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' POST-HEARING BRIEF ON MERITS AND REMEDIES

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ABBREVIATED TERMS

2001 CT Decision	**Doc. CE-11**, Constitutional Tribunal Decision dated March 15, 2001
2013 CT Order	**Doc. CE-17**, Constitutional Tribunal Order dated July 16, 2013
2014 Supreme Decrees	**Doc. CE-37**, Supreme Decree No. 17-2014-EF, January 17, 2014, and **Doc. CE-38**, Supreme Decree No. 19-2014-EF, January 21, 2014
ACR	Regulatory quality analysis (*análisis de calidad regulatoria*)
CPI	Consumer Price Index
CT	Constitutional Tribunal
Gramercy	Gramercy Funds Management LLC and Gramercy Peru Holdings LLC
ICJ	International Court of Justice
Land Bonds	Peruvian Agrarian Reform Bonds
LD 1310	**Doc. CE-621**, Legislative Decree 1310, December 29, 2016
LOPE	*Ley Orgánica del Poder Ejecutivo*
MEF	Peru's Ministry of Economy and Finance
MFN	Most favored nation
MST	Minimum standard of treatment
Pomalca	**Doc. CE-342**, Fifth Civil Court of Chiclayo, File No. 09990-2006-0-1706-JR-CI-09
Treaty	**Doc. CE-139**, United States-Peru Trade Promotion Agreement of February 1, 2009

REFERENCED SUBMISSIONS

C-2	Amended Notice of Intent, April 15, 2016 ("***Notice of Intent***")
C-34	Third Amended Notice of Arbitration and Statement of Claim, July 13, 2018 ("***Statement of Claim***")
C-63	Statement of Reply and Answer to Objections [Corrected], May 21, 2019 ("***Reply***")
C-80	Claimants' Opposition to Peru's Petition, March 23, 2020 ("***Opposition***")
CER-4	Amended Expert Report of Sebastian Edwards, July 13, 2018 ("***Edwards I***")
CER-5	Second Amended Expert Report of Delia Revoredo Marsano de Mur, July 13, 2018 ("***Revoredo Rep.***")
CER-6	Reply Expert Report of Sebastian Edwards, May 21, 2019 ("***Edwards II***")
CER-9	Expert Report of Mario Castillo Freyre, May 21, 2019 ("***Castillo Rep.***")
CER-10	Expert Report of Alfredo Bullard, May 21, 2019 ("***Bullard Rep.***")
CWS-3	Second Amended Witness Statement of Robert S. Koenigsberger, July 13, 2018 ("***Koenigsberger I***")
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RWS-1	Witness Statement of Betty Armida Sotelo Bazán, December 14, 2018 ("***Sotelo I***")

CROSS-REFERENCES TO ANSWERS TO THE TRIBUNAL'S QUESTIONS

Question	Reference
Question from the Hearing	
Comment on *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 2018 I.C.J. REP. 507 (October 1), ¶ 162.	¶ 32
Questions from Procedural Order No. 11	
"In the course of the Hearing, the Tribunal reiterated its interest in the following issues: [t]he number of outstanding bonds; and [a]ny calculations made by Peru of the budgetary impact that the different calculation methods would have on Peru's budget."	¶¶ 134-137
"When did Claimants initially conclude that Peru had breached the Treaty?"	Gramercy will answer this question in its Post-Hearing Brief on Jurisdiction
"How do third parties invest in Gramercy's corporate structure? What is the legal title held by investors vis-à-vis Gramercy?"	Gramercy will answer this question in its Post-Hearing Brief on Jurisdiction
"What was the factual background and the legal and financial justification of the 2017 Purchase?"	¶ 60; *see also* Opposition, **C-80**, ¶¶ 51-55
"Please explain in detail the amounts in cash or otherwise to which a participating bondholder is entitled. Does the State have discretion in establishing the amount to be paid or the payment methodology?"	¶¶ 87-93; *see also* Reply, **C-63**, § III.A.2(c)

Question	Reference
"What would have happened if Gramercy had submitted its Bonds to the Bondholder Process? What amount would Gramercy have received? Would the State have any discretion in paying Gramercy? Is Gramercy a speculative investor pursuant to art. 18(7) of RD 242/2017? What would be the consequences of such qualification?"	¶¶ 63-65, 93-96; *see also* Reply, **C-63**, § III.D; Statement of Claim, **C-34**, § V.C
"What court actions did Claimants file in Peru? What was the development of such court actions? Did Gramercy collect in the *Pomalca* case?"	¶¶ 98, 121; *see also* Reply, **C-63**, ¶ 484
"What are the legal consequences of the 'Sentencia Casación N° 11339-2016'?"	¶¶ 130-132
"What is the methodology used by Gramercy to value the bonds in its different annual financial statements?"	¶ 142; *see also* Reply, **C-63**, § IV.C.2(b); Joannou, CWS-6, § II
"Mr. Olivares Caminal submitted that the Land Bonds have been traded in a secondary market. Can the Parties explain the timing and conditions of such secondary market trades?"	Gramercy will answer this question in its Post-Hearing Brief on Jurisdiction

I. INTRODUCTION

1. The hearing confirmed that the "Bondholder Process" Peru established to wipe out its long-overdue agrarian reform debt is irrational, arbitrary, and confiscatory, and hence violates the Treaty.

2. After the hearing, the basic facts are now clear. All the experts and witnesses confirmed that Peru had an undisputed legal obligation to pay bondholders the true value of their Land Bonds under the current value principle (*principio valorista*). And there was a decade-long consensus about calculating that value using CPI plus interest—including a "uniform jurisprudence" in Peruvian courts on which both parties' Peruvian law experts agreed, and on which Gramercy and its founder, Robert Koenigsberger, had relied when investing.

3. But just as the Constitutional Tribunal ("***CT***") was poised to reaffirm that consensus in July 2013, through a considered opinion nearly two years in the making, the Ministry of Economy and Finance ("***MEF***") intervened. At the eleventh hour, in *ex parte* meetings, the MEF misled the Justices to believe the objectively false conclusion that ordering Peru to pay what it owed would condemn it to economic ruin. Instead of signing the opinion that the CT had prepared, a CT "majority"—through shocking procedural irregularities that have no place in any country's highest court, plus a dubious casting vote—adopted a hastily cobbled-together order that handed the MEF enormous discretion to undervalue the debt, endorsing a valuation method that the Justices professed not to understand and which hailed from an error-filled, unexamined desk study the MEF itself had peddled.

4. The MEF then seized this opportunity to issue not one but *three* formulas that effectively wipe out the agrarian reform debt for a tiny fraction of its true value. These formulas are so irrational and arbitrary that not a single one of Peru's fact or expert witnesses was willing even to explain, much less defend, them. Not the former Minister of Economy and Finance Luis Castilla Rubio (who signed the first formula); not the former Vice-Minister of Finance Betty Sotelo Bazán (who has been involved with the Land Bonds debt for over a decade); and not even Peru's quantum experts, who were unfamiliar with even some of the basic economic concepts underlying the formulas, like parity exchange rates. In contrast, Sebastian Edwards—the former Chief Economist for Latin America at the World Bank, a chaired professor of international economics, and a scholar who has written books on these very subjects—described in considerable and convincing detail that the MEF's initial formula was "completely messed up," and that the MEF's multiple attempts to fix and restate it were no less irrational or arbitrary.

5. The fact and expert witnesses also confirmed that the MEF's formulas are not only economically indefensible, but were adopted in violation of Peru's own administrative procedures, apparently without any MEF scrutiny of the formulas themselves, without any analysis of their impact on bondholders or the nation's budget, and

without even fulfilling critical elements of the CT's Order. As Peru's own witnesses and experts admitted, the MEF's application of those formulas in the Bondholder Process has been a complete failure: it has attracted only a small fraction of bondholders; the drop-out rate has been strikingly high; the rate at which bondholders' claims are being processed is so slow that it would take a century for the Process to conclude; the sums it is paying are pitiable; and there is no access to any meaningful court review. Even Min. Castilla admitted it was "disappointing." The unchallenged words of one of its bondholder victims—a man who, more than 45 years since Peru expropriated his family farm, and after three-and-a-half years in the Process, was awarded an insulting *US$240*—more accurately called it "a joke." And by deliberately placing investors like Gramercy last in line for even that risible prospect, all the Process seems to have achieved is to embody then-President Pedro Pablo Kuczynski's conviction: "We don't owe them [Gramercy] anything."

6. Hence, the hearing disproved each of Peru's defenses. As Peru's leading professor of civil law, Mario Castillo Freyre, explained, in testimony that even Peru's legal expert agreed with on cross-examination, there was no "cloud of legal uncertainty" around the Land Bonds' value. As Min. Castilla and Vice-Min. Sotelo admitted, there was no obstacle to Peru paying that value. And, as Mr. Koenigsberger explained, Prof. Edwards quantified, Prof. Rodrigo Olivares-Caminal contextualized, and Dr. Norbert Wühler could not deny, far from "imparting value," the Supreme Decrees destroyed it—by offering only the faintest glimmer of a tiny fraction of what bondholders had routinely received simply by prosecuting their cases in Peruvian courts.

7. Given these breaches of the Treaty, international law requires that Peru compensate Gramercy for the full intrinsic value of its debt. Prof. Edwards calculated that value to be US$1.8 billion as of May 31, 2018—a calculation whose mathematical accuracy Peru's quantum experts do not seriously contest. In the alternative, Gramercy is entitled, at a minimum, to US$841 million. That sum represents what Gramercy would have received either under the CT's original majority decision before the MEF's unlawful intervention, or if Gramercy had simply been permitted to continue enforcing its rights in Peruvian courts.

8. Furthermore, the hearing revealed that Gramercy is entitled to approximately the same amount *even if* the CT's 2013 Orders and Resolutions were the product of a legitimate process free of political influence and met the Treaty's standards. If the MEF had used all the parameters it cajoled the CT to adopt—dollarization, converting to dollars at the last-clipped-coupon date, and updating the principal by reference to U.S. Treasury bills—but had just faithfully implemented the CT's directive to balance bondholders' rights to receive current value "plus interest" and the State's ability to pay, then Peru would still owe Gramercy over US$841 million. Because if the MEF had done so in good faith, it would have had to use a valid parity exchange rate (or at least consistently use its invalid one to convert back to *nuevos soles* at

the time of payment), and to abide by the CT's, and later the Supreme Court's, unchallenged directives to add compensatory interest to the updated principal. Merely eliminating those two irrational features of the Supreme Decrees—features that no witness or document has even purported to defend—would produce a value consistent with the CPI-plus-interest approach that had been so widely adopted by Peruvian courts and Congress before Peru's breaches.

9. The Tribunal should accordingly hold that Peru breached the Treaty and award Gramercy the substantial relief it seeks.

II. THE HEARING CONFIRMED THAT PERU BREACHED THE TREATY

A. Gramercy Is Entitled to CPI Updating, From the Date of Issuance, Plus Interest at a Real Rate.

10. The hearing evidence completely disproved Peru's contention that current value was an amorphous and essentially meaningless concept prior to the 2013 CT Order. To the contrary, the hearing demonstrated that current value has always had a clear and well-established meaning with respect to the Land Bonds, requiring (*i*) updating the unpaid principal using the consumer price index (the "***CPI***"), (*ii*) from the Land Bonds' issuance date, (*iii*) plus compensatory interest. The evidence confirmed that this was not only the uniform practice of Peru's own courts and the shared understanding of other public actors, but also clearly the right result as a conceptual matter—as Prof. Castillo and former CT Justice Delia Revoredo explained, and as even Peru's expert Oswaldo Hundskopf agreed on cross-examination.

1. Current Value Had a Clear and Objective Meaning.

11. The hearing exposed the falsity of Peru's assertions that the application of the current value principle to the Land Bonds was somehow "uncertain" at the time Gramercy invested in them.[1] Prof. Castillo explained that the Land Bonds were, by their very nature, unequivocally subject to the current value principle because the obligation to pay fair compensation (*justiprecio*) for an expropriation is a textbook example of a debt of value.[2] Prof. Castillo also explained in unrebutted testimony, consistent with his academic writings, that the current value principle seeks to preserve the value of a debt at the time that it arose, protecting that value against fluctuations due to inflation that might affect purchasing power and thus the original balance of the

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1 *Cf., e.g.,* Tr. (1) 233, 238, 244 (Peru's opening).

2 Tr. (4) 1393, 1426-32 (Castillo) (compensation owed for an expropriation is "the example par excellence of a debt of value"); Castillo Pres., **H-6** p. 4; Castillo Rep., **CER-9**, ¶¶ 64-75; **Doc. RA-357**, Felipe Osterling Parodi & Mario Castillo Freyre, *El Nominalismo y el Valorismo en el Perú*, REVISTA JURÍDICA DEL PERÚ (2001), p. 53.

parties' rights and obligations.[3] Contrary to Peru's quantum experts' assertion that the CT had "coined" the term in 2001, the current value principle is in fact a longstanding feature of many civil law systems and was codified in Peru's Civil Code in 1984.[4]

12. Prof. Castillo is Peru's foremost authority on the law of obligations and the current value principle in particular. Having dedicated his career to the law of obligations, he co-authored the leading treatise with Felipe Osterling Parodi, who presided over the commission that drafted Peru's Civil Code, and has written extensive monographs on the current value principle.[5] The Peruvian courts routinely cite Profs. Osterling and Castillo's work, including on the current value principle.[6] And both Justice Revoredo and Dr. Hundskopf relied on Prof. Castillo's academic writings on the meaning of current value.[7]

13. On cross-examination, Dr. Hundskopf agreed with Prof. Castillo's testimony on virtually all the key issues. To the extent any areas of disagreement remain, Prof. Castillo's opinions are far more authoritative and reliable than those of Dr. Hundskopf. On the stand, Dr. Hundskopf contradicted and even recanted his prior opinions,

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3 *See* Tr. (4) 1389-90 (Castillo); Castillo Rep., **CER-9**, ¶¶ 21(iii-vi), 29, 54-55, 57, 62, 66, 75, 80, 106-07; **Doc. CE-76**, Felipe Osterling Parodi & Mario Castillo Freyre, ESTUDIO SOBRE LAS OBLIGACIONES DINERARIAS EN EL PERÚ (1995); *see also* Revoredo Rep., **CER-5**, ¶¶ 14, 17; Hundskopf I, **RER-2**, ¶¶ 46, 50, 56-57; **Doc. CE-356**, Luis Moisset de Espanés, *Límites al "valor" o al "Monto" de la Expropiación*, SEMINARIO JURÍDICO DE COMERCIO Y JUSTICIA (1977); **Doc. CE-709**, Enrique Carlos Banchio, OBLIGACIONES DE VALOR (1975), pp. 64 *et seq.*; **Doc. RA-206**, Luciano Barchi Velaochaga, CÓDIGO CIVIL COMENTADO (2004), p. 521; **Doc. RA-207**, William Namén Vargas, *Obligaciones Pecuniarias y Corrección Monetaria*, REVISTA DE DERECHO PRIVADO (1998), pp. 47-50; **Doc. RA-209**, Eduardo Benavides, EL CUMPLIMIENTO DE PRESTACIONES DINERARIAS EN EL CÓDIGO CIVIL PERUANO (1994), p. 176.

4 *Compare* Peru Quantum II, **RER-11**, ¶ 88, *with* **Doc. CE-55**, Peruvian Civil Code (1984), Art. 1236.

5 *See* Tr. (4) 1388-89 (Castillo); Castillo Rep., **CER-9**, Appendix I; **Doc. CE-76**, Felipe Osterling Parodi & Mario Castillo Freyre, ESTUDIO SOBRE LAS OBLIGACIONES DINERARIAS EN EL PERÚ (1995); **Doc. CE-82**, Felipe Osterling Parodi & Mario Castillo Freyre, TRATADO DE LAS OBLIGACIONES (1996); **Doc. CE-479**, Felipe Osterling Parodi & Mario Castillo Freyre, COMPENDIO DE DERECHO DE LAS OBLIGACIONES (2008); **Doc. CE-554**, Felipe Osterling Parodi & Mario Castillo Freyre, TRATADO DE DERECHO DE LAS OBLIGACIONES (2014); **Doc. RA-357**, Felipe Osterling Parodi & Mario Castillo Freyre, *El Nominalismo y el Valorismo en el Perú*, REVISTA JURÍDICA DEL PERÚ (2001); *see also* Tr. (6) 2051 (Hundskopf) ("Who better than [Prof. Osterling] to make comments in connection with the [Civil Code]?").

6 *See, e.g.*, **Doc. RA-203**, Cas. No. 2171-199 (Ica), July 5, 2000, ¶¶ 2, 3; *see also* Tr. (6) 2051 (Hundskopf).

7 *See* Revoredo Rep., **CER-5**, ¶¶ 16-18; Hundskopf I, **RER-2**, ¶ 41.

endorsed confused positions, and admitted that the law of obligations is an area outside of his "specialty" that he first broached in 2019.[8]

14. For instance, despite having initially claimed that the 2001 CT Decision was based on "equitable," not legal, considerations, on cross-examination Dr. Hundskopf recognized that "clearly" the CT had simply applied Peru's Civil Code and Constitution to the Land Bond debt.[9] Similarly, although in his reports he suggested that the CT, the Supreme Court, countless other Peruvian courts, and Prof. Castillo were all mistaken in their uniform view that the Land Bonds were, by their nature, debts of value, on the stand he readily conceded the "necessity" that the Land Bonds be paid according to the current value principle.[10]

15. Prof. Castillo's testimony also confirmed that the current value principle has three ineluctable implications for the Land Bonds:

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[8] Tr. (6) 2038 (Hundskopf). *Compare, e.g.*, Tr. (6) 2046-47, Hundskopf I, **RER-2**, ¶ 23, Hundskopf II, **RER-7**, ¶ 12 (claiming that the Land Bonds are not transferrable, because they are *intuitu personae* obligations of the State, because they were issued to a named individual), *with* Tr. (6) 2047-48 (Hundskopf); Hundskopf I, **RER-2**, ¶ 27; Hundskopf II, **RER-7**, ¶ 13 (admitting that the Land Bonds have been freely transferable since 1979 and the State, not the bondholder, is the obligor). *Compare* Tr. (6) 2039-2042 (insisting that it was the bondholders' "decision to opt" for different classes of Bonds), *with* **Doc. CE-1**, Decree Law No. 17716, Land Reform Act, June 24, 1969, Art. 177.

[9] *Compare, e.g.*, Hundskopf II, **RER-7**, ¶ 23, *with* Tr. (6) 2055 (Hundskopf).

[10] *Compare, e.g.*, Hundskopf II, **RER-7**, ¶ 5 (claiming that the debt "became a monetary obligation" when the Bonds were issued), *and id.*, ¶ 38 ("these securities are subject to the nominal value principle"), *and id.*, ¶ 56 ("[T]he Agrarian Bonds were by nature monetary debts, not value debts, and, therefore, they would have been validly subject to the nominal value principle."), *with* **Doc. CE-11**, 2001 CT Decision, "Foundation" Section, ¶ 2 (holding that paying the Bonds at their nominal value "*was*, and continues to be, unconstitutional"), *and* Tr. (6) 2053, 2056 (Hundskopf) (admitting the CT "was correct" to hold that the Land Bonds are subject to the current value principle, and no court had held otherwise between 2001 and 2013). *See also, e.g.*, **Doc. CE-14**, Supreme Court, Cas. No. 1002-2005 ICA, July 12, 2006, "Foundation" Section, ¶ 5; **Doc. CE-15**, Supreme Court, Cas. No. 1958-2009, January 26, 2010, "Foundation" Section, ¶¶ 3, 4, 7, 8; **Doc. CE-99**, Supreme Court, Cas. No. 2755 (Lima), August 27, 2003, "Foundation" Section, ¶¶ 5, 8, 12; **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, May 4, 2006, pp. 7-8; **Doc. CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File No. 652-07, June 14, 2007, "Foundation" Section, ¶¶ 3, 4, 5; *id.*, "Has Resolved" Section; **Doc. CE-128**, Supreme Court, Cas. No. 2146-2006-LIMA, September 6, 2007, "Foundation" Section, ¶ 6; **Doc. CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File No. 01898-2007, August 14, 2008, "Foundation" Section, ¶ 110; **Doc. CE-148**, Civil Court of Pacasmayo, Resolution, Case File No. 163-73, January 29, 2010, "Foundation" Section, ¶ 6; **Doc. CE-528**, Supreme Court, Cas. No.4201-2010-LIMA, September 4, 2012, "Foundation" Section, ¶¶ 3, 5; **Doc. CE-572**, Lima Sixteenth Commercial Civil First Instance Court, Case File No. 12196-2009-0-1817-JR-CO-16, March 18, 2014, "Foundation" Section, ¶¶ 4, 8.

(*i*) the principal must be updated using CPI to offset inflation; (*ii*) that inflation-updating must occur from the date of issuance, in order to preserve the true value of the debt; and (*iii*) the Land Bonds must accrue compensatory interest on the inflation-updated principal at a real rate.

a. CPI Is the Proper Updating Method.

16. The testimony proved that the only conceptually correct method of updating the Land Bonds' principal is CPI, because that is the only index that offsets the effect of inflation on their original value.[11] As Prof. Castillo explained, an obligation of value can only have a "single value," not multiple values.[12] Accordingly, the current value principle requires the debt to be updated using the index that properly reflects the nature of the underlying obligation.[13] If the obligation is to pay compensation for the loss of a certain quantity of gold, for instance, the corresponding measure of value would be the price of gold.[14] Where a monetary amount is at stake, however, as Min. Castilla put it, current value "means restoring [that amount's] original purchasing power."[15]

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[11] *See generally* Statement of Claim, **C-34**, ¶¶ 10, 62; Reply, **C-63**, ¶¶ 294, 302-03, 520; Castillo, **CER-9**, ¶ 21(vi), § IX, ¶¶ 86-99.

[12] Tr. (4) 1411 (Castillo); *see also id*., 1393-94, 1440, 1460-62.

[13] *See* Tr. (4) 1394, 1440 (Castillo); Castillo Rep., **CER-9**, ¶¶ 82-84; *see also* Tr. (4) 1442 (Castillo) (clarifying that an abrogated version of Article 1236, which was in force for only three years, mandated the same outcome); **Doc. RA-202**, Felipe Osterling Parodi & Mario Castillo Freyre, TRATADO DE LAS OBLIGACIONES (2003), pp. 159-71; **Doc. CE-554**, Felipe Osterling Parodi & Mario Castillo Freyre, TRATADO DE DERECHO DE LAS OBLIGACIONES (2014), pp. 966 ("[E]l índice que escogiese el juez debía estar íntimamente relacionado con la deuda de valor de que se tratara, a fin de que esta mantuviera intacto dicho valor."); **Doc. RA-208**, Jack Bigio Chrem, EXPOSICIÓN DE MOTIVOS OFICIAL DEL CÓDIGO CIVIL (1998), pp. 125-26.

[14] *See* Tr. (4) 1394 (Castillo); Castillo Rep., **CER-9**, ¶ 83.

[15] Tr. (4) 1183 (Castilla); *see also* Castillo Rep., **CER-9**, ¶¶ 21(iii-viii), 24-25, 62, 73-75, 83, 87, 91-92, 108; Revoredo Rep., **CER-5**, ¶¶ 16-20, 28; **Doc. CE-12**, 2006 Agrarian Commission Report, pp. 32-33; **Doc. CE-116**, Veto of President Alejandro Toledo, April 19, 2006, p. 2; **Doc. CE-356**, Luis Moisset de Espanés, *Límites al "valor" o al "Monto" de la Expropiación*, SEMINARIO JURÍDICO DE COMERCIO Y JUSTICIA (1977); **Doc. CE-709**, Enrique Carlos Banchio, OBLIGACIONES DE VALOR (1975), pp. 64 *et seq.*; **Doc. CE-479**, Felipe Osterling Parodi & Mario Castillo Freyre, COMPENDIO DE DERECHO DE LAS OBLIGACIONES (2008); **Doc. CE-554**, Felipe Osterling Parodi & Mario Castillo Freyre, TRATADO DE DERECHO DE LAS OBLIGACIONES (2014), p. 967; **Doc. CE-69**, Max Arias Schreiber Pezet, LUCES Y SOMBRAS DEL CÓDIGO CIVIL PERUANO DE 1984 (1992), p. 64; **Doc. CE-99**, Supreme Court, Cas. No. 2755 (Lima), August 27, 2003, ¶ 5 (updating Land Bonds using CPI from issuance date); **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, May 4, 2006, p. 7 (same); **Doc. CE-14**, Supreme Court, Cas. No. 1002-2005 ICA, July 12, 2006, ¶ 15 (same).

