

**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' OPPOSITION
TO PERU'S INTERIM MEASURES APPLICATION**

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June 1, 2018

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I.

INTRODUCTION

1. Gramercy Funds Management LLC (“*GFM*”) and Gramercy Peru Holdings LLC (“*GPH*”) (collectively, “*Gramercy*” or “*Claimants*”) oppose the Republic of Peru’s (“*Peru*”) request for interim measures intended to muzzle Gramercy and broadly prevent it from participating in the longstanding, public, and ongoing debate and discussion about the Land Bonds.

2. Peru has not attempted to, and cannot, satisfy the demanding requirements for the Tribunal to grant such extraordinary relief, which amounts to a “gag order” and prior restraint on speech of the kind that is anathema to democracies like Peru and the United States. While Peru has deceptively tried to present its request as simply seeking “basic” procedural provisions that are “routine” in any case, no tribunal has ever imposed such a sweeping set of measures aimed at throttling legitimate discussion over what is an unavoidably public and political issue whose contours are much broader than Gramercy’s particular rights at issue in this arbitration. *Cf. R-7*, Letter from Peru to the Tribunal, April 17, 2018, p. 4.

3. Peru has misleadingly sought to justify its request for this extraordinarily relief by accusing Gramercy of being “engaged in a warpath of aggravating conduct” and of “mounting an attack campaign to harm Peru.” *Cf. id.* While Peru has obviously advanced that narrative to portray itself as the victim rather than the perpetrator, it is a false and misleading account.

4. In fact, if any party has “aggravated” this dispute, it is Peru. For years, Peru has taken active steps to undermine, in the eyes of the public, its obligation to pay the Land Bonds, to misrepresent to the international community the Land Bonds’ status as a sovereign obligation, to manipulate Peru’s Constitutional Tribunal into issuing a tainted decision about the Land Bonds that is now the subject of a criminal prosecution, and to issue a series of Supreme Decrees that purport to pay the Land Bonds, but that actually deprive them of their value. While some of these developments also comprise part of Gramercy’s claim in this arbitration, all of them are intrinsically political events that are matters of legitimate public concern and debate in Peru, the United States, and elsewhere. Given that fuller context, Gramercy was and remains well within its rights to engage in and stimulate discussion about these matters broadly with the public at large and especially with democratically elected officials in Peru and the United States.

5. In any event, Peru cannot satisfy any, much less all, of the elements required for the kind of relief it seeks. The rules governing this

arbitration, the United States-Peru Trade Promotion Agreement (the “*Treaty*”), and public international law generally establish a demanding standard for such interim measures. Peru has not attempted to and cannot meet that standard. For example, Peru cannot show that the Tribunal will be unable to fulfill its mandate or will be deprived of jurisdiction unless it grants the measures. It cannot show that it has suffered any prejudice from Gramercy’s alleged conduct, much less that any such prejudice outweighs the prejudice Gramercy would suffer if the Tribunal imposed the measures. It cannot show that it has a good prospect of winning ultimate relief, as it has not asserted—and jurisdictionally cannot assert in this arbitration—a claim for that relief. In short, its application has no legal foundation or precedent.

6. Moreover, Peru certainly is not entitled to the one-sided relief it seeks. Peru obviously has no intention of, for example, refraining from making further representations—to the public as well as to officials of the United States, regulatory agencies, and multilateral institutions—about its public debt, its track record with respect to paying its sovereign obligations, its Supreme Decrees that purport to offer payment on the Land Bonds, the white-out scandal, and other related topics on which it frequently opines in an effort to sweep the treatment of the Land Bonds under the rug. It therefore cannot hypocritically seek restrictions on Gramercy that it has no intention of honoring itself.

7. The “gag order” Peru seeks restricting public commentary and even private conversations with democratically elected representatives, regulatory agencies, institutions, and others, goes far beyond what could reasonably be considered necessary to maintain the integrity of the arbitral proceedings, and indeed far beyond the scope of any measures ordered by prior tribunals. Gramercy respectfully requests that the Tribunal decline to order such measures and award it costs.

II.

