requires wiping out all the consequences of Peru’s illegal acts and restoring Gramercy to the position it would have been in absent Peru’s Treaty breaches. Here, that entails an award of damages equal to the full intrinsic value of the Land

Bonds, which, as of May 31, 2018, Prof. Edwards properly calculated at approximately US\$1.8 billion, and which continues to grow. Edwards, **CER-4** ¶ 14. Under the *Chorzów* standard, which gives primacy to “restitution in kind,” the Tribunal must thus endeavor to restore Gramercy’s legal entitlement to that sum of money. In practice, the way in which the Tribunal may do so is to issue an award ordering Peru to pay damages equal to the Land Bonds’ current value plus interest, as that represents, by definition, the “payment of a sum corresponding to the value which a restitution in kind would bear.” *Factory at Chorzów*, **Doc. CA-23**, ¶ 125. Indeed, although Gramercy faced risk prior to Peru’s repudiation that Peru would not fully meet its debt obligations, it will continue to face that default risk even after it receives an award from this Tribunal ordering payment of the Land Bonds’ full intrinsic value. Such an award will thus restore Gramercy to the exact same position it was in before Peru’s Treaty breaches, while any lesser award would enrich Peru and leave Gramercy worse off.

B. In the Alternative, Gramercy Is Entitled at Least to the Value It Likely Would Have Achieved in Court Proceedings in Peru.

528. In the alternative to full reparation of the Land Bonds’ intrinsic value, Gramercy is at a minimum entitled to what it would, on the balance of probabilities, have obtained had Peru not foreclosed access to courts and unilaterally reversed the CPI plus interest framework that prevailed before the unlawful 2013 CT Order and the ensuing Bondholder Process.

529. At the time of its investment, it was crystal clear that Gramercy enjoyed the right to go to Peruvian courts to vindicate its position and seek judgments enforcing its claims on the Land Bonds. *See* Section III.B.1 above. Just a couple of years before Gramercy began to invest in Peru, the Constitutional Tribunal had explicitly affirmed that fundamental right. It upheld the 2000 Emergency Decree as constitutional only insofar as it was interpreted as “an option that the bondholder is free to select instead of going to court to demand payment of the updated debt, plus interest,” emphasizing that the Decree “d[id] not seek to preclude the possibility of going to court seeking a judgment to enforce the payment of the bond, nor d[id] it interfere with the proceedings that are currently before the court[.]” **Doc. CE-107**, Constitutional Tribunal, Decision, File N° 0009-2004-AI/TC, August 2, 2004, “Foundations” Section, ¶¶ 17, 7.

530. Bondholders had universally prevailed in the courts of law, which repeatedly ordered Peru to pay the current value of the Land Bonds, ascertained by reference to CPI, plus interest. *See* Section III.B.1 above; *see also* Statement of Claim, **C-34** ¶¶ 9-10, 61; Castillo, **CER-9** ¶¶ 86-99; Edwards, **CER-6** ¶¶ 61-66. Beginning in approximately 2011, GPH likewise sought to obtain judgments ordering payment on some of

its own Land Bonds and initiated applications in seven local proceedings. *See* Section III.B.1 above.

531. Through the August 2013 Resolution, however, Peru eliminated the rights of all bondholders—including Gramercy—to access the Peruvian justice system to determine current value. **Doc. CE-180**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013. Peru imposed the Bondholder Process outlined in the MEF’s Supreme Decrees as the only available alternative. *Id.* Even pending judicial proceedings in which judgments had already been entered but had not yet become *res judicata* were now subject to the MEF’s haphazard valuation formulas. *Id.* ¶ 10.

532. By effectively slamming shut the doors of its courthouses, Peru unlawfully deprived Gramercy of the right to pursue its claims in court and to obtain, as many others before it had done, final judgments awarding it the current value of its Land Bonds and interest.

533. At a minimum, Gramercy is therefore entitled to damages reflecting the value that would—on a balance of probabilities—have been available to it in Peruvian courts but for Peru’s treaty breaches. *See, e.g., Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of September 22, 2014, **Doc. CA-119**, ¶ 685 (“[T]he appropriate standard of proof [in respect of damages] is the balance of probabilities”). Indeed, in the alternative to the Land Bonds’ full intrinsic value, evidence of what Gramercy would likely have secured in court proceedings “provide[s] a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.” *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of March 28, 2011, **Doc. CA-30**, ¶ 246. And, having definitely established the *fact* of its loss, Gramercy need only provide a reasonable basis with respect to the *quantum* of its damages. *See id.*; *see also Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of April 4, 2016, **Doc. CA-18**, ¶ 875 (“[O]nce the *fact* of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty.”). This is particularly the case here because any evidentiary difficulties Gramercy may have in proving the counterfactual scenario of what it would have likely obtained in Peruvian courts is caused by Peru’s Treaty breaches and imposition of the exclusive Bondholder Process.

534. In court litigation, Gramercy could have relied on the same arguments concerning current value and interest that it has raised in this proceeding, including with respect to the application of interest at a real rate of return. At a bare minimum, however, Gramercy would have secured updating of its Land Bonds using CPI, applied as of the Land Bonds’ issuance date, plus compound interest *at the stated coupon rates*. Indeed, both Gramercy’s own litigation experience and the

Constitutional Tribunal’s original majority opinion of 2013 support this conservative outcome.

535. *First*, in one of the local court cases to which Gramercy was a party, the *Pomalca* case, two public accountants appointed by the Civil Court of Chiclayo as experts (Esther Morillo and Luis Chafloque) submitted a report valuing the Land Bonds using an approach that relied on CPI updating and compound interest. *See Doc. CE-342*, Fifth Civil Court of Chiclayo, File N° 09990-2006-0-1706-JR-CI-09, Accounting Expert Report, August 14, 2014; *id.*, Resolution N° 45, Oct. 3, 2014. The competent Chiclayo Court had appointed the two experts because of discrepancies found in respect of a prior valuation that had used simple, rather than compound, interest. *Id.*, Resolution N° 37, 22 Oct. 2013. The court-appointed experts opined that the current value principle required: (i) that they use CPI to update the principal amount from the Land Bonds’ issuance date; and (ii) an award of compound interest at the bond coupon rates. *Id.*, Accounting Expert Report, August 14, 2014. As of July 31, 2014, the local, court-appointed experts valued the 44 Land Bonds at stake in that case, which had unclipped coupons with a face value of 44,000,000 *soles de oro*, at 50,865,299.87 new *soles* in updated principal, plus 633,035,174.64 new *soles* of accrued interest. *Id.* p. 10. These specific figures amount to a total of 683,900,474 *soles*, or about US\$250 million.

536. While the *Pomalca* valuation may be criticized for being too low as it did not compute interest using an economically appropriate rate of return, it nevertheless endorses CPI—applied from the Land Bonds’ issuance date—and compound interest at non-risk-free rates. At that level, it is compatible with Prof. Edwards’s approach and clearly at odds with Peru’s haphazard valuation formulas. As Prof. Edwards explains, the *Pomalca* methodology is more simplistic than his own approach yet conceptually defensible and, if applied to the totality of Gramercy’s Land Bonds, it yields a valuation of approximately US\$842 million as of May 31, 2018. Edwards, **CER-6 ¶¶** 64-65.

537. *Second*, under the Constitutional Tribunal’s original majority opinion of 2013—which was later converted, with the use of white-out, into Justice Mesía Ramírez’s dissent—Gramercy likewise would have obtained CPI updating and compound interest. *See Doc. CE-17*, Constitutional Tribunal of Peru, Order, July 16, 2013, Dissenting Opinion of Justice Mesía Ramírez, ¶¶ 23-25. Because the original majority opinion reflects the state of the world immediately preceding the series of unlawful actions taken by Peru, it offers a unique glimpse into the counterfactual world in which the parties would have found themselves but for Peru’s treaty breaches. In that but-for world, Gramercy’s Land Bonds would have been updated using CPI:

[U]pdating must be carried out through a principle of equity and justice, following the same criteria

that the State uses when it is dealing with the updating of the tax debts of the taxpayers, whether individual persons or legal entities. In consequence, . . . the land reform debt bonds [must] be updated in conformity with the fifth paragraph of Article 33 of the Single Ordered Text of the Tax Code, which provides that ‘during the period of a stay the debt shall be updated based on the Consumer Price Index (CPI),’ insofar as the State cites the validity of the CPI as a factor for updating debt.

