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

GRAMERCY FUNDS MANAGEMENT LLC,
AND
GRAMERCY PERU HOLDINGS LLC,

Claimants

— v.—

THE REPUBLIC OF PERU,

Respondent

CLAIMANTS' RESPONSE TO PERU'S INTERIM MEASURES APPLICATION

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I.

INTRODUCTION

1. Gramercy Funds Management LLC ("***GFM***") and Gramercy Peru Holdings LLC ("***GPH***") (collectively, "***Gramercy***" or "***Claimants***") again oppose the Republic of Peru's ("***Peru***") request for measures that seek to tie Gramercy's hands unilaterally by proscribing it from speaking with other stakeholders about matters of public concern. Although Peru misleadingly and innocuously calls this application a request for "procedural safeguards," it is actually a request for an astonishingly broad gag order that the Tribunal could consider only as an interim measure proven to a standard Peru cannot meet, no matter how hard Peru tries to obscure that fact.

2. Throughout its submission, Peru accuses Gramercy of committing a litany of so-called "incidents of aggravation," but fails to take responsibility for its own conduct that is far more "aggravating" than anything it has accused Gramercy of doing. *See* **R-20**, Peru's Submission, ¶ 43. It was Peru, not Gramercy, that applied white-out on a decision from its highest constitutional court to transform a majority opinion into a dissent. It was Peru, not Gramercy, that pretended to pay the Land Bonds through what it touts as a "legitimate bondholder procedure" while actually offering next-to-no value in its flawed Supreme Decree formulas. It was Peru, not Gramercy, that then unpredictably and unilaterally changed those payment formulas, and refused to provide even a single sentence of justification for the formulas or an explanation as to how they worked. It was Peru, not Gramercy, that misled creditors and international institutions with respect to its public debt by omitting any mention of the Land Bonds and falsely stating that it had no disputes with its creditors. It was Peru, not Gramercy, that strung its counter-party along for years by purportedly expressing interest in resolving this dispute, and then repeatedly reversed course at the last minute, despite Gramercy's continued willingness to engage in good faith negotiations. When Peru's President appears on national television shortly after the commencement of this arbitration and announces that he does not think that Peru "owe[s] [Gramercy] anything," it is hard to fathom how Peru can credibly paint itself as a woebegotten victim of Gramercy's alleged aggravation. **Doc. CE-266**, LatinFinance, *Peru's PPK: "I don't think we owe [Gramercy] anything,"* August 22, 2016.

3. When seen from this more balanced perspective, it becomes clear that the gag order Peru seeks here is not only unfairly one-sided, but totally unnecessary and essentially impractical. While Peru may find Gramercy's statements to be inconvenient or annoying, engagement by Gramercy—and by Peru as well—on matters of public concern is simply part of the kind of debate and discussion that are a hallmark of democracies like the United States and Peru. Peru has no right to silence

its critics or to prevent publication of accurate but embarrassing facts about its conduct, just as Gramercy has no right to silence Peru or cause this Tribunal to order Peru to stop its misrepresentations.

4. In any event, Peru has not proven any entitlement to the relief it seeks. It cannot avoid the applicable legal standard simply by pretending that its request is "routine and commonsensical." **R-20**, Peru's Submission, ¶ 8. While Peru's application masquerades as a request that the Tribunal express bland and general principles, a closer reading reveals it to call for broad and unprecedented restrictions on speech.

5. Peru has even not attempted to, and cannot, satisfy the standard actually required for the Tribunal to consider such extraordinary relief. As Gramercy's Opposition explains, the rules governing this arbitration, the United States-Peru Trade Promotion Agreement (the "***Treaty***") and international law impose a demanding standard for such interim measures, which Peru cannot meet. **C-22**, Gramercy's Opposition, ¶ 5. For example, Peru has not demonstrated that the requested relief preserves any actual rights it possesses or ensures that the Tribunal's jurisdiction is fully effective, or that irreparable harm is likely to result if the requested measures are not ordered. It also cannot show that any speculative harm it alleges outweighs the certain harm to Gramercy from granting the measures. Nor has it demonstrated a reasonable possibility that it will succeed on the merits of the claim.

6. Instead, Peru relies on loose reasoning, misleading argumentation and leaps of logic to justify its extraordinary request, citing to cases out of context or in ways that are completely inaccurate. To mention just one of several examples, Peru contends that the International Court of Justice ordered relief prohibiting "campaigns 'calculated to inflame opinion,'" but misleadingly quotes the applicant's *request* rather than the Court's decision, and fails to mention that the Court in fact *declined* to issue such an order. *See Anglo-Iranian Oil Co. Case*, Order of July 5, 1951: I.C.J. Reports 1951, **Doc. RA-3**, at 90-91, 93; **R-20**, Peru's Submission, ¶ 22.

7. For the reasons set forth herein, Gramercy respectfully requests that the Tribunal deny Peru's application and award Gramercy costs. Alternatively, to the extent the Tribunal is inclined to grant any relief requested by Peru, such relief should be limited in scope and truly mutual.

II.

PERU HAS NO VALID BASIS FOR THE RELIEF IT SEEKS

8. While Peru's current framing of the measures it requests appears relatively inoffensive and more restrained than those Peru

initially included in its prior communications to the Tribunal, Peru intends for these innocuous-seeming measures to prohibit a very broad range of specific actions. Peru has no legal basis for the extraordinary relief it seeks. *First*, Peru has not even purported to apply the heightened standard described above for the Tribunal to order such extraordinary relief. *Second*, it cannot in any event meet that standard. *Third*, should the Tribunal be inclined to order any relief, such relief must be truly mutual and constrain an equally wide range of Peru's conduct.

A. Peru Has Failed to Apply the Correct Legal Standard for the Broad Relief It Seeks

9. Peru is wrong in asserting that the measures it now seeks are "routine and commonsensical," "uncontroversial," and "reasonable safeguards." **R-20**, Peru's Submission, ¶¶ 8, 16, 29. Although Peru has sought to characterize its measures in relatively neutral terms, it in fact seeks incredibly wide-ranging relief, which aims to restrict a broad range of actions including both public and private communications as well as public statements having nothing to do with the arbitration itself. This relief goes far beyond what prior Tribunals have ordered, and in particular goes far beyond anything that could be construed as a merely "procedural" matter rather than an interim measure of protection.