FACTUAL BACKGROUND

8. Peru’s treatment of the Land Bonds has been and remains a matter of widespread public interest and debate. That debate began prior to Gramercy’s investment and continues to this day to involve a broad range of stakeholders. Peru has itself been an active participant in that debate, and Gramercy’s involvement followed Peru’s attempts to frame the issues in misleading ways that are detrimental to the rights of Gramercy and other bondholders.

A. Public Concern Surrounding the Land Bonds

9. As discussed in detail in Gramercy’s Statement of Claim, Peru’s treatment of the Land Bonds, including the amount of compensation owed and the proper mechanism to deliver that

compensation, has been a matter of widespread public interest and debate in Peru for decades. *See* **C-5**, Gramercy's Second Amended Notice of Arbitration and Statement of Claim, ¶¶ 45-59. This debate has involved numerous actors and stakeholders, including the Peruvian government and its institutions. Peru's Congress, its courts, and its executive have all taken part in this debate by, among others, issuing decisions and draft legislation and making public statements relating to the Land Bonds. *See, e.g.*, **Doc. CE-73**, Law N° 26207, July 2, 1993, Art. 3; **Doc. CE-84**, Law N° 26597, April 24, 1996, Art. 2; **Doc. CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001; **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N° 11971/2004-CR; **Doc. CE-14**, Supreme Court, Constitutional and Social Law Chamber, Cas. N° 1002-2005 ICA, July 12, 2006; **Doc. CE-122**, Ministry of Agriculture, Report N° 1328-2006-AG-OGAJ, December 20, 2006, pp. 2, 4; **Doc. CE-110**, *Expreso*, INEI: Land Reform Debt Should Be Recalculated using CPI, March 1, 2005.

10. In addition, the majority of outstanding Land Bonds are held by people who are unrelated to Gramercy, with ownership distributed widely across Peru and the United States. As such, the Land Bonds concern not only Gramercy, but also the public at large, as well as particularly interested third parties, including thousands of Peruvians and Peruvian-Americans, and U.S. institutional investors, who also own Land Bonds. These parties have a legitimate interest in all matters relating to the Land Bonds, including Peru's continuing conduct with respect to the Land Bonds, and have been active participants in public debate surrounding the Land Bonds. *See, e.g.*, **Doc. CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001 (lawsuit brought by the Engineers' Bar Association against the passage of Law N° 26597); **Doc. CE-183**, Constitutional Tribunal, Resolution, File N° 00022-1996-PI/TC, November 4, 2013 (request for clarification filed by the Land Reform Bondholders' Association regarding the Constitutional Tribunal's 2013 Order).

11. The scope of the public debate regarding the Land Bonds also goes beyond Gramercy's arbitration claims against Peru. Even if Peru contests Gramercy's claims in particular, there is no question that Peru must pay the Land Bonds. Peru itself has acknowledged this obligation in, among others, the Constitutional Tribunal decisions of 2001 and 2013, the MEF's Supreme Decrees in 2014 and 2017, and the 2006 Congressional Report, all of which are available to the public and already the subject of public debate in Peru. *See* **Doc. CE-11**, Constitutional Tribunal, Decision, Exp. N° 022-96-I/TC, March 15, 2001; **Doc. CE-17**, Constitutional Tribunal of Peru, Order, July 16, 2013; **Doc. CE-37**, Supreme Decree N° 17-2014-EF, January 17, 2014; **Doc. CE-38**, Supreme Decree N° 19-2014-EF, January 21, 2014; **Doc. CE-269**, Supreme Decree N° 034-2017-EF, February 28, 2017; **Doc. CE-275**, Supreme Decree N° 242-2017-EF, August 19, 2017; **Doc. CE-**

276, Supreme Decree N° 242-2017-EF (corrected), August 26, 2017; **Doc. CE-12**, Opinion issued on Draft Laws N° 578/2001-CR, N° 7440/2002-CR, N° 8988/2003-CR, N° 10599/2003-CR, N° 11459/2004-CR, and N°11971/2004-CR, p. 13. Thus, the question is not whether Peru must pay the Land Bonds, but rather how much and when. This question is not exclusive to this dispute, but is a broader issue of public concern that affects all holders of the Land Bonds unrelated to Gramercy.