17. Peru did not rebut that Peruvian CPI is the official measure of purchasing power in Peru.[16] Indeed, the Peruvian government itself relies on it to update debts for inflation.[17] Peru also did not rebut Prof. Edwards's testimony that the "standard [method] around the world" to restore purchasing power, and the one that 99 out of 100 economists would use, is CPI.[18] Dr. Hundskopf conceded that as a general rule Peruvian courts applied CPI for the Land Bonds, and his suggestion that indices other than CPI could be applied assumed an agreement between the parties to this effect—a *cláusula valorista* under Article 1235 of the Peruvian Civil Code—and hence did not apply to the Land Bonds.[19] So, as Prof. Castillo explained, while CPI is not the only way of applying the current value principle in the abstract, it *is* the only conceptually correct way of applying it *to the Land Bonds*.[20]

18. Dr. Hundskopf also retracted his prior opinion that the 2004 CT Decision endorsed dollarization as an appropriate methodology for updating the Land Bonds.[21] After finally reading the decision "in depth," he admitted on cross-examination that an "important

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16 *Cf*. Tr. (4) 1460 (Castillo); Tr. (5) 1590 (Edwards); Castillo Rep., **CER-9**, ¶¶ 84, 92-93, 95-96; Revoredo Rep., **CER-5**, ¶¶ 29-30; **Doc. CE-725**, Law No. 26702, General Law of Finance System and System of Insurances and Superintendence of Bank and Securities, Art. 240.

17 *See* **Doc. CE-365**, Decree No. 510, February 10, 1989, Art. 2 (tax units to be updated using CPI for Metropolitan Lima); **Doc. CE-90**, Supreme Decree No. 064-2002-EF, April 9, 2002, Art. 5(1) (tax debt to be updated using CPI for Metropolitan Lima); **Doc. CE-132**, Supreme Decree No. 024-2008-EF, February 13, 2008, Art. 2 (same); **Doc. CE-376**, Decree No. 816, April 21, 1996, Art. 79 (same); **Doc. CE-394**, Law No. 27344, September 7, 2000 (tax debt to be either updated using CPI for Metropolitan Lima or subject to an annual valuation of 6%, whichever is less); **Doc. CE-369**, Res. No. 543-92-EF-94.10.0-CONASEV, December 14, 1992 (minimum amount of net equity to be updated using CPI for Metropolitan Lima); **Doc. CE-384**, Supreme Decree No. 004-98-EF, January 21, 1998 (monthly pension payments to be updated using CPI for Metropolitan Lima); **Doc. CE-205**, INDECOPI, Res. 030-2015/CLC-INDECOPI, August 12, 2015, ¶ 186 (fines imposed to be updated using CPI); *see also* **Doc. CE-17**, 2013 CT Order, Mesía "Dissent," ¶ 23 ("[U]pdating must be carried out through a principle of equity and justice, following the same criteria that the State uses when it is dealing with the updating of the tax debts of the taxpayers . . . . In consequence, . . . the land reform debt bonds [must] be updated in conformity with . . . [CPI].").

18 Tr. (5) 1576 (Edwards).

19 *Compare* Tr. (5) 2019-20, 2031 (Hundskopf), *and* Hundskopf II, **RER-7**, ¶ 25 (invoking the updating factors listed in Article 1235), *with* Tr. (5) 2058-59 (Hundskopf) (acknowledging that Article 1235 applies only by agreement of the parties). *See also* Hundskopf I, **RER-2**, ¶ 46 ("[F]or the parties to adopt any of the readjustment factors set forth in Section 1235, it will be necessary that there be an express agreement between them."); **Doc. CE-11**, 2001 CT Decision, "Background" (referencing Article 1236).

20 Tr. (4) 1394-95 (Castillo); *see also* Castillo Rep., **CER-9**, ¶¶ 21(vi-viii), 84, 86, 92, 97, 99.

21 *Cf*. Hundskopf I, **RER-2**, ¶ 80; Hundskopf II, **RER-7**, ¶ 70.

qualification" of the CT's 2004 holding was that dollarization was constitutional because it was "voluntary"—as Justice Revoredo, who joined in that decision, and Prof. Castillo had said all along.[22]

19. Peru was unable to adduce a single example of Peruvian courts applying a method *other than* CPI to the Land Bonds before the 2013 CT Order. Dr. Hundskopf conceded that he was not aware of any such decisions.[23] None are in the voluminous record, although, as a party to those proceedings, Peru would necessarily have had them if they existed.[24] Peru's counsel conceded that the cases Peru did invoke as evidence of dollarization pre-2013 did not concern the Land Bonds, and Prof. Castillo's unchallenged testimony confirmed that they are inapposite.[25] Peru did not rebut that courts at all levels were in unison, giving rise to what the Peruvian Congress accurately described as a "uniform jurisprudence" applying CPI to update the value of the Land Bonds.[26] Peru's attempt to question this unanimity by noting that certain courts applied regional CPIs (for instance, Trujillo CPI) or the Central Bank Automatic Adjustment Index to the Land Bonds only further undermined its case: as Prof. Castillo explained, *all* of these approaches are still CPI—just measured on a regional basis or with one month's delay, respectively.[27]

b. The Bonds' Issuance Date Is the Proper Start Date.

20. Peru also failed to rebut that the only conceptually correct date from which to update the value of the Land Bonds is the date of their issuance, which is when the debt of value arose.[28] As

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22 *Compare* Hundskopf I, **RER-2**, ¶ 80, *and* Hundskopf II, **RER-7**, ¶ 70, *with* Tr. (6) 2061 (Hundskopf). *See also* **Doc. CE-107**, 2004 CT Decision, ¶¶ 11, 13, 16, 17; Revoredo Rep., **CER-5**, ¶¶ 34-35; Castillo Rep., **CER-9**, ¶ 105; Tr. (4) 1399-1400 (Castillo) (explaining that the Constitutional Tribunal held that the challenged provisions were "not unconstitutional insofar . . . as the mechanism established by Emergency Decree 088 was not obligatory—that is to say, it did not stand in the way of the interested Party being able to have recourse to the Courts of Justice with the claims for the compensation as it saw fit"); *id*., pp. 1402-03 (same); Reply, **C-63**, ¶¶ 194, 310-14, 529.

23 *See* Tr. (6) 2064 (Hundskopf) (admitting that all the cases he cited applying dollarization to Land Bonds did so because of the 2013 CT Order).

24 Tr. (6) 2059 (Hundskopf).

25 *See* Castillo Rep., **CER-9**, ¶ 94; Tr. (4) 1439-41 (Castillo); Peru's Pres., **H-2**, p. 27 (citing four cases, three of which predated the 2001 CT Decision, as alleged examples of the "contemporaneous use of dollarization"). *But see* Tr. (1) 237 (Peru's opening) ("President Fernández-Armesto: These cases refer to 'bonos agrarios'? Mr. Jijón: No.").

26 **Doc. CE-160**, 2011 Agrarian Commission Report, p.13; Tr. (1) 81-82 (Gramercy's opening); Gramercy's Pres., **H-1**, p. 98.

27 *Cf., e.g.*, Peru's Pres., **H-2**, p. 29; Tr. (1) 238 (Peru's opening); *but see* Tr. (4) 1391, 1462-63 (Castillo); Castillo Rep., **CER-9**, ¶ 95, fn. 76.

28 *See* Tr. (4) 1393, 1416, 1435-36, 1467-69 (Castillo).

Prof. Castillo memorably put it, to update from any other date would be as arbitrary as updating from "the last solar eclipse."[29]

21. *First*, because the current value principle indisputably seeks to preserve the *original* value of the debt—on which Dr. Hundskopf and legal scholars unanimously agree[30]—it necessarily follows that updating must occur by reference to the value of the debt when the obligation arose, and not some later point in time.[31] That would not be true updating, as Prof. Castillo explained.[32]

22. That the Land Bonds have coupons does not affect this analysis. As Dr. Hundskopf acknowledged, the Land Bonds' principal represents the *justiprecio* of the expropriated lands at the time of the taking.[33] And, as Prof. Castillo explained, because each coupon's principal component represents simply a fraction of the *justiprecio*, it is only by updating that principal from the Land Bonds' issuance date that the original value of the debt can be preserved.[34] Prof. Edwards also showed that updating from any later point in time erodes the original value of the Land Bonds—including any unredeemed portion of them—and saddles bondholders with the burden of the inflation experienced during the intervening period.[35] That value-destroying effect is precisely what the current value principle prevents.

23. Moreover, Prof. Castillo further explained—without any disagreement from Peru or Dr. Hundskopf—that the obligation to pay compensation for an expropriation cannot be compared to long-term obligations with periodic payments, such as under a lease agreement.[36] Under Peruvian law, obligations to pay money under a contract—unlike obligations to make *full reparation* for a loss—are not debts of value.[37] Inflation may, over time, erode the real value of the lessee's recurring rent payments, but that is very different from an expropriation. An expropriated landowner is not a contracting party, but the involuntary creditor of a debt of value that arose at a fixed point in the past. At the time of the expropriation, the State should have paid the *justiprecio* in full, and it should not benefit from the fact that it decided unilaterally to spread payment over time.

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29 *See* Tr. (4) 1469 (Castillo).

30 *See* references in footnote 3 above.

31 Tr. (4) 1393 (Castillo); Castillo **CER-9**, ¶¶ 21(v), 66, 73-75, 91-92.

32 Tr. (4) 1396, 1399, 1424-26, 1432, 1435-36, 1467-69 (Castillo); Castillo Pres., **H-6**, pp. 5, 7, 12.

33 *See* Tr. (6) 2055 (Hundskopf); *see also* Castillo Rep., **CER-9**, ¶¶ 66-73; **Doc. RA-199**, Manuel María Diez, MANUAL DE DERECHO ADMINISTRATIVO (1981), p. 289 (noting that compensation for an expropriation is "the effective value" of what was taken "at the precise moment" in which it was taken); Tr. (4) 1393, 1416 (Castillo).

34 *See* Tr. (4) 1396, 1399, 1424-26, 1432, 1435-36, 1467-69 (Castillo); Castillo Pres., **H-6**, pp. 5, 7, 12.

35 Tr. (5) 1576 (Edwards).

36 *Cf.* Tr. (4) 1426-32 (Castillo).

37 Tr. (4) 1428-30 (Castillo).

24. *Second*, Peru did not challenge the fact that, with one single and inconsequential exception, every court decision and expert report in the record that expressly addressed the issue before the 2013 CT Order updated from the issuance date.[38] The report prepared by the MEF's own commission, created under Supreme Decree No. 148, updated the Land Bonds' principal from the issuance date.[39] So, too, did the 2006 and 2011 Agrarian Commission bills.[40] At the hearing, Peru chose to seize on the one exception—the *Laredo* case, in which the court-appointed expert used the date of the last clipped coupon instead.[41] But *Laredo*'s unique facts explain why it was an outlier. In that case, 20 out of the 25 bonds at issue were unclipped; only five bonds had been clipped at all; and, in each of those five instances, only *one* coupon was missing.[42] In those circumstances, Peru's quantum experts agreed that the effect of choosing between issuance date and last-clipped-coupon date was virtually nil.[43] Peru adduced no evidence that the parties or the court in *Laredo* devoted any attention at all to the issue, and it did not provide a single additional example of a Peruvian court updating Land Bonds from any date other than the issuance date.

25. *Finally*, the hearing in fact showed that Peru's approach of updating from the last-clipped-coupon date is arbitrary and value-destroying. Specifically, Peru offered no cogent explanation for why the last-clipped-coupon date, or any other alternative date, makes sense. It does not. Dr. Hundskopf's misconceived justification on the basis that the right of a transferee bondholder "is born with the bonds' acquisition" did not survive his admission that the value of the Land Bonds, as *títulos de valor nominativos*, does not change based on their holder.[44] And his

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38 **Doc. CE-99**, Supreme Court, Cas. No. 2755 (Lima), August 27, 2003, "Foundation" Section, ¶ 5 (updating to reflect the value of the Bonds when issued); **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, May 4, 2006, pp. 5, 7, 9, [12]-[13], [35]-[36] (updating from issuance date); **Doc. CE-14**, Supreme Court, Cas. No. 1002-2005 (Ica), July 12, 2006, "Foundation" Section, ¶ 15 (updating to reflect the value of the Bonds when issued); **Doc. CE-142**, Specialized Civil Court of Pacasmayo, Expert Report, File No. 163-1973, December 18, 2009, p. 4 (updating from *fecha de origen*); **Doc. CE-342**, *Pomalca*, August 14, 2014, pp. [15]-[19], [109]-[14] (updating from issuance date); **Doc. CE-518**, Report of Lázaro Alberto Cahuana Echegaray & Luis Burgos Encarnación, Vigésimo Sétimo Juzgado Civil, November 4, 2011, pp. [15]-[23] (updating from *fecha de colocación*).

39 **H-15** (**Doc. R-257** composite), 148 Commission Report, pp. [10]-[11].

40 **Doc. CE-12**, 2006 Agrarian Commission Report, p. 39; **Doc. CE-160**, 2011 Agrarian Commission Report, p. 18.

41 Peru's Pres., **H-2**, p. 29; Tr. (1) 238 (Peru's opening); Tr. (7) 2421 (Kunsman).

42 **Doc. CE-119**, Fifth Civil Court of Trujillo, Expert Report, File No. 303-72, November 6, 2006, pp. 3-4.

43 Tr. (7) 2458-60 (Kunsman).

44 *Compare* Hundskopf II, **RER-7**, ¶ 44, *with* Tr. (6) 2048-2050 (Hundskopf) (admitting that after 1979 the Bonds became freely transferable, which made them "not different from any other securities"). *See also*

speculation that other dates "could have . . . [been] *possible*"[45] does not establish that they would have been *right*. As Prof. Castillo explained, the last-clipped-coupon date—or any date other than issuance—has "nothing to do" with the original obligation to pay *justiprecio* that must be restored.[46]

26. Further illustrating the arbitrary and unprincipled nature of updating from the last-clipped-coupon date, Peru's quantum experts confirmed that the MEF's formulas treat otherwise identical coupons attached to clipped and unclipped bonds unequally. They admitted that "the MEF values one Bond's [c]oupons more highly than identical [c]oupons from . . . other Bonds."[47] In one example, the updated amount could be *230 times* lower for identical coupons if one set of coupons came from clipped bonds and the other set of coupons came from otherwise identical bonds from which no coupons had been clipped.[48]

27. Peru offered no rational economic justification for treating identical coupons from otherwise identical bonds differently depending on whether *other* coupons from those bonds are clipped or unclipped. There is none. Peru's quantum experts' suggestion that using the last-clipped-coupon date would be reasonable because "[t]he MEF is solving a problem of unpaid paper"[49] is flawed in both premise and conclusion. As Prof. Castillo explained, what triggers the application of the current value principle is not the fact of Peru's non-payment of the debt, but the nature of the underlying obligation itself.[50] The Land Bonds have *always* embodied debts of value subject to updating pursuant to Article 1236 of the Civil Code; that Peru stopped paying them did not affect their nature.[51] Indeed, as the 2001 CT Decision emphasized, the current value principle is "inherent" to the expropriated property itself, and payment of anything other than the obligation's current value "*was*, and continues to be, unconstitutional."[52]

Doc. RA-187, Law No. 27287, Peruvian Securities Act, June 6, 2000, Arts. 12, 14, 29.1, 92.

45 Hundskopf II, **RER-7**, ¶ 42 (emphasis added).

46 Tr. (4) 1468 (Castillo).

47 Tr. (7) 2439 (Peru's quantum experts).

48 *See, e.g.*, Tr. (7) 2438 (Peru's quantum experts).

49 Tr. (7) 2445 (Peru's quantum experts).

50 Tr. (4) 1393, 1398, 1431 (Castillo); Castillo Rep., **CER-9**, ¶¶ 64-75.

51 Tr. (4) 1392-93, 1395, 1398 (Castillo); Castillo Rep., **CER-9**, ¶¶ 52-57.

52 **Doc. CE-11**, 2001 CT Decision, "Foundation" Section, ¶ 2 (emphasis added).

c. Compensatory Interest Applies on the Updated Principal.

28. Peru also did not rebut that Gramercy is entitled to compensatory interest on the properly-updated value of the Land Bonds' outstanding principal.[53]

29. *First*, Peru did not challenge Prof. Castillo's testimony that interest seeks to compensate bondholders' forgone opportunities, and therefore that it is owed *in addition* to the inflation-updating of the principal.[54] For example, as Dr. Hundskopf acknowledged, the

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[53] *See* Tr. (1) 79-82, 133 (Gramercy's opening); Gramercy's Pres., **H-1**, pp. 93, 96, 109; Statement of Claim, **C-34**, ¶¶ 247-250; Reply, **C-63**, ¶¶ 325-29, 518-20, 527-30, 534-41; Tr. (4) 1395, 1405 (Castillo); Castillo Rep., **CER-9**, ¶¶ 15, 21(iii), 58-63; Castillo Pres., **H-6**, pp. 6-7, 11-12; Tr. (5) 1571-72, 1574-78, 1603-04 (Edwards); Edwards Pres., **H-8**, pp. 3-4, 6, 8, 11, 34, 36; Edwards II, **CER-6**, ¶¶ 31-52, 61-64; Edwards I, **CER-4**, ¶¶ 51-56, 147, 158, 169; **Doc. CE-12**, 2006 Agrarian Commission Report, p. 39; **Doc. CE-160**, 2011 Agrarian Commission Report, p. 18; **Doc. CE-162**, Congress of Peru, Permanent Committee, Debate Transcript, July 18, 2011, p. 24 (last paragraph); **H-15** (**Doc. R-257** composite), 148 Commission Report, pp. [10]-[11]; **Doc. R-418**, Bill No. 11459/2004-CR, August 24, 2004, Arts. 7, 8; **Doc. R-419**, Bill No. 11971/2004-CR, November 2004, p. 4, 15-16; **Doc. R-466**, Bill No. 3272/2008-CR, 2008, Art. 7; **Doc R-502**, Bill No. 3272/2008-CR, May 21, 2009, Arts. 7-8. For Peruvian court cases, see **Doc. CE-14**, Supreme Court, Cas. No. 1002-2005 ICA, July 12, 2006, "Foundation" Section, ¶ 5; **Doc. CE-15**, Supreme Court, Cas. No. 1958-2009, January 26, 2010, "Foundation" Section, ¶¶ 3, 4, 7, 8; **Doc. CE-17**, 2013 CT Order, ¶¶ 25, 28; *id.*, Mesía "Dissent," ¶¶ 23-25; **Doc. CE-40**, Constitutional Tribunal, Writ, April 7, 2015, Fortini Dissent, p. [6]; **Doc. CE-99**, Supreme Court, Cas. No. 2755 (Lima), August 27, 2003, "Foundation" Section, ¶¶ 5, 8, 12; **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, May 4, 2006, pp. 7-8; **Doc. CE-119**, Fifth Civil Court of Trujillo, Expert Report, File No. 303-72, November 6, 2006, pp. 4-5; **Doc. CE-126**, Superior Court of La Libertad, Second Civil Chamber, Resolution, Case File No. 652-07, June 14, 2007, "Foundation" Section, ¶¶ 3, 4, 5; *id.*, "Has Resolved" Section; **Doc. CE-128**, Supreme Court, Cas. No. 2146-2006-LIMA, September 6, 2007, "Foundation" Section, ¶ 6; **Doc. CE-134**, Superior Court of Lima, First Civil Chamber, Ruling, Case File No. 01898-2007, August 14, 2008, "Foundation" Section, ¶ 10; **Doc. CE-148**, Civil Court of Pacasmayo, Resolution, Case File No. 163-73, January 29, 2010, "Foundation" Section, ¶ 6; **Doc. CE-342**, *Pomalca*, pp. [15]-[19], [109]-[14]; **Doc. CE-518**, Report of Lázaro Alberto Cahuana Echegaray & Luis Burgos Encarnación, Vigésimo Sétimo Juzgado Civil, November 4, 2011, pp. 6-13; **Doc. CE-528**, Supreme Court, Cas. No. 4201-2010-LIMA, September 4, 2012, "Foundation" Section, ¶¶ 3, 5; **Doc. CE-572**, Lima Sixteenth Commercial Civil First Instance Court, Case File No. 12196-2009-0-1817-JR-CO-16, March 18, 2014, "Foundation" Section, ¶¶ 4, 8.

[54] Tr. (4) 1395-96 (Castillo); Castillo Pres., **H-6**, pp. 6-7, 11-12; Castillo Rep., **CER-9**, ¶¶ 15, 21(iii), 58-63; **Doc. CE-479**, Felipe Osterling Parodi & Mario Castillo Freyre, COMPENDIO DE DERECHO DE LAS OBLIGACIONES (2008), p. 497; **Doc. RA-357**, Felipe Osterling Parodi & Mario Castillo Freyre, *El Nominalismo y el Valorismo en el Perú*, REVISTA JURÍDICA DEL

2004 CT Decision allowed bondholders to receive the payment of the updated debt, *plus the interest* applicable under the law.[55] In fact, Dr. Hundskopf agreed that interest on top of inflation-updating "is highly coherent."[56]

30. *Second*, Peru also did not challenge Prof. Castillo's testimony that the requirement to pay full reparation for an expropriation under Article 70 of the Constitution, including to pay damages for losses associated with that expropriation, justifies awarding interest at a rate that compensates bondholders for the opportunities they lost.[57] Support exists in the historical record for this approach, too. Emergency Decree 88 and the 2006 Agrarian Commission Bill, for instance, provided for compound interest on the inflation-adjusted value, at rates of 7.5% and 6.7%, respectively, which were higher than the coupon rates of the Land Bonds themselves.[58] As the report accompanying the 2006 Bill noted, it was necessary to award interest "that reflects [bondholders'] cost of opportunity."[59] Prof. Edwards similarly testified that "we have to provide for compensatory interest that takes into account lost opportunity for not having received those monies on time."[60] His analysis leads to a rate of 7.22%, reflecting the average historical return on debt in Peru as a conservative proxy for the bondholders' forgone opportunities.[61]

31. *Finally*, Peru did not challenge that, at a minimum, Gramercy could expect to receive interest at the coupon rates of four, five or six percent, which its quantum experts accepted was the virtually unanimous practice of Peruvian courts and court-appointed experts.[62] Peru's quantum experts conceded that, where courts deviated from the coupon rates, they in fact awarded *higher*, not lower, interest amounts.[63] In the *Saavedra* case, for instance, the court applied the legal or statutory interest rate (*tasa de interés legal*), which was as high as *300%* during certain periods, resulting in an award of interest more than 20 times

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PERÚ (2001), pp. 45-46; **Doc. RA-390**, Felipe Osterling Parodi, LAS OBLIGACIONES (2007), p. 33.

55 Tr. (6) 2063 (Hundskopf); *see also* **Doc. CE-107**, 2004 CT Decision, "Foundation" Section, ¶ 17 (holding that bondholders have the right of "going to court to demand payment of the updated debt, *plus the interest* that is applicable under the law") (emphasis added).

56 Tr. (6) 2070 (Hundskopf).

57 Tr. (4) 1396-97 (Castillo).

58 Tr. (5) 1773 (Edwards); Edwards II, **CER-6**, ¶¶ 56, 59-60, 71, 130; **Doc. CE-88**, Emergency Decree No. 088-2000, Art. 5(a); **Doc. CE-12**, 2006 Agrarian Commission Report, p. 40.

59 **CE-12**, **Doc. CE-12**, 2006 Agrarian Commission Report, p. 32.