10. For example, Peru requests that the Tribunal order the Parties to "abstain from any action or conduct that may result in aggravation of the dispute." *See cf*. **R-20**, Peru's Submission, ¶ 2. On its face, this request seems rather general and even somewhat aspirational in that it leaves open a wide scope of interpretation about what conduct may or may not somehow result in aggravation of the dispute. Yet later in its Submission Peru reveals that it intends for this "general provision" to be given a much more pointed and specific meaning, namely to:

> . . . encompass[ ] a range of types of conduct previously highlighted by Peru, including, for example, engaging in lobbying activity, interfering with public officials or public events, using the press or social media in an offensive manner to apply undue pressure, circumventing established dispute mechanisms related to this proceeding in an effort to obtain materials in a non-transparent manner, disregarding designated channels of contact, or interfering with diplomatic relations and/or public institutions.
>
> **R-20**, Peru's Submission, ¶ 11.

11. This list shows that Peru's objective is not simply to obtain a general exhortation about non-aggravation, but instead to enjoin a whole series of specific (if still too vaguely defined) actions that range from

asking questions at open investor conferences, to speaking with government representatives, to communicating with the media in any way that Peru subjectively considers "offensive." If Peru had been more honest and candid and explicitly asked the Tribunal for an order barring Gramercy specifically from these same activities, the Tribunal would immediately see Peru's request for what it is—an application for interim relief of an extraordinary kind.

12. Similarly, Peru also requests that the Tribunal order the Parties to:

> 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.
>
> *See* **R-20**, Peru's Submission, ¶ 45.

13. Again, taken at face value, this language is relatively innocuous, and Gramercy would have little objection other than that it does not seem to serve any real purpose, especially since the Tribunal has already proposed a procedure governing non-disputing Party submissions, as reflected in its Draft Procedural Order 1. Tribunal's Draft Procedural Order 1, June 3, 2018, ¶ 71. However, Peru's Submission and prior communications make clear that Peru views "respect[ing] the role of the non-disputing Party" as Gramercy refraining altogether from any communications with any U.S. officials about anything relating to the Land Bonds. *See* **R-20**, Peru's Submission, ¶¶ 10-12; **R-7**, Letter from Peru to the Tribunal, April 17, 2018, p. 4-5. Such an extraordinary request is unprecedented and would again have to be carefully evaluated as a request for interim relief, not just some casually adopted "procedural safeguards."

14. Finally, Peru requests that the Tribunal enter an order stating:

> 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.
>
> *See* **R-20**, Peru's Submission, ¶ 45.

15. As Peru's counsel made clear during the first Procedural Conference, Peru intends for this provision to cover not only legal communications relating to the arbitration—which, as Gramercy

acknowledged, have been and will be conducted through counsel—but also all non-legal communications. As Gramercy's Opposition discussed, this is in fact an incredibly broad request, which would interfere with a potentially wide range of legitimate communications. *See* **C-22**, Gramercy's Opposition, ¶¶ 42-44. And despite the fact that Peru assures the Tribunal that this request is "routine and commonsensical," it provides no legal basis for the Tribunal's authority to grant it, nor does it cite to any similar examples of tribunals ordering such relief, even as an interim measure. Instead, Peru self-referentially cites to requests it sent Gramercy to channel all communications through its external counsel. Peru's requests—however frequent—do not create a legal entitlement. If it were otherwise, any conduct or action could be restricted if a party requests it frequently enough.

16. The Tribunal cannot order such sweeping measures as simply being within its "mandate and power." *See* **R-20**, Peru's Submission, ¶ 13. Rather, prior case law makes clear that if Peru seeks such broad measures, it must satisfy the stringent standard for interim relief. Indeed, prior investment tribunals that have considered requests for restrictions on public discussion or disclosure have largely done so in the context of provisional measures, assessing whether the measures are "necessary" and "urgent" to prevent "irreparable harm," in addition to balancing the interests of both parties. *See, e.g.*, *United Utilities (Tallinn) B.V. v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Provisional Measures of May 12, 2016, **Doc. CA-55**, ¶¶ 74, 78; *Teinver S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures of April 8, 2016, **Doc. CA-54**, ¶ 103; *Valle Verde v. Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures of January 25, 2016, **Doc. CA-56**, ¶ 86. And tribunals have declined to grant similar measures related to restrictions on publicity where the applicant failed to meet the standard.

17. In *Dawood Rawat v. Mauritius*, for example, the tribunal declined to order measures restricting the respondent's alleged "media campaign" against the claimant's family, on the basis that the claimant had not demonstrated irreparable harm. *Dawood Rawat v. Mauritius*, PCA Case 2016-20, 1976 UNCITRAL Rules, Order on Interim Measures of January 11, 2017, **Doc. CA-61**, ¶ 129. Similarly, in *Valle Verde*, the tribunal declined to order specific measures enjoining the respondent from publishing certain statements online, finding that the claimant had not shown the measures were necessary to protect against irreparable harm. *Valle Verde*, Decision on Provisional Measures, **Doc. CA-56**, ¶ 92. In the *Von Pezold v. Zimbabwe* annulment proceeding, the tribunal declined to award provisional measures based on the publication of the award in the underlying proceeding, noting, "Parties . . . must be considered to be entitled to comment on the ICSID award in question to the media . . . ." *Von Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Annulment Proceeding, Decision on Provisional Measures of March 17, 2016, **Doc. CA-64**, ¶ 35.

18. While investment tribunals have on occasion ordered or recommended certain protections without assessing the full standard for interim measures, they have done so only in the context of more limited relief—namely, a general directive that the parties refrain from "aggravating" the dispute, coupled with an acknowledgement that this directive does *not* equate to a broad restriction on speech. *See, e.g.*, *Vigotop Ltd. v. Hungary*, ICSID Case No. ARB/11/22, Award of October 1, 2014, **Doc. CA-63**, ¶ 60 (declining to formally address the provisional measures request and recommending to the parties not to "aggravate the dispute or undermine the integrity of the proceedings" when communicating with the press, while noting that the tribunal "did not wish to and could not prevent the Parties from talking to the press"). Despite Peru's attempts to disguise its request in similar terms, such a general exhortation encouraging the Parties' circumspection is markedly not what Peru seeks in this case.

19. Further, even in *Biwater*—a case on which Peru relies heavily for the proposition that a "non-aggravation" order "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"—the tribunal in fact assessed whether there was a "sufficient risk of harm or prejudice" prior to ordering any relief. *See* **R-20**, Peru's Submission, ¶ 30 (citing *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of September 29, 2006, **Doc. CA-47**, ¶ 135); *Biwater* PO 3, **Doc. CA-47**, ¶ 146. The *Biwater* tribunal also made clear that, "given the public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public information . . . any restrictions must be carefully and narrowly delimited." *Biwater* PO 3, **Doc. CA-47**, ¶ 147. As such, while the tribunal ordered the parties to refrain from publishing certain dispute documents, and "recommended" that the parties "refrain from taking any steps which might undermine the procedural integrity . . . of the arbitral process and/or which might aggravate or exacerbate the dispute," it made clear that "[f]or the avoidance of doubt, the parties may engage in general discussion about the case in public." *Id.* ¶ 163.