B. Gramercy’s Participation in Public Discussions on the Land Bonds

12. Despite the public importance of the Land Bonds, Gramercy generally did not take an active role in the public debate after it invested in the Land Bonds, instead focusing on participating in ongoing attempts to find a comprehensive and global resolution to the issue. To this end, it made numerous attempts to seek good faith negotiations directly with Peru. For example, in April 2014, Gramercy wrote privately to Peru stating that it “welcomes any efforts by the Peruvian Government to finally honor its obligations to the holders of the Land Reform Bonds” and reiterated that its “fervent desire remains to resolve this matter in a spirit of respect, friendship, cooperation and compromise.” **Doc. CE-190**, Letter from Gramercy to the President of the Council of Ministers and the Minister of Economy and Finance, April 21, 2014.

13. However, such efforts turned out to be futile when, in 2015, the white-out scandal surrounding the July 2013 Order of the Constitutional Tribunal (“**2013 CT Order**”) first broke in the Peruvian press. That episode—which remains the subject of an ongoing criminal investigation—betrayed a shocking willingness of Peruvian institutions at all levels to ignore all rules of fair play, and revealed the lengths to which Peru would go to avoid honoring the Land Bond debt and to try to erase it from history. *See, e.g., Doc. CE-278*, *El Comercio, Prosecutor Asks for Three Years in Prison for Adviser to the Constitutional Tribunal*, May 31, 2018. The fact that the Peruvian Government has never reproached the Constitutional Tribunal’s conduct of the matter, and has instead continued to rely on the forged 2013 CT Order through two Presidential administrations by issuing new Supreme Decrees purporting to implement the 2013 CT Order, has only confirmed Gramercy’s suspicions about Peru’s intentions. **Doc. CE-37**, Supreme Decree N° 17-2014-EF; **Doc. CE-38**, Supreme Decree N° 19-2014-EF; **Doc. CE-269**, Supreme Decree N° 034-2017-EF; **Doc. CE-275**, Supreme Decree N° 242-2017-EF; **Doc. CE-276**, Supreme Decree N° 242-2017-EF (corrected).

14. 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. In particular, Gramercy’s statements have primarily focused

on the following: (1) that the irregularities relating to the 2013 CT Order, and in particular the use of white-out to forge the “dissent,” evidence severe wrongdoing by the Peruvian government, and thus questioning the government’s continued reliance on this decision; (2) that by failing to report the Land Bond debt as a valid sovereign obligation, Peru is misrepresenting the size and maintenance of its public debt to, among others, the International Monetary Fund (“*IMF*”), the World Bank, the Organisation for Economic Co-operation and Development (“*OECD*”), the U.S. Securities and Exchange Commission (“*SEC*”), the Luxembourg Stock Exchange, capital markets, and rating agencies; (3) that Peru’s failure to report the Land Bond debt is inconsistent with international standards, including those of the IMF, the World Bank, and the OECD; and (4) that Peru’s default on the Land Bonds impacts thousands of Peruvian bondholders and American workers.

15. Gramercy has acted within its rights to participate in a public debate that is much broader than the issues contained in this arbitration in order to protect its interests and fulfill its fiduciary duty to its investors. Further, the substance of Gramercy’s participation in this debate has related to valid public policy concerns in response to Peru’s continued misconduct and misrepresentations. These concerns are independent from the claims at issue in the arbitration, and public discussion of these issues will not affect the ability of the Tribunal to hear this case or to decide Gramercy’s claims against Peru on the merits.

C. Peru’s Efforts to Misrepresent the Land Bonds’ Status

16. In the meantime, Peru has continued to actively engage in a public campaign misrepresenting the Land Bonds’ status as a valid sovereign obligation, in an attempt to suppress meaningful discussion on this matter of public interest and to coerce thousands of bondholders to accept the terms that Peru has unilaterally imposed in its Supreme Decrees. Peru has issued blanket denials of misconduct, continued to misrepresent that the Land Bonds constitute part of its sovereign debt, and disparaged Gramercy and attempted to undermine the validity of its claims. For instance:

- a) In an interview with *LatinFinance* during his first month after taking office, former President Pedro Pablo Kuczynski stated that “I don’t think we owe [Gramercy] anything . . . it’s that simple.” See **Doc. CE-266**, *LatinFinance, Peru’s PPK: “I don’t think we owe [Gramercy] anything,”* August 22, 2016.
- b) Despite the public revelations concerning the irregularities of the 2013 CT Order, Peruvian officials continue to rely on that decision and the flawed procedures set forth in the Supreme Decrees to deflect criticism for Peru’s continued nonpayment. For example, in March 2016, former Minister Alonso Segura stated that “[t]here’s a procedure established by the highest court

[in Peru] which mandates how we should proceed in terms of the authentication, registration and the valuation of the bonds, and we're sticking closely to that." **Doc. CE-264**, Wall Street Journal, *Peru Finance Minister Defends Handling of Land Bonds Dispute*, March 10, 2016. While Peru continues to tout this procedure as legitimate and successful, to Gramercy's best knowledge, it has not resulted in any payment to bondholders so far. *See* **Doc. CE-265**, Ministry of Economy and Finance, Peru Advances Agrarian Reform Bonds Payment Process and Acknowledges Dispute Notice, June 2, 2016.

- c) Despite overwhelming evidence to the contrary, Peru continues to insist that it is "a stable and responsible country in the management of its sovereign debt," and that it uniformly meets its sovereign debt obligations. *See, e.g., id.* But it does so by failing to disclose its Land Bond debt as an ongoing default or obligation. Even worse, Peru affirmatively denies the existence of any dispute with its creditors. For instance, in its October 2015 prospectus filed with the SEC, Peru stated that it "is unaware of any other claims filed against it . . . for overdue debt payments and Peru is not involved in any disputes with its internal or external creditors." **Doc. CE-262**, Preliminary Prospectus Supplement to Prospectus dated August 18, 2015, October 27, 2015, p. 1. Peru repeated this blatantly false statement in more recent filings to the SEC. *See, e.g.,* **Doc. CE-263**, Prospectus Supplement to Prospectus dated August 18, 2015, February 25, 2016, p. 1; **Doc. CE-274**, Form 18-K of the Republic of Peru, July 6, 2017, D-123; *see also* **Doc. CE-22**, Egan-Jones Rating Company, Egan-Jones Assigns a First-time Rating of "BB" to the Republic of Peru's International Bonds, November 17, 2015, p. 8 (stating that Peru "[did] not include any disclosure with respect to the status of its ongoing default nor any mention of the amount owed with respect to the Land Reform Bonds" in its SEC filings). Similarly, Peru has failed to disclose the existence of its Land Bond debt by failing to report it to international institutions and credit rating agencies. For example, Peru reports its total debt outstanding to the IMF but fails to include any amount for the Land Bonds. *See, e.g.,* **Doc. CE-261**, International Monetary Fund Country Report No. 15/294, October 2015, p.13.
- d) In its press release following Gramercy's June 2016 filing, Peru's Ministry of Economy and Finance ("**MEF**") declined to respond to any of the allegations in substance, instead falsely accusing Gramercy of having "not consulted in good faith," carrying out "a negative campaign seeking to harm Peru and Peruvians," and having "disseminated propaganda regarding the Constitutional Tribunal Decision" or resorting "to threats and blackmail." **Doc. CE-265**, Peruvian Ministry of Economy and

Finance, Peru Advances Agrarian Reform Bonds Payment Process and Acknowledges Dispute Notice, June 2, 2016.

17. Further, Peru has attempted to silence criticism relating to its treatment of the Land Bonds issue, including by attempting to ban Gramercy employees from attending open investor conferences, refusing to respond to requests for information from bondholders and others on the amounts owed by Peru under its various Supreme Decrees, and playing the “victim card” while publicly and privately attacking Gramercy and refusing to meaningfully engage in dialogue.

18. Peru’s continued attempts to misrepresent the Land Bonds’ status as a valid sovereign obligation to the international community, the capital markets, and the Peruvian public have had a detrimental effect on the rights of Gramercy and other bondholders over the years. In particular, by continually denying the Land Bonds’ status, Peru has attempted to inoculate itself from questions or criticism over its default, while at the same time drumming up domestic political sentiment against paying an “invalid debt.” Indeed, many of Peru’s public defenses on the Land Bonds—and its responses thus far in the arbitration—seek to take advantage of this misleading rhetoric. *See, e.g., R-2*, Response of the Republic of Peru, September 6, 2016, ¶ 12 (the Land Bonds are “the product of a unique era in Latin America history which is not and cannot be subject to claims in this contemporary Treaty proceeding”).

19. Peru’s conduct in this respect has continued throughout the onset of this arbitration, including in its conduct before and communications with the Tribunal thus far. Despite the fact that the subject of this arbitration is to adjudicate Gramercy’s allegations of Peru’s violations of international law, Peru has attempted to construct an alternative narrative under which Peru, not Gramercy, is the aggrieved party. To this end, Peru has repeatedly disparaged Gramercy and its counsel, provided one-sided and misleading descriptions of communications, and misrepresented its own course of conduct at every possible opportunity, including in routine procedural communications to the Tribunal. This conduct is unproductive, inappropriate, and prejudicial to Gramercy. While Gramercy has thus far attempted to avoid engaging in a tit-for-tat response, it objects to both these characterizations and Peru’s continued conduct and is willing to release all written communications between the Parties to correct the record.

20. In addition, although not reflected in Peru’s one-sided record of communications, Gramercy has continually sought clarification on what exactly Peru objects to in its various references to “non-aggravation” and “channels of communication.” While Gramercy has repeatedly indicated a willingness to discuss and potentially resolve these issues, Peru has regrettably appeared more intent on creating a record to

support its version of events than in actually reaching constructive solutions. To give just a few examples:

- a) In its email to Peru dated September 13, 2016, Gramercy stated that “we do not agree that Peru’s position on non-aggravation is clear and well-established. In fact, on our call, I communicated just the opposite, and I requested clarification as to the specific steps Peru wishes for the parties to follow to avoid aggravation of the dispute.” **Doc. CE-267**, Email from Gramercy’s Counsel to Peru’s Counsel, September 13, 2016.
- b) In its letter to Peru dated October 25, 2016, Gramercy stated that “in principle Gramercy does not accept Peru’s position that principals cannot engage in direct communications once arbitration has commenced. . . . Nonetheless, we understand that you are working on a more specific proposal regarding a framework for discussion including concrete proposals regarding the measures Peru considers as aggravation of the dispute. We invite further conversations on this matter.” **Doc. CE-268**, Letter from Gramercy’s Counsel to Peru’s Counsel, October 25, 2016.

21. Instead of responding to Gramercy’s requests for clarification, Peru has continued to vilify Gramercy as a convenient “foreign” scapegoat to detract from Peru’s continued failure to properly compensate *all* bondholders, including thousands of Peruvians. Peru’s misleading rhetoric has continued throughout this arbitration, and it cannot seek this Tribunal’s authority to continue suppressing discussions on matters of public concern that do not affect this arbitration or the Tribunal’s ability to adjudicate this case.

III.

PERU CANNOT SATISFY THE REQUIREMENTS FOR THE EXTRAORDINARY RELIEF IT SEEKS

22. Peru has no valid legal basis for the relief it seeks, and the Tribunal should deny that relief.

23. In its letter dated April 17, 2018, Peru requested that the Tribunal order three measures it has somewhat innocuously called “non-aggravation,” “non-disputing party,” and “channel of communications.” *See R-7*, Letter from Peru to the Tribunal, April 17, 2018, p. 4. Those bland labels attempt to conceal that what Peru actually seeks through the combined effect of these measures is a breathtakingly broad “gag order,” which would prevent Gramercy from discussing the Land Bonds generally in public fora, with U.S. government officials including members of Congress or the executive branch who have expressed an interest in the Land Bonds, and even with any Peruvian public officials

who might have an interest in exploring a constructive resolution of the Land Bonds issue.

24. Unsurprisingly, the applicable rules and law do not contemplate such relief, and require a far more compelling showing than Peru can muster for anything even approaching it to be considered. No Tribunal has ordered such sweeping relief, and this Tribunal should not be the first to do so.

A. Peru Must Meet a High Standard to Justify Interim Measures

25. While Peru has presented this request as “procedural” in nature, the broad restrictions it seeks to impose effectively amount to interim measures. As such, the requested provisions are hardly “focused, respectful and consistent with prior rulings of tribunals”—rather, they are, as tribunals have repeatