

In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

1. GRAMERCY FUNDS MANAGEMENT LLC
2. GRAMERCY PERU HOLDINGS LLC

Claimants

v.

THE REPUBLIC OF PERU

Respondent

PROCEDURAL ORDER NO. 5

ARBITRAL TRIBUNAL
Prof. Juan Fernández-Armesto (Presiding Arbitrator)
Mr. Stephen L. Drymer
Prof. Brigitte Stern

SECRETARY OF THE TRIBUNAL
Ms. Marisa Planells-Valero

ASSISTANT TO THE PRESIDENT
Mr. Luis Fernando Rodríguez

Paris, August 29, 2018

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WHEREAS

1. This arbitration arises between Gramercy Funds Management LLC and Gramercy Peru Holdings LLC [**“Gramercy”** or **“Claimants”**] and the Republic of Peru [**“Peru”** or **“Respondent”**] under the United States-Peru Free Trade Agreement signed on April 12, 2006 [the **“Treaty”**]. Claimants and Respondent shall be jointly referred to as the **“Parties”**.
2. On April 17, 2018, the Parties submitted their agreements and respective positions on the contents of a draft Terms of Reference and a draft Procedural Order No. 1 [**“PO1”**] circulated by the Tribunal¹.
3. By communication A-2, the Arbitral Tribunal convened a case management conference call, which took place on May 4, 2018. The Parties and the Tribunal discussed the draft Terms of Appointment, the draft PO1 and the procedural timetable. During the discussion, it became apparent that the Parties were unable to reach an agreement on the rules governing the issues of point of contact and the non-aggravation measures to be observed throughout these proceedings. The Tribunal requested that the Parties agree by May 8, 2018, on the deadlines for two rounds of submissions regarding these issues, following which the Tribunal would issue a decision on the matter².
4. On May 8, 2018, the Parties submitted communications C-16 and R-12, advising that they had been unable to reach an agreement on the deadlines.
5. On May 9, 2018, the Parties exchanged communications R-13, R-14, and C-17, discussing further the preferred dates for the submissions.
6. On May 10, 2018, the Tribunal set the deadlines for two rounds of simultaneous submissions³. In its communication, the Tribunal instructed both Parties to abstain in the meantime from any action or conduct that could result in an aggravation of the dispute, and that *pro tem* all communications between the Parties had to be channeled in the manner required by each Party.
7. On May 22, 2018, the Tribunal and the Parties executed the Terms of Appointment.
8. As per the Tribunal’s instructions, on June 1, 2018, the Parties simultaneously submitted a first round of pleadings, numbered as C-22 [**“Gramercy I”**] and R-20 [**“Peru I”**], on the issues of point of contact and non-aggravation measures.
9. On June 15, 2018, the Parties simultaneously submitted a second round of pleadings on the same issues, numbered as C-28 [**“Gramercy II”**] and R-27 [**“Peru II”**].
10. Having considered the position of each Party, the Tribunal hereby issues the following Procedural Order.

¹ C-13 and R-7.

² Communications A-8, of May 5, 2018, and A-9, of May 7, 2018.

³ A-11.

PROCEDURAL ORDER NO. 5

11. This Procedural Order rules on Peru's triple request that the Tribunal issues an order that both Parties shall not aggravate the dispute; shall use each Party's designated point of contact; and shall respect the role of the non-disputing Party as established in the Treaty.
12. The Tribunal will first explain briefly the relief sought by each Party (1.) and then the Respondent's (2.) and the Claimants' arguments (3.).

1. THE PARTIES' RELIEF SOUGHT

13. Peru requests the Tribunal to enter an order as follows:

“All communications among any of the Parties, including communications involving any of their representatives, shall be channeled solely in the manner indicated by each Party in the Terms of Appointment.

The Parties shall abstain from any action or conduct that may result in an aggravation of the dispute.

Correspondingly, the Parties shall respect the role of the non-disputing Party as established in the Treaty. In consultation with the Parties, the Tribunal shall establish in [sic] a procedural order pursuant to which the non-disputing Party may make certain submissions in a manner consistent with the Treaty⁴”.