Id. ¶ 23.

538. In addition, the opinion would have likewise clarified that, in light of the constitutional requirement that “prior payment in cash must be made as fair compensation” for an expropriation, “it is imperative that the debt be updated *from the date of placement of the bonds* to the date of payment.” *Id.* ¶ 24 (emphasis added). And it, too, like the *Pomalca* report, would have favored the award of compound interest, calculated at the bond coupon rates, up until the date of payment. *Id.* ¶ 25.

539. The use of compound interest was also supported by the Land Reform Bond Debt Swap Bill contained in the 2011 Congressional Report and statements by senior Peruvian Government officials estimating the Land Bond debt as being at least \$4 billion dollars, an overall figure which “strongly implied acceptance of compound interest.” Joannou, **CWS-6** ¶ 21; *see also* **Doc. CE-160**, Opinion of the Agrarian Commission of Congress on Draft Bills N^os 456/2006-CR, 3727/2008-CR and 3293/2008-CR, June 16, 2011; **Doc. CE-156**, Actualidad Empresarial, Gobierno Anuncia que Pagará los Bonos de la Reforma Agraria, March 3, 2011; **Doc. CE-259**, Reuters, Interview-Peru Court Plans to Clean Up Billions in Land Bonds, November 2, 2012. Consistently with these indicators, Gramercy’s own internal valuation analyses, which sought to model “a conventional method used in Peru,” used CPI updating and compounded the Land Bonds’ face interest rate. Joannou, **CWS-6** ¶ 15. As Mr. Joannou explains, this was a “simpler, albeit less economically accurate, method” compared to Prof. Edwards’s approach, which relies on a real rate of return. *Id.* ¶ 15. It nevertheless provided a rational and conservative estimate of the value of Gramercy’s legal entitlement.

540. That Gramercy would have obtained at least CPI and interest is further validated by numerous other court cases and expert reports—all of which unequivocally established that, under Peruvian law, bondholders were entitled to these two components. *See* Section III.B.1 above. While many of these cases applied interest on a simple, rather than compound, basis, that approach in itself implies a valuation of Gramercy’s Land Bonds, as of May 31, 2018, of at least US\$330 million.

See Edwards, **CER-6** ¶¶ 68-69. The fact remains that compound interest is undoubtedly correct from an economic perspective. Edwards, **CER-4** ¶¶ 51-55. Even the MEF has recognized the need to compound interest in both Emergency Decree No. 088-2000 and the later 2014 and 2017 Supreme Decree formulas. See **Doc. CE-88**, Emergency Decree N° 088-2000, October 10, 2000; **Doc. CE-38**, Supreme Decree N° 19-2014-EF, Annex 1; see also Edwards, **CER-4** ¶ 50.

541. In sum, absent Peru's treaty breaches, Gramercy would have likely secured—at the very least—CPI updating of the Land Bonds' principal from the date of issuance and compound interest calculated at the coupon rates. While this approach does not restore the full value of Gramercy's legal entitlement, as explained in Section IV.A above, it is not arbitrary and provides, as a matter of fact, a minimum amount of compensation, US\$842 million, that may be awarded in this case.

C. Other Measures of Damages Do Not Provide an Appropriate Standard of Compensation on the Facts of this Case.

542. Without refuting the full reparation standard or offering any defense in support of the MEF's formulas, Peru nevertheless asserts that Prof. Edwards's valuation is wrong because he did not calculate "the fair market value of the outstanding Coupons as of 2013." Statement of Defense, **R-34** ¶ 307 (citing Peru's Quantum Expert Report, **RER-5** ¶ 16(a)). Peru equates "fair market value" with "the amount Claimants could have received from selling the Gramercy Bonds just before the issuance of the 2013 CT Decision." Peru's Quantum Expert Report, **RER-5** ¶ 126. Peru then conflates market value and sunk costs to assert that "Gramercy's acquisition price [paid for the Land Bonds] of US\$31.2 million incurred between June 2006 and September 2008 . . . likely represents the fair market value of Claimants' interest on 15 July 2013." *Id.* ¶ 124; see also Statement of Defense, **R-34** ¶ 310.

543. Both the legal premises and the factual conclusions of Peru's argument are wrong. In this case, where Gramercy was deprived of a legal entitlement to money, market value does not provide an adequate measure of compensation under customary international law. Yet, even if it did, the price that Gramercy paid, over a half-decade before Peru's treaty breaches, is not representative of the value ascribed to the Land Bonds by market participants at the time of the 2013 CT Order and the 2014 Supreme Decrees.

1. The Notion of Market Value Does Not Comport with the Full Reparation Standard in Cases Where the Protected Investment, As Here, Is a Debt Instrument.

544. Whichever way it is construed, the notion of "market value" is inappropriate on the facts of this case.

545. *First*, the notion of market value ignores the very nature of the legal entitlement physically embodied in a bond. Rights to payment of a sum of money have an intrinsic value that reflects the terms of the underlying obligation, as defined by the parties' agreement or applicable law.

546. That intrinsic value need not—and, indeed, typically does not—coincide with the price at which that right would trade in a hypothetical market transaction. *See* Joannou, **CWS-6** ¶ 11 (“The acquisition of a distressed financial instrument may not be its intrinsic value[.]”) This is not surprising. A promise to pay money cannot be worth the same as the agreed sum. Leaving aside time value of money, a creditor faces the debtor's default risk, at the very least, and potentially also litigation or other enforcement risks. Because rational actors are risk-averse, any purchaser of a security will demand a return for taking on risk and price that security by discounting its intrinsic value accordingly. *See* Edwards, **CER-6** ¶ 126 (“the price that a seller was willing to accept from Gramercy in the 2006-2008 period takes into account factors such as default risk”). As a result, as Robert Joannou, Gramercy's Chief Financial Officer, explains:

Holders of assets that come under pressure sometimes just want to sell their positions. I believe that these holders become tired of dealing with the situation, or do not have the experience or the patience to work through the difficulty, or have little financial or emotional interest in the asset, or conclude that their time and energy is better spent on other matters, or for other reasons they just want out and they will accept some reasonable payment even if they know that they are giving up a chance to receive a much larger payment later. At the same time, the buyer may see opportunity and means to later realize something closer to an asset's intrinsic value.

Joannou, **CWS-6** ¶ 11.

547. While fair market value can provide an adequate standard to compensate an investor for the loss of tangible property and certain other interests—which have no intrinsic value *per se*—the very idea that a court or tribunal should seek to award the market value of an obligation to pay is nonsensical. Indeed, in these circumstances, to award an investor market value would not represent what has been taken. Moreover, it would allow the debtor unilaterally to reduce the extent of what it owes by simply stating publicly that it does not intend to pay—a statement which, in itself, would cause the market to discount the value of any bonds issued by that debtor. Obviously, that result would be

absurd, and the law will not lend itself to furthering these perverse incentives.

548. As a result, when bringing disputes arising in connection with bonds and other security instruments, bondholders have obtained recognition of their right to compensation equal to the full intrinsic value of those instruments. In the *Serbian Loans Case*, for instance, the Permanent Court of International Justice—under the presidency of Judge Anzilotti, who also presided in *Chorzów*—decided that French bondholders who had acquired bonds issued by the Kingdom of the Serbs, Croats and Slovenes had a right to obtain payment on those bonds in “gold francs,” a standard of value established by reference to a certain weight and fineness of gold, rather than “paper francs,” whose value had been eroded by inflation. See *Case Concerning the Payment of Various Serbian Loans Issued in France*, 1929 P.C.I.J. (ser. A) No. 20-21, Judgment No. 14, July 12, 1929, **Doc. CA-95**. The Court found that the bonds contained a valid “gold clause” under the applicable municipal law, and it ruled—dismissing the very same argument that Peru attempts to make in this arbitration—that “it is not admissible to assert that the standard should not govern the payments because the depreciation in French currency was not foreseen.” *Id.*, p. 34; compare Peru’s Quantum Expert Report, **RER-5** ¶ 139 (“Peru would not have known what inflation would be in the future”); Statement of Defense, **R-34** ¶ 308. In a companion case, the Court similarly found for French bondholders who had acquired Brazilian bonds containing gold clauses. See *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1929 P.C.I.J. (ser. A) No. 20-21, Judgment No. 15, July 12, 1929, **Doc. CA-94**.

549. Investment tribunals and domestic courts in the United States have similarly affirmed bondholders’ rights to enforce their legal entitlement rather than receive some form of discounted market price. *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, March 9, 1998, **Doc. CA-208**, ¶¶ 29-30 (recognizing a claimant’s right to specific payments established in promissory notes); *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (1997), **Doc. CA-164**, p. 853 (granting summary judgment on claim for full outstanding debt on bonds “acquired . . . at a discount in the secondary market for sovereign debt”); *Lightwater Corp. Ltd. v. Republic of Argentina*, 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. April 14, 2003) (same), **Doc. CA-132**; see also Olivares-Caminal, **CER-8** ¶¶ 133-137 (noting that international principles demand respect for the rule of law and the sanctity of legal obligations in debt). In doing so, these U.S. federal courts have emphasized that “the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders.” *Pravin*, 109 F.3d, **Doc. CA-164**, p. 855 (citing cases); *Lightwater*, 2003 WL 1878420, **Doc. CA-132**, p. *3 (same).

550. While Gramercy’s entitlement to current value arises under Peruvian constitutional and statutory law, rather than the contractual terms of the Land Bonds themselves, it, too, like any other bondholder, is entitled to payment of the full intrinsic value of the bonds. That is why in the Peruvian courts Land Bond holders successfully obtained judgments awarding them 100% of current value, not some discounted percentage of current value of the kind fair market value offers.

551. *Second*, while the fair market value standard typically governs compensation for lawful expropriations, it does not apply to the *damages* owed for *unlawful* expropriation or other treaty breaches. Indeed, it is well settled that different standards apply to lawful expropriations, on the one hand, and treaty breaches, on the other hand. *Phillips Petroleum Co. Iran v. Iran & Nat’l Iranian Oil Co.*, Award, 21 IRAN-U.S. CL. TRIB. REP. 79 (1989), **Doc. CA-36**, ¶ 110; *Amoco*, **RA-51** ¶ 192 (“[A] clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.”); *Factory at Chorzów*, **Doc. CA-23**, ¶ 124 (rejecting approach that “would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned”). Where, as here, the treaty does not contain a rule governing compensation owed for an unlawful expropriation, the customary international law standard set out in *Chorzów Factory* applies. *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Doc. CA-2**, ¶ 483 (“Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law . . .”). That same standard applies to other treaty breaches, including a breach of the fair and equitable treatment standard. *See Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of March 28, 2011, **Doc. CA-30** ¶ 149 (applying *Chorzów* to breach of the fair and equitable treatment standard even where such breach “does not lead to a total loss of the investment”); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award of December 24, 2007, **Doc. CA-8** ¶¶ 421-429 (applying the *Chorzów* principle as a matter of customary international law and noting that “the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of September 22, 2014, **Doc. CA-119** ¶ 678 (applying the “principles espoused in the *Chorzów Factory* case [as] the relevant principles of international law to apply when considering compensation for breach of a BIT”).

552. As detailed in Section III.A above, Peru has unlawfully expropriated Gramercy’s investment. In addition, it has violated Peru’s obligation to afford Gramercy the minimum standard of treatment;

deprived Gramercy of effective means; and granted Gramercy treatment less favorable than Peruvian nationals. See Sections III.B, III.C, and III.D above, respectively.

553. In these situations, it is undisputed that the full reparation standard, as articulated in the *Chorzów Factory* case, applies. And, under that standard, a tribunal is not necessarily limited to an award of the fair market value of the asset—understood as the price that a willing buyer would pay to a willing seller—on the day of the taking. *Factory at Chorzów*, **Doc. CA-23** ¶ 124; *accord ADC*, **Doc. CA-2** ¶ 497.

554. *Third*, fair market value is merely a proxy for full reparation. The amount of damages owed under the full reparation standard does not necessarily equate with market value. As the *Occidental* tribunal correctly reasoned: “[T]he test is not ‘what would a hypothetical buyer pay in the circumstances as they are now’; the test is ‘what have the Claimants lost.’” *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of October 5, 2012, **CA-150** ¶ 539. Specifically, the tribunal in that case found it inappropriate to award damages on the basis of what a hypothetical buyer would have paid for the asset as encumbered by measures in breach of the relevant treaty. *Id.* (“[A]sking what a hypothetical investor would pay under [a measure] which the Tribunal has found to be in breach of the Participation Contract is irrelevant to assessing what [claimant], whose contract protected it against things like [the measure in question], has actually lost.”). The *Occidental* Annulment Committee, addressing respondent’s submission that the tribunal had failed to apply the fair market value standard, affirmed the challenged award in this part and clarified that the fair market value standard is simply one possible tool to assess damages:

The willing buyer/willing seller standard is simply a valuation tool used for calculating compensation in certain circumstances. Tribunals have a wide discretion in selecting and applying valuation tools.

Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award of November 2, 2015, **CA-151**, ¶ 509.

555. So while market value may be, and often is, an appropriate measure of damages, that is not always the case. If the facts of the case are such that resorting to market value will not achieve the goal of full reparation and instead reward Peru’s malfeasance, the Tribunal need not—and, indeed, must not—look to market value when awarding damages. Indeed, the “willing buyer/willing seller” valuation tool cannot

override the principles governing full reparation under customary international law.

556. A rigid approach, which fixates on the notion of fair market value, may be particularly inadequate where the investor had no intention of selling. As the *Burlington* tribunal observed, typically, an investor “did not lose an opportunity to sell its contract rights; it lost an opportunity to exercise them.” *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award of Feb. 7, 2017, **CA-92**, ¶ 366. Indeed, where the investor planned to hold on to an asset with a unique payoff—including where the investor was particularly well situated to make that payoff occur—to ascribe value to that asset on the basis of a hypothetical sale is to deprive the investor, in violation of the full reparation standard, of the full value of its investment.

557. Here, Gramercy invested in the Land Bonds with the purpose of bringing its unique expertise to the table to facilitate a global solution. See Koenigsberger, **CWS-3** ¶ 33; [REDACTED]

[REDACTED] It did not intend to buy and resell those instruments at a deep discount to their intrinsic value or to make a “quick buck” on trades. While it sought to engage Peru to effect a sovereign debt restructuring, which could have entailed a discount to full intrinsic value, Peru chose to rebuff those attempts. See Statement of Claim, **C-34** ¶¶ 115-121. Having shunned a negotiated solution and sought to force a cram-down on Gramercy and all bondholders, Peru must now live with the consequences of its having forced Gramercy to arbitration. This includes payment of the full intrinsic value of its legal obligations—which Peru guaranteed “without reservations whatsoever” (**Doc. CE-1**, Decree Law N° 17716, Land Reform Act, June 24, 1969, Art. 175)—under customary international law.

558. *Finally*, and in any event, the distinction between *fair* market value, as a normative standard, and full intrinsic value is a red herring in this case. Peru’s case for applying some form of market value appears to be premised on the notion that the Tribunal must take account of potential uncertainties affecting the value of the Land Bonds. Specifically, Peru asserts that, “[a]t 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 . . . would be calculated and when.” Statement of Defense, **R-34** ¶ 303. As already explained, this assertion is incorrect: while there was uncertainty as to when and how Peru would comply with its obligations to pay, there was a clear legal framework mandating payment of the Land Bonds’ current value and interest. See Section III.B.1 above.

559. The price at which Gramercy acquired the Land Bonds was lower than their full intrinsic value because bondholders perceived the risk that Peru would delay payment or otherwise impair bondholders' rights to payment. ██████████, who made an objective decision to sell her bonds to Gramercy in 2007, testifies that “[a]lthough [she] knew that [she] was selling the Land Bonds at a significant discount, [she] was confident that [she] was getting a fair deal from Gramercy [in] trading time and uncertainty for a certain upfront payment.” ██████████ In other words, the risk affecting the value of the Land Bonds was the risk of delayed payment or unlawful sovereign action, including the possibility that Peru might, as it has done, take measures unilaterally to cancel its debt.

560. Operating companies and physical assets of the sort that are typically at issue when the fair market value standard is applied face an array of risks external to the conduct of any contracting party. These include uncertainties about things like future prices and costs, customer demand, availability of supplies, and theft or property loss or damage. In those cases, it is appropriate to discount the value of an investment for those business risks.

561. Unlike those business risks, however, the risk of illegal sovereign action—in particular, the risk that a debtor will not comply with the specific obligation that is breached and ends up giving rise to the claim—may not be taken account of to reduce Gramercy's damages and dilute the full reparation standard. States are not permitted to benefit from the risk that they will not behave in accordance with their legal obligations. Awarding a “fair” market value impacted by the risk, which eventually materialized, that Peru would not pay the Land Bonds fully would improperly reward Peru for its own malfeasance.

562. The principle that a state cannot take advantage of its own wrongful conduct—*nullus commodum capere de sua injuria propria*—is well established in international law. See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), **Doc. RA-32**, p. 149. Several international tribunals have relied upon that general principle in excluding the risk of unlawful Government action. See, e.g., *Burlington Decision on Reconsideration and Award*, **Doc. CA-92**, ¶ 362 (“when quantifying the value of a going concern, the Tribunal must disregard the effects of value-depressing measures taken by the State related to the investment.”); *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, **Doc. CA-150**, ¶ 564 (applying the principle in question to exclude impact of value-depressing Government action when determining the fair market value of the investment). In the words of Peru's legal expert, Prof. Reisman, and a co-author, it is a “venerable and general legal principle, common to municipal and international law, that a delictor may not benefit from its own delict.” Reisman, W. Michael & Sloane,

Robert D., *Indirect Expropriation and its Valuation in the BIT Generation*, 74 *British Y.B. Int'l L.* 115 (2003), **Doc. CA-167**, p. 146.

563. As a result, even if the fair market value principle were applicable here, the risk that Peru would not honor its legal obligations would have to be excluded from the valuation. The law does not permit damages to be reduced to allow for the risk that the party in default will default, so Gramercy's damages must be assessed "assuming compliance by [Peru] with its contractual obligations." *Burlington Decision on Reconsideration and Award*, **Doc. CA-92**, ¶ 368. Because Peru's risk of default was the only risk Gramercy faced, the fair market value of its Land Bonds—properly construed in accordance with the full reparation standard—would thus converge with their intrinsic value.

2. Even Under the Fair Market Value Standard, Gramercy's Damages Would Exceed US\$550 Million.

564. As explained above, an award based on the Land Bonds' market value would not meet Gramercy's entitlement to full reparation on the facts of this case. If the Tribunal nevertheless adopts Peru's position that the Tribunal must look to market value, it must determine what that value was immediately before Peru breached the Treaty. Peru's reliance on the price Gramercy paid for its Land Bonds in 2006-2008, which equates fair market value with acquisition costs, is thus misplaced. The fair market value of Gramercy's Land Bonds cannot be determined from what Gramercy paid for those Land Bonds more than half a decade before Peru repudiated its obligations and breached the Treaty.

565. Market value does not remain fixed over time. Peru's misguided attempt to rely on the price Gramercy paid in 2006-2008 ignores: *first*, that the intrinsic value of the Land Bonds continued to increase after that time; and, *second*, that relevant circumstances that affect market value, including the market's assessment of the risk that Peru would not fully pay its Land Bond debt, Peru's general creditworthiness, and broader macro-economic conditions in Peru, had improved by the time Peru issued the 2013 CT Order and the 2014 MEF Supreme Decrees more than half a decade later.

566. Gramercy's contemporaneous internal valuations of its portfolio for accounting purposes, done under a fair market value standard, provide the best evidence of the Land Bonds' market value. Those valuations, which third parties scrutinized and transacted upon, establish a floor for damages of approximately US\$550 million.

(a) Gramercy’s Entitlement to Damages Is Not Determined by the Price It Paid for Its Land Bonds.

567. Peru’s quantum experts assert that “Gramercy’s acquisition price of US\$31.2 million incurred between June 2006 and September 2008, represents the best contemporaneous assessment of the fair market value of Claimants’ investment.” Peru’s Quantum Expert Report, **RER-5**, ¶ 124. That is flatly at odds with the position taken by Peru itself, in its Statement of Defense, that “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 date.” Statement of Defense, **R-34** ¶ 310 (emphasis added); *see also CE-139*, Treaty, Art. 10.7 (“The compensation . . . shall . . . be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.”) (addressing the standard of compensation applicable to *lawful* expropriations).

568. Simply put, it strains credulity to assert that the fair market value of Gramercy’s Land Bonds in 2013 can be determined from the price Gramercy had paid for them five or more years earlier. Not only did the intrinsic value of the bonds continue to increase during that time due to continued current-value updating and interest accrual, but court cases and other government actions detailed above provided reason for market participants to have greater confidence that the full intrinsic value of the Land Bonds could be realized. Moreover, improvements to Peru’s credit-worthiness and the overall Peruvian economy gave the market reason to believe there was less risk Peru would not fully meet its obligations.

569. Even Peru appears to be uncomfortable with its own quantum experts’ conclusions. While Mr. Kaczmarek and Ms. Kunsman explicitly claim—with no explanation or evidentiary support, and no further analysis—that the US\$31.2 million Gramercy allegedly paid in 2006-2008 “likely represents the fair market value of Claimants’ interest on 15 July 2013” (Peru’s Quantum Expert Report, **RER-5**, ¶ 124), Peru does not press that argument in its Statement of Defense. Peru instead makes only the milder assertion that a proper fair market value analysis “would incorporate relevant indicators of value from [the alleged deprivation date], including the prices that Claimants paid a few years earlier and any evidence of other purchases or sales.” Statement of Defense, **R-34** ¶ 310.

570. But even Peru’s assertion that the price Gramercy paid in 2006-2008 is a “relevant indicator[] of value” in 2013 goes too far. *See id.* ¶ 310. Here, there is no reason to give any evidentiary weight to the prices Gramercy paid five years or more before Peru renounced its obligations under the Land Bonds and breached the Treaty.

571. *First*, as a general matter, transactions five years prior to the valuation date are too remote to provide useful evidence of fair market value at the relevant time. As Prof. Edwards explains, just as “[w]hether you had paid \$200,000 or \$2,000,000 to acquire your home at some point in the past does not indicate the value of your home today,” so, too, “the price paid by Gramercy (or any other claimant) at some earlier point in time is entirely irrelevant.” Edwards, **CER-6**, ¶ 126.

572. *Second*, the intrinsic value of Gramercy’s Land Bonds continued to increase after Gramercy purchased them. Indeed, by definition, the intrinsic value of the Land Bonds is not static. Because the unpaid principal of the Land Bonds is an obligation of value, the amount of Peru’s debt grows over time to keep pace with both inflation in Peru and the ongoing loss of the bondholders’ opportunity to invest the principal. Professor Edwards calculated that the intrinsic value of Gramercy’s Land Bonds has more than doubled in the decade since Gramercy completed its purchases, growing from US\$758 million as of December 31, 2008 to US\$1.8 billion as of May 31, 2018 (as a result of continued inflation in Peru and the continued compounding of a real rate of return reflecting bondholders’ forgone investment opportunities). Edwards, **CER-6** ¶ 134. Peru has only its own delay in resolving the debt to blame for this further increase in the size of its obligation, and Gramercy must be compensated accordingly.

573. Peru’s experts, by contrast, ignore even the effects of inflation on nominal value. The US\$33.2 million Gramercy paid in 2006-2008 nominal dollars (Lanava, **CWS-5** ¶ 12) was worth more in real terms than what US\$33.2 million nominal dollars were worth in 2013. Mr. Kaczmarek and Ms. Kunsman nevertheless assert that the fair market value was Gramercy’s purchase price (which they incorrectly estimate at US\$31.2 million) in nominal dollars in 2013. *Cf.* Quantum Expert Report, **RER-5** ¶ 124. They are thus arguing that the fair market value of the Land Bonds *declined*, in real terms, after Gramercy bought them.

574. Peru similarly ignores the effects of inflation when it asserts that the US\$33.57 million it claims Gramercy could have obtained through the Bondholder Process—a number which, in fact, was never available to Gramercy, as explained in Section III.A above—would have been a “windfall” compared to what Gramercy paid. Statement of Defense, **R-34** ¶¶ 127-128. Far from a “windfall,” US\$33.57 million in nominal dollars in 2018 is *less*, in real terms, than US\$33.2 million in 2006-2008 nominal dollars. Neither Peru nor its experts have identified any basis for their assertions that the real value of Gramercy’s Land Bonds decreased prior to Peru’s Treaty violations. There is none.

575. *Third*, intervening events would have suggested to reasonable market participants that realization at improved value was much closer in 2013 than it was in 2006-2008.

576. When Gramercy first started purchasing its Land Bonds in 2006, bondholders were fed up. These individuals, who lacked expertise in sovereign debt restructurings, were too diffuse and powerless to achieve resolution on their own. [REDACTED], one of the many bondholders who chose to sell Land Bonds to Gramercy, explains that she “anticipated an onerous and lengthy process, which would be particularly complex for an individual like [her], rather than a dedicated company or association, to pursue successfully.” [REDACTED] Despite a clear legal entitlement, a concrete resolution was not within immediate reach. As Mr. Koenigsberger describes, “[t]he Government was legally required to pay the Land Bonds at current value, but had no plan regarding how to do so.” Koenigsberger, **CWS-3** ¶ 34.

577. Yet both developments specific to the Land Bonds and macroeconomic factors propelled bondholders closer to a resolution during the ensuing years. As reflected in Gramercy’s internal valuation model, “[t]here were many positive signs during the initial years of the investment,” and such “progress . . . led [Gramercy] to increase [its] internal fair market values.” Joannou, **CWS-6** ¶ 17. In particular, subsequent to Gramercy’s purchases, a number of events decreased the risks to Land Bond holders’ ability to vindicate their rights under the Land Bonds.

578. Bondholders further vindicated their rights to payment successfully through judicial proceedings in Peruvian courts. Joannou, **CWS-6** ¶ 19 (viewing “these successful outcomes as data points that tended to confirm [Gramercy’s] own valuation process”). For instance, on August 14, 2008, after Gramercy had already purchased most of its Land Bonds, the Superior Court of Lima affirmed an award of just over one million soles to [REDACTED], updating his bonds “at current value in accordance with the current value principle.” **Doc. CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File N° 01898-2007, August 14, 2008, Operative ¶ 9; *see also* **Doc. CE-528**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 4201-2010-LIMA, September 4, 2012 (applying adjusted CPI to update the Land Bonds to current value); **Doc. CE-572**, Lima Sixteenth Commercial Civil First Instance Court, case file N° 12196-2009-0-1817-JR-CO-16, March 18, 2014 (same). *See also* Section III.A.

579. In addition to favorable court proceedings, in 2011 Peru’s Permanent Commission of Congress approved the Land Reform Bond Debt Swap Bill contained in the 2011 Congressional Report. **Doc. CE-160**, Opinion of the Agrarian Commission of Congress on Draft Bills N°s 456/2006-CR, 3727/2008-CR and 3293/2008-CR, June 16, 2011. Under that bill, unpaid principal was to be adjusted for inflation from the time of issuance using CPI, and interest was to accrue on a compound basis at the Land Bonds’ coupon rates. *Id.*, p. 18, Art. 8. Even though an announcement by late President García that he would veto the bill led Congress to desist (*see* Statement of Claim, **C-34** ¶ 71),

approval of the Land Reform Bond Debt Swap Bill demonstrated positive momentum and legislative will to provide substantial compensation for the Land Bonds. Joannou, **CWS-6** ¶ 18. This would have decreased reasonable market participants' assessment of the risk that Peru would not meet its obligations under the Land Bonds.

580. Furthermore, in October 2011, the Engineers' Bar Association asked the Constitutional Tribunal to enforce the 2001 CT Decision, which Gramercy—justifiably—perceived as “[a]nother seemingly positive development.” Joannou, **CWS-6** ¶ 20. The Chief Justice of the Constitutional Tribunal at the time, Ernesto Alvarez, publicly stated that the Tribunal would issue a decision ordering an “adequate compensation” for bondholders, adding that the Government was bound to pay its domestic debt. **Doc. CE-173**, Peru21, *El TC Exigirá al Gobierno Pagar los Bonos de la Reforma Agraria*, November 2, 2012. Then-Minister of Economy and Finance, Luis Miguel Castilla, also indicated that the Government would comply with the Constitutional Tribunal's decision on the petition filed by the Engineers' Bar Association. *Id.* As Mr. Joannou recalls, “[t]he press reports also quoted former Minister of Finance Ismael Benavides publicly stating the outstanding debt for the Land Bonds was \$4.5 billion dollars, and that Peru could very much afford to pay them.” Joannou, **CWS-6** ¶ 22; *see also* **Doc. CE-530**, Gestión, *Constitutional Tribunal could order the payment of the agrarian debt next week*, September 21, 2012; **Doc. CE-533**, Expreso, *Constitutional Tribunal will order payment to 150,000 agrarian bondholders*, September 21, 2012; **Doc. CE-531**, La República, *Payment of the Agrarian Debt Could Be with 30 Year Tradable Bonds*, September 21, 2012; **Doc. CE-532**, Correo, *New Solution for the Agrarian Bonds*, September 21, 2012. All of this signaled further momentum toward a definitive resolution.

581. In light of these lower court proceedings, the 2011 legislation, and the push to enforce the 2001 CT Decision, the risks that bondholders would not be able fully to obtain the value of their bonds had decreased substantially compared to 2006-2008. Because of this decreasing risk, the fair market value of the Land Bonds increased during this period by an amount even greater than the increase in their intrinsic value. In pricing debt instruments, the market applies a smaller risk discount to intrinsic value when risk decreases. As Prof. Edwards explains, “as the risk of non-payment decreases, the fair market value of the Gramercy Land Bonds will converge to the correct updated value of those bonds.” Edwards, **CER-6** ¶ 118.

582. *Finally*, improvements in Peru's economy further decreased the objective risk that Peru would not pay the full value of the Land Bonds. That decreased risk is reflected in upgrades to Peru's credit ratings and corresponding decreases in the interest rates that the market demanded for Peruvian sovereign debt between 2008 and 2014.

583. Although Peru had already begun an impressive economic turnaround by the time Gramercy first started buying its Land Bonds in 2006, Peru’s credit-worthiness was still under a cloud at that time. Following on from Peru’s sustained, decade-plus default on its international syndicated loans from 1984 through 1997, all of the international ratings agencies rated Peru’s sovereign debt below investment grade. *See* Edwards, **CER-4** ¶¶ 33-34; *cf.* Peru’s Quantum Expert Report, **RER-5** p. 50, table 10. Moody’s’ ratings are illustrative: during the entire time Gramercy was purchasing its Land Bonds from June 2006 to September 2008 (*see* **Doc. CE-224B**, Gramercy’s Bond Inventory, July 5, 2018), Moody’s credit rating for Peru was below investment grade, indicating “substantial credit risk.” *See* Edwards, **CER-4** ¶ 131.

584. After Gramercy completed its purchases, Peru’s economy improved at a remarkable rate. Peru notes with justifiable pride the acknowledgement by then-World Bank President Jim Yong Kim in October 2015 that “[o]ver the past 10 years, Peru’s GDP has increased at an average rate of over 6 percent each year.” *See* Statement of Defense, **R-34** ¶ 12 (*quoting* **Doc. R-528**, Jim Yong Kim, The Lessons of Carabayllo: Making Tough Choices, World Bank Group/IMF Annual Meetings, October 9, 2015). Indeed, Peru’s per capita GDP grew at an impressive growth rate in *real* terms (i.e. inflation-adjusted)—averaging 3.6% annually in the years after Gramercy purchased its Land Bonds—and Peru’s debt-to-GDP ratio dropped by about 8 percentage points from the end of 2008 to the start of 2014. *See* Edwards, **CER-4** Appendices Q and R. This impressive economic performance culminated in what Peru rightfully describes as “a hallmark moment for Peru and its people” in October 2015 when the IMF and World Bank Group chose Lima to be the first Latin American city to host the IMF’s Annual Meetings in nearly 50 years, recognizing that Peru had, at last, moved from being a “country of the future” to being a “country of the present.” Statement of Defense, **R-34** ¶¶ 11-12.

585. The ratings agencies took heed of these improvements. As Prof. Edwards explains, “according to Moody’s, Peru has transitioned from a non-investment-grade credit to an investment grade credit since the time Gramercy purchased its Land Bonds.” *See* Edwards, **CER-4** ¶ 132. Peru received an investment-grade rating of Baa3 from Moody’s for the first time in December 2009 and then was upgraded further to Baa2 in August 2012. *See id.* ¶ 135. S&P gave Peru its first investment-grade rating of BBB- in July 2008 then upgraded that rating twice more—to BBB in August 2011 then to BBB+ in August 2013—before Peru renounced its Land Bond obligations in the 2014 MEF Supreme Decree. *See id.* ¶ 136.

586. Accordingly, Gramercy’s internal valuations, too, correctly “reflected these changing dynamics.” Joannou, **CWS-6** ¶ 26.

(b) Contemporaneous Market Transactions and Gramercy’s Internal Valuations Establish that the Fair Market Value of Gramercy’s Land Bonds Was at Least \$550 Million.

587. Peru acknowledges that a proper fair market value analysis “would incorporate relevant indicators of value from [the alleged breach date], including . . . any evidence of other purchases or sales.” Statement of Defense, **R-34** ¶ 310. Fortunately, such evidence of other purchases or sales exists.

588. Mr. Joannou explains that Gramercy’s internal valuation model—which, as described above, accounted for the market’s changing dynamics—assessed the Land Bonds’ fair market value for each year from 2006 to 2013. Joannou, **CWS-6** ¶ 26. As at year-end 2012 and 2013, the Land Bonds were valued at US\$554,121,874 and US\$577,880,980, respectively. *Id.*

589. These values were used as the basis for real-world transactions when Gramercy needed “to calculate the entry or exit price for [its] investors, or to make capital calls.” *Id.* ¶ 30. For instance, in three transactions occurring between February 2012 and January 2013, [REDACTED] purchased indirect interests in Gramercy’s Land Bonds at prices that, consistently with Gramercy’s internal valuations, implicitly valued Gramercy’s full Land Bond portfolio at US\$554,121,874 million as of January 2013. *Id.* The first transaction, completed in February 2012, resulted in [REDACTED] purchasing a 1.23% stake in PARB from Gramercy Select Master Fund in exchange for US\$4,576,062. Accordingly, at this specific moment in time, PARB had an implied value of US\$372,625,768. *See* Joannou, **CWS-6**, ¶ 30; [REDACTED]

[REDACTED] In May 2012, this time from Gramercy Emerging Markets Fund, [REDACTED] acquired a stake in PARB of 3.11% for \$11,569,944, implying a PARB valuation of US\$372,241,822. *See* Joannou **CWS-6**, ¶ 30; [REDACTED]

[REDACTED] Finally, in January 2013, [REDACTED] acquired a third stake in PARB, again from Gramercy Select Master Fund. For US\$2,257,346, it acquired 0.41%, implying a PARB valuation of US\$554,121,874. *See* Joannou, **CWS-6** ¶ 29; [REDACTED]

590. It is thus clear, as Mr. Joannou testifies, that “into mid-2013 Gramercy did not consider that the Land Bonds’ fair market value was anything like the price that Gramercy had paid to acquire the Land Bonds in 2006 to 2008. It was many times greater.” Joannou, **CWS-6** ¶ 31; *see also id.* (noting valuation of US\$526,639,898 as of June 30, 2013).

591. In sum, Gramercy’s internal valuations and contemporaneous transactions provide the best evidence of the Land Bonds’ fair market value at the time of Peru’s treaty breaches: that value was, at least, US\$550 million. As Mr. Joannou notes, these numbers “were not just abstractions. They were the figures we used in the conduct of our business.” Joannou, **CWS-6** ¶ 29. Real-world investors putting real money at risk valued the Land Bonds accordingly. Moreover, Gramercy’s internal valuations were validated by reputable third parties, including independent auditors and investment banks that were willing to put their credibility at stake. *See id.* ¶¶ 23-25. Recognizing the substantial value of its investment, Gramercy took out insurance in an amount of US\$500 million on the Land Bonds. *Id.* ¶ 8.

592. Accordingly, a valuation of US\$550 million, which is supported by real market indicators, offers a much more reliable estimate of fair market value, as of the date of the breach, than the price paid for the Land Bonds between 2006 and 2008—a figure which reflects only Gramercy’s initial sunk costs, not the value of its investment. Therefore, even if the Tribunal were to award Gramercy damages on the basis of fair market value—which would undercompensate Gramercy and deny it full reparation—Gramercy is entitled to US\$550 million at a minimum.

D. The Damages Award Must Be Structured So that Gramercy Receives the Full Intrinsic Value of Its Land Bonds on the Payment Date.

593. As described above, to place Gramercy in the position it was in before Peru repudiated its obligation to pay Gramercy the full intrinsic value of the Land Bonds, the Tribunal must issue an award that restores Gramercy’s legal entitlement to the current value of the Land Bonds.

594. Peru’s obligation under the Land Bonds is not static. That obligation has never been to pay a nominal sum on a specific date. *See* Castillo, **CER-9** ¶¶ 11-13. Rather, as an obligation of value, Peru’s obligation under the Land Bonds will continue to increase until Peru satisfies the obligation by paying the Land Bonds’ full intrinsic value as of the date payment is made. Edwards, **CER-6** ¶ 134. That full intrinsic value on any particular date is the current value of the unpaid principal—adjusted for inflation from the date of issuance to the payment date using Peru’s CPI—plus compound interest on that amount at an annual rate of 7.22%, which accrues from the date of the last clipped coupon to the payment date. Edwards, **CER-4** ¶ 13; Edwards, **CER-6** ¶¶ 11-16, 19. The interest component, here, is *not* a pre-award interest rate; it forms

part of the value of the Land Bonds themselves. As Prof. Edwards explains, “Gramercy purchased that value and stepped into the shoes of the prior bondholders.” Edwards, **CER-6** ¶ 36. That value incorporates accumulated interest.

595. For an award to provide full reparation to Gramercy, putting it in the position it would have been in but for Peru’s Treaty breaches, it must restore that dynamic obligation. The most direct way to accomplish this is to award Gramercy the full intrinsic value of its Land Bonds as of the date of the award and *post*-award interest that accrues at an annually-compounding real rate of 7.22% (*i.e.*, the same rate applied to the Land Bonds through the date of the award). That approach is very similar to legislation passed by the Peruvian Congress in 2006. **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N°11971/2004-CR, pp. 13, 40 (updating for Peruvian inflation and paying compound interest at an annual rate of 6.7%). More importantly, it is fully consistent with, and in fact mandated by, *Chorzów*’s full reparation standard. *See Chorzów* Judgment, **Doc. CA-23** ¶ 125.

596. Such an award is also consistent with other ways of thinking about how to structure damages awards appropriately. It is, for example, well established that, when an unlawfully expropriated asset appreciates in value between the time of expropriation and the time of the award, customary international law mandates use of the date of the award as the proper valuation date. *See, e.g., ADC Award*, **Doc. CA-2**, ¶ 497 (noting that various courts have applied the *Chorzów* standard to “compensate the expropriated party the higher value the property enjoyed at the moment of the Court’s judgment rather than the considerably lesser value it had had at the earlier date of dispossession”); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award of February 6, 2007, **Doc. CA-41**, ¶ 360 (“The Tribunal has to apply customary international law. Accordingly, the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded”); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of September 16, 2015, **Doc. CA-165**, ¶ 377 (reasoning that “damages stand in lieu of restitution which would take place just following the award or judgment”). Thus, awarding the full intrinsic value of the Land Bonds as of the award date is consistent with the usual approach taken in cases of unlawful expropriation or other treaty breaches.

597. In the alternative, if the Tribunal determines that the amount of the award should be determined as of the time of Peru’s Treaty breaches, the principal amount of damages would be the full intrinsic value of the Land Bonds as at that time. But, in that case, *pre*-award interest at an annually-compounding real rate of 7.22%, which would accrue on the total value owed as of the breach date, would be required

to provide Gramercy with full reparation. Edwards, **CER-6** ¶ 7. Post-award interest at the same rate would then apply from the date of the award until full payment is received.

598. Awarding post-award interest and pre-award interest (if applicable) at a 7.22% compound real rate is not only appropriate, but required, fully to implement Peru's obligation. Peru has not denied that a claimant is entitled to interest to be made whole. *See* Statement of Defense, **R-34** ¶¶ 312-313; *see also id.* ¶ 314 (requesting itself that interest be applied on any costs and expenses that may be awarded to it). Nor could it. Compensation in the form of interest is an integral part of a damages award. Even before *Chorzów*, a clear international principle had emerged according to which a state is responsible for delayed payment of a monetary debt. *See Russia v. Turkey*, PCA, Award of Nov. 11, 1912, **Doc. CA-175**, p. 10 (dismissing the claim as lapsed, but recognizing "that the general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt"). And investment tribunals now recognize that compound, rather than simple, interest "better reflect[s] contemporary financial practice and . . . constitutes the standard of international law in expropriation cases." *Quiborax Award*, **Doc. CA-165**, ¶ 524 (internal quotations omitted); *see also Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of March 28, 2011, **Doc. CA-30**, ¶¶ 359-360 (following "recent case law [that] tends to accept annual or semi-annual capitalization of unpaid interest"). In light of the full reparation standard, the Tribunal must thus award interest at a compound rate.

599. Furthermore, it falls well within the scope of the Tribunal's discretion to award interest at a rate reflecting the real rate of return of 7.22% per annum.

600. *First*, it is well established that Tribunals "enjoy a large margin of discretion" in the choice of interest rate to apply. *See* Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2017, **Doc. CA-134**, p. 338; *see also, e.g., Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision of the Annulment Committee of February 5, 2002, **Doc. RA-61**, ¶ 96 ("As an extended practice shows, international tribunals and arbitration panels usually dispose of a large margin of discretion when fixing interest. It is normal, therefore, that very limited reasons are given for a decision which is left almost entirely to the discretion of the tribunal"). Here, the Treaty specifies that "the tribunal may award . . . any applicable interest," without cabining the Tribunal's discretion in any way. **Doc. CE-139**, Treaty, Art. 10.26.1(a) (emphasis added); *see also id.* Art. 10.26.1(b) (also providing for "any applicable interest" where damages are awarded in lieu of restitution).

601. *Second*, the Tribunal's exercise of such discretion is supported by cogent economic analysis and solid data. Professor

Edwards has calculated that a real rate on debt of 7.22% per annum is a *conservative* measure of the compensation owed to bondholders for the investment opportunities of which they were deprived. *See* Edwards, **CER-4** ¶ 13; *see also* Edwards, **CER-6** ¶ 39. Peru’s own submissions confirm this. Indeed, while Peru’s quantum experts have criticized Prof. Edwards’s use of a long-term average rate of return and the use of data from different sources and periods (*see* Quantum Expert Report, **RER-5** ¶ 147), Prof. Edwards demonstrates that Peru’s criticisms, if taken into account, would, in fact, *increase* the interest rate calculated—and thus enlarge the Land Bonds’ value and Gramercy’s damages. Edwards, **CER-6** ¶¶ 37-39 (discussing use of long-term average real rate of return). He also shows that the data on which he relied is the best available data, reflecting, where appropriate, reasonable assumptions that are fully supported by the economic literature. *See id.* ¶¶ 41-42 (labor share of GDP), ¶ 43 (natural land as a proportion of GDP and capital stock), ¶¶ 44-48 (indirect taxes as a proportion of GDP). Tellingly, Peru’s quantum experts have provided no alternative calculation of a real rate of return.

E. Peru’s Unsubstantiated Accusations Cannot Support Its Prayer for Costs.

602. The Tribunal should order Peru to pay all the costs of the arbitration, as well as Gramercy’s professional fees and expenses.

603. Peru does not deny Gramercy’s argument that the principle of full reparation requires that a prevailing claimant be made whole for the costs of the arbitration proceedings and its legal expenses, as reflected in the Treaty, the governing UNCITRAL Rules, and arbitral practice. *Compare* Statement of Claim, **C-34** ¶¶ 252-254 *with* Statement of Defense, **R-34** ¶¶ 314-316. Rather, Peru claims that *it* is entitled to “*full* arbitration costs and expenses – with interest – as a result of Gramercy’s bad faith conduct.” Statement of Defense, **R-34** ¶ 314 (emphasis added). Peru’s request, supported only by accusations that are neither particularized nor substantiated, fails.

604. *First*, Peru accuses Gramercy of “harassing,” “harming,” and “attack[ing]” Peru in bad faith as part of a “litigation strategy to increase the value of the distressed assets that it purchased.” *Id.* But Peru presents no evidence of this “campaign” and fails to present a theory of how an alleged campaign of this kind might increase the Land Bonds’ value. Peru also misconstrues the run-up to Procedural Order No. 5 (“**PO5**”) and the Tribunal’s disposition in that order. The Tribunal made no mention of any alleged campaign on Gramercy’s part and instead obliged *both* “Parties [to] abstain from any action that may result in an aggravation of the dispute.” PO5 ¶ 62.

605. *Second*, and in any event, arguments about Gramercy’s conduct outside this arbitration are irrelevant. The question of costs

applies to conduct in the arbitration only. See **Doc. CE-174**, UNCITRAL Arbitration Rules, 2013, Art. 40.

606. *Third*, Peru repeats its arguments—while bringing to bear no new evidence—that Gramercy brought this arbitration in “bad faith” instead of relying on the hopelessly flawed “Bondholder Process.” Statement of Defense, **R-34** ¶ 314. As noted in Section II.E above, Gramercy has not committed any abuse of process.

607. While this is not the place to re-litigate Peru’s baseless allegations that Gramercy aggravated the dispute, the facts show that Gramercy was forced to vindicate its rights through this proceeding because it could not reasonably expect justice from the Bondholder Process, which has delivered paltry sums for those who have submitted to it after waiving their rights to appeal, and because for years, Peru rebuffed Gramercy’s attempts to reach a constructive, consensual resolution of the Land Bond debt. To cite just a few examples:

- Gramercy repeatedly invited Peru to “resolve the Land Reform Bonds situation amicably and in a way that pays the Bondholders substantially what they are due while enhancing Peru’s standing in the international community.” **Doc. CE-190**, Letter from Gramercy to the President of the Council of Ministers Cornejo and the Minister of Economy and Finance Castillo, April 21, 2014, p. 3; **Doc. CE-727**, Letter from Minister of Economy and Finance Castillo to Gramercy, April 21, 2014.
- Peru, however, refused to engage with Gramercy, and only when it filed its Notice of Intent and Arbitration did Peru even pretend to engage, with the President of the Special Commission Representing the State in International Investment Disputes, Javier Roca Fabian, inviting Gramercy to meet in Lima. **Doc. CE-588**, Letter from Javier Roca Fabian to Mark W. Friedman, February 15, 2016.
- Gramercy then proposed a tolling agreement to delay the commencement of the arbitration and give the Parties time to pursue meaningful discussions, but Peru derailed the tolling agreement negotiation at the eleventh hour by inserting new language that it knew Gramercy would not accept. **Doc. R-53**, Letter from Gramercy to Peru, May 30, 2016, pp. 3-4.
- Notwithstanding the formal commencement of proceedings, Gramercy continued to seek an amicable resolution, and Mr. Koenigsberger even wrote directly to the then-President Kuczynski several times, but to no avail, even after the former President announced on national television that he does not think that Peru “owe[s] [Gramercy] anything.” **Doc. CE-611**, Letter from Gramercy to President of Peru, September 19, 2016; **Doc.**

R-192, Letter from Gramercy to President of Peru, September 29, 2017; **Doc. CE-266**, Llanos-Small, Katie, *Peru's PPK: "I Don't Think We Owe [Gramercy] Anything,"* LatinFinance, August 22, 2016, p. [1].

- Peru refused to engage with Gramercy, instead issuing new decrees without any warning or so much as the courtesy of informing Gramercy. Thus, Peru published a new Supreme Decree *one day* before a scheduled negotiation meeting in February 2017. See **Doc. CE-269**, Supreme Decree N° 034-2017-EF, February 28, 2017.
- Gramercy wrote to Peru seeking clarification of its February 2017 Supreme Decree, which yielded no less than *six* different interpretations. See, e.g., **Doc. CE-270**, Gramercy's Letter to Peru of March 1, 2017. Peru refused to respond and instead issued another Decree setting forth another methodology and procedure to compensate bondholders in August 2017, followed by an "errata" the next week. **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017; **Doc. CE-276**, Supreme Decree N° 242-2017-EF (corrected), August 26, 2017.
- Peru has failed to honor President Kuczynski's promise to U.S. Congress to resolve the dispute and continues to refuse to engage with Gramercy. **Doc. R-183**, Gramercy's Letter to Peru of September 11, 2017; **Doc. R-184**, Peru's Letter to Gramercy of September 14, 2017.
- Just *three days* before Gramercy's due date for this submission, Peru has published yet another resolution regarding its Bondholder Process. **Doc. CE-697**, Directorial Resolution N° 023-2019-EF/52.01, May 8, 2019 (published May 11, 2019); **Doc. CE-698**, Directive Approved by Directorial Resolution N° 023-2019-EF/52.01, May 8, 2019 (published May 11, 2019).

608. As is evident from the above, Peru has repeatedly denied Gramercy's requests to negotiate, instead setting up a Bondholder Process meant ostensibly to resolve Peru's debt but which instead has offered bondholders compensation at a small fraction of the current value mandated by Peru's own courts.

609. Moreover, Peru's accusations against Gramercy ring especially hollow given the aspersions that Peru has cast against Gramercy and its counsel, and the imperious and disdainful approach Peru has taken to ordinary procedural matters in this arbitration. This includes:

- Peru continues to complain about matters the Tribunal has already resolved in Procedural Order No.5 on August 29, 2019, with regard to Peru’s interim measures application. *See, e.g.*, **R-45**, Respondent’s Letter to the Tribunal of April 24, 2019.
- Peru’s failure to produce documents in response to requests going to significant issues in the case—such as the basis for the formulas in its Supreme Decrees—confirms Gramercy’s fear that Peru insisted on an expensive document discovery phase only as a one-sided fishing expedition and without any commitment to provide reciprocal discovery in response. This is compounded by Peru’s repeated revisionist accusations that Gramercy is “withholding documents” that Gramercy has produced or is actively seeking to voluntarily produce under a confidentiality order. *See, e.g.*, **R-45**, Peru’s Letter to the Tribunal of April 24, 2019; *see also* **Doc. CE-750**, Gramercy’s Letter to Peru of March 25, 2019; **C-13**, Gramercy’s Letter to the Tribunal of April 17, 2018, p. 8 (expressing its position that “[c]ounsel’s prior experience in investment arbitration proceedings involving States is that discovery is often unfairly asymmetrical”); **R-7**, Peru’s Letter to the Tribunal of April 17, 2018, pp. 3-4 (Peru insisting that “[d]ue process calls for a document production phase” in order to “facilitate the search for truth and bring access to justice, and this is especially true when parties have unequal access to evidence”).
- Peru continues to refuse to agree to a perfectly reasonable confidentiality agreement to cover certain sensitive documents that Gramercy has agreed to voluntarily produce to Peru. *See, e.g.*, **R-45**, Respondent’s Letter to the Tribunal of April 24, 2019. Peru dragged this issue out for weeks, despite clear directives from the Tribunal mandating that the Parties “act in good faith” and “cooperate actively to achieve a rapid, efficient, and final solution of the present dispute.” PO5 ¶ 62.
- Most recently, despite Gramercy’s reasonable grounds to seek a modest extension that would not prejudice Peru, Peru repeatedly failed to respond to Gramercy by successive deadlines and instead accused Gramercy’s counsel of sending a “disingenuous” and “rambling and biased communication [that] is unmasked as farce by the lack of college [sic] conduct toward Peru and its counsel.” *See* **Doc. CE-700**, Email from Peru to Gramercy, May 12, 2019.

610. Just as Peru’s approach to addressing the Land Bond debt has been unconstructive, its intransigence and aggressive procedural tactics in this proceeding have led Gramercy to spend needless time and resources to address even the most basic and routine issues. Gramercy

expects that the Tribunal will call for briefing on costs at the appropriate time, and Gramercy will reserve its detailed comments on Peru's conduct for such submissions. Meanwhile, Gramercy respectfully suggests that Peru focus on the substantive issues in dispute rather than continuing its misplaced attempts to impugn Gramercy's conduct.

V.

REQUEST FOR RELIEF

611. Gramercy is entitled to relief that would wipe out the effects of Peru's unlawful conduct and restore Gramercy's right to obtain full compensation for the Land Bonds.

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

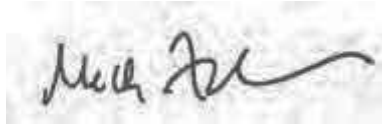
- a. Declaring that Respondent:
 - i. unlawfully expropriated Gramercy's investment in breach of Article 10.7 of the Treaty;
 - ii. failed to accord the minimum standard of treatment to Gramercy's investment in breach of its obligations under Article 10.5 of the Treaty;
 - iii. denied Gramercy MFN treatment by depriving it of effective means, in breach of Article 10.4 of the Treaty; and
 - iv. subjected Gramercy to treatment that was less favorable than the treatment granted to its own investors in breach of its obligations under Article 10.3 of the Treaty.
- b. Ordering Respondent to pay monetary damages in an amount that would wipe out all the consequences of Respondent's illegal acts, valued at an amount that is the contemporary equivalent of the Land Bonds' value at the time they were issued, which is approximately US\$1.80 billion as of May 31, 2018, and which continues to grow and will be further updated as of the date of the award;
- c. In the alternative to the request set out at (b) above, ordering Respondent to pay monetary

damages equal to the value that Gramercy would have likely obtained, at a minimum, in court proceedings in Peru, which is approximately US\$842 million as of May 31, 2018, and which continues to grow and will be further updated as of the date of the award;

- d. In the further alternative to the requests set out at (b) and (c), ordering Respondent to pay monetary damages equal to the fair market value of the Land Bonds as of immediately before Peru's breaches, which is approximately US\$550 million, plus interest at commercial, annually compounding rates, such as the rate of the real return on debt in Peru, on that amount from the date of the breach through the date of the award;
- e. Ordering Respondent to pay all the costs of the arbitration, as well as to pay Gramercy's professional fees and expenses;
- f. Ordering Respondent to pay interest at commercial, annually compounding rates, such as the rate of the real return on debt in Peru, on the above amounts from the date of the award until full payment is received; and
- g. Ordering any other such relief as the Tribunal may deem appropriate.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark W. Friedman", is centered on a light gray background.

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New York, New York, May 21, 2019