

**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' REJOINDER
TO PERU'S OBJECTIONS TO JURISDICTION**

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2001 CT Decision	Constitutional Tribunal Decision dated March 15, 2001, Doc. CE-11
2013 CT Order	Constitutional Tribunal Order dated July 16, 2013, Doc. CE-17
2013 CT Resolutions	Constitutional Tribunal Resolution dated August 8, 2013, Doc. CE-180 , and Constitutional Tribunal Resolution dated November 4, 2013, Doc. CE-183
2014 Supreme Decrees	Supreme Decree N° 17-2014-EF dated January 17, 2014, Doc. CE-37 , and Supreme Decree N° 19-2014-EF dated January 21, 2014, Doc. CE-38
BIT	bilateral investment treaty
CAFTA	Central American Free Trade Agreement
CPI	Consumer Price Index
CT	Constitutional Tribunal
Decree Law N° 17716	Land Reform Act of June 24, 1969, Doc. CE-1
GA	Gramercy Advisors LLC
GEMF	Gramercy Emerging Markets Fund LLC
GFM	Gramercy Funds Management LLC
GIA	Gramercy Investment Advisors LLC
GPH	Gramercy Peru Holdings LLC
ILC	International Law Commission
IMF	International Monetary Fund
Land Bonds	Peruvian Agrarian Land Reform Bonds
Land Reform	Peru's expropriation and redistribution of agrarian land, for which the Government issued Land Bonds as purported compensation
MEF	Peru's Ministry of Economy and Finance
Mincetur	<i>Ministerio de Comercio Exterior y Turismo</i>

Model BIT	Model Bilateral Investment Treaty
NAFTA	North American Free Trade Agreement
PARB	Peru Agrarian Reform Bond Company Ltd.
U.S. Submission	Submission of the United States of America as Non-Disputing Party, June 21, 2019
Treaty	United States-Peru Trade Promotion Agreement of February 1, 2009, Doc. CE-139
VCLT	Vienna Convention on the Law of Treaties, Doc. CA-193

TABLE OF PARTIES' SUBMISSIONS

C-1	Notice of Intent to Commence Arbitration, February 1, 2016
C-2	Amended Notice of Intent to Commence Arbitration, April 15, 2016
C-3	Notice of Arbitration and Statement of Claim, June 2, 2016
C-4	Amended Notice of Arbitration and Statement of Claim, July 18, 2016
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C-22	Claimants' Opposition to Peru's Interim Measures Application, June 1, 2018
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C-69	Claimants' Rejoinder to Peru's Objections to Jurisdiction, November 13, 2019 (" <i>Rejoinder on Jurisdiction</i> ")
CER-1	Expert Report of Sebastian Edwards, June 2, 2016 (" <i>Edwards I</i> ")
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CER-3	Amended Expert Report of Delia Revoredo Marsano de Mur, August 5, 2016 (" <i>Revoredo II</i> ")
CER-4	Amended Expert Report of Sebastian Edwards, July 13, 2018 (" <i>Edwards II</i> ")
CER-5	Second Amended Expert Report of Delia Revoredo Marsano de Mur, July 13, 2018 (" <i>Revoredo III</i> ")

- CER-6** Reply Expert Report of Sebastian Edwards, May 21, 2019 (“*Edwards III*”)
- CER-7** First Expert Report of Amb. Peter Allgeier, May 21, 2019 (“*Allgeier I*”)
- CER-8** First Expert Report of Prof. Rodrigo Olivares-Caminal, May 21, 2019 (“*Olivares-Caminal I*”)
- CER-9** Expert Report of Prof. Mario Castillo Freyre, May 21, 2019 (“*Castillo*”)
- CER-10** Expert Report of Alfredo Bullard, May 21, 2019 (“*Bullard*”)
- CER-11** Reply Expert Report of Amb. Peter Allgeier, November 13, 2019 (“*Allgeier II*”)
- CER-12** Reply Expert Report on Jurisdiction of Prof. Rodrigo Olivares-Caminal, November 13, 2019 (“*Olivares-Caminal II*”)
- CWS-1** First Witness Statement of Robert S. Koenigsberger, June 2, 2016 (“*Koenigsberger I*”)
- CWS-2** Amended Witness Statement of Robert S. Koenigsberger, August 5, 2016 (“*Koenigsberger II*”)
- CWS-3** Second Amended Witness Statement of Robert S. Koenigsberger, July 13, 2018 (“*Koenigsberger III*”)
- CWS-4** Reply Witness Statement of Robert S. Koenigsberger, May 21, 2019 (“*Koenigsberger IV*”)
- CWS-5** First Witness Statement of Robert Lanava, May 21, 2019 (“*Lanava I*”)
- CWS-6** Witness Statement of Robert Joannou, May 21, 2019 (“*Joannou*”)
- CWS-7** Witness Statement of [REDACTED], May 14, 2019 (“[REDACTED]”)
- CWS-8** Witness Statement of [REDACTED], May 14, 2019 (“[REDACTED]”)
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- CWS-10** Rebuttal Witness Statement of Robert S. Koenigsberger, November 13, 2019 (“*Koenigsberger V*”)

CWS-11	Reply Witness Statement of Robert Lanava, November 13, 2019 (“ <i>Lanava I</i> ”)
R-1	Respondent’s Response, September 6, 2016
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R-27	Respondent’s Second Submission on Procedural Safeguards, June 15, 2018
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RER-5	Quantum Expert Report, December 14, 2018 (“ <i>Peru’s Quantum Report I</i> ”)
RER-6	Supplemental Opinion with Respect to Jurisdiction of Professor W. Michael Reisman, September 6, 2019 (“ <i>Reisman II</i> ”)
RER-7	Second Expert Report of Oswaldo Hundskopf, September 13, 2019 (“ <i>Hundskopf II</i> ”)
RER-8	Expert Report of Eduardo García-Godos, September 13, 2019 (“ <i>García-Godos</i> ”)
RER-9	Supplementary Expert Report of Norbert Wühler, September 13, 2019 (“ <i>Wühler II</i> ”)

- RER-10** Second Expert Report of Pablo E. Guidotti, PhD., September 13, 2019 (“*Guidotti II*”)
- RER-11** Second Quantum Expert Report, September 13, 2019 (“*Peru’s Quantum Report II*”)
- RWS-1** Witness Statement of Betty Armida Sotelo Bazán (“*Sotelo I*”)
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- RWS-4** Second Declaration of Luis Miguel Castilla Rubio (“*Castilla II*”)
- RWS-5** Witness Statement of Carlos Alberto Herrera Perret, September 13, 2019 (“*Herrera*”)

I.

INTRODUCTION

1. Peru's Statement of Rejoinder (the "*Rejoinder*") once again confirms that Peru's litany of jurisdictional objections essentially boil down to one ideological proposition: that Gramercy is a "hedge fund speculator," and for that reason should not be entitled to protection under the United States-Peru Trade Promotion Agreement (the "*Treaty*"). Thus, Peru argues that Gramercy cannot qualify as an "investor," despite both Claimants plainly satisfying the Treaty's straightforward definition of that term as U.S. entities that made an investment; Gramercy's investment in the Land Bonds is not an "investment," despite the Treaty's explicit protection of bonds, debt instruments, and public debt, and the fact that the Land Bonds present the characteristics of an investment; and that Gramercy's investment in the Land Bonds constitutes an abuse of the Treaty and an impermissible attempt to extend the Treaty to a legacy domestic problem, even though there is no dispute that Gramercy was at all times a U.S. national protected by the Treaty and that the State conduct that gives rise to Gramercy's claims occurred many years after Gramercy invested in Peru.

2. In its attempt to exclude Gramercy from the Treaty protections to which it is entitled, Peru thus proposes an interpretation of the Treaty that is at odds with both its ordinary meaning and its object and purpose. Peru's approach also leads to untenable consequences: it would exclude not only Gramercy's investment in the Land Bonds, but almost *any* investor and *any* investment. Peru's various proposed limitations on the Treaty text would mean, for example, that a U.S. investor that owns and controls an asset of the kind expressly identified by the Treaty as a form of investment nevertheless would *not* qualify unless it made some unspecified but "active contribution" to that investment, unless there were no upstream stakeholders or third parties that would benefit from the investment, unless the investment was bought with the investor's own money without help from others, and unless the purchase price was paid directly to the Government of Peru rather than to Peruvian nationals, and not in a series of one-off payments. It would mean that this otherwise-covered investment would not be protected under the Treaty unless the investment had been marketed to foreign investors on foreign markets and denominated in a foreign currency, unless there had

never been any kind of domestic litigation relating to the investment, unless it did not relate to a historical period of Peru's past, unless the investment was of a long enough duration but also not too old, unless it demonstrably improved living conditions and labor standards, unless it created parity between foreign and host-State investors, and so on. That is clearly not what the State Parties here intended or agreed in concluding a Treaty that Peru admits contains a broad definition of investment covering all possible forms of assets from which exclusions were specifically approved and explicitly identified.

3. Beyond seeking to impose these untenable constraints on the Treaty's scope, Peru largely fails to address the arguments, evidence, and authority that Gramercy presented in its Statement of Reply and Answer to Objections (the "**Reply**"). Accordingly, notwithstanding Peru's attempts to misconstrue the Treaty and mischaracterize the facts, each of Peru's jurisdictional and admissibility objections remains meritless.

4. *First*, both Gramercy Funds Management LLC ("**GFM**") and Gramercy Peru Holdings LLC ("**GPH**") qualify as investors under the Treaty, as they are U.S. entities that made an investment in Peru. Peru's attempt to introduce, for the first time in its Rejoinder, a heightened standard of "active contribution" is unsupported as a matter of treaty interpretation and in any event irrelevant because Gramercy satisfies even that heightened standard. Peru's second new objection, also presented for the first time in its Rejoinder, that Gramercy does not have "standing" to bring claims because third parties—*i.e.*, Gramercy's clients—have an indirect financial interest in the Land Bonds, is similarly divorced from the Treaty framework and would disqualify almost every kind of investor imaginable, including any company by virtue of the fact that it had shareholders.

5. *Second*, the Land Bonds qualify as covered investments under the Treaty because they are forms of investment that the Treaty expressly recognizes—namely, "bonds," "*obligaciones*," and "debt instruments," including "public debt"; they have "the characteristics of an investment," including those the Treaty provides as examples; and Gramercy "owns or controls" them. Treaty, **Doc. CE-139**, Article 10.28. Peru's insistence that the definition of "bonds" must be limited to so-called "modern sovereign bonds" that were issued on international markets for international investors likewise has no basis in the Treaty. Peru cannot rebut that the Land Bonds satisfy the ordinary meaning in

context and in good faith of the terms the Treaty expressly enumerates as forms of investment; that a comparison of the Land Bonds to so-called modern sovereign bonds is a distinction without a relevant difference and finds no support in the Treaty text; and that Peru and the United States were well aware of disputes with U.S. investors arising out of Peru's land reforms during the negotiation of the Treaty, but did not expressly exclude either those reforms or the Land Bonds from the scope of the Treaty, as they would have had to do under the negative list negotiating framework if they had agreed to carve out these Land Bonds as distinct from all other bonds.

6. *Third*, Gramercy has complied with all of the Treaty's preconditions to arbitration, because both Claimants have submitted a valid waiver, and all claims were submitted within three years of Gramercy's knowledge of Peru's breach and that it had incurred loss regardless of whether the effective date of the arbitration was as early as June 2, 2016 or as late as August 8, 2016. Peru at last appears to accept that GFM's waiver was effective as of June 2, 2016, making its remaining objections on GPH's waiver inconsequential as well as inaccurate. Peru's novel argument that the date when Peru's courts accepted GPH's withdrawals from local proceedings should determine the date on which GPH complied with its waiver obligations also has no basis in the Treaty's text and would lead to perverse consequences. Peru further does not rebut that the relevant local proceedings could not trigger the waiver provision in the first place because they are not proceedings with respect to the same measures that Gramercy alleges breached the Treaty.

7. *Fourth*, Gramercy's claims do not require retroactive application of the Treaty. All of Peru's actions that give rise to Gramercy's claims occurred many years after the Treaty came into force. The fact that Peru's Land Reform occurred decades before that is irrelevant, because the dispute between Gramercy and Peru is not about the Land Reform, and because the Treaty ties temporal jurisdiction not to the sameness of disputes, but to acts and facts that occurred, and situations that continued, after the Treaty's entry into force—which is indisputably the case here.

8. *Finally*, Gramercy has not "abused" its right to arbitration, and thus its claims are not inadmissible on that basis. Peru's attempts to disparage Gramercy for investing in Peru's Land Bonds when they were in default does not meet the high standard of establishing that Gramercy abused its right to

arbitration. Peru does not even grapple with, let alone rebut, the evidence that Gramercy did not buy the Land Bonds in order to bring a Treaty claim against Peru, or with the facts that the initial investors were and remain protected U.S. nationals, that there was no abusive reorganization, and that the measures in dispute in this arbitration postdate Gramercy's investment by a half-decade. Gramercy's awareness that the Treaty, if and when it came into force, would protect Gramercy against any unlawful conduct by Peru in the future is simply prudent investor behavior and not an abuse of process.

9. Accordingly, Peru's assortment of kitchen-sink objections has no merit and should be dismissed, with a full award of costs in Gramercy's favor.

II.

ARGUMENT

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

10. In its Rejoinder, Peru largely abandons its previous ill-founded argument that Gramercy does not qualify as an investor because it had not "prove[d]" it had actually acquired the Land Bonds. *Compare* Statement of Defense, **R-34**, ¶¶ 214, 216, *with* Rejoinder, **R-65**, ¶¶ 87-88. As Gramercy demonstrated, that argument failed as both a legal and factual matter, because GPH purchased the Land Bonds in full compliance with Peruvian law, through transactions in Peru with Peruvian bondholders, and with the purchase price paid into their Peruvian bank accounts, while GFM exercised both factual and legal control over GPH and the Land Bonds. *See* Reply, **C-63**, ¶¶ 16-18. Furthermore, there is no dispute that GPH and GFM are U.S. companies. Thus, both GPH and GFM are qualifying investors: they are U.S. enterprises that "made" an investment in Peru.

11. Unable to deny these key facts, Peru's principal arguments now are that: (i) the Treaty's reference to a U.S. national that has "made an investment" requires some heightened standard of "active contribution" beyond ownership or control, and (ii) Gramercy's business as an investment manager somehow disqualifies it from Treaty protection. Much of Peru's arguments on why Gramercy is not a protected investor thus unsuccessfully rehash Peru's arguments that the Land Bonds are not covered

investments, and that Gramercy had “speculative” aims. *See, e.g.*, Rejoinder, **R-65**, ¶¶ 7-8, 86. The Treaty contains no such restrictions, however, and neither of these arguments is supported as a matter of law or fact.

1. Peru’s Attempts to Impose a Substitute Legal Standard Do Not Overcome the Fact That Gramercy “Made” an Investment in Peru.

(a) All the Treaty Requires Is That GPH and GFM Have “Made” an Investment in Peru.

12. The crux of the difference between the Parties on personal jurisdiction is that Peru attempts to read into the Treaty various restrictions that its text, properly interpreted, simply does not contain.

13. The Treaty provides a straightforward definition of investor—one which both GPH and GFM clearly meet. As Gramercy explained in its Reply, and as Peru acknowledges, the Treaty defines an “investor” to include “an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party.” *See* Treaty, **Doc. CE-139**, Article 10.28; Rejoinder, **R-65**, ¶ 89. As such, in order to qualify as an investor, GPH and GFM need only satisfy two criteria: (i) they are U.S. enterprises, and (ii) they have “made an investment” in Peru.

14. Peru does not deny that GPH and GFM are U.S. enterprises. And there can be no doubt that they invested “in the territory of” Peru since that is where they purchased the Land Bonds and took steps to recover their value. Reply, **C-63**, ¶¶ 24-26. Peru thus cannot impose some elusive heightened standard of personal jurisdiction by distorting the straightforward phrase “*made* an investment.”

15. *First*, the plain meaning of the verb “to make” is “to cause (something) to exist” or “to give rise to; to have as a result or consequence; to be the cause of.” *See* BLACK’S LAW DICTIONARY, 2019, Definition of “Make,” **Doc. CE-776**; OXFORD ENGLISH DICTIONARY, Definition of “Make,” **Doc. CE-777**. There is no reason to assume that the use of that verb in the Treaty’s definition of investor requires any other, special meaning. The Treaty does not specifically define that common word at all, much less in some narrow and peculiar way. Nor would it make sense for Treaty

sections aimed at encouraging investors to invest to surprise them with the idea that a word like “make,” with a perfectly comprehensible ordinary meaning, actually means something highly specialized and very different. Consequently, all that GPH and GFM must show is that they caused an investment to exist, gave rise to it, or brought it about.

16. *Second*, the thing that must be brought about or caused to exist necessarily informs whether an investor has “made” that thing. As a result, the making of an investment for purposes of the Treaty’s definition of an “investor” must also be interpreted by reference to the definition of “investment” as any qualifying asset “that an investor owns or controls, directly or indirectly.” See Treaty, **Doc. CE-139**, Article 10.28.

17. These definitions clearly depend on and refer back to each other: the act of making an “investment” itself qualifies an enterprise as an “investor.” Reading them together does not “oversimplif[y] the Treaty’s requirement” or “rel[y] on the wrong Treaty provision,” as Peru claims (*cf.* Rejoinder, **R-65**, ¶ 89); rather, it is faithful to the Treaty’s text. Indeed, despite its criticisms, this is also the approach that Peru itself adopts—inaptly—in invoking the *Salini* factors on the meaning of “investment” under the ICSID Convention to dispute that GPH and GFM are not protected *investors*. See Rejoinder, **R-65**, ¶¶ 103-104. Even Prof. Reisman appears to agree: his only basis for considering that Gramercy “cannot be an investor” is that “the Bonds do not constitute an ‘investment.’” W. Michael Reisman, Supplemental Opinion with Respect to Jurisdiction (“*Reisman II*”), **RER-6**, ¶ 40.

18. Thus, taking these definitions together, the requirement to “[make] an investment” simply requires Gramercy to “cause” or “give rise to” its ownership or control, direct or indirect, of a qualifying asset.

19. *Third*, in light of those Treaty terms, Peru is simply wrong to contend that “nominal ownership or control of an investment does not alone confer ‘investor’ status.” *Cf.* Rejoinder, **R-65**, ¶ 90. Contrary to Peru’s assertion, the Treaty does not state that anything “[m]ore is required.” *Cf. id.* Article 10.28’s clear language grants Treaty protection to any assets that investors “own,” whether nominally or otherwise, as well as those they “control,” without more—and in both cases, for assets owned or controlled “directly or indirectly”—all of which fall within the

definition of “investment.” See Treaty, **Doc. CE-139**, Article 10.28; see also Reply, **C-63**, ¶ 19. Nothing in this language requires an investor to have caused to exist or given rise to anything “[m]ore” than ownership or control, whether direct or indirect. Indeed, neither Peru nor Prof. Reisman advanced such a theory in Peru’s prior filing; to the contrary, Prof. Reisman’s primary objection was that Gramercy had allegedly not provided sufficient evidence that it “made an investment, *i.e. acquired the Bonds.*” See Statement of Defense, **R-34**, ¶ 214; W. Michael Reisman, Opinion with Respect to Jurisdiction (“*Reisman I*”), **RER-1**, ¶ 64 (emphasis added); Reply, **C-63**, ¶ 16.

20. Finally, the Treaty provides one single exception to this general definition of investor, by allowing the respondent State to deny benefits to an otherwise qualified investor if a particular set of circumstances are met: namely, “if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.” See Treaty, **Doc. CE-139**, Article 10.12.2; Reply, **C-63**, ¶ 28. Those conditions for denial of benefits are clearly not met here, and indeed Peru has not suggested they are, much less invoked this clause.

21. Both GPH and GFM thus meet the Treaty’s definition of investor because they are U.S. enterprises that have “made an investment” in Peru.

(b) Peru’s Attempts to Impose a Substitute Standard of “Active Contribution” Are Unfounded and at Odds with the Treaty Text.

22. Contrary to its prior submissions, Peru now argues that neither GPH nor GFM has “made an investment” because neither ownership of the Land Bonds nor control of them suffices; instead, Peru claims that the Treaty should be interpreted to require a heightened standard of “active contribution,” which Gramercy allegedly does not meet. Cf. Rejoinder, **R-65**, ¶¶ 89-90; Reply, **C-63**, ¶¶ 16-17. While Peru does not explain what it means by “active contribution”—despite its repeated invocations of the term—its various arguments on the topic suggest that it would require direct acquisition of the asset, and beyond that, acquisition with funds originating at all times from the claimant entity itself. See, e.g., Rejoinder, **R-65**, ¶¶ 89-93, 141. These arguments are notably not supported by Prof. Reisman’s opinions on the

application of the Treaty to this case, or by Mr. Herrera's account of the Treaty's negotiation. They are also at odds with the Treaty text, prior decisions, and the relevant facts.

23. *First*, the Treaty defines an investor as a U.S. enterprise who “attempts through concrete action to make, is making, or has made an investment.” See Treaty, **Doc. CE-139**, Article 10.28. Peru's claim that the reference to “concrete action” in Article 10.28 requires an investor to “*actively* ‘make’ an investment through *tangible* measures” appears to be based on an obvious grammatical error. Cf. Rejoinder, **R-65**, ¶ 89 (emphasis added). A plain reading of this text makes clear that the phrase “through concrete action” modifies only the first of these three actions—namely, a national who *attempts* to make an investment—but has no bearing on a party that *has made* an investment: the words “through concrete action” appear in between “attempts” and “to make,” not at the outset of “attempts to make, is making, or has made.” Peru's witness Mr. Herrera, who states that he was part of Peru's negotiating team for the Treaty, confirms this interpretation: he explains that the Treaty “would extend only to those that ‘make’ or ‘made’ an investment, or at minimum *develop concrete steps in a good faith attempt at making* an investment.” Statement of Carlos Alberto Herrera Perret (“*Herrera*”), **RWS-5**, ¶ 19 (emphasis added).

24. The negotiation summaries of the Treaty also support this interpretation and explain why the qualifier “concrete action” appears in the Treaty but not in the U.S. Model Bilateral Investment Treaty (“*Model BIT*”), as Peru points out. See Rejoinder, **R-65**, ¶ 89. The question of coverage of the pre-investment phase was concern for the Andean nations. See 3rd Round of Andean-U.S. FTA Negotiations, **Doc. CE-421**, p. 41; see also Herrera, **RWS-5**, ¶ 19 (noting that the Andean nations “highlighted the need to specify the conditions that must be verified to determine that an investor is ‘attempting to make an investment’”). That concern was apparently resolved by adding the qualifier of “concrete action” with respect to investors *attempting* to make an investment, after which Peru concluded that just as the definition of investment “is broad,” the final definition of “investor *is also broad* and comprises the State, its nationals and the companies constituted under the laws of that State, which *intend to make*, are making or have made an investment in the country.” 13th Round of Andean-U.S. FTA Negotiations, **Doc. CE-447**, p. 55 (emphasis added). There is no reference in Peru's negotiation summaries of any additional requirement of

“active contribution.” As Amb. Allgeier confirms, if the inclusion of these terms were intended to substantially narrow the scope of protected investors, the U.S. negotiators would have had to get approval from the inter-agency review process, and he is not aware of such a process having taken place regarding this issue when negotiating the Treaty. Reply Expert Report of Ambassador Peter Allgeier (“*Allgeier II*”), **CER-11**, ¶ 30.

25. *Second*, equally erroneous is Peru’s assertion that “tribunals repeatedly have ruled” that “a claimant must make its own active contribution,” which term would not be satisfied by ownership or control. *Cf.* Rejoinder, **R-65**, ¶ 90.