14. Peru also requests that the Tribunal award Peru all costs in connection herewith⁵.
15. Claimants in turn request that the Tribunal:

“a) Deny Peru's application to order the measures as formulated in Peru's Letter to the Tribunal of April 18, 2018 and Peru's Submission on Procedural Safeguards of June 1, 2018;

b) In the alternative, to the extent the Tribunal grants any part of Peru's application, to clarify that any order must be truly mutual, and that it does not prevent the Parties from, among other activities:

- i) communicating with U.S. officials;
- ii) communicating with Peruvian officials who consent to speak with them;
- iii) engaging in discussions about the Land Bonds in public fora;
- iv) engaging with other land bondholders, individually and in organizations;

⁴ Peru I, para. 45, and Peru II, para. 89.

⁵ Peru I, para. 46, and Peru II, para. 90.

v) engaging in general discussion about the case in public fora, which discussion is not limited to updates on the status of the case and may include wider aspects of the case, such as a summary of the Parties' positions; and

c) Grant Gramercy costs⁶”.

2. **THE RESPONDENT'S POSITION**

16. Peru asks the Tribunal to issue an order that the Parties shall not aggravate the dispute (**A.**), shall use the channels of communications designated by each Party (**B.**), and shall respect the role of the non-disputing Party as established in the Treaty (**C.**). Peru also puts forward some arguments in joint support of its three requests (**D.**).

A. Request on non-aggravation

17. Peru asks the Tribunal to order that the Parties “shall abstain from any action or conduct that may result in an aggravation of the dispute⁷”.

18. Over the last two years – Peru argues – Gramercy has engaged in many actions aimed at aggravating this controversy⁸. These means of aggravation include, among others, the following:

- engaging and paying lobbyists to pressure Peruvian and U.S. public authorities⁹;
- establishing and using organizations to amplify its grievance, such as the Peruvian-American Bondholders for Justice, the *Asociación de Bonistas de la Deuda Agraria* or *Alianza por el Pago Justo de los Bonos Agrarios*¹⁰;
- hiring and relying on academic writers to publish biased reports on public policy matters against Peru's reputation¹¹; or
- retaining public relations firms to issue negative information in the press¹².

19. Peru has provided the Tribunal with a detailed account of instances in which Gramercy has tried to force Peru to change its laws, has lobbied the Peruvian Government or interfered with Peru's interests and projects in the international field¹³.

⁶ Gramercy II, para. 68. A shorter version in Gramercy I, para. 7.

⁷ Peru I, para. 45, and Peru II, para. 89.

⁸ Peru I, para. 2.

⁹ Peru I, para. 37.

¹⁰ Peru I, para. 36.

¹¹ Peru I, para. 38.

¹² Peru I, para. 40.

¹³ Peru I, para. 43 and “Annex on Incidents of Aggravation”.

20. Peru contends that the requested order is necessary to bring this pattern of conduct to an end, based on the following arguments¹⁴:
21. *First*, the principle of non-aggravation governs this arbitration. This principle has been long acknowledged by investment tribunals. It prevents parties from taking any step that might harm or prejudice the integrity of the proceedings or exacerbate the dispute. This may include the parties' duty to refrain from public communications that can aggravate the controversy¹⁵.
22. *Second*, the present arbitration is an investor-state dispute settlement mechanism, which has removed the dispute from international relations and politics and has subjected it to a regulated procedure under legal criteria. Both Parties have consented to submitting the dispute to arbitration and therefore Gramercy must not continue to create political or diplomatic pressures to resolve it¹⁶.

B. Request on channels of communications

23. Peru also asks the Tribunal to issue the following order regarding channels of communications:

“All communications among any of the Parties, including communications involving any of their representatives, shall be channeled solely in the manner indicated by each Party in the Terms of Appointment¹⁷”.
24. Peru complains that for the last two years Gramercy has consistently and knowingly disregarded the channels of communication designated by Peru. In order to advance its goals, Gramercy has repeatedly contacted people or entities other than its counsel, such as the Special Commission that Represents the State in International Investment Disputes or even the Office of the President of Peru¹⁸.
25. According to Peru, Gramercy itself has admitted its disregard for the designated channels of communication¹⁹.
26. Ignoring the designated channels of communications on a regular basis constitutes aggravation of the dispute by the Claimants, justifying the requested safeguard²⁰.

¹⁴ Peru II, paras. 13 to 15, paras. 19 and 20, 27 to 37.

¹⁵ Peru I, para. 20 to 24 and Peru II, paras. 48 to 56, citing to, among others, *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/05, Procedural Order No. 3, January 27, 2010 (Doc. RA-14); *Anglo-Iranian Oil Co. Case, Order*, 5 July 1951: I.C.J. Reports 1951, paras. 90 to 91 (Doc. RA-3); *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Request for Provisional Measures, December 9, 1983, para. 412 (Doc. RA-4); *Occidental Petroleum Corp., and Occidental Exploration and Production Co. v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Request to Modify the Decision on the Stay of Enforcement of the Award, September 23, 2014, para. 31 (Doc. RA-18); or *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006, para. 135 (Doc. RA-11).

¹⁶ Peru I, paras. 14 to 19 and Peru II, paras. 42 to 47.

¹⁷ Peru I, para. 45, and Peru II, para. 89.

¹⁸ Peru I, paras. 7 to 9, and Peru II, paras. 10 to 12.

¹⁹ Peru II, paras. 21 to 26.

²⁰ Peru II, para. 22.

C. Request on the role of the non-disputing Party to the Treaty

27. Finally, Peru asks the Tribunal to enter the following order regarding the role of the non-disputing Party to the Treaty:

“Correspondingly, the Parties shall respect the role of the non-disputing Party as established in the Treaty. In consultation with the Parties, the Tribunal shall establish in [sic] a procedural order pursuant to which the non-disputing Party may make certain submissions in a manner consistent with the Treaty²¹”.

28. This order is necessary because, according to Peru, Gramercy has aggravated the dispute by disrespecting the role of the non-disputing Party as established in the Treaty²².
29. In particular, Peru alleges that Gramercy has tried, after the commencement of this arbitration, to engage U.S. government officials to advocate for its claims in this dispute and put pressure on the Peruvian authorities²³.

D. Arguments regarding the three requests

30. Peru submits that its three requests are “procedural safeguards” necessary to protect the validity and integrity of this proceeding²⁴, for the following reasons:
31. *First*, the requested safeguards fall within the Tribunal’s ordinary powers and inherent authority – under Art. 17.1 UNCITRAL Rules – to “conduct the arbitration in such manner as it considers appropriate”. Further, the Terms of Appointment grant the Tribunal authority to “ensure effective case management [. . .] after consulting the Parties [to] adopt such procedural measure as it considers appropriate²⁵”. Investment tribunals have in fact adopted similar safeguards in the past²⁶.
32. *Second*, the requested safeguards are not interim measures, as Claimants suggest²⁷. And even assuming they were, Peru would be entitled to such relief²⁸.
33. *Third*, Peru’s requested safeguards are mutual and will cause no harm to the Parties, which will have the opportunity to present their cases in accordance with an established and orderly procedure²⁹. If anything, the safeguards are meant to protect Peru and the legitimacy of this arbitration³⁰.

²¹ Peru I, para. 45, and Peru II, para. 89.

²² Peru I, para. 2.

²³ Peru I, para. 43 and its “Annex on Incidents of Aggravation”, paras. 13 to 16.

²⁴ Peru I, para. 2, and Peru II, paras. 4, 5, and 41.

²⁵ Peru II, para. 58, Terms of Appointment, para. 64.

²⁶ Peru I, paras. 30 and 31, citing to *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006, paras. 135 and 145 (RA-11).

²⁷ Peru II, paras. 57 and 64.

²⁸ Peru II, paras. 64 to 73.

²⁹ Peru I, paras. 25 to 29, and Peru II, paras. 41 and 75 to 85.

³⁰ Peru II, paras. 74 to 85.

3. THE CLAIMANTS' POSITION

34. Gramercy submits that the Tribunal should dismiss Peru's requests and award it its costs³¹.
35. For ease of reading, the Tribunal will first summarize Claimants' global arguments on the three requests (**A.**), and then will cover some considerations the Claimants make regarding each specific request (**B. to D.**).

A. Arguments regarding the three requests

36. Claimants allege that Peru's requests effectively amount to a "sweeping set" of interim measures, which would prevent a "longstanding, public and ongoing discussion" about the land bonds and other legitimate actions by Claimants³².
37. In particular, Claimants point out that the Tribunal has no power to impose such extraordinary restrictions³³ and, in any case, Peru's requests fail to meet the applicable standard for interim measures, namely³⁴:
38. *First*, pursuant to Art. 10.20(8) of the Treaty, Peru must demonstrate that the measures are necessary to "preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective".
39. *Second*, under Art. 26.3 of the UNCITRAL Rules, Peru must additionally show that
- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered;
 - such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed; and
 - there is a reasonable possibility that the requesting party will succeed on the merits of the claim.
40. Peru has not demonstrated that the requested relief preserves its rights, ensures that the Tribunal's jurisdiction is fully effective or that irreparable harm is likely to result if the measures are rejected. Peru has also failed to show how Gramercy's alleged conduct harms Peru³⁵ or will affect this legal dispute or the Tribunal's power to decide upon it³⁶.
41. Tribunals have granted interim measures to prevent aggravation of the dispute only under extreme and coercive scenarios, such as threatens of arrest, imminent seizure

³¹ Gramercy I, para. 7, and Gramercy II, paras. 1 and 7.

³² Gramercy I, paras. 1 and 2, and Gramercy II, paras. 2 and 9 to 15.

³³ Gramercy II, para. 16.

³⁴ Gramercy I, paras. 26 and 27.

³⁵ Gramercy I, para. 30, and Gramercy II, paras. 23 to 40.

³⁶ Gramercy I, para. 35 and 36.

or destruction of a protected investment³⁷. Furthermore, tribunals that have issued interim measures restricting the parties' speech – as Peru is now seeking – have done so after assessing whether they were necessary, urgent or prevented irreparable harm³⁸.

42. In the present case, however, Peru's requests are broad, far-ranging, and vague³⁹. In fact, granting the interim measures would harm Gramercy, because it would prevent it from speaking freely on matters of public concern⁴⁰ and to engage in a wide range of legitimate activities⁴¹:
- The land bonds at the center of this dispute involve a matter of widespread public interest and debate⁴².
 - Gramercy has not generally taken an active role in this public debate⁴³, and its participation has been limited to express valid public-policy concerns in response to Peru's conduct against Gramercy and the bondholders⁴⁴.
 - Peru's requested relief would restrict public commentary and even private conversations with elected representatives, regulatory agencies, institutions, etc., who have expressed an interest in the issue⁴⁵. These concerns are independent from the claims at issue and does not affect the ability of the Tribunal to hear this case⁴⁶; and
 - last but not least, the requested measures go far beyond what is necessary to maintain the integrity of the proceedings⁴⁷.
43. Finally, Gramercy says that any relief, if granted, should be equally imposed on both Parties⁴⁸.

B. Request on non-aggravation

44. Concerning the request for an order of non-aggravation of the dispute, Gramercy replies as follows:

³⁷ Gramercy I, para. 32, citing to *Teinver S.A. v. Argentine Republic*, ICSID Case No. Arb/09/01, Decision on Provisional Measures, April 8, 2016 (Doc. CA-54), or *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Procedural Order No. 1, June 29, 2009 (Doc. CA-48), among others.

³⁸ Gramercy II, paras. 16 to 22, citing to *United Utilities (Tallinn) B.V. v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, May 12, 2016 (Doc. CA-55), or *Valle Verde v. Republic of Venezuela*, ICSID Case No. AARB/12/18, Decision on Provisional Measures, January 25, 2016 (Doc CA-56), among others.

³⁹ Gramercy I, para. 38.

⁴⁰ Gramercy I, paras. 45 to 52.

⁴¹ Gramercy I, paras. 56 and 57 and Gramercy II, paras. 41 to 58.

⁴² Gramercy I, paras. 8, 9 to 15.

⁴³ Gramercy I, para. 12.

⁴⁴ Gramercy I, para. 15, and paras. 16 to 21.

⁴⁵ Gramercy I, para. 23.

⁴⁶ Gramercy I, para. 15.

⁴⁷ Gramercy I, para. 7.

⁴⁸ Gramercy I, paras. 56 to 60, and Gramercy II, paras. 61 to 67.

45. *First*, Peru misrepresents the facts that in its view have aggravated the dispute⁴⁹. The conduct alleged by Peru mostly relates to Gramercy's attempts to respond to Peru's misrepresentations about the land bonds to international financial institutions. Gramercy says that Peru has also hired lobbyists and experts and taken alternative actions to advance its goals in connection with this controversy.
46. *Second*, the non-aggravation principle does not constitute a catch-all measure by which a party to a proceeding can constrain any conduct that it considers aggravating. Instead, the principle constrains serious State conduct that threatens the rights at issue in the proceeding, causing irreparable harm or escalating the dispute beyond means of non-violent resolution⁵⁰.
47. *Third*, Peru has not shown any harm or likelihood of harm resulting from Gramercy's actions or how they have affected or will affect the integrity of these proceedings⁵¹.

C. Request on channels of communications

48. As for the request on channels of communications, Claimants submit that what Peru is actually asking from the Tribunal is to bar Gramercy from having all kinds of communications with anyone other than its external legal counsel. Such request must be dismissed for the following reasons⁵²:
49. *First*, the relief is extraordinary given that Gramercy has business interests and investments in Peru outside the issues in this arbitration.
50. *Second*, principal-to-principal conversations are common, and frequently encouraged, between the parties in a dispute.
51. *Third*, Peru has failed to demonstrate why Gramercy should be barred from speaking directly to Peru's thousands of representatives on non-legal matters or how this would aggravate the dispute.
52. *Fourth*, there is no basis for the Tribunal to order Gramercy to refrain from all potential direct contact with every person who has a position in the Peruvian government.

D. Request on the role of the non-disputing Party to the Treaty

53. The request concerning the non-disputing Party's role is similarly broad and should also be dismissed.

⁴⁹ Gramercy II, paras. 31 to 33.

⁵⁰ Gramercy II, para. 24.

⁵¹ Gramercy II, paras. 34 to 40.

⁵² Gramercy I, paras. 42 and 43.

54. As presented by Peru, the measure will effectively prevent Gramercy from speaking to U.S. representatives regarding the dispute. Peru has not shown how such communication will harm the Parties' rights or the Tribunal's jurisdiction⁵³.

4. DISCUSSION

55. In this section, the Tribunal discusses and rules on the three requests submitted by Peru.
56. As explained below, this Procedural Order acknowledges and confirms the existence of a non-aggravation principle governing this arbitration (**4.1**); the validity of the Parties' agreements regarding channels of communications, (**4.2**); and the Tribunal's previous directions concerning the role of the non-disputing Party to the Treaty, which were issued after consultation with the Parties (**4.3**).
57. In light of this outcome, the question of whether or not Peru's requests would also qualify as requests for interim measures has become moot and the Tribunal does not have to address it; the present Order is based on the Tribunal's ordinary powers to organize the procedure under Art. 17.1 UNCITRAL Rules.

4.1 NON-AGGRAVATION

58. The Respondent requests the Tribunal to order the Parties to abstain from any action or conduct that may result in an aggravation of the dispute.
59. In its communication A-11, dated May 10, 2018, the Tribunal provisionally instructed both Parties to abstain from any action or conduct that may result in an aggravation of the dispute. The Tribunal now confirms such direction for the duration of the proceeding, as this is a principle underpinning any investment arbitration.
60. *First*, the duty of non-aggravation of the dispute is a principle that any party in an investment arbitration must observe at all times. As both Parties recognize, many investment arbitration tribunals have acknowledged this duty, under which the parties must abstain from any step that might "antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult⁵⁴", as well as from events that "threaten to interfere unduly with the parties' ability to present positions in the arbitration, or the tribunal's ability to fashion meaningful relief at the close of the case⁵⁵".
61. *Second*, while the principle is clear, it is not possible for the Tribunal to make a *numerus clausus* catalog of the specific actions that may *a priori* aggravate the

⁵³ Gramercy I, paras. 39 to 41

⁵⁴ *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3, January 27, 2010, para. 86 (Doc. RA-14). See also, *Anglo-Iranian Oil Co. Case*, Order of July 5, 1951: I.C.J. Reports 1951 (Doc. RA-3) or *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006 (Doc RA-11).

⁵⁵ *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, 29 March 2017, para. 236 (Doc. CA-50).

dispute. As Claimants correctly point out, aggravation does not exist in the abstract⁵⁶. What constitutes an aggravation can vary widely, and it is only after considering the specific circumstances of each situation that the Tribunal can decide, or each Party can assess, whether or not certain actions aggravate the dispute.

62. For the foregoing reasons, the Tribunal confirms its order that the Parties abstain from any action that may result in an aggravation of the dispute. Furthermore, the Tribunal trusts that the Parties will act in good faith and will henceforth cooperate actively to achieve a rapid, efficient, and final solution of the present dispute.
63. If any of the Parties has any doubt whether a specific action it intends to adopt might result in the violation of the above order, the Tribunal encourages such Party to approach the Tribunal *ex ante* and request additional guidance.