60 Tr. (5) 1574 (Edwards).

61 Tr. (5) 1581-83, 1703-09, 1733-34 (Edwards); Edwards Pres., **H-8**, p. 11; Edwards I, **CER-4**, § VI; Edwards II, **CER-6**, § II.B.

62 Tr. (4) 1397 (Castillo); Tr. (7) 2479-80 (Peru's quantum experts).

63 Tr. (7) 2479-80 (Peru's quantum experts).

greater than the updated principal.[64] Thus, even though the *Saavedra* court awarded simple interest, the total interest awarded was much higher than compound interest at the stated coupon rates or even Prof. Edwards's rate of 7.22%.[65] And, in *Luna*—another of the cases Peru's quantum experts put forward—the court awarded compound interest at a real rate of 3.915% *on top of* the stated coupon rates.[66]

2. Gramercy Invested In Reliance on that Clear Entitlement to Current Value.

32. The testimony also proved that CPI-updating from the issuance date, plus interest, was not only what Peruvian law required, but also what Gramercy legitimately expected when investing in the Land Bonds.[67] Legitimate expectations are an element of fair and equitable treatment, to which the Treaty expressly refers.[68] The ruling of the International Court of Justice ("***ICJ***") in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* does not affect that conclusion, and indeed neither party has invoked it. The ICJ in fact recognized that investment treaty tribunals refer to investors' legitimate expectations when applying investment treaty clauses that provide for fair and equitable treatment, but observed that "it does not follow" from this practice that the legitimate expectations of one State could give rise to general international law obligations for another State.[69] That observation is as uncontroversial as it is inapt to this case: it does not mean that legitimate expectations of an *investor* are irrelevant either to the minimum standard of treatment of aliens under international law, or to the meaning of "fair and equitable treatment" in investment protection

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64 Tr. (7) 2466-81 (Peru's quantum experts); **Doc. CE-142**, Specialized Civil Court of Pacasmayo, Expert Report, File No. 163-1973, December 18, 2009, pp. 6, 9-14.

65 *See* Tr. (7) 2466-78 (Peru's quantum experts).

66 *See* Tr. (7) 2478-79 (Peru's quantum experts); *see also* **Doc. CE-117**, Fourteenth Civil Court of Lima, Expert Report, File No. 31548-2001, May 4, 2006, pp. 7-8.

67 *See generally* Tr. (1) 70, 79-93 (Gramercy's opening); Gramercy's Pres., **H-1**, 22, 115-17; Statement of Claim, **C-34**, ¶¶ 66-67, 183-84; Reply, **C-63**, § III.B.1; Koenigsberger I, **CWS-3**, ¶¶ 29-31, 33-35; Koenigsberger II, **CWS-4**, ¶¶ 1-4, 8-13.

68 *See* Statement of Claim, **C-34** ¶ 178; Reply, **C-63** ¶ 285; *see also* **Doc. CE-139**, Treaty, Art. 10.5 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including *fair and equitable treatment* and full protection and security." (emphasis added)); *id.*, Annex 10-B, Art. 3(a)(ii) (referring to "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" as part of the expropriation analysis); *cf.* Statement of Defense, **R-34**, ¶¶ 252-53 (assuming for the sake of argument, but not disputing, that legitimate expectations are the dominant element of the fair and equitable treatment obligation).

69 *Cf.* **H-20**, *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v. Chile*), Judgment, 2018 I.C.J. REP. 507 (October 1), ¶ 162.

agreements like the Treaty, which exist precisely to encourage investors to invest.

33. Gramercy's expectation that it was entitled to the current value of its Land Bonds and that, if it did not reach a consensual resolution with Peru, it would be able to enforce those rights in Peruvian courts, is both unquestionable and legitimate. *First*, Peru's attempt to diminish Gramercy's due diligence did not succeed. Robert Koenigsberger, Gramercy's founder and Chief Investment Officer, described the due diligence that Gramercy conducted on Peru's creditworthiness and on bondholders' legal entitlement to the Land Bonds' CPI-updated principal and interest.[70] Peru did not establish any meaningful inaccuracies in the due diligence memorandum itself, and the inconsequential example on which it seized only revealed that Peru was confused about the publication dates of the CT decisions cited.[71] Peru also did not challenge Mr. Koenigsberger's testimony that the memorandum accurately reflected Gramercy's contemporaneous expectations.[72]

34. *Second*, Peru could not rebut the legitimacy of Gramercy's contemporaneous conclusion that the agrarian reform debt "has to be paid at its real value, adjusted for inflation."[73] As noted above, the evidence in this proceeding, including from Peru's own witnesses and the consensus view of the Peruvian legal experts, vindicates that expectation.

35. Peru's attempt to develop a new theory at the hearing about how the Land Bonds gave Gramercy only "expectative rights" (*derechos expectaticios*) did not last long.[74] Alfredo Bullard explained in unchallenged testimony that this language, plucked from the purchase contracts, serves to allocate collection risk between assignor and assignee, effectively disclaiming any obligation of the selling bondholder

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70 Tr. (2) 378-84, 473-75, 477-78, 608-11, 618-20 (Koenigsberger) (explaining how Gramercy's contemporaneous due diligence included both top-down and bottom-up analyses).

71 *Compare* Rejoinder, **R-65**, ¶ 234 (suggesting that memorandum was "replete with errors" and contained "several references to a 'March 15, 2005 . . . decision' even though the Constitutional Tribunal did not rule on the Agrarian Reform Bonds on March 15, 2005"), *with* Tr. (2) 386-91 (Koenigsberger) (explaining that "March 2005 is the publication date, and the actual issue date was prior to that, I believe, in late 2004, in August," and noting that "it is not uncommon in Latin America to have an issue date and then to have a publication date").

72 Tr. (2) 383-91, 618-20 (Koenigsberger).

73 *See* **Doc. CE-114**, Memorandum from David Herzberg to Robert Koenigsberger, January 24, 2006, p. [2] (noting that "land reform claims are an indemnization debt, and has to be paid at its real value, adjusted for inflation"); Tr. (1) 98 (Gramercy's opening).

74 *See, e.g.*, Tr. (1) 265 (Peru's opening) ("It's not an absolute right. It's not a clear right. It's not a clear legal certainty. It's a 'derecho expectatitivo [*sic*].'"); *id.*, 267 ("That's the story of purchasing expectative rights by Gramercy at a time of legal uncertainty.").

to make whole Gramercy, as purchaser, if Gramercy was not able to collect payment from Peru.[75] It does *not* call into question the value of the Land Bonds, or Gramercy's legal entitlement to current value, or Peru's obligation to pay that value.

36. Indeed, contrary to Peru's attempts to depict the Land Bonds as "smelly" and "just paper,"[76] Min. Castilla, Vice-Min. Sotelo, and Rodrigo Olivares-Caminal—Professor of Banking and Finance Law and an expert in sovereign debt who has first-hand experience with debt restructurings around the world—all confirmed that the Land Bonds are sovereign obligations and that Peru guaranteed payment on that paper without any reservation whatsoever.[77] Continuing on Peru's drumbeat, on direct, Dr. Hundskopf had characterized Gramercy's rights under the Land Bonds as "a gamble" or "an option."[78] But when pressed, he "withdrew" that characterization and admitted that "it is no doubt an obligation of the State to pay the Land Bonds. There is no doubt about it."[79] Dr. Hundskopf also admitted that, at least after the 2001 CT Decision, any buyer of Land Bonds had a "clear" right for Peru to pay the updated current value of the principal, even if, just like with any other security, the buyer ran a risk of not collecting that payment.[80]

37. Similarly, Peru's attempt to sow uncertainty about whether Gramercy validly acquired authentic Land Bonds also did not survive the hearing. Peru did not rebut that Gramercy's 2006 memorandum correctly identified the steps required to acquire the Land Bonds.[81] Mr. Koenigsberger and Robert Lanava, who was Gramercy's Head of Operations during the 2006-2008 acquisition period and is now Chief Compliance Officer, both confirmed on cross-examination that Gramercy worked with Peruvian counsel to authenticate and validly acquire the Land Bonds.[82] Mr. Lanava testified that, after Gramercy's Peruvian counsel physically reviewed them for authenticity, he received each Land Bond package, containing the bond certificates, the title with notarized transfer to Gramercy, sales contracts, testimonies of the sellers, and *sentencias judiciales* (the judgments declaring the transfer of the

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75 Tr. (5) 1898-99 (Bullard); *see also* Bullard Pres., **H-9**, p. 8.

76 *See, e.g.*, Tr. (1) 231, 350 (Peru's opening).

77 Tr. (3) 904-05 (Sotelo); Tr. (4) 1305 (Castilla) ("[T]he Peruvian State has the obligation to meet all the obligations that it has before it, whether it be the Land Bonds or any other debt."); Olivares-Caminal Pres., **H-7**, pp. 4-5; Tr. (5) 1482-83 (Olivares-Caminal); **Doc. CE-1**, Decree Law No. 17716, Land Reform Act, June 24, 1969, Art. 175 (providing that the Land Bonds "will be guaranteed by the State without reservations whatsoever.")

78 Tr. (6) 2014-15 (Hundskopf).

79 Tr. (6) 2016 (Hundskopf).

80 Tr. (6) 2049-50, 54 (Hundskopf).

81 *See* **Doc. CE-114**, Memorandum from David Herzberg to Robert Koenigsberger, January 24, 2006, pp. [2-3]; *see also* Tr. (2) 550-51 (Koenigsberger).

82 Tr. (2) 478, 551, 620 (Koenigsberger); Tr. (2) 673, 682-86, 698-701 (Lanava).

underlying land to Peru).[83] As both Mr. Koenigsberger and Mr. Lanava testified, Gramercy offered multiple times to provide the Land Bonds to Peru for authentication, but Peru rejected those offers.[84]

38. Gramercy executed hundreds of notarized assignment agreements with individual bondholders, and Peru did not question Prof. Bullard on his opinion that Gramercy validly acquired the Land Bonds and that no further formalities were necessary.[85] Dr. Hundskopf, in turn, backtracked yet again: recanting the speculation in one of his reports that there might have been uncertainty about whether Land Bonds could validly be transferred, on cross-examination he readily acknowledged that registration of securities transfers under Peruvian law are declarative (not constitutive) formalities, and that he now "ha[d] [n]o doubts whatsoever" about the validity of Gramercy's purchase contracts and "agree[s] with Mr. Bullard 100 percent."[86]

39. *Finally*, the testimony also proved fatal for Peru's refrain that, until the 2013 CT Order, there was no legal framework for paying the Land Bonds or for negotiating a global resolution of the kind Gramercy repeatedly proposed.[87] Both Min. Castilla and Vice-Min. Sotelo confirmed that individual bondholders had always had the right to have their Land Bonds paid and, until the 2013 CT Resolutions, the right to go to the Peruvian courts to obtain a judgment awarding the properly updated value of their Land Bonds, plus interest.[88]

40. The only thing that was lacking was an *administrative* process for resolving the agrarian reform debt as a whole—a process that the *MEF itself* was responsible for establishing.[89] As Vice-Min. Sotelo acknowledged, the MEF "had to abide by" the 2001 CT Decision—which was binding on all public officials—and it was "the Ministry of

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83 Tr. (2) 678-79, 683 (Lanava).

84 Tr. (2) 549 (Koenigsberger); Tr. (2) 700 (Lanava).

85 Tr. (5) 1897-1902 (Bullard); Bullard Rep., **CER-10**, § III.

86 *Compare* Hundskopf II, **RER-7**, ¶¶ 5, 7, 14 (claiming that "the transfer of the Agrarian Bonds was valid under certain conditions, among them registry with the Agrarian Development Bank" and that he does not agree with Prof. Bullard's analysis of transferability), *with* Tr. (6) 2043-45 (Hundskopf) (admitting that "he has no doubts [that Gramercy is the legitimate acquirer of the Bonds] if there is an assignment of rights where the assignor and the assignee are identified."), *and id.*, 2048-50 (claiming he "never said that" registration affected validity, agreeing that "no provision in the Peruvian law" says so, that registration is only declarative, not constitutive, of the right, and that since 1979 "no limitations exist" on Land Bonds' transferability).

87 *Cf.* Peru's Pres., **H-2**, pp. 28-30, 34; Statement of Defense, **R-43**, ¶¶ 32-51.

88 Tr. (3) 904, 908, 914, 915-18 (Sotelo); Tr. (4) 1242-44 (Castilla); *see also* **Doc. R-298**, Report No. 004-2011-EF/52. 04 from DGETP to Vice-Minister of Finance, May 9, 2011, ¶¶ 14-15; **Doc. R-462**, Constitutional Tribunal Record No. 00022-1996, Engineers' Bar Association, p. [715].

89 Tr. (1) 88 (Gramercy's opening); Tr. (4) 1189-93 (Castilla); Tr. (3) 1053 (Sotelo).

Economy and Finance that ha[d] to do the updating[.]"[90] Similarly, Min. Castilla recognized that "in 2001 the Constitutional Tribunal Order required the public authorities, including the Executive Branch, to establish a legal framework."[91] He admitted that the President or the MEF could have done so by decree, without any further congressional act—as it had done in 2000 with Emergency Decree No. 88, or indeed as it is now doing with the 2014 Supreme Decrees—in Vice-Min. Sotelo's words, "paying [the Land Bonds] according to the legal rules…that the Ministry itself established."[92] All the MEF needed to do was to "establish . . . a mechanism that would make it possible to undertake the evaluation . . . and [] an administrative mechanism that would make it possible to make the payments once the valuation was done."[93] It was precisely *because* the MEF was responsible for creating this global solution that Gramercy repeatedly wrote to the executive with various proposals for a productive bond swap.[94]

41. But the MEF ignored both Gramercy and the CT. Instead of establishing an administrative mechanism for payment consistent with the 2001 CT Decision, the MEF dragged bondholders through protracted court proceedings in which it took untenable positions, including arguing that the Land Bond debt had lapsed or that nominal payment sufficed, despite the 2001 CT Decision having decisively foreclosed any such contention—the kind of argument that in many courts would be not just dismissible but sanctionable.[95] In the same vein, the MEF continued to rebuff Gramercy's efforts to find a global solution to the agrarian reform debt, on the same circular and obstinate basis that it lacked the kind of administrative framework that it was duty-bound to create.[96] The hearing put a nail in the coffin of that

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90 Tr. (3) 906-07 (Sotelo); *see also* Tr. (2) 927-928 (Sotelo) ("MEF was bound by the 2001 Constitutional Court ruling"); Tr. (4) 1188 (Castilla) ("[A]ll public entities were obligated to abide by the judgment of the Constitutional Tribunal.").

91 Tr. (4) 1189 (Castilla).

92 *See* Tr. (4) 1191- 93 (Castilla); *see also* Tr. (3) 1053 (Sotelo).

93 Tr. (4) 1175 (Castilla).

94 *See, e.g.*, **Doc. CE-490** / **R-261**, Letter from Gramercy to Peru of May 7, 2009; **Doc. CE-185**, Letter from Gramercy to the President of the Council of Ministers and the MEF of December 31, 2013; **Doc. CE-190**, Letter from Gramercy to the President of the Council of Ministers and the MEF of April 21, 2014, p. 3; **CE-216**, Letter from Gramercy to Amb. Luis Castilla of December 23, 2015, p. 5; **CE-256**, Letter from Gramercy to Amb. Luis Castilla of January 29, 2016, p. 4; *see also* Notice of Intent, **C-2** ¶¶ 11-12, 56; Statement of Claim, **C-34** ¶¶ 115-121; Reply, **C-63**, ¶¶ 91, 188, 212, 346, 557; Koenigsberger I, **CWS-3**, ¶¶ 11-19, 22, 34-35, 44-49, 55-56, 60, 69-70; Koenigsberger II, **CWS-4**, ¶¶ 30-35, 38, 41-42, 48.

95 *See, e.g.*, **Doc. R-462**, CT Record No. 00022-1996, Engineers' Bar Association, pp. [385]-[87], [389]-[90]; **Doc. CE-17**, 2013 CT Order, ¶ 15; **Doc. CE-160**, 2011 Agrarian Commission Report, §7, p.14.

96 **Doc. R-262**, Report No. 073-2009-EF/75.20 from DNEP to Vice-Minister of Finance, June 30, 2009, ¶ 3 ("[A]djustment of the value of the Land Reform Bonds is only possible via the judiciary."); Sotelo I, **RWS-1**, ¶ 27.

excuse, too: as Vice-Min. Sotelo admitted, "[t]here was no legal bar to the [MEF], in the context of preparing the draft bill . . . from sitting down and discussing with the Bondholders a common solution."[97]

42. Meanwhile, as Min. Castilla conceded, the various legislative proposals that Peru tried to cite as evidence of some uncertainty about the meaning of current value sought to bridge the administrative gap that the MEF's own obstinacy created[98]—*not* to cast doubt on the meaning of the current value principle, or to prejudice bondholders' ability to obtain current value in the courts. Mr. Koenigsberger testified that recourse to courts is what Gramercy expected, too: besides the legislative attempts to create a "consensual path" to the resolution of the Land Bond debt framework, "there was always another legal framework, which is Bondholders always had the right to go to local courts."[99] Indeed, as Vice-Min. Sotelo testified, "this is the right that all bondholders had."[100] Min. Castilla further confirmed that individual bondholders had "recourse to [local] courts," and that they had successfully secured "judgments in [their] favor."[101] And, given the MEF's intractable refusal to pay without a court order, "[b]ondholders were routinely suing and getting judgments against the Ministry for updated payment of the Land Reform debt," in which courts "updated [the] value of the Land Reform Bonds applying the CPI."[102] Indeed, Gramercy was on the road to doing so for part of its portfolio in the *Pomalca* case, in which court-appointed experts had updated the value of Gramercy's Land Bonds using CPI plus compound interest, before it discontinued those proceedings in order to commence this arbitration.[103]

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97 Tr. (3) 921-22 (Sotelo); *see also* Notice of Intent, **C-2**, ¶¶ 11-12, 56; Statement of Claim, **C-34**, ¶¶ 115-21; Reply, **C-63**, ¶¶ 91, 188, 212, 346, 557.

98 *Cf.* Tr. (4) 1189 (Castilla) (noting that, in 2011, "attempts were made to establish a legal framework via bill" to comply with the 2001 CT Decision).

99 Tr. (2) 494-95 (Koenigsberger) ("[T]here's two paths. There's the consensual path, which might have gone along the path of what the Congress might pass and how the Ministry might interpret it, but there was always another legal framework, which is Bondholders always had the right to go to local courts. . . .").

100 Tr. (3) 914 (Sotelo); *see also* Tr. (2) 908 (Sotelo) (agreeing that "Bondholders could . . . go to the Courts—to Peruvian justice system—to ask for a process of valuing, and then the Peruvian State would pay as per the order of the judge," and concluding that "[Bondholders] have always had the right to go to the Courts").

101 Tr. (4) 1244 (Castilla).

102 Tr. (3) 916-18 (Sotelo); *see also* **Doc. R-298**, Report No. 004-2011-EF/52.04 from DGETP to Vice-Min. of Finance, May 9, 2011, ¶¶ 14-15.

103 *See* **Doc. CE-342**, *Pomalca*, August 26, 2014, pp. [15]-[19], [109]-[14]; Statement of Claim, **C-34**, ¶¶ 157, 235; Reply, **C-63**, ¶¶ 242, 325, 484, 530, 535-38; Tr. (1) 81, 146, 154, 167-69 (Gramercy's opening); Gramercy's Pres., **H-1**, pp. 182, 207; Edwards II, **CER-6**, ¶ 61-64.

43. Thus, none of Peru's attempts to cast doubt as to the meaning of current value, or to defuse Gramercy's entitlement to receive it, survived the hearing.

B. The 2013 CT Order Was the Product of Improper Influence from the MEF, in Breach of the Treaty.

44. The centerpiece of Peru's defense has always been that the CT's imprimatur somehow shields from scrutiny all of Peru's breaches of the Treaty.[104] But the hearing proved that the 2013 CT Order was part of Peru's breach, not an excuse for it. The key facts remain undisputed.[105] After nearly two years of deliberation, a majority of the CT was poised to issue a decision affirming the decade-long consensus about the manner in which the agrarian reform debt should be updated. Yet, five business days later, the CT issued an order reversing the existing legal framework, and—in breach of its own rules and procedures—that majority decision was transformed, with white-out, into a forged dissent.

45. That shocking reversal was not the result of considered legal analysis by the highest court in the land. It was, instead, the result of dissembling and improper interference *by the MEF* in the CT's decision-making. The hearing testimony, corroborated by the other evidence in the record, leaves no doubt that the MEF caused the CT to render a decision whose impact even the Justices professed to not understand, whose key elements could have come only from Prof. Seminario's deficient work for the MEF, and whose premise of budgetary sustainability Min. Castilla and Vice-Min. Sotelo admitted had no empirical basis. Peru did not offer any of the CT Justices to deny the MEF's interference. The record allows for no other explanation, and Min. Castilla all but confessed to it on the stand.

46. *First*, the undisputed sequence of events surrounding the CT's decision leaves no doubt about the MEF's interference. After years of deliberation, on Tuesday, July 9, 2013, the majority of the CT's Justices endorsed an opinion drafted by the Rapporteur, Justice Gerardo Eto Cruz.[106] Like the uniform jurisprudence of the Peruvian courts before it, that Opinion ordered updating of the Bonds' unpaid principal using CPI from the issuance date, plus interest at the stated coupon rate.[107] The Justices were due to affix their final signatures to this decision at the CT's next plenary the following Tuesday, July 16, which

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[104] *See* Statement of Defense, **R-34**, ¶¶87, 90-93, 110-13, 119-20, 221, 240-41, 243, 245, 250-51, 266, 272, 288, 297; Rejoinder, **R-65** ¶¶ 188-200, 201, 205, 356, 366, 377, 384, 407, 414, 423.

[105] *See* Statement of Claim, **C-34** ¶¶ 16-18, 80-100; Reply, **C-63** ¶¶ 6, 404-12, 431-35.

[106] **Doc. CE-31**, Motion of Justice Mesía, ¶ 2; **Doc. CE-675**, 2019 Congressional Hearing, pp. 10-11 (Urviola).

[107] **Doc. CE-17**, 2013 CT Order, Mesía "Dissent," ¶¶ 23-25.

would have been their last day in office before Congress was scheduled to replace most of them.[108]

47. On the same day, however, then-President Ollanta Humala publicly warned the Justices not to rule on the Land Bonds.[109] On Friday, July 11, Min. Castilla—who had previously stated that it was "not appropriate to comment on the matter"[110]—reportedly told the press that he was now "confident" that the CT would act with responsibility and deliberation, and specifically that it "will do nothing to harm the country's budgetary balance in issuing its ruling on payment of land reform debts decision."[111] And, indeed, Justice Eto told Peruvian prosecutors that the very next day, on Saturday, July 12, Chief Justice Urviola gave him an "alternative draft" that rejected CPI in favor of dollarization, and asked him to sign the new draft and present it to the other Justices as if Justice Eto had been the author.[112]

48. At the CT's next plenary, the following Tuesday, July 16, 2013—the day when final signatures were to be added to the previously agreed opinion affirming CPI-updating—Justice Eto submitted the new draft for discussion. Chief Justice Oscar Urviola and Justice Ernesto Álvarez—both of whom had, a week earlier, endorsed CPI-updating—joined in the opinion, while Justice Carlos Mesía "expressed his disagreement with [this] new draft opinion."[113] Because it was the first time that Justice Mesía saw the "alternative draft," he demanded the 48 hours to which he was entitled to review the new draft and write a dissent.[114] But Justice Mesía was denied that right. Instead, that same day, someone transformed Justice Eto's original majority opinion into Justice Mesía's purported dissent—by erasing with white-out Justice Eto's signature from every page on which it appeared and the signature blocks for Justices Urviola and Álvarez, as well as by replacing "the Ruling of the Constitutional Tribunal" with the "Dissenting Opinion

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[108] **Doc. CE-26**, *Ollanta Humala Pidió al TC "Abstenerse a Dar Fallos en Temas Sensibles,"* EL COMERCIO, July 9, 2013, p. 1; **Doc. CE-675**, 2019 Congressional Hearing p. 29 (Eto); *see also* **Doc. CE-179**, *Tres Miembros de Gana Perú son Nombrados Magistrados del Tribunal Constitucional*, NOTICIAS PERÚ HOY, July 17, 2013; Castilla I, **RWS-2**, ¶ 30.

[109] **Doc. CE-26**, *Ollanta Humala Pidió al TC "Abstenerse a Dar Fallos en Temas Sensibles,"* EL COMERCIO, July 9, 2013, p. 1

[110] **Doc. CE-173_T**, *El TC Exigirá al Gobierno Pagar los Bonos de la Reforma Agraria*, PERU21, November 2, 2012, p. 2; *see also* Castilla I, **RWS-2**, ¶ 28; Castilla II, **RWS-4**, ¶ 5; **CE-259**, *Peru Court Plans to Clean Up Billions in Land Bonds*, REUTERS, November 2, 2012, p. 3.

[111] *See* **Doc. CE-291**, *Minister of Economy Confident that CT Will Act with Deliberation Regarding Land Reform Debt*, ANDINA, July 11, 2013; Tr. (4) 1213 *et seq*. (Castilla).

[112] **Doc. CE-28**, Eto Statement to Prosecutor, Question 6.

[113] **Doc. CE-177**, CT Minutes, p. 2; *see also* **Doc. CE-675**, 2019 Congressional Hearing, p. 22 (Álvarez).

[114] **Doc. CE-24**, Mesía Letter, p. 2; **Doc. CE-29**, Mesía Statement to Prosecutor, Question 4.

of Justice Mesía Ramirez."[115] Chief Justice Urviola then declared a 3-3 tie and cast a tie-breaking vote in favor of the new draft, which then became the 2013 CT Order.[116]

49. What changed in those few days, between July 9 and July 12, to turn the CT's decision so profoundly on its head that the years-long considered majority view became the dissent? In short, the MEF intervened. Peru does not deny that, over the course of these few days, there were several *ex parte* meetings between CT Justices and representatives of the Executive Branch, including after-hours visits from President Humala's personal advisor, Roy Gates, and discussions with Min. Castilla himself.[117] Chief Justice Urviola contemporaneously admitted these meetings in the media.[118] Justice Eto testified to Peruvian Congress that there was what he called a "*historic meeting* in the Ministry of Economy, with the entire Constitutional Tribunal," in which the MEF "explained the impact of the debt" and "the Minister of Economy himself" informed the Justices that the debt "might reach the stratospheric amount of 18.5 billion," unless the CT adopted a novel valuation methodology.[119]

50. Peru did not rebut or even attempt to explain this evidence at the hearing. And there is no other explanation for the evolution in Min. Castilla's statements to the press and his confidence, by July 11, about the CT's respect for the alleged principle of "budgetary balance." On cross-examination, Min. Castilla—a former Ambassador to the United States, who is a graduate of McGill University, and has a

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[115] **Doc. CE-29**, Mesía Statement to Prosecutor, Questions 4, 6, 7, 9-12; **Doc. CE-25**, Forensic Report, pp. 5, 10-29; **Doc. CE-36**, Díaz Transcript, pp. 23, 46; **Doc. CE-675**, 2019 Congressional Hearing, p. 29, 33 (Eto).

[116] *Cf.* Statement of Defense, **R-34**, ¶ 99.

[117] **Doc. CE-292**, *Urviola: Decisión del TC Sobre Bonos de Reforma Agraria Ayudará al MEF a Actualizar su Valor*, EL COMERCIO, July 12, 2013 (Urviola stating that the CT "coordinated" with the MEF on the terms on which the Bonds would be paid, so as to avoid causing problems for the Treasury); **Doc. CE-178**, *Dr. Oscar Urviola, Presidente del TC Entrevistado por Jaime de Althaus*, LA HORA, July 16, 2013, p. [3]; **Doc. R-587**, Transcript, Interview with Juan Jiménez Mayor, President of the Council of Ministers, TV PERU, July 11, 2013, p. [2] (Jimenez confirming that the executive branch had met with Justice Urviola); **Doc. CE-289**, Justice Urviola Responds to Humala, RADIO PROGRAMAS DEL PERÚ, July 10, 2013, pp. [2]-[3] (Urviola admitting that one of the President's advisors, presumably Eduardo Roy Gates, had visited the Tribunal in regard to the Land Bonds case); **Doc. CE-27**, Register of Visitors to the Constitutional Tribunal, July 11, 2013, p. 2.

[118] **Doc. CE-292**, *Urviola: Decisión del TC Sobre Bonos de Reforma Agraria Ayudará al MEF a Actualizar su Valor*, EL COMERCIO, July 12, 2013; **Doc. CE-178**, *Dr. Oscar Urviola, Presidente del TC Entrevistado por Jaime de Althaus*, LA HORA, July 16, 2013, p. [3]; **Doc. CE-289**, Justice Urviola Responds to Humala, RADIO PROGRAMAS DEL PERÚ, July 10, 2013, pp. [2]-[3].

[119] **Doc. CE-675**, 2019 Congressional Hearing, p. 36 (Eto) (emphasis added).

Ph.D. in economics from Johns Hopkins University[120]—preferred invoking "translation" issues and technological difficulties to giving a direct answer.[121] In the end, however, he did not deny that he met with certain CT Justices in the days immediately before the 2013 CT Order was issued; he did not contradict Chief Justice Urviola's and Justice Eto's accounts; and he did not disavow the contemporaneous news reports about those meetings.[122] Careful to state that he had no memory of any "official" meetings with a "plenary" of the CT Justices,[123] he ultimately admitted that there "must have been" a meeting with some CT Justices about the Land Bonds and that, in any such meeting, he would have emphasized the government's "limited resources" and discussed the "budgetary consequences" for Peru of the CT's decision.[124] And there is nothing in the record to suggest that Min. Castilla ever issued any public statement disavowing the press articles reporting on those events. In other words, both his testimony and prior conduct are entirely consistent with Justice Eto's account: less detailed, but equally damning.

51. *Second*, the substance of the resulting 2013 CT Order is yet another smoking gun. The Order contains several idiosyncratic features that clearly originate from the work performed by the MEF's consultant, Prof. Seminario, which the MEF had commissioned in 2011 but had never publicly released.[125] In particular, the 2013 CT Order betrays the telltale signs of Prof. Seminario's misguided and error-filled proposal: (*i*) rejection of CPI; (*ii*) use of a "parity exchange rate" to convert to U.S. dollars; (*iii*) inflation updating by reference to U.S. Treasury bonds; and (*iv*) the idea of updating only from the last-clipped-coupon date.

- The 2013 CT Order shared the same flawed premise as

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120 Tr. (3) 1149-50 (Castilla).

121 Tr. (3) 1198-99, 1215-17, 1224-26 (Castilla).

122 Tr. (4) 1201 (Castilla) ("I remember meeting Mr. Urviola at some point in time to discuss—not that issue but sundry issues, issues that had to do with budget-related decisions"); *id*., ("I had to interact with a number [of] institutions, and those institutions included the Constitutional Tribunal"); *id*., 1204 ("I don't discard the fact that Mr Urviola talked about this case and other cases"); *id*., 1207 ("I do not recall the exact dates, but it could be that Mr. Urviola could have asked me about certain Decisions, and he may have included this one. This one was very important . . . if there was a meeting—it must have been—but I do not recall."); *id*., 1209 ("I am not going to question what Justice Urviola said in a public statement."); *id*., 1210 ("Chief Justice Urviola may have referred to this or any other matter, and my position was always that of responsibility that judicial legal judgements had to be aware that we had limited resources for the population and also to address any Decision by the Court."); *id*., 1211-12 (agreeing with the President's summary of his testimony as having been that he and Justice Urviola discussed the "budgetary issues and also the budgetary consequences of [the CT's] Decision").

123 Tr. (4) 1230-33.

124 Tr. (4) 1207, 1210-12.

125 Castilla I, **RWS-2**, ¶¶ 19-20; Sotelo I, **RWS-1**, ¶ 37; Sotelo II, **RWS-3**, ¶¶ 14-15.

Prof. Seminario's report: that CPI is an inaccurate method for updating in times of hyperinflation.[126] But as Prof. Edwards explained, calculating the current value of the Land Bonds properly, from issuance date, does not actually require using CPI from any of the years of hyperinflation, but instead involves a comparison of two periods that are both *unaffected* by hyperinflation.[127] Ironically, the method that the CT endorsed *does* use CPI from the period of hyperinflation.[128]

- The 2013 CT Order ordered the use of a "parity exchange rate" to convert from *soles de oro* to U.S. dollars, rather than an official exchange rate or some other exchange rate.[129]

- For inflation updating, the 2013 CT Order ordered the application of the yield on the U.S. Treasury bonds, just as Prof. Seminario had done, instead of some other benchmark like U.S. CPI.[130]

- Similarly, while the original majority opinion acknowledged that it was "imperative that the debt be updated from the date of placement of the bonds to the date of payment,"[131] after the MEF's intervention, the CT instead held that updating should occur "as of the date of default on the payment of the coupons on the bond."[132] That half-sentence—bereft of even the slightest justification—has had the disastrous consequence of causing those bondholders who dutifully redeemed their coupons until the inflationary period to be paid for their remaining unclipped coupons as little as half a per cent of what bondholders holding otherwise identical bonds would receive for the identical coupons from their unclipped bonds.[133]

52. Not a single one of these value-destroying concepts—much less the combination of all four of them—can be found in the extensive record of the CT proceedings, or in the many public initiatives

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126 *Compare* **Doc. CE-17**, 2013 CT Order, ¶ 23 ("[I]n times of deep economic crisis, the CPI gets disconnected from the economic reality."), *with* **Doc. CE-751** / **R-297** / **R-569**, Seminario Report, p. [2] ("[T]here are serious issues with CPI since it is highly unlikely that the basket has not suffered variation during periods of hyperinflation").

127 *See* Tr. (5) 1586-87 (Edwards); Edwards II, **CER-6**, ¶ 23; *see also* Tr. (7) 2487-88 (Peru's quantum experts) (acknowledging that "CPI, at a particular point in time, is a measurement of prices at that time").

128 *See* Tr. (5) 1620-21 (Edwards); Edwards Pres., **H-8**, p. 33; Edwards II, **CER-6**, ¶ 23; *see also* Tr. (3) 1012-14, 1021-22 (Sotelo) (acknowledging that the MEF Supreme Decrees continue to use Peruvian CPI).

129 *Compare* **Doc. CE-17**, 2013 CT Order, ¶¶ 24-25, *with* **Doc. CE-751** / **R-297** / **R-569**, Seminario Report, pp. [11]-[12].

130 *See* **Doc. CE-751** / **R-297** / **R-569**, Seminario Report, pp. [3]-[5]; **CE-17**, 2013 CT Order, ¶¶ 24-25.

131 **Doc. CE-17**, 2013 CT Order, Mesía "Dissent," ¶ 24.

132 **Doc. CE-17**, 2013 CT Order, ¶ 25.

133 *Cf.* Tr. (7) 2438 (Peru's quantum experts).

about the Land Bonds over the preceding decade, or (as Prof. Castillo explained) in any prior decision of a Peruvian court.[134] The CT Justices hardly came up with these economically irrational concepts themselves. But they were all present in Prof. Seminario's report to the MEF. There is simply no explanation for how the CT would have arrived at the very same, jerry-rigged dollarization method as Prof. Seminario, *other than* the MEF's intervention.

53. Moreover, Peru offered no evidence that the CT Justices even understood—let alone weighed—the consequences of trusting the MEF as they did. The updating methodology in the 2013 CT Order constitutes a single sentence, without any explanation or elaboration.[135] Quite to the contrary, Justice Álvarez testified to Congress that the "formula for payment" was "a technical issue *of whose consequences we were at the time unaware*."[136] Because he and his fellow Justices were "unsure of the consequences of either" of the competing valuation methodologies, he explained, they simply "withdrew, and Liquid Paper was used."[137]

54. *Third*, if this account of the judicial branch capitulating to the executive were not troubling enough, Peru has failed to rebut an additional fact that only compounds the MEF's interference. A critical, and very specific, part of Justice Eto's testimony is that the MEF told the Justices that the outstanding agrarian reform debt was as high as US$18.5 billion, which Peru could not afford.[138] The CT Justices testified that the very human desire to avoid being personally responsible for their nation's financial ruin motivated their capitulation: Justice Eto testified that the MEF led him and his fellow Justices to believe that CPI-updating "would have been devastating, an extraordinary high amount,"[139] and that it was thus necessary to "temper or tone down the judgment" to "reduce[] the impact of the debt."[140] Justice Urviola likewise testified that CPI-updating "would have meant total ruin for the Peruvian State," would have "bankrupted the Peruvian State" and "left it with a debt that would take many generations to pay off."[141]

55. But that US$18.5 billion figure had no basis in reality. If Peru's representations to this Tribunal about the completeness of its document production and Min. Castilla's and Vice-Min. Sotelo's

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134 Castillo Rep., **CER-9**, ¶¶ 93, 94, 99, 104-07 (explaining the dollarization formula of the 2013 CT Order is *sui generis* and unprecedented).

135 **Doc. CE-17**, 2013 CT Order, ¶ 25.

136 **Doc. CE-675**, 2019 Congressional Hearing, pp. 22, 75 (Álvarez).

137 **Doc. CE-675**, 2019 Congressional Hearing, p. 22 (Álvarez).

138 **Doc. CE-675**, 2019 Congressional Hearing, p. 27 (Eto) (explaining that the CT adopted dollarization because "if the CPI had been used, the amount of the debt would be far too high. We had the impression that it would amount to more or less 4.5 billion dollars, increasing with interest and everything to 18.5 billion dollars.").

139 **Doc. CE-675**, 2019 Congressional Hearing, p. 29 (Álvarez).

140 **Doc. CE-675**, 2019 Congressional Hearing, p. 32 (Álvarez).

141 **Doc. CE-675**, 2019 Congressional Hearing, pp. 10, 12 (Urviola).

testimony are to be believed, the CT issued the 2013 CT Order without the benefit of any "presentations, studies, calculations, and estimates of the impact of the value of the total Land Bond debt outstanding on Peru's budget."[142] And Justice Eto himself testified that "[t]here was no . . . documentation or anything," that the CT simply "took note" of the information the MEF provided to it, and that was "the end of the matter."[143] The most likely source for this "stratospheric amount" is again Prof. Seminario, whose analysis artificially inflated the impact of the debt by calculating the value of the entire 15 billion *soles de oro* of Land Bonds that Peru had originally authorized, rather than the modest fraction of that—at a maximum, 2.5 billion *soles de oro*—that remained outstanding in the years prior to his analysis.[144] His numbers were at least *500%* too high.

56. Whatever one may think of the wisdom or propriety of the CT's deference to the MEF, the end result of this reliance is that the 2013 CT Order was issued for "reasons that are different from those put forward by the decision maker" and in "willful disregard of due process and proper procedure," and was therefore arbitrary as a matter of law.[145]

57. *Finally*, Peru's attempts to somehow legitimize this extraordinary series of events by claiming that "the use of Liquid Paper was not something crazy," or that it affected only the dissent, purposely miss the point.[146] It is of course not the use of white-out *per se* that constitutes Peru's Treaty breach. Rather, Peru's breaches result from the manner in which the MEF misled a critical mass of the CT Justices into reversing the established legal framework; the way those Justices misused white-out to manufacture a forged dissent and violate the CT's own deliberative rules to create a "tie" that the Chief Justice could break with a casting vote; and, as the next section shows, the MEF's further

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142 PO6, Annex A, p. 1 (Request 1) (committing to produce "[a]ny documents, including presentations, studies, calculations, and estimates of the impact of the value of the total Land Bond debt outstanding on Peru's budget, and draft decisions, prepared by or for the Government of Peru and provided directly or indirectly to the [CT], any of its justices, or employees . . . prior to the issuance of the July 2013 CT Order" but ultimately producing none); *see also* Tr. (4) 1199-1204, 1207, 1210, 1231-35 (Castilla); Tr. (3) 959-60 (Sotelo) (denying having met with or provided information to the CT about the agrarian reform debt); Castilla II, **RWS-4**, ¶ 5; Castilla I, **RWS-2**, ¶¶ 28, 32; **Doc. CE-173_T**, *El TC Exigirá al Gobierno Pagar los Bonos de la Reforma Agraria*, PERU21, November 2, 2012, p. 2; **CE-259**, *Peru Court Plans to Clean Up Billions in Land Bonds*, REUTERS, November 2, 2012, p. 3 (Min. Castilla denying having met with or provided information to the CT about the agrarian reform debt).

143 **Doc. CE-675**, 2019 Congressional Hearing, pp. 36-37 (Eto).

144 **CE-751**, Seminario Report, pp. [3]-[5], [13], [21]-[22]; *see also* Tr. (3) 949-50 (Sotelo) ("[Prof. Seminario] was valuing the entire original principal [of 15 billion *soles de oro*] that had been authorized by law").

145 *See* Reply, **C-63**, ¶¶ 388, 422, 425 (*citing Saluka* Partial Award, **Doc. CA-39** ¶ 307, **Doc. CA-29**, *Lemire* Decision, ¶ 262, **Doc. CA-43**, *Waste Management II* Award, ¶ 98).

146 *Cf.* Tr. (1) 274 (Peru's opening).

exploitation of that hastily-issued Order to eviscerate the value of Gramercy's investment.

C. The MEF's Supreme Decrees Breached the Treaty.

58. Having created a semblance of cover through its extraordinary interference in the CT's work, the MEF then implemented its goal of completely wiping out the agrarian reform debt without paying it. In doing so, it stripped Gramercy of the minimum standard of treatment that the Treaty requires, indirectly expropriated Gramercy by depriving it of substantially all the value of its investment, and treated Gramercy less favorably than Peruvian and Italian investors. The hearing confirmed that: *first*, the formulas at the heart of the Supreme Decrees are arbitrary, irrational, and value-destroying, are not faithful even to the flawed the 2013 CT Order, and the process by which they came about confirms that the MEF never seriously intended to comply with that Order; *second*, the Supreme Decrees were enacted in violation of basic principles of Peruvian administrative law, and are thus illegal, unreasonable, and automatically inapplicable; and *finally*, the Bondholder Process the Decrees created is confiscatory, non-transparent, and discriminatory and violates due process.

1. The MEF's Formulas Are Arbitrary and Irrational and Destroy Substantially All of the Land Bonds' Value.

59. Peru does not dispute either that a government act that is arbitrary or irrational falls below the Treaty's minimum standard of treatment,[147] or that an act that substantially destroys the value of an investment without providing compensation is expropriatory.[148] The hearing proved not only that the MEF's formulas have precisely those characteristics, but also that the MEF—despite issuing three formulas—never engaged in a serious or good-faith attempt to implement the 2013 CT Order properly in accordance with its terms.

60. *First*, the formulas are irrational on their face. Prof. Edwards gave unrebutted testimony that the formulas contain elementary mathematical blunders and violate basic rules of economics in purporting to calculate parity exchange rates.

- **The 2014 Formula.** Peru accepted Prof. Edwards's testimony that the 2014 formula, which reduced to the mathematical impossibility that $x=x^2$, was "completely messed up."[149] Min. Castilla and

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147 *See, e.g.*, Gramercy's Pres., **H-1**, p. 77 (citing authorities); Reply, **C-63**, ¶ 339 (citing authorities); Statement of Claim, **C-34**, ¶ 177 (citing authorities).

148 *See, e.g.*, Gramercy's Pres., **H-1**, p. 71 (citing authorities); Statement of Claim, **C-34**, ¶ 151 (citing authorities); *accord* Tr. (1) 332 (Peru's opening).

149 Tr. (5) 1693 (Edwards); *accord id.*, 1610 (pointing out the formula's "gross mistake" and noting that "it ends up saying that any unit in soles oro is equal to some unit in soles oro squared"); Edwards I, ¶¶ 182-217; Edwards II, ¶¶ 84-90; Reply, ¶ 247; *see also* Tr. (1) 122 (Gramercy) ("[T]he

Vice-Min. Sotelo agreed that it contained errors.[150] Peru's own quantum experts conceded as much, and completely cast that formula aside, insisting that they "wouldn't carry out the formula and try to make sense of the result" because doing so would be "nonsensical."[151]

- **The February 2017 Formula.** Peru similarly did not rebut Prof. Edwards's testimony that the February 2017 "precisions" to the formula allowed for a wide range of possible interpretations—including a valuation as high as *US$2.62 billion* for Gramercy's Land Bonds.[152] Vice-Min. Sotelo admitted that the formula was subject to "various interpretations."[153] Gramercy correctly perceived that reasonable interpretations of the MEF's precisions produced values much higher than what the MEF had previously offered,[154] and in that context a different Gramercy fund seized an opportunity to acquire an indirect interest in additional bonds (which are not subject to this arbitration).[155] But the MEF ultimately refused even to explain the precisions or to disclose the full revised formula.[156]

- **The August 2017 Formula.** Peru's third formula was likewise arbitrary and irrational. It is undisputed that the August 2017 formula calculates parity exchange rates using only *one* month—January 1969—as the base period.[157] The formula thus contravenes what Prof. Edwards described as the "basic rules" for calculating parity exchange rates: to take a "long average" from a period when the economy is in a "steady state" of "equilibrium" and "tranquility;" which means, of course, "*never* use one month."[158] The MEF's irrational formula violates both of those basic rules at once: it chooses just one month at an "extraordinary" time—a time of political turmoil following a military coup, with capital controls, hyperinflation, and currency pegs.[159]

61. Peru also did not challenge Prof. Edwards's testimony that *all* the MEF's formulas are logically flawed in another, very

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formulas in them reduced to the mathematical impossibility that X equals X squared.").

150 Tr. (4) 1259-60 (Castilla); Tr. (3) 967, 969 (Sotelo).

151 Tr. (7) 2501-03 (Peru's quantum experts).

152 *See* Edwards Pres., **H-8,** p. 31; Tr. (5) 1612-13 (Edwards); Edwards I, **CER-4**, ¶ 235; *accord* Tr. (3) 997-98 (Sotelo); Tr. (7) 2502-05 (Peru's quantum experts).

153 Tr. (3) 998 (Sotelo).

154 *See* Tr. (2) 636-37 (Koenigsberger).

155 *See* Opposition, **C-80**, ¶¶ 51-55.

156 *See* Tr. (2) 644-45 (Koenigsberger); **Doc. R-161**, Gramercy's Letter to Peru of March 8, 2017, p. 2; Opposition, **C-80**, ¶ 53.

157 *See, e.g.*, **Doc. CE-275**, August 2017 Supreme Decree, Appendix 1; Tr. (5) 1620 (Edwards); Tr. (7) 2404 (Kunsman).

158 Tr. (5) 1616-18, 1822-23 (Edwards) (emphasis added).

159 Tr. (5) 1823 (Edwards); *see also id*., 1598-99 (Edwards).

significant respect: they apply the MEF's senseless parity exchange rates only when converting *into* U.S. dollars; however, to convert *back* to *nuevos soles*, the MEF then adopts the currently prevailing exchange rate.[160] As Prof. Edwards pointed out, because the current rate is much lower than the MEF's broken parity exchange rate, the MEF's formulas destroy value twice.[161] None of Peru's witnesses offered any explanation for why the MEF mismatched exchange rates in this self-serving way. One of Peru's quantum experts in fact confessed: "I have no idea. We didn't do that calculation."[162]

62. *Second*, the MEF's formulas are also arbitrary in what they all omit: *none* of the MEF's formulas made good on the CT's directive to pay compensatory interest. While the CT accepted the MEF's formula for updating the principal for inflation by converting it to dollars at a parity exchange rate and adding the U.S. Treasury bond yield, it repeatedly held that interest should be paid on top of that updated amount: "*plus* the interest."[163] A 2015 opinion by a CT Justice addressing the 2013 CT Order similarly observed that the CT had ordered "the Ministry of Economy and Finance to pay the full updated amount, *plus interest*."[164] As discussed in further detail in Section III.B.3.b below, Peru's Supreme Court, in decisions applying the 2013 CT Order, consistently foresaw payment of interest on top of the dollarization-updated principal.[165] And yet, the MEF *never* included compensatory interest in its formulas—not even in the last Supreme Decree, which was issued *after* two of the Supreme Court decisions awarding interest pursuant to the 2013 CT Order. With the stroke of a pen, the MEF thus inexplicably wrote off decades of interest—the single most important component of the compensation due to bondholders.

63. *Third*, as a result of these gross failures, each of the formulas yields trivial amounts and destroys value so substantially as to be confiscatory. Peru did not dispute that conclusion with respect to the 2014 formula, which was the basis on which Gramercy commenced arbitration. That formula returns a valuation of *US$861,000* for all of Gramercy's Land Bonds—a sum that Peru's own quantum experts called "miniscule"[166] and that represents only *0.05%* of the Land Bonds' true value.[167] But the conclusion holds true also with respect to the August

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160 Edwards Pres., **H-8**, p. 29.

161 Tr. (5) 1611-12 (Edwards).

162 Tr. (7) 2534 (Peru's quantum experts).

163 **CE-17**, 2013 CT Order, "Resolution" Section, ¶ 28; *see also id.*, "Has Resolved" Section, ¶ 2 ("plus interest").

164 **Doc. CE-40**, CT Writ, Fortini Dissent, April 7, 2015, p. [5].

165 *See* **Doc. RA-391**, Supreme Court, Cas. No. 9450-2014-LIMA, October 27, 2015, ¶¶ 11.3, 12.3-12.4; **Doc. RA-392**, Supreme Court, Cas. No. 4245-2015-LIMA, October 6, 2016, ¶ 15, IV; **Doc. RA-393**, Supreme Court, Cas. No. 8741-2015-LIMA, October 3, 2017, ¶ 10, IV; **Doc. RA-394**, Cas. No. 11339-2016-LIMA, April 10, 2018, ¶¶ 10.3, 10.5, III; *see also* Gramercy's Pres., **H-1**, p. 169.

166 Tr. (7) 2505 (Peru's quantum experts).

167 *See* Reply, **C-63**, ¶ 247.

2017 formula. In its argument, Peru defended the August 2017 formula on the ground that Gramercy might have recovered close to what it paid for its Land Bonds—in nominal terms, and a decade earlier—if it had submitted them to the Bondholder Process.[168] This apparent coincidence is, however, no defense at all. It does not excuse the formula's arbitrary and irrational character, which falls below the minimum standard of treatment the Treaty requires.

64. Even as a defense to expropriation, Peru's argument still fails. It relies on a false comparison: the *nominal* purchase price paid by Gramercy between 2006 and 2008 is in fact worth much more in real terms than that same nominal amount in 2018.[169] Even if the comparison were appropriate, Peru does not dispute that Gramercy's purchase price represented a steep discount to its Land Bonds' true value, and that the reason for the discount was Peru's own conduct—as Ms. G. recounted in testimony that Peru chose not to cross-examine about her first-hand experience of selling Land Bonds to Gramercy.[170] That discounted purchase price cannot provide the right measure of damages, and would amount to allowing a State to benefit from its own unlawful conduct.

65. In any event, the mere US$34 million that Gramercy calculates could be paid to it under the last iteration of the MEF's formula is—by any measure—still expropriatory. It represents less than *2%* of the true value of Gramercy's Land Bonds (US$1.8 billion), and is in fact *25 times* smaller than what Gramercy would have likely obtained in Peruvian courts (US$841 million). Peru's reliance on *GAMI v. Mexico*, for the very first time at the hearing, is misplaced.[171] In *GAMI*, the tribunal found that Mexico had not violated the NAFTA because, during the pendency of the arbitration, Mexico returned three of five sugar mills in which the investor had indirectly invested, and which Mexico had unlawfully expropriated, and promised to pay compensation for the two remaining mills.[172] Peru, in contrast, has not even attempted to make that sort of significant reparation or to give back anything close to substantial value to Gramercy.

66. *Fourth*, the formulas are not just irrational and arbitrary on their face, but in fact have no reasoned justification or rationale at all. That the MEF issued *three* formulas in as many years only further underscores the arbitrary and haphazard nature of the MEF's actions. Indeed, the hearing belied Peru's claim that the MEF "contemplated that there would be further attention to valuation issues."[173] As Vice-Min. Sotelo testified, "the Peruvian State and the MEF, as a prestigious institution, cannot anticipate that the formula is going to be corrected.

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168 *Cf.* Tr. (1) 224, 333-34 (Peru's opening).

169 *See* Reply, **C-63**, ¶ 574.

170 *See* Ms. G., **CWS-7**, ¶¶ 16, 18, 22.

171 *Cf.* Tr. (1) 335 (Peru's opening) (*citing* **Doc. RA-71**, *GAMI* Final Award).

172 *See* **Doc. RA-71**, *GAMI* Final Award, ¶¶ 8, 122, 132.

173 *Cf.* Tr. (1) 334 (Peru's opening).

That cannot happen."[174] And, yet, *all* of the MEF formulas violate the Treaty.

67. Peru initially defended its formulas by invoking the work of Prof. Seminario—the author of the 2014 formula and the 2017 "precisions"—but the hearing revealed that the MEF blindly rubberstamped his materially flawed work.[175] After the 2013 CT Order, rather than commissioning a study of parity exchange rates, the MEF cut and pasted the formula from Prof. Seminario's *2011* report, which the MEF had commissioned for a different purpose, and which does not include any rigorous analysis of parity exchange rates or explanation of the formulas.[176] Vice-Min. Sotelo conceded that Prof. Seminario's work was a rushed desktop study, concluded in a matter of mere days, which—while purportedly undertaken on the basis of vague instructions about "fiscal sustainability"—lacked any supporting macroeconomic analysis whatsoever.[177] And yet, she admitted that the MEF accepted Prof. Seminario's formula without *any* critical review. Because the MEF "had hired [Prof. Seminario] . . . to see what his Opinion was and *also to accept what he had concluded*," she said, "*no one* within the Ministry questioned the formula."[178] Vice-Min. Sotelo acknowledged that the MEF again did not review Prof. Seminario's proposed "precisions"—including the nonsensical notion that CPI should be expressed in *soles de oro*—when it issued the February 2017 Decree.[179]

68. With the August 2017 formula, Peru jettisoned Prof. Seminario altogether, adopting, as Prof. Edwards put it, a "completely different" formula—"[d]ifferent rate, different system, different approach."[180] But the process leading up to the August 2017 formula was, if anything, even more arbitrary and haphazard. While the 2014 and February 2017 formulas can at least be traced back to Prof. Seminario's shoddy work, there is simply no justification or rationale at all for the August 2017 formula anywhere in the record, and Peru's witnesses could provide none either.

69. Peru's attempt to cloak the August 2017 formula in the apparent legitimacy of Central Bank data fell apart at the hearing.[181] Prof. Edwards gave unchallenged testimony that the Central Bank never published parity exchange rates, and Vice-Min. Sotelo "d[id] not know" otherwise.[182] As Prof. Edwards explained, what the Central Bank

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174 Tr. (3) 975 (Sotelo).

175 *Cf.* Statement of Defense, **R-34**, ¶ 113 ("The mathematical formulas . . . were from a report prepared by consultant Bruno Seminario."); *id.*, ¶ 115 (referencing Prof. Seminario's "precisions").

176 *See* Reply, **C-63**, ¶¶ 341-45; *see also* Statement of Defense, **R-34**, ¶ 82.

177 *See* Tr. (3) 933-941 (Sotelo).

178 Tr. (3) 948 (Sotelo) (emphases added).

179 Tr. (3) 991-92 (Sotelo).

180 Tr. (5) 1613 (Edwards).

181 *Cf.* Statement of Defense, **R-34**, ¶ 117; Tr. (3) 997-98 (Sotelo); Tr. (6) 1969-73 (Bullard).

182 Tr. (3) 1011 (Sotelo); Tr. (5) 1613-14 (Edwards).

provided at the MEF's request was simply a real exchange rate series that could be used as one of the *inputs* to calculate parity exchange rates.[183] In doing so, the Central Bank did not provide any parity exchange rate formulas or offer any analysis of how to calculate parity exchange rates, other than to warn that the "calculation of the parity level for a certain period is subject to the base period chosen"[184]—in other words, that the selection of the base period has a dramatic impact on the calculation of parity exchange rate.

70. But the MEF did not heed that warning. As it had done before, the MEF carried on, in Prof. Edwards's words, "without thinking, without reflecting."[185] Vice-Min. Sotelo acknowledged that anchoring the parity exchange rate to January 1969 "was a decision by the Ministry, not the Central Bank."[186] Yet, there is no explanation in the record for why the MEF chose that month. Vice-Min. Sotelo conceded that the "record for the process of adopting" the Decree contains *no* analysis of why, and how, the MEF took that decision.[187] The only evidence in the record suggests that the change was intended simply to reduce value even more: Vice-Min. Sotelo admitted that documents produced by Peru showed that the August 2017 formula was projected to *lower* the value ascribed to the Land Bonds.[188]

71. Peru's quantum experts could also shed no light on the economic rationale underlying that formula of unknown provenance.[189] They "didn't do any study about whether [the MEF's formula] would provide the type of Parity Exchange Rate that economists would agree on,"[190] and in fact they conceded that they could not explain it, either: "the 1969, I don't know the reasoning why."[191] Eventually it became clear that Peru's quantum experts simply lacked the necessary expertise on the subject. Isabel Kunsman was not familiar with basic inputs into the formula, such as that "real exchange rates" means exchange rates adjusted for inflation.[192] Brent Kaczmarek—who quipped that parity exchange rates was "not a deep-dive topic [he] like[s] to spend a lot of time on"[193]—admitted that he had not consulted any academic literature on parity exchange rates despite being aware of a "field of economics" dedicated to the topic.[194] Prof. Edwards, by contrast, wrote a book on the

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183 Tr. (5) 1613-20 (Edwards).

184 **Doc. R-1072**, Peru's Document Production, ROP034572, p. [40] (Letter No. 047-2017-BCRP from Julio Velarde Flores to Alfredo Thorne Vetter).

185 Tr. (5) 1618 (Edwards).

186 Tr. (3) 1009 (Sotelo).

187 Tr. (3) 1010 (Sotelo).

188 Tr. (3) 1028-29 (Sotelo) (discussing **Doc. R-1072**, ROP034572, p. [74]); Tr. (7) 2525 (Peru's quantum experts).

189 Tr. (7) 2516, 2522, 2524 (Peru's quantum experts).

190 Tr. (7) 2517 (Peru's quantum experts).

191 Tr. (7) 2523 (Peru's quantum experts).

192 Tr. (7) 2509 (Peru's quantum experts).

193 Tr. (7) 2529 (Peru's quantum experts).

194 Tr. (7) 2528-29 (Peru's quantum experts).

topic and has consulted with governments around the world on the calculation of parity exchange rates.[195]

72. It is thus no surprise that, just as Gramercy had foreshadowed in its opening, Peru did not present *any* witness capable of even *explaining* any of the three formulas, much less defending them.[196] Peru's witnesses and experts all made clear that they wanted nothing to do with the formulas: Min. Castilla, who signed the original 2014 Supreme Decrees, testified that he "did not work with formula[s]"; Vice-Min. Sotelo, who was in charge of implementing the Bondholder Process, said she was "not going to discuss the mathematical formula"; Dr. Wühler, whose task was to opine on whether the Bondholder Process was "fair and effective," claimed that the Process's "valuation and valuation methodology . . . was not part of my assignment"; and Mr. García-Godos, who was meant to defend the reasonableness of the Decrees promulgating the formulas, admitted he "ha[d] not delved deep into" those formulas.[197] No one defended the MEF's formulas because they are indefensible. And an act that cannot be explained or justified—that no one can defend—constitutes the very definition of arbitrariness.[198]

73. *Finally*, the hearing left no doubt that the MEF never took its mandate to carry out the 2013 CT Order seriously. As discussed in Section II.B above, the MEF's improper interference with the CT's deliberations corrupted the 2013 CT Order. But the way in which the MEF played the *carte blanche* that it had convinced the CT to give it is, effectively, more proof of Peru's bad faith.

74. As Justice Álvarez testified, "in principle, we had all agreed that the petition (i.e. the substance) must be declared well founded," noting that the bondholders "had been practically cheated by the State and we had to accept that they were right."[199] Indeed, the CT even chastised the MEF for "contradictorily . . . ignoring the Current Value Principle both in administrative and judicial proceedings,"[200] and ordered the MEF to act swiftly to implement a process for paying the debt—an obligation the Peruvian State had "no option but to honor."[201] Although a majority of the Justices yielded to the *sui generis* dollarization methodology that the MEF had peddled, they clearly still expected that whatever system the MEF put in place would result in large payments to bondholders—even if less than the US$18.5 billion they had been led to believe CPI updating would cost. Indeed, while Peru chose not to tender any of the CT Justices as witnesses in the arbitration, Justice Eto's unchallenged testimony before Congress confirms that the Justices believed that "[t]he judgment established a debt of

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195 *See* Edwards Pres., **H-8**, p. 1; Tr. (5) 1568-70, 1622 (Edwards).

196 Tr. (1) 122-23 (Gramercy's opening); Gramercy's Pres., **H-1**, p. 153.

197 Tr. (3) 991 (Sotelo); Tr. (4) 1261 (Castilla); Tr. (6) 2207 (Wühler); Tr. (6) 2116 (García-Godos).

198 *See* Reply, **C-63**, ¶ 339.

199 **Doc. CE-675**, 2019 Congressional Hearing, pp. 21, 74 (Álvarez).

200 **Doc. CE-17**, 2013 CT Order, ¶ 15.

201 **Doc. CE-17**, 2013 CT Order, ¶ 29.

approximately *2 billion dollars*."[202] The 2013 CT Order thus noted that "regardless of the option to be used in the process of quantifying the land reform debt, it *will amount to a fairly large figure*, which will undoubtedly generate an inevitable fiscal impact, *impossible to be faced immediately* without damaging important sections or sectors of our economy."[203] It contemplated that the debt might need to be paid "in installments or partial payments," to be "deferred throughout various budgetary periods," so as to ensure a "system of payments that is progressive."[204] Even if read in its best light and with a sympathetic gloss, the 2013 CT Order thus required—at a minimum—that the MEF develop a formula that in principle honored Peru's obligation to pay current value, but in doing so did not wreck the whole Peruvian economy and, in the CT's words, "mak[e] the original obligation impossible to be paid by the debtor."[205]

75. Min. Castilla conceded that the MEF indeed had to "carry[] out . . . [the] implementation of the [2013 CT Order in a manner that] would ensure that there would not be a serious sacrifice of either element of the balance, paying the Bondholders or fiscal sustainability."[206] Moreover, as both Min. Castilla and Vice-Min. Sotelo admitted, the MEF had an obligation to carry out that mandate with diligence and in good faith.[207]

76. But the various installments of the MEF's updating formula did not come even close to being a thoughtful, good-faith attempt to strike that balance. Both Min. Castilla and Vice-Min. Sotelo admitted that the MEF did not engage in any balancing exercise at all.[208] Peru adduced *no* evidence to the contrary: it presented no analyses purporting to assess how much bondholders would receive, how that amount compared to the true current value of the outstanding debt, or what the impact on Peru's fiscal budget would be, whether under any version of its formula or any other alternative valuation method. In fact, under the MEF's final formula, the value of *all* potentially outstanding bonds, estimated as of May 31, 2018, is just *US$221 million*.[209] In other words, even if *all* bonds that are not accounted for were presented for payment, the MEF's formula would have allowed Peru to wipe out its entire, decades-old Land Bond debt for about *one-tenth* of the value the CT had intended in its 2013 CT Order, and also less than what Gramercy would have received for the *Pomalca* Bonds alone. In reality, of course, Peru is paying even less: as noted in Section II.C.3 below, its byzantine

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202 **CE-675**, 2019 Congressional Hearing, pp. 21, 74 (Álvarez).

203 **Doc. CE-17**, 2013 CT Order, ¶ 29 (emphasis added).

204 **Doc. CE-17**, 2013 CT Order, ¶ 29.

205 **Doc. CE-17**, 2013 CT Order, ¶ 23.

206 Tr. (4) 1257-58 (Castilla).

207 Tr. (3) 970 (Sotelo); Tr. (4) 1238 (Castilla)

208 *See, e.g.*, Tr. (3) 1054-57 (Sotelo); Tr. (4) 1219-26 (Castilla).

209 The US$221 million estimate is extrapolated from the value of Gramercy's Land Bonds under the MEF's 2017 formula, assuming the total outstanding agrarian reform debt has a principal face value of 2.5 billion *soles de oro*, as explained in § III.B.4 below.

Bondholder Process has attracted only a fraction of the total outstanding debt and even that fraction is plagued by high drop-out rates.

77. Min. Castilla's dismissive approach to the issue is emblematic of the MEF's *modus operandi*: he admitted that he "didn't read [the 2013 CT Order] in detail,"[210] and he dismissed the landmark 2014 Supreme Decree that established the Bondholder Process as "one more of many Decrees that I would sign on a daily basis."[211] The same attitude is clear from then-President PPK's public stance: "I don't think we owe [Gramercy] anything. . . . It's that simple."[212] The MEF's formulas are thus irrational, arbitrary, profoundly value-destroying, and unjustified, *not* by mistake, but by the MEF's intentional or reckless disregard of the 2013 CT Order—even crediting that decision's validity.

2. The Supreme Decrees Violate Basic Peruvian Law Requirements of Legality and Reasonableness.

78. Peru cannot dispute that gross violations of domestic law are symptomatic of arbitrary conduct that falls below the Treaty's minimum standard of treatment.[213] Indeed, ostensibly as its defense, Peru touted how the MEF's Supreme Decrees and the Bondholder Process allegedly complied with Peruvian law.[214] But Prof. Bullard's testimony and Mr. García-Godos's cross-examination dispelled any such notion.

79. *First*, Prof. Bullard gave cogent and reliable testimony that the Supreme Decrees are illegal, unreasonable, and automatically inapplicable as a matter of Peruvian law, because the MEF: (*i*) failed to abide by formal legal requirements, including the obligation to pre-publish the draft Decrees for comment; (*ii*) did not justify or explain the reasons underlying the various formulas; and (*iii*) attempted to sidestep the control mechanism set out in Legislative Decree 1310 ("***LD 1310***"), under which the Executive Branch must submit analyses for approval before enacting regulations like the Supreme Decrees.[215] As Peru has

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[210] Tr. (4) 1247 (Castilla).

[211] Tr. (4) 1294 (Castilla).

[212] **Doc. CE-266**, *Peru's PPK: "I Don't Think We Owed [Gramercy] Anything,"* LATINFINANCE, August 22, 2016, p. 1.

[213] *See, e.g.*, **Doc. CA-40**, *Tza Yap Shum* Award, ¶ 218 ("[The Peruvian tax agency's] failure to observe its own procedures must be considered arbitrary."); **Doc. CA-29**, *Lemire* Decision, ¶ 385 (holding that "a blatant disregard of applicable [domestic legal] rules" translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard); **Doc. CA-187**, *TECO* Award, ¶ 458 (holding that a breach of MST is established where there is "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning").

[214] *See* Rejoinder, **R-65** ¶ 376; Statement of Defense, **R-34**, ¶ 251; *cf.* Reply, **C-63**, ¶¶ 374-84.

[215] *See* Bullard Pres., **H-9**, pp. 27, 52; *see also* Bullard Rep., **CER-10**, ¶¶ 132-55 (illegality), 156-204 (unreasonableness), 205-08 (inapplicability).

never denied, Prof. Bullard is a leading expert on the validity of administrative regulations—indeed, he has been engaged multiple times as an expert on that topic by Peru itself. Among other roles, he was the president of the tribunal at Peru's regulatory agency, INDECOPI, when it handed down the landmark case and binding precedent on the application of the core principles of legality and reasonableness.[216]

80. By and large, Peru chose not to cross-examine Prof. Bullard on the substance of his opinions. Peru put no questions *at all* to Prof. Bullard about the legality of the Supreme Decrees or their inapplicability under LD 1310.[217] And Peru's attempt to attack Prof. Bullard's credibility instead—through baseless conjectures about unrelated matters (such as his work as a legal expert appointed by the same counsel on behalf of Peru) that concerned entirely different factual patterns and legal issues—was both ineffective and inapposite.[218]

81. Peru's second tactic was the disingenuous suggestion that Prof. Bullard had failed to consider an exchange of letters between the MEF and the Central Bank, which Peru raised for the very first time at the hearing.[219] Prof. Bullard relied on the set of documents that Vice-Min. Sotelo, Peru's fact witness on the manner in which the Supreme Decrees were enacted, represented was the official record for each Decree and which did not include that document.[220] Both Peru and its expert Mr. García-Godos relied on that exact same set of documents.[221] In any event, this tactic backfired, too. As discussed in Section II.C.1 above, the Central Bank correspondence does not undermine Prof. Bullard's opinions, but only confirms that there is no rational explanation for the MEF's choice to anchor the parity exchange rate in the August 2017 formula to January 1969. Vice-Min. Sotelo admitted that she is unaware of any such explanation, which "is not in the record for the process of adopting Supreme Decree 242."[222]

82. *Second*, Peru's rebuttal expert, Mr. García-Godos, in fact corroborated Prof. Bullard's conclusions. On the stand, Mr. García-Godos agreed with Prof. Bullard that the MEF "had to abide by" certain legal requirements and formalities in passing the Decrees.[223] He acknowledged that the *Ley Orgánica del Poder Ejecutivo* (the "***LOPE***")—which he described as "one of the grounds of validity of the Supreme Decrees"—requires pre-publication of decrees when the law so

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216 *See* Bullard Rep., **CER-10**, ¶¶ 8, 105-06; *see also* Tr. (5) 1903-05 (Bullard); Bullard Pres., **H-9**, p. 22.

217 *Cf.* Bullard Pres., **H-9**, pp. 46-48, 51; Bullard Rep., **CER-10**, ¶¶ 205-08; Reply, **C-63**, ¶ 379.

218 *See generally* Tr. (5) 1928-49 (Bullard).

219 **Doc. R-1072**, ROP034572, pp. [39]-[40], [54].

220 *Compare* Tr. (3) 1000-01, 1072 (Sotelo), *and* Sotelo, **RWS-1**, ¶¶ 34, 38, 39, *with* Bullard Pres., **H-9**, p. 28.

221 *See* Rejoinder, **R-65** ¶ 205, fn. 440; Tr. (6) 2124-25 (García-Godos).

222 Tr. (3) 1010 (Sotelo).

223 Tr. (6) 2084 (García-Godos); *accord* Bullard Pres., **H-9**, p. 27.

requires, and that this was not done for the Supreme Decrees.[224] On cross-examination, he recanted his initial claim that pre-publication did not apply because no such "Law" or "statute" existed, ultimately admitting that the Treaty itself supplied that requirement,[225] and admitted that the LOPE's implementing decree did not qualify or limit the scope of the obligation to pre-publish regulations like the Supreme Decrees.[226]

83. Mr. García-Godos also recanted his claim that pre-publication and further consultations would have been superfluous, allegedly because the 2013 CT Order left the MEF only a narrow margin of discretion.[227] On the stand, he conceded that the 2013 CT Order did not go into the details of the updating formula, that "there was still scope for the Executive to exercise discretion and to implement the CT Order by different means," and that pre-publication could have helped to avoid the errors in the MEF's formulas.[228]

84. *Third*, Mr. García-Godos's and Vice-Min. Sotelo's testimony confirmed that the MEF failed to provide the reasoned justification that Peruvian law requires. Mr. García-Godos was quick to abandon his earlier opinion that a statement of reasons was not required under Peruvian law, and accepted that such statements must be accompanied by studies, technical reports, consultations with specialists, and references to public hearings.[229] He conceded the need to prepare a "rigorous" cost-benefit analysis, a "method of . . . a quantitative nature" that "is a tool of the utmost importance."[230] As Vice-Min. Sotelo confirmed, however, no such quantitative exercise was done for the Supreme Decrees—despite the fact that the Ministry of Justice specifically highlighted that defect.[231] Indeed, as Prof. Bullard testified,

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224 Tr. (6) 2083, 2099-2100 (García-Godos); *see also* García-Godos Pres., **H-11**, p. [5]; **Doc. CE-477**, Law No. 29158, Organic Law of the Executive Power, December 18, 2007, Art. 13(3).

225 *Compare* Tr. (6) 2100, 2104 (García-Godos), *and* García-Godos Pres., **H-11**, p. 8; *with* Tr. (6) 2106-07 (García-Godos) (admitting that the "obligation to prepublish . . . has its foundations on [the Treaty] as incorporated into Peruvian law," and that international treaties like the Treaty "*son normas con rango de ley*").

226 *See* Tr. (6) 2111 (García-Godos); *see also* **Doc. CE-489**, Supreme Decree No. 001-2009-JUS, January 15, 2009, Art. 14; Bullard Pres., **H-9**, p. 34.

227 *Cf.* García-Godos Rep., **RER-8**, ¶¶ 68, 75.

228 Tr. (6) 2116-17 (García-Godos); *see also id.*, 2113-14 (acknowledging that the 2013 CT Order did not specify "how the parity exchange rate was to be calculated," "the Base period which should be used," or "whether we should use the 1- or the 5- or the 10- or the 20- or the 30-year Treasury Bonds"); *accord* Tr. (4) 1258-59 (Castilla) (acknowledging that "the technical implementation . . . was the job of the MEF").

229 *Compare* Tr. (6) 2118 (García-Godos), *and* García-Godos Pres., **H-11**, p. 8, *with* Tr. (6) 2118-19, 2020-21 (García-Godos). *See also* **Doc. CE-477**, Law No 29158, Organic Law of the Executive Branch, December 18, 2007, Art. 13; **Doc. CE-452**, Supreme Decree No 008-2006-JUS, March 23, 2006, Arts. 1, 10; Bullard Rep., **CER-10**, ¶¶ 88, 112 & fn. 100, 137.

230 Tr. (6) 2121-22 (García-Godos); *accord* Tr. (5) 1909-10 (Bullard).

231 *See* Tr. (3) 979-89, 1002-03 (Sotelo); *accord* Tr. (5) 1911 (Bullard).

with no rebuttal, the boilerplate cost-benefit analysis language that appears in the Decrees is a textbook example of how *not* to justify a regulation.[232]

85. *Finally*, Mr. García-Godos ultimately agreed with Prof. Bullard that the Supreme Decrees are automatically inapplicable as a matter of Peruvian law because the MEF did not prepare the regulatory quality analysis (*análisis de calidad regulatoria*) ("***ACR***") that LD 1310 requires for any of the four Supreme Decrees.[233]

86. Both of Mr. García-Godos's two arguments for why LD 1310 should not apply collapsed at the hearing. While he initially speculated that the Supreme Decrees "would have passed [the] ACR test," he conceded that only the Multisectoral Commission was empowered to make that determination, and that holding otherwise "would defeat the whole purpose of having a mandatory external control."[234] And his prior claim that the Decrees were exempted from control because they are not norms of a "general character" was not only wrong on its face, but contradicted both by his own opinions and by the authorities he cited in his report.[235] Indeed, the *only* document in the record that suggests that LD 1310 does not apply to the Supreme Decrees is a self-serving memorandum prepared by the MEF itself, almost a year *after* the final Supreme Decree was issued, and in circumstances that would have triggered not only a declaration of the Supreme Decree's inapplicability, but also potential administrative liability for the MEF officials involved.[236] Under oath, Mr. García-Godos ultimately refused to say whether or not, in his professional opinion, the MEF's position was right: in his words, the matter "is up for discussion."[237] Thus, not even Peru's tendered legal expert—who has worked as an officer or consultant for the Peruvian Government for the better part of the last two

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232 Bullard Pres., **H-9**, p. 32; Bullard Rep., **CER-10**, ¶ 174 (citing **Doc. CE-653**, Ministry of Justice, Legislative Technical Guide for Preparing Normative Drafts by Executive Branch Entities (2018), p. 68).

233 Tr. (6) 2130-32 (García-Godos); Tr. (5) 1907-08 (Bullard); Bullard Pres., **H-9**, pp. 46-48, 51; Bullard Rep., **CER-10**, ¶¶ 205-08; Reply, **C-63**, ¶ 379.

234 Tr. (6) 2132-33 (García-Godos).

235 *Compare* Tr. (6) 2133 (García-Godos), *and* García-Godos Rep., **RER-8**, p. 19 (stating that the Supreme Decrees are not norms of a general character and are thus exempt from compliance with LD 1310), *with* Tr. (6) 2133-34 (agreeing that the legal definition of a Supreme Decree under Peruvian law makes reference to its general character), *and* García-Godos Rep., **RER-8**, ¶ 30 (same), *and* Tr. (6) 2135 (acknowledging that the *acción popular*, which Mr. García-Godos stated was available to bondholders, can only be filed against norms of a general character), *and id*., 2135-37, 2139-41 (agreeing that the scholars cited in his report all endorsed the view the Supreme Decrees are norms of a general character).

236 *See* Tr. (6) 2144-45 (García-Godos); *see also* **Doc. R-1148**, MEF, Memorandum No. 264-2018-EF/42.01, June 27, 2018.

237 Tr. (6) 2152 (García-Godos) ("*es discutible*").

decades[238]—could bring himself to vouch for the Supreme Decrees' compliance with Peruvian law requirements.

3. The Bondholder Process Is Confiscatory, Non-Transparent, and Discriminatory, and Violates Due Process.

87. The hearing also exposed the artificiality of Peru's defense of the arbitrary Supreme Decrees on the basis that the Bondholder Process they created was "functioning."[239] On the stand, all of the witnesses and experts—including Peru's—conceded that it was in fact functioning badly. Peru's own data about the Process, and the first-hand experience of the bondholders who actually participated in it—whose evidence Peru did not challenge, and whose stories Peru did not want the Tribunal and the public to hear—starkly illustrate the point. A process that, after six years, has paid only 4.6 million *nuevos soles* (about US$1.36 million), on less than *1%* of the outstanding principal of the bonds submitted to it, can hardly have been the kind of process that the CT believed it had mandated.[240] Peru did not challenge Gramercy's estimate, that, at its current pace, the Bondholder Process would exhaust the outstanding agrarian reform debt for *US$12 million*[241]—clearly not a "financially impossible" sum that would "impact[] fiscal resources, and consequently the basic services for the poorest population of our country."[242] The evidence thus confirmed that the Bondholder Process is exactly as Gramercy described it: arbitrary in design and a complete failure in execution.

88. *First*, Peru did not challenge the evidence of the bondholder witnesses who could have told the Tribunal first-hand about how the Process worked. Mr. S., a 91-year-old, twice-widowed father of 10 whose livelihood was taken away by Peru's Land Reforms, testified that the Process was a "joke" and a "trap" seeking to "deprive [bondholders] of fair compensation."[243] He received just *US$240* for the expropriation of 56 hectares of land in 1975.[244] Another bondholder, Ms. L., received just *US$67* for the expropriation of her family's 148 hectares of land in 1973.[245] Together, Peru paid Ms. L. and Mr. S.—for

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238 Tr. (6) 2154-55 (García-Godos); García-Godos Rep., **RER-8**, Appendix 1.

239 *Cf.* Tr. (1) 279, 283 (Peru opening); *id.*, 212-13, 341; Rejoinder, **R-65**, ¶ 201; Statement of Defense, **R-34**, ¶ 251.

240 *Cf.* Tr. (3) 900 (Sotelo); *id.*, (3) 1048-49; Olivares-Caminal Pres., **H-7**, p. 15.

241 *See* Tr. (1) 137-38 (Gramercy's opening); Gramercy's Pres., **H-1**, pp. 173-74 (citing **Doc. R-1062**, Administrative Process Status Table, August 31, 2019).

242 *Cf.* **Doc. CE-17**, 2013 CT Order, ¶ 29.

243 Mr. S., **CWS-9**, ¶ 22; Ms. L., **CWS-8**, ¶ 43.

244 Mr. S., **CWS-9**, ¶ 26.

245 Ms. L., **CWS-8**, ¶ 3.

over 200 hectares of land expropriated over 45 years ago—less than it paid its expert, Dr. Wühler, for just *one hour* of his time.[246]

89. *Second*, Peru's witnesses, Dr. Wühler, and Prof. Olivares-Caminal confirmed that Peru's own data show the Bondholder Process has been a failure in practice. By August 2019—five and a half years into the Process and seven months after the Process closed to new applications—only 443 cases, consisting of 12,902 bonds, had been submitted into the Process.[247] It takes on average *4.6 years* to receive any payment,[248] and as of August 2019, only *4.2%* of the cases in which the bonds had been authenticated, representing only *1.33%* of the total number of bonds submitted into the Process, had made it through to payment.[249] Of the bondholders who made it to the stage where they could see how much the MEF has decided to award them, only about *41%* chose to collect that amount.[250] Prof. Olivares-Caminal estimated, with no rebuttal from Peru, that overall only about 8.7% of the total outstanding principal has been submitted to the Process, and *less than 0.3%* has made it through the end.[251]

90. Even the updated statistics that Vice-Min. Sotelo introduced for the first time on the stand confirm how abysmal the results of this Process have been. She testified that, as of January 10, 2020, only "22 cases," representing "191 bonds," have reached a final valuation, for a total of "about 4.5 million" *nuevos soles*—about *US$1.36 million*.[252] These represent fewer than *6%* the cases and *2%* of the bonds that the MEF had authenticated as of August 31, 2019.[253] Peru has not paid even those paltry sums: it has instead spread out payments over time by swapping the Land Bonds for new government debt. Vice-Min. Sotelo testified that only about 1 million *nuevos soles—US$300,000*—was paid in cash.[254] And it has taken Peru *six years* to reach even that shocking outcome. The rate at which even the small number of submitted bonds are moving through the Process is so slow that it would take *100 years* for them all to be processed.[255] As Vice-Min. Sotelo explained, the Process is now closed for new registrations,[256] meaning that the amount that the MEF will pay out of the Bondholder Process is capped by the

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246 *See* Tr. (6) 2258 (Wühler) (hourly rate of US$400).

247 *See* **Doc. R-1062**, Administrative Process Table, August 31, 2019, tab "Formato A," cells B:454 and F:454.

248 *Cf.* **Doc. R-1062**, Administrative Process Table, August 31, 2019, tab "Formato A," column D; *id*., tab "RD Pagos," column O.

249 *Cf.* **Doc. R-1062,** Administrative Process Table, August 31, 2019, tab "RD Pagos") (showing payment of 16 cases, representing 152 bonds); **Doc. R-1064**, Administrative Process Summary Slide (reporting 377 authenticated cases, representing 11,395 bonds).

250 Tr. (6) 2228 (Wühler); *see also* Wühler Pres., **H-12**, p. 9.

251 Tr. (4) 1493 (Olivares-Caminal); Olivares-Caminal Pres., **H-7**, p. 15.

252 *See* Tr. (3) 900 (Sotelo); *see also id*., (3) 1048-49.

253 *Cf.* **Doc. R-1064**, Administrative Process Summary Slide.

254 Tr. (3) 1070 (Sotelo).

255 Tr. (3) 1050 (Sotelo).

256 Tr. (3) 1044-45 (Sotelo).

small number of bondholders who have opted to participate in the Process.

91. At the hearing, not a single witness or expert endorsed these figures as a success. Min. Castilla admitted that these results are "disappointing."[257] Prof. Olivares-Caminal concluded that Peru "has resolved just a tiny fraction of the overall debt" and that the Process it has put into place "does not contain any of the hallmarks of what is understood as an effective process to resolve sovereign debt obligations."[258] He testified that much larger and more complex sovereign defaults have been resolved much more quickly—sometimes as quickly as 30 days—with 90% creditor participation, and described the delay as a consequence of Peru's "self-imposed obstacles."[259]

92. Dr. Wühler—the expert that Peru tendered to rubberstamp the Process as "fair and effective"[260]—admitted on the stand that he had not looked at whether it was either "fair" or "effective" *in practice*. He acknowledged that the Process was "designed to provide compensation to legitimate Bondholders,"[261] but steadfastly distanced himself from "anything to do with the method and the numbers of valuation"—deliberately disclaiming any opinion on whether the Process had achieved that purpose.[262] Dr. Wühler conceded, however, that most observers would conclude that the amount paid out so far is "a pitiful result."[263] He admitted that he had not considered what Peru's own data showed about the low participation and high drop-out rates.[264] That he professed "surprise" that only about half of the bondholders whose bonds were authenticated asked to proceed to the next step, even though that was "a real simple step," reveals the limited nature of his analysis.[265] No matter how simple the process, it is no surprise that bondholders would choose not to participate if they are dissatisfied with the likely outcome—as Dr. Wühler eventually allowed.[266] He admitted that he had not considered the specifics of the two bondholder witnesses' cases, despite citing them as evidence that the Process was "functioning."[267] He also resisted offering any opinion even on abstract concepts like what threshold percentage of participation would typically be considered a

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257 Tr. (4) 1306 (Castilla).

258 Tr. (4) 1478-79, 1494 (Olivares-Caminal); *see also* Olivares-Caminal I, ¶¶ 112-47.

259 Tr. (4) 1495-1496 (Olivares-Caminal); Olivares-Caminal Pres., **H-7**, p. 16.

260 Tr. (6) 2197 (Wühler).

261 Tr. (6) 2245-46.

262 Tr. (6) 2246, 2211 (Wühler); *see also id*., 2248 (acknowledging that he "didn't actually look at whether the Bondholder Process provides current value"); *id*., 2179, 2207, 2210-11, 2213-14, 2248-50, 2255, 2267 (repeatedly refusing to opine on the compensation provided to bondholders).

263 Tr. (6) 2243 (Wühler).

264 Tr. (6) 2193 (Wühler).

265 *Cf*. Tr. (6) 2193 (Wühler).

266 Tr. (6) 2228-29 (Wühler).

267 *Compare* Wühler II, ¶ 43, *with* Tr. (6) 2250-52 (Wühler).

"success,"[268] or whether a process that awarded *one* U.S. dollar to each bondholder would be "reasonable" or comply with "accepted standards."[269]

93. Instead, Dr. Wühler reverted to superficial observations to justify the Process, like whether there was a website and whether the forms were "very simple" and "eas[y] to fill out."[270] But he admitted that it was not so simple after all. Noting that the Supreme Decrees were "quite technical,"[271] Dr. Wühler conceded that the average bondholder would not be able to predict, at the outset of the Process, how *much* compensation to expect at the end or what *form* that compensation might take; even he, an expert in such processes, did not understand the formulas.[272] He was also confused about how the payment mechanisms worked in practice: he first asserted that a bondholder "has choices" to accept payment in cash or bonds,[273] but then admitted that, in fact, the *MEF* makes the final determination—and he was at a loss to explain how the MEF makes those decisions in particular cases.[274] In short, Dr. Wühler has not evaluated whether the substance *or* outcome of the Process conformed to the standards he purported to apply. Thus, even taking his testimony at face value, it is of no help to the Tribunal in assessing whether the Bondholder Process was confiscatory, fair, equitable, or discriminatory.

94. *Third*, none of Peru's attempts to deflect responsibility for the Bondholder Process's appalling track record onto Gramercy can succeed. Peru offered no evidence at all that any alleged "propaganda campaign" is to blame. Even Dr. Wühler declined to speculate to this effect and, in any event, that misconceived theory could not explain why so many bondholders who *already irrevocably submitted* their bonds to the Process would choose not to follow that Process through to the end.[275] Nor can the low participation rate be attributed to the 2017 purchase by a Gramercy affiliate of a company owned by non-Peruvians that owns additional bonds.[276] Even including those 2017 bonds, the face value of the bonds held, directly or indirectly, by Gramercy entities is only 22% of the total outstanding principal as estimated by the

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268 *See* Tr. (6) 2223 (colloquy).

269 Tr. (6) 2249, 2255 (Wühler).

270 Tr. (6) 2173 (Wühler).

271 Tr. (6) 2173 (Wühler).

272 Tr. (6) 2210-13 (Wühler). *Compare id*., *with* Tr. (6) 2172-73, 2205 (Wühler) (opining that the Bondholder Process "allows the Bondholders to understand how the process operates" and that it "provides sufficient information for bondholders to make informed choices about participation").

273 Tr. (6) 2179-80 (Wühler).

274 Tr. (6) 2181-84 (Wühler).

275 *See* Tr. (6) 2228-29 (Wühler); Wühler Pres., **H-12**, p. 9 (showing drop-offs of 53, 49, and 41% in the number of bonds submitted for registration, actualization, and payment, respectively).

276 *See* Opposition, **C-80**, ¶ 46.

148 Commission.[277] Peru still has no explanation for the thousands of other bondholders who have chosen not to participate in the Process.

95. *Fourth*, Peru's argument that some bondholders would have obtained more money through the Bondholder Process than they received from Gramercy is a red herring.[278] The price at which an individual bondholder agreed to sell to Gramercy is irrelevant to the calculation of current value. As explained above in Section II.C.1, bondholders chose to sell to Gramercy at deep discounts for personal reasons, opting for certain cash immediately between 2006 and 2008 instead of an unpredictable amount from an administrative process that more than 10 years later has still barely made a dent in the debt that Peru is obliged to pay.[279]

96. *Finally*, the hearing confirmed that the Bondholder Process was designed to discriminate against Gramercy by placing "speculative" investors last in queue.[280] Peru has repeatedly denigrated Gramercy as a "speculator" in these proceedings, and Peru could not identify any other investor to whom this category could (or was intended to) apply.[281] Its witnesses refused to affirm or deny that obvious conclusion. Min. Castilla—whose signature appears on the Supreme Decree that first introduced this distinction[282]—refused to "say anything about" whether Gramercy met the definition, could not explain where it came from, and could not identify any other investor "like Gramercy" to whom it could apply.[283] Vice-Min. Sotelo likewise refused to answer questions about this category. She acknowledged that the 2013 CT Order did not include any such distinction, but refused to provide "an explanation beyond what is in the documents" about why the MEF added the distinction and "reserve[d her] Opinion" about its application to Gramercy.[284]

D. Peru Took Away Gramercy's Right to Receive Current Value in Court, in Breach of the Treaty.

97. The hearing also confirmed that Peru took away Gramercy's and other bondholders' admitted right to obtain current value in the Peruvian courts, and thereby deprived Gramercy of effective

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277 *See* Edwards II, CER-4, ¶ 283 (estimating that the unpaid principal balance of Gramercy's bonds is 382 million); Sale and Purchase Agreement, April 27, 2017, **H-19**, p. 1 (stating that face value of bonds purchased is 170 million *soles de oro*); **Doc. CE-12**, 2006 Agrarian Commission Report, p. 31 (estimating total outstanding principal at 2,552 million).

278 *Cf*. Tr. (1) 282 (Peru's opening); Tr. (6) 2267 (Wühler).

279 *See, e.g.*, Ms. G., **CWS-7**, ¶¶ 14, 18-19.

280 *See* **Doc. CE-37**, January 2014 Supreme Decree, Art. 19(7); **Doc. CE-275**, August 2017 Supreme Decree, Art. 18(7); *see also* Reply, **C-63**, ¶ 498.

281 Reply, **C-63**, ¶¶ 274, 499; *see also* Tr. (6) 2323 (Guidotti) (claiming Gramercy's purchases were "speculative").

282 **Doc. CE-37**, January 2014 Supreme Decree, Art. 4.

283 Tr. (4) 1265-67 (Castilla).

284 Tr. (3) 1072 (Sotelo).

means of enforcing its rights in breach of its Treaty obligation of most-favored-nation ("***MFN***") treatment.[285] Peru did not offer any testimony to rebut Gramercy's arguments, instead resorting to misconstructions of the Treaty in an effort to disclaim that obligation in the first place.

98. *First*, as noted in Section above, Peru did not deny that, until the 2013 CT Resolutions, Gramercy and other bondholders could have resorted to the Peruvian courts to obtain a court-appointed expert valuation of their Land Bonds and an order that the State must pay. Indeed, Gramercy successfully pursued judicial claims with respect to a significant portion of its Land Bond portfolio. In 2011, after Peru refused to entertain Gramercy's attempt at conciliation, Gramercy reopened seven court proceedings, which together accounted for over a quarter of the value of Gramercy's portfolio.[286] As discussed in Section III.B.2 below, in the *Pomalca* case alone, the court-appointed experts valued a subset of Gramercy's Land Bonds at roughly US$250 million, implying a valuation for Gramercy's entire portfolio of US$841 million, as of May 31, 2018.

99. *Second*, Peru did not rebut that the August and November 2013 CT Resolutions took away that right, instead imposing the MEF's irrational and confiscatory formula and Bondholder Process as the exclusive means for valuing and obtaining payment on the Land Bonds.[287] Peru also did not rebut that this new rule applied to all ongoing proceedings, even to final judgments that had not yet become *res judicata*.[288]

100. *Third*, Peru did not rebut that this byzantine, exclusive, and value-destroying Bondholder Process delivered no justice at all. It did not challenge the testimony of Ms. L. and Mr. S., the bondholder witnesses who participated in that Process and received a pittance for their families' livelihoods.[289] Peru did not even dare call them to testify. And the hearing laid bare that the alleged remedies Peru had invoked—internal administrative appeals and the possibility of *amparo*[290]—are a

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[285] *See* Gramercy's Opening, **H-1**, p. 78; Reply, **C-63**, § III.C; Statement of Claim, **C-34**, § V.C.

[286] Reply, **C-53**, § III.B.1. *Compare* Rejoinder, **R-65**, ¶¶ 411, 417, *with* Tr. (1) 167 (Gramercy's opening), Gramercy's Opening, **H-1**, p. 205.

[287] *See* Reply, **C-53**, ¶¶ 445, 531-32.

[288] *See* Reply, **C-53**, ¶¶ 531-32.

[289] *See* Ms. L., **CWS-8**, ¶¶ 35, 43 ("On the MEF's valuation . . . I am entitled to receive no more than approximately S/ 3.00, or less than a dollar, for each of the hectares of land that were left unpaid after three and a half decades of the expropriation. . . . The truth is that the procedure turned out to be nothing but a scam. I feel completely betrayed and deceived by my own Government, which, in my opinion, has set up a trap for bondholders, seeking to deprive them of fair compensation."); Mr. S., **CWS-9**, ¶¶ 5, 21-22 ("I have participated in this process and what the government has offered to pay me for my Bonds is an insult . . . . Offering to pay me 791.15 soles [US$240] for my Bonds was a joke.")

[290] Statement of Defense, **R-34**, ¶¶ 124, 278, 298; Rejoinder, **R-65**, ¶¶ 213, 214, 215, 371, 377, 395.

chimera. At the hearing, Peru did not identify a single instance in which a bondholder successfully challenged the outcome of the Bondholder Process. The only evidence in the record about these remedies is Ms. L.'s testimony about how illusory they are, which Peru chose not to challenge.[291] Dr. Wühler claimed that "judicial remedies outside" the Bondholder Process provided sufficient due process,[292] but admitted on cross-examination that he had explicitly been instructed not to consider whether the Process actually afforded bondholders an effective remedy, in the form of current value.[293]

101. *Finally*, rather than address the substance of Gramercy's argument, Peru sought to argue that it had no obligation to provide Gramercy with effective means in the first place.[294] Peru did not deny, for example, that Article 10.4 is broad enough to cover substantive protections afforded in Peru's other treaties, or that what it called the "*Maffezini* footnote" expressly carves out dispute resolution clauses but *not* substantive protections, or that as this footnote illustrates, the Treaty's negative list framework requires any exclusions of coverage to be explicit.[295] Peru also abandoned its groundless claim that the MFN clause applies only to *de facto* and not *de jure* treatment.[296]

102. The new arguments Peru belatedly raised for the first time in its Rejoinder have no merit, either. They would all amount to reading the MFN clause out of the Treaty altogether. Thus, Peru's argument that its Article 10.5 minimum standard of treatment ("***MST***") obligation does not go beyond MST is both inapposite (because Gramercy's effective means claim arises under Article 10.4's MFN obligation), and ignores that the very purpose of an MFN clause is to import *more favorable* standards of treatment than those set out in the Treaty.[297] Similarly, Peru failed to explain how either Article 10.5.3 or the reservations in Annex II of the Treaty—both arguments that Peru invoked for the very first time in its Rejoinder—precludes the operation of the Treaty's separate MFN clause.[298] Article 10.5.3 concerns claims under the MST provision, not the MFN clause, and Annex II concerns "any *measure* that accords differential treatment to *countries*," not the treatment that Peru promised to accord to investors under Article 10.4.[299] Peru already knows this argument is wrong: as the *Bear Creek Mining v. Peru* tribunal held on identical treaty language, this reservation does not

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[291] Ms. L., **CWS-8**, ¶ 42 (citing **Doc. CE-677**, Ms. L.'s *amparo* petition).

[292] Tr. (6) 2173-74 (Wühler).

[293] Tr. (6) 2246-48, 2265 (Wühler).

[294] *See* Reply, **C-63**, ¶¶ 461-71; Tr. (1) 344-45 (Peru's opening); Tr. (4) 1318-20 (Allgeier).

[295] *See* Reply, **C-63**, ¶¶ 461-71.

[296] *Cf.* Statement of Defense, **R-34**, ¶ 295; Reply, **C-63**, ¶¶ 463-67.

[297] *Compare* Rejoinder, **R-65**, ¶ 393, *and* Tr. (1) 344-345 (Peru's opening), *with* Reply, **C-63**, ¶ 478.

[298] *Cf.* Tr. (1) 345 (Peru's opening); Rejoinder, **R-65**, ¶ 393.

[299] **Doc. CE-139**, Treaty, Annex II-Peru-1 (emphasis added); *see also id.*, Arts. 1.3, 10.4.

preclude an investor like Gramercy from invoking standards of treatment from pre-existing investment treaties.[300] And where, like here, those standards have been breached, investors are entitled to relief.

* * *

103. The hearing evidence thus unequivocally confirmed that the Bondholder Process is confiscatory, non-transparent, and discriminatory, and that it violates due process—both in theory and in practice—and is not even faithful to the 2013 CT Order itself. Therefore, even if the Tribunal overlooks Peru's illegal interference in procuring the 2013 CT Order, the MEF's Supreme Decrees and Bondholder Process are independent Treaty breaches that entitle Gramercy to relief.

III. THE HEARING CONFIRMED THAT GRAMERCY IS ENTITLED TO AT LEAST US$841 MILLION

104. The hearing confirmed that Prof. Edwards's US$1.8 billion valuation of Gramercy's Land Bonds as of May 31, 2018 is economically correct. If the Tribunal accepts the overwhelming evidence about what current value means under Peruvian law, it follows that US$1.8 billion is the true intrinsic value of Gramercy's investment.

105. But the hearing also confirmed that Gramercy is entitled, at a minimum, to around US$841 million even if the Tribunal does not accept that conclusion. An award of approximately US$841 million reflects the amount Gramercy would have received for its Land Bonds under any one of several "but-for" scenarios: (*i*) under the decision the CT had planned to issue, had the MEF not improperly manipulated the CT's deliberative process; (*ii*) under court-appointed expert valuations, had the CT and the MEF permitted Gramercy to continue pursuing its rights in Peruvian courts; or (*iii*) under a faithful implementation of the 2013 CT Order, had the MEF not denatured it. Each of these "but-for" analyses, which compare the actual state of affairs to the situation Gramercy would have been in absent certain of Peru's unlawful conduct, triangulates to a very similar figure of at least US$841 million. When the risk of Peru's unlawful conduct is removed from the equation, contemporaneous evidence of market value corroborates that conclusion. And Peru plainly has the financial capacity to pay that amount, including if the same approach were extrapolated to all bondholders.

106. The hearing also exposed that Peru has no case on quantum proper. Peru did not make any serious attempt to challenge Prof. Edwards' approach, either in correctly applying CPI or in calculating the cost of bondholders' forgone opportunities. Indeed, Peru's opening devoted a mere *two slides* and just *five pages* of transcript to quantum, during which it largely recycled the same misguided merits defenses about the alleged "uncertainty" of current value as half-hearted

[300] **Doc. RA-371**, *Bear Creek* Award, ¶ 520.

quantum points.[301] Peru's quantum experts, in turn, offered no assistance to the Tribunal on the true economic issues—like how to update for inflation, derive parity exchange rates, or calculate the value of forgone opportunities. In advancing uncalled-for legal opinions, Peru's quantum experts instead revealed themselves to be mere advocates for Peru.

A. Prof. Edwards Correctly Calculated the Gramercy Land Bonds' True Intrinsic Value at US$1.8 Billion as of 2018.

107. The hearing confirmed that Prof. Edward's US$1.8 billion valuation of Gramercy's Land Bonds, as of May 31, 2018, reflects their true intrinsic value, because it is nothing more or less than the economically rigorous application of the clear and objective meaning of current value that the hearing so amply confirmed: (*i*) updating the unpaid principal for inflation using Peru's CPI, (*ii*) from the Land Bonds' issuance date, (*iii*) plus compound interest to compensate for forgone opportunities at a real rate of return that Peruvians have actually earned over the past decades.[302] Because Gramercy was deprived of its legal entitlement to that value, full reparation requires an award that restores that amount.[303]

1. Gramercy Is Entitled to Inflation Updating Using CPI.

108. Peru had no response to Prof. Edwards's testimony that CPI is the standard method economists use to update for inflation.[304] Peru's quantum experts did not challenge the accuracy of Peru's CPI statistics; in fact, they admitted they "haven't undertaken any study to verify the accuracy or inaccuracy" of those statistics.[305] And Peru's attempts to question its own official CPI statistics' reliability during periods of hyperinflation did not survive the hearing. As a conceptual matter, Prof. Edwards—who has studied, written about, and lived through hyperinflation—explained that "the main characteristic of hyperinflation is that all prices go up at the same time," so changes in consumption habits leading to substitution effects are not pronounced.[306] Moreover, because governments often instill price controls, if anything, "inflation tends to be *under*reported, rather than overreported" during hyperinflationary periods.[307]

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301 *Cf.* Tr. (1) 224-29 (Peru's opening); Peru's Pres., **H-2**, pp. 157-58.

302 *See* Tr. (5) 1574-76 (Edwards); Edwards Pres., **H-8**, p. 8; Edwards II, **CER-6**, § II; Edwards I, **CER-4**, § III.

303 *See* Reply, **C-63**, § IV.A.

304 *See* Tr. (5) 1576-78 (Edwards); Edwards Pres., **H-8**, p. 9; Edwards I, **CER-4**, § IV.B.

305 Tr. (7) 2489 (Peru's quantum experts) ("Q. So, other than during times of hyperinflation, I assume you have no reason to doubt Perú's official CPI statistics, do you? A. (Mr. Kaczmarek) We haven't undertaken any study to verify the accuracy or inaccuracy of CPI statistics.").

306 Tr. (5) 1584-85 (Edwards); *see also* Edwards I, **CER-4**, ¶ 67.

307 Tr. (5) 1585-86 (Edwards) (emphasis added).

109. In any event, any alleged problem with CPI during Peru's hyperinflationary period could not creep into Prof. Edward's calculations: as Prof. Edwards established in unchallenged testimony, his calculation "skip[s] the hyperinflation," so "there is no contagion of this spike in the actual calculations."[308] As both parties' experts agreed, the CPI on any particular date is a measurement of prices on that date; so to calculate inflation over a given period, economists simply compare the CPI measurement on the beginning date with the CPI measurement on the end date.[309] Prof. Edwards's valuation thus compares Peru's CPIs on the Land Bonds' respective issuance dates with the CPI on May 31, 2018, avoiding the hyperinflationary period. By contrast, the MEF's dollarization formula, which updates the Land Bonds' principal from the last-clipped-coupon date, by and large uses CPI measurements that fall precisely *within* the hyperinflationary period.[310]

110. Unable to challenge Prof. Edwards's expert evidence, Peru's quantum experts limited their critiques to conceptual points premised on flawed legal opinion, not economics. They acknowledged that, if the current value principle requires CPI-updating from the Land Bonds' issuance date, then Prof. Edwards's method is correct.[311] And, on cross-examination, they conceded that the thrust of Peru's quantum case—namely, that the Bondholder Process *imparts* value on the Land Bonds and represents a "hair extension"—stems from the premise that "almost anything goes" under the current value principle, including paying only cents on the entirety of the outstanding agrarian reform debt.[312] That premise, however, is fundamentally wrong as a legal matter, as Prof. Castillo and Justice Revoredo explained and Dr. Hundskopf conceded (*see* Section II.A above).

2. Gramercy Is Entitled to Interest at a Real Rate of 7.22%.

111. The hearing also validated Prof. Edwards's 7.22% interest rate as a reliable and conservative measurement of bondholders' forgone opportunities.[313] The average *overall* real rate of return in Peru was much higher: 10.97%.[314] But, consistent with his decision to be

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308 Tr. (5) 1586-87 (Edwards); *see also* Edwards II, **CER-6**, ¶ 23.

309 Tr. (5) 1586 (Edwards); Tr. (7) 2487-88 (Peru's quantum experts); *see also* Edwards II, **CER-6**, ¶ 95; Edwards I, **CER-4**, ¶ 221.

310 *See* Edwards Pres., **H-8**, p. 33; Edwards II, **CER-6**, ¶ 23.

311 Tr. (7) 2371-72 (Peru's quantum experts) (conceding that they would change their view if "as of Day 1 . . . the Bonds were subject to the Current Value Principle").

312 Tr. (7) 2447-49 (Peru's quantum experts); *id.*, 2449 ("Q. So, when you say 'hair extension,' all that you mean by that is that Gramercy gets something more than 20 cents for all of its Land Bonds; right? A. (Ms. Kunsman) For the unclipped Coupons, yeah.").

313 *See* Edwards II, **CER-6**, § II; Edwards I, **CER-4**, § VI; Reply, **C-63**, § IV.A.

314 *See* Tr. (5) 1580-81 (Edwards); *id.*, 1755; Edwards Pres., **H-8**, p. 11; Edwards II, **CER-6**, ¶ 32; Edwards I, **CER-4**, § VI.

"conservative on every step,"[315] Prof. Edwards deconstructed that rate into its equity and debt components and applied only the lower average real return on debt, assuming that bondholders would have been mere passive investors.[316]

112. Peru neither disputed the conservatism of Prof. Edwards's approach, nor identified any flaws in his calculations, nor rebutted that its own proposed adjustments to those calculations would only have *increased* Gramercy's claim.[317] The various misguided conceptual objections that Peru raised at the hearing also had no basis.

113. *First*, the evidence disproved Peru's suggestion that Prof. Edward's analysis was affected by "gaps" in the data.[318] As Prof. Edwards explained, the absence of some data is a "very customary" issue, which is "nothing surprising" in Peru's case, and for which economists have developed "customary solutions" that Prof. Edwards applied.[319] Peru also did not rebut Prof. Edwards's testimony that "every time [he] faced a fork on the road . . . [he] took the conservative line in an effort to under rather than overestimate the value."[320]

114. *Second*, Peru did not articulate any legal or economic basis to question Prof. Edward's calculations on the ground that they use historical data on what *actually* transpired.[321] Indeed, precisely *because* Prof. Edwards uses actual data, his valuation cannot be faulted as a form of "arbitrage" that rewards bondholders for risks they did not take.[322]

115. *Third*, Peru did not rebut that Prof. Edwards' technique to calculate the average rate of return on investment—the Harberger method—"is universally accepted."[323] During his time as the World Bank's Chief Economist for Latin America, Prof. Edwards "used it all the time," since "[i]t was the preferred method to evaluate projects."[324] And Peru did not rebut that *the MEF itself* used that method in 2011, arriving at "the hurdle rate of return on capital in Perú" of "11.6 percent,"[325] corroborating Prof. Edwards' approach and results.

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315 Tr. (5) 1580 (Edwards) ("I was going to be conservative on every step.").

316 Tr. (5) 1580-81 (Edwards); *id*., 1755; Edwards II, **CER-6**, ¶ 32; Edwards I, **CER-4**, § VI.

317 *See* Tr. (1) 160-61 (Gramercy's opening); Gramercy's Pres., **H-1**, pp. 196-99; Reply, **C-63**, § IV.D; *see also* Edwards II, **CER-6**, ¶¶ 39, 42, 44; Edwards I, **CER-4**, § VI.

318 *See* Tr. (5) 1738-42 (Edwards); *see also* Edwards I, **CER-4**, § VI.

319 Tr. (5) 1741 (Edwards); *see also* Edwards II, **CER-6**, II.B.3; Edwards I, **CER-4**, § VI.

320 Tr. (5) 1742 (Edwards); *see also* Edwards II, **CER-6**, ¶¶ 15, 32, 39, 45, 46; Edwards I, **CER-4**, ¶¶ 13, 139, 147, 158, 165, 169, 284.

321 *See* Tr. (5) 1742 (Edwards); *see also* Edwards II, **CER-6**, ¶ 17.

322 *Cf*. Peru Quantum II, **RER-11**, ¶¶ 31, 122, 194.

323 Tr. (5) 1582 (Edwards).

324 Tr. (5) 1582 (Edwards).

325 Tr. (5) 1678 (Edwards); *see* **Doc. CE-158**, MEF, Jorge Fernández-Baca, UPDATING OF THE SOCIAL DISCOUNT RATE, April 17, 2011, § 5.4.

116. *Finally*, Prof. Edwards showed that Peru's objection that no "specific security" existed in Peru that would yield a real return of 7.22% is beside the point.[326] As Prof. Edwards explained on cross-examination, Peru's suggestion that such returns were "theoretical" is incorrect because the average return on debt in Peru "was obviously available to Peruvians because these are ex post data. This is what happened."[327] Ironically, Peru's criticism only invalidates its own formulas, because (as Peru did not rebut) capital controls would have prevented Peruvians from investing in 1-year U.S. Treasury bonds.[328]

B. But For Any of Peru's Breaches, Gramercy Would Have Received, At a Minimum, US$841 Million.

117. In the alternative to full reparation of the Land Bonds' intrinsic value, Gramercy is at a minimum entitled to what it would, on the balance of probabilities, have obtained for its Land Bonds but for Peru's various breaches. The hearing confirmed that the minimum Gramercy would have received is US$841 million—no matter which one of Peru's breaches is assumed not to have occurred.

1. But For the MEF's Unlawful Interference with the 2013 CT Order, Gramercy Would Have Received US$841 Million.

118. The Tribunal need not speculate as to the "but-for" world that would have existed had Peru not unlawfully interfered with the CT's deliberations at the eleventh hour, as described in Section II.B above. The CT's original majority opinion—which the MEF's intervention turned into Justice Mesía's dissent, as discussed above in Section II.B—offers a unique glimpse into that counterfactual world.

119. In line with over a decade of jurisprudence before it, the CT's long-considered, original majority opinion unequivocally endorsed (*i*) updating the unpaid principal for inflation using Peru's CPI, (*ii*) from the Land Bonds' issuance date, (*iii*) plus compound interest at the stated coupon rates.[329] Prof. Edwards calculated that this approach yields a value of US$841 million for Gramercy's Land Bonds as of May 31, 2018, which would be even higher today.[330] Neither Peru nor its experts have shown any error in that calculation. While this approach does not restore the full value of Gramercy's legal entitlement because it does not fully compensate their forgone opportunity, it is at the very least not arbitrary, and provides a minimum floor for compensation.

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326 *See* Tr. (5) 1759-62 (Edwards); *cf*. Peru Quantum II, **RER-11**, ¶¶ 37-39.

327 Tr. (5) 1761-62 (Edwards).

328 *See* Tr. (5) 1762 (Edwards).

329 *See* **Doc. CE-17**, 2013 CT Order, Mesía "Dissent," ¶¶ 23-25; Reply, **C-63**, ¶¶ 537-38.

330 Edwards II, **CER-6**, ¶ 64.

2. But For Peru's Denial of Court Access, Gramercy Would Likewise Have Received at Least US$841 Million.

120. Had Peru not unlawfully foreclosed Gramercy's access to Peruvian courts through the 2013 CT Resolutions and the Supreme Decrees, Gramercy would have received this same US$841 million amount through the Peruvian courts. In 2011, Gramercy (as the successor-in-interest to local bondholders) revived seven court actions seeking orders that the MEF pay the updated value of certain of its Land Bonds.[331] Gramercy did so after the Government rebuffed Gramercy's many attempts to come to a consensual resolution of the Land Bond debt, including the 2009 bond swap proposal and the 2010 requests for conciliation.[332] In connection with this arbitration, Gramercy withdrew and waived all of those Peruvian court proceedings.[333]

121. As Peru's quantum experts confirmed, in one of those cases—*Pomalca*—the court-appointed experts had already issued a report valuing a sub-set of Gramercy's Land Bonds in the same way as the CT's original majority opinion: (*i*) updating the unpaid principal for inflation using Peru's CPI, (*ii*) from the Land Bonds' issuance date, (*iii*) plus compound interest at the stated coupon rates.[334] That approach valued the Land Bonds in the *Pomalca* case alone at approximately US$250 million, and likewise implies a value for Gramercy's entire portfolio of US$841 million, which Peru's quantum experts did not dispute.[335]

122. Peru's attempts to downplay the significance of these undisputed facts by suggesting that Gramercy "only brought their seven claims" do not go far.[336] Peru did not dispute that the seven court cases already underway accounted for 27% of the total value of Gramercy's portfolio.[337] Peru also could not deny that the *Pomalca* approach is consistent with both the "uniform jurisprudence" of the Peruvian courts until the 2013 CT Order,[338] which was what many bondholders actually achieved and what the CT would have ordered in July 2013 had the MEF

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331 *See* **Doc. CE-342**, *Pomalca*, Res. No. 45, October 3, 2014; *see also* Reply, **C-63**, § IV.B.

332 *See* Tr. (1) 37-38, 146 (Gramercy's opening); Gramercy's Pres., **H-1**, pp. 59-60; **Doc. CE-490** / **R-261**, Letter from Gramercy to Peru of May 7, 2009, p. 1; **Docs. R-266** to **R-295**, Gramercy's requests for conciliation proceedings, October and November 2010; **Doc. CE-160**, 2011 Agrarian Commission Report, p. 10.

333 *See* Reply, **C-63**, ¶¶ 169, 172 (citing withdrawal petitions).

334 *See* Tr. (7) 2456-57 (Kunsman); *see also* Edwards II, **CER-6**, ¶¶ 61-66; Reply, **C-63**, § IV.B; **Doc. CE-342**, *Pomalca*, Res. No. 37, October 22, 2013; *id.*, Accounting Expert Report, August 14, 2014; *id*., Res. No. 45, October 3, 2014.

335 *See* Tr. (1) 81, 146 (Gramercy's opening); Tr. (3) 1031 (Gramercy's counsel); Edwards II, **CER-6**, ¶ 64.

336 *Cf*. Tr. (1) 344 (Peru's opening).

337 Tr. (1) 167 (Gramercy's opening).

338 *See* **Doc. CE-160**, 2011 Agrarian Commission Report, p. 13.

not intervened. As Peru's quantum experts acknowledged on the stand, the *Pomalca* experts' use of compound interest, in particular, was the result of careful consideration: the court rejected a first report that used simple interest, and new court-appointed experts produced a second report that applied the stated coupon rates on a compound basis.[339] The *Pomalca* approach thus provides yet another evidentiary basis to award Gramercy a minimum of US$841 million.

3. But For the MEF's Unlawful Implementation of the 2013 CT Order, Gramercy Would Have Received at Least US$845 Million.

123. Even if the Tribunal were to ignore the flaws in the 2013 CT Order and the MEF's unlawful interference that led to it, Gramercy would still have received significant value for its Land Bonds had Peru not breached the Treaty again through its unlawful implementation of that Order, as described in Section II.C above. Even ignoring the other flaws in the MEF's Supreme Decrees, making just two adjustments to the MEF's most recent arbitrary and irrational valuation formula—(*i*) correcting the erroneous and indefensible parity exchange rates and (*ii*) adding compensatory interest at the stated coupon rates—would value Gramercy's Land Bonds at between US$845 and US$885 million, again as of May 31, 2018.

a. Even Under the 2013 CT Order, Gramercy Is Entitled to Rational Parity Exchange Rates.

124. As noted in Section II.C.1 above, Prof. Edwards's unchallenged testimony established that the MEF's economically irrational and self-servingly inconsistent approach to parity exchange rates amounted in practice to a second expropriation. There are two straightforward ways to eliminate at least this arbitrary aspect of the MEF's formula.

125. *First*, the more cogent economic approach is Prof. Edwards's—whose accuracy Peru has not challenged from an economic perspective. Because Prof. Edwards calculates the parity exchange rate by reference to the base period spanning from January 1999 to May 2018, his rate is very close to the official exchange rate as of May 31, 2018.[340] As Prof. Edwards testified with no rebuttal, under his formula, it is thus perfectly appropriate to convert into U.S. dollars at a true parity exchange rate, while converting back to *nuevos soles* using the currently prevailing official exchange rate.[341]

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339 *See* Tr. (7) 2463-64 (Peru's quantum experts); Reply, **C-63**, ¶ 535; **Doc. CE-342**, *Pomalca*, Res. No. 37, October 22, 2013; *id.*, Accounting Expert Report, August 14, 2014,; *id*., Res. No. 45, October 3, 2014.

340 Edwards I, **CER-4**, ¶ 117.

341 Tr. (5) 1831 (Edwards); *see also* Edwards I, **CER-4**, §§ V.D-E; Edwards Pres., **H-8**, p. 25.

126. *Second*, a cruder approach would be to apply the MEF's arbitrary parity exchange rates, but to do so consistently: using the same approach to convert *into* U.S. dollars at the last-clipped-coupon date and *back* to Peruvian *nuevos soles* at the present time.[342] This solution would at least avoid the arbitrary, inconsistent, and value-destroying use of the much lower exchange rate to convert the relevant amounts back to *nuevos soles*.

b. Even Under the 2013 CT Order, Gramercy Is Entitled to Compensatory Interest.

127. As noted in paragraph 62 above, the MEF's failure to account for compensatory interest in its formula violated the 2013 CT Order's mandate that the MEF pay "the land reform debt bonds, *plus interest*" and establish a procedure to calculate "the updated amount of the land reform debt bonds, *plus the interest*."[343] Assuming that the MEF had faithfully implemented the 2013 CT Order, its formulas would have provided for compensatory interest *at least* at the stated coupon rates—as Peruvian courts had consistently done both before and after that Order. The MEF's formulas, however, fail to do so.

128. *First*, the hearing disproved Peru's suggestion that the MEF's use of the 1-year U.S. Treasury bond yield "includes compensation for foregone [*sic*] opportunity costs" and thus obviates the need for interest.[344] Peru's quantum experts admitted that they did not even attempt to determine the real return above inflation in the 1-year U.S. Treasury bond yield.[345] While asserting that the nominal yield (which includes inflation) was "very high at certain points,"[346] Peru's quantum experts admitted they had "no idea" whether such spikes matched periods of historically-high inflation in the United States.[347] In contrast, Prof. Edwards explained that applying the yield on 1-year Treasury bonds to decades-old Peruvian debt can only be seen as a proxy for inflation updating—albeit an imperfect one—and not compensation for lost opportunities.[348] Prof. Edwards demonstrated, through unrebutted testimony, that the 1-year U.S. Treasury bond yield in fact tracks inflation very closely, and includes only a negligible *real* component.[349] From 1988 to 2018, the average annual *real* return on

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342 Edwards Pres., **H-8**, p. 34; *see also* Tr. (5) 1622-24 (Edwards).

343 *See* **Doc. CE-17**, 2013 CT Order, "Resolution" Section, ¶¶ 2, 28 (emphasis added).

344 *Cf.* Peru Quantum II, **RER-11**, ¶ 186.

345 Tr. (7) 2453 (Peru's quantum experts) ("I haven't broken out the inflation. . . . So, I don't know the components.").

346 *Cf.* Tr. (7) 2395 (Kaczmarek); Peru Quantum Pres., **H-14**, p. 37.

347 Tr. (7) 2453 (Peru's quantum experts).

348 *See* Tr. (5) 1595 (Edwards); *see also* Edwards II, **CER-6**, § III.C; Edwards I, **CER-4**, § VII.E.

349 Edwards Pres., **H-8**, p. 23; Edwards I, **CER-4**, ¶ 164.

those Treasury bonds was a mere 0.77%.[350] Peru did not dispute that such 0.77% return in real terms is more than *14 times lower* than the 10.97% average real return on capital in Peru from 1950 to 2011.[351]

129. Cross-examination likewise destroyed Peru's quantum experts' unsupported assertions that the 1-year Treasury bond yield was "more than fair" and "10 to 20 times higher than the effective annual rates embedded in the Agrarian Bonds."[352] It became clear that they had completely misunderstood how the Land Bonds' interest payments worked: coupon interest payments were not calculated by applying the stated coupon rate to the bond's principal and then dividing that amount by the number of coupons, as they had claimed.[353] Instead, as Vice-Min. Sotelo and Prof. Edwards both testified, and Peru's quantum experts ultimately conceded, the stated coupon rates were *effective* rates that accrued yearly on the entire outstanding principal balance.[354] Forced to acknowledge this basic blunder, Peru's quantum experts admitted their reports and resulting opinions were simply wrong: their "effective annual interest rates" were wrong, the "principal discounts" were wrong, and the "effective face values" were wrong.[355] Peru's submissions on these points can thus be disregarded entirely.

130. *Second*, Peru had no answer for the fact that its own Supreme Court held, and its own expert Dr. Hundskopf agreed, that under the 2013 CT Order bondholders are entitled to interest at the stated coupon rates *on top of* the dollarized principal after it has been inflation-updated using the U.S. Treasury bond yield.

131. It is undisputed that that is how Peru's own Supreme Court consistently interpreted and applied the 2013 CT Order, in at least four decisions issued in 2015, 2016, 2017, and 2018, which Dr. Hundskopf himself cited in his reports and unwaveringly endorsed on cross-examination.[356] Discussing just one of them—Cas. No. 1139-2016-LIMA, dated April 10, 2018, in which the court took the consequential step of reversing the lower court's decision precisely for failure to award interest—as an "example" of how Peruvian courts applied that Order, Dr. Hundskopf agreed that "after the updating with

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350 Edwards Pres., **H-8**, p. 23; *see also* Tr. (5) 1692 (Edwards) (stating his use of the "Fisher equation" to "decompose[] [the yield] into a real component interest rate and an inflation component"); Edwards I, **CER-4**, ¶ 164.

351 *See* Edwards Pres., **H-8**, p. 23; Edwards I, **CER-4**, ¶ 164.

352 *Cf.* Peru Quantum II, **RER-11**, ¶ 122.

353 *Cf.* Peru Quantum II, **RER-11**, ¶¶ 38-46.

354 *See* Tr. (3) 1062 (Sotelo); Tr. (5) 1570-73 (Edwards); Edwards Pres., **H-8**, p. 4; Tr. (7) 2449 (Peru's quantum experts).

355 Tr. (7) 2449-51 (Peru's quantum experts).

356 *See* Hundskopf II, **RER-7**, ¶ 59, fn. 68; **Doc. RA-391**, Supreme Court, Cas. No. 9450-2014-LIMA, October 27, 2015, ¶¶ 11.3, 12.3-12.4; **Doc. RA-392**, Supreme Court, Cas. No. 4245-2015-LIMA, October 6, 2016, ¶ 15, IV; **Doc. RA-393**, Supreme Court, Cas. No. 8741-2015-LIMA, October 3, 2017, ¶ 10, IV; **Doc. RA-394**, Cas. No.11339-2016-LIMA, April 10, 2018, ¶¶ 10.3, 10.5, III; *see also* Gramercy's Pres., **H-1**, p. 169.

the method determined by the CT in July 2013, in addition to this, compensatory interest is added."[357] He agreed that the compensatory interest owed is the "interest rate . . . preestablished on the Bond" and that it applies on top of the Treasury bills yield.[358] Dr. Hundskopf added that this judgment was "very interesting . . . because it reflects the *essence* of the provisions of the Resolution in 2013 by applying dollarization, *and clearly interest*," noted that "the Civil Code had to be applied" to award interest, and declared that its result "is *highly coherent*" under Peruvian law.[359] He confirmed that the other Supreme Court rulings he cited were in accord, and even suggested that there had been a forum in Lima to discuss the impact of the 2013 CT Order that had concluded the same.[360] Peru's only comeback to its own expert, on redirect, was the puzzling suggestion that the Supreme Court's decisions were somehow inferior to the CT's.[361] Peru misses the point, however, that the Supreme Court was not attempting to overrule the CT, but rather was *applying* the 2013 CT Order, and repeatedly interpreted it to require payment of compensatory interest—an outcome with which Peru's own expert Dr. Hundskopf concurred.[362]

132. The legal consequence of this "highly coherent" decision is thus clear: even if the Tribunal finds that the MEF's interference with the 2013 CT Order was not a breach of the Treaty, in a world "but for" Peru's other independent breaches, Gramercy is entitled to compensatory interest at the stated coupon rates *on top of* the adjusted principal. While not as economically rigorous as compensating bondholders for the actual value of their forgone opportunities (*i.e.*, the 7.22% real rate Prof. Edwards conservatively estimated, and which Prof. Castillo endorsed as consistent with Article 70 of the Peruvian Constitution), awarding interest at the coupon rates is at least not arbitrary, and it is consistent with both the 2013 CT Order itself and the weight of Peruvian authority that preceded and followed it, as noted in Section II.A.1.c above.

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133. Gramercy has asked Prof. Edwards to calculate the combined effect of these two adjustments to the August 2017 formula on the value of Gramercy's Land Bond portfolio. He has done so in the manner set out in more detail in the **Appendix** to this brief by applying the applicable parity exchange rate and interest-compounding formulas

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357 Tr. (6) 2066-67 (Hundskopf).

358 Tr. (6) 2069-72 (Hundskopf).

359 Tr. (6) 2066, 2070 (Hundskopf) (emphases added).

360 Tr. (6) 2071 (Hundskopf).

361 Tr. (6) 2074-75 (Hundskopf).

362 *Cf.* Tr. (6) 2066 (Hundskopf) (agreeing that the Supreme Court decision in Cas. No. 1139-2016-LIMA "is an example of what the courts did in the application of the [2013 CT Order]"), 2070 (noting that this decision "does not contradict the [2013 CT Order]"), 2071 (agreeing that, like the decision in Cas. No. 1139-2016-LIMA, all other Supreme Court decisions cited in his report follow the 2013 CT Order).

set out in his reports to data that is already in the record in his valuation model.[363] As of May 31, 2018, those values are: (*i*) US$845 million, applying Prof. Edwards's parity exchange rates, plus interest at the stated coupon rates; and (*ii*) US$885 million, applying the MEF's parity exchange rates consistently at the time of conversion to dollars and back to *nuevos soles* at the present time, plus interest at the stated coupon rates. Should Peru disagree with these figures, with the Tribunal's instruction on the relevant parameters, Prof. Edwards could work with Peru's quantum experts jointly to agree on the resulting calculations.

4. Reliable Estimates of the Total Outstanding Debt Confirm Both the Accuracy of These Alternative Valuations and That Peru Can Afford to Apply Them.

134. These alternative approaches to valuation, if applied to the total remaining outstanding principal, would create a total debt burden of around US$5 to 6 billion—a sum that Peru can easily afford to pay to resolve its outstanding agrarian reform debt to all bondholders, consistent with the CT's concern for fiscal sustainability.[364] That fact remains true notwithstanding the uncertainty that Peru has attempted to sow by not providing any estimate of the value of the outstanding agrarian reform debt, despite its undertakings, Gramercy's entreaties, and the Tribunal's questions.

135. The elusive testimony of Peru's witnesses left unclear whether Peru failed to make such estimates or instead failed to produce them despite clears orders to do so.[365] Peru's quantum experts have not even attempted to adduce any evidence on point.[366] Vice-Min. Sotelo

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363 Edwards I, **CER-4**, Supporting Documents, "Model.xlsx"; *id*., ¶¶ 72(3), 256, Appendix K; *see also* **Doc. CE-224B**, Gramercy's Bond Inventory; **Doc. CE-320**, Central Reserve Bank of Peru, Official Exchange Rate; **Doc. CE-326**, Central Reserve Bank of Peru, CPI; **Doc. CE-334**, U.S. Bureau of Labor Statistics, CPI; **Doc. CE-335**, Central Reserve Bank of Peru, Bilateral Real Exchange Rate Index; **Doc. CE-336**, Bloomberg, U.S. Treasury Yields; **Doc. CE-337**, Bloomberg, Official Exchange Rate.

364 *See* **Appendix**; *see also* Edwards I, **CER-4**, ¶¶ 281-303 (addressing Peru's ability to repay).

365 *See* Opposition, **C-80**, ¶¶ 29-34; Gramercy's Letter to the Tribunal of March 28, 2019, **C-43**; PO6, Appendix A, pp. 1-3 (Gramercy's Request No. 1) (Tribunal taking note of Peru's undertaking to "produce relevant and material documents located in response" to Gramercy's request for "[a]ny documents, including presentations, studies, calculations, and estimates of the value of the total Land Bond debt outstanding on Peru's budget . . ."); *id*., pp. 17-18 (Gramercy's Request No. 7) (Tribunal taking note of Peru's undertaking to "produce relevant and material documents located in response" to Gramercy's request for "[a]ny documents or reports prepared by or on behalf of the MEF estimating or discussing the total land bond debt under different valuation methods . . . and/or Peru's ability to pay the estimated outstanding Land Bond debt, as well as any documents, lists, or reports listing or describing the total quantity of known Land Bonds outstanding and the characteristics of those Bonds").

366 Tr. (7) 2492-93 (Peru's quantum experts).

testified that she was not aware of any assessment by the MEF of the Land Bond debt's impact on Peru's budget.[367] She further acknowledged that "[n]ot even in the Technical Reports that the Supreme Decree relies on . . . well, it didn't say how much it was going to cost."[368] Min. Castilla said he was "not going to deny that we didn't have any estimates, otherwise, it would have been negligence by the Ministry," and accepted the President's observation that it is "unthinkable that such analysis would not have been performed"—while at the same time admitting that the MEF did not maintain an "official or unofficial estimate of the cost of the Land Bond debt," and refusing to confirm whether any projections in writing were ever provided to him, still less to offer any concrete numbers.[369]

136. Although Peru would have been much better placed to assist the Tribunal on this issue, as with other key issues, it has been in fact Gramercy who has presented the only reliable analyses. Prof. Olivares-Caminal provided detailed testimony, based on congressional research, establishing that the best evidence of the total outstanding principal of the agrarian reform debt is 2.52 billion *soles de oro*—which is the result of subtracting the amortized principal from the total face principal of all Land Bonds actually placed.[370] That figure thus conservatively assumes that *all* unredeemed coupons are still outstanding, even though bondholders may have lost or destroyed their paper certificates.[371]

137. The 2.52 billion *soles de oro* estimate is indeed the *only* real estimate in the record. Although Prof. Seminario was asked to "quantify the potential cost" of the outstanding agrarian reform debt, he never in fact did so.[372] Vice-Min. Sotelo explained that Prof. Seminario's work considered "the entire original principal that had been authorized by law," without accounting for the face value of Land Bonds that were never issued or the principal coupon amounts that had been redeemed over the years.[373] But, of course, as the Vice-Min. herself admitted, "you can only have right now in the market a lower amount."[374] Moreover, she had no knowledge of, and was unable even to authenticate, the unexplained figure of 8.5 billion *soles de oro* that

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367 Tr. (3) 942-44, 979-81, 988-89, 1023-24 (Sotelo).

368 Tr. (3) 979-80 (Sotelo).

369 Tr. (4) 1220-24, 1278-80 (Castilla).

370 *See* Olivares-Caminal Pres., **H-7**, p. 14; *see also* **Doc. CE-12**, 2006 Agrarian Commission Report, pp. 30-32; **H-15** (**Doc. R-257** composite), 148 Commission Report, pp. [7]-[8].

371 *See* Edwards I, **CER-4**, ¶ 284.

372 *Cf.* Tr. (4) 1225 (Castilla); **Doc. R-509,** Consulting Contract between the MEF and Luis Bruno Seminario de Marzi, April 13, 2011, Clause 2.1.

373 Tr. (3) 949-50 (Sotelo); *see* **Doc. CE-751** / **R-297** / **R-569**, Seminario Report, p. [3] (noting the debt issuance of 15 billion *soles de oro*).

374 Tr. (3) 950 (Sotelo).

emerged from a document cited for the first time at the hearing—it simply did not "ring a bell."[375]

138. Based on the 2.52 billion *soles de oro* figure, Prof. Edwards calculated the current value of the outstanding agrarian reform debt, assuming that Gramercy's portfolio is a representative sample of the total universe of Land Bonds. Peru did not dispute his estimate that the total maximum value of all potentially outstanding Land Bonds is US$11.89 billion if using his method of CPI updating plus interest at a rate of 7.22%.[376] And the total maximum value is instead around US$5.6 billion to US$5.9 billion using either of the alternative approaches described in Sections III.B.2 and III.B.3 above. Because by definition the 2.52 billion *soles de oro* figure represents the *maximum* possible outstanding debt, the Tribunal can take comfort that the *total* amount Peru owes—not just to Gramercy, but to *all* other bondholders—cannot possibly exceed these estimates.

139. Peru has not disputed that all these figures are well within Peru's budgetary capacity; indeed, at the hearing, it repeatedly touted its economic performance.[377] Prof. Edwards's unchallenged testimony shows that even payment of all of the outstanding debt under his primary, CPI-based method would amount to a mere *0.4%* of GDP, and a tiny fraction of Peru's 2017 public spending if Peru were to finance payment with new 30-year bonds.[378] Such an approach would accord with the MEF's current practice of spreading out payments under the Bondholder Process, as Min. Castilla and Vice-Min. Sotelo acknowledged.[379] Mr. Koenigsberger reiterated that Gramercy would accept payment of the value of its Land Bonds in this form.[380]

140. With all the more reason, paying the total outstanding debt under any of the alternative approaches described above (the original CT majority opinion, the *Pomalca* expert valuation, and the two adjustments to the MEF's formula) would not even make a dent on Peru's finances. Those estimates converge around the lower figure of US$5.5 billion. That figure, in turn, is very much in line with Moody's 2015 calculation of US$5.1 billion.[381] And Moody's—which

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375 Tr. (3) 1036 (Sotelo); *cf.* Peru's Document Production, **Doc. R-1072**, ROP034572, p. [74] ("Matriz Comparativa de la Metodología de Actualización de los [Bonos de la Reforma Agraria]").

376 *See* Edwards I, **CER-4**, ¶ 283; Edwards II, **CER-6**, ¶ 7.

377 *See* Tr. (1) 207 (Peru's opening); Tr. (4) 1172 (Castilla); *see also* Edwards I, **CER-4**, § IX.

378 *See* Tr. (5) 1590-95 (Edwards); Edwards Pres., **H-8**, p. 18; Edwards I, **CER-4**, § IX.

379 Tr. (3) 1069-70 (Sotelo); Tr. (4) 1296-98 (Castilla).

380 Tr. (2) 455 (Koenigsberger); *see also* **Doc. CE-185**, Letter from Gramercy to the President of the Council of Ministers and the MEF, December 31, 2013, p. 2; **Doc. CE-490** / **R-261**, Letter from Gramercy to Peru of May 7, 2009, p. 1 (proposing a debt swap).

381 *See* **Doc. CE-21**, *FAQs on Peru's Bonos de la Deuda Agraria*, MOODY'S INVESTORS SERVICE, December 18, 2015, pp. 1, 3.

Min. Castilla endorsed as "highly credible"[382]—confirmed that such a level of debt "would not materially affect the sovereign's fiscal dynamics or its creditworthiness."[383]

C. The Fair Market Value of Gramercy's Land Bonds Further Confirms Their Valuation of US$841 Million.

141. Although a fair market valuation is the wrong measure to apply in this case, the fair market value of Gramercy's Land Bonds further confirms that an award of at least US$841 million is appropriate.[384] Peru's arguments for a risk-discounted market valuation are flawed in concept, and its attempts to challenge the reliability of Gramercy's valuations did not survive the hearing.

142. *First*, the critical difference between Gramercy's internal valuations—which assessed its Land Bonds' market value at approximately US$550 million as of year-end 2013[385]—and the approximately US$841 million that the *Pomalca* and original CT decision imply is simply discounting for risk. As Prof. Edwards explained, and basic economics dictates, the market value of debt instruments tends to converge to their intrinsic value if risk-discounting is assumed away.[386] As Robert Joannou, Gramercy's Chief Financial Officer, explained, Gramercy adopted the same approach as the *Pomalca* experts and the original CT decision: (*i*) updating the unpaid principal for inflation using Peru's CPI, (*ii*) from the Land Bonds' issuance date, (*iii*) plus compound interest at the stated coupon rates.[387] To arrive at market value, Gramercy [redacted][388] Peru did not identify any risks that Gramercy failed to take into account and that would further depress the Land Bonds' market value.

143. Undoing that risk-discounting exercise for purposes of deriving a measure of damages is not only appropriate but necessary. Gramercy's market valuations are an inappropriate measure of damages in an investment arbitration precisely because they include steep

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382 Tr. (4) 1300-02 (Castilla).

383 **Doc. CE-21**, *FAQs on Peru's Bonos de la Deuda Agraria*, MOODY'S INVESTORS SERVICE, December 18, 2015, p. 3.

384 *See* Reply, **C-63**, § IV.B.

385 *See* Reply, **C-63**, § IV.C.2; Joannou, **CWS-6**, ¶ 26; *id*., Annex A.

386 *See* Edwards II, **CER-6**, ¶ 124; *see also* Tr. (1) 171 (Gramercy's opening).

387 Tr. (2) 782-83, 877-80 (Joannou) ([redacted]); *see also* Joannou, **CWS-6**, ¶ 16.

388 Tr. (2) 844-46, 880-85 (Joannou); *see also* Joannou, **CWS-6**, ¶¶ 11, 14, 17.

discounts for the risk of Peru's unlawful action—risk that investment law excludes.[389] Because that risk was entirely within Peru's control, the full reparation standard requires assuming it away, rather than crediting Peru for unilaterally depressing the Land Bonds' value.[390] Moreover, the other discount factors, including default risk and time value of money, simply do not apply here: Peru clearly has the ability to pay and will presumably pay promptly any amount awarded by the Tribunal. And if Peru were to pay with new bonds, any future payment risk would already be priced into those bonds, and hence it cannot be double counted.

144. *Second*, in continuing to advocate for damages equal to the risk-discounted market value, Peru ignores the crucial fact that Gramercy never intended to sell its Land Bonds in the market. To the contrary, as Mr. Koenigsberger's unchallenged testimony established, Gramercy invested in the hopes of facilitating a global solution to the entire debt, as it had done elsewhere.[391] Indeed, as the ample authority in the record shows, courts and tribunals—including the Peruvian courts—routinely award the intrinsic value of debt instruments, not some risk-discounted market value, which would improperly assume they would have been sold to other market participants.[392] So too must this Tribunal.

145. *Third*, Peru did not meaningfully challenge the reliability of Gramercy's internal valuations. As Mr. Joannou confirmed, [redacted][393] At the hearing, Peru instead harped on about [redacted]

146. Mr. Joannou also disproved Peru's baseless suggestion that Gramercy's internal valuations were unreliable because Gramercy

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389 *See, e.g.*, **Doc. RA-32**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987), p. 149 (articulating the principle that a State cannot benefit from its own wrongful conduct); **Doc. CA-167**, W. Michael Reisman & Robert D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, 74 BRIT. Y.B. INT'L L. 115 (2003), p. 146 (same); **Doc. CA-92**, *Burlington* Decision, ¶ 362; **Doc. CA-150**, *Occidental* Award, October 5, 2012, ¶ 564.

390 *See* Reply, **C-63**, ¶¶ 561-63.

391 Tr. (2) 615-16, 624-25 (Koenigsberger); Koenigsberger III, **CWS-10**, ¶ 5; Koenigsberger II, **CWS-4**, ¶ 34; Koenigsberger I, **CWS-3**, ¶¶ 12-19, 34-35; **Doc. CE-185**, Letter from Gramercy to President of the Council of Ministers and the MEF, December 31, 2013, pp. 2-3.

392 *See, e.g.*, Reply, **C-63**, ¶¶ 548-49 (citing cases from the Permanent Court of International Justice, investment tribunals, and U.S. courts).

393 Tr. (2) 787-88 (Joannou); *see also* Joannou, **CWS-6**, Annex A (citing audited financial statements).

394 Tr. (2) 848-51 (Joannou).

395 *See* **Doc. CE-579**, 2014 GSMF Financial Statements, pp. 10-11.

had an incentive to over-value its Land Bonds.[396] Peru did not challenge Mr. Joannou's testimony that Gramercy had financial incentives to "be careful with the valuation," since clients could exit their positions for cash at any time at Gramercy's valuation; and, as the President observed, overcharging clients is not prudent business practice.[397]

147. *Finally*, the hearing confirmed that arm's-length transactions involving sophisticated investors endorsed the accuracy of Gramercy's internal valuations.[398] Mr. Joannou rebutted Peru's suggestion that Gramercy imposed the terms of these transactions on its clients;[399] instead, [redacted][400]

148. Thus, when the risks that Peru created are excluded from Gramercy's internal calculations of its Land Bonds' market value, as they must be, those valuations similarly imply that Gramercy's Land Bonds were worth roughly US$841 million, as of May 31, 2018—corroborating that figure as the minimum compensation that Gramercy must receive.

IV. RELIEF REQUESTED

149. Gramercy respectfully requests that the Tribunal:

a. Declare that Peru breached Articles 10.3, 10.4, 10.5, and 10.7 of the Treaty;

b. Order Peru to pay monetary damages in an amount that would wipe out all the consequences of its illegal acts, in an amount reflecting:

   i. the contemporary equivalent of the value of Gramercy's Land Bonds at the time they were issued, which was approximately US$1.80 billion as of May 31, 2018, which continues to compound at an interest rate of 7.22%, to be further updated as of the date of the award;

   ii. in the alternative to (i), the value that Gramercy would likely have obtained under the original majority opinion for the 2013 CT Order or in court proceedings in Peru, which was approximately US$841 million as of May 31, 2018, and which continues to compound at the interest rates set forth in the Land Bonds, to be further updated as of the date of the award;

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396 *Cf.* Rejoinder, **R-65**, ¶ 270.

397 *See* Tr. (2) 864 (Joannou); *see also* Tr. (1) 175 (Gramercy's opening) ("[O]vercharging clients is not a prudent way to retain them as clients.").

398 Tr. (2) 784-85 (Joannou); *see also* Joannou, **CWS-6**, ¶ 30.

399 *Cf.* Rejoinder, **R-65**, ¶ 270.

400 Tr. (2) 784-85 (Joannou).

iii. in the further alternative to (i) and (ii), the value that Gramercy would likely have obtained through a good-faith implementation of the 2013 CT Order, which was approximately US$845 million as of May 31, 2018, and which continues to compound at the interest rates set forth in the Land Bonds, to be further updated as of the date of the award;

iv. in the further alternative to (i) through (iii), the fair market value of Gramercy's Land Bonds immediately before Peru's breaches, which was approximately US$550 million, plus interest at commercial, annually-compounding rates, such as the rate of the real return on debt in Peru, from the date of the breach through the date of the award;

c. Order Peru to bear all the costs of the arbitration and reimburse Gramercy's professional fees and expenses;

d. Order Peru to pay interest at commercial, annually compounding rates, such as the rate of the real return on debt in Peru, on all amounts ordered from the date of the award until full payment is received; and

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

150. 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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