In the matter of

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
Claimants

v.

The Republic of Peru
Respondent

(UNCT/18/2)

Second Submission of the Republic of Peru on Procedural Safeguards

15 June 2018

RUBIO LEGUÍA NORMAND
Lima

WHITE & CASE
Washington, D.C.

Second Submission of the Republic of Peru on Procedural Safeguards

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Second Submission of the Republic of Peru on Procedural Safeguards

1. The Republic of Peru ("Peru") hereby submits its Second Submission on Procedural Safeguards, further to Tribunal communication A-11 dated 10 May 2018 and in response to the Opposition to Peru's Interim Measures Application by Gramercy Funds Management LLC and Gramercy Peru Holdings LLC (together, "Gramercy") dated 1 June 2018 ("Gramercy's First Submission").

2. The Tribunal instructed the Parties, in Tribunal communication A-11 of 10 May 2018, to "abstain from any action or conduct that may result in an aggravation of the dispute, and that *pro tem* all communications between the Party be channelled in the manner required by each Party."[1] In accordance with Peru's Submission on Procedural Safeguards dated 1 June 2018 ("Peru's First Submission"), Peru respectfully requests that the Tribunal maintain such procedural safeguards to protect the integrity of this proceeding under the Peru-United States Trade Promotion Agreement (the "Treaty").

3. By way of introduction, the World Cup of soccer (*futbol*) has just commenced, and teams from around the world (including Peru) have consented to enter a rule-based forum, and see who wins. It is fundamental that participation in the competition requires submission to applicable rules and principles of fair play. Accordingly, there are referees – literally, *árbitros* – who are authorized and required to ensure order and fair play.

4. Treaty proceedings similarly depend on basic safeguards, as Parties consent to arbitration pursuant to a rules-based system and arbitrators are authorized and charged with ensuring fair play and the integrity of the proceeding. Indeed, the procedural safeguards before this Tribunal are not particularly complex, controversial or uncommon. They are, however, necessary to put order to this proceeding and protect the integrity of the proceeding under the Treaty in light of Gramercy's aggravating conduct.

5. As set forth in its Request for Relief, Peru respectfully requests that such safeguards remain in place and that recourse to the Tribunal be available as may be required to maintain order and protect the integrity and validity of this proceeding. The Tribunal need to be lead astray by Gramercy's disingenuous "Opposition to Peru's Interim Measures Application," an approach that is inapposite considering that Peru has not made such an application nor has the Tribunal identified the issues before it as an application for interim measures. In any event, the safeguards satisfy the standard for interim measures, as well.

6. To assist the Tribunal, and in response to Gramercy's First Submission, Peru addresses below (I) the Treaty and the agrarian reform bonds, (II) the procedural safeguards, (III) relevant facts, (IV) the legal basis for the safeguards (including, in the alternative, as to interim measures), and (V) its request for relief.

[1] Letter from Tribunal to Parties, 10 May 2018 (A-11) (quoting communication A-11).

I. THE TREATY & THE AGRARIAN REFORM BONDS

7. The Republic of Peru is a respectful participant in investment arbitration proceedings, a reliable partner of the United States and a fiscally responsible sovereign that established a process for the historic and lawful resolution of Peruvian agrarian reform bonds, for the benefit of all legitimate bondholders. Instead of participating in the bondholder process which would allow it a significant recovery, Gramercy has engaged in a persistent campaign of aggravation aimed at undermining Peru and the bondholder process in an effort to obtain increased returns to which Gramercy has no right. It is Gramercy, not Peru, that has violated the object, purpose and requirements of the Treaty. Gramercy has now gone further in its First Submission, setting out an inaccurate depiction of facts aimed at the merits and setting up straw arguments as to legal standards. To avoid further prejudice from Gramercy's First Submission, Peru thus summarizes below the context of the pending request for procedural safeguards, and responds in detail to Gramercy's arguments further below.

- **The Integrity of the Treaty Proceeding**

  This Treaty proceeding arises under the Peru-U.S. Trade Promotion Agreement. Gramercy chose to commence the present Treaty proceeding to resolve a dispute with Peru related to the agrarian reform bonds. Its choice has consequences. The Treaty provides a mechanism for the resolution of investment disputes in a neutral forum and subject to due process, with a Treaty-established role for the non-disputing Party, as well. Ironically, however, Gramercy has scarcely advanced its Treaty proceeding over a period of more than two years. Instead, it sought to force Peru to capitulate to Gramercy by changing Peruvian law. This proceeding is only advancing now because Peru, not Gramercy, requested the appointment of the President of the Tribunal, in the face of Gramercy's disinterest in respectful consultations and ongoing aggravation.

- **The Historical Status of the Agrarian Reform Bonds**

  Gramercy claims incorrectly that the status of the bonds was clear when it allegedly chose to acquire them. In fact, the agrarian reform bonds have unique historical origins that pre-date the Treaty by decades. They are old physical instruments provided decades ago as compensation for land in Peru, in local currency and subject to Peruvian law and jurisdiction. They were not offered publicly, listed on an exchange or issued into the U.S. market, and are not comparable to contemporary sovereign bonds. Years of currency changes and hyperinflation resulted in uncertainty as to the value of bonds and procedure for recovery.

- **Gramercy's Speculative Acquisition of Agrarian Reform Bonds**

  Gramercy continues to depict itself as an innocent victim. In fact, Gramercy is a Connecticut-based fund with the stated mission "to exploit distressed investment opportunities in emerging markets."[2] The profoundly speculative nature of Gramercy's alleged acquisitions is evident in its contemporaneous internal memorandum emphasizing "the complexity surrounding the investment opportunity" and highlighting a "discrepancy" as to the possible valuation method, noting various valuation scenarios. Given this uncertainty, Gramercy's own memorandum reveals that it contemplated from the outset a lobbying campaign to effect a change in law favorable to Gramercy.[3]

[2] *Overview*, Gramercy Funds Management, 3 July 2016 *available at* http://www.gramercy.com/Overview.aspx.

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

- **Gramercy's Failure to Explain Its Solicitation of Funds From Pension Funds**

  Gramercy continues to divert attention from its own unexplained dealings with pension funds and "beneficial owners." In fact, having acquired bonds despite the lack of clarity regarding their status, Gramercy solicited funds from pension funds and others, including the agrarian reform bonds in its portfolio of distressed debt. Gramercy has yet to reveal in this proceeding, despite queries over more than two years, basic information such how it paid for the bonds, who it paid for the bonds or how much it paid for the bonds, or provided originals of these paper instruments which by law are subject to authentication procedures. Nor has Gramercy revealed information such as how it solicited funds from pension funds and others, who those beneficial owners may be and what disclosures were made to them. It is telling that a Gramercy presentation to one U.S. pension fund referenced Peru as a small part of a portfolio, made no reference to the agrarian reform bonds and emphasized: "[t]he investments' performance may be volatile and investors may lose all or a substantial portion of their investment."[4]

- **Peru's Establishment of a Bondholder Process**

  Gramercy has abused a submission on procedural safeguards as a further effort to undermine the bondholder procedure in an effort to advance its own self-interest. Gramercy continues to repeat incessantly the bare allegation that Peru is in "default" in an ongoing effort to undermine a duly establish bondholder process. In fact, after years of uncertainty, the legal status of the bonds was settled by a resolution of the Constitutional Tribunal. Peru duly established and has continued to advance a local bondholder procedure for valuation and payment of the agrarian reform bonds, including through the issuance of an August 2017 Supreme Decree relevant to all bondholders and the continued advancement of the bondholder process. Gramercy also alleges that the bondholder procedure has no resulted in any payment to bondholders; that is incorrect.

- **The Aggravation of the Treaty Proceeding**

  Gramercy denounces the bondholder process, and now claims that it merely has joined in a public discussion about the agrarian reform bonds. In fact, Gramercy originated a persistent attack campaign to harm Peru, aligning paid lobbyists, secondary ratings agencies, one-sided experts and public relations firms. Having failed to consult respectfully with Peru, Gramercy has engaged in a smear campaign which has always revealed its uncertainty in its claims. The scope of its pattern of aggravation has been reported in detail over time and in Peru's current and recent submissions. For its part, Peru has continued to carry out the bondholder process, interacted with Gramercy in a diligent and respectful manner, and limited its discussion of the ongoing dispute.

8. Whatever happened in the past, the arbitral process is fully engaged, and the circumstances requires that the Tribunal put and maintain order in this proceeding. Peru has thus respectfully requested that the Tribunal put in place reasonable procedural safeguards that protect the integrity of the proceeding and the right to be heard, so that the Parties may present their respective cases and this dispute can be resolved in accordance with the Treaty. Gramercy should stop its trash-talking, enter the arena, follow the rules and put on its case. It can rest assured that Peru will respond.

[4] San Bernardino County Employee's Retirement Association, Minutes, Board of Retirement, 2 August 2012, 1.

II. CONFIRMING THE PROCEDURAL SAFEGUARDS

9. Gramercy's First Submission strongly confirms, rather than undermines, the need for the Tribunal to maintain procedural safeguards related to (A) respect for channels of communications and (B) the non-aggravation of the proceeding. The procedural safeguards are reasonable, appropriate, and consistent with what has been ordered by tribunals in other proceedings, as well as in Tribunal communication A-11.

A. Respect for Channels of Communication

10. As to point of contact, Peru confirms its request for 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.*

11. Gramercy's First Submission confirms the necessity of an order regarding respect for channels of communication:

- Gramercy has no answer to the fact that Peruvian law establishes that the Special Commission established pursuant to Law No. 28933 is the competent entity that represents the Peruvian State in investment disputes under the Treaty, that the Special Commission has empowered Peru's counsel to represent Peru in all matters related to the dispute, and that Gramercy has been told the same, time and time again.[5]

- Gramercy freely admits that it considers itself entitled to disregard the designated channels of communication and that it intends to continue doing so. When asked to confirm respect for the channel of communication, Gramercy's representative stated: "Absolutely not. Absolutely 100% not." Gramercy's party representative and counsel each made similar statements during the procedural consultation, thumbing their noses at Peru, the Tribunal and the Treaty proceeding on the very first and most basic procedural item in the Terms of Appointment.[6]

- Gramercy admits that "Peru's representatives are, of course, free to decline to speak with Gramercy."[7] But Gramercy does acknowledge that when Peruvian officials repeatedly have done so, it has ignored their requests to direct communications through designated channels.

- Gramercy states that its "attempts to communicate directly with Peru have frequently been in response to its frustrating failure to receive clear (if any) responses from the so-called 'designated channel,'" citing one email to Peru's counsel dated 7 March 2017. But Gramercy does not reveal that on 6 March 2017 it had a call with Peru and its counsel, or that on 8 March 2017 Peru responded by reiterating the channel of communication.[8] Indeed, the existing record demonstrates that Peru's representatives have been consistently diligently and respectful in communicating with Gramercy

[5] *See, e.g.*, Letter from Peru to the Tribunal, 11 May 2018 (R-15).

[6] *See* Terms of Appointment ¶ 2 (Respondent).

[7] Gramercy's First Submission ¶ 43 (C-22).

[8] Gramercy's First Submission ¶ 42 (C-22); Letter from Peru to Gramercy, 8 March 2017 (Doc R-160).

over more than two years, and in fact that it has been Gramercy that has consistently taken steps such as cancelling or not returning phone calls.[9]

- Gramercy states that "Peru has not demonstrated any basis under which Gramercy should be barred from speaking directly to Peru's thousands of representatives on non-legal matters."[10] But Gramercy fails to acknowledge that Peru's point of contact (as Gramercy agreed in the Terms of Appointment, as in various prior instances) is the designated channel of communication "in all matters related to the dispute,"[11] and that Gramercy previously agreed in the Consultation Protocol to "communicate in connection with any and all issues related to the Arbitration through their counsel or as otherwise designated by a Party in writing to the other Party."[12]

12. Gramercy's excuses for disregarding designated channels of communication are not credible and its statements only underscore that it will continue to act with disregard for the Treaty proceeding and disrespect toward Peru absent the continued order of the Tribunal regarding point of contact. The facts and evidence of Gramercy's disregard for channels are further detailed below.

B. Non-Aggravation of the Dispute

13. As to non-aggravation, Peru confirms its request for an order as follows:

> *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 a procedural order pursuant to which the non-disputing Party may make certain submissions in a manner consistent with the Treaty.*

14. Gramercy's First Submission confirms the necessity of an order with respect to non-aggravation of the dispute, and respect for the role of the non-disputing Party:

- Gramercy feigns ignorance as to the facts related to its aggravating conduct and states that it has "continually sought clarification on what exactly Peru objects to in its various references to 'non-aggravation.'"[13] Ironically, Gramercy also admits to key elements of its campaign (for example, the focus on the OECD and American workers), and is certainly familiar with the record of more than two years of evidence which it has generated and which Peru has consistently pointed to in meetings, correspondence and pleadings.[14] Gramercy cites two letters it cites in support of its fake puzzlement, but fails to mention that they were sent within weeks of Peru's Response of 6 September 2016 that detailed Gramercy's aggravation.[15]

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[9] *See, e.g.*, Email from Gramercy to Peru, 22 August 2017 (Doc. R-181) ("Based on [issuance of Supreme Decree No. 242-2017-EF], we see no need for a phone call later today.").

[10] Gramercy's First Submission ¶ 43 (C-22).

[11] *See e.g.* Letter from Peru to Tribunal, 11 May 2018 (R-15); Letter from Peru to Tribunal, 14 May 2018 (R-16).

[12] Consultation Protocol signed 11 November 2016 (Doc. R-153).

[13] Gramercy's First Submission ¶ 20 (C-22).

[14] *See e.g.* Response of the Republic of Peru, 6 September 2016, ¶¶ 47-68, 94-99 (R-1).

[15] *See, e.g.*, Email from Peru to Gramercy dated 6 October 2016 (Doc. R-149) ("Gramercy's rote statement that it is not aware of its own conduct is not credible given the long written record and its ongoing conduct. Peru again

- Gramercy purports to address the "context" of aggravating conduct.[16] But Gramercy failed to provide comprehensive and transparent information and evidence to the Tribunal, providing only 18 exhibits, despite being the source of or having access to virtually all of the evidence which Peru submitted with its First Submission.[17]

- Echoing an allegation that was first transmitted to Peru through a U.S. official half a year ago, Gramercy states that the procedural safeguards constitute a "gag order" and a "prior restraint on speech of the kind that is anathema to democracies like Peru and the United States."[18] But Gramercy fails to acknowledge that the focused limits are in fact *less* restrictive than orders issued by U.S. courts, which can restrict all communications by parties,[19] and that the phrase "gag order" is just one more Gramercy talking point aimed at disparaging Peru and disrespecting the authority of the Tribunal and the Treaty proceeding.

- Gramercy states that "the measures requested by Peru go far beyond the relief ordered even in cases where Tribunals have issued some form of directive relating to non-aggravation and publicity."[20] But that is simply wrong, and Gramercy cherry-picks from the jurisprudence and mischaracterizes the cases on which it relies.

- Gramercy states with respect to the "'non-disputing party' measure" that "Peru's treatment of the Land Bonds is an issue of concern […] for many American stakeholders, including a number of U.S. pension funds."[21] Gramercy does not mention that such stakeholders are only involved because they invested in Gramercy, which itself disclaims all risk of loss from such investments.

15. Gramercy's excuses for its aggravating conduct are not credible and its statements only underscore that it will continue to aggravate the dispute absent the continued order of the Tribunal regarding aggravation. The facts and evidence of Gramercy's aggravating conduct are further detailed below.

III. THE FACTS RELATED TO THE SAFEGUARDS

16. The Tribunal can, but does not need to make affirmative findings of fact as to aggravation or actual harm to adopt safeguards to put order to this Treaty proceeding.[22] Gramercy's First Submission confirms, rather than undermines, the relevance of the facts before the Tribunal to the procedural safeguards.

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requests that Gramercy respect the treaty procedure that it chose to commence and will address this issue further as relevant.").

[16] Gramercy's First Submission ¶ 4 (C-22).

[17] *See* Peru's First Submission, Index of Fact Exhibits (R-20) (attaching Doc. R-71 to Doc. R-225).

[18] Gramercy's First Submission ¶¶ 2, 66 (C-22).

[19] Peru's First Submission, ¶¶ 27-28 (R-20).

[20] Gramercy's First Submission ¶ 37 (C-22).

[21] Gramercy's First Submission ¶ 39 (C-22).

[22] *See* Peru's First Submission ¶ 32 (R-20). Peru briefed the facts relevant to Gramercy's conduct in its First Submission, together with the corresponding documentary evidence. As Peru advised the Tribunal, Peru stands ready to provide additional details and/or evidence should it prove useful to the Tribunal, and reserves all rights in this regard. Peru notes that Gramercy's First Submission neither addresses significant aspects of Gramercy's campaign and provides limited evidence to substantiate its account of the facts.

- Inaccurate Depiction of the Context. Gramercy's First Submission inaccurately depicts the context of its conduct, setting out merits-based assertions and using its end of obtaining an exorbitant payout to justify the ends of aggravating conduct.

- Disrespect for Channels of Communication. Gramercy misrepresents the extent of its disrespect for the channels of communication, as well as its willingness to accept when officials decline to speak to it. For example, Gramercy fails to disclose its repeated attempts to contact the President of Peru despite receiving multiple communications reiterating the appropriate point of contact.

- Campaign against Peru. In an attempt to downplay its conduct as mere "participation in public discussions," Gramercy misrepresents and to address the extent of its aggravating conduct.

    - Gramercy' misrepresents the origins of its campaign, saying it was triggered by news breaking in 2015 that had in fact been known since at least 2014.
    - Gramercy conceals its creation of and use of "fake grass roots" group PABJ, and the rest of its campaign mechanism identified by Peru.
    - Gramercy now admits to having focused on elements of the incidents of aggravation described by Peru, including the focus on OECD and American workers. Gramercy fails to acknowledge that it has itself disclaimed any responsibility for the risks assumed by its investors.
    - Peru has had a measured response to Gramercy's conduct, and unlike Gramercy has only participated in general discussion to a limited degree, and never as part of a campaign against Gramercy.

A. Gramercy Inaccurately Depicts the Context of the Dispute

17. Gramercy uses its First Submission as an opportunity to make allegations as to the merits of the dispute that are false and misleading. Without prejudice to Peru's right to respond in accordance with its fundamental right to due process, Peru notes as follows:

- Gramercy states that Peru is "misrepresenting the Land Bonds' status as a valid sovereign obligation," and trying to "erase it from history."[23] In fact, it is Gramercy that omits to mention the historical context, and, contrary to Gramercy's assertion, there is no question as to the legal status of the agrarian reform bonds.

    - The agrarian reform bonds have unique historical origins dating back almost half a century to an era of agrarian reforms adopted across Latin America. Utterly different from contemporary sovereign bonds, these old bearer instruments are subject to Peruvian law and jurisdiction and many years ago were given as compensation for the expropriation of land in Peru. After years of hyperinflation and economic problems, the status of the bonds was resolved by a 2013 court resolution.[24]

    - Peru has established a process ("Bondholder Process") to pay legitimate holders of Peruvian agrarian reform bonds. Participating bondholders are able to verify

[23] *See, e.g.,* Gramercy's First Submission ¶¶ 4, 6, 11, 13, 14, 16, 18, 47, 56.

[24] *See* Response of the Republic of Peru, 6 September 2016 ¶¶ 28-32, 36, 38-39 (R-1).

the authenticity of agrarian reform bonds, register as legitimate bondholders, calculate the current value of bonds, and choose among payment methods.[25]

- During the last two years, Peru has continued developing and implementing the Bondholder Process, as previously anticipated.[26] Advances during the past two years include, among other things, Supreme Decree No. 034-2017-EF dated 28 February 2017 and Supreme Decree No. 242-2017-EF dated 18 August 2017 which continued to advance the Bondholder Process.[27]

- Gramercy states that there is a "complete lack of transparency as to the functioning" of the Bondholder Process.[28] But Gramercy fails to acknowledge that Peru's Ministry of Economy and Finance has made available on its website an "Orientation Portal" about the agrarian reform bonds, which is freely accessible to the public.

- Gramercy continues to refer to a "default" by Peru,[29] and asserts that "to Gramercy's best knowledge, [the Bondholder Process] has not resulted in any payments to bondholders so far."[30] In fact, Peru has now authenticated, valued and made payment on agrarian reform bonds pursuant to the Bondholder Process at the request of participating bondholders.

18. Gramercy rejected the Bondholder Process and chose to forgo the available payment options according to Peruvian law. Gramercy instead opted for pursuing international arbitration under the Treaty, and issues it may have regarding the agrarian reform bonds and Peru's payment thereof are properly raised with its claims on the merits. It has been Peru's position that "Gramercy and its representatives [should] respect the proceeding its chose to commence under the Peru-United States Trade Promotion Agreement and channel its communication and conduct accordingly."[31]

19. While Gramercy has chosen not to address its campaign against Peru, Peru has summarized ten incidents of aggravation that span over two years and cover the entire the duration of this dispute. Specifically, even though Gramercy now admits focusing on the OECD and American workers issues, Gramercy has not revealed its involvement in any of the incidents discussed in the Annex to Peru's First Submission:

1. *The IMF/World Bank Meetings in Lima*
2. *The Embassy in Washington*
3. *The Notice of Intent, Consultations and Threats*
4. *The Initial Notice of Arbitration and Peruvian Elections*
5. *The Government Transition and Third Notice of Arbitration*
6. *The Evolving Campaign and Sovereign Finance*
7. *The Teamsters Issue and Aftermath*
8. *The Further Politicization of the Dispute*
9. *The OECD Issue*
10. *The Tribunal Order and the Permanent Campaign*

[25] Response of the Republic of Peru, 6 September 2016 ¶ 41 (R-1).

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

[27] Supreme Decree No. 034-2017-EF; Supreme Decree No. 242-2017-EF (Doc. RA-22).

[28] See Gramercy's First Submission ¶ 57 (C-22).

[29] See Gramercy's First Submission ¶ 18 (C-22).

[30] Gramercy's First Submission ¶ 16 (C-22).

[31] *See, e.g.,* Letter from Peru to Gramercy, 6 October 2016 (Doc. R-238).

20. Peru has set out and substantiated its position on channels of communication and non-aggravation. In addition to its prior correspondence with Gramercy, Peru briefed these issues in its Response, addressed them in its letter of 17 April 2018 (R-7) and during the procedural conference, and has now briefed them again in Peru's First Submission, detailing the scope of Gramercy's conduct which Peru has substantiated with relevant evidence. As Peru advised the Tribunal, Peru stands ready to provide additional details and/or evidence should it prove useful to the Tribunal, and reserves all rights in this regard. On the other hand, Gramercy's First Submission neither fails to address significant aspects of Gramercy's campaign and attaches a limited number of exhibits to support Gramercy's allegations. And while Gramercy cannot change the fact of its failure to address these issues at the appropriate time, Gramercy also has exhibited a pattern of wanting to invert due process and proper order.[32] Peru reserves the right to respond to any attempt by Gramercy to sandbag Peru.

B. Gramercy Admits Its Disregard for Channels of Communication

21. Gramercy misrepresents its failure to respect numerous the channels of communication, despite repeated requests from Peruvian officials. Peru has provided the Tribunal a list of 22 examples of Peru's reiterated requests for Gramercy to respect the designated channels of communication.[33] There are additional examples. Gramercy has attached emails with the Peru's Ministry of Foreign Trade in February of 2016.[34] But Gramercy does not include a subsequent email sent by the Minister after she became aware of Gramercy's notice under the Treaty, advising Gramercy as to the designated channels.[35]

22. Peru has advised Gramercy that such disregard for channels of communication constitutes aggravation. For example, on 3 and 4 October 2016, Peru advised Gramercy that "[t]he long written record highlight's Peru's concerns regarding Gramercy's conduct, including, among other things, disregard for established channels of communication," and that "Gramercy continues to actively aggravate the circumstances including by disregarding channels of communication."[36]

23. Gramercy takes the position that it has the "right to engage in and stimulate discussion […] with democratically elected officials in Peru,"[37] but that "Peru's representatives are, of course, free to decline to speak with Gramercy."[38] As a factual matter, Gramercy fails to acknowledge its refusal to respect the requests from officials in this regard.

24. Gramercy has cited its email of 7 March 2017 to Peru counsel, stating that Gramercy would be communicating directly with the Special Commission.[39] Peru's counsel and the Special Commission both responded by email on 8 March 2017 reiterating that

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[32] *See, e.g.,* Letter from Gramercy to the Tribunal, 13 April 2018 (C-12) (unexpected submission of evidence by Gramercy into record a time that preempted the discussion as to the appropriate procedural mechanism that was ongoing among the Parties.)

[33] *See* Letter from Peru to Tribunal, 17 April 2018 (R-7).

[34] Email from Gustavo Ferraro to Magalli Silva Velarde-Alvarez, Minister of Exterior Commerce and Tourism, February 12, 2016 (CE-257); Email Exchange between Gustavo Ferraro and Magalli Silva Velarde-Alvarez, February 15, 2016 (CE-258).

[35] Email from Ministry of Foreign Trade and Tourism to Gramercy, 19 February 2016 (Doc. R-108).

[36] Email from Peru to Gramercy, 3 October 2016 (Doc. R-236); Email from Peru to Gramercy, 4 October 2016 (Doc. R-237).

[37] Gramercy's First Submission, ¶ 4 (C-22).

[38] Gramercy's First Submission, ¶ 43 (C-22).

[39] Email from Gramercy's Counsel to Peru's Counsel, March 2, 2017 (Doc. CE-273).

communications should be channeled through Peru's counsel.[40] Notwithstanding these request, Gramercy wrote directly to the Special Commission on the same day.[41]

25. Gramercy made numerous efforts to contact the President of Peru after being copied on an email from the Office of the Presidency that politely advised that "the right person to talk to" was Peru's counsel.[42] Despite this, Gramercy wrote the President of Peru on 29 September 2017,[43] after which the Presidency again told Gramercy that Peru's counsel "is the designated and preferred channel of communication for this matter, as this Office has confirmed."[44] On 29 November 2017, Gramercy wrote the President, put words in his mouth, and criticized what actually had been directly communicated by the President's office by questioning the role of Peru's counsel and stating that it "remain[ed] available to discuss the matter with you or other appropriate representatives of the Peruvian Government."[45]

26. Claimants in investment disputes tend to complain about States being inconsistent. Here Gramercy apparently cannot abide by Peru's approach and is instead seeking to knock on other doors, hoping to get a different, more favorable answer.

C. Gramercy Cannot Deny Its Aggravation of the Dispute

27. Gramercy's efforts to downplay its conduct as mere "participation in public discussions" are fatally flawed;[46] Gramercy misstates the origin of its aggravation, fails to address the mechanism it has put in place, and now admits to what has been the focus of its campaign. Peru, on the other hand, has been measured in its response.

1. Gramercy Misstates the Origins of the Aggravation

28. Gramercy's portrayal of its conduct as responsive to Peru is inconsistent with the facts. Gramercy states that it "generally did not take an active role in the public debate after it invested in the Land Bonds".[47] But Gramercy does not acknowledge that it had a strategy to change Peruvian law by taking advantage of Peruvian officials "with little to lose" as far back as 2006, when it first acknowledged that there were multiple scenarios for valuing the agrarian reform bonds.[48] Nor does it mention that "introduce[ing] a catalyst" is a fundamental part of its business strategy, as it has touted to investors.[49]

29. Gramercy says the trigger for its campaign was news about the 2013 court resolution that "first broke in the Peruvian press" in 2015,[50] but does not cite any contemporaneous evidence.[51] Gramercy fails to mention that the news was known in 2014 at least.[52]

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[40] Email from Peru to Gramercy, 8 March 2017 (Doc R-240).

[41] Letter from Gramercy to Peru, 8 March 2017 (Doc R-161).

[42] *See* Email from Office of President of Peru to U.S. Congressional Staffer, 10 August 2017 (Doc. R-241).

[43] *See e.g.* Letter from Gramercy to President of Peru, 29 September 2017 (Doc. R-192).

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

[45] Letter from Gramercy to President of Peru, 29 November 2017 (Doc. R-201).

[46] *See* Gramercy's First Submission ¶¶ 14, 15, 31 (C-22).

[47] Gramercy's First Submission ¶ 12 (C-22).

[48] *See* Memorandum from David Herzberg to Robert Koenigsberger, 24 January 2006, at 3 (Doc. CE-114).

[49] Gramercy Emerging Markets Equity, Gramercy, 3 October 2013, at 9 (Doc. R-71) (explaining that Gramercy looks for "situations where we can introduce a catalyst to positively affect the outcome.").

[50] Gramercy's First Submission ¶ 13 (C-22).

[51] *See also* Notice of Arbitration and Statement of Claim, June 2, 2016, ¶ 87 (C-3) (alleging news broke in January 2015).

30. Gramercy does not mention that the main development in its campaign during 2015 was the creation of the group Peruvian-American Bondholders for Justice ("PABJ) in June.[53] PABJ developed its website and solicited names and addresses by offering free tickets to the Peru-US football match on 4 September 2015,[54] where it distributed fans and other branded material.[55] Nor does Gramercy mention that the flashpoint for the campaign in 2015 was Gramercy's attempt to gain publicity during the annual IMF/World Bank fall meetings which Peru hosted in October 2015. At the time the Financial Times reported that Gramercy was "ramping up its campaign," which linked PABJ to Gramercy.[56]

31. Gramercy states: "From that point forward, Gramercy's participation in public discussions increased, but has been directed at providing truthful information about the Land Bonds and Peru's conduct in order to counteract misrepresentations made by Peru about its sovereign obligations."[57] This is false. Gramercy has used threats of media attention as a strategic tool against Peru as well as to dissuade participation in the Bondholder Process.[58] If more evidence were necessary, even a cursory look at the PABJ twitter feed shows the dearth of substantive discussion of the agrarian reform bonds: Of PABJ's last 10 tweets, only three (3) mention the bonds, with the rest finding unrelated matters to criticize Peru.[59] Moreover, Gramercy has not provided information on the agrarian reform bonds. Despite its electing to commence Treaty proceedings, Gramercy (together with PABJ and others) has actively to engage in trial-by-media with Peru, and repeatedly "challenge[d]" Peru to respond to Gramercy's public statements.[60]

2. Gramercy Conceals its Campaign Mechanism

32. In its effort to minimize the extent of its own role, Gramercy also fails to acknowledge that it is at the center of a sophisticated mechanism, relying on specially created organizations, lobbyists, hired experts, and public relations advisors, among others, who serve to shield and perpetuate the campaign against Peru.[61] No matter what Gramercy may say in the future, it is damning that Gramercy did not acknowledge the nature of its relationship with these entities, despite Peru's having already noted the issue in its Response.

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[52] *See e.g.*, *Ministerio Publico Confirma Fraude y Falsificación en el Tribunal Constitucional*, ABDA, 13 October 2014 (Doc. R-226). Peru reserves all rights in this regard.

[53] *See* PABJ Certificate of Incorporation, 29 June 2015, at 4 (Doc. R-81).

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

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

[56] Robbin Wigglesworth, *Hedge fund pressures Peru to pay back 40-year-old debt*, Financial Times, 7 October 2015 (Doc. R-88); *see also* @RobinWigg (Robbin Wigglesworth), Tweet, 7 October 2015 (Doc. R-87).

[57] Gramercy's First Submission ¶ 14 (C-22).

[58] *See* Letter from Gramercy to Special Commission of Peru, 28 March 2016 (Doc. R-47) ("Gramercy is open to refraining from taking other actions including affirmative steps to publicize the land bond issue at other upcoming events."); Email from Gramercy to Special Commission of Peru, 13 April 2016 (Doc. R-118) ("Gramercy and others will be resuming their efforts to focus attention on the land bonds issue.".

[59] *See* @PeruLandBonds (PABJ), Tweets, 4-15 June 2018 (Doc. R-243).

[60] *See e.g.* Gramercy Funds Management, Gramercy, *Gramercy Once Again Responds to False Accusations Contained in Peru's Response on Land Bonds*, PR Newswire, 6 July 2016 (Doc. R-138); *Flyer*, Peruvian-American Bondholders for Justice, 16 April 2016 (Doc. R-33) (PABJ circulated questions and "demanded" answers).

[61] *See e.g.* Peru's First Submission, ¶¶ 35-44 (R-20); Response, 6 September 2016, ¶¶ 54-56 (R-1).

33. Gramercy distinguishes itself from "interested third parties, including thousands of Peruvians and Peruvian-Americans, and U.S. institutional investors [….] have been active participants in public debate."[62] Gramercy has long sought to create the impression of such widespread public support by creating "fake grass roots" or "astroturf" groups.[63] PABJ is a prime example of this kind of *astroturfing*, having been created by Gramercy,[64] and with Gramercy's lobbyists behind its communications and flyers,[65] despite which it purports to be "part of a broader coalition"[66] and does not acknowledging its connection to Gramercy.[67]

34. Gramercy cannot distance itself from the various parts of its mechanism or write them off as "third-parties." Gramercy's own words show that it is in control of the campaign against Peru. In 2016 when Gramercy's failed to make Peru capitulate through threats of press attention, Gramercy informed Peru that "Gramercy and others will be resuming their efforts to focus attention on the land bonds issue."[68] Even in its First Submission, Gramercy references "two prior occasions when Gramercy voluntarily accorded Peru the very relief that it now seeks."[69]

3. Gramercy Admits A Range of Aggravating Conduct

35. Gramercy's First Submission makes critical admissions as to the focus of Gramercy's conduct. Peru previously has explained and provided evidence of several incidents of aggravation by Gramercy. Although Gramercy does not reveal any details, it has now admitted that its focus has been on these issues.

- As detailed in Peru's First Submission, Gramercy has repeated incessantly certain simplistic messaging about the supposed "default," of the "Land Bonds."[70] In describing its focus, Gramercy expressly refers to "providing truthful information about the Land Bonds," and "Peru's default on the Land Bonds."[71]
- As detailed in Peru's First Submission, Gramercy and various parts of its campaign mechanism have sought to prevent Peru from joining the OECD and to impact Peru's good reputation with this and other international institutions. After PABJ and ABDA disseminated a report sent to OECD attacking Peru, a sometime member of Gramercy's team publicly denied Gramercy's involvement.[72] Gramercy now admits to focusing its statements on the allegation "that Peru's failure to report the Land

[62] Gramercy's First Submission ¶ 8 (C-22).

[63] Astroturfing (from the term for synthetic grass used in certain stadia) is the practice of "spending money behind the scenes to create the appearance of authentic support." *See* Zachary Mider and Ben Elgin, *How Hedge Funds (Secretly) Get Their Way in Washington*, Bloomberg, 25 January 2018 (Doc. R-244).

[64] *See* PABJ Certificate of Incorporation, 29 June 2015, at 4 (Doc. R-81); PABJ, 2015 Annual Franchise Tax Report, Delaware, 5 February 2016 (Doc. R-104).

[65] *See* @PeruLandBonds (PABJ) (Doc. R-199).

[66] *See* @PeruLandBonds (PABJ) (Doc. R-199).

[67] *See, e.g.,* @PeruLandBonds (PABJ), Tweets, 11 May 2018 ("An American company says it is owed more than $1 billion by #Peru on defaulted #landbonds—this is something Peru's new administration can rectify!") (Doc R-199).

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

[69] Gramercy's First Submission ¶ 48 (C-22).

[70] *See* Peru's First Submission ¶ 41 (R-20).

[71] Gramercy's First Submission ¶ 14 (C-22).

[72] *See e.g.,* Letter from PABJ, ABDA and others to Secretary-General of OECD, 3 December 2017 (Doc. R-203); *Agrarian bondholders:* "*We don't want an amount, but rather an updated methodology*", Gestion, 6 December 2017 (Doc. R-206).

Bond debt is inconsistent with international standards, including those of the IMF, the World Bank, and the OECD."[73]

- As detailed in Peru's First Submission, the purported concern for American workers is another trope of Gramercy's discourse, particularly since the change of government in Washington in 2017. Among other things, it has included the March 2017 letter from the President of the International Brotherhood of Teamsters, a major labor union, sent a letter to the Ambassador of Peru and copied the President of the United States and others in his administration,[74] and subsequently disseminated to the press (reportedly by Gramercy representatives),[75] quoted on PABJ flyers[76] and on mobile billboards,[77] as well as recent articles and op-eds.[78] Despite this, when asked to confirm if the bonds referenced by the Teamsters where the same bonds as those allegedly held by Gramercy, Gramercy's counsel replied: "No comment." Gramercy now admits "primarily focusing" is the allegation "that Peru's default on the Land Bonds impacts thousands of Peruvian bondholders and American workers [*N.B.– Gramercy does not refer to American bondholders*]."[79] Gramercy's professed concern for American workers is indicative; since Peru never placed the agrarian reform bonds in the United States or otherwise marketed them to American workers, the reason they are involved is because they put their money in Gramercy. Notably, in soliciting investments from American workers, Gramercy disclaims responsibility for losses, stating that investors must be "willing to assume the risks involved with such an investment" and may "lose all or a substantial portion of their investment."[80]

D. Peru Has Been Measured in its Conduct

1. Peru Respects the Treaty and the Proceeding

36. For the avoidance of doubt, Peru highlights its ongoing commitment to its longstanding alliance with the United States, with which it first established diplomatic relations over 190 years ago, just after Peru achieved its independence.[81] Peru and the United States are strategic partners with shared key values. Moreover, Peru and the United States are key economic and trade partners, with the United States representing Peru's second

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[73] Gramercy's First Submission ¶ 13 (C-22).

[74] Letter from International Brotherhood of Teamsters to Embassy of Peru, 24 March 2017 (Doc. R-163).

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

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

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

[78] *See, e.g.*, Nick Nardi, *Hard day's work deserves fair* pension, LimaOhio, 24 March 2018 (Doc. R-212); Dennis Hower, President, Teamsters Local 773, *Peru's default on bonds hurting union retirees*, Lehigh Valley Opinion, 16 April 2018 (Doc. R-214); Ed Rollins, *Trump, don't let Peru rip off American workers*, The Hill, 13 May 2018 (Doc. R-218).

[79] Gramercy's First Submission ¶ 14 (R-20).

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

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

[81] *Bilateral Relations: 19th Century*, Embassy of Peru (Doc. R-247).

closest important and export partner,[82] and over US$ 20.5 billion in trade between the countries in 2015, making Peru the United States' 35th largest trading partner.[83] Peru does not and has not sought to raise doubts about the legitimacy of the Treaty or to suggest it should be terminated, as PABJ and others have done.[84] On the contrary Peru has consistently encouraged Gramercy to focus on the Treaty proceedings, consistent with the general principles of international law discussed below.[85]

2. Peru Has Advanced the Bondholder Process and Limited Its Responses to the Aggravation

37. Gramercy errs in its attempt to draw a false equivalence between its conduct and Peru's. Peru has never engaged in conduct remotely similar to Gramercy's: Peru has never created an organization as a mouthpiece, has never distributed flyers outside of international events demanding answers, has never hired billboards to drive through the streets of Washington, has never contacted Gramercy's underwriters to inform them of this dispute, among other incidents of aggravation that Peru has detailed. There simply is no comparison.

38. Peru has made limited public statements on the Bondholder Process and the Treaty proceedings, which summarize their status Peru's positions therein consistent with Peru's role as sovereign.[86] Contrary to Gramercy's assertion, such statements do not disparage Gramercy or attempt to undermine the validity of its claims.[87] Gramercy's First Submission identifies only two statements by Peru that even mention Gramercy, both of which merely referred to Peru's position in the arbitration. The press release issued by Peru in June 2016 expressly served to inform the public of Gramercy's Notice of Arbitration and Peru's position thereto. Similarly, the statement by former President Kuczynski (made in response to interview questions in the context of the media interest created by Gramercy) that he did not think Peru owed Gramercy anything is entirely consistent with Peru's position that Gramercy's claims should be dismissed in their entirety.[88]

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[82] *The World Factbook: Peru*, Central Intelligence Agency, 4 June 2018 (Doc. R-245).

[83] *U.S.-Peru Trade Facts*, Office of the United States Trade Representative (Doc. R-248).

[84] *Stakeholders: U.S. Policymakers*, PABJ website (Doc. R-222).

[85] Letter from Peru to Gramercy, 25 July 2016 (Doc. R-142) ("Peru again invites a confirmation and a continuous demonstration that Gramercy will focus on the Treaty's mechanism it has chosen without aggravating the circumstances"); *see also* Email from Peru to Gramercy, 6 October 2016 (Doc. R-149) ("Peru again requests that Gramercy and its representatives respect the proceeding its chose to commence [under the Peru-United States Trade Promotion Agreement]"); Letter from Peru to Gramercy, 26 September 2016 (Doc. R-235) ("Peru diligently has encouraged and participated in respectful consultations on this matter and continues to invite a focus on concrete procedural issues and the designation of the President of the Tribunal."); Email from Peru to Gramercy, 3 October 2016 (Doc. R-236) ("Peru has asked that we reiterate its invitation to Gramercy to focus on respectful consultations regarding concrete procedural steps so that each party may be heard in a valid proceeding, starting with the constitution of the Tribunal."); Email from Peru to Gramercy, 4 October 2016 (Doc. R-237) ("Peru again invites Gramercy to focus on the concrete work of appointing a President."); Email from Peru to Gramercy, 17 October 2016 (Doc. RA-239) ("Our client has asked that we invite you again to clarify, in advance of our call, the position of the Gramercy entities with respect to Peru's party-appointed arbitrator and the willingness of Gramercy to respect the Treaty procedure/channel of communications.").

[86] *Peru moves forward with process of payment of Agrarian Reform Bonds and recognizes notification of dispute*, Ministry of Economy and Finance, 2 June 2016 (Doc. R-130); *Peru responds to Gramercy notice of arbitration and advances payment process for agrarian reform bonds*, Ministry of Economy and Finance, 6 July 2016 (Doc. R-137).

[87] *See* Gramercy's First Submission ¶ 16 (C-22).

[88] *See* Response of the Republic of Peru, 6 September 2016 ¶ 113 (R-1) (requesting that the Tribunal "[d]ismiss Gramercy's claims in their entirety.").

39. Peru has engaged lobbyists in Washington, DC,[89] but unlike Gramercy's lobbyists, this firm's efforts are unrelated to the dispute between Peru and Gramercy or the agrarian reform bonds. For the avoidance of doubt, Peru has not requested that these issues be raised or any actions taken as to Gramercy. In contrast, Gramercy's lobbyists have reported almost US$ 2 million dollars for lobbying since 2015, and have been closely involved in the attacks on Peru through PABJ.

IV. THE LEGAL BASIS FOR THE SAFEGUARDS

40. Gramercy's First Submission confirms, rather than undermines, the legal basis for procedural safeguards: (A) the procedural safeguards are necessary to put order to this proceeding and protect the integrity and validity of the proceeding; and (B) even if the Tribunal wishes to consider Gramercy's disingenuous effort to characterize this as a matter of interim measures, the appropriate standard and its application only confirm that the procedural safeguards are appropriate.

A. The Integrity of the Proceeding

41. The procedural safeguards proposed by Peru are based on and consistent with the object of Investor-State Dispute Settlement under the Treaty and the established principle of non-aggravation, and can be adopted within the inherent authority and mandate of the Tribunal.[90] Gramercy's efforts to argue the opposite have no basis in either law or fact.

1. Exclusivity as a Consequence of Commencing a Treaty Case

42. Submitting claims to arbitration under the Treaty has consequences and is not something to be taken lightly. As the tribunal in *Isolux* explained:

> Submitting a claim under a treaty is not a trivial matter. There is a responsibility when the arbitration mechanism is set in motion and the counterparty is forced to respond to the claim against it. The decision to resort to the arbitration procedure must be taken in all seriousness and full awareness of its implications.[91]

43. Electing arbitration depoliticizes the dispute, and makes it subject to the Treaty's mechanism for Investor-State Dispute Settlement ("ISDS").[92] Gramercy has sought to have it both ways by commencing arbitration while continuing to engage in a public campaign to pressure Peru, including efforts to elevate the issues in dispute to the level of political and diplomatic relations between Peru and the United States.

44. Gramercy's First Submission explicitly defends its approach, misquoting Professor Salacuse for the proposition that "often an appropriate intervention by representatives of the investor's home country can help to settle an investor-state dispute."[93] In fact, the passage cited by Gramercy is out of context, having been taken from Professor Salacuse's discussion

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[89] Gramercy's First Submission ¶ 40 (C-22).

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

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

[92] Peru's First Submission, ¶¶ 14-19 (R-20).

[93] Gramercy's First Submission ¶ 39 (C-22).

of *interstate* consultations and negotiations.[94] With respect to ISDS, on the other hand, Professor Salacuse clearly states that "*[a]rbitration is thus a means for converting a diplomatic dispute into a legal or judicial dispute*,"[95] and that the modern ISDS system arose in part as a reaction to the deficiencies of interstate dispute settlement, for which "the remedy was highly politicized."[96]

This is uncontroversial. It is widely recognized that "investor-State arbitration . . . led to a 'de-politicization' of investment disputes and drastically reduced the risk that they escalated into inter-State conflicts."[97] Explaining the historical development, Professor Schreuer describes the move away from diplomatic protection as follows:

> Economic disputes are frequent sources of international conflicts. Where interests of foreign investors are involved, the traditional method for settlement is the exercise of diplomatic protection. Under this method a State espouses the claim of its national and pursues it in its own name. *Diplomatic protection was developed as a consequence of the non-availability of international remedies to individuals and corporations under traditional international law*.[98]

45. Highlighting the historical disadvantages of diplomatic protection,[99] In this context Professor Schreuer describes how direct access to arbitration to investors "obviate[es] the need for diplomatic protection,"[100] explaining:

> These disputes are transferred from the political bilateral arena to a judicial forum especially charged with the settlement of mixed investor-State

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[94] Jeswald Salacuse, *The Law of Investment Treaties* 364 (Oxford University Press), 2015, 400 (Doc. CA-58).

[95] Jeswald Salacuse, *The Law of Investment Treaties* 364 (Oxford University Press), 2015, 402 (Doc. CA-58). (emphasis added).

[96] Jeswald Salacuse, *The Law of Investment Treaties* 364 (Oxford University Press), 2015, 416 (Doc. CA-58).

[97] Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, CIDS Research Paper (3 June 2016), ¶ 12 (citing Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. – FOREIGN INV. L.J. 1-25 (1986)) (Doc. RA-43); Thomas W. Wälde, *The Specific Nature of Investment Arbitration, in* New Aspects of International Investment Law / Les aspects nouveaux du droit des investissements internationaux 43, 117 (Philippe Kahn & Thomas M. Wälde, eds. 2007) (Doc. RA-33); Christoph H. Schreuer, *Do we need Investment Arbitration? in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 879, 880 (Jean E. Kalicki & Anna Joubin-Bret, eds. 2015) (Doc. RA-42); Christoph H. Schreuer, *Investment Arbitration, in* OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 295, 296 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany) (Doc. RA-41); *see also* United Nations Commission on International Trade Law, *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), Note by the Secretariat*, U.N. Doc. A/CN.9/917 (20 April 2017), ¶ 9 (same) (citing CIDS Research Paper, *supra*, ¶¶ 8-14) (Doc. RA-45).

[98] Christoph Schreuer, *Investment Protection and International Relations*, 2007, at 345 (Doc. RA-34) (emphasis added); *see also* Christoph Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary* (2nd Ed.), 2009, at 415 (Doc. RA-10) (Diplomatic protection "was developed as a consequence of the non-availability of international remedies to individuals and corporations under traditional international law.").

[99] Christoph Schreuer, *Investment Protection and International Relations*, 2007, at 346 (Doc. RA-34) ("Diplomatic protection on behalf of investors also carries important disadvantages to the States concerned. It can seriously disrupt their international relations, at times leading as far as the use of force.") (emphasis added).

[100] Christoph Schreuer, *Investment Protection and International Relations*, 2007, at 346 (Doc. RA-34) (emphasis added).

disputes. The dispute settlement process is depoliticized and subjected to objective legal criteria.[101]

46. Similarly, with respect to the role of the non-disputing State, Professor Schreuer notes that "the transfer of investment disputes from the inter-State arena to a mixed mechanism of investor-State arbitration shows that the involvement of the non-disputing State, and hence the potential for inter-State conflict, has been drastically reduced."[102]

47. In consequence, Gramercy, having chosen to pursue ISDS under the Treaty, is bound to abide by the rules of that process and must not continue seeking to create political or diplomatic pressures to resolve the dispute. This does not deprive Gramercy of any rights,[103] in particular, as Gramercy retains the option of withdrawing from the arbitration and opting for those alternatives. So long as Gramercy chooses to pursue arbitration, however, it cannot have its cake and eat it too.

2. The Broad Application of the Non-Aggravation Principle

48. Gramercy's electing to commence arbitration makes it subject to the well-established principle of international law that parties must refrain from conduct that aggravates the dispute, as Peru has explained various times in this proceeding.[104]

49. The principle of non-aggravation is comprehensive. As decided by the ICJ in the *Anglo-Iranian Oil* Case, parties "should ensure that *no step of any kind* is taken capable of aggravating or extending the dispute."[105] Other courts and tribunals have also used broad language to describe the types of conduct from which parties must abstain, among them:

- "*any step of any kind* to be taken which might aggravate or extend the dispute,"[106]
- "*anything* that could aggravate or exacerbate,"[107]
- "*any action, regardless of its nature* that may aggravate or extend the controversy pending before the tribunal,"[108]
- "*any step* that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute."[109]

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[101] Christoph Schreuer, *Investment Protection and International Relations*, 2007, at 346 (Doc. RA-34); *see also* Christoph Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary* (2nd Ed.), 2009, at 416 (Doc. RA-10) ("the arbitration procedure provided by ICSID offers considerable advantages to both sides… The dispute settlement process is depoliticized and subjected to objective legal criteria.").

[102] Christoph Schreuer, *Investment Protection and International Relations*, 2007, at 354 (Doc. RA-34).

[103] *See* Gramercy's First Submission ¶ 44 (C-22).

[104] *See e.g.* Response of the Republic of Peru, 6 September 2016, ¶ 108 (R-1); Letter from Peru to Tribunal, 17 April 2018, at 4 (R-7); Peru's First Submission, ¶¶ 20-24 (R-20).

[105] *Anglo-Iranian Oil Co. Case*, Order, 5 July 1951: I.C.J. Reports 1951, at 90-91 (Doc. RA-3) (emphasis added).

[106] *Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), 1939 P.C.I.J. (ser. A/B) No. 79, Order, 5 December 1939, at 199 (Doc. RA-2) (emphasis added).

[107] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983, at 412 (Doc. RA-4) (emphasis added).

[108] *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, 23 September 2014, ¶ 31 (Doc. RA-18) (emphasis added).

[109] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (Doc. RA-11) (emphasis added).

50. Gramercy neither acknowledges nor contests that the principle of non-aggravation. While Gramercy states that is aware of "some cases where Tribunals have issued some form of directive relating to non-aggravation and publicity,"[110] it cites only three in support of its proposition that the relief ordered by prior tribunals has been limited.[111] Gramercy's argument is fatally flawed by key omissions from the very cases on which it relies, all of which were cited in Peru's First Submission.

51. In *Teinver*, for example, Gramercy focuses on a provisional measure ordered by the tribunal relating to "publicizing the particular criminal investigation against claimant's counsel,", but fails to acknowledge five previous more general orders that that the parties refrain from taking any steps that would aggravate or extend the dispute.[112] This omission of any previous orders is notable since the same paragraph cited by Gramercy refers to "the Tribunal's repeated orders to the Parties not to aggravate the dispute."[113]

52. Likewise, Gramercy repeatedly misrepresents the scope of *Biwater* and *United Utilities*, which were not limited to "prohibit[ing] the publication of certain specific documents cited in the arbitration," as Gramercy asserts.[114] In fact, the tribunals in both *Biwater* and *United Utilities* specifically stated that public discussion should not be an instrument to antagonise the parties, exacerbate their differences, disrupt the proceedings, unduly pressure any party, or render the resolution of the dispute potentially more difficult.[115]

53. Nor does Gramercy mention other cases in which tribunals have explicitly referred to limits on public communications. In the *Abaclat* decision referenced in *United Utilities*, for example, the tribunal issued a procedural order adopting rules as to what public communications were appropriate, including as follows:

> Subject to further specific restrictions on disclosure of specific documents and information as set out herein, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to

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[110] Gramercy's First Submission ¶ 37 (C-22).

[111] Gramercy's First Submission ¶ 37 (C-22).

[112] Gramercy's First Submission, ¶ 37 (C-22); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, fn. 20 (Doc. RA-19) (citing "Procedural Order No. 2; Tribunal's letter of 13 May 2011; Tribunal's letter of 1 April 2012; Procedural Order No. 4; and Procedural Order No. 5.").

[113] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, ¶ 210 (Doc. RA-19).

[114] Gramercy's First Submission ¶¶ 31, 37 (C-22).

[115] *See Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 149, at 38 (Doc. RA-11) (Ordering that "Subject to the restrictions on disclosure of specific documents set out below, neither party should be prevented from engaging in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to the Republic's duty to provide the public with information concerning governmental an public affairs), *and is not used as an instrument to further antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult.*") (emphasis added); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decisions Respondent's Application for Provisional Measures, 12 May 2016, ¶¶ 112, 114(2) (Doc. RA-20) ("The Tribunal shares in this respect many of the views and adopts many aspects of the general approach taken by the *Abaclat* and *Biwater* tribunals. Specifically, the Tribunal considers that no party should be prevented from engaging in general discussion about the case in public, 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, *provided that such public discussion is not used as an instrument to antagonise any party, exacerbate the parties' differences, aggravate the dispute, disrupt the proceedings or unduly pressure any party.*") (emphasis added).

> antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.[116]

54. The *Abaclat* tribunal further explained that engaging in general discussion included in particular "general updates on the mere status of the case and may include wider aspects of the case such as a summary of the Parties' position, provided however that such discussion remains within the above mentioned boundaries."[117]

55. Gramercy errs in arguing that procedural safeguards are improper because the Treaty "did not require Gramercy [] to waive its right to free speech and to comment on matters of public concern."[118] Peru rejects the premise that the adoption of procedural safeguards would somehow deprive Gramercy of the right to free speech. The right to free speech should be exercised in good faith,[119] and not as an excuse for conduct that contravenes the principle of non-aggravation under international law, which the Tribunal is bound to apply.[120] In electing to commence proceedings under the Treaty, Gramercy assumed the obligation not to aggravate the dispute, and, as Bin Cheng explains, "[w]hatever the limits of the right might have been before the assumption of the obligation, from then onwards, the right is subject to restriction […] it must be exercised bona fide, that is to say reasonably."[121] In the instant case, the procedural safeguards proposed by Peru are reasonable, consistent with the practice of prior tribunals,[122] and less restrictive than orders by U.S. courts.[123] Gramercy will be able to pursue its claims (as well as "criticize government policies") in the context of the Treaty proceeding and may engage in general discussion provided it does not aggravate the dispute.

56. Thus, Peru's request is not just consistent with previous awards, but also with the position indicated earlier by the Tribunal. In contrast, Gramercy's viewpoint is not in conformity with the jurisprudence cited or with the Tribunal's indication.

3. The Authority and Mandate of the Tribunal

57. To resist the Tribunal adopting procedural safeguards, Gramercy repeatedly mischaracterizes Peru's request as an "application for interim measures," both in the title to

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[116] *Abaclat and others v. The Argentine Republic,* ICSID Case No. ARB/07/5, Procedural Order No. 3, 27 January 2010, ¶ 153 (Doc. RA-14).

[117] *Abaclat and others v. The Argentine Republic,* ICSID Case No. ARB/07/5, Procedural Order No. 3, 27 January 2010, ¶ 85 (Doc. RA-14).

[118] Gramercy's First Submission ¶ 44 (C-22).

[119] *See, e.g.,* B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 122 (1953) (Doc. RA-24) ("Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law.")

[120] *See* Treaty, Art. 10.22; Terms of Appointment ("The Tribunal shall decide the issues in dispute in accordance with the Treaty and applicable rules of international law.").

[121] B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 125 (1953) (Doc. RA-32).

[122] *See e.g. Abaclat and others v. The Argentine Republic,* ICSID Case No. ARB/07/5, Procedural Order No. 3, 27 January 2010, ¶ 153 (Doc. RA-14); *Biwater Gauff v. Tanzania,* ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 149, at 43 (Doc. RA-11); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decisions Respondent's Application for Provisional Measures, 12 May 2016, ¶ 114(2) (Doc. RA-20).

[123] *See* Peru's First Submission, ¶¶ 27-28 (R-20).

its First Submission and in dozens of places therein.[124] There is no legal or factual basis for Gramercy's mischaracterization. The Tribunal has the mandate and the authority to adopt the requested procedural safeguards in the form of a procedural order, and there is thus no need for an order of interim measures, which Peru in any event has not requested.

58. The Terms of Appointment signed by both Parties expressly authorize the Tribunal, "[i]n order to ensure effective case management" and "after consulting with the Parties," to "adopt such procedural measures as it considers appropriate."[125] This is consistent with Article 17.1 of the UNCITRAL Arbitration Rules, which gives the Tribunal broad authority to "conduct the arbitration in such manner as it considers appropriate."[126]

59. Peru's First Submission explains that the Tribunal may adopt safeguards against aggravation further to its inherent authority over the proceeding, and Gramercy is incorrect when it suggests that such safeguards require interim measures. As the tribunal in *Biwater* explained:

> *It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute.* ***Both may be seen as a particular type of provisional measure*** *[…]* ***or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process****.*[127]

60. In referring to *Dawood Rawat v. The Republic of Mauritius*, Gramercy neglects to mention that the tribunal also recognized that the non-aggravation was a "general legal principle," that among other things, requires parties "to avoid any action of any kind, including media statements, that might aggravate or extend the dispute. This principle applies to the parties at all stages of the arbitration, independently of the criteria for ordering other interim measures."[128]

61. The jurisprudence of the Iran-United States Claims Tribunal, whose rules are based on the UNCITRAL Arbitration Rules,[129] confirms that a tribunal has the "inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."[130] In a

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[124] It is telling that Gramercy does not refer to interim measures in its request for relief. Gramercy's First Submission ¶ 61 (C-22) (requesting "that the Tribunal decline to include such language in a Procedural Order, or alternatively, to order truly mutual relief.")

[125] Terms of Appointment, 22 May 2018, ¶ 64.

[126] UNCITRAL Arbitration Rules, Art. 17.1.

[127] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (Doc. RA-11) (emphasis added).

[128] *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, ¶ 132 (Doc. RA-44); *see also Nova Group Investments B.V. v. Romania* (ICSID Case No. ARB/16/19), Procedural Order No. 7, 29 March 2017, ¶ 365 (Doc. CA-50) ("the Tribunal reminds both Parties of their general duty not to aggravate the dispute or jeopardize its procedural integrity.").

[129] *See* Iran-United States Claims Tribunal, Final Tribunal Rules of Procedure, 3 May 1983, Introduction and Definitions, ¶ 2, 2 IRAN-U.S. CL. TRIB. REP. 405, 406 (1983-I) (Doc. RA-28) ("The Tribunal Rules incorporate the UNCITRAL Rules and Administrative Directives 1, 2, 3 and 4 previously issued by the Tribunal, with certain modifications to each.").

[130] *E-Systems Inc. v. Islamic Republic of Iran et al.*, Award No. ITM 13-388-FT, 4 February 1983, 2 IRAN-U.S. CL. TRIB. REP. 51, 57 (1983-I) (Doc RA-26); *see also QuesTech, Inc. v. The Islamic Republic of Iran et al*., Award No. ITM 15-59-1, 1 March 1983, 2 IRAN-U.S. CL. TRIB. REP. 96, 98 (1983-I) (Doc. RA-27) (same); *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran et al.*, Award No. ITM 17-430-1, 5

number of cases, the Iran-United States Claims Tribunal thus relied on this inherent power, rather than on its power to issue interim measures under Article 26 of its Rules,[131] to request Iran to seek a stay of parallel proceedings before the Iranian courts pending the completion of the proceedings before the Tribunal.[132] As the Iran-United States Claims Tribunal noted, that "consistent practice . . . indicates, that this inherent power is in no way restricted by the language in Article 26 of the Tribunal Rules."[133]

62. Professor Sean Murphy concludes that this jurisprudence of the Iran-United States Claims Tribunal "provides support for *all* international arbitral tribunals (and courts) to issue interim relief, whether or not the tribunal operates under the UNCITRAL rules."[134] *A fortiori*, a tribunal applying the UNCITRAL Arbitration Rules as revised in 2010 and 2013 has the same inherent power to grant interim relief without being restricted by the express requirements of Article 26.

63. As a factual matter, Peru never requested interim measures; Peru's request is for reasonable rules appropriate as a matter of the Tribunal's inherent procedural authority. Peru previously sought to negotiate procedural safeguards with Gramercy further to the Tribunal's communication A-2,[135]to no avail. Gramercy rejected Peru's proposals, did not propose any alternative or compromise, and refused to engage constructively in any way at all. It is telling that neither Party mentioned interim measures when they addressed these issues in their letter of 17 April 2018[136] or during the preliminary conference held on 4 May 2018.

May 1983, 2 IRAN-U.S. CL. TRIB. REP. 310, 311 (1983-I) (Doc. RA-29) (same); *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran et al*., Award No. ITM 20-430-1, 6 June 1983, 2 IRAN-U.S. CL. TRIB. REP. 369, 371 (1983-I) (Doc. RA-30) (same); *The Government of the United States of America, on behalf and for the benefit of Shipside Packing Company, Inc., v. The Islamic Republic of Iran (Ministry of Roads and Transportation)*, Award No. ITM 27-11875-1, 6 September 1983, 3 IRAN-U.S. CL. TRIB. REP. 331 (!983-II) (Doc. RA-31) (same).

[131] *See* Iran-United States Claims Tribunal, Final Tribunal Rules of Procedure, 3 May 1983, Art. 26, 2 IRAN-U.S. CL. TRIB. REP. 405, 429 (1983-I) (Doc. RA-28) ("Article 26 of the UNCITRAL Rules is maintained unchanged.").

[132] *See E-Systems Inc. v. Islamic Republic of Iran et al*., Award No. ITM 13-388-FT, 4 February 1983, 2 IRAN-U.S. CL. TRIB. REP. 51, 57 (1983-I) (Doc. RA-26); *QuesTech, Inc. v. The Islamic Republic of Iran et al*., Award No. ITM 15-59-1, 1 March 1983, 2 IRAN-U.S. CL. TRIB. REP. 96, 98-99 (1983-I) (Doc. RA-27); *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran et al.*, Award No. ITM 17-430-1, 5 May 1983, 2 IRAN-U.S. CL. TRIB. REP. 310, 311 (1983-I) (Doc. RA-29); *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran et al*., Award No. ITM 20-430-1, 6 June 1983, 2 IRAN-U.S. CL. TRIB. REP. 369, 371 (1983-I) (Doc. RA-30).

[133] *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran et al*., Award No. ITM 20-430-1, 6 June 1983, 2 IRAN-U.S. CL. TRIB. REP. 369, 371 (1983-I) (Doc. RA-30).

[134] Sean D. Murphy, *Interim Measures of Relief: The Continuing Importance of the Iran-U.S. Claims Tribunal's Jurisprudence*, *in* THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION 75, 78 (Christopher R. Drahozal & Christopher S. Gibson, eds. 2007) (Doc. RA-35); *see also Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, 1963 I.C.J. Rep. 15, 103 (Separate Opinion of Sir Gerald Fitzmaurice) (Doc. RA-24) ("Although much (though not all) of this incidental jurisdiction [inter alia, to decree interim measures of protection] is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or any court of law—being able to function at all"); V.S. Mani, INTERNATIONAL ADJUDICATION, PROCEDURAL ASPECTS 287 (1980) (Doc. RA-25) ("A tribunal expected to perform its judicial functions must be presumed to have power to regulate matters of its incidental jurisdiction"); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 269 (1953) (Doc. RA-32).

[135] Letter from Tribunal to Parties, 9 March 2018 (A-2) (requesting that the Parties confer and submit a joint communication with regards to procedural matters including "any other matters that the Parties wish to include.").

[136] Letter from Peru to Tribunal, 17 April 2018 (R-7); Letter from Gramercy to Tribunal, 17 April 2018 (C-13). It is telling that at that time Gramercy argued against Peru's proposal on the ground that "such an order is not

Nor has the Tribunal treated Peru's proposed safeguards as a request for interim measures. As indicated in the Tribunal's letter of 11 May 2018, what is at issue are "rules governing the issues of point of contact and non-aggravation measures to be observed during these proceedings."[137]

64. Based on the foregoing, it is apparent that Gramercy's mischaracterization is merely an attempt to raise the bar for the Tribunal, and has no factual or legal basis. Accordingly, the Tribunal need not further complicate this matter by considering the procedural safeguards in the context of an interim measures request. Without prejudice to the foregoing, even if Peru's request were considered an application for interim measures, Peru would nonetheless be entitled to relief, and Peru reserves all rights in this regard.

B. In the Alternative, Interim Measures are Appropriate

65. Gramercy disingenuously treats the question of procedural safeguards as an application for interim measures, notwithstanding that Peru has not requested interim measures, and that the Tribunal has the authority and mandate to safeguard the proceeding without them. Without prejudice to the foregoing, even assuming (incorrectly) that interim measures were the sole vehicle for ordering the procedural safeguards, Gramercy's conduct readily demonstrates why the actual standard for interim measures is readily satisfied.

1. Gramercy Mischaracterizes the Standard and Precedents

66. As demonstrated below, Peru's request for procedural safeguards meets the requirements for interim measures under Article 10.20.8 of the Treaty and Article 26.3 of the UNCITRAL Arbitration Rules. Gramercy hinges its contentions to the contrary on a thinly veiled misrepresentation of the applicable preconditions for interim measures.

67. Gramercy contends that "interim measures may be granted only . . . if failure to do so would cause irreparable harm."[138] This contention is not reconcilable with the plain language of Article 26.3(a), which requires that "[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered."[139] Indeed, the drafting history of that provision shows that the formulation "not adequately reparable" was chosen deliberately in order to avoid using the term "irreparable," due to "concerns that irreparable harm might present too high a threshold."[140] Recognizing this distinction, the tribunal in *Paushok v. Mongolia* noted that "the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures."[141]

68. Additionally, Article 26.3 must be interpreted in the context of Article 26.2, which describes types of interim measures.[142] Notably, while Article 26.3 requires that the harm

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permissible, is inconsistent with the U.S.-Peru Trade Promotion Agreement," and even Gramercy admits that the Treaty permits interim measures. *See* Gramercy's First Submission ¶ 26 (C-22).

[137] Letter from Tribunal to Parties, 10 May 2018 (A-11).

[138] Claimants' Opposition to Peru's Interim Measures Application, 1 June 2018, ¶ 27 (C-22).

[139] UNCITRAL Arbitration Rules, Art. 26.3(a).

[140] DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES—A COMMENTARY 522 (2d ed. 2013) (Doc. RA-39) (quoting UNCITRAL, *Report of the Working Group on Arbitration on the Work of its Fortieth Session* (New York, 23-27 February 2004), U.N. Doc. A/CN.9/547, at 13, ¶ 89).

[141] *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶¶ 68-69 (Doc. RA-36).

[142] *See* UNCITRAL Arbitration Rules, Art. 26.2(b) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a

must be "likely," its language does not require "current or imminent harm," as does one of the types of interim measures described in Article 26.2(b).[143] Moreover, it is widely recognized that "[h]arm to a procedural right may have the consequence . . . that the arbitral process as a whole will be frustrated," and that "averting such serious harm is 'axiomatically urgent.'"[144]

69. The *Biwater Gauff v. Tanzania* tribunal recognized that where procedural rights or the integrity of the proceeding are at stake, "a concern about the risk of future prejudice, or the potential risk to the arbitral process as it unfolds hereafter" may be sufficient:[145]

> The Tribunal disagrees . . . with the suggestion that actual harm must be manifested before any measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect). […] [I]ts mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties.[146]

70. This is consistent with the description of interim measures in Article 26.2(b) of the UNCITRAL Arbitration Rules, which addresses "prejudice to the arbitral process itself" as a separate sub-category from "current or imminent harm."

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party, for example and without limitation, to: . . . (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself . . . .").

[143] UNCITRAL Arbitration Rules, Art. 26.2(b).

[144] Jan Paulsson & Georgios Petrochilos, UNCITRAL ARBITRATION 222, ¶ 18 (2018) (Doc. RA-46); *see also Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 11, 27 June 2012, ¶ 20 (Doc. RA-38) ("[E]ven if urgency were not at stake, the Tribunal finds that it can recommend provisional measures for the preservation of Respondent's rights of defense"); *Quiborax SA et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 153 (Doc. RA-37) ("[I]f measures are intended to protect the procedural integrity of the arbitration . . . , they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case . . . is essential to (and therefore cannot await) the rendering of an award on the merits."). Gramercy's reliance on *Valle Verde v. Venezuela* for the proposition that "actual harm" is required is misplaced. Gramercy's First Submission, ¶ 33 (C-22). Unlike the instant case, *Valle Verde* was an ICSID case, applying a different standard. *See Valle Verde v. Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, 25 January 2016 (Doc. CA-56). Moreover, as explained herein, even if the tribunal were to apply the *Valle Verde* standard, the Tribunal should still accept Peru's proposal as Gramercy's aggravating conduct harms Peru.

[145] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 144 (Doc. RA-11). Gramercy cites *Plama v. Bulgaria* for the proposition that "the right to procedural integrity 'must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal.'" *See* Gramercy's First Submission, ¶ 36 (C-22). Peru notes that this case is easily distinguishable on the facts, as the interim measures requested relate domestic court proceedings brought by the respondent State related to debt and insolvency proceedings, in contrast to Gramercy's conduct in this case. It is also decided under the ICSID Rules. Moreover, with respect to non-aggravation specifically, the tribunal in Plama held "the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the tribunal more difficult." Accordingly, even if it choose to apply the *Plama* standard, the Tribunal should accept Peru's proposal as Gramercy's aggravation makes resolution of the dispute by the tribunal more difficult, as described herein. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2015, ¶¶ 3, 45, 60 (Doc. CA-53). Compare *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (Doc. CA-48) (holding that "the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.").

[146] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 145 (Doc. RA-11).

71. As regards the requirement of a reasonable possibility of success on the merits, the *Paushok* tribunal explained the test as follows:

> At [the interim measures] stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of [the party requesting interim measures]. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.[147]

72. Professors Paulsson and Petrochilos explain that a "reasonable possibility" "is akin to that of a 'serious question to be tried' (which filters our obviously unmeritorious claims but not much more.)"[148] Professor Caron and Mr. Caplan similarly note that the Iran-US Claims Tribunal, "a principal source of practice for UNCITRAL Rules, adopted what is known as the 'prima facie test,'"[149] and explain that the standard requires that "a party whose case is *clearly* without merit should not be granted a request for interim measures."[150]

73. In summary, "at the stage of interim measures an arbitral tribunal should not be overly concerned with the merits of the case," and only "a party whose case is clearly without merit should not be granted a request for interim measures."[151] This is especially true where interim measures are sought to protect the integrity of the proceeding. With respect to such cases, Professors Paulsson and Petrochilos explain that "[t]he general principle is that measures which seek to preserve the integrity of the proceeding … are not taken for the sake of a party and therefore do not in principle require a showing of a case on the merits."[152]

2. Gramercy Disregards the Harm and Prejudice of Aggravation

74. In the instant case, interim measures could be appropriate to the extent that Gramercy's documented pattern of aggravating conduct threatens the legitimacy of the proceedings and harms Peru. For example:

- *Threatening the Treaty and the legitimacy of the Tribunal's decisions thereunder*. Along with the politicization of dispute, PABJ and others are urging U.S. policymakers to "[e]nd the U.S.-Peru Free Trade Agreement."[153] In effect, Gramercy is planting the seeds for delegitimizing an eventual award in Peru's favor, and threatening the framework for free trade between Peru and the United States.

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[147] *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 55 (Doc. RA-36).

[148] Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, 2018, at 220 (Doc. RA-46).

[149] David D Caron, Lee M Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd Edition), 523, 2013 (Doc. RA-39).

[150] David D Caron, Lee M Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd Edition), 523, 2013 (Doc. RA-39).

[151] David D. Caron & Lee M. Caplan, THE UNCITRAL ARBITRATION RULES—A COMMENTARY 523 (2d ed. 2013) (Doc. RA-39).

[152] Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, 2018, at 221 (Doc. RA-46).

[153] *Stakeholders: U.S. Policymakers*, PABJ Website (Doc. R-222). *See also* Letter from International Brotherhood of Teamsters President James P. Hoffa to Embassy of Peru, 24 March 2017 (Doc. R-163); Ed Rollins, *Trump, don't let Peru rip off American workers*, The Hill, 13 May 2018 (Doc. R-218).

- *Harming the Functioning of the Bondholder Process*. Gramercy's campaign seeks to discourage participation in the Bondholder Process, calling it a "sham."[154] By discouraging participation, Gramercy not only seeks to pressure Peru to change its laws, it also seeks to bolster its arguments in the Treaty dispute by incorrectly alleging that the Bondholder Process is not working.[155]

- *Altering the public record*. Gramercy, directly and through its representatives has sought to generate materials outside of this arbitral proceeding, on which it and its experts then rely.[156] This includes, among other examples, negative ratings by Egan Jones,[157] which Gramercy has submitted this into the record of the arbitration and on which it relies,[158] as well as the planting of articles in the press and the manipulation of Wikipedia.[159]

- *Creating "shadow" experts not subject to cross-examination*. Similarly, Gramercy and its representatives have commissioned and disseminated reports from supposed experts, on which Gramercy then relies in the arbitration.[160] Because Gramercy has put these reports in the record as documentary evidence, as opposed to as expert opinions, Peru is deprived of the opportunity to cross-examine and test the experts, and Gramercy is spared having the experts disclose their involvement.[161]

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[154] *See, e.g., Gramercy, Gramercy Once Again Responds to False Accusations Contained in Peru's Response on Land Bonds,* PR Newswire, 6 July 2016 (Doc. R-238).

[155] *See, e.g.,* Gramercy's First Submission ¶ 16 (C-22).

[156] *See* Peru Letter R-7 to Gramercy the Tribunal, 17 April 2018 (R-7) ("The Parties have conveyed to the Tribunal the existing record of the proceeding as indicated in the following communications: Gramercy's communication C-9 dated 14 March 2018, and Peru's communication R-4 dated 23 February 2018. In addition, Gramercy has submitted to the Tribunal with a copy to Peru the following materials: the report by Deloitte dated 12 January 2017 and the attachment of 9,656 PDF files. Peru reserves the right to address such materials. The Parties previously engaged in consultations, including pursuant to a Consultation Protocol dated 18 November 2016 which (as amended) established a Consultation Period through 28 February 2017, and provided that communications and interactions by and among the Parties during the Consultation Period are without prejudice to the positions, rights and defenses of the Parties, and information exchanged in connection with the Amicable Consultations during the Consultation Period following this Protocol is confidential and shall not be admissible in any forum for any purpose materials and information are confidential and not admissible in any forum for any purpose.")

[157] Peru's First Submission ¶ 39 (R-20).

[158] *See* Gramercy's First Submission, ¶ 16 (R-20) (citing Egan-Jones Rating Company, Egan-Jones Assigns a First-time Rating of "BB" to the Republic of Peru's International Bonds, 17 November 2015).

[159] *See* Peru's First Submission ¶ 40, Annex on Incidents of Aggravation, ¶ 14 (R-20).

[160] *See, e.g.*, Peru's First Submission, ¶ 38 (R-20); John C. Coffee, Jr., Legal Opinion to GFM, 11 Jan 2016 (Doc. CE-39); Arturo Porzecanski, Fitch, Moody's and Standard & Poor Haven't Learned Enough From the Financial Crisis, Forbes, 9 December 2015 (Doc. R-95); Arturo Porzecanski, *Peru's Selective Default: A Stain on Its Creditworthiness,* American University Working Paper Series, Paper No. 2016-1, 28 January 2016 (Doc. CE-219). In fact, Gramercy's most recent submission attacks Peru's relationships with the United States Securities and Exchange Commission, the International Monetary Fund, and the Organization for Economic Cooperation and Development, each of which has been the subject of a prior report procured by Gramercy or one of its agents and not submitted as an expert report in this proceeding.

[161] *See* Email from Secretary of Tribunal to the Parties, 1 June 2016, attaching draft Procedural Order No. 1. Gramercy's attempt to deprive Peru of its rights with respect to cross-examination is potentially even more alarming considering its refusal to accept of Peru's proposal of an equal allocation of time at the hearing. Specifically, Peru proposed: ""Hearing time shall be divided equally between (a) Gramercy and (b) Peru, subject to consideration of particular circumstances that may arise in connection with the hearing and subject to discussion by the Parties and consideration of the Tribunal. Certain time shall be reserved for the Tribunal." *See* Letter from Peru to Tribunal, 17 April 2018 (R-7).

- *Circumventing document production.* Gramercy has sought to obtain documents relating to the Bondholder Process and Peru's legal representation in this matter from Peru outside of this proceeding by submitting requests for access to information to the Peruvian State.[162] Gramercy, thus, attempts to evade the norms of document production in this proceeding.

- *Harassing potential witnesses*. Gramercy threatened and has used its publicity campaign to target not Peruvian officials by name, thus harassing and inviting the harassment of potential witnesses in this proceeding. For example, prior to filing its Notice of Arbitration, Gramercy threatened to include "serious allegations against not just the Peruvian State but also specific individuals within the executive branch, the Constitutional Tribunal and the Ministry of the Economy … [that will] provide grist for the media mill for a long time."[163] In its Notice, Gramercy included allegations against specific individuals.[164] PABJ has also targeted specific Peruvian officials.[165]

3. Gramercy Ignores That The Safeguards Do Not Prejudice It

75. Gramercy errs in averring that the procedural safeguards would cause "certain" and "substantial harm." Gramercy speculates that it might be harmed in two ways: (ii) "being deprived of its rights," and (ii) "prejudice suffered by Peru's continuing conduct."[166] Gramercy's arguments are misplaced, as the safeguards are not prejudicial and in any case apply mutually to the Parties.[167]

76. Gramercy does not identify any concrete harm it will suffer if the Tribunal adopts the procedural safeguards. Gramercy's statement that Gramercy would be "deprived of its rights to speak freely on matters of public concern and to democratically elected representatives"[168] fails to acknowledge that that the Parties already have agreed to transparency pursuant to the Terms of Appointment,[169] and that the safeguards do not restrict non-aggravating communications. As in prior cases, the Parties may engage in general discussion about the case in public, provided that they do not aggravate the dispute.

77. Given the scope of the safeguards requested by Peru, the premise of Gramercy's assertion that it would be harmed by the safeguards must be that Gramercy has some particular interest in engaging in aggravating conduct. Gramercy has not identified any such interest, or explained how such an interest trumps the need to protect the integrity of the dispute.

78. Gramercy's First Submission states vaguely that Gramercy has chosen "to participate in a public debate […] in order to protect its interests and fulfill its fiduciary duty to its

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

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

[164] See Second Amended Notice of Arbitration and Statement of Claim, ¶¶ 15, 100 (C-5).

[165] *PABJ Demands Answers From Peruvian Finance Minister Alonso Segura Regarding the Agrarian Reform Bond Scandal While He Attends the IMF World Bank Meetings in Washington, D.C.*, PR Newswire, 13 April 2016 (Doc. R-119); PABJ, *PABJ Demands Answers From Peruvian President Ollanta Humala Regarding the Agrarian Reform Bond Scandal While He Attends the UN General Assembly Special Session in New York*, PR Newswire, 22 April 2016 (Doc. R-122).

[166] *See e.g.* Gramercy's First Submission ¶ 46 (C-22).

[167] Peru's First Submission ¶¶ 25-29 (R-20).

[168] *See e.g.* Gramercy's First Submission ¶ 46 (C-22).

[169] Terms of Appointment, Art. X (Transparency).

investors."[170] If Gramercy's interest / fiduciary duty is obtaining payment on the agrarian reform bonds it allegedly holds, it is not harmed by the procedural safeguards given that the appropriate means for resolving this dispute is the arbitration Gramercy chose to commence.

79. Thus Gramercy's assertion that it would be harmed if it were "left unable to correct the record," is necessarily wrong.[171] Even assuming that the public record were in need of correcting (which Peru disputes), the relevant record for Gramercy is the record of this arbitration, and it may raise and argue the relevant issues in this context without extending the dispute. Moreover, if Gramercy is correct that the public debate "will continue in Peru regardless of what happens in the context of this arbitration,"[172] then it is unclear why Gramercy is uniquely able to make the supposedly necessary corrections.

80. To the extent that Gramercy considers that a restriction on aggravating the dispute harmful because such conduct is necessary to obtain payment on the bonds, Gramercy is betraying its lack of confidence in its own claims. If Gramercy thinks that unrestricted participation in public debate is a better way to resolve the dispute or does not trust this Tribunal, it is at liberty to withdraw and attempt some other method.

81. It may be that Gramercy has other interests that it is loath to reveal (issues relating to the management of its fiduciary duties to its investors or otherwise). If that is the case, it is not for Peru or the Tribunal to speculate, and Gramercy would have to show why these interests are harmed by a procedural safeguard restricting aggravation. If Gramercy has hidden interests it is trying to protect, it should reveal them.

82. Gramercy also errs in supposing that it will suffer some harm from "Peru's continuing conduct" if the procedural safeguards are adopted. Gramercy's mere "belie[f]" that Peru's public statements are "untruthful and materially detrimental to its rights,"[173] does not impact Gramercy's ability to contest those statements in the arbitration proceedings, and Gramercy provides no basis for supposing that Peru's conduct "render[s] any possible resolution of the dispute—including amicable resolution or eventual payment of an adverse award— significantly less likely."[174] Indeed, as addressed above, Peru has not in fact engaged in conduct that may aggravate the dispute, but has rather encouraged a focus on the Treaty proceeding.

83. Without prejudice to the foregoing, Peru agrees that the procedural safeguards should be mutual, and consistently has proposed safeguards to apply to both Parties. Gramercy admits that "Peru has formulated its request as applying equally to both Parties," but wrongly asserts that "it is in fact anything but a mutual order."[175] Gramercy's mistake comes from assuming that Peru's alleged "misrepresentations about the Land Bonds and its own public financing,"[176] are equivalent to Gramercy's own aggravating conduct. Even leaving aside Gramercy's mischaracterizations of Peru's statements, it is clear that such statements are qualitatively different from Gramercy's campaign.

[170] Gramercy's First Submission ¶ 15 (C-22).

[171] Gramercy's First Submission ¶ 47 (C-22).

[172] Gramercy's First Submission ¶ 47 (C-22).

[173] Gramercy's First Submission ¶ 59 (C-22).

[174] Gramercy's First Submission ¶ 52 (C-22).

[175] Gramercy's First Submission ¶ 56. (C-22)

[176] Gramercy's First Submission ¶ 47 (C-22).

84. For example, Gramercy takes issue with Peru "making representations about the size and maintenance of its public debt and public finances to, among others, the U.S. government, the IMF, the World Bank, the SEC, the OECD, capital markets, and rating agencies." Contrary to Gramercy's assertion, however, such statements are *not* "likely to 'aggravate' the dispute."[177] The statements Gramercy complains about have no bearing on the dispute whatsoever. With such actions, Peru is exercising its functions of a sovereign, beyond any particular issues relating to Gramercy or the payment of agrarian reform bonds. Such actions do not affect Gramercy's case or its rights in this proceeding any more than does Gramercy's investing in Eastern Europe, for example. Such actions are in no way comparable to efforts Gramercy in communications to Peru's underwriters, international institutions, or to the U.S. government, which are intended to pressure Peru into changing its laws and paying Gramercy more.

85. Gramercy also takes issue with Peru "making representations about the 'legitimacy' [of the Bondholder Process]," which it tries to equate to its own criticisms of that procedure.[178] Contrary to Gramercy's false equivalence, Peru's statements about the Bondholder Process have consisted of informing of the public of the State's advances in implementing that process, and limited responses to questions raised by Gramercy's own campaign. Such statements do not harm Gramercy or the proceedings. Such differences underscore both the measured approach taken by Peru in responding to Gramercy's aggravation, as well its role as sovereign.

4. Gramercy Fails In Effort to Link the Safeguards to the Merits

86. According to the UNCITRAL Rules, interim measures require that there be "a reasonable possibility that the requesting party will succeed on the merits of the claim."[179] This provision is intended to prevent interim measures where claims are frivolous on their face, and does not require the Tribunal to prejudge the dispute.

87. While Gramercy accepts that "the Tribunal need not and should not prejudge the dispute," it nonetheless tries to turn the standard on its head, arguing that "Peru has yet to even address any of Gramercy's arguments on the merits," and thus "in the arbitration's current posture the Tribunal would have no basis to conclude that Peru has shown a reasonable possibility of prevailing in the case."[180] Departing from the prima facie test, Gramercy's reading would effectively bar interim measures requested by respondents prior to their ever briefing their defenses.

88. Gramercy has consistently sought excuses to have Peru set out its defenses outside a properly established procedural calendar, before Gramercy fully sets out its own case, and if Gramercy's interpretation of the UNCITRAL Rules were adopted, it would effectively require Peru to brief its defenses well in advance of its Counter-Memorial of 14 December 2018. In any case, Peru has twice presented a Response to Gramercy's various Notices of Arbitration, in which it has already identified numerous deficiencies in Gramercy's case, more than satisfying the prima facie requirement.[181]

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[177] Gramercy's First Submission ¶ 59 (C-22).

[178] Gramercy's First Submission ¶ 59 (C-22).

[179] UNCITRAL Rules (2013), Art. 26(3)(b).

[180] Gramercy's First Submission ¶ 55 (C-22).

[181] *See* Response of the Republic of Peru, 6 September 2016 (R-1); Response of the Republic of Peru, 5 July 2016 (R-2).

V. REQUEST FOR RELIEF

89. For the foregoing reasons, Peru reiterates its request that the Tribunal 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 a procedural order pursuant to which the non-disputing Party may make certain submissions in a manner consistent with the Treaty.

90. Peru also requests that the Tribunal award Peru all costs in connection herewith which Peru has had to incur given Gramercy's stubborn refusal to agree to what are basic procedural safeguards.[182]

91. For the avoidance of doubt, Peru reserves the right to amplify the issues discussed herein and maintains its continuous reservation of rights with respect to this matter.

Respectfully submitted,

WHITE & CASE

Washington, D.C.

Counsel to the Republic of Peru

15 June 2018

[182] UNCITRAL Arbitration Rules (2013), Art. 40(1) ("The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.").