20. Despite the fact that the measures sought by Peru go far beyond simple "procedural safeguards," Peru now asks the Tribunal to order these measures without any reference to the appropriate legal standard. In fact, Peru appears to ask the Tribunal not to apply *any* legal standard, instead stating obliquely that the Tribunal "has a mandate to put order to this Treaty proceeding," and that the measures requested "are based on and consistent with the object of Investor-State Dispute Settlement under the Treaty and the established principle of non-aggravation." *See* **R-20**, Peru's Submission, ¶¶ 2-3. These empty justifications are simply insufficient. The Tribunal is putting "order to the proceedings"—whatever that means—by taking the normal steps it has already begun to set out the procedure, create a schedule, choose a seat and the like. Whether a Gramercy representative asks a question

from the floor at an investor conference will in no way thwart the Tribunal's orderly conduct of this arbitration. Similarly, the measures that Peru requests are manifestly inconsistent with the parameters for *this* Treaty proceeding. Far from constraining speech or walling off the arbitration from the outside world, the Treaty here reflects an exceptional degree of transparency and openness consistent with the fundamental democratic principles of the Treaty Parties.

21. While the Tribunal has the authority to "conduct the arbitration in such manner as it considers appropriate," this authority is not unlimited. **Doc. CE-174**, UNCITRAL Rules, Article 17.1. Rather, it is "[s]ubject to" the Rules governing this arbitration, as well as to the Treaty. *See id*. Both the UNCITRAL Rules and the Treaty limit the application of interim measures to circumstances in which the Tribunal is satisfied that the relevant standards are met. *See id.* Article 26.3; **Doc. CE-139**, Treaty, Art. 10.20.8. Imposing interim measures on a lesser or different showing would exceed the Tribunal's mandate and be ineffective and unenforceable.

22. As Gramercy's Opposition explains, Peru must therefore satisfy the Tribunal that granting the measures would either preserve its rights or ensure that the Tribunal's jurisdiction is made fully effective, and that failure to grant the measures would cause irreparable harm, or at least harm not adequately reparable by damages that is "likely" to result if the measures are not ordered. **C-22**, Gramercy's Opposition, ¶¶ 26-27; **Doc. CE-174**, UNCITRAL Rules, Article 26.3(a); *see also Biwater*, **Doc. CA-47**, ¶¶ 145-146 (determining that while "actual harm" need not "be manifested before any measures may be taken," a "sufficient risk of harm or prejudice" existed to justify "some form of control"). Peru must also satisfy the Tribunal that such irreparable harm substantially outweighs the harm likely to result to Gramercy if the Tribunal grants the requested measures, and that there is a reasonable possibility that Peru will prevail on the merits of the claim. *See id*.

B. Peru Cannot Meet the Legal Standard for Interim Measures

1. Peru Has Not Demonstrated That the Requested Relief Preserves Its Rights or Ensures That the Tribunal's Jurisdiction Is Fully Effective, or That Irreparable Harm Is Likely to Result if the Requested Measures Are Not Ordered

23. As Gramercy's Opposition discussed, Peru has not demonstrated that the requested relief preserves any identifiable legal rights it possesses or ensures that the Tribunal's jurisdiction is fully effective, or that there is a likelihood of irreparable harm if the requested relief is not granted. **C-22**, Gramercy's Opposition, ¶¶ 29-44. Peru's Submission neglected to address these standards and instead relied on the "established principle of non-aggravation" and the Tribunal's "mandate

to put order to this Treaty proceeding" as the sole legal bases for its request. *See* **R-20**, Peru's Submission, ¶¶ 2-3.

24. While some courts and tribunals have recognized a non-aggravation principle, that principle does not constitute a catch-all by which a party to a proceeding can constrain any conduct that it subjectively considers to be "aggravating" in the colloquial sense. Rather, the non-aggravation principle developed as a means to constrain serious State conduct that threatened to eviscerate the very rights at issue in the proceeding, or that might escalate the dispute beyond means of non-violent resolution. Even in the context of investor-State dispute settlement—where the risk of inter-State escalation is not present—tribunals have typically referred to "aggravation" in the context of serious actions that threatened to harm irreparably the rights of the parties, and thereby make it much more difficult if not impossible for the tribunal to award effective relief.

25. The very cases Peru cites to highlight "the principle of non-aggravation" in investment cases in fact illustrate this point. In *Teinver*, the "aggravating" measure was not simply a "press conference"—it was a press conference held by the State announcing criminal prosecution against claimant's counsel, which the tribunal found "threaten[ed] to affect Claimants' right to be represented by counsel of their choice in this arbitration." *Teinver S.A.*, Decision on Provisional Measures, **Doc. CA-54**, ¶¶ 53, 205; *see* **C-22**, Gramercy's Opposition, ¶ 32. In *City Oriente v. Ecuador* and *Occidental v. Ecuador*, the "aggravating" measures in question were threatened actions by the respondent State to alter its underlying legal regime, which would clearly affect claimants' contractual rights at issue in the dispute and thus undermine the tribunals' ability to order effective relief. *See City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures of November 19, 2007, **Doc. RA-13**, ¶¶ 55-58, 83; *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 of September 23, 2014, **Doc. RA-18**,¶¶ 31-32 .

26. Rather than engaging with the actual contours of "non-aggravation" as previously understood by international courts and tribunals, Peru instead boldly—and incorrectly—proclaims that the International Court of Justice has proscribed "campaigns 'calculated to inflame opinion'" in its prior orders, to justify Peru's broader conclusion that "various types" of conduct may constitute aggravation. **R-20**, Peru's Submission, ¶ 22. In fact, the Court *declined* to grant the United Kingdom's request to order Iran to "abstain from all propaganda calculated to inflame opinion in Iran against the Anglo-Iranian Oil Company, Limited, and the United Kingdom," contrary to Peru's blatant misrepresentation of the United Kingdom's *request* as an order of the Court. Instead, the Court merely directed both parties to "ensure that no action of any kind is taken which might aggravate or extend the dispute

submitted to the Court," without specifying any particular conduct prohibited. *See Anglo-Iranian Oil Co. Case*, Order of July 5, 1951: I.C.J. Reports 1951, **Doc. RA-3**, at 90-91, 93. More to the point, the basis for seeking such measures rested not on a general distaste for unwelcome public commentary in a democracy of the kind that Peru is trying to silence, but on fear by the United Kingdom that State-sponsored "inflammation" and "propaganda" could lead to "mob assaults" against British employees resulting in "[i]ll-treatment, bodily damage and, even still worse . . . death." *Anglo-Iranian Oil Co. Case*, Request for the Indication of Interim Measures of Protection, June 22, 1951, **Doc. CA-59**, ¶ 9.

27. There is nothing remotely like that gravely menacing conduct here. Instead, Peru's alleged "Pattern of Aggravation" consists of a hodge-podge of legitimate and factually-based public advocacy activities by which Gramercy and other bondholders sought to rebut Peru's misrepresentations, and expose its misconduct.

28. Indeed, as Gramercy's Opposition discussed, the vast majority of the alleged conduct relates to Gramercy's efforts to respond to and correct Peru's misrepresentations about the Land Bonds to international financial institutions and capital markets, and indeed often mirrors behavior that Peru itself has taken recently and frequently. *See, e.g.*, **C-22**, Gramercy's Opposition, ¶¶ 16-21. This behavior includes hiring lobbyists, engaging experts, and speaking to ratings agencies—all conduct in which Peru also engages, and which simply does not affect the rights at issue in this arbitration or the Tribunal's ability to decide the dispute. **C-22**, Gramercy's Opposition ¶ 40; **R-2**, Response of the Republic of Peru, September 6, 2016, ¶¶ 61-62.

29. Peru similarly lambasts Gramercy's coordination with Peruvian and Peruvian-Americans, including through the umbrella organizations Peruvian-American Bondholders for Justice ("***PABJ***"), the Asociación de Bonistas de la Deuda Agraria ("***ABDA***"), the Asociación de Agricultores Expropiados por Reforma Agraria ("***ADAEPRA***"), and the Alianza por el Pago Justo de los Bonos Agrarios ("***APJBA***"), as a "Pattern of Aggravation." **R-20**, Peru's Submission, ¶ 36. These organizations—all of which have existed for many years and at least one prior to Gramercy's investment in the Land Bonds—comprise thousands of bondholders, and advocate to protect the rights of their members. Gramercy's coordination with these organizations is perfectly legitimate, and was indeed a reasonable response to Peru's continued refusal to engage with bondholders generally, a large and diverse group comprised of many people other than Gramercy. Moreover, such coordination was a responsible component of Gramercy's original investment strategy to aggregate a critical mass of bonds and bondholders for a pre-packaged solution to help Peru solve its issues with fragmented creditor groups. As Robert Koenigsberger, Gramercy's Founding and Managing Partner, stated, Gramercy saw the Land Bonds as "a good opportunity . . . to act

as a catalyst for a constructive solution to this selective default." **C-9**, Amended Witness Statement of Robert S. Koenigsberger ("RK WS"), August 5, 2016, ¶ 22. Gramercy's coordination with other individuals and organizations who share a common interest may yet produce that kind of constructive and comprehensive solution, but it in no way deprives Peru of any right or impedes this arbitration.

30. In addition, in a bizarre illustration of how endlessly elastic Peru considers the term "aggravation" to be, Peru characterizes Gramercy's exercise of its rights under the Treaty as "incidents of aggravation." **R-20**, Peru's Submission, Annex, ¶¶ 4-8. Peru cannot seriously contend that Gramercy's transmission of its Notice of Arbitration is "aggravating" conduct that impermissibly harms Peru's rights or threatens the Tribunal's jurisdiction. To the contrary, Gramercy's exercise of its rights activated the Tribunal's jurisdiction in the first place, and initiated the very forum that Peru now contends is the exclusive one to decide this dispute.

31. Furthermore, Peru grossly misrepresents the historical record. As just one example, while Peru accuses Gramercy of "reject[ing] good faith invitations to participate in further consultations" prior to filing its Notice of Arbitration, Peru conspicuously omits the fact that it was *Gramercy* that proposed a tolling agreement several times as a means of prolonging the possibility of amicable negotiations and deferring commencement of the arbitration; it was *Gramercy* that responded to each of Peru's communications with detailed explanations during the negotiation; and it was *Gramercy* that sent its representatives to Lima, Peru in an effort to pursue agreement. *See id.*, Annex, ¶ 5; **Doc. R-53**, Letter from Gramercy to Peru, May 30, 2016. Peru similarly omits the fact that it obscured its intentions, dragged out the negotiations, and eventually blew up the tolling agreement negotiation at the eleventh hour by inserting a new "poison pill" provision it knew Gramercy would not accept, giving Gramercy no choice but to commence this arbitration. **Doc. R-53**, Letter from Gramercy to Peru, May 30, 2016. Peru, incredibly, characterizes these events as Gramercy "reject[ing] consultations," when in truth it was Peru that sabotaged them. **R-20**, Peru's Submission, Annex, ¶ 7.

32. Finally, Peru takes offense to what it calls "the Gramercy messaging." **R-20**, Peru's Submission, ¶ 41. Yet Peru has failed to show that there is anything remotely inaccurate, much less "aggravating," about Gramercy's use of words such as "default" and "Land Bonds," and its estimate of the total amount of outstanding Land Bond debt. The suggestion that it is somehow "aggravation" to use the word "default" to describe a debt that remains unpaid decades after its issuance and maturity is plainly absurd, and so far removed from the concept of aggravation that international tribunals have developed as to render it effectively meaningless.

33. In short, Peru demeans a doctrine intended to prevent grave and precipitous acts that threaten human life and health, intimidate witnesses and counsel, destroy businesses and the like when it invokes those same principles to complain about alleged attempts to edit a Wikipedia page with "sockpuppets." **R-20**, Peru's Submission, ¶ 40.

34. Peru consequently has not shown *any* harm or even likelihood of harm resulting from this conduct, let alone the specific kinds of harm that could permit the Tribunal to consider interim measures. While Peru falsely alleges that Gramercy is "affirmatively attempting to harm Peru and its people," it gives no elaboration of how such harm or risk of harm has materialized. **R-20**, Peru's Submission, Annex, ¶ 9. In fact, it is Peru that is causing harm to the many Peruvian bondholders by its continued misrepresentations relating to the Land Bonds, and its repeated unilateral actions affecting the legal rights of bondholders.

35. Peru similarly has not even attempted to articulate how the alleged conduct affects *any* of its rights. Rather, "aggravation," as Peru characterizes it, appears to constitute a vague and accordion-like concept that allows the Tribunal to order relief without establishing any particular impact on the arbitration or the legal rights at issue in it. Yet "aggravation" cannot be an end in itself—rather, the "aggravating" conduct must imperil specific underlying rights at issue in the arbitration. For example, in *Amco*, which Peru cites in support of the "principle of non-aggravation," the tribunal rejected Indonesia's request to enjoin publication of an article "recount[ing] a one-sided version of the Claimant's story," finding that no right relating to the dispute "could be threatened by the publication of articles." *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures of December 9, 1983, **Doc. RA-4**, pp. 410, 411. Moreover, while acknowledging that it "might possibly be that a large press campaign" could influence issues outside the arbitration—for example, by affecting Indonesia's economy—the tribunal nevertheless found that "even so, it would not be an influence on rights in dispute." *Id.*

36. Indeed, tribunals have found that the "right to non-aggravation" does not simply refer to all conduct that might subjectively worsen the relationship between the parties. Rather, as the *Plama* tribunal held, while certain actions

> may well, in a general sense, aggravate the dispute between the parties . . . the Tribunal considers that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by *the Tribunal* more difficult. It is a right to maintenance of the *status quo*, when a change of circumstances threatens the ability of the

> *Arbitral Tribunal* to grant the relief which a party seeks and the capability of giving effect to the relief.
>
> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of September 6, 2005, **Doc. CA-53**, ¶ 45 (emphasis added).

37. Similarly, the tribunal in *Nova Group v. Romania* held that any right to "non-aggravation of the dispute" must be interpreted narrowly, holding that "only if continuing events . . . threaten to interfere unduly with the parties' ability to present positions in the arbitration, or the tribunal's ability to fashion meaningful relief at the close of the case, will the events constitute an impermissible infringement on rights to preserve the *status quo* and non-aggravation of the dispute." *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 of March 29, 2017, **Doc. CA-50**, ¶236.

38. "Aggravation" does not exist in the abstract. Rather, it arises in the context of a legal proceeding conducted in accordance with due process. As such, aggravation is relevant only to the extent that it affects and impairs those rights, by, for example, impeding the tribunal's ability to order effective relief by altering the status quo or undermining the substantive rights at issue in the dispute. None of the alleged conduct that Peru cites even remotely approaches this level.

39. Finally, public discussion of the broader issue of the Land Bonds does not affect the "integrity of the proceedings." Again, the "usual" basis for this type of request refers not to a general platitude but to conduct that threatens specific procedural rights, such as conduct having an "effect . . . on the obtaining of evidence, the possible intimidation of witnesses or other effects which would impede the procedural progress of the arbitration." *Teinver*, **Doc. CA-54**, ¶ 165; *see also Nova Group*, **Doc. CA-50**, ¶ 235. Further, even when tribunals have assessed public statements in the context of "procedural integrity," their concerns have clearly been tied to the arbitration itself—namely, with "prosecution of a *dispute* in the media . . . uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration." *Biwater* PO 3, **Doc. CA-47**, ¶ 136 (emphasis added). Here Peru has not shown anything of the sort. Gramercy's public statements relating to the arbitration itself—namely, press releases announcing Gramercy's filings—have been limited and were mirrored by Peru's similar public announcements, and even Peru has not had the audacity to allege that Gramercy improperly disclosed confidential arbitration materials. *See, e.g.*, **Doc. CE-279**, Ministry of Economy and Finance, Press Release, February 2, 2016; **Doc. CE-265**, Ministry of Economy and Finance Press Release, June 2, 2016; **Doc. CE-280**, Ministry of Economy and Finance, Press Release, July 5, 2016. To the

extent that the Parties wish to limit in-depth public discussion of the arbitration itself, Gramercy is willing to consider reasonable—and mutual—parameters. However, it does not follow that broader public discussion of the Land Bond issue in general can or should equally be limited by this Tribunal.

40. Accordingly, the Tribunal should reject the implicit assumption on which Peru bases its application, namely, that public engagement and statements that touch on topics related to those at issue in the arbitration constitute "aggravation." That contention is unprecedented, unsupported, and pernicious in a democratic society, particularly when the discussion and debate does not concern the arbitration itself or in any way affect the Tribunal's ability to order effective relief.

2. Any Speculative Harm Alleged by Peru Does Not Outweigh the Certain Harm to Gramercy

41. Further, as Gramercy's Opposition showed, the injury to Gramercy that will result from imposition of the measures far outweighs the possibility of any harm to Peru.

42. While Peru has not demonstrated any actual concrete harm if the measures are not granted, imposing Peru's requested measures will necessarily prejudice Gramercy. In particular, barring Gramercy from participating in the ongoing discussion of Peru's treatment of the Land Bonds will deprive it of its fundamental right to speak freely on matters of public concern to democratically elected representatives and to institutions. *See* **C-22**, Gramercy's Opposition, ¶¶ 47-52. Moreover, Peru's demonstrated record of taking advantage of Gramercy's silence shows that Peru's requested measures will prejudice Gramercy's rights, as Gramercy will not be able to correct the misrepresentations about the Land Bonds and public finances that Peru has been vocally promoting. *See id*. At the end of the day, regardless of the outcome of this arbitration, the Land Bonds issue will have to be resolved—not just for Gramercy, but for all bondholders. Yet Peru's continued attempts to undermine the validity of the obligation render any ultimate resolution much harder. This harm is difficult to quantify, but it is very real.

43. Further, Peru's citation of U.S. law to support its claim that the restrictions it proposes are "*not* undemocratic or violative of free speech" is both puzzling and self-defeating. **R-20**, Peru's Submission, ¶ 27 (emphasis added). Even if U.S. law is perhaps relevant to the current application, on the assumption that the United States would not join a Treaty that violated its fundamental constitutional principles, U.S. law, in fact, is at odds with—and ultimately invalidates—Peru's position.

44. *First*, prior restraints on free speech, like the type Peru seeks here, are anathema to bedrock U.S. constitutional principles. Abundant

case law demonstrates that restrictions on speech should *never* be granted lightly given the irreversible harm inflicted upon the stifled party. As the U.S. Supreme Court has held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976), **Doc. CA-66.** In particular, speech critical of the exercise of governmental power "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), **Doc. CA-65**.

45. Even the cases Peru cites—and U.S. case law generally—illustrate that there is "a heavy presumption" against prior restrictions on free speech, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), **Doc. CA-69**, which are "subject to strict scrutiny because of the peculiar dangers presented by such restraints," *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985), **Doc. RA-5**. As U.S. courts have consistently held, a sweeping restraint on free speech, like the kind Peru demands, is the "most serious and the least tolerable infringement on First Amendment rights," and the "damage [of such a restraint] can be particularly great when [it] falls upon the communication of news and commentary on current events." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), **Doc. CA-68**.

46. *Second*, all three cases that Peru relies upon involve circumstances in which the First Amendment right to speech is directly pitted against a criminal defendant's Sixth Amendment right to a fair jury trial. Even in this context, which features two competing constitutional norms, a restriction on speech is "permissible *only* if its absence would prevent securing twelve jurors who could, with proper judicial protection, render a verdict based only on the evidence admitted during trial." *In re Dan Farr Prods*., 874 F.3d 590, 593 (9th Cir. 2017) (emphasis added) (internal quotation marks omitted), **Doc. CA-67.** For example, in *Application of Dow Jones & Co., Inc.*, a criminal case concerning a highly publicized corruption trial, the Second Circuit upheld a narrow restraining order based on the "threat to defendants' Sixth Amendment rights" to a fair jury trial. *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir. 1988), **Doc. RA-7**. The court justified that holding by the unique circumstances of the case—including the possibility of targets fleeing and witnesses being less willing to testify—which threatened the defendant's right to a fair jury trial. *Id*. at 609-11. At the same time, the Court explained that "pretrial publicity, even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* at 609 (internal quotation marks omitted). This special concern to preserve the effectiveness of a jury of twelve lay men and women susceptible to influence by excessive pretrial publicity is obviously inapt to an international arbitration proceeding conducted by three sophisticated and experienced arbitrators.

47. *Third*, even more astonishingly, Peru has ignored and even twisted the facts and holdings of some of the cases on which it relies. For example, Peru declares that in *Levine v. U.S. Dist. Court for Cent. Dist. of California*, "the Ninth Circuit Court of Appeals upheld an order restraining 'all attorneys in this case, all parties, and all their representatives . . . [from] mak[ing] any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury.'" **R-20**, Peru's Submission, ¶ 28. But, in fact, contrary to Peru's flagrant mischaracterization, the Ninth Circuit *rejected* as "overbroad" the very language of the order that Peru quotes, explaining that "many statements that 'bear upon the merits to be resolved by the jury' present no danger to the administration of justice." *Levine*, **Doc. RA-5**, at 599. On this basis, the Court directed the district court to "determine which types of extrajudicial statements pose a serious and imminent threat to the administration of justice in this case," and then "fashion an order specifying the proscribed types of statements." *Id*. Far from being a case that endorses sweeping orders, *Levine* stands for the polar opposite proposition: even when a defendant's "basic and fundamental right to a fair criminal jury trial" is at stake, only the most limited restraining order—one that is narrowly tailored and "aimed expressly at publicity during, or immediately before, trial"—may be contemplated. *Id*. at 591, 598-99. The extensive relief Peru now seeks—which attempts to broadly restrict public commentary on not just any "aspect of this case," but any aspect of the Land Bonds issue, and not merely on the eve of the arbitral hearing, but years before—presents the very concerns that led the Ninth Circuit to reject the "overbroad" district court order in *Levine*. *Id*.

48. Peru similarly undermines its argument and its credibility when it cites an inapposite case involving a defense attorney's alleged violation of a state professional conduct rule prohibiting lawyers from making extrajudicial statements to the press that will have a "substantial likelihood of materially prejudicing" a trial. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991), **Doc. RA-8**. Turning *Gentile* on its head, Peru bizarrely claims that this case shows that U.S. courts "can and do impose even stricter restraints on litigants" than the one it proposes. **R-20**, Peru's Submission, ¶ 27. Yet the *Gentile* case demonstrates no such thing. To the contrary, the Supreme Court observed that speech by "a lawyer who represents a defendant involved with the criminal justice system" is subject to less rigorous protection than heavily protected speech by parties outside the criminal justice context—like Gramercy and other bondholders. *Id*. at 1071, 1074-1075. And the Court went on to note that even restrictions on attorney speech must still be "narrowly tailored." *Id*. at 1076. Even more misleading, Peru altogether omits that the Supreme Court ultimately *overturned* the state rule restricting inflammatory attorney speech as impermissibly vague. *Id*. at 1033-1034, 1048-1051, 1058.

49. Peru's defense of its requests to silence public commentary critical of Peru about an issue of public concern thus rests on misstating the holdings of cases that actually contradict its position. The U.S. cases convincingly demonstrate why prior restraints on speech should almost never be imposed, and when they are, only where and to the limited extent absolutely necessary to preserve a defendant's right to a fair jury trial. All of which again illustrates how unjustified a gag order is here. In this case there is simply nothing equivalent to the circumstances that can justify even narrow speech limitations.

50. Peru's failure to mention Peruvian law in addition to U.S. law perhaps reflects the fact that it too undermines Peru's application. The Peruvian Constitution likewise enshrines the nation's commitment to free speech. **Doc. CE-72**, Peru's Constitution of 1993, Art. 2(4), June 15, 1993. Similar to the First Amendment to the U.S. Constitution, the Peruvian corollary—Article 2 of the Peruvian Constitution—guarantees "[e]very person" the right "[t]o freedom of information, opinion, expression, and dissemination of thought whether oral, written, or in images, through any medium of social communication, and *without previous authorization, censorship, or impediment, under penalty of law*." *Id.* (emphasis added). Peruvian case law, like U.S. case law, demonstrates that restraints on free speech—particularly on issues of public import—cannot be restricted in any fashion absent extraordinary circumstances. As the Peruvian Constitutional Tribunal has declared, the "fundamental right" to freedom of expression is recognized as a generator of "free public opinion" and is built into the "configuration of the democratic state as a right." Constitutional Tribunal of Peru, Judgment on Proceeding No. 2262-2004, October 17, 2005, **Doc. CA-71,** Section 13, pp. 8-9, 11. The Tribunal goes on to declare that "[t]he constitutional provision is sufficiently clear and unequivocal: *all* types of prior censorship of the content of speech is prohibited." *Id.* Section 13, p. 9 (emphasis added); *see also* Constitutional Tribunal of Peru, Order on Proceeding Exp. 2465-2004, October 11, 2004, **Doc. CA-70** ("It is true that in a democratic State, freedom of expression acquires a significant tenor and gains a preferential position since it is the means of guarantee through which one exercises debate, consensus, and social tolerance."). Accordingly, there is nothing in Peruvian law barring litigants or third parties from engaging in public discussions on a significant matter—like a controversial law or issue—even when that matter is also being litigated in Peruvian courts. To the contrary, the Peruvian Constitution expressly protects the right to the "public nature of proceedings," emphasizing that "legal proceedings related to constitutionally guaranteed fundamental rights, are *always* public in nature." **Doc. CE-72**, Art. 139, Section IV (emphasis added).

51. Consequently, at the time they signed the Treaty, Peru and the United States could not have intended the Treaty to broadly restrict free speech in the manner Peru now requests. Neither U.S. nor Peruvian case law supports the proposition that broad prior restraints on free

speech are "not prejudicial," nor that they are "an inherent element of due process and protecting the integrity of a legal forum." *See* **R-20**, Peru's Submission, ¶ 25. In fact, both countries' laws stand for the complete opposite proposition. It therefore stands to reason that if the Treaty Parties had intended the Treaty to upend these fundamental principles they would have clearly expressed that in the Treaty text. That the text omits any such notion—and indeed calls for a high degree of openness and transparency—strongly indicates that the Treaty does not contemplate the kind of gag order Peru seeks, much less that it is a routine element of the Treaty's dispute resolution procedure.

52. Moreover, Peru's proposed restrictions go even further: they also seek to deprive Gramercy of its right and fiduciary obligation to interact with its elected representatives, including those whose constituents are affected by Peru's treatment of the Land Bonds, while, at the same time, preserving Peru's ability to interact with these very same representatives. *Id.* ¶¶ 10-11. As Gramercy explained to Peru before this arbitration commenced, "the resolution of this matter is of significant importance to our respective governments," as "the Land Bonds that Gramercy manages and controls are beneficially owned by institutional investors including approximately 200 U.S. State, municipal and trade union pension funds." **Doc. CE-256**, Letter from James Taylor, Gramercy, to Dr. Luis Miguel Castilla, Ambassador of Peru to the United States, January 29, 2016. To thwart democratically elected representatives from speaking freely to Gramercy about public policy issues affecting their constituents extends far beyond any relief necessary or within the Tribunal's power to order. Peru is unable to point to *any* instance in which a tribunal or court has granted a party the relief it now demands.

53. Peru cannot justify its extraordinary request with a general reference to the "exclusivity of investor-state dispute settlement," and asserting, without support, that "[a] necessary corollary" to a State's agreement not to engage in "diplomatic protection" is that a claimant "may not agitate to induce its State to engage in actions that fall within the category of diplomatic protection." **R-20**, Peru's Submission, ¶¶ 14-19.

54. Even if that impermissibly loose reasoning had merit, it is totally inapt to this case. "Diplomatic protection" refers to a specific concept in international law "whereby a State espouses the claim of its national against another State and pursues it in its own name." *See* **Doc. RA-10,** Christoph Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary*, 2001, p. 415. Professor Reisman confirms that elementary point, in the opinion Peru cites, where he describes how bilateral investment treaties' "two-track regime" of investor-State and State-State arbitration "replac[es] the traditional system of diplomatic espousal." **Doc. RA-15**, W. Michael Reisman, *Opinion with Respect to Jurisdiction in the Interstate Arbitration Initiated by Ecuador against the*

United States, April 24, 2012, ¶¶ 25, 35. Moreover, it is somewhat ironic that Peru relies on Professor Reisman's opinion given that he criticizes Peru's own gamesmanship in trying to defeat an investment arbitration by commencing a State-to-State arbitration on the same subject in *Lucchetti v. Peru*—a challenge that the *Lucchetti* tribunal "quickly and accurately" dismissed. *Id.* ¶ 34. Peru has not even alleged much less proven that Gramercy has ever agitated to induce the United States to engage in such diplomatic protection.

55. Hence, even in circumstances where a pending investor-State arbitration preempts a diplomatic protection claim, it does not bar communications with the investor's State of nationality—even communications directly relating to the dispute. For example, in *Autopista v. Venezuela*, a case involving a Mexican investor, the tribunal concluded that there was nothing improper about interventions by Mexico relating to the dispute—such as the Ambassador of Mexico sending letters to the Venezuelan Ministry of Foreign Affairs—since those actions constituted efforts "to facilitate the settlement of the dispute between Aucoven and Venezuela," with "no indication that Mexico has espoused Aucoven's claim." *Autopista Concesionada de Venezuela v. Republic of Venezuela*, ICSID Case No. ARB/00/05, Decision on Jurisdiction of September 27, 2001, **Doc. CA-60**, ¶ 139. The ICSID Convention similarly distinguishes between diplomatic protection and other State interventions, explicitly providing that "diplomatic protection . . . shall *not* include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute." ICSID Convention, **Doc. CA-72**, Art. 27(2) (emphasis added).

56. Further, communications between an investor and its State of nationality do not in any way call into question the "exclusivity" of an investor-State arbitration. Rather, the issue of "exclusivity" arises in cases where there is a possibility of multiple *formal* proceedings or remedies, and may bar a party from "initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID." *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 of July 1, 2003, **Doc. CA-62**, ¶ 1. As Professor Schreuer and Ms. Loretta Malintoppi noted, the drafting history of Article 26 of the ICSID Convention, which guarantees the right to have ICSID arbitration be the exclusive remedy, "centred almost exclusively around the relationship of ICSID arbitration to domestic courts, especially the requirement to exhaust local remedies in a host State before the initiation of ICSID arbitration by the foreign investor." **Doc. RA-10,** Christoph Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary*, 2001, p. 380. Accordingly, past tribunals have found the right to exclusivity to be relevant in cases where criminal or contract claims brought in domestic judicial or administrative proceedings pertained to the subject matter at issue in the arbitral dispute. *See, e.g.*, *Tokios Tokelés*, PO 1, **Doc. CA-62**; *Teinver*, Decision on Provisional Measures, **Doc. RA-19**. By contrast, an investor's general

communications with its country of nationality clearly do not invoke the same concerns, or rise to the level of "judicial or administrative proceedings."

57. Gramercy does not contest that the Parties should "respect the role of the non-disputing Party as established in the Treaty." **R-20**, Peru's Submission, ¶ 10. However, this does not mean what Peru says it means. In actuality, it means no more and no less than that *in this arbitration* the United States should receive certain submissions and have the opportunity to express views on Treaty interpretation. But nothing in the Treaty or in international law prevents Gramercy from communicating with representatives of the U.S. government more broadly. **C-22**, Gramercy's Opposition, ¶ 41. As Gramercy previously observed, the Treaty does not require a waiver of speech rights like it does of certain litigation rights. Hence, Peru's extraordinary and unprecedented request is simply not within the Tribunal's authority to grant.

58. Moreover, a general order of the kind Peru nominally seeks poses another significant risk: distracting the Tribunal from its main objective of resolving the dispute before it. The Tribunal's principal job is not to police communications and debate outside the arbitration. Yet Peru's requested measures would invite endless collateral litigation over both sides' potential breaches of vague and general measures. Regardless of any action by this Tribunal, it is inevitable that the debate surrounding the Land Bonds will remain an issue of public concern. The Tribunal should not have to be consumed with the distracting sideshow of hearing the Parties bicker about alleged incidents of aggravation every time Peru, or Gramercy, or organizations with which Gramercy cooperates, or one of thousands of bondholders, or Peruvian or U.S. officials, or ratings agencies, or anyone else says something in public about the Land Bonds that intentionally or coincidentally reflects a Party's position. The follow-on requests that would likely ensue from a general order will be counterproductive, and risk diverting the Tribunal's attention from its *actual* mandate: resolving the substantive legal dispute that the Parties have presented.

3. Peru Has Not Demonstrated a Reasonable Possibility That It Will Succeed on the Merits of the Claim

59. Peru cannot evade its obligation to demonstrate that it has a "reasonable possibility that the requesting party will succeed on the merits of the claim" by framing its interim measures as innocuous "procedural safeguards." *See* **Doc. CE-174**, UNCITRAL Rules, Art. 26(b). As Gramercy explained in its Opposition, Peru has not even attempted to show that it has a good prospect for winning ultimate relief, or that the relief sought through these measures is anything to which it would be entitled in a final award. Gramercy's Opposition, ¶¶ 53-55.

60. Gramercy's claims are clearly founded on Peru's actions in violation of the Treaty, none of which Peru has addressed or explained with any justification, despite having had years to do so. *See id.* ¶ 54. The Tribunal therefore has no basis at all to conclude that Peru has shown a reasonable possibility of prevailing in the case generally, and even less that it could make a successful claim for the kind of relief it now seeks on an interim basis.

C. Any Relief Ordered Must Be Truly Mutual

61. Finally, as Gramercy's Opposition explains, any relief ordered must be truly mutual. Peru's submission makes clear that while it considers "aggravation" to stretch to include just about everything Gramercy says or does regarding the Land Bonds, it somehow does not encompass Peru's own conduct. In an attempt to validate this untenable position, Peru repeatedly—and erroneously—echoes the refrain that Gramercy "has not similarly alleged aggravation by Peru." **R-20**, Peru's Submission, ¶ 2; *see also id*. ¶ 34. This is a brazenly false claim, for Gramercy has long made clear that Peru's own misconduct and misrepresentations animated Gramercy's public engagement and even the commencement of this arbitration.

62. Indeed, Gramercy has long contended that Peru's conduct is far more "aggravating" than any action undertaken by Gramercy. For example, Peru lambasts Gramercy for attempting to raise awareness about Peru's default—and even using the word "default" to describe Peru's decades-long nonpayment of a sovereign obligation. Yet Peru actually *is* in default on the Land Bonds. Peru also criticizes Gramercy's purported failure to engage in good-faith negotiations. Yet Peru has continually pulled the rug out from under Gramercy during Gramercy's repeated efforts at amicable resolution by, for example, blowing up the tolling agreement—which Gramercy had repeatedly proposed—at the eleventh hour. Peru accuses Gramercy of misleading it, yet Peru continually duped Gramercy by erratically and unilaterally changing the payment formulas in its Supreme Decrees. Peru also criticizes Gramercy's engagement of lobbyists and discussions with U.S. representatives. Yet Peru has engaged its own lobbyists—in addition to its permanent embassy presence in Washington—in an effort to not only court U.S. representatives, but also to tarnish Gramercy's reputation and claims.

63. It is telling that Peru has yet again referenced—inaccurately—a statement Gramercy's counsel made in relation to the OECD as "proof" of aggravation. **R-20,** Peru's Submission, Annex, ¶ 17. In fact, in the April conversation Peru mentioned, Gramercy's counsel merely expressed its consistently-held position that any forbearance must be mutual, so Gramercy will refrain from making statements with respect to Peru's default if Peru likewise ceases to make representations to international institutions and others ignoring the existence of that default.

Peru clearly has no intention of doing so—rather, it has consistently doubled down on its desire for one-sided discourse by, among other things, sending a letter to the Secretary General of the OECD once again misrepresenting its bondholder process and chastising Gramercy, and by retaining lobbyists as recently as February 2018 to "provide strategic advice" in matters including "possible entry to the OECD and other issues of interest to the Government of Peru in the United States." *See* **Doc. R-205**, Letter from Peru to Secretary General of OECD, No. 264-2017-PCM/DPCM, December 5, 2017; **Doc. CE-281**, Exhibit AB to Registration Statement Pursuant to the Foreign Agents Registration Act, February 12, 2018.

64. Consequently, Peru—the very Party that has repeatedly endorsed its judicial system's use of white-out to forge the decision that resulted in the Supreme Decrees—cannot attempt to feign innocence and claim that it has clean hands. If Gramercy's conduct constitutes "aggravation," so too does Peru's. And so too must Peru desist from not only engaging in activities that harm Gramercy, but that injure all bondholders with a stake in this matter of public import.

65. For example, if Peru insists that Gramercy stop talking to creditors or ratings agencies about Peru's default, Peru must equally stop misrepresenting to them that it is not in default and paying on the Land Bonds. If Peru insists that Gramercy refrain from criticizing the flawed Supreme Decree process, so too must Peru refrain from touting the virtues of its "legitimate bondholder procedure." If Peru insists that Gramercy remain silent about Peru's continued default, the serious allegations of judicial misconduct, and its complete lack of transparency, so too must Peru cease representing itself as a "responsible sovereign" that unequivocally upholds the rule of law.

66. The incredibly broad scope of conduct that the Tribunal would have to enjoin in order to ensure that Peru's requested relief is truly mutual illustrates why the Tribunal should decline to order any relief at all. If Gramercy had come before the Tribunal requesting such broad relief against Peru—that Peru cannot publicly comment on its credit history, the Supreme Decrees, the nature and value of the Land Bonds, its commitment to the rule of law, and the like—Peru would have vehemently objected, and decried Gramercy's audacity in even making the request. Yet this is exactly what Peru asks the Tribunal to order against Gramercy. Putting it that way further illustrates how the relief Peru requests would be an unprecedented interference into the Parties' abilities to carry out a wide range of legitimate activities unrelated to and outside the context of this arbitration—activities protected by law and enjoyed by right in democratic societies.

67. Gramercy has not "consistently rejected procedural safeguards." *See* **R-20**, Peru's Submission, ¶ 6. Indeed, if Peru actually sought reasonable safeguards, the Parties could likely have avoided this

entire exercise, as Gramercy has consistently indicated that it is open to discussing reasonable and mutual limitations. Instead, Peru decided to come before the Tribunal seeking extraordinary relief, while at the same time refusing to acknowledge that it was doing so, refusing to present the legal basis for its claims, and completely misrepresenting multiple cases on which it relies, even saying the exact opposite of what the courts actually held. The Tribunal should consider this behavior not only for purposes of assessing the merits of this application, but also in allocating costs.

III.

REQUEST FOR RELIEF

68. For the above-mentioned reasons, Gramercy respectfully requests that the Tribunal:

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

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

   i) communicating with U.S. officials;

   ii) communicating with Peruvian officials who consent to speak with them;

   iii) engaging in discussions about the Land Bonds in public fora;

   iv) engaging with other land bondholders, individually and in organizations;

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

c) Grant Gramercy costs.

69. Gramercy reserves all rights.

Respectfully submitted,

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