4.2 COMMUNICATIONS AMONG THE PARTIES

64. Peru also asks the Tribunal to issue an order directing that “[a]ll communications among any of the Parties, including communications involving any of their representatives, shall be channeled solely in the manner indicated by each Party in the Terms of Appointment⁵⁷”.
65. The Tribunal agrees with the principle, but finds that the language proposed by Peru is too broad. For the following reasons, it will narrow the scope of the order from “all communications among any of the Parties” to “communications concerning the conduct of this arbitration or the settlement of the underlying dispute”:
66. *First*, the Tribunal’s powers to regulate the Parties’ actions are not unlimited. On the contrary, the Tribunal may regulate their conduct to the extent it concerns the present dispute and in accordance with the applicable law and rules, as set out in the Terms of Appointment.
67. *Second*, the present arbitration involves, on the one hand, a sovereign State, whose duties and rights under national and international law comprise a wide range of actions and relations. On the other, Claimants are U.S. companies that keep business, legal interests and relations with many private and public entities⁵⁸. It is reasonable to assume that there might be communications between the Parties that have nothing to do with this dispute. For the reason explained above, the Tribunal cannot, and should not, prevent or control relations and communications unrelated to this arbitration.
68. Accordingly, the Tribunal is unable to give directions about “all communications among any of the Parties, including communications involving any of their representatives”, as Respondent requests. Such a sweeping language, if applied

⁵⁶ Gramercy II, para. 38.

⁵⁷ Peru I, para. 7.

⁵⁸ Notice of Intent, para. 2; Gramercy Funds Management LLC “is an asset manager that principally invests in emerging markets, and has considerable experience investing in Latin America. GFM and its owners have often helped States find cooperative and mutually beneficial solutions to challenging situations”.

literally, might well cover many communications among the Parties that are not connected with the present dispute.

Past experience

69. The Tribunal acknowledges that in the years prior to setting these proceedings in motion, communication between the Parties has not been easy and grievances and tensions have arisen. It is in the Parties' best interest that such drift comes to an end.
70. Both Parties have entrusted the adjudication of their dispute to a legally-regulated procedure. They have also indicated in the Terms of Appointment specific representatives, addresses, and channels of communication. Observing each Party's designated channel is all the more important in this case because both Parties are large legal entities with many potential representatives and potential points of contact. Besides, ignoring such preferences can cause serious disruption and harm the effective management of these proceedings.
71. Therefore, the Tribunal concludes that both Parties have made clear their preferences in regard to communications and that each Party should respect the other's indication.
72. For the foregoing reasons, the Tribunal directs the Parties to channel all their communications concerning the conduct of this arbitration or the settlement of the underlying dispute solely in the manner indicated by each Party in the Terms of Appointment.

4.3 ROLE OF THE NON-DISPUTING PARTY

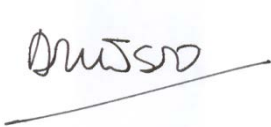
73. Respondent's third request seeks an order from the Tribunal that the Parties shall respect the role of the non-disputing Party as established in the Treaty. "In consultation with the Parties", Respondent says, "the Tribunal shall establish in [sic] a procedural order pursuant to which the non-disputing Party may make certain submissions in a manner consistent with the Treaty".
74. On the one hand, this request has become moot, since the Tribunal issued on July 25, 2018, upon consultation with the Parties, Procedural Order No. 3, dealing with third-party submissions. The Order sets out – in line with the Treaty – rules for the participation of non-disputing Party in these proceedings. It also provides for adequate times at which the Parties may comment on any potential submissions that the non-disputing Party could make regarding the interpretation of the Treaty.
75. On the other hand, this request asks the Tribunal to issue an order that makes a generic acknowledgment of an undisputed principle: Parties must respect the role of the non-disputing Party as established in the Treaty.
76. In conclusion, the Tribunal does not see any need to issue further or more specific directions in this regard.

5. **DECISION**

77. For all the foregoing reasons, the Arbitral Tribunal orders as follows:

- both Parties shall abstain from any action or conduct that may result in an aggravation of the dispute; if in doubt whether a specific action or conduct might result in the violation of the above order, both Parties are recommended to approach the Tribunal *ex ante* and request additional guidance;
- all communications among the Parties concerning the conduct of this arbitration or the settlement of the underlying dispute shall be channeled in the manner required by each Party.

78. The decision on costs is reserved.



Juan Fernández-Armesto
Presiding Arbitrator

Place of Arbitration: Paris, France
Date: August 29, 2018