26. In fact, tribunals that have interpreted similarly worded treaty language have generally refused to impose additional jurisdictional requirements like Peru’s elaborate and restrictive reading of the word “make” or “made.” In *Abaclat, Ambiente Ufficio*, and *Alemanni* for example, the treaty defined “investor” as “any individual or corporation of one Contracting Party that *has made, makes or undertakes to make* investments in the territory of the other Contracting Party.” *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-309**, ¶ 393 (emphasis added). These three tribunals readily concluded that they had personal jurisdiction over the claimants—who included institutional investors of the requisite nationality—without further enquiring whether they had “made” a sufficiently active contribution. *Id.*, ¶¶ 401, 421 (over the respondent’s objection that the “Claimants did not make an investment in the territory of the Argentine Republic”); *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility of February 8, 2013, **Doc. RA-173**, ¶ 322; *Alemanni and others v. Argentine Republic*, ICISD Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of August 17, 2013, **Doc. RA-178**, ¶¶ 261-273; *see also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, **Doc. CA-119**, Award of September 22, 2014, ¶ 264 (noting that in *EnCana v. Ecuador*, under a treaty defining “investor” as a foreign national “who makes the investment,” “[t]he fact that EnCana acquired the parent which owned the companies who held the concessions [at issue in the arbitration] was considered by all to be sufficient to constitute the ‘making’ of an investment” (citing *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award of February 3, 2006, **Doc. RA-78**)); *Vladislav Kim and others v. Republic of*

Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction of March 8, 2017, **Doc. CA-218**, ¶¶ 310-312 (rejecting the argument that references to protection of investments “made by” qualifying nationals required the tribunal to interpret the treaty “in a more restrictive manner or to require a greater degree of involvement in the management of the investment by Claimants than would otherwise be the case”); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award of December 19, 2016, **Doc. CA-215**, ¶¶ 229-231 (rejecting the argument that an investment must be “actively made” based on the treaty’s reference to “investment[s] of the [claimant]”).

27. In contrast, the cases on which Peru relies do not address treaty language of an investor who has “made an investment”—which as noted above simply connotes “to cause” or “to give rise to”—but rather consider different treaty language, or address the question of “contribution” in other contexts. See Rejoinder, **R-65**, ¶ 91. In *KT Asia*, for example, the statements on which Peru relies relate to the tribunal’s consideration of whether there was an “investment” according to the so-called *Salini* factors—not to whether the claimant qualified as an “investor,” which the tribunal in fact decided in the affirmative. *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of October 17, 2013, **Doc. RA-317**, ¶¶ 140-144; see also *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award of July 16, 2012, **Doc. RA-318**, ¶¶ 322, 337-361 (Prof. William W. Park) (analyzing “contribution” in the context of interpreting treaties referencing “investments by” an investor); *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award of May 20, 2019, **Doc. RA-319**, ¶¶ 230-231 (analyzing contribution in the context of interpreting “invested by” investors); *Standard Chartered Bank v. United Republic of Tanzania I*, ICSID Case No. ARB/10/12, Award of November 2, 2012 **Doc. RA-320**, ¶¶ 221, 225, 261 (analyzing contribution in the context of interpreting clause limiting tribunal’s jurisdiction to disputes concerning investments “of” investors); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award of June 5, 2012, **Doc. RA-321**, ¶¶ 343, 351, 360 (analyzing contribution in the context of interpreting “investment,” defined as “every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party,” in order to determine if the claimant met foreign nationality requirement); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational*

State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction of September 27, 2012, **Doc. RA-322**, ¶¶ 228, 232 (analyzing whether the investor made an “original contribution” as part of its interpretation of “investment” under Article 25(1) of the ICSID Convention”).

28. Peru also mischaracterizes these cases in other ways. In *Alapli*, it was not the tribunal but only *one* of the three tribunal members who opined that—“on the unique facts of this case”—the claimant did not qualify as an investor because it had not made an investment. *Cf.* Rejoinder, **R-65**, ¶ 91; *Alapli* Excerpts of Award, **Doc. RA-318**, ¶ 315. That award is heavily redacted and appears to have generated three separate partially concurring and dissenting opinions. It appears, however, that the arbitrator in question reached this conclusion on the basis that the claimant, a Dutch entity, served as a “conduit” by which a U.S. entity made financial contributions to the local entity (whose shares constituted the “investment”) in order to fulfill the U.S. entity’s obligations to a third entity—a fact pattern not analogous to Gramercy’s own ownership and control of the Land Bonds. *Alapli* Excerpts of Award, **Doc. RA-318**, ¶¶ 340-346, 349. The *majority* of the tribunal in *Alapli*, however, concluded that the claimant satisfied the definition of investor. *See id.*, ¶ 390 (reflecting Prof. Brigitte Stern’s conclusion that the claimant qualified as an investor, but denying jurisdiction on the basis that there was no protected investment); *id.*, Dissenting Opinion of Hon. Marc Lalonde, ¶ 4 (finding that claimant “clearly meets the definition of ‘an investor’ under both the [bilateral investment treaty] and the [Energy Charter Treaty]”).

29. Peru also mischaracterizes the holding of *Clorox*. *Cf.* Rejoinder, **R-65**, ¶ 91. In *Clorox*, the treaty did not require the investor to have “made” an investment, but it defined covered “investments” as “every kind of asset *invested by* investors of a Contracting Party.” *Clorox* Award, **Doc. RA-319**, ¶¶ 795, 801 (emphasis added). The tribunal found that the reference to investing by investors required the claimant to be “the active subject of the action of investing,” which it found was not the case on the facts before it as the claimant would have had no independent existence but for the share exchange through which it inherited its ownership of the local business. *Id.*, ¶¶ 802, 830-831. But the tribunal’s reasoning that “owning shares is not the same as investing in shares,” *cf. id.*, ¶ 821, illustrates why *Clorox* is inapposite here: the Treaty in this case expressly speaks

of assets that an investor “owns or controls,” not ones that it has “invested.”

30. Nothing in the Treaty or prior decisions, therefore, supports interpreting “made an investment” as requiring anything beyond ownership or control, whether direct or indirect, of that investment.

(c) Regardless of the Articulation of the Standard, GFM and GPH Satisfy It.

31. Whether under the Treaty’s standard of having “made” an investment that Gramercy “owns or controls, directly or indirectly,” or under Peru’s inapt and unarticulated standard of “active contribution,” each of GPH and GFM qualifies on the facts of this case.

32. *First*, Peru does not deny that GPH itself actively sought out, negotiated, and ultimately acquired the investment in the Land Bonds directly from Peruvian individual bondholders in arm’s-length transactions in Peru. *See* Reply, **C-63**, ¶¶ 16-18; Witness Statement of Robert Lanava (“*Lanava I*”), **CWS-5**, ¶¶ 6-13; Rebuttal Witness Statement of Robert S. Koenigsberger (“*Koenigsberger V*”), **CWS-10**, ¶ 22; Second Witness Statement of Robert Lanava (“*Lanava II*”), **CWS-11**, ¶ 5. Nor does Peru deny that GFM legally and factually controlled the investment, both in its own right and through its predecessors-in-interest Gramercy Advisors LLC (“*GA*”) and Gramercy Investment Advisors LLC (“*GIA*”), at all relevant dates. *See* Reply, **C-63**, ¶¶ 19-23; Reply Witness Statement of Robert S. Koenigsberger (“*Koenigsberger IV*”), **CWS-4**, ¶¶ 36-43; Koenigsberger V, **CWS-10**, ¶ 23. The fact that GFM took over management and control from predecessor entities after the initial acquisition does not mean that GFM did not “make” an investment, nor does it render GFM analogous to a so-called “passive” investor. To the extent any “active contribution” is required, GFM would satisfy such a requirement through, among other things, its commitment of know-how, contacts, expertise, and time. *See* Reply, **C-63**, ¶ 23; Koenigsberger V, **CWS-10**, ¶ 23. Peru appears to acknowledge this point, though it attempts to avoid it by arguing that “[a]ny management services contributed by GFM benefited only GPH and Gramercy, not Peru”—a distinction that is both incorrect and irrelevant to whether GFM controlled Gramercy’s investment in the Land Bonds or made a sufficiently

“active” contribution to that investment. *See* Rejoinder, **R-65**, ¶ 104.

33. As Gramercy has previously established, these facts are sufficient to demonstrate Gramercy’s ownership and control of the Land Bonds and thereby satisfy the Treaty’s requirements for personal jurisdiction. *See* Reply, **C-63**, ¶¶ 16-30. In contrast, the arbitral decisions on which Peru relies concern materially different fact patterns. *Cf.* Rejoinder, **R-65**, ¶ 91 & n. 165. *Clorox*, *Standard Chartered*, and *KT Asia* involve holding company claimants who came into the ownership chain of the investment, often years after the initial acquisition, through an internal corporate restructuring by which they obtained a shareholding or interest in the investment without any exchange of value, and did not separately control it. *See Clorox Award*, **Doc. RA-319**, ¶¶ 803, 831; *Standard Chartered Award*, **Doc. RA-320**, ¶¶ 221, 225, 261; *KT Asia Award*, **Doc. RA-317**, ¶¶ 175, 178, 181. In *Caratube* and *Quiborax*, tribunals found no jurisdiction where natural persons had acquired substantial shares of their investments after paying little to no money and contributing nothing in the way of expertise or management skills. *See Caratube Award*, **Doc. RA-321**, ¶¶ 455-456; *Quiborax Decision on Jurisdiction*, **Doc. RA-322**, ¶¶ 232-233. *Alapli* similarly involved a corporate restructuring by which a Dutch entity was introduced into the ownership structure of assets previously owned by Turkish (*i.e.*, domestic) entities. *See Alapli Excerpts of Award*, **Doc. RA-318**, ¶ 351. These fact patterns bear no resemblance to either GPH, which did not passively inherit an interest in the Land Bonds for no consideration, but rather itself made the initial acquisition through direct purchases from bondholders—or GFM—which actively managed the investment once it assumed control from the predecessor entities GA and GIA. *See* Reply, **C-63**, ¶ 23; *Koenigsberger IV*, **CWS-4**, ¶¶ 36-43; *Koenigsberger V*, **CWS-10**, ¶¶ 21-23.

34. *Second*, Peru’s attempt to deny that “control” is sufficient to confer investor status under the Treaty is also unavailing. *Cf.* Rejoinder, **R-65**, ¶ 92. Peru’s dismissal of cases on which Gramercy relies for the meaning of “control” as “entirely irrelevant” because they consider “control” in a different context is misplaced. *Cf. id.* Each of *Thunderbird*, *Von Pezold*, and *Perenco* interprets the meaning of the term “control” for jurisdictional purposes—even if not for the definition of investor as such—and finds that “control” is satisfied by either *de jure* or *de facto* control. *See* Reply, **C-63**, ¶ 21 (citing *International Thunderbird Gaming*

Corporation v. United Mexican States, UNCITRAL, Arbitral Award of January 26, 2006, **Doc. RA-77**, ¶ 106; *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of July 28, 2015, **Doc. CA-197**, ¶ 324; *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). The recent *United Utilities* decision confirms this view in the context of “foreign control” under Article 25(2)(b) of the ICSID Convention. See *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award of June 21, 2019, **Doc. CA-225**, ¶¶ 366-367 (holding that “control” “is a flexible concept” that “can only be determined case by case in light of the particular facts”). The *United Utilities* tribunal found that the claimant enjoyed both “operational” and “strategic control” over the investing entity, even though the claimant had only a minority shareholding in that entity. *Id.*, ¶¶ 411-420. Peru’s repeated attempts to stress that GFM “never even indirectly owned the Bonds” are thus irrelevant: GFM’s *control* of the investment, which Peru has not denied, is sufficient for jurisdictional purposes. *Cf.* Rejoinder, **R-65**, ¶ 104; Reply, **C-63**, ¶ 22.

35. Peru also fails to meaningfully distinguish *Mera v. Serbia*. See Reply, **C-63**, ¶ 22 (citing *Mera v. Serbia*, ICSID Case No. ARB/178/2, Decision on Jurisdiction of November 30, 2018, **Doc. CA-140**, ¶¶ 61, 106-107). Peru does not deny the *Mera* tribunal’s conclusion that it was “not convinced” that “there [was] a requirement of activity when determining the status of an investor.” See *Mera* Decision on Jurisdiction, **Doc. CA-140**, ¶ 106; Reply, **C-63**, ¶ 22. Instead, Peru contends that the claimant in *Mera* “made substantial contributions to an investment vehicle’s founding capital,” yet does not address the fact that, at the time the claimant filed for arbitration, it had no ownership stake in the investment. *Cf.* Rejoinder, **R-65**, ¶ 92 (citing *Mera* Decision on Jurisdiction, **Doc. CA-140**, ¶¶ 10-11). Moreover, the fact that the claimant “actively administered that vehicle as it engaged in local investment projects” (*cf. id.*) not only fails to distinguish that case, but to the contrary, it confirms that GFM’s active management of the Land Bonds makes it an investor. See also Reply, **C-63**, ¶ 23; Koenigsberger IV, **CWS-4**, ¶ 38; Koenigsberger V, **CWS-10**, ¶ 23.

36. Finally, to the extent that Peru seeks to draw distinctions based on whether GPH or GFM contributed their own funds, such distinctions also fail to rebut the fact that Gramercy owned and controlled the Land Bonds. See, e.g., Rejoinder, **R-65**,

¶ 99 (alleging that “Gramercy did not commit any capital of its own”). There is no origin of capital constraint in the Treaty, and no basis for inferring it. In *Tokios Tokelès v. Ukraine*, for example, the majority rejected respondent’s argument that the origin of capital used to make the investment determined whether the claimant qualified as an “investor.” See *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004, **Doc. CA-224**, ¶ 77. The majority found the proposed restriction was “plainly absent from the text” of the treaty, unsupported by its context, and “inconsistent with the object and purpose of the Treaty, which . . . is to provide broad protection to investors and their investments in the territory of either party.” *Id.* Even the dissenting arbitrator recognized that ICSID tribunals need not, “as a matter of principle, look behind the legal structure by the parties with a view to discovering some hidden ‘reality,’” but would have found no jurisdiction where “there is simply no question of any foreign [investment] and where there is only, and indisputably,” a local investment.” *Id.*, Dissenting Opinion of Prof. Prosper Weil, ¶ 27. There is no such concern here because none of the capital that Gramercy invested originated from Peru and virtually all of it originated from the United States.

37. Other tribunals have likewise affirmed that the origin of capital is not relevant unless the applicable treaty says otherwise. For example, in *South American Silver v. Bolivia*, the majority found that “it cannot be concluded that whoever qualifies as an investor, because it is a company of a State party to the Treaty, may not obtain resources from third parties or companies of the group to which it belongs in order to make the investment.” *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award of November 22, 2018, **Doc. CA-221**, ¶ 322. To the contrary, “nothing in the Treaty states that the Tribunal must examine the origin of the capital invested by an investor in order to decide on its jurisdiction.” *Id.*; see also *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of May 4, 2017, **Doc. CA-213**, ¶ 228 (rejecting argument that the funds invested were not claimants’ own as a basis to deny jurisdiction because “the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction”).

38. Peru’s attempts to read additional hurdles of an “active contribution” that is the claimant’s “own” into the Treaty’s definition of qualifying investor thus cannot succeed in

overcoming the evidence that Gramercy “made” an investment in the Land Bonds.

2. The Fact That Gramercy Is an Investment Manager Does Not Make It Any Less of an Investor.

39. Peru is also wrong that Gramercy cannot be an investor because other parties, namely Gramercy’s clients, are investors in Gramercy. *Cf.* Rejoinder, **R-65**, ¶¶ 94-119. Like Peru’s attempt in its Statement of Defense to escape the Treaty’s actual requirements by pejoratively calling Gramercy a “hedge fund speculator,” what Peru now calls Gramercy’s “business model as a hedge fund focusing on distressed assets” has no bearing on the fact that Gramercy satisfies the Treaty’s requirements for being an investor, and is no more than an alarmist mischaracterization of normal investment practices. *Cf.* Rejoinder, **R-65**, ¶¶ 94-105; Reply, **C-63**, ¶¶ 24-29.

40. *First*, Peru gives no explanation or support for why the way in which Gramercy runs its business or structured its investment in the Land Bonds, or the price it paid for them, is relevant to whether Gramercy qualifies as an investor pursuant to the Treaty definition. *Cf.* Rejoinder, **R-65**, ¶¶ 95 *et seq.* At pains to demonstrate the legal relevance of these various observations, Peru instead addresses the separate (but equally misconceived) so-called *Salini* criteria for the “characteristics of an investment.” *See* Rejoinder, **R-65**, ¶¶ 103-104. But the Treaty contains no limitations of the kind Peru implies, whether on qualifying investors or qualifying investments. Nowhere does the Treaty, or international law more generally, exclude an otherwise protected investor on the basis that it is an asset manager, that it has upstream investors, that it took steps to hedge risk in its portfolio, that it acquired its investment through “one-off” payments or “at deep discounts,” and so on. For similar reasons, Peru’s allegation that Gramercy “withheld” any relevant documents is without merit—unlike Peru, Gramercy produced responsive documents that were relevant and material to the issues in dispute. *Cf.* Rejoinder, **R-65**, ¶¶ 115-119; Reply, **C-63**, ¶¶ 15-18; Procedural Order No. 6, Annex B.

41. *Second*, Peru’s complaint that Gramercy “securitized” its investment in the Land Bonds and “did not invest in Peru” by offering investment products to its clients outside Peru is nothing more than a complaint that Gramercy, in turn, has its own

investors. *Cf.* Rejoinder, **R-65**, ¶¶ 94 *et seq.*; Koenigsberger V, **CWS-10**, ¶ 32; Lanava II, **CWS-11**, ¶¶ 8-10.

42. Peru's position is simply illogical, and at odds with the basic reality of foreign investment. As Gramercy explained in its Reply, investors frequently rely on a variety of different forms and vehicles to structure and fund foreign investments, and once made, take a variety of different approaches to monetize those investments. *See* Reply, **C-63**, ¶¶ 27-28. A typical publicly traded multinational company, for example, will have local subsidiaries, shareholders of different tiers and classes, bondholders, bank lenders, hedging transactions, forward sales, and the like. Unless there is specific treaty language to the contrary, nothing excludes an investor from treaty protection for organizing its affairs in this way. Yet, according to Peru's analysis, investors would be prohibited from funding investments through anything other than the entity's existing capital, or from taking any measures to reduce or diversify the risks associated with the investment. This would potentially disqualify investors from protection if they engaged in a wide variety of common investment practices, including obtaining financing for an initial capital investment and purchasing insurance to protect against certain risks associated with the investment. That is an untenable and unsupported proposition. Not only does the Treaty not prohibit particular forms of funding or corporate structures, it explicitly allows them, including by protecting both direct *and* indirect investors.

43. Peru provides no meaningful response to the fact that the Treaty expressly covers financial services, a broad category that easily includes asset managers like Gramercy. *See* Reply, **C-63**, ¶¶ 27-30; Rejoinder, **R-65**, ¶ 105. Peru instead tries to argue that "[w]hether or not the Treaty might extend protections to 'investment firms' in certain circumstances, those circumstances are not present here." Rejoinder, **R-65**, ¶ 105. But the Treaty does not restrict coverage to only "certain circumstances," nor does Peru explain why any such "circumstances" should exclude Gramercy in particular. The complaints Peru raises in relation to the structure or funding of Gramercy's investment would equally apply to many other types of financial investors. For example, banks collect deposits from third parties and then make investments using funds from those pooled assets. Insurance companies receive premiums from clients which they then similarly pool to make investments. This is no different than an investment manager receiving funds from investors and then making investments from those pooled funds. Peru cannot seriously claim that these types of investors are

excluded from Treaty protection simply by virtue of their business models.

44. *Third*, Peru’s argument that Gramercy “does not have standing to submit claims” because the Land Bonds are allegedly “beneficially owned by third parties” is similarly conceptually flawed. *Cf. id.*, ¶¶ 106 *et seq.* In addition to yet again ignoring the fact that the Treaty does not require beneficial ownership of the investment, it betrays either a misunderstanding or a mischaracterization of Gramercy’s business. *Cf. id.*, ¶ 100.

45. As Mr. Koenigsberger explains, Gramercy’s clients are not entitled to any stake *in the Land Bonds* themselves, but rather are “beneficiaries” of *funds* that are invested, directly or indirectly, in *GPH*. See Koenigsberger V, **CWS-10**, ¶¶ 24-30; see also Lanava II, **CWS-11**, ¶¶ 7-10. Peru is therefore wrong to contend that Gramercy’s clients are the true owners of the Land Bonds or the real parties in interest in this arbitration, and thus that Gramercy is seeking to recover “losses suffered by third parties.” Rejoinder, **R-65**, ¶¶ 106-108. Peru’s reliance on the distinction, in the Treaty’s Article 10.16.1, between claims submitted on Gramercy’s own behalf and claims submitted on behalf of a locally incorporated entity is thus entirely misplaced.

46. Moreover, the fact that parties other than Gramercy may indirectly financially benefit from Gramercy’s investment is not a basis for denying the benefits of the Treaty to Gramercy, as Peru’s argument would suggest. Peru does not deny that the Treaty explicitly specifies the one circumstance in which a State Party can deny the Treaty’s benefits to an otherwise qualifying investor on the basis of the investor’s upstream arrangements: it does so through the denial of benefits clause, which as noted above allows disqualification only “if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.” See Treaty, **Doc. CE-139**, Article 10.12.2; Reply, **C-63**, ¶ 28. But those conditions are clearly not met here, and Peru does not even invoke the clause. Peru simply cannot now graft onto the Treaty another denial of benefits provision that was not part of its agreement with the United States.

47. Peru also cannot achieve this result by invoking prior arbitral decisions that have no bearing on the case at hand to argue that Gramercy has no “standing” to bring claims with respect to the

interest of third-party beneficial owners, which it claims is a “well-established principle[] of international law.” *See* Rejoinder, **R-65**, ¶¶ 110, 114. This, too, is conceptually confused. Gramercy is not seeking to recover losses suffered by third parties who are the real “parties-in-interest” with respect to Peru’s conduct. GPH is the direct owner of 100% of the Land Bonds, maintains both nominal and economic, as well as legal and beneficial, interests in the Land Bonds, and brings claims on its own behalf and not on behalf of the alleged third-party beneficiaries. *See* Reply, **C-63**, ¶¶ 16-23; Second Amended Witness Statement of Robert S. Koenigsberger (“*Koenigsberger III*”), **CWS-3**, ¶¶ 3, 37-40; Koenigsberger V, **CWS-10**, ¶¶ 21-33; Lanava I, **CWS-5**, ¶¶ 8-28, 30; Lanava II, **CWS-11**, ¶¶ 7-10. Moreover, because the Treaty gives standing not only to U.S. enterprises that “own” investments in Peru but also to those that “control” them, none of these ownership cases decided under other treaties can deprive *this* Treaty of its meaning by requiring “beneficial ownership” in addition to “control.”

48. None of the cases Peru invokes are thus on point. For example, *Occidental*, *Siag*, and *Impregilo* each involved a very different factual scenario—namely, where the claimant possessed a less-than 100% economic interest in the investment itself, usually by virtue of a joint venture or other contractual agreement entered into as a horizontal transaction, but nevertheless sought damages for 100% of the investment. *See* Rejoinder, **R-65**, ¶¶ 111-113 (citing *Occidental Petroleum Corporation et al. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of November 2, 2015, **Doc. RA-329**; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of June 1, 2009, **Doc. RA-332**; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, **Doc. RA-334**). *Blue Bank* is also inapposite, as it was undisputed that “Blue Bank brings this claim as trustee of the Qatar trust,” over assets that the Qatar trust had purchased before claimant was even appointed as trustee and over which Blue Bank had no nominal or beneficial ownership under Barbados law. *Blue Bank International & Trust v. Venezuela*, ICSID Case No. ARB/12/20, Award of April 26, 2017, **Doc. RA-333**, ¶¶ 138, 148, 151, 161, 165. Similarly, *Saghi* does not advance Peru’s claims. In that case, the tribunal found jurisdiction over claimants even though they did not have nominal ownership over shares of a local company, on the basis that they had beneficial ownership. *See James M. Saghi et al. v. Islamic Republic of Iran*, IRAN-U.S. CLAIMS TRIBUNAL REPORTS, Vol. 29,

Case No. 298, Award of January 22, 1993, **Doc. RA-335**, ¶¶ 28, 31. The tribunal’s *dicta* that the Iran-U.S. Claims Tribunal has, in the past, “favored beneficial over nominal ownership of property” was based on its view that the Algiers Accords’ goal of settling litigation “could not be fully implemented unless the Tribunal’s jurisdiction were broad enough to permit the beneficial owners of affected property interests to present their claims,” and cannot be interpreted as a bar to a U.S. company that actually and directly owns title to an asset bringing claims under an investment instrument such as the Treaty. *Id.*, ¶¶ 18, 31; *cf.* Rejoinder, **R-65**, ¶ 113.

49. Nothing in these cases supports the premise that the presence of indirect upstream investors deprives the tribunal of jurisdiction over an otherwise-qualified claimant. Rather, as the *CSOB* tribunal concluded, the “absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant.” *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999, **Doc. CA-209**, ¶ 32; *see also* Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS*, 2009, **Doc. CA-212**, p. 301 (“As control is the touchstone for the quality of the relationship between the claimant and its investment, other possible contenders must be excluded. Among them is the suggested requirement of beneficial ownership.”).

50. *Finally*, taken to its logical conclusion, Peru’s argument would be nonsensical. The litany of supposed restrictions Peru claims are inherent in the Treaty would effectively deny coverage to almost any investor—perhaps other than a self-funded individual making a direct investment—including those that the Treaty clearly covers. If Peru’s interpretation were correct, any entity with upstream investors, bondholders, or other economic stakeholders could not qualify as an investor. Peru’s approach would therefore categorically bar companies from asserting claims as investors, since each company is owned by its shareholders who “benefit” from the fortunes of the company itself. Such a conclusion is irreconcilable with a treaty like this one that expressly permits “enterprises” to be investors, and that more generally is broad and flexible, not limiting, regarding permissible forms of ownership and control. This simply cannot be a good faith interpretation of the Treaty.

51. The perversity of Peru’s interpretation is self-evident when one considers the singular role that Gramercy has played in making and managing the Land Bonds investment. GPH and GFM are not only clearly *qualifying* investors under the ordinary meaning of the Treaty’s express terms, but they are also the obvious and natural candidates to bring an investment claim in this case, because they are the *only* entities who actually own and control the investment. As Mr. Koenigsberger explains:

GPH remains the only entity to actually own title to the Land Bonds, and GFM remains the only entity that controls these Land Bonds. Gramercy developed the idea to invest in the Land Bonds. Gramercy performed the diligence to understand the opportunity. Gramercy sought out the local bondholders who might be willing to sell. Gramercy negotiated the deal terms. Gramercy attracted and called upon the capital necessary to fund the investment. Gramercy executed the many deals necessary to acquire the Land Bonds, including making payments to bondholders. Gramercy maintained the custody of the Land Bonds, arranged and paid for security to preserve them, and paid insurance premiums on the Land Bonds to protect against their destruction. Gramercy also made all of the efforts over many years to seek some kind of resolution on the Land Bonds.

Koenigsberger V, **CWS-10**, ¶ 29.

52. Consequently, as Mr. Koenigsberger concludes, “[i]t is therefore hard for me to understand how Gramercy could not be an investor in the Land Bonds. Such a conclusion would be a very surprising one for us, and I believe for investors generally.” *Id.*, ¶ 33. As Prof. Reisman has repeatedly opined, it is inappropriate to read investment treaties—which are concluded for the benefit of third-party investors—in a manner that undermines the rights and expectations of these third-party investors who must rely on its plain language. *See Reply*, **C-63**, ¶ 121.

53. Accordingly, none of the factually inaccurate and legally misguided complaints that Peru raises in its Rejoinder affect Gramercy’s status as an “investor” under the Treaty.

B. The Tribunal Has Material Jurisdiction Because the Land Bonds Are Covered Investments Under the Treaty.

54. The crux of Peru's objection that the Land Bonds are not covered investments is that the "object and purpose of the Treaty" must somehow be interpreted to exclude the Land Bonds, or that the Land Bonds should be considered not to reflect the "characteristics of an investment," based on an assortment of factors found nowhere in the Treaty text. *See, e.g.*, Rejoinder, **R-65**, ¶¶ 8, 121, 135-146; Reisman II, **RER-6**, ¶¶ 21-31. Peru thus does not deny, but instead chooses to treat as irrelevant, many of the interpretive elements that the Vienna Convention on the Law of Treaties (the "*VCLT*") requires the Tribunal to take into account that the Treaty expressly refers to "bonds," "*obligaciones*," and "debt instruments," including "public debt" as forms of covered investments; that the only kind of "public debt" that the State Parties excluded was State-to-State debt; that the definition of "investment" is and was intended to be broad; and that the Treaty reflects the State Parties' "negative list" approach and contains explicit exclusions from its scope which do not include the Land Bonds, even though the State Parties were well aware of Peru's Agrarian Reform and the resulting disputes with U.S. investors involving the Land Bonds. *See* Reply, **C-63**, Sections II.B.1-3.

55. Peru's accusation that Gramercy relies "on a purely literal, out-of-context interpretation" of the Treaty is thus both wrong and disingenuous. *Cf.* Rejoinder, **R-65**, ¶ 122. It is *Peru* that tries to ignore or dismiss the relevant facts, in favor of vague and unsupported notions of the Treaty's "fundamental objective." *Cf. id.*, ¶ 121. But no distortion of the Treaty's "object and purpose" can contradict its explicit text, render superfluous its clear terms, or trump the uncontested circumstances of its conclusion. The Land Bonds *are* "investments," as that term is defined in Article 10.28 of the Treaty and properly interpreted under VCLT Articles 31 and 32, because they are the kind of "bonds," "*obligaciones*," "debt instruments," and "public debt" that the Treaty explicitly encompasses; because they possess the "characteristics of an investment" that the Treaty contemplates; and because they were not excluded from the Treaty's broad definitions, as the State Parties would and should have done had they truly intended such a result. *See* Reply, **C-63**, Section II.B.1.

56. Nothing in the Treaty's "object and purpose" or "fundamental objective" warrants a different result. *Cf.* Rejoinder, **R-65**, ¶ 121. Neither Peru's misguided attempts to treat its own

arguments in this case as alleged “agreed interpretations” between the State Parties, nor Peru’s attempts to fashion jurisdictional criteria out of the Treaty’s Preamble, nor Peru’s inapposite insistence that the Land Bonds “were issued in a unique domestic historical context,” nor Peru’s false accusation that Gramercy does not address arbitral decisions that Gramercy in fact addressed extensively in its Reply, can deprive the Tribunal of jurisdiction over Gramercy’s investment. *Cf.* Rejoinder, **R-65**, ¶¶ 8, 121, 139, 152.

1. Peru Fails to Rebut That the Land Bonds Fall Within the Ordinary Meaning of “Investment.”

(a) Peru Fails to Demonstrate That the Land Bonds Are Not “Bonds,” “Obligaciones,” or “Debt Instruments.”

57. Peru’s attempts to deny that the Land Bonds are “bonds,” “*obligaciones*” or “debt instruments” within the terms of Article 10.28 offend common sense and distort the applicable principles of treaty interpretation.

58. *First*, Peru’s primary argument turns Treaty interpretation on its head. Contending that a tribunal must look beyond “a purely grammatical interpretation” or a “simple dictionary reading of the terms,” Peru argues that the Treaty’s express list of forms of potential investments—which includes “bonds,” “*obligaciones*,” and “debt instruments”—is irrelevant. Rejoinder, **R-65**, ¶ 124. According to Peru, because all assets must be assessed on their own terms in order to determine whether they possess the “characteristics of an investment,” the fact that an asset is specifically enumerated in the Treaty has no bearing on this question. *Id.*, ¶ 131. Professor Reisman thus complains about Prof. Olivares-Caminal’s alleged “syllogism” “that ‘the Land Bonds are, in fact, bonds’ and ‘[i]t is sufficient under the Treaty to show . . . that the Land Bonds are, in fact, bonds,’” when “the actual question . . . is whether Peru’s Agrarian Reform Bonds are an ‘investment’ under the Treaty.” *See* Reisman II, **RER-6**, ¶ 19.

59. Yet it is this very reasoning that is “circular”: the Treaty explicitly lists “bonds” as a form that an “investment” may take. Hence, whether the Land Bonds are indeed “bonds” is obviously relevant to whether they are an “investment” under the Treaty. Contrary to Peru’s sophistic reasoning, interpreting a treaty “in accordance with the ordinary meaning to be given to [its]

terms . . . in their context and in the light of its object and purpose” (VCLT, **Doc. CA-193**, Article 31.1) does *not* mean that the “ordinary meaning” can be disregarded. Ignoring Article 10.28’s list of “[f]orms that an investment may take” upends the ordinary meaning of that text and deprives that language of *effet utile*. There would be little point in specifically listing certain assets as “[f]orms an investment may take” if, as Peru contends, that list were irrelevant to the question of whether a specific asset is an “investment.” See Reply, **C-63**, ¶ 66; Allgeier II, **CER-11**, ¶¶ 15-17.

60. As Gramercy explained, a good faith interpretation of the Treaty’s text, read in context and in light of the Treaty’s object and purpose, leads to the conclusion that the enumerated forms of investment listed in Article 10.28 are in fact those that typically possess the characteristics of an investment. See Reply, **C-63**, ¶ 66; Expert Report of Ambassador Peter Allgeier (“*Allgeier I*”), **CER-7**, ¶ 36; Allgeier II, **CER-11**, ¶¶ 15-17. The enumerated list gives context to the Treaty’s requirement that an asset “ha[ve] 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” by identifying certain assets that almost certainly satisfy that requirement. Treaty, **Doc. CE-139**, Article 10.28. The distinction that the Treaty’s footnote 12 draws between debt obligations of longer or shorter time horizons only confirms that the Land Bonds, which are bonds issued with 20-, 25-, and 30-year maturity periods, are precisely the kind of debt obligation that is “more likely” to have the characteristics of an investment. See Treaty, **Doc. CE-139**, p. 10-24, n. 12.

61. Contrary to Peru’s suggestion, the U.S. Submission does not support Peru’s attempts to argue otherwise. Cf. Rejoinder, **R-65**, ¶ 130; Reisman II, **RER-6**, ¶ 17. The United States’ statement that the “enumeration of a type of asset in Article 10.28 . . . is not dispositive” does not mean that it is *irrelevant*, as Peru would have it. See Submission of the United States of America (“*U.S. Submission*”), ¶ 18. Neither do the U.S. Submission and Peru’s own arguments in this case create a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” within the meaning of VCLT Article 31(3)(a), as Peru and Prof. Reisman contend, without any authority whatsoever. Cf. Rejoinder, **R-65**, ¶ 8; Reisman II, **RER-6**, ¶ 12. Disputing and non-disputing party submissions in individual contested cases are

not authoritative interpretations of treaties, and it would be a dangerous proposition for the entire investor-State arbitration system were they so. To the contrary, as the International Law Commission (the “*ILC*”) has explained, subsequent agreement must “be ‘reached’ and presupposes a deliberate common act or undertaking by the parties.” ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, **Doc. CA-217**, p. 30, ¶ 10.

62. That is not the case here. The Treaty specifically provides a mechanism for the State Parties to issue authoritative interpretations of the Treaty: namely, a Free Trade Commission comprised of cabinet-level representatives whose interpretations are binding on Chapter 10 arbitral tribunals. *See* Treaty, **Doc. CE-139**, Article 20.1 (establishing Free Trade Commission); *id.*, Article 20.1.3(c) (providing that the Free Trade Commission may “issue interpretations of the provisions of [the Treaty]”); *id.*, Article 10.22.3 (providing that Commission interpretations made pursuant to Article 20.1.3 “shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision”). If the United States and Peru wished to agree upon an authoritative interpretation of a particular Treaty provision, they would have done so through this mechanism, but obviously they did no such thing.

63. Indeed, no arbitral tribunal has ever found that State party pleadings constituted “subsequent agreement” under VCLT Article 31(3)(a). *See, e.g.,* Kendra Magraw, *Investor-State Disputes and the Rise of Recourse to State Party Pleadings as Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties*, ICSID REVIEW, Vol. 30, No. 1, 2015, **Doc. CA-219**, p. 166; *see also* *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction of October 21, 2005, **Doc. CA-75**, ¶ 251 (finding that Bolivia’s position in the arbitration and official statements by the Government of the Netherlands, “despite the fact that they both relate to the present dispute, are not a ‘subsequent agreement between the parties’”); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of December 19, 2012, **Doc. CA-226**, ¶ 51 (“[Argentina] had referred to the position taken by [Spain in another arbitration], but such argumentation merely shows what had been argued by counsel at that time on Spain’s

behalf in that particular arbitration. It does not allow a broader understanding concerning an interpretation shared by the Spanish Government in general pertaining to the application of certain provisions of the BIT.”); *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of May 25, 2006, **Doc. CA-223**, ¶ 111 (finding that litigation positions taken by Contracting States did not constitute an “agreement” between the parties concerning interpretation of the relevant treaty); *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction of July 15, 2016, **Doc. RA-146**, ¶ 156 (“[T]he Tribunal is not bound by the views of either State Party. Although the Tribunal must ‘take into account’ any subsequent agreement between the State Parties pursuant to VCLT Article 31(3)(a), the proper interpretation of [the Treaty] and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.”).

64. *Second*, to the extent it attempts to address the “ordinary meaning” of the Treaty’s reference to “bonds,” Peru again fails to demonstrate how this ordinary meaning would exclude the Land Bonds.

65. In its Rejoinder, Peru cites to the *Black’s Law Dictionary* definition of a “bond” as a “long-term, interest bearing debt instrument issued by a corporation or a governmental entity, usually to provide a particular financial need.” Rejoinder, **R-65**, ¶ 125 (emphasis in original). But Peru provides no explanation for why the Land Bonds—long-term, interest bearing debt instruments issued by the Peruvian Government to meet the need of financing Peru’s agricultural expropriation as required under Peruvian law—would not meet this definition. See Reply, **C-63**, ¶ 63; Expert Opinion of Professor Rodrigo Olivares-Caminal (“*Olivares-Caminal I*”), **CER-8**, ¶¶ 29-32; Reply Expert Report on Jurisdiction of Professor Rodrigo Olivares-Caminal (“*Olivares-Caminal II*”), **CER-12**, ¶¶ 5-7. Peru also has no response to Prof. Olivares-Caminal’s explanation that the Land Bonds have all the characteristics of a “bond” as that term is generally understood in law, finance, and economics, namely, an instrument acknowledging a debt and an obligation to pay it. See Reply, **C-63**, ¶ 45; Olivares-Caminal I, **CER-8**, ¶¶ 20, 26-39; see also Olivares-Caminal II, **CER-12**, ¶¶ 5-10. Peru does not deny that the Land Bonds fit comfortably within those definitions.

66. Peru’s residual attempts to stress the “domestic” and “historic” nature of the original land reforms do not affect this analysis, as Gramercy already explained. *See* Reply, **C-63**, ¶ 128; *cf.* Rejoinder, **R-65**, ¶ 121. Its repeated insistence that the Land Bonds are “not like contemporary sovereign debt” is simply irrelevant. *Cf.* Rejoinder, **R-65**, ¶¶ 2, 5, 147-152, 159, 175-179; Reisman II, **RER-6**, ¶ 35; Pablo E. Guidotti, Ph.D., Second Expert Report (“*Guidotti II*”), **RER-10**, ¶¶ 3-4, 21. Peru never explains why, even if the distinctions that it and its experts attempt to draw between the Land Bonds and other forms of sovereign debt were accurate—which they are not—those distinctions would be meaningful under the Treaty’s terms. *See* Reply, **C-63**, ¶ 128; Olivares-Caminal I, **CER-8**, ¶¶ 46-47; Olivares-Caminal II, **CER-12**, ¶ 8.

67. The Treaty does not distinguish between types of “bonds,” “public debt,” or “debt instruments,” whether “modern” or otherwise. Peru also does not deny that whether an asset is marketed abroad, or was originally owned by a host State national, likewise are not relevant considerations under the Treaty. *See* Reply, **C-63**, ¶ 308; Allgeier I, **CER-7**, ¶ 38. Indeed, many, perhaps most, investment arbitrations concern investments that are domestic businesses, contracts, or financial instruments, that are not marketed abroad or traded on exchanges, and that are governed by local law. Peru thus has no answer to the hypothetical scenario in which Gramercy had purchased a factory on the outskirts of Lima built in the 1970s from Peruvian owners. *See* Reply, **C-63**, ¶¶ 77, 128. On Peru’s argument, that factory would not be an investment because it was not modern, was built during a particular historical period, was not marketed abroad, was originally owned by host State nationals, and is regulated by Peruvian law. But that would be an absurd conclusion.

68. Peru’s continued insistence that the Land Bonds are excluded because they were not “aimed at obtaining financing *in international markets*” repeats the same flaw. *Cf.* Rejoinder, **R-65**, ¶ 158 (emphasis added). The only basis for this proposition is an unsubstantiated statement by Peru’s new witness, Mr. Herrera, that Peru’s negotiating team’s “understanding and focus of the concept of public debt . . . was always as an instrument aimed at obtaining financing in international markets.” *See* Herrera, **RWS-5**, ¶ 33. But Mr. Herrera provides no support for this assertion. Ambassador Allgeier, the Deputy U.S. Trade Representative at the time, is not aware of any such understanding, and it is not reflected anywhere in the Treaty text or contemporaneous negotiation

summaries. Allgeier II, **CER-11**, ¶ 25. It is also contrary to the negative list framework under which the Treaty was negotiated, which Peru does not deny. As Amb. Allgeier explains, the whole point of that approach is that an asset is included unless it is expressly excluded. Allgeier II, **CER-11**, ¶¶ 23-24.

69. Moreover, the alleged understanding of individual negotiating team members is not a basis to introduce restrictions on the ordinary meaning of the Treaty text that appear nowhere in its terms, and in fact contradict the Treaty text. *Cf.* Herrera, **RWS-5**, ¶ 33; *see* Allgeier II, **CER-11**, ¶ 25. A leading treatise on treaty interpretation endorses the rule of interpretation of the U.S. Supreme Court:

[W]hen the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, diplomatic correspondence of the contracting parties to establish its meaning But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.

Richard Gardiner, *TREATY INTERPRETATION*, 2015, **Doc. CA-115**, p. 113 (citation and internal quotation marks omitted) (omission in original).

70. *Finally*, Peru does not respond to Gramercy’s argument that the Land Bonds fall within the ordinary meaning of either “*obligaciones*” or “other debt instruments,” as those terms are used in Article 10.28. *See* Reply, **C-63**, ¶¶ 40, 50, 75, 116, 137, 144. As noted in the Reply, the Spanish version of the Treaty renders “debentures” 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; *see also* Olivares-Caminal II, **CER-12**, ¶ 17. Furthermore, Peru offers no response to the point that the Treaty covers “other debt instruments,” and the Land Bonds undoubtedly are “debt instruments.” *See* Reply, **C-63**, ¶ 44, 52; Olivares-Caminal I, **CER-8**, ¶¶ 51-53; Olivares-Caminal II, **CER-12**, ¶¶ 16-17.

**(b) Peru Fails to Rebut That the Land Bonds Are
“Public Debt.”**

71. Peru’s continued insistence that the ordinary meaning of “public debt” excludes the Land Bonds is no better than its prior reliance on a user-generated blog post by an unknown author to provide a definition of “public debt.” *Cf.* Rejoinder, **R-65**, ¶ 125; *see* Reply, **C-63**, ¶¶ 56-58; Allgeier I, **CER-7**, ¶ 44; Olivares Caminal I, **CER-8**, ¶ 57. Peru neither defends nor retracts its reliance on that clearly unreliable source, which formed the cornerstone of Peru’s and Prof. Reisman’s prior position. Peru instead states in conclusory fashion that Gramercy’s “attack” was “ineffectual,” while Prof. Reisman admits only that sources on which he previously relied were “obscure.” *See* Rejoinder, **R-65**, ¶ 128; Reisman II, **REER-6**, ¶ 36.

72. But Peru’s latest attempt to contend that the Land Bonds are not “public debt” fares no better. Critically, Peru offers no response at all to the fact that Peru itself repeatedly, in formal acts and public statements, characterized the Land Bonds as public debt (*deuda pública*). *See* Reply, **C-63**, ¶ 46; Olivares-Caminal I, **CER-8**, ¶ 27; Olivares-Caminal II, **CER-12**, ¶¶ 11-15; Supreme Decree N° 17-2014-EF, **Doc. CE-37**, Third Final Supplemental Provision (“The debt resulting from the administrative updating of the value of the Land Bond Reforms will be registered as internal public debt by the [*Dirección General de Endeudamiento y Tesoro Público*] of the [Ministry of Economics and Finance (the “*MEF*”)].”). Peru has not even attempted to explain how these instruments that Peru accurately and openly acknowledged to be public debt have somehow changed their character and are now not public debt.

73. Peru also does not appear to deny that public debt falls within the Treaty’s definition of “investment,” except if it is bilateral State-to-State debt, which is expressly excluded by footnote 13 to Article 10.28. *See* Reply, **C-63**, ¶¶ 41-42, 99-104; Allgeier I, **CER-7**, ¶¶ 33, 38-49. Peru’s criticism of the proposition that “the Treaty addresses public debt and therefore covers public debt” as “circular” is both a mischaracterization of Gramercy’s case and obscure on its own terms. *Cf.* Rejoinder, **R-65**, ¶ 133. If public debt were not already an asset falling within the definition of investment, the State Parties would have no reason to place specific limitations on certain claims relating to public debt, and no reason to explicitly exclude State-to-State debt. *See* Reply, **C-63**, ¶ 41. Contrary to Peru’s allegation, Gramercy

does not argue that Annex 10-F “limit[s] or expand[s] the definition of ‘investment’ under Article 10.28,” and Gramercy’s argument is not inconsistent with the U.S. Submission. *Cf.* Rejoinder, **R-65**, ¶ 133 (citing U.S. Submission, ¶ 18). Rather, Annex 10-F confirms that “public debt” is a type of investment already falling under Article 10.28 and which is not excluded from the ordinary meaning of either “bonds” or “debt instruments.” Reply, **C-63**, ¶ 47. The U.S. Submission does not contradict that conclusion. *See* U.S. Submission, ¶ 19; *cf.* Rejoinder, **R-65**, ¶ 133.

74. Despite its own characterization of the Land Bonds as *deuda pública*, Peru’s latest argument that the Land Bonds are not “public debt” now rests on the proposition that “public debt” within the meaning of the Treaty should be limited to “debt arising from and as connected with the activity of *borrowing* funds.” *Cf.* Rejoinder, **R-65**, ¶ 128; Reisman II, **RER-6**, ¶ 36; Guidotti II, **RER-10**, ¶ 22.

75. Just as before, however, this definition still does not exclude the Land Bonds. Peru cites the very same dictionary definitions of debt on which Gramercy relied, but without explaining how they exclude the Land Bonds. The Land Bonds *are* a “debt owned by a . . . national government,” as *Black’s Law Dictionary* provides. *Compare* Rejoinder, **R-65**, ¶ 125 (citing BLACK’S LAW DICTIONARY, 2014, **Doc. CE-718**), *with* Reply, **C-63**, ¶ 39 (same). The Land Bonds also amply qualify as “borrowings by governments to finance expenditures not covered by current tax revenues.” *Cf.* Rejoinder, **R-65**, ¶ 125 (citing DICTIONARY OF FINANCE AND INVESTMENT TERMS, 2014, **Doc. CE-717**); *see also* Reply, **C-63**, ¶¶ 41, 89-91. By compensating landowners in Land Bonds instead of in cash, Peru effectively “borrowed” from those individuals. *See* Olivares-Caminal II, **CER-12**, ¶ 13. Peru also does not address any of the other well-established definitions of “public debt” that Gramercy and Prof. Olivares-Caminal cite, including the ILC’s definition of public debt as “an obligation binding on a public authority,” the International Money Fund (the “*IMF*”)’s definition of public debt as “all liabilities of public sector units . . . excluding equity and investment fund shares and financial derivatives and employee stock options,” or indeed the MEF’s own definition of “public debt” as the “outstanding balance . . . of the total borrowings the State receives to satisfy its financing needs.” *See* Reply, **C-63**, ¶ 41; (citing ILC, Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries, 1981, **Doc. CA-122**, p. 77); Olivares-Caminal I,

CER-8, ¶¶ 55, 58 (citing IMF, Public Sector Debt Statistics: Guide for Compilers and Users, 2011, **Doc. CE-178**, p. 1; MEF, Public Debt Glossary, entry for “*Deuda Pública*,” **Doc. CE-721**); *see also* Olivares-Caminal II, **CER-12**, ¶¶ 11-15.

76. Professor Guidotti’s opinion—expressed in a short paragraph with no citation—that the Land Bonds are not public debt because “they were not issued in connection with government financing” is similarly flawed. *Cf.* Rejoinder, **R-65**, ¶ 126; Guidotti II, **RER-10**, ¶ 22. As Prof. Olivares-Caminal has explained, whether debt is public or not turns on the *identity* of the issuer, not the *purpose* for which the debt is issued. *See* Olivares-Caminal I, **CER-8**, ¶¶ 54-60; Reply, **C-63**, ¶ 46; *see also* Olivares-Caminal II, **CER-12**, ¶ 11. Surely, the Land Bonds—sovereign obligations of the Peruvian State—are not *private* debt.

77. Moreover, Peru and Prof. Guidotti are simply wrong that the Land Bonds were “*not* [issued] to finance Government activity or economic development.” *Cf.* Rejoinder, **R-65**, ¶ 126 (citing Guidotti II, **RER-10**, ¶¶ 4, 22). The Land Bonds supported the State’s land redistribution and financed the Government’s land reform activity, which the Government contemporaneously justified as being necessary for Peru’s economic development. *See* Reply, **C-63**, ¶¶ 89-91, 126, 134. Beyond the bare assertion that the Land Bonds “were never intended nor used for th[e] purpose” of financing Government operations, Peru has no response whatsoever to its own contemporaneous characterizations of the purpose and nature of the Land Bonds as “urgently necessary” to “contribute to the Nation’s social and economic development.” *Compare* Rejoinder, **R-65**, ¶ 128, *with* Decree Law N° 17716, Land Reform Act, June 24, 1969, **Doc. CE-1**, Preamble & Article 1; Reply, **C-63**, ¶ 46. There is thus nothing artificial about accepting that the Land Bonds fall within these ordinary meanings of public debt, as Peru itself acknowledged at the time.

78. The latest sources on which Peru endeavors to rely do not establish otherwise. Having seemingly abandoned Ritika Muley and the mission statement of the defunct U.S. agency, Prof. Reisman now cites to the caption of a table appearing in the Central Intelligence Agency’s World Factbook. *Cf.* Reisman II, **RER-6**, ¶ 36 (citing Central Intelligence Agency, World Factbook, Country Comparison: Public Debt, **Doc. R-1028**). But that caption does not purport to offer an actual definition of public debt, much less a comprehensive one, whether for purposes of the Treaty, or in the “investment context,” or any other generally applicable

purpose. It merely provides the explanation of the kind of public debt reflected in that table. Central Intelligence Agency, World Factbook, Country Comparison: Public Debt, **Doc. R-1028**; *see also* Olivares-Caminal II, **CER-12**, ¶ 14. It is obvious that it could not be a general definition of public debt, among other things, because it describes that term as “governmental borrowings less repayments that are denominated *in a country’s home currency*.” *Id.* (emphasis added). But governments often issue sovereign bonds in foreign currency—as Prof. Reisman himself notes three paragraphs earlier, referring to the bonds in *Abacat*. Reisman II, **RER-6**, ¶ 33 (“Bonds were issued in foreign currencies[.]”).

79. Professor Reisman next cites to the first line of the executive summary of a working paper published by the IMF, which expresses the views of its academic authors (not, as Peru and Prof. Reisman incorrectly suggest, the view of the IMF as a whole). *Cf. id.*, ¶ 37 (citing Barry J. Eichengreen *et al.*, Public Debt Through the Ages, International Monetary Fund, Working Paper WP/19/6, 2019, **Doc. R-1029**, p. 2 (“The views expressed in IMF Working Papers are those of the author(s) and do not necessarily represent the views of the IMF[.]”)); *see also* Rejoinder, **R-65**, ¶ 128 (referring to unspecified authorities from “international institutions”). Those authors state that they “consider public debt from a long-term historical perspective, showing how the purposes for which governments borrow have evolved over time.” Eichengreen *et al.*, **Doc. R-1029**, p. 1. Professor Reisman makes a great deal of the fact that this statement “links ‘public debt’ to sovereign borrowing” (*see* Reisman II, **RER-6**, ¶ 37) even though there is nothing to suggest that the authors intended it to put forward a comprehensive definition of public debt (*see* Olivares-Caminal II, **CER-12**, ¶ 15)—and certainly not that they intended to undermine or constrain the IMF’s own broad definition of public debt as “all liabilities of public sector units . . . excluding equity and investment fund shares and financial derivatives and employee stock options,” which Prof. Reisman ignores. *See* Olivares-Caminal I, **CER-8**, ¶ 55; *see also* Olivares-Caminal II, **CER-12**, ¶¶ 11-15. To the contrary, the authors note that States have issued “public debt” for such varied purposes as supporting a modernization agenda or paying accumulated debts. Eichengreen *et al.*, **Doc. R-1029**, p. 12. The paper’s observation that “sovereign borrowing” can finance “government consumption” (*id.*, p. 11) “reflects exactly the Peruvian Government’s land expropriation: the government’s acquisition of an asset on credit” (Olivares-Caminal II, **CER-12**, ¶ 15). Professor Guidotti’s own

characterization of the Land Bonds as having been issued “to implement a specific and contingent government expenditure” (*cf.* Guidotti II, **RER-10**, ¶ 22) thus is actually an admission—not a basis for denying—that the Land Bonds are indeed public debt.

**(c) Nothing in the Treaty’s Object and Purpose
Affects the Ordinary Meaning of the Treaty’s
Terms.**

80. Peru’s insistence that “critical elements in the Preamble” of the Treaty mean that the Treaty’s “object and purpose” requires excluding the Land Bonds has not improved through repetition. *Cf.* Rejoinder, **R-65**, ¶ 135; Reply, **C-63**, ¶¶ 119-129.

81. The object and purpose of the Treaty is of course part of the Tribunal’s interpretative exercise under the primary rule in VCLT Article 31, and Gramercy has never suggested otherwise. *See* Reply, **C-63**, ¶¶ 119-120. But its role is to shed “light” on the ordinary meaning, in good faith and in context, of the Treaty’s express terms—not to bypass that ordinary meaning altogether. Peru does not deny that a treaty’s object and purpose cannot be used to override its plain terms. *See* Reply, **C-63**, ¶ 120. Thus, prefatory statements in the Preamble cannot be interpreted as threshold jurisdictional requirements that tacitly limit the State Parties’ deliberately broad definition of investment—especially where, as Amb. Allgeier explains and Peru does not deny, the State Parties’ common intent and understanding was to encompass a broad range of investments. *See* Allgeier I, **CER-7**, ¶¶ 36, 43; Allgeier II, **CER-11**, ¶¶ 15-16; Reply, **C-63**, ¶¶ 42, 99-104; 13th Round of the Andean-U.S. FTA Negotiations, November-December 2005, **Doc. CE-447**, p. 55 (noting that Peru’s own conclusion 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”).

82. Considering the ordinary meaning of the word “shares,” for example, “in the light of” the Treaty’s object and purpose cannot justify, as Peru suggests, creating a tacit requirement that any such otherwise qualifying investment must also clear additional hurdles divined from the Treaty’s Preamble. *See* Reply, **C-63**, ¶ 120; Allgeier I, **CER-7**, ¶¶ 51-55; Allgeier II, **CER-11**, ¶¶ 13-15. Whatever Peru may mean by Prof. Reisman’s statement

that the Preamble “enables the Tribunal seized of the case to address a broad range of provisions” (*cf.* Reisman II, **RER-6**, ¶ 24), the fact that the Treaty contains a broad Preamble, consistent with its nature as a multifaceted trade agreement, cannot in and of itself create additional constraints on the definition of investment that the Treaty’s express definition of investment does not contain. As Amb. Allgeier explains, the “very purpose of an illustrative list of characteristics of investment, and the associated footnote, is to prevent exactly such unguided meanderings and speculation about the negotiators’ intentions” as Prof. Reisman advances. *See* Allgeier II, **CER-11**, ¶ 18; *cf.* Reisman II, **RER-6**, ¶ 16.

83. Peru’s heavy reliance on the Preamble is especially inappropriate given that Peru reads it only selectively. Peru and Prof. Reisman continue to ignore the Preamble’s reference to a “predictable legal and commercial framework for business and investment.” *See* Reply, **C-63**, ¶¶ 123-127; *cf.* Rejoinder, **R-65**, ¶ 136; Reisman II, **RER-6**, ¶¶ 21-24. Peru’s repetition of its unsubstantiated assertion that Gramercy did not “respect parity between domestic and foreign investors” is no answer to Gramercy’s showing that the reference to “parity” does not prevent U.S. investors from bringing certain claims, in an international forum, that are not available to Peruvian nationals. *See* Reply, **C-63**, ¶ 127; Allgeier I, **CER-7**, ¶ 56; *cf.* Rejoinder, **R-65**, ¶ 138.

84. In any event, Peru offers no cogent response to Gramercy’s demonstration that the Land Bonds *do* meet whatever developmental objectives Peru seeks to draw from the Preamble. *See* Olivares-Caminal I, **CER-8**, ¶¶ 78-80; Witness Statement of [REDACTED] (“[REDACTED]”), **CWS-7**, ¶ 22; *see also* Olivares-Caminal II, **CER-12**, ¶¶ 19-24. As Gramercy previously explained, the Government issued the Land Bonds with the explicit intent of creating broad-ranging economic benefits. *See* Reply, **C-63**, ¶ 89 (citing Decree Law N° 17716, Land Reform Act, June 24, 1969, **Doc. CE-1**, Article 1). Peru made the Land Bonds tradable without restrictions on the nationality of the purchaser. Accordingly, Gramercy created a secondary market in which bondholders could exchange their long-stagnated debt for capital. *See* Reply, **C-63**, ¶ 89 (citing Decree Law N° 22,749, November 13, 1979, **Doc. RA-193**, Article 5); Olivares-Caminal I, **CER-8**, ¶ 79. That undoubtedly benefitted the Peruvian nationals who sold the Land Bonds, like [REDACTED], who “invest[ed]” her liquidity to buy out her family’s country house. [REDACTED], **CWS-7**, ¶ 22.

85. More generally, as Prof. Olivares-Caminal explains and Peru does not meaningfully rebut, participation in secondary sovereign debt markets is an important factor in contributing to economic development, and creating an opportunity for Peru to resolve the longstanding impasse relating to the Land Bonds is also a contribution to Peru's economic development. Olivares-Caminal I, **CER-8**, ¶¶ 79-80, 90; Olivares-Caminal II, **CER-12**, ¶ 23; Reply, **C-63**, ¶ 91; *see also* Koenigsberger V, **CWS-10**, ¶¶ 11-12, 32. As Mr. Koenigsberger explains, beyond the microeconomic effects of creating liquidity for previously illiquid assets and of aggregating the interests of a large number of individual Land Bond holders, Gramercy had hoped to produce a macroeconomic “virtuous shock” for the Peruvian economy, thus promoting Peru's creditworthiness and ability to attract foreign investment. Koenigsberger V, **CWS-10**, ¶¶ 12-19. Professor Guidotti's contention that “any liquidity” that Gramercy injected into Peru “only benefits Gramercy” is thus patently incorrect. *Cf.* Guidotti II, **RER-10**, ¶ 30; Olivares-Caminal I, **CER-8**, ¶ 79; Olivares-Caminal II, **CER-12**, ¶¶ 22-23.

86. Professor Reisman's response that the injection of over US\$33 million into the Peruvian economy is “the nature of every inward transaction,” and thus “the [Treaty's] object and purpose of being developmental would be deprived of *effet utile*,” is similarly flawed. *Cf.* Reisman II, **RER-6**, ¶ 28. Nothing in the Preamble of the Treaty would be deprived of *effet utile* by recognizing that a payment of US\$33 million in Peru to acquire Peruvian assets is a protected investment. The fact that many transactions could be deemed to contribute to the Peruvian economy has no bearing on whether those transactions themselves contributed to the Peruvian economy. The Treaty includes other clear text-based requirements, such as nationality requirements for investors; just because many investors could fulfill that nationality requirement does not mean that there should be additional jurisdictional requirements beyond what the Treaty provides. Professor Reisman's observation also ignores the “scale of Gramercy's multimillion dollar investment, which distinguishes Gramercy's purchases from retail or private transactions that presumably would not lead to the same direct or multiplier effects.” Olivares-Caminal II, **CER-12**, ¶ 21.

87. Moreover, Prof. Reisman's facetious observation that Gramercy's claim is not an “*actio popularis* ‘for all parties’” is beside the point. *Cf.* Reisman II, **RER-6**, ¶ 31. By definition, investments aim to earn profits for their investors and are not undertaken *pro bono*, but that does not prevent them from having

wider economic benefits and being, in Prof. Reisman’s word, “developmental,” just as Gramercy aimed to do with its investment in the Land Bonds. *Cf. id.*; *see* Koenigsberger V, **CWS-10**, ¶¶ 9-19. Gramercy can hardly be faulted for “not produc[ing] any ‘solution’ with respect to the Bonds” (*cf. id.*)—let alone denied jurisdiction on that basis—when its inability to do so is attributable not to its lack of effort but to Peru’s own intransigence. *See* Olivares-Caminal II, **CER-12**, ¶ 24. On that tortured logic, a State could eliminate jurisdiction by expropriating an asset.

88. At the end of the day, Peru’s attempts to use the Treaty’s Preamble as a pretext for imposing layer upon layer of extra-textual restrictions cannot be sustained. Peru simply has no answer to the absurd implications of its position. *See* Reply, **C-63**, ¶¶ 79, 124-125. According to Peru, in order to qualify for protection under the Treaty, an asset must be acquired with the investor’s own funds and not “using funds from third parties”; there must be no upstream investors or stakeholders; the purchase price must be paid directly to the Government of Peru; yet, it cannot be acquired in “one-off payments,” or be “de-risked”; it cannot be controlled, even directly; it must be “actively” contributed in some “tangible” way; it must also demonstrably “strengthen cooperation or integration” between the State Parties and “create new employment opportunities, or improved living conditions”; it must create “parity” between foreign and host State nationals; it must have been “made for foreign investment” rather than for host-State nationals; it must have been “actively marketed to, and issued on, international markets”; it must also be “issued in foreign currencies, governed by foreign law, subject to foreign courts”; and it cannot be “decades-old,” but yet must have a certain “duration.” *Cf.* Rejoinder, **R-65**, ¶¶ 89, 97-99, 103-105, 138-139, 141-142, 149. Peru’s approach would exclude almost every conceivable kind of asset and every conceivable transaction from the Treaty’s scope, in direct contradiction to the State Parties’ self-avowed intent that it cover a broad range of assets except for those explicitly excluded. *See* 13th Round of the Andean-U.S. FTA Negotiations, **Doc. CE-447**, p. 55 (noting that the Treaty resulted in the adoption of a “conception of investment [that] is broad and covers all possible forms of assets”) (emphasis added); Reply, **C-63**, ¶ 54; Allgeier I, **CER-7**, ¶¶ 36-37; *see also* Herrera, **RWS-5**, ¶ 20.

89. There is therefore nothing in the Treaty’s object and purpose that supports limiting the definition of “bonds,” “obligaciones,” “public debt,” or “debt instruments” in a manner

that would be at odds with the ordinary meaning of those terms and that would exclude the Land Bonds.

(d) Peru Fails to Rebut Gramercy’s Showing That the Land Bonds Also Have the “Characteristics of an Investment.”

90. Peru’s overarching disparagement of Gramercy as a “speculator” trying to obtain a “windfall” also infects its analysis of whether the Land Bonds possess the “characteristics of an investment” under Article 10.28 of the Treaty. *Cf.* Rejoinder, **R-65**, ¶¶ 3, 8, 292-293. Despite having previously acknowledged that the specific characteristics mentioned in Article 10.28—“the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”—are neither mandatory nor cumulative (*see* Reply, **C-63**, ¶ 67), Peru continues to both attempt a wholesale importation of the so-called *Salini* characteristics, and to misrepresent the Land Bonds’ nature to contend that they do not possess these characteristics. Peru’s approach fails on both counts.

(i) Peru’s Interpretation of “Characteristics of an Investment” Is Wrong.

91. *First*, Peru’s approach to defining the “characteristics of an investment” continues to be conceptually flawed. Beyond incorrectly accusing Gramercy of making a “concession” that the Treaty imports three of the *Salini* criteria, Peru does not address the fundamental point that the Treaty, on its plain terms, does not require an asset to satisfy any particular one of these elements—let alone all three, and let alone a fourth criterion of contributing to the host State’s economic development that is conspicuously absent from the Treaty’s text. *Compare* Rejoinder, **R-65**, ¶ 140, *with* Reply, **C-63**, ¶ 79; *see also* Reply, **C-63**, ¶¶ 67, 78; Allgeier I, **CER-7**, ¶¶ 36, 51-57. Peru and Prof. Reisman had admitted as much, and the U.S. Submission is also consistent with this interpretation. *Cf.* Reisman II, **REB-6**, ¶ 16; *see* U.S. Submission, ¶ 18. Mr. Herrera also agrees that the analysis must be “subject to specific limits in the text” of the Treaty. *Cf.* Herrera, **RWS-5**, ¶ 17. The recent decision of the *Seo v. Korea* tribunal, interpreting identical language in the Korea-U.S. FTA, confirms this point, finding that the three listed characteristics need not “be present cumulatively for an asset to qualify as an investment” and that none of them “is indispensable.” *See Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award of September 27, 2019, **Doc. CA-220**, ¶¶ 94-95.

92. *Second*, Peru cannot impose the *Salini* criteria, including the abandoned “contribution to economy” prong, as mandatory jurisdictional requirements, ostensibly for the sole reason that Prof. Reisman “reaffirms . . . that application of *Salini* is appropriate.” *Cf.* Rejoinder, **R-65**, ¶ 140. Professor Reisman’s academic opinions say the opposite—just like the overwhelming body of arbitral jurisprudence to consider the evolution of *Salini*, which Prof. Reisman neither denies nor addresses. *See* Reply, **C-63**, ¶¶ 80 *et seq.*

93. Professor Reisman’s attempt to square that circle by claiming, in his latest report, that “the Contracting Parties to the US-Peru Treaty specifically *did* adopt these policy considerations”—by which he appears to mean the reference to development in the Preamble and the three non-cumulative, non-mandatory “characteristics of an investment”—cannot succeed. *Cf.* Reisman II, **RER-6**, ¶ 39; Olivares-Caminal I, **CER-8**, ¶¶ 61-67; Olivares-Caminal II, **CER-12**, ¶¶ 18-24.

94. Peru’s approach again defies axiomatic principles of Treaty interpretation. Beyond conclusory assertions in a single paragraph in Peru’s Rejoinder and a single paragraph in Prof. Reisman’s supplemental opinion, neither Peru nor Prof. Reisman grapple with Gramercy’s extensive arguments on this point in its Reply. *See* Reply, **C-63**, ¶¶ 78-85; Rejoinder, **R-65**, ¶ 140; Reisman II, **RER-6**, ¶ 39. As Gramercy already noted, 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.’” Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, 2009, **Doc. CA-194**, p. 140; Reply, **C-63**, ¶ 78. *Salini* was issued years before the conclusion of the Treaty, and yet the State Parties did *not* include the “duration” prong or the “contribution to economic development” prong, and did not make any of the expressly listed “characteristics” mandatory. *See* Reply, **C-63**, ¶ 79.

95. Peru does not deny that tribunals have on the whole rejected the idea that the *Salini* factors are mandatory requirements, or that they should be transposed to non-ICSID cases where the State Parties have agreed on their own definition of investment, or that even among tribunals that have invoked the *Salini* factors many have rejected the “contribution to economy” prong. *See* Reply, **C-63**, ¶¶ 82-88. Peru’s reliance on one

additional article in a collection entitled “The First 50 Years of ICSID,” and one additional case considering the *Salini* criteria in an ICSID arbitration, to state merely that there is a “greater recognition of the *Salini* criteria” does little to rehabilitate Prof. Reisman’s prior reliance on a law student article and two cases from 2006 (one of which he had criticized elsewhere) for the suggestion that *Salini* is “controlling law” in non-ICSID cases—a proposition that Prof. Reisman has rejected in his academic writings. Cf. Rejoinder, **R-65**, ¶ 140, n. 251; Reisman I, **RER-1**, ¶ 44; see Reply, **C-63**, ¶¶ 81-82. The recent decision in *Seo v. Korea*, under the identically-worded Korea-U.S. FTA, likewise rejects the position Peru advances here. That tribunal observed:

[T]he *Salini* criteria serve to identify an investment within the meaning of the ICSID Convention, which does not itself provide any definition of what an investment is. This stands in stark contrast to Article 11.28 of the KORUS FTA, which contains an express definition of the term. The Tribunal does not find it possible or appropriate to replace the working of said provision (in particular the terms “including” and “or”) with another tribunal’s findings made in the context of ICSID arbitration cases.

Seo Final Award, **Doc. CA-220**, ¶ 98; see also *id.*, ¶¶ 97-101 (rejecting the State’s argument that the *Salini* criteria are applicable to the Korea-U.S. FTA, which instead “pursues a typological approach that revolves around a non-exhaustive and non-cumulative list of three important characteristics”).

96. Moreover, if Peru were right that preambular references to promoting development were sufficient to import the *Salini* criteria, that would surely be the case for most if not all investment treaties—yet Peru has identified no other tribunal that has squarely endorsed such an approach. To the contrary, many of the cases in which tribunals explicitly *rejected* the “contribution to host State economy” factor involved treaties with preamble provisions very similar to those upon which Peru now attempts to rely. That was the case in *Seo*, for example, notwithstanding the Korea-U.S. FTA’s preambular reference to “promoting economic growth.” *Seo* Final Award, **Doc. CA-220**, ¶ 137. Likewise, in

Deutsche Bank, despite language in the applicable treaty’s preamble reflecting the States’ desire to foster “economic cooperation,” “favorable conditions for greater investments,” and the “[p]romotion” and “protection” of investments, the tribunal found that application of this factor was inappropriate, noting that “the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal.” *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; *see also, e.g., Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award of November 26, 2009, **Doc. CA-173**, ¶ 207 (declining to apply contribution to economy factor where treaty’s preamble referenced the States’ desire to “promote and protect foreign investments with the aim to foster the economic prosperity of both States”); *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 (declining to apply contribution to economy factor where treaty’s preamble referenced the aim to “benefit the world economy” and view that “broader energy cooperation among signatories is essential for economic progress and more generally for social development and a better quality of life”); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009, **Doc. RA-100**, ¶ 85 (finding that “the contribution of an international investment to the *development* of the host state is impossible to ascertain” where the treaty’s preamble referenced States’ desire to foster “economic cooperation,” “favorable conditions for greater investments,” and the “promotion and protection of investments”) (applying Czech Republic-Israel BIT, **Doc. CE-758**).

97. References to “development” in the Preamble are thus not *carte blanche* to create additional jurisdictional prerequisites that the Treaty’s definition of investment does not contain or require.

(ii) Peru Fails to Rebut That the Land Bonds Satisfy the Enumerated “Characteristics.”

98. In addition to impermissibly expanding the “characteristics of an investment” and treating them as both mandatory and cumulative, Peru’s response to Gramercy’s showing that the Land Bonds in fact possess all of these characteristics is typically superficial.

99. *First*, Peru’s argument that Gramercy did not make a “commitment of capital or other resources”—Treaty terms it ignores in favor of the term “contribution of money or assets”—essentially repeats its allegation that the funds used to purchase the Land Bonds originated from “third party investors” and were transferred to GPH from GEMF, and that “GFM never contributed any money or assets.” *See* Rejoinder, **R-65**, ¶¶ 103-104, 141. Yet, as Gramercy has already explained, the *origin* of funds is irrelevant to whether it made a “commitment of capital or other resources.” *See* Section II.A.1(c) above; *see also* Reply, **C-63**, ¶¶ 16-23. Peru’s position would lead to absurd results, such as disqualifying from protection a company that acquires a factory using funds contributed by third parties, such as its shareholders or banks. Similarly, as explained above, GFM “commit[ted] . . . other resources” in its management of the investment, including expertise and human capital. *See* Section II.A.1(c) above.

100. For similar reasons, Peru’s further attempt to limit this factor to only *direct* payments of money (*cf.* Rejoinder, **R-65**, ¶¶ 103-104) is at odds with the plain text of the Treaty, which references “capital or other resources” and does not require the contribution to be “direct.” Professor Guidotti’s even more extreme claim that only money paid directly *to Peru* can lead to a protected investment is even more meritless. *Cf.* Guidotti II, **RER-10**, ¶ 30. Gramercy purchased the Land Bonds from Peruvian bondholders, to whom Gramercy collectively transferred tens of millions of dollars. *See* Gramercy’s Bondholder Packages, **Doc. CE-339**; Witness Statement of Robert Joannou, **CWS-6**, ¶ 7; Lanava I, **CWS-5**, ¶¶ 7-13. Neither Prof. Guidotti, nor Peru, nor even Prof. Reisman, offer any explanation as to why payment must be directly provided to the State for the contribution to qualify as an investment. Most investments are not acquired through direct transactions with the State. *See* Olivares-Caminal II, **CER-12**, ¶¶ 21-22.

101. *Second*, Peru does not deny or even address the fact that Gramercy had an expectation of gain or profit from investing in the Land Bonds, as Gramercy explained in its Reply. *See* Reply, **C-63**, ¶ 70. Professor Reisman’s argument that the Land Bonds did not entail an expectation of profit because the bondholders had no choice but to accept the Land Bonds as compensation for expropriation is wide of the mark. *Cf.* Reisman II, **RER-6**, ¶ 26; Rejoinder, **R-65**, ¶¶ 145-146. Professor Reisman offers no support for his conclusion that this criterion “impl[ies] certain voluntary actions and decisions on the part of an ‘investor.’” *Cf.* Reisman II,

RER-6, ¶ 26. In any event, it is Gramercy’s “actions and decisions” *vis-à-vis* the Land Bonds that matter, not those of the landowners who originally received the Land Bonds.

102. Furthermore, Prof. Reisman does not explain the basis or relevance of his conclusion that “later Government permission enabling the original bondholders to transfer their [Land] Bonds to someone else [would not], by this act alone, change the character of the [Land] Bonds.” *Cf. id.* But that measure opened the door for the Land Bonds to become a protected investment. Under Article 10.28, assets receive protection when they become owned or controlled by an “investor.” A locally owned factory could become a Treaty investment upon its acquisition by a foreign investor. That does not change the “character” of the factory, but does make it eligible for Treaty protection. Likewise, the Land Bonds have always had the “character” of bonds. Gramercy’s ownership and control of them also make the “investments” under the Treaty.

103. *Third*, Peru argues that GPH did not assume “risk” in connection with its investment in the Land Bonds on the basis of a circular argument that it made no “contribution,” and because it allegedly “transferred” any risk in the Bonds “by selling ownership interests to third parties.” *See* Rejoinder, **R-65**, ¶ 103. As Gramercy has already explained, and Peru has failed to rebut, GPH and GFM clearly assumed risks in their ownership and management of the Land Bonds. *See* Reply, **C-63**, ¶¶ 71-72. Indeed, Peru itself has recognized the risks that Gramercy took in purchasing stagnated sovereign debt. *See, e.g.*, Rejoinder, **R-65**, ¶ 262 (referring to “particular risks relevant to the Agrarian Reform Bonds”); Herrera, **RWS-5**, ¶ 32 (“Annex 10-F also states that the Contracting Parties ‘recognize that the purchase of debt issued by a Party entails commercial risk.’ This reflected the Contracting Parties’ shared understanding that debt issued by a State, to the extent protected under the Treaty, is not immune from risk and might not always be repaid.”). Peru also offers no response to Gramercy’s argument that the Treaty does not specify any particular type of risk required with respect to “the purchase of debt issued by a Party,” which is all the Treaty requires and is what the Land Bonds are. *See* Reply, **C-63**, ¶¶ 72, 103.

104. Peru’s argument that GFM could not have incurred risk because it never “owned” the Land Bonds is similarly without basis: the Treaty does not require an investor to own an investment in the first place. Nor does GPH’s operating agreement

demonstrate that GFM did not incur “risk” because it limits GFM’s liability. *Cf.* Rejoinder, **R-65**, ¶ 103; *see* Reply, **C-63**, ¶ 23. The relationship is not unlike that of third-party insurance, whereby a party seeks to reduce or even eliminate its risk. International investment law does not preclude investors from bringing claims for investments subject to an insurance policy even though the “risk” would be similarly limited. *See* Section II.A.2 above; *see also* CSOB Decision on Jurisdiction, **Doc. CA-209**. In any event, GFM also has an economic interest in the Land Bonds. *Koenigsberger V*, **CWS-10**, ¶ 31.

105. *Finally*, Gramercy has already demonstrated why the “contribution to economic development” factor is inappropriate. *See* Reply, **C-63**, ¶¶ 79-86; *Allgeier I*, **CER-7**, ¶¶ 53-54. Even if the Tribunal were to consider this factor, however, it would be satisfied for the same reasons as discussed above in connection with the Treaty’s “object and purpose.” *See* Section II.B.1(c) above; *Olivares-Caminal I*, **CER-8**, ¶¶ 77-80; *Olivares-Caminal II*, **CER-12**, ¶¶ 19-24.

2. Peru Fails to Rebut That the Circumstances of the Treaty’s Conclusion Confirm That the Land Bonds Are Covered Investments.

106. In its Reply, Gramercy described in detail how Peru’s own contemporaneous accounts of the Treaty negotiations and descriptions of the Treaty’s scope, as well as the factual circumstances in which the Treaty was negotiated—including U.S. trade policy and negotiating objectives—demonstrate that the State Parties were aware of ongoing disputes regarding Peru’s Agrarian Reform and the Land Bonds, and ultimately agreed to a broad definition of “investments” that included public debt, with a carve-out for sovereign bilateral debt but not for the Land Bonds. *See* Reply, **C-63**, Sections II.B.2(a)-(b). Peru does not dispute the accuracy of Gramercy’s account, but instead alleges that it is “misplaced” and “one-sided.” Rejoinder, **R-65**, p. 51, ¶ 154. Peru’s criticisms are unavailing.

107. *First*, Peru’s complaint that the materials on which Gramercy relies are not official *travaux préparatoires* to the Treaty does not make them irrelevant. *Cf.* Rejoinder, **R-65**, ¶ 153. In addition to “the preparatory work of the treaty,” VCLT Article 32 allows recourse to “the circumstances of its conclusion,” as well as any other supplementary means of interpretation. VCLT, **Doc. CA-193**, Article 32. The circumstances of a treaty’s

conclusion can refer to a broad range of factors, such as “[t]he circumstances which cause a treaty to be drawn up, affect its content, and attach to its conclusion.” Gardiner, **Doc. CA-115**, p. 398; *see also* Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES, **Doc. CA-195**, p. 445 (“[T]he circumstances of its conclusion . . . include the political, social and cultural factors—the *milieu*—surrounding the treaty’s conclusion.” (emphasis omitted)).

108. Contrary to Peru’s allegation, these circumstances *can* relate to one Party’s trade objectives and to “events preceding the Treaty,” such as in *Plama*, where the tribunal considered relevant to the interpretative exercise the geopolitical observation that “Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions.” *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, **Doc. RA-73**, ¶ 196; *cf.* Rejoinder, **R-65**, ¶ 153. Also contrary to Peru’s allegation, supplementary means of interpretation can also include materials and instruments drawn up by only one Party. *Cf.* Rejoinder, **R-65**, ¶ 153; Villiger, **Doc. CA-195**, p. 445 (“Among other supplementary means included but not listed in Article 32 (N.2), the following may be mentioned: . . . documents not strictly qualifying as *travaux préparatoires* (N.4), *e.g.*, a State’s internal documents upon preparation of a treaty unknown to other States at the time[.]”). In *CMS v. Argentina* and *Continental Casualty*, for example, the tribunal took note of the U.S. President’s letter of submittal of the treaty to the U.S. Congress in interpreting the fork-in-the-road provision and the public order exception clause, respectively. *See CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of July 17, 2003, **Doc. CA-211**, ¶ 82; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of September 5, 2008, **Doc. RA-95**, ¶ 187, n. 278; *see also Churchill Mining v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction of February 24, 2014, **Doc. CA-210**, ¶¶ 208-229 (examining the United Kingdom’s and Indonesia’s notes and interparty correspondence surrounding the negotiation of the treaty to shed light on their negotiating positions).

109. Moreover, Gramercy does not rely on these materials to “counter the results of the application of article 31,” as Peru claims (*cf.* Rejoinder, **R-65**, ¶ 153 (citing Reisman II, **RER-6**, ¶ 9)), but to “*confirm* the meaning resulting from the application of article 31”

of the VCLT—which, as explained in Section II.B.1(c) above, shows that the ordinary meaning of the Treaty terms clearly encompasses the Land Bonds as a type of protected investment. VCLT, **Doc. CA-193**, Article 32 (emphasis added); *cf.* Rejoinder, **R-65**, ¶ 153; Reisman II, **RER-6**, ¶¶ 8-9.

110. *Second*, beyond its misconceived attempt to dismiss them as irrelevant, Peru has no meaningful answer to the accounts of the negotiating rounds of the Treaty that were drafted and issued by Peru’s own *Ministerio de Comercio Exterior y Turismo* (“*Mincetur*”) or to the framework that determined the United States’ negotiating policy for the Treaty. *See* Reply, **C-63**, ¶¶ 99-104; Allgeier I, **CER-7**, ¶¶ 17-33, 41-43; Allgeier II, **CER-11**, ¶¶ 5-6.

111. The Mincetur summaries describe Peru’s and other Andean nations’ goals in the negotiations, and record that the States expressly negotiated the scope of protected investments and concluded that the resulting “*concept of investment is broad*” and “include[s], among others . . . debt instruments (*including public debt*, except for bilateral debt).” *See, e.g.*, 13th Round of the Andean-U.S. FTA Negotiations, November 14-22 and December 5-7, 2005, **Doc. CE-447**, p. 55 (emphasis added); *see also* Reply, **C-63**, ¶¶ 99-105; Allgeier I, **CER-7**, ¶ 43. Those materials are hardly “one-sided” or “U.S.-focused,” as Peru suggests. *Cf.* Rejoinder, **R-65**, ¶ 154.

112. Nor do either Peru or its new witness Mr. Herrera dispute that these summaries provide a fair and accurate account of the Treaty’s negotiations. *Cf.* Herrera, **RWS-5**, ¶¶ 17-20. Mr. Herrera does not appear to dispute Amb. Allgeier’s account of the United States’ negotiating policy, or contradict the content of Peru’s own summaries of the negotiations, which he largely repeats. *See* Allgeier I, **CER-7**, ¶¶ 41-43; Allgeier II, **CER-11**, ¶ 5; *cf.* Herrera, **RWS-5**, ¶¶ 17-34. He does not deny that the State Parties adopted the negative list approach to negotiate the terms of the Treaty, that they expressly addressed the inclusion of public debt in the scope of protected investments, and that they ultimately agreed that the “*concept of investment is broad*.” *See* Allgeier I, **CER-7**, ¶¶ 41-43; Allgeier II, **CER-11**, ¶¶ 6, 23-24. Instead, Peru’s only response to those negotiation summaries is to dismiss them in favor of “an assessment of the ‘characteristics of investment’ in light of the Treaty’s object and purpose” (Rejoinder, **R-65**, ¶ 158)—*i.e.*, Peru’s attempts to narrow what is meant to be a

“broad” concept of investment by imposing requirements that the Treaty’s text nowhere contains.

113. Peru’s attempts to downplay the significance of U.S. laws and materials in interpreting the Treaty are similarly unavailing. *Cf.* Rejoinder, **R-65**, ¶¶ 153-154; Reisman II, **RE-6**, ¶¶ 8-9. Here, the U.S. laws and policies that define and govern the United States’ approach to treaty negotiations are probative indicators of the circumstances of the Treaty’s conclusion. For all its criticisms of U.S. congressional records regarding the Treaty negotiations, Peru does not deny the accuracy of the account that Gramercy and Amb. Allgeier have presented, which shows that as a matter of policy the United States sought to define the scope of protected investments in the broadest possible terms. *See* Reply, **C-63**, ¶¶ 99-114; Allgeier I, **CER-7**, ¶¶ 45-49; Allgeier II, **CER-11**, ¶¶ 5-6. Neither Peru nor Mr. Herrera deny, for example, that under the Andean Trade Promotion and Drug Eradication Act, the U.S. President could not designate a country that had “nationalized, expropriated or otherwise seized ownership or control of property owned by a United States” person without adequate, effective and prompt compensation to receive trade preferences, and that the United States continued to press for the resolution of those outstanding issues, even as the States continued to negotiate the Treaty. *See* Reply, **C-63**, ¶¶ 106-114; Allgeier I, **CER-7**, ¶¶ 59-69; Allgeier II, **CER-11**, ¶¶ 19-22.

114. *Third*, Peru is also wrong that the State Parties’ negotiations over the inclusion or exclusion of “public debt” “have no bearing whatsoever on the Bonds.” *Cf.* Rejoinder, **R-65**, ¶ 158. Although this assertion is not explained, it seems to stand and fall with the erroneous notion that the Land Bonds are not “public debt” in the first place. While Peru invokes Mr. Herrera’s testimony in support, the height of Mr. Herrera’s contribution to this key question is his unsupported statement that “[n]either Contracting Party ever mentioned the Agrarian Reform Bonds during the negotiations”—but this, of course, does not mean that they do not fall within its terms. *Cf.* Herrera, **RWS-5**, ¶ 34. The test for a qualifying investment under the Treaty is not whether someone remembers if it was nominatively mentioned in negotiations, but whether it falls within the Treaty’s ordinary meaning, properly interpreted. Even if Peru were right in its unsubstantiated assertion that the State Parties’ negotiations on public debt “were founded upon considerations regarding contemporary sovereign bonds issued outside of Peru to obtain financing on [*sic*] international markets” (*cf.* Rejoinder, **R-65**,

¶ 159), this would not affect the question of whether the Treaty terms to which they ultimately agreed do or do not include the Land Bonds. Indeed, Mr. Herrera agrees with Amb. Allgeier that the “United States wanted to include public debt within the definition of investment, while the Andean countries did not agree,” and that the issue was settled when the United States offered the public debt annex and exclusion of bilateral State debt—but not any *other* kind of public debt—from the investment chapter’s coverage. Herrera, **RWS-5**, ¶¶ 24-32; *see also* Allgeier I, **CER-7**, ¶¶ 41-43; Allgeier II, **CER-11**, ¶ 16.

115. *Fourth*, Peru also attempts to dismiss as “wholly irrelevant” the fact that the State Parties expressly excluded public debt in other contemporaneous treaties and in their model BITs. *Cf.* Rejoinder, **R-65**, ¶ 157. Although investment tribunals rarely expressly articulate where one of the signatory States’ contemporaneous treaty practice falls within the hierarchy of VCLT Articles 31 and 32, as a practical matter, they do frequently consider that practice—typically as part of the supplementary means of interpretation under VCLT Article 32. *See, e.g., Churchill Mining Decision on Jurisdiction, Doc. CA-210*, ¶ 195 (“Treaties on the same subject matter concluded respectively by the United Kingdom and Indonesia with third States can legitimately be considered as part of the supplementary means of interpretation.”); *Plama Decision on Jurisdiction, Doc. RA-73*, ¶ 195 (“It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty’s text at the time it was entered into.”); *KT Asia Award, Doc. RA-317*, ¶ 123 (“[T]he Tribunal’s reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one . . . while in ten other BITs it has added a requirement[.]”).

116. The Tribunal may find both State Parties’ contemporary treaty practice relevant in this case given that both State Parties had model treaty texts, the Treaty follows one of those texts very closely, and Peru’s argument is essentially that the Treaty silently excludes certain investments that both fall within its express terms and do not appear on the Treaty’s express list of exclusions. The Treaty’s resemblance to the U.S. Model BIT, which does not expressly exclude public debt, is particularly relevant here, since this text served as the starting point for negotiations between the Parties. Allgeier II, **CER-11**, ¶ 16. Were the Tribunal to find either State Party’s treaty practice relevant, Peru does not dispute

that, unlike the Treaty, the 1994 U.S. Model BIT and treaties concluded on that model expressly exclude sovereign debt by adding explicit qualifiers. *See* Reply, **C-63**, ¶ 116. It also does not deny that Peru's own Model BIT of 2000 expressly excludes sovereign debt, as do Peru's contemporaneous treaties with other countries such as the Japan-Peru BIT and the Canada-Peru BIT. *See* Peru 2000 Model BIT, **Doc. CE-389**, Article 1.1; Japan-Peru BIT, **Doc. CE-498**, Article 1.1; Canada-Peru BIT, **Doc. CE-448**, Article 1; *see also* Reply, **C-63**, ¶ 117. If the Tribunal were to consider this common practice relevant, therefore, Peru does not dispute that it supports the conclusion that if the State Parties had intended to exclude a particular kind of public debt, or to exclude the Land Bonds more generally, they would have done so expressly. *See* Reply, **C-63**, ¶ 47.

117. *Finally*, Peru's characterization as "misleading" the fact that the resolution of pending investment disputes between Peru and the United States was a precondition for Peru to obtain the Treaty is both incorrect and inapt. *Cf.* Rejoinder, **R-65**, ¶ 155; Herrera, **RWS-5**, ¶ 14. Peru fails to distinguish the conditions necessary to *begin negotiations* from the conditions necessary to *conclude an agreement* and submit it to Congress. *See* Allgeier II, **CER-11**, ¶ 20. As Amb. Allgeier confirms, the United States often initiates negotiations conditionally to provide an additional incentive for the other State to address outstanding issues or disputes. *Id.* Peru was, however, required to address these disputes in order for the United States to *conclude* the Treaty, because key members of the U.S. Congress had made it "clear that they would not support a free trade agreement with Peru unless the outstanding investment disputes were resolved." *Id.*, ¶ 21. The implementing legislation was not passed until *after* Peru settled its ongoing disputes, including the LeTourneau dispute, with U.S. investors. *Id.*, ¶ 20; *see also* Allgeier I, **CER-7**, ¶ 68; Reply, **C-63**, ¶¶ 110-111. Contemporary cables confirm this linkage, which Peru does not deny. **Doc. CE-453**, LeTourneau and GOP [Government of Peru] Reach Settlement After 35 Years, April 3, 2006; *see also* Reply, **C-63**, ¶¶ 110-111; Allgeier I, **CER-7**, ¶ 68.

118. Peru's reliance on Mr. Herrera's testimony that Peru "explained in the course of negotiations that the [ongoing disputes] were being addressed in a binding forum, and should not be a matter of discussion in the Treaty negotiations" does not help Peru. *Cf.* Herrera, **RWS-5**, ¶ 14 (citing 10th Round of the Andean-U.S. FTA Negotiations, June 6-10, 2005, **Doc. CE-439**, pp. 22-23); Rejoinder, **R-65**, ¶ 155. As the documents on which

Mr. Herrera relies make clear, the passage that Mr. Herrera invokes relates to the State Parties' disagreement over Peru's proposal that disputes regarding *investment agreements* only be arbitrable if they amount to a violation of Section A of the Investment Chapter. 10th Round of the Andean-U.S. FTA Negotiations, June 6-10, 2005, **Doc. CE-439**, pp. 22-23. The United States "explained that it was extremely difficult" to agree to Peru's proposal in light of existing disputes relating to investment agreements. *Id.* It is with respect to those specific disputes that Peru responded that they were being addressed in other fora and "should not be a matter of discussion when defining the issue" of *investment agreements* more generally. *Id.*, p. 23.

119. To the contrary, Mr. Herrera's testimony actually confirms that the Treaty negotiators were *aware* of both the Land Bonds as an existing class of debt and of disputes relating to them, and yet did not expressly exclude the Land Bonds from the Treaty's scope, as they did with other assets and other forms of public debt. *See* Reply, **C-63**, ¶¶ 41-42; Allgeier II, **CER-11**, ¶ 22. Whether or not resolution of existing disputes was a legal or practical precondition to the conclusion of the Treaty is beside the point. What matters is that the Parties were fully conscious of the Land Bonds during Treaty negotiations and did not exclude them as a covered investment.

120. Peru does not deny the basic facts in this respect. Peru and Mr. Herrera do not deny that the Treaty negotiators were aware of pre-existing disputes relating to the Agrarian Reform, one of which included references to the Land Bonds. *Cf.* Rejoinder, **R-65**, ¶ 155; Herrera, **RWS-5**, ¶ 14. Peru also does not deny that—at least as a matter of fact—it resolved, or attempted to resolve, the vast majority of these disputes right before and during the Treaty negotiations. *Cf.* Rejoinder, **R-65**, ¶¶ 155-156; *see* Reply, **C-63**, ¶¶ 106-114; Allgeier I, **CER-7**, ¶¶ 59-69; Allgeier II, **CER-11**, ¶ 20. Peru also does not deny that among those disputes was the LeTourneau dispute, which Peru admits related to its "Agrarian Reform," or that another U.S. investor had complained about being expropriated due to Peru's Agrarian Reform and "made no attempt to redeem the bonds" issued as compensation. *Cf.* Rejoinder, **R-65**, ¶¶ 155-156; Allgeier I, **CER-7**, ¶¶ 67-68; Allgeier II, **CER-11**, ¶ 20. Peru cannot artificially dissociate the Land Bonds from its "Agrarian Reform" since the former were an integral part of the latter. Thus, Peru ultimately cannot rebut the fact that the State Parties' failure to exclude either Peru's Agrarian Reform, or the Land Bonds that were part of it, from the scope of

the Treaty was not an accidental omission. *See* Reply, **C-63**, ¶¶ 112-114.

121. None of Peru’s attempts to ignore the circumstances of the Treaty’s conclusion, therefore, can succeed.

3. Peru Fails to Rebut That Other Investment Cases Confirm That the Land Bonds Are Covered Investments.

122. Peru’s accusation that Gramercy “fails to engage with jurisprudence on contemporary sovereign debt” does not pass muster. *Cf.* Rejoinder, **R-65**, p. 49. Gramercy extensively addressed prior arbitral decisions—including *Abaclat*, *Ambiente Ufficio*, *Alemanni*, *Fedax*, and *Poštová*—throughout its Reply, including in an entire separate section spanning no fewer than six pages. *See* Reply, **C-63**, ¶¶ 93-96, 130-146. Peru cannot simply ignore Gramercy’s arguments with respect to these cases, none of which support its allegation that bonds must be “contemporary sovereign bonds” in order to qualify as protected investments. *Cf.* Rejoinder, **R-65**, ¶¶ 147-152.

123. While Peru and Prof. Reisman once again attempt to distinguish *Abaclat* based on a list of so-called “distinguishing characteristics” of the bonds involved in that case, they cannot demonstrate the legal relevance of those distinctions in the first place. *Cf.* Rejoinder, **R-65**, ¶¶ 148-149; Reisman II, **RER-6**, ¶¶ 33-34. Contrary to Peru’s assertion that “Gramercy does not meaningfully engage with the key elements that distinguish *Abaclat*” and this case, Gramercy already extensively addressed this argument in its Reply. *See* Reply, **C-63**, ¶¶ 137-143. The fact that the sovereign bonds at issue in *Abaclat*, *Ambiente Ufficio*, and *Alemanni* qualified as investments under the applicable treaty does not prove that the Land Bonds do not qualify as “bonds,” “debt instruments,” or “*obligaciones*” under the U.S.-Peru TPA.

124. To the contrary, those tribunals’ reasoning supports Gramercy’s position, not Peru’s. *See* Reply, **C-63**, ¶¶ 137-143. Peru does not deny that in *Abaclat* the tribunal majority defined bonds generally as “a debt, in which an interested party loans money to an entity (corporate or governmental)” and 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. The majority concluded that, regardless of the subcategory,

bonds *in general* qualified as *obligaciones* and “public securities” that were protected under the Italy-Argentina BIT. *Id.*, ¶¶ 355-356. The Treaty expressly mentions *obligaciones* and bonds, which are a subset of “public securities.” *See* Olivares-Caminal II, **CER-12**, ¶ 17; Olivares-Caminal I, **CER-8**, p. 19, fig. 1. Hence, contrary to Peru’s assertion, the alleged distinguishing factors, such as the fact that they were “made for foreign investment,” had a “face value [that] specified payment terms over a defined period,” were “issued in foreign currencies, governed by foreign law, subject to foreign courts,” and “one of the pillars’ of a growth plan,” had no place in the *Abaclat* majority’s jurisdictional finding. *Cf.* Rejoinder, **R-65**, ¶ 149.

125. Similarly, Peru once again barely engages with the *Alemanni* and *Ambiente Ufficio* decisions, which Peru dismisses in a single sentence stating that they have “addressed the same bonds and reached similar conclusions” as *Abaclat*. *Cf.* Rejoinder, **R-65**, ¶ 150; *see* Reply, **C-63**, ¶¶ 130, 140-141. Peru offers no response to Gramercy’s point that the *Ambiente Ufficio* tribunal 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 Article 25 of the [ICSID] Convention.” *Ambiente Ufficio* Decision, **Doc. RA-173**, ¶ 471. Likewise, Peru does not deny that in *Alemanni*, the tribunal endorsed the *Abaclat* and *Ambiente Ufficio* tribunals’ reasoning and agreed that nothing in the applicable treaty’s definition of “investment” could be read as “containing an implicit restriction that would rule out investments taking the form of bonds.” *Alemanni* Decision on Jurisdiction, **Doc. RA-178**, ¶ 296.

126. Moreover, Peru does not even mention *Fedax* in its Rejoinder after Gramercy debunked Peru’s mischaracterizations of that case. As Gramercy explained in its Reply, *Fedax* in fact supports Gramercy’s position as it found that promissory notes issued by Venezuela to a local company and later endorsed to a Dutch company were covered investments under the ICSID Convention and the applicable treaty. *See* Reply, **C-63**, ¶¶ 132-136; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction of July 11, 1997, **Doc. RA-159**, ¶¶ 42-43.

127. Finally, far from “offer[ing] no response” on *Poštová* as Peru states, Gramercy has already explained that the case is inapposite because of the materially different language of the applicable treaty. *Compare* Rejoinder, **R-65**, ¶ 151 *with* Reply,

C-63, ¶ 144. The Slovakia-Greece BIT that applied in *Poštová* did not expressly include “bonds” or “public titles or obligations” in the list of covered investments and restricted covered debentures to those “of a company.” See *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award of April 9, 2015, **Doc. RA-179**, ¶¶ 285, 331 (emphasis omitted). Noting that the treaty had no “reference to any sort of public indebtedness,” the tribunal thus found 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.” *Id.*, ¶¶ 334, 340. It is in this context that the *Poštová* tribunal assessed the “special features and characteristics” that it believed differentiated sovereign debt from corporate debt. In contrast, in this case, the 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.” Treaty, **Doc. CE-139**, Article 10.28 & Annex 10-F, ¶ 1. These material differences in the applicable treaty terms distinguish *Poštová* from this case.

128. Furthermore, the *Poštová* tribunal’s general observation that sovereign debt has “special features and characteristics” does not support Peru’s position that the Land Bonds do not qualify as protected investments. Cf. Rejoinder, **R-65**, ¶ 151 (citing *Poštová* Award, **Doc. RA-71**, ¶ 318). To the contrary, the Land Bonds meet all of those criteria. As Gramercy explained in its Reply and above in Section II.B.1, they are “clearly a method of financing government operations, from investments in infrastructure to ordinary government expenditures” as well as a “key instrument of monetary and economic policy,” because—as Peru omits to quote from the *Poštová* decision—“indebtedness may be incurred to avoid either the issuance of fresh money . . . or an increase in taxes,” which is precisely what Peru sought to achieve by issuing bonds instead of cash for implementing its Agrarian Reform. See *Poštová* Award, **Doc. RA-171**, ¶¶ 318-323; see also Reply, **C-63**, ¶¶ 63 *et seq.*

129. It is thus Peru, not Gramercy, who either ignores or mischaracterizes other investment treaty decisions, none of which support imposing extraneous jurisdictional requirements not specified in the Treaty in the way that Peru urges.

C. Peru Has Consented to Jurisdiction and Gramercy's Claims Are Admissible Because Gramercy Complied with the Treaty's Preconditions to Arbitration.

130. In its Reply, Gramercy demonstrated that, on a proper interpretation of the Treaty, its claims were properly submitted as of June 2, 2016; that even if the Tribunal were to follow *Renco*, GFM has properly submitted an effective waiver on June 2, 2016, and GPH submitted an effective waiver as of August 5, 2016 at the latest; and that, even if GPH's claims were not submitted to arbitration until August 5, 2016, all of its claims would still fall within Article 10.18.1's three-year time bar. *See* Reply, **C-63**, ¶¶ 182-197. As a result, Peru's objections to jurisdiction on these grounds are inconsequential, in addition to being incorrect.

131. Beyond the unprecedented and unprincipled argument that Peru's own conduct should determine whether GPH has submitted a waiver, and continued mischaracterizations of Gramercy's claims, Peru offers no meaningful rebuttal. To the contrary, Peru now appears to accept that regardless of its objections to GPH's waivers, *GFM's* waiver was effective as of June 2, 2016, rendering both Peru's waiver objection and its time bar objection entirely moot as to GFM.

1. Peru Fails to Rebut That Both Claimants Submitted Effective Waivers by August 5, 2016 at the Latest.

132. As Gramercy noted in its Reply, and Peru has not denied, Article 10.18.2 of the Treaty does not itself explicitly require any specific conduct beyond provision of a written waiver. *See* Reply, **C-63**, ¶ 150. However, even assuming that this provision requires both a "formal" written waiver and a so-called "material" waiver, both Gramercy claimants have satisfied each of these two components.

(a) Peru Does Not Deny That Both Claimants Have Provided a Formally Valid Waiver and Thus Validly Submitted Their Claims.

133. There is little dispute between the Parties with respect to Gramercy's satisfaction of the written (*i.e.*, formal) component of the waiver. Peru again does not deny that GFM provided a formally valid written waiver on June 2, 2016. *See* Rejoinder, **R-65**, ¶ 74; Reply, **C-63**, ¶ 156. Nor does Peru deny that GPH's

waivers of July 18, 2016 and August 5, 2016 were both formally valid. *See* Rejoinder, **R-65**, ¶ 70; Reply, **C-63**, ¶ 159.

134. Thus the sole dispute between the Parties appears to be whether GPH’s June 2, 2016 waiver—which reserved rights in the event the Tribunal denies jurisdiction—was sufficient to satisfy the written waiver requirement. This disagreement, too, remains largely academic. As Gramercy has already explained, GPH’s June 2, 2016 waiver was fully consistent with Article 10.18.2 properly interpreted, and Peru’s latest arguments do not disprove that conclusion. However, even if the Tribunal were to conclude that that waiver was not effective, Peru now appears to acknowledge that the result is *not* dismissal of both Gramercy claimants’ claims, but rather that GPH’s claims would be considered to have been submitted to arbitration on the date of the first effective waiver—here, July 18, 2016.

135. *First*, as Gramercy argued in its Reply, GPH’s June 2, 2016 waiver reserving rights in the event that the Tribunal denies jurisdiction is fully consistent with the Treaty’s express text, read in context, in good faith, and in the light of its object and purpose, and the *Renco* tribunal’s decision to the contrary is not binding on this Tribunal. *See* Reply, **C-63**, ¶¶ 154-155. As such, the Tribunal should uphold GPH’s June 2, 2016 waiver as formally valid. *Id.* Peru’s response that the Treaty’s ordinary meaning is “categorical” and “not subject to any carve-out,” even if correct, does not affect this analysis: nothing about GPH’s reservation limits the designated scope of the waiver as covering any “right to initiate or continue . . . any proceeding with respect to any measure alleged to constitute a breach” in the arbitration. *See* Notice of Arbitration and Statement of Claim, **C-3**, ¶ 233(h); *cf.* Rejoinder, **R-65**, ¶ 71. Rather, it reserves rights *only* to the extent that the Tribunal determines that it lacks jurisdiction over certain claims—or in other words, to the extent that the Tribunal ultimately concludes that those claims have not properly been submitted to arbitration. It remains “categorical” with respect to the claims in fact submitted for decision. The rigid approach Peru endorses, by contrast, is *less* faithful to the Treaty text, read in context and in light of its object and purpose—and tellingly, contradicted by Peru’s repeated exhortations that the tribunal must look beyond “a simple dictionary reading of the terms” and avoid a “superficial” interpretation of the Treaty in connection with nearly every other provision on which Peru bases its jurisdictional objections. *See, e.g.*, Rejoinder, **R-65**, p. 41, ¶ 124.

136. *Second*, Peru’s argument that Gramercy’s waiver “ignores the basic purpose and function of the waiver provision,” which it describes as a “no U-turn” provision intended to prevent parallel proceedings, is unavailing for a similar reason. *Cf.* Rejoinder, **R-65**, ¶ 72. The purpose of preventing future claims once “a party elects to submit a Treaty claim” is not thwarted by limiting the waiver to only those claims that are actually and successfully submitted. *Cf. id.* Rather, doing so upholds the text and purpose of the waiver provision while also avoiding substantial prejudice to claimants and causing no overriding prejudice to the respondent State, as Gramercy explained in its Reply. *See* Reply, **C-63**, ¶¶ 157-158. While Peru now asserts that upholding the waiver reservation “would be highly prejudicial to Peru,” it provides no explanation why this would be the case. *See* Rejoinder, **R-65**, ¶ 73. There is nothing prejudicial about Peru or any other State having to defend the merits of its allegedly unlawful conduct in at least one forum. By contrast, as Gramercy explained, claimants would suffer real prejudice if they were required to waive all substantive rights in a good faith attempt to bring their claims before an arbitration tribunal, only to be left without *any* forum for recourse in the event the Tribunal denies jurisdiction. *See* Reply, **C-63**, ¶¶ 155-158.

137. *Third*, Peru’s contention that the fact that *GFM*’s June 2, 2016 waiver was formally valid is “irrelevant” is nonsensical. *Cf.* Rejoinder, **R-65**, ¶ 74. To the contrary, as Peru appears to accept, it means that *GFM* has validly submitted all of its claims to arbitration as of June 2, 2016. Since *GFM*’s claims and damages are identical to *GPH*’s, even if Peru’s various objections regarding *GPH*’s waivers were to succeed, they would have little consequence on the issues that the Tribunal will need to decide.

138. Peru’s only point appears to be that the validity of *GFM*’s waiver does not “cure” *GPH*’s original waiver, if that were found to be defective. *Cf. id.* Yet, even accepting this proposition for the sake of argument, it is beside the point: Gramercy is not arguing that *GFM*’s valid June 2, 2016 waiver should “cure” *GPH*’s waiver of the same date if the Tribunal finds the latter invalid. That Peru separately seeks to challenge *GFM*’s status as an “investor”—the only point Peru appears to offer in response—does not negate the fact that *GFM* has complied with the Article 10.18.2 written waiver requirement at all times, which Peru does not deny.

139. *Finally*, Peru does not deny that its objections are largely ineffectual because, even if the Tribunal were to conclude that GPH’s June 2, 2016 waiver is formally invalid, the result is not dismissal of Gramercy’s claims altogether. Rather, as Peru now acknowledges, the consequences are straightforward: GPH’s claims would be considered submitted as of the date that it filed an effective waiver, even if that is subsequent to the Notice of Arbitration. *See* Rejoinder, **R-65**, ¶ 84; Reply, **C-63**, ¶¶ 159-166. The United States also agrees with this position in its Submission, noting that even when a waiver is initially defective, a claimant may still submit an effective waiver “subsequent to the Notice of Arbitration but before constitution of the tribunal,” with the consequence that the claim “will be considered submitted to arbitration on the date on which the effective waiver was filed . . . and not the date of the Notice of Arbitration.” *See* U.S. Submission, ¶ 17. Submitting an effective waiver “before constitution of the tribunal” is exactly what GPH has done here, as Peru does not deny.

(b) Neither Peru’s Distortion of the Treaty Language, Nor Peru’s Belated Arguments, Overcome the Fact That Both Claimants Have Also Satisfied Any “Material” Waiver Requirement.

140. Peru’s attempt to deny that Gramercy has also complied with any material conduct requirements, beyond the written waivers that the Treaty expressly mentions, is similarly both misconceived as a legal matter and ultimately inconsequential.

141. *First*, just as with the written waiver, Peru does not contest that GFM was never a party to *any* local proceedings. *Cf.* Reply, **C-63**, ¶ 168. There is therefore no dispute between the Parties that GFM’s June 2, 2016 waiver was fully effective as of that date.

142. The United States, in its Submission, has opined that “any juridical persons that a claimant directly or indirectly owns or controls . . . must likewise abstain from initiating or continuing proceedings” falling within the scope of the waiver. *See* U.S. Submission, ¶ 16. Peru does not appear to rely on this statement in its Rejoinder, and rightly so. Article 10.18.2(b) requires a claimant to submit a waiver on behalf of an entity “that the claimant owns or controls directly or indirectly” *only* where that claimant has submitted its claims to arbitration pursuant to

Article 10.16.1(b) of the Treaty, *i.e.*, on behalf of a local enterprise. *See Doc. CE-139*, Treaty, Articles 10.18.2(b), 10.16.1(b). That is not the case here. There is no such requirement for claims submitted under Article 10.16.1(a) of the Treaty, the provision on which both Gramercy claimants rely. *See id.*, Article 10.16.1(a); Notice of Arbitration and Statement of Claim, **C-3**, ¶ 230; Amended Notice of Arbitration and Statement of Claim, **C-4**, ¶ 230; Second Amended Notice of Arbitration and Statement of Claim, **C-5**, ¶ 230; Third Amended Notice of Arbitration and Statement of Claim (the “*Third Amended Statement of Claim*”), **C-34**, ¶ 256. GFM’s waiver was thus both formally and materially valid on June 2, 2016, and GFM’s claims are thus considered to have been submitted to arbitration on that date.

143. *Second*, Peru’s claim that GPH’s unqualified waiver of July 18, 2016 was not effective because GPH was a party to certain local proceedings at that time continues to depend on a mischaracterization of both the nature of those proceedings and the scope of the Treaty. *Cf.* Rejoinder, **R-65**, ¶¶ 80 *et seq.*

144. Critically, neither GFM nor GPH ever maintained local proceedings with respect to the measures “alleged to constitute a [Treaty] breach.” *See* Reply, **C-63**, ¶¶ 168-171. Peru’s allegation that Gramercy’s argument “is not credible on its face” and that “Gramercy has . . . misread the Treaty” ignores the plain language of Article 10.18.2 and fails to address the substance of Gramercy’s argument about the nature of the proceedings. *Cf.* Rejoinder, **R-65**, ¶ 81; *see* Reply, **C-63**, ¶¶ 169-171. Ironically, even as Peru stresses that “Article 10.18.2 must be interpreted in accordance with the ordinary meaning of the terms in context,” and that “[t]he Treaty expressly requires a written waiver ‘of *any* right to initiate or continue . . . *any* [local] proceeding’” (Rejoinder, **R-65**, ¶ 71 (emphasis in original)), Peru omits a key portion of the text: that the waiver only relates to a local proceeding “with respect to *any measure alleged to constitute a breach*” (Treaty, **Doc. CE-139**, Article 10.18.2(b) (emphasis added)). As Gramercy explained in its Reply, the key question is thus whether or not the local proceedings concern the *same measures* that give rise to its claims for breach in the arbitration. *See* Reply, **C-63**, ¶ 170.

145. Peru’s arguments that the waiver must be triggered because “fundamentally, Gramercy’s claims in this Treaty proceeding arise from the same longstanding dispute over valuation and payment of the Bonds” and “seek the same relief,” or because “Gramercy could not have proceeded with [the local

proceedings] without raising a legitimate risk of double recovery and conflicting outcomes in relation to its claims in this Treaty proceeding,” are thus inapposite as a matter of law, in addition to being wrong as a matter of fact. *Cf.* Rejoinder, **R-65**, ¶ 83. This is not the correct legal standard under the Treaty—a standard that Peru otherwise insists must be interpreted strictly. *Cf.* Rejoinder, **R-65**, ¶ 71. Article 10.18.2 does not ask whether the proceeding relates to a particular “dispute” or “relief” or whether there is a risk of “conflicting outcomes”; it more specifically applies only to proceedings with respect to “measure[s] alleged to constitute a breach” of the Treaty. Treaty, **Doc CE-139**, Article 10.18.2.

146. The decision of the *Commerce Group* tribunal, which Peru cites in support of its argument, in fact clearly illustrates this distinction. There, the tribunal’s conclusion that the local proceedings fell within the scope of CAFTA’s waiver provision was not based on a determination that they involved the “same subject matter,” “[arose] from the same longstanding dispute” as the arbitration claims, or any of the other formulations Peru suggests might be relevant. *Cf.* Rejoinder, **R-65**, ¶ 32. Rather, it was based on the fact that the claimant invoked *the same specific measures*—namely, revocation of certain environmental permits related to mining—in both cases. *See 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**, ¶ 101. The *Commerce Group* tribunal then proceeded to consider claimants’ argument that they could still maintain claims based on a *different* measure, an alleged “*de facto* mining ban,” on the grounds that this measure was not at issue in the local proceedings. *See id.*, ¶¶ 109-113. The tribunal’s reasoning in rejecting this argument is again instructive: it concluded that claimants had not alleged a “separate and distinct claim[.]” based on the “*de facto* mining ban,” but rather that it was “part and parcel” of the claims based on revocation of environmental permits, and that in any event, the alleged ban “does not constitute a ‘measure’ within the meaning of CAFTA.” *See id.*, ¶¶ 111-112.

147. The tribunal in *Railroad Development Corp.*, another CAFTA case, similarly stressed that “the key question[.]” is “whether the measures before the domestic arbitrations are the same measures which are ‘alleged to constitute a breach’” in the treaty arbitration. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction of November 17, 2008, **Doc. RA-97**, ¶ 48. The tribunal then proceeded to analyze whether the specific measures

at issue in the local proceedings—here, a failure to remove “squatters” from claimant’s rail right-of-way and make payments into a trust fund for rehabilitation and modernization of the railroad—also formed the basis for claims in the arbitration, ultimately concluding in the affirmative. *See id.*, ¶¶ 50-52. It thus dismissed those claims for failure to comply with the waiver requirement. *See id.* However, the tribunal then concluded that the waiver was valid as to claimant’s claims based on other specific measures that were *not* at issue in the local proceedings, and allowed those claims to proceed to the merits. *See id.*, ¶¶ 75-76. Peru’s attempts to substitute the same inchoate notion of a historical “dispute” about its agrarian reforms that it urges elsewhere for the Treaty’s express requirements thus cannot succeed.

148. *Third*, beyond a vague and unsupported statement that the local proceedings that GPH discontinued “concern many of the same measures,” Peru does not even attempt to make such a showing. *Cf.* Rejoinder, **R-65**, ¶ 83. Just as Peru attempts to mischaracterize the nature of this arbitral dispute, Peru also seeks to mischaracterize the nature of GPH’s local proceedings.

149. In fact, as Gramercy previously explained, the local proceedings did not concern the measures that Gramercy alleges constituted a breach of the Treaty. *See* Reply, **C-63**, ¶ 170. In the local proceedings, GPH was seeking to update the value of its Land Bonds for which Peru had stopped issuing payment. *See* Petition by GPH to the Senior Judge of the Fifth Special Civil Special Court of Lambayeque of May 9, 2011, Exp. No. 9990-2006, **Doc. CE-764**, p. 1 (noting that the cause of action was to seek the updating of the debt owed to Gramercy by Peru); Petition by GPH to the Senior Judge of the Fifth Special Civil Special Court of Lambayeque of November 5, 2012, Exp. No. 3272-2007, **Doc. CE-765**, p. 1 (same); Petition by GPH to the Senior Judge of the Third Special Civil Special Court of Lambayeque of November 14, 2012, Exp. No. 026-1973, **Doc. CE-766**, p. 1 (same); Petition by GPH to the Senior Judge of the Third Special Civil Special Court of Lambayeque of November 14, 2012, Exp. No. 195-1978, **Doc. CE-767**, p. 1 (same); Petition by GPH to the Senior Judge of the Seventh Special Civil Special Court of Lambayeque of February 15, 2013, Exp. No. 4233-2011, **Doc. CE-768**, p. 1 (same); Petition by GPH to the Senior Judge of the First Special Civil Special Court of Lambayeque of August 4, 2013, Exp. No. 258-1970, **Doc. CE-770**, p. 1 (same); Petition by GPH to the Senior Judge of the Third Special Civil Special Court

of Lambayeque of September 16, 2013, Exp. No. 161-1971, **Doc. CE-771**, p. 1 (same). The complained-of measure in these local proceedings—*i.e.*, Peru’s failure to update the value and pay the Land Bonds—is *not* the same as the measures that GPH claims as Treaty breaches in this arbitration, namely, Peru’s series of measures beginning in 2013, including the 2013 CT Order and the irregularities surrounding its issuance, the 2013 CT Resolutions, and the 2014 (and later) Supreme Decrees. *See, e.g.*, Third Amended Statement of Claim, **C-34**, ¶¶ 150, 181, 196-208, 215, 233-236; Reply, **C-63**, ¶¶ 219, 278, 328-329, 389, 482-483, 498. Almost all of these measures occurred *after* GPH became a party to the local proceedings.

150. *Finally*, even if the local proceedings fell within the waiver provision *and* GPH had to actively withdraw from the proceedings to comply with the waiver (as opposed to abstaining from any action in the dormant proceedings), Peru’s new argument that the “material” component could not be fulfilled until the Peruvian courts acted on GPH’s withdrawal petitions is unsupported as a matter of law and would lead to absurd results at odds with the purpose of the waiver provision. *Cf.* Rejoinder, **R-65**, ¶ 80.

151. Peru does not contest that GPH took all steps within its power to withdraw from each of the local proceedings by August 5, 2016, or that it did so in accordance with the procedure that Peru itself identified in *Renco* as a sufficient withdrawal. *See* Reply, **C-63**, ¶ 172 (*comparing Renco*, Peru’s Memorial on Waiver, **Doc. CE-581**, ¶¶ 50 & n. 116, 52 & n. 123 (invoking Articles 340, 342, and 343 as the proper provisions under Peru’s Civil Code for terminating a proceeding) *with Docs. CE-600* through **CE-606** (GPH’s withdrawal petitions invoking the same provisions)); *see generally* Rejoinder, **R-65**, ¶¶ 76-84. Nor does Peru deny that the Treaty provides no specific requirements for withdrawal of ongoing proceedings, as the “material” component itself is not required or specified in the plain text of Article 10.18.2. Peru instead argues, for the first time, that GPH’s waiver “could not take the intended legal effect . . . until the Peruvian courts entered orders to grant the petitions.” Rejoinder, **R-65**, ¶ 79.

152. Peru’s belated argument is both unprincipled and unprecedented. It would create perverse incentives by placing satisfaction of that requirement outside the hands of the claimant—the waiving party—and instead would permit a respondent’s own courts to unilaterally block investors from seeking treaty remedies

by indefinitely delaying taking action on withdrawal petitions. Peru's argument that GPH's withdrawal was insufficient because, while it was pending, GPH could have "revoke[d] its withdrawal petitions and move[d] forward with the cases" depends on a hypothetical scenario that is in any event beside the point. *Cf. Rejoinder*, **R-65**, ¶ 79. A putative claimant could still take actions inconsistent with its Treaty waiver even after the court has accepted an individual withdrawal petition, such as by commencing a new lawsuit, but GPH did not do so. Peru does not contest that GPH took no further action after withdrawing the cases, or that the Peruvian courts upheld each of the withdrawal petitions.

153. Unsurprisingly, therefore, Peru can summon no authority in support of this novel and belated argument. Tribunals have repeatedly characterized compliance with a "material" waiver requirement as concerning actions within the claimant's power. For example, in assessing whether claimants' failure to discontinue certain local proceedings rendered their waiver invalid, the tribunal in *Commerce Group v. El Salvador* assessed whether the *claimants* could have taken steps to "discontinue" the local proceedings, as well as whether such discontinuance could be "without prejudice." *Commerce Group Award*, **Doc. RA-113**, ¶¶ 41, 50. After finding that a procedure for the claimants to terminate local proceedings without prejudice existed under Salvadoran law, the tribunal concluded that claimants were "under an obligation to discontinue those proceedings in order to give material effect to their formal waiver," but had failed to do so because "the [local] proceedings continued *with no positive action on Claimants' part to discontinue them*, and ultimately resulted in two judgments." *Id.*, ¶ 102 (emphasis added).

154. Other tribunals considering the "material" element of waiver have similarly emphasized the *claimant's* actions, rather than those dependent on the respondent State. *See, e.g., Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of January 18, 2017 (majority opinion), **Doc. CA-222**, ¶ 297 ("Once an international arbitration is initiated, the *investor* is thereby required to . . . *withdraw* from the actions it has initiated[.]" (emphases added)); *Waste Management Inc. v. United Mexican States I*, ICSID Case No. ARB(AF)/98/2, Arbitral Award of June 2, 2000 (majority opinion), **Doc. CA-227**, ¶ 20 (describing the material component of waiver as requiring claimant to take "the *material act* of either *dropping* or desisting from initiating parallel proceedings before other courts or tribunals"

(emphases added)). The U.S. Submission, on which Peru otherwise heavily relies, similarly emphasizes this point by its references to the “*claimant’s* waiver.” See U.S. Submission, ¶ 15 (emphasis added). Peru’s own submissions in the *Renco* case adopt the same approach, alleging that the claimant violated the material waiver provision by “continuing” local proceedings even though it “could have terminated the [local proceeding] under Peruvian law,” and because it had “taken no steps to terminate” the proceeding in question. See *Renco* Peru’s Memorial on Waiver, **Doc. CE-581**, ¶¶ 50 & n. 116, 52 & n. 123.

155. Peru also cannot excuse its novel last-minute argument by its false allegation that Gramercy “previously withheld documents” relating to these proceedings. Cf. Rejoinder, **R-65**, ¶¶ 76-78. The so-called “newly-submitted documents” in question are the withdrawal petitions GPH submitted in the local proceedings in question, as well as the subsequent approvals of those petitions by Peruvian courts—all of which were submitted to Peruvian courts in proceedings in which the government of Peru was a party. See Reply, **C-63**, ¶ 172. Peru cannot seriously contend that these documents were not in its possession, or that Gramercy improperly “withheld” these documents from Peru.

156. GFM and GPH thus both fulfilled the material requirement by, at the latest, June 2, 2016 and August 5, 2016, respectively. See Reply, **C-63**, ¶¶ 168, 172-173.

2. Gramercy’s Claims Are Not Time-Barred.

157. Peru’s time bar objection is similarly of limited practical relevance, in addition to being legally and factually wrong. Peru does not appear to dispute that if either claimant validly submitted claims to arbitration on June 2, 2016, then there would be no prescription issue as to that claimant, since all relevant measures unquestionably occurred after June 2, 2013. Peru’s objection under Article 10.18.1 of the Treaty is thus only relevant for GPH, and then only if the Tribunal determines that GPH did not submit a valid waiver until July 18, 2016 or August 5, 2016. The latest critical date for purposes of the analysis is thus August 5, 2013. Even if that were the case, however, Peru does not deny that the only measure that could conceivably be affected by such an objection is the 2013 CT Order, which was issued on July 16, 2013; all other measures unquestionably occurred *after* August 5, 2013. And even in that scenario, as Gramercy already explained, GPH’s claims relating to the 2013 CT Order would still

survive because the record clearly demonstrates that Gramercy did not know and could not have known at the time that the 2013 CT Order, standing alone, breached its rights or caused it loss or damage. *See* Reply, **C-63**, ¶¶ 184-198.

(a) Peru Fails to Rebut That Gramercy Did Not Have Knowledge of Any of the Alleged Breaches Until After August 5, 2013.

158. Peru’s allegation that Gramercy had knowledge of all of the breaches it submitted to arbitration before August 5, 2013 hinges on a fundamental mischaracterization of Gramercy’s claims. Peru alleges that Gramercy’s case is that “Peru’s breach of multiple Treaty provisions arises from a continuing course of conduct,” for which the issuance of the 2013 CT Order allegedly serves as the “foundation.” *Cf.* Rejoinder, **R-65**, ¶¶ 58, 65. This is both legally misguided and factually wrong.

159. *First*, the Treaty does not define the critical date for purposes of the three-year period in Article 10.18.1 as being the occurrence of a factual event that is the alleged “foundation” for the individual claims submitted, but as the claimant’s “knowledge of *the breach alleged*” under the Treaty, as well as “knowledge that the claimant . . . has incurred loss or damage.” Treaty, **Doc. CE-139**, Article 10.18.1 (emphasis added); *see also* Reply, **C-63**, ¶¶ 176-183. The U.S. Submission is in accord. *See* U.S. Submission, ¶ 7 (“[A] claimant has actual or constructive knowledge of the alleged ‘breach’ once it has (or should have had) knowledge of all elements required to make a claim under the article in question.”). Peru provides no support for its alternative test for timely submission of claims, and there is none.

160. *Second*, in its Reply, Gramercy explained why it could not have had knowledge of *any* of the alleged breaches until after August 5, 2013, including because the basic facts underlying elements of each claim either had not occurred, or had not been revealed, until after that date. *See* Reply, **C-63**, ¶¶ 187-198. In particular, Gramercy explained that: (i) its claim for expropriation could not have occurred until after there was a “substantial deprivation” of the value of its investment, which did not occur with the mere issuance of the 2013 CT Order but rather after, and as a result of, the 2014 Supreme Decrees; (ii) key elements of Gramercy’s minimum standard of treatment claim did not occur until after the 2013 CT Resolutions and 2014 Supreme Decrees, and Gramercy could not have had knowledge of the 2013

CT Order irregularities until much later, after the scandal broke in the press in 2015 and Justice Urviola testified to Congress regarding his true motive surrounding the 2013 CT Order; (iii) Peru's breach of the most favored nation clause by depriving Gramercy of effective means did not occur until after the 2013 CT Resolutions; and (iv) Peru's breach of the national treatment clause did not occur until after the 2014 Supreme Decrees, which first introduced the discriminatory provision that "speculative entities" (presumably such as Gramercy) would be last in priority for payment. *See id.*

161. Peru does not address the salient facts showing that Gramercy would not have had actual or constructive knowledge of these claimed breaches until after August 5, 2013. The sole rebuttal Peru offers in response to what it calls Gramercy's "attempt[] to parse various later measures in respect of individual claims" is that Gramercy sent a letter to Peru's President of the Council of Ministers on December 31, 2013, which Peru claims is a "contemporaneous 2013 representation [that] belies Gramercy [*sic*] claim here that it could not have been aware of any Treaty breach or alleged damage until issuance of the Supreme Decrees in 2014." *Cf.* Rejoinder, **R-65**, ¶ 63. Yet nothing in this letter indicates that Gramercy had knowledge of any particular Treaty breach or loss resulting from Peru's actions to that date—let alone afterward. This is a gross mischaracterization of the letter. While the letter states that Gramercy believes it has rights under the Treaty, and expresses Gramercy's valuation of its Land Bonds, it makes absolutely no allegation that Peru had yet breached those rights or caused Gramercy any loss or damages. To the contrary, the letter—written five months *after* the 2013 CT Order, but *before* the 2014 Supreme Decrees—describes a "historic opportunity" to actually negotiate a "consensual, non-conflictive resolution" of the Land Bond debt for all stakeholders. Gramercy Letter to President of the Council of Ministers, December 31, 2013, **Doc. CE-185**, pp. 2-3; *see also* Koenigsberger V, **CWS-10**, ¶ 43.

162. *Third*, Peru does not deny that, even if the issuance of the 2013 CT Order were to fall outside the critical date, the Tribunal would not be deprived of jurisdiction over events falling within the prescription period just because relevant factual antecedents occurred before that date. *See* Reply, **C-63**, ¶¶ 204-205. For example, in *Grand River*, the investor brought claims based on U.S. actions including: (i) a "Master Settlement Agreement" that required cigarette manufacturers to make certain cash payments; (ii) "Escrow Statutes" that required manufacturers

not participating in the settlement to make equivalent payments to escrow accounts; and (iii) subsequent U.S. actions and legislation to strengthen enforcement of the Escrow Statutes. *Grand River Enterprises Six Nationals v. United States*, UNCITRAL, Decision on Objections to Jurisdiction of July 20, 2006, **Doc. CA-216**, ¶¶ 8, 79, 103. The tribunal concluded that the claims based on the Master Settlement Agreement and Escrow Statutes fell outside the three-year period, because the investor knew or should have known of the relevant breach and damage more than three years prior to filing its claims. However, it upheld jurisdiction over the third category of claims, rejecting the United States’ argument that these should also be time-barred because they related to enforcement of the existing regime and finding that it could not “bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events.” *Id.*, ¶ 86; see also *Feldman v. United States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, **Doc. CA-24**, ¶¶ 53-65 (considering claims over the denial of a specific set of requests for tax rebates postdating the cutoff date, even though they were part of a broader dispute involving a series of legislative acts, administrative decisions, and court challenges that unfolded before the cutoff date); *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability of March 17, 2015, **Doc. CA-13**, ¶ 266 (“[T]he Tribunal finds it possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits.”).

163. Other tribunals have similarly paid attention to the specific claims brought before the tribunal when considering whether they fall within the three-year period. For example, in *Eli Lilly*, Canada argued that the claims were time-barred because they fundamentally challenged a legal test known as the “promise utility doctrine” and its application to a specific patent owned by the plaintiff, and the legal test was already adopted prior to the relevant cutoff date for the three-year time bar. See *Eli Lilly v. Canada*, UNCITRAL Case No. UNCT/14/2, Award of March 16, 2017, **Doc. CA-214**, ¶ 121. The investor argued that its claims were based neither on the “promise utility doctrine” in the abstract nor the specific application Canada referenced, but rather on the Canadian courts’ later invalidation of two *other* patents applying that doctrine. *Id.*, ¶ 163. After a careful review of claimants’ written submissions, the tribunal found that the claims were *not*

time-barred. The tribunal noted that “[a]lthough the alleged promise utility doctrine is not the substantive basis of Claimant’s claim, it plays a prominent role in Claimant’s submissions,” but concluded that “[i]n this context, many NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim.” *Id.*, ¶¶ 171-172. Similarly, in *Glamis Gold*, when the tribunal upheld jurisdiction over claims related to events occurring outside the relevant time period, it reasoned that “[i]t is necessary that any action be preceded by other steps, but such factual predicates are not *per se* the legal basis for the claim” and stated that “[t]he basis of the claim is to be determined with reference to the submissions of Claimant.” *See Glamis Gold v. United States*, UNCITRAL, Award of June 8, 2009, **Doc. RA-101**, ¶¶ 348-350.

164. *Fourth*, Peru’s misguided reliance on the United States’ statement that “subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period” does not affect this analysis. *Cf.* Rejoinder, **R-65**, ¶ 64 (citing U.S. Submission, ¶ 6 (emphasis omitted)). Peru takes this observation, which hails from the *Grand River* decision, entirely out of context. The claimants in *Grand River* had argued that, when determining the relevant cutoff date, the tribunal had to consider separately each measure taken by each U.S. state in implementing the Master Settlement Agreement, thus resulting in “not one limitations period, but many.” *See Grand River Decision on Jurisdiction*, **Doc. CA-216**, ¶ 81. The tribunal rejected this argument, noting: “This is not how the Claimants pleaded their case. Instead, the claims were directed against the adoption and enforcement of the escrow statutes and other measures in a generic manner.” *Id.* The tribunal further concluded that, in any event, all relevant legislation had been adopted by 2000, so the claimant would have been subject to it by January 1, 2001 (which predated the relevant cutoff date). *Id.* It is in this context, then, that the *Grand River* tribunal stated that claimants’ proposed analysis “seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.” *Id.*; *see also* U.S. Submission, ¶ 6 (citing same). The tribunal was clearly *not* advocating, as Peru argues, that separate measures giving rise to treaty breaches may be barred as a “continuing course of conduct” if they are factually related to earlier state acts—the *Grand River* tribunal *rejected* this very argument. *See Grand River Decision on Jurisdiction*,

Doc. CA-216, ¶ 81; *see also Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of August 22, 2016, **Doc. RA-147**, ¶ 229 (finding that, if a sufficient linkage is found between different measures, “the continuing character of the acts and the composite nature of the breach may justify that the totality of acts may be considered as a unity not affected by the time bar”).

165. *Finally*, Peru’s belated argument that Gramercy did not submit its claims to arbitration until August 10, 2016—which as discussed above, is both unprecedented and unprincipled—does not materially affect the time bar analysis.

166. Even if August 10, 2013 were the relevant date, this would not affect Gramercy’s claims. The August 2013 CT Resolution was dated August 8, but was not actually published until August 13, 2013. *See* Peru’s Constitutional Tribunal Website, Publication Date of the August 2013 CT Resolution, **Doc. CE-769**. That Resolution clarified that the as-yet unannounced MEF procedure would be “mandatory” and “exclusive,” *i.e.*, that, going forward, claims for payment of the Land Bond debt could “only be raised through the [MEF] procedure, and not through a judicial action,” but also—contradictorily—that the “dollarization” rule and the interest rate of the U.S. Treasury Bonds would apply to ongoing judicial proceedings. *See* Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, **Doc. CE-180**, “Whereas” Section, ¶¶ 10, 16, “Rules” Section, ¶¶ 4.c, 4.d. However, while these clarifications are relevant to Gramercy’s effective means claim and its claim that Peru violated the minimum standard of treatment, the full effect of Peru’s actions eliminating avenues in which Gramercy could enforce its rights did not occur until at least the issuance of the 2014 Supreme Decrees. *See* Third Amended Statement of Claim, **C-34**, ¶¶ 233-236; Reply, **C-63**, ¶ 194. The August 2013 CT Resolution left additional points of implementation unresolved, including how the “mandatory” and “exclusive” bondholder procedure would affect existing and/or ongoing proceedings in Peruvian courts, whether initiating such bondholder procedure would entirely foreclose the possibility of accessing the courts, and whether the MEF procedure would provide any opportunity to challenge the updating formula within the procedure itself. *See* Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, August 8, 2013, **Doc. CE-180**, “Whereas” Section, ¶¶ 8-10, 16, “Rules” Section, ¶¶ 4.c, 4.d. Gramercy’s own internal communications from October 2013 confirm that even after the August 8, 2013 CT Resolution, it was

unclear what the effect of the 2013 CT Order would be on ongoing cases. *See, e.g.*, Email from José Cerritelli to Robert Koenigsberger *et al.*, October 9, 2013, **Doc. CE-546**, p. [1] (noting “obvious ambiguities” in “the issue of ongoing litigation in local [P]eruvian (lower) courts,” namely, “[i]s the formula that will be offered by the government going to overrule the judgement amounts ruled calculated and ordered to be paid by the courts in local litigation cases?”). The 2014 Supreme Decrees (as well as the subsequent Supreme Decrees) established that: (i) bondholders would have to waive their right to resort to local proceedings in order to go through the mandatory bondholder process or to continue with ongoing local proceedings that would apply the MEF’s formula; and (ii) the MEF formula could not itself be challenged within the MEF’s procedure. *See* Third Amended Statement of Claim, **C-34**, ¶ 114; Reply, **C-63**, ¶¶ 439, 494. As such, even if August 2013 CT Resolution were to fall outside the critical date, which Gramercy denies, the constitutive elements of these breaches still would arise within the three-year period.

167. Peru’s attempt to obscure the analysis by focusing only on the issuance of the 2013 CT Order thus cannot overcome the fact that Gramercy did not have, and could not have had, knowledge of the constitutive elements of the breaches it has submitted to arbitration until well *after* August 2013.

(b) Peru Fails to Rebut That Gramercy Did Not Have Knowledge That It Had Incurred Loss Until at Least the 2014 Supreme Decrees.

168. Peru similarly ignores the facts with respect to the second element of the time bar analysis, namely, Gramercy’s knowledge “that it has incurred loss or damage.” Peru’s analysis of knowledge of loss suffers from the same defect as its analysis of knowledge of breach: it incorrectly assumes that mere knowledge of the issuance of the 2013 CT Order is sufficient to trigger the three-year period. *Cf.* Rejoinder, **R-65**, ¶ 60; Reisman II, **RER-6**, ¶ 46.

169. *First*, as a conceptual matter, Gramercy could not have had knowledge of the loss or damage arising from any Treaty breaches until the breaches actually occurred, which must necessarily be no earlier than the date of the specific measures constituting the elements of the breach for a particular claim. *See, e.g., Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case

No. UNCT/13/2, Interim Award (Corrected) of May 30, 2017, **Doc. RA-150**, ¶ 211 (“[T]he apprehension of loss or damage required by [CAFTA] Article 10.18.1 concerns loss or damage that is incurred *as a result* of an alleged breach that falls within the tribunal’s jurisdiction.” (emphasis added)). That, as shown above, did not occur until *after* the 2013 CT Order, with the 2013 CT Resolutions, the 2014 Supreme Decrees, and the discovery of the irregularities affecting the 2013 CT Order. *See* Reply, **C-63**, ¶¶ 184-198.

170. *Second*, the evidence does not bear out Peru’s argument that Gramercy “appreciate[d]” that it had incurred loss or damage on July 16, 2013, the date of the 2013 CT Order. *Cf.* Rejoinder, **R-65**, ¶ 60; Reisman II, **RER-6**, ¶ 46.

171. Peru appears to acknowledge that a suspicion that something bad may happen is insufficient to trigger a claimant’s knowledge of loss under the Treaty. *See* Rejoinder, **R-65**, ¶ 59; Reply, **C-63**, ¶ 178. Peru has no response at all to the recent *Mobil Investments* and *Resolute Forest Products* decisions, addressing this very issue under similarly worded treaties. *See* Reply, **C-63**, ¶¶ 178-181 (citing *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of July 13, 2018, **Doc. CA-142**, ¶ 155; *Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction of January 30, 2018, **Doc. CA-170**, ¶ 178).

172. However, Peru’s simplistic argument that “Gramercy understood all key elements” of the 2013 CT Order, and thus that “its ‘first appreciation’ of alleged loss or damage from an alleged breach occurred on the same day that the Constitutional Tribunal issued its 16 July 2013 decision,” is simply wrong. *Cf.* Rejoinder, **R-65**, ¶ 60. This argument ignores Mr. Koenigsberger’s testimony that Gramercy “could make neither heads nor tails” of the 2013 CT Order, and “did not know whether we had actually suffered any loss, much less how much of a loss” when the 2013 CT Order was issued. *See* Koenigsberger IV, **CWS-4**, ¶¶ 15-20; *see also* Witness Statement of Robert S. Koenigsberger (“*Koenigsberger I*”), **CWS-1**, ¶ 54; Amended Witness Statement of Robert S. Koenigsberger (“*Koenigsberger II*”), **CWS-2**, ¶ 54; Koenigsberger V, **CWS-10**, ¶¶ 35-43. As Mr. Koenigsberger explains, “[e]ven on its own terms, there was just too much uncertainty and lack of clarity about how Peru would actually make good on the Land Bonds, even through dollarization, for us

to be able to make any kind of conclusive analysis of its effect on our investment.” Koenigsberger IV, **CWS-4**, ¶ 17.

173. After all, the 2013 CT Order on its face did not contain many key elements necessary for Gramercy to understand its impact, such as the time at which the conversion of the Land Bonds’ value should be calculated, whether the initial conversion to dollars should use the official currency exchange rate or the parity exchange rate, the payment terms, inclusion of interest, and many other factors. *See* Koenigsberger IV, **CWS-4**, ¶¶ 17-18; Koenigsberger V, **CWS-10**, ¶¶ 35-41. The 2013 CT Order instructed the MEF to determine those key parameters, which were essential for the implementation of the dollarization approach and for Gramercy to even be able to ascertain the impact of the 2013 CT Order. Gramercy could not have known at the time how the MEF would implement the decision, much less that it would destroy the value of the Land Bonds and deprive bondholders of due process in doing so. *See* Koenigsberger III, **CWS-3**, ¶ 54; Koenigsberger IV, **CWS-4**, ¶¶ 17-31; Koenigsberger V, **CWS-10**, ¶¶ 35-41; Email from José Cerritelli to Robert Koenigsberger *et al.*, October 9, 2013, **Doc. CE-546** (relaying uncertainties about the effects of the 2013 CT Order).

174. The fact that Gramercy analyzed the ruling and noted elements of the decision that departed from the prevailing legal approach in Peru at the time, including by endorsing dollarization and not the consumer price index (“*CPI*”) approach, does not demonstrate a “reasonable degree of certainty on the part of the investor that some loss or damage will be sustained.” *See Mobil Decision on Jurisdiction*, **Doc. CA-142**, ¶ 155; *cf.* Rejoinder, **R-65**, ¶ 60. To the contrary, Mr. Koenigsberger explains, and the contemporaneous documents confirm, that Gramercy still believed that it would realize substantial value from the investment, and that “it remained possible for the MEF to create a process that was fair, reasonable, and expeditious.” Koenigsberger IV, **CWS-4**, ¶ 20; *see also* Koenigsberger V, **CWS-10**, ¶¶ 35-47. This is consistent with the fact that, since the 2013 CT Order was issued to implement the 2001 CT Decision—which mandated that the Land Bonds must be given current value—one could have expected that dollarization would be implemented so as to yield current value as well. And as Prof. Edwards demonstrated, the 2013 CT Order could have led to a non-negligible recovery had the MEF implemented it logically and in accordance with the current value principle. *See* Amended Expert Report of Sebastian Edwards, **CER-4**, ¶ 12.

175. If, after the 2013 CT Order, the MEF had instead produced a cogent, sensible and fair dollarization approach, while affording the requisite due process and transparency to bondholders in establishing a payment procedure, no claim would likely not have arisen, Gramercy would likely not have suffered a loss or damage, and Gramercy would likely never have commenced this arbitration. Even by April 2015, when the CT rejected the Land Reform Bondholders' Association's application to set aside the 2014 Supreme Decrees as contrary to Peruvian law, the Constitutional Tribunal noted that the challenge was "premature, as the calculation of the value of the bonds must be made by the Ministry of Economy and Finance." Decision of the Constitutional Tribunal of April 7, 2015, **Doc. CE-40**, ¶ 40. If Gramercy had commenced an investment claim under the Treaty on July 17, 2013—the day after the 2013 CT Order—Peru could have legitimately objected that Gramercy did not yet have either a claim or a loss. *See* Reply, **C-63**, ¶ 189; Koenigsberger IV, **CWS-4**, ¶ 20; Koenigsberger V, **CWS-10**, ¶¶ 39-42.

176. Instead of addressing this testimony from Mr. Koenigsberger and the full context of Gramercy's contemporaneous exchanges about the 2013 CT Order, Peru relies principally on an excerpt from a single email from José Cerritelli on July 16, 2013—the day the 2013 CT Order was issued—stating that he "would expect [the updating criteria] to represent a significant haircut," and on Mr. Cerritelli's statement to the press the next day that the decision provided the Government with "wiggle room" to pay bondholders less than they expected. *Cf.* Rejoinder, **R-65**, ¶ 60 (citing Email from José Cerritelli to Robert Koenigsberger, July 16, 2013, **Doc. CE-544**; Peru's Land-Reform Debt Payout Could Be Minimal, Bondholders Say, Reuters, July 17, 2013, **Doc. R-398**).

177. But as Mr. Koenigsberger again explains, Mr. Cerritelli's immediate knee-jerk reaction does not establish either that Gramercy had a "reasonable degree of certainty" that the Government would expropriate its investment, or that Gramercy "actually did suffer loss" at that time. *See* Koenigsberger V, **CWS-10**, ¶ 40; *Resolute Forest Products* Decision on Jurisdiction, **Doc. CA-170**, ¶ 178; *see also* Reply, **C-63**, ¶¶ 188-189. Rather, the contemporaneous documents demonstrate Gramercy's only awareness of a *risk* that Peru might use the 2013 CT Order to justify strategic behavior to devalue Gramercy's investment in the future. The very same email from Mr. Cerritelli says that Gramercy would not "have full answers

until the government proposes a method to implement this ruling,” and ultimately, that “[t]he devil is in the details of what the government will do in the next six months to comply with this ruling.” Email from José Cerritelli to Robert Koenigsberger, July 16, 2013, **Doc. CE-544**, p. [1]. Mr. Cerritelli’s more detailed email on the following day outlined both the seemingly favorable aspects of the CT’s ruling—like the fact that it had acknowledged the Land Bonds debt and ordered the executive to settle it—and the many critical issues that it left open. *See* Email from José Cerritelli to Robert Koenigsberger of July 17, 2013, **Doc. CE-545**, pp. [1]-[2]; Koenigsberger V, **CWS-10**, ¶¶ 37-38. That email reflects Gramercy’s conclusion that “[t]he resolution says that the government should negotiate with the bondholders to formulate the specific terms and conditions of its agrarian bonds debt settlement plan,” and that “[t]hese details of the final term sheet will have to be negotiated with the government.” Email from José Cerritelli to Robert Koenigsberger, July 17, 2013, **Doc. CE-545**, pp. [1]-[2]; *see also* Koenigsberger V, **CWS-10**, ¶¶ 37-38.

178. Mr. Cerritelli also explained that his “wiggle room” comment meant that “[t]he resolution [2013 CT Order] 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 [net present value] of the claim.” Email from José Cerritelli to Robert Koenigsberger *et al.*, October 9, 2013, **Doc. CE-546**, p. [1]; Koenigsberger V, **CWS-10**, ¶ 40. The same email reflects Mr. Cerritelli’s speculation, several months later, about what the Government might try to do based on the 2013 CT Order. *See* Email from José Cerritelli to Robert Koenigsberger *et al.*, October 9, 2013, **Doc. CE-546**, p. [2] (noting that Peru could “*try to impose a confiscatory settlement*” and that the Treaty would protect Gramercy “from the *possibility* of indirect confiscation of the NPV of our investment” (emphases added)). But the fact that Gramercy’s concerns eventually came to pass—and resulted in significant losses—does not mean that, at the time of issuance of the 2013 CT Order, they were reasonably certain to do so. As the record shows and Mr. Koenigsberger confirms, Gramercy did not and could not have known that as of July 16, 2013.

179. Further, Gramercy had no way of knowing at the time that this expropriatory, deficient process would be the *only* forum available to it, and that avenues to challenge the MEF’s implementing formula would be eliminated. *See* Koenigsberger IV, **CWS-4**, ¶¶ 21-22; Koenigsberger V, **CWS-10**, ¶ 40.

180. Nor could Gramercy have raised claims based on the serious irregularities and inappropriate interference underlying the 2013 CT Order, because—as Peru does not deny—these are not apparent from the face of the decision. *See* Koenigsberger IV, CWS-4, ¶¶ 18-20. Gramercy did not learn about them until over a year later. *See* Koenigsberger IV, CWS-4, ¶ 27; Koenigsberger V, CWS-10, ¶ 42; *see also* Reply, C-63, ¶¶ 193, 197.

181. Contrary to Peru’s attempts to mischaracterize both the legal standard and the evidence, therefore, Gramercy submitted its claims in a timely manner.

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

182. Peru’s argument that the Tribunal does not have temporal jurisdiction over Gramercy’s claims continues to rest on Peru’s mischaracterizations of both the applicable legal standard and Gramercy’s claims. Peru’s central argument is that Gramercy’s claims “are founded on—and thus seek to ‘bind’ Peru in relation to—acts and facts that took place before the Treaty even entered into force,” and thereby violate the principle of non-retroactivity of treaties (reflected in VCLT Article 28 and Article 10.1.3 of the Treaty) according to which the Treaty’s 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 this Agreement.” Treaty, Doc. CE-139, Article 10.1.3; *cf.* Rejoinder, R-65, ¶ 50. Peru’s argument is factually, logically, and legally wrong.

183. *First*, Gramercy’s claims do *not* seek to “bind [Peru] in relation to any act or fact that took place” before February 1, 2009, when the Treaty entered into force. The “acts and facts” to which Gramercy claims the Treaty applied, to which it seeks to “bind” Peru, and from which its claims in this arbitration arise—namely, the 2013 CT Order and subsequent conduct—all postdate the Treaty’s entry into force. *See* Reply, C-63, ¶ 201. All of these “acts or facts” occurred years *after* the Treaty’s entry into force, which Peru does not and could not deny. Gramercy is not, therefore, seeking to apply the Treaty retroactively to State conduct occurring before its entry into force. This suffices to dispose of Peru’s objection as to temporal jurisdiction.

184. *Second*, Peru’s attempt to bypass this clear result by arguing that Gramercy’s claims are “founded on” a pre-existing situation, and that they are “so intertwined with pre-treaty acts and facts that they cannot be detached and adjudicated independently,” is both inaccurate as a matter of fact and inapposite as a matter of law. *Cf.* Rejoinder, **R-65**, ¶¶ 51-52; Reisman II, **RER-6**, ¶ 44.

185. Although Peru does not articulate the legal theory supporting this argument, it appears to be a reference to the line of jurisprudence assessing whether an international law dispute that arose before entry into force of a treaty can be justiciable under that treaty in the absence of an express provision in the treaty excluding pre-existing disputes. *See, e.g.*, Rejoinder, **R-65**, ¶ 53 (referring to “a dispute over the Bonds that arose many years before”); *id.*, ¶¶ 32-33 (referring to a “preexisting dispute in Peru [that] concerned the same essential subject matter at issue in this Treaty proceeding”); Reisman II, **RER-6**, ¶ 44 (referring to an “integrated dispute” and an alleged “impression that one of the later [fragments] in the series is a ‘new’ dispute”). But that is simply the wrong question here. Peru has no answer to the fact that this Treaty—unlike others—does not determine temporal jurisdiction by reference to the arising of a “dispute,” but by reference to the “tak[ing] place” of “acts or facts,” the “ceas[ing] to exist” of a “situation,” and by the *claims* submitted and *measures* challenged. *See* Reply, **C-63**, ¶ 202. The Treaty expressly provides that *claims* that may be submitted for arbitration are 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. Treaty, **Doc. CE-139**, Articles 10.1.1 (emphasis added), 10.16.1(a)(i)(A). Peru does not address, let alone mention, these two Treaty provisions. Peru’s only defense of its attempt to substitute a sameness of dispute-based test for the express “act or fact” test in Article 10.1.3 of the Treaty appears to be the statement that Gramercy “ignores the express limitations of Article 10.1.3,” which Peru neither explains nor substantiates. *Cf.* Rejoinder, **R-65**, ¶ 51. As a threshold matter, therefore, Peru’s and Prof. Reisman’s references to the so-called “foundation” of Gramercy’s claims are completely misguided under international law. *Cf. id.*; Reisman II, **RER-6**, ¶¶ 42-44.

186. Peru’s continued mischaracterization of *Berkowitz* and other decisions does not rehabilitate this misconceived theory. *Cf.* Rejoinder, **R-65**, ¶ 52 (citing *Berkowitz* Interim Award, **Doc. RA-150**). The Tribunal members will no doubt form their

own views as to the content of this and other decisions and the appropriate weight that they should be given. The *Berkowitz* case bears little resemblance to the present one. In *Berkowitz*, the claimants argued that Costa Rica’s conduct, *after* the applicable treaty’s entry into force—such as its continuing failure to pay compensation for an expropriation that occurred before the treaty’s entry into force, delays in carrying out the expropriation, the Contraloría Report (which described the expropriatory acts already taken and further required by the government), and judicial decisions—constituted separate breaches that fell within the tribunal’s temporal jurisdiction. *See, e.g., Berkowitz* Interim Award, **Doc. RA-150**, pp. 33-34, 48-56, 59-75, ¶ 146 (“[T]he Claimants contend that it is manifest that the delays in the payment of compensation . . . are delays that can be traced to post-10 June 2010, i.e., conduct after 10 June 2010, and/or are delays that amount to a continuing violation that straddles 10 June 2010 and/or are delays that form part of a composite act, an actionable component of which take place after 10 June 2010.”). Contrary to Peru’s assertion that Gramercy is mischaracterizing this case, the tribunal in *Berkowitz* did in fact find that neither the failure to compensate, nor the delays, nor the Contraloría Report were “independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.” *Id.*, ¶ 246; *see also id.*, ¶ 240 (regarding the Contraloría report, finding that it was not “a post-entry into force act or fact addressed to the Claimants on which they can rely to found a cause of action,” as it merely amounts to a “compilation of facts and steps taken or to be taken by the Government”); *cf. Rejoinder, R-65*, ¶ 52. The tribunal thus rejected the claimants’ characterization of their claims based on this alleged post-treaty conduct, finding that “[t]here [was] extensive general expropriatory regulatory conduct of the Respondent in the period following the purchase of each property, conduct on which the Claimants rely to support their claims, conduct which in every instance precedes” the relevant cutoff date. *Berkowitz* Interim Award, **Doc. RA-150**, ¶ 244.

187. Peru also fails to mention that the *Berkowitz* tribunal found that it *did* have temporal jurisdiction over the claimants’ minimum standard of treatment claim with respect to five properties for which the Costa Rican courts had issued “judicial decisions addressing the quantum of compensation” *after* the critical date for jurisdiction. *Id.*, ¶ 274. The tribunal reasoned that a court judgment “has the potential to be an independently actionable breach, a distinct and legally significant event that is capable of founding a claim in its own right that is separable from

the action of expropriation that it addresses.” *Id.*, ¶ 276. Therefore, in addressing that claim, “the Tribunal may properly have regard to pre-entry into force and limitation period conduct for purposes of determining whether there was a subsequent breach of a justiciable obligation.” *Id.*

188. Here too, there is independent State conduct postdating the Treaty’s entry into force. Notably, Peru does not clearly identify on what “pre-Treaty acts and facts,” and on which “dispute over the [Land] Bonds,” it claims Gramercy’s claims “hinge.” *Cf.* Rejoinder, **R-65**, ¶ 53. To the extent Peru means its historical conduct in expropriating land and issuing Land Bonds as compensation for that expropriation, that background is perfectly separable from the 2013 CT Order and the irregularities that surrounded it, the 2013 CT Resolutions, the 2014 and 2017 Supreme Decrees, and the creation and implementation of the Bondholder Process. Peru’s obliteration of the value of Gramercy’s investments and the arbitrary and nontransparent means through which it went about doing so are what gave rise to the dispute at stake in this arbitration—*not* the historical fact that Peru had issued Land Bonds and had not paid them. That Peru’s historical conduct in failing to pay the Land Bonds had also given rise to domestic litigation—culminating in, among others, the 2001 CT Decision and subsequent legislative efforts to resolve the issue pursuant to that decision—is equally separable. It was Peru’s *departure* from that settled legal framework via the measures listed above that frustrated Gramercy’s legitimate expectations at the time of investment. It would be illogical if an investor could not rely on long-settled law as part of the general framework for its investment when alleging that specific later measures undermined that legitimate expectation.

189. In contrast, Peru’s response boils down to the position that the 2013 CT Order, 2013 CT Resolutions, and Supreme Decrees are somehow devoid of legal impact and indistinguishable from Peru’s expropriation of the land and issuance of the Land Bonds. This is untenable, and even Peru contradicts itself elsewhere. In fact, in attempting to defend its actions, Peru argues that “the July 13 Resolution was a turning point” and that the 2013 CT Order, 2013 CT Resolutions, and 2014 (and later) Supreme Decrees were “measures [that] served to resolve the longstanding uncertainty over the [Land] Bonds by establishing valuation and payment mechanisms for the first time.” Rejoinder, **R-65**, ¶¶ 189, 326. Peru cannot have it both ways by arguing, in an effort to resist jurisdiction, that the 2013 CT Order and ensuing

measures did *not* amount to “measures impacting the legal status and valuation of the [Land] Bonds,” while simultaneously asserting, for purposes of liability and quantum, that they in fact “functioned effectively to impart value to the otherwise facially worthless [Land] Bonds.” *Compare* Rejoinder, **R-65**, ¶ 54, *with* Rejoinder, **R-65**, ¶¶ 5, 188-191, 321, 323, 326; *see also* Statement of Defense, **R-34**, ¶¶ 225-226; Guidotti II, **RER-10**, ¶ 3 (“Peru’s bondholder process actually significantly increases the amount to be paid to bondholders relative to the contractual terms of the instrument.”).

190. *Third*, even if the time when a dispute arose were relevant, Peru continues to ignore the axiomatic definition of a dispute in international law, which is a “disagreement on a point of law or fact, a conflict of legal views or of interest between two persons.” *Mavrommatis Palestine Concessions*, Permanent Court of International Justice, Series A, No. 2, Judgment, Objection to the Jurisdiction of the Court, August 30, 1924, **Doc. CA-138**, ¶ 19; *see also* Reply, **C-63**, ¶ 203. Peru has no answer to the fact that there was not, and could not have been, any such “dispute” between Gramercy and Peru before 2009 arising out of measures that only occurred in 2013 and later. *See* Reply, **C-63**, ¶ 203. Peru’s and Prof. Reisman’s reductionist argument that Gramercy’s acquisition of the Land Bonds “does not cause the acts and facts of the previously existing and the continuing and recurring conflict with respect to the Bonds to vanish” is, again, both wrong and inapposite. *Cf.* Reisman II, **RER-6**, ¶ 44; Rejoinder, **R-65**, ¶ 55. There was not, and could not have been, any “dispute” between Gramercy and Peru as to whether the 2013 CT Order and subsequent measures complied with Peru’s obligations under the Treaty until those measures actually took place, which was indisputably years *after* the Treaty entered into force.

191. *Fourth*, whatever Peru may mean when it references “a dispute over the Bonds that arose many years before,” any such “dispute” would not be a “situation that ceased to exist” before the Treaty entered into force. Treaty, **Doc. CE-139**, Article 10.1.3; *cf.* Rejoinder, **R-65**, ¶ 53; Reisman II, **RER-6**, ¶ 43. Peru does not address this second element of Article 10.1.3 at all. *See* Reply, **C-63**, ¶ 203. In characterizing Gramercy’s claims as an alleged “integrated dispute or situation . . . distributed along a time continuum,” Prof. Reisman does not explain how this “situation . . . ceased to exist” before 2009. *Cf.* Reisman II, **RER-6**, ¶¶ 43-44. Even on Peru’s logic, therefore, any such “dispute” would still fall within the Treaty’s temporal scope.

192. *Finally*, consistent with the Treaty’s coverage of situations that continue to exist after entry into force, the fact that there may be relevant background facts that occurred before the Treaty’s entry into force does not deprive the Tribunal of temporal jurisdiction. *Cf.* Reply, **C-63**, ¶ 204 (citing *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, **Doc. CA-42**, ¶ 66; *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; *Société Générale v. Dominican Republic*, LCIA Case No. UN 7929, Award on Preliminary Objections to Jurisdiction of September 19, 2008, **Doc. CA-183**, ¶ 87); *see also* *Berkowitz Interim Award*, **Doc. RA-150**, ¶ 277. Peru has no answer to this point, either.

193. Peru’s objection to the Tribunal’s temporal jurisdiction is thus riddled with misconceptions and cannot stand.

E. Gramercy Has Not Abused Its Right to Arbitration.

194. For similar reasons, Peru’s objection that Gramercy’s claims are inadmissible because “the essence of Gramercy’s case—a dispute over Bond valuation and payment—had already arisen and was subject to ongoing legal proceedings when Gramercy acquired the Bonds” is also misconceived. *Cf.* Rejoinder, **R-65**, ¶ 24. It appears to be based on the flawed premise that an investor who is aware of the existence of Treaty protections at the time of acquiring its investment is then prohibited from availing itself of those protections. That is not, and should not be, the law.

195. As a preliminary matter, Peru does not deny that the standard for finding an abuse of process is and must be high. *See* Reply, **C-63**, ¶ 209. Deriving as it does from the implicit principle of good faith in international law, and amounting to a finding of bad faith on the part of the investor in availing itself of a right it undoubtedly enjoys, tribunals do not lightly apply the doctrine of abuse of process to bar claims. Peru’s confused mischaracterizations of Gramercy’s claims and motives come nowhere near surmounting that high bar.

196. *First*, Peru and Prof. Reisman are wrong to infer that Gramercy has somehow “concede[d]” that “obtaining access to a treaty mechanism that it would otherwise not have was a motive” for Gramercy’s investment. *Cf.* Rejoinder, **R-65**, ¶¶ 28-31;

Reisman II, **RER-6**, ¶ 48. Gramercy has conceded no such thing. The Gramercy entities who invested in the Land Bonds were, remain, and have always been U.S. investors; accordingly, they were, are, and have always been entitled to access the Treaty mechanism from the time it came into force. *See* Reply, **C-63**, ¶ 215.

197. Moreover, Gramercy’s investment in Peru was not made *for the purpose of* bringing claims against Peru. *See* Reply, **C-63**, ¶¶ 211-214; Koenigsberger III, **CWS-3**, ¶¶ 11-19, 34-35, 42-47, 70; Koenigsberger IV, **CWS-4**, ¶¶ 34-35; Koenigsberger V, **CWS-10**, ¶¶ 2-8. Peru’s implication that Gramercy opportunistically incorporated GPH on April 17, 2006, “five days after the signing of the Treaty,” is highly misleading. This coincidence is meaningless. *Cf.* Rejoinder, **R-65**, ¶ 29. The Treaty was over a year away from legislative approval in the United States and Peru, and nearly three years away from U.S. presidential approval and entry into force in February 2009. *See* White House, Proclamation to Implement the United States-Peru Trade Promotion Agreement and for Other Purposes, January 16, 2009, **Doc. CE-763**.

198. Peru is also wrong to allege that Gramercy made no efforts to reach a consensual resolution with Peru and that Gramercy’s motive in investing in the Land Bonds was to bring a Treaty arbitration. *Cf.* Rejoinder, **R-65**, ¶¶ 30, 37-44. Peru has no basis to doubt Mr. Koenigsberger’s testimony that Gramercy’s motive and investment strategy was to serve as a “catalyst” for the fair restructuring of the Land Bonds debt through negotiations with the Government—an approach that Gramercy had successfully achieved in Nicaragua and other countries. Koenigsberger III, **CWS-3**, ¶¶ 11-19, 34-35, 42-47, 70; Koenigsberger IV, **CWS-4**, ¶¶ 39, 48; Koenigsberger V, **CWS-10**, ¶¶ 7-8. That is borne out by the facts, not least of which that Gramercy did not bring a Treaty claim against Peru immediately after it bought the Land Bonds. Instead, for almost 10 years *after* it invested in Peru, Gramercy sought a negotiated restructuring of the Land Bonds and then a negotiated resolution to the Treaty dispute. Koenigsberger III, **CWS-3**, ¶¶ 76-77; Koenigsberger IV, **CWS-4**, ¶ 31; Koenigsberger V, **CWS-10**, ¶¶ 5-7. For example, before commencing arbitration in 2016, Gramercy had submitted to conciliation proceedings in Peru in an effort to “find solutions that are satisfactory for both parties” for the payment of the Land Bonds. *See, e.g.*, Acta de Conciliación N° 542-2010, October 11, 2010, **Doc. R-266**, p. 13; Acta de Conciliación N° 562-2010,

October 15, 2010, **Doc. R-273**, p. 19; Acta de Conciliación N° 572-2010, October 27, 2010, **Doc. R-282**, p. 15; Acta de Conciliación N° 600-2010, November 5, 2010, **Doc. R-288**, p. 15; Acta de Conciliación N° 659-2010, November 11, 2010, **Doc. R-294**, p. 29; *see also* Koenigsberger V, **CWS-10**, ¶ 6; *cf.* Rejoinder, **R-65**, ¶ 42. As Mr. Koenigsberger explains, for an entity whose business is built in large part on the time value of money, it would have been foolish for Gramercy to wait 10 years if bringing an arbitration had really been its initial strategy. Koenigsberger V, **CWS-10**, ¶ 7.

199. Even after the 2013 CT Order, Gramercy continued to seek a “consensual, non-conflictive solution” with Peru, as the very letter from Mr. Koenigsberger in December 2013 on which Peru relies clearly states. Letter from Robert Koenigsberger to President of the Council of Ministers, December 31, 2013, **Doc. CE-185**, p. 2; *see* Rejoinder, **R-65**, ¶ 44. Far from making “barely-veiled threats regarding Treaty claims,” as Peru argues (*cf.* Rejoinder, **R-65**, ¶ 42), in this letter—sent *seven years* after Gramercy began investing in the Land Bonds—Mr. Koenigsberger in fact stated:

We have analyzed our rights with respect to the Land Reform Bonds under Peruvian law, the Peru-United States Trade Promotion Agreement (“TPA”), and the applicable principles of international law, and we believe that we have a legal right to the payment of a cash amount equivalent to the total value of the debt indicated above. Consequently, we feel that our position in ownership of Land Reform Bonds is quite valuable

Naturally, you will understand that we must reserve all our rights under the TPA, international law and Peruvian legislation, and that we are presenting this letter without prejudice to any of those rights. But at the same time, we hope you can appreciate the sincerity with which we are sending this letter and *our clear preference to help Peru find a consensual, non-conflictive solution* to the difficult situation of the Land Reform Bonds.

Letter from Robert Koenigsberger to President of the Council of Ministers, December 31, 2013, **Doc. CE-185**, pp. 2-3 (emphasis added).

200. Peru is also wrong that this letter was “the culmination of Gramercy’s touted efforts to ‘negotiate’ a ‘consensual resolution’” with Peru. *Cf.* Rejoinder, **R-65**, ¶ 43. On April 21, 2014, after the 2014 Supreme Decrees were issued, Gramercy again wrote to the President of the Council of Ministers and the MEF, reiterating Gramercy’s “offer to meet with you to present ideas regarding such a solution [for its Land Bond debt]. Our fervent desire remains to resolve this matter in a spirit of respect, friendly cooperation and compromise.” Letter from Gramercy to the President of the Council of Ministers and the Ministry of Economy and Finance, April 21, 2014, **Doc. CE-190**, p. 2. Thereafter, as Mr. Koenigsberger has testified, Gramercy repeatedly sought to meet with the Government to discuss a fair resolution of the matter, only to be rebuffed by Peru at every turn, which Peru again does not deny. Koenigsberger III, **CWS-3**, ¶ 60; Koenigsberger V, **CWS-10**, ¶¶ 43-44, 47.

201. As Peru is at pains to deny, therefore, Gramercy’s acquisition of the Land Bonds before Peru’s breaches, its attempts to seek a restructuring of the debt through conciliation and negotiations with the Government, and its attempts to find a consensual solution even after Peru’s breaches, are not remotely analogous to the kind of belated corporate reorganization that has given rise to the abuse of process doctrine.

202. *Second*, Peru’s fallback argument that Gramercy acted “with the understanding” that, as a U.S. investor, it would “hav[e] the ability to threaten a Treaty claim” in case of a future dispute with Peru is also unavailing. *Cf.* Rejoinder, **R-65**, ¶ 30; Reisman II, **RER-6**, ¶ 50. Peru cannot rebut the fact that being aware of relevant investment protections is legitimate corporate planning, not abusive *per se*. See Reply, **C-63**, ¶ 216 (citing *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Case V2013/153, Award of July 12, 2016, **Doc. CA-127**, ¶ 701; *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**, ¶ 204; *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction of February 8, 2013, **Doc. CA-189**, ¶ 184; *Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case

No. ARB/11/17, Award of January 9, 2015, **Doc. RA-135**, ¶ 184; *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, **Doc. CA-75**, ¶ 330). Were it otherwise, it would defeat the very purpose of concluding a treaty in order to incentivize investments. *See* Reply, **C-63**, ¶ 216. Here too, Peru has no reply; it even acknowledges that a restructuring to secure treaty protections would be “a perfectly legitimate goal as far as it concerned future disputes.” *Cf.* Rejoinder, **R-65**, ¶ 34 (citing *Tidewater* Decision on Jurisdiction, **Doc. CA-189**; and *Venezuela Holdings* Decision on Jurisdiction, **Doc. CA-207**).

203. It is a far stretch from this knowledge of existing investment protections to the conclusion that Gramercy invested in the Land Bonds for the sole, or even principal, purpose of bringing a Treaty claim against Peru in relation to a pre-existing dispute. *See, e.g., Phoenix Action* Award, **Doc. RA-100**, ¶ 142; *David Aven et al. v. Republic of Costa Rica*, DR-CAFTA, ICSID Case No. UNCT/15/3, Final Award of September 18, 2018, **Doc. CA-102**, ¶¶ 225-247; *Isolux* Award, **Doc. CA-127**, ¶ 696; *cf.* Reisman II, **RER-6**, ¶ 48. Peru cannot bridge that gap here. Peru’s reliance on an alleged “preexisting domestic dispute” and “litigation” with which it claims the Land Bonds were “already burdened” before Gramercy acquired them rests on the same misguided mischaracterization of the measures that give rise to Gramercy’s claims in this arbitration. *Cf.* Rejoinder, **R-65**, ¶¶ 26-27; Reisman II, **RER-6**, ¶ 49. Contrary to Peru’s assertion, it is not the case that the “preexisting dispute in Peru concerned the same essential subject matter at issue in this Treaty proceeding—*i.e.*, valuation and payment of the Bonds.” *Cf.* Rejoinder, **R-65**, ¶¶ 32-33. Rather, this arbitration arises from Peru’s series of measures many years *after* Gramercy acquired its investments. *See* Reply, **C-63**, ¶ 212. These complained-of measures did not occur—and thus could not have resulted in the dispute at issue in this arbitration, or caused the damages sought in this arbitration—until years *after* Gramercy’s purchase of the Land Bonds.

204. Thus, unlike in *Phoenix Action*, here there was no “dispute” with an “initial investor” that “was not entitled” to treaty protection, and no “redistribution of assets” *after* “all the damages claimed by [the claimant] had already occurred.” *Phoenix Action* Award, **Doc. RA-100**, ¶¶ 136-140. The “initial investors” here were and remain the claimants in this arbitration. They suffered loss to their investment several years *after* they invested and commenced arbitration after unsuccessful attempts at amicable

resolution several years after that. *See* Reply, **C-63**, ¶¶ 24-25, 212. This case is thus materially different from the critical considerations in *Phoenix Action* and other decisions. It is, instead, exactly the kind of case in which the investor “reli[ed] on the Treaty as protection against a general risk of disputes” that it did not foresee at the time it invested—which Prof. Reisman acknowledges is not abusive. *Cf.* Reisman II, **RER-6**, ¶ 50.

205. *Finally*, Peru’s accusation that Gramercy’s claims are abusive because of an alleged “ongoing campaign of aggravation” is similarly devoid of legal or factual basis. *Cf.* Rejoinder, **R-65**, ¶¶ 37-44. Peru’s multitude of ill-fated procedural complaints that have already been resolved by the Tribunal cannot be re-litigated and do not constitute any abuse of process by Gramercy. *See* Procedural Order No. 5, ¶ 61; Procedural Order No. 9, ¶ 86.

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

III.

REQUEST FOR RELIEF

207. Accordingly, for the reasons above and those explained in Gramercy’s prior submissions, and in addition to the specific relief Gramercy requested in its Third Amended Statement of Claim and its Reply, Gramercy respectfully requests that the Tribunal:

- a. Dismiss Peru’s objections to jurisdiction and admissibility;
- b. Declare that it has jurisdiction over Gramercy’s claims and that such claims are admissible;
- c. Proceed to consider Gramercy’s claims on the merits;
- d. Order Peru to pay all the costs of the arbitration, as well as to pay Gramercy’s professional fees and expenses; and
- e. Order any other such relief as the Tribunal may deem appropriate.

208. 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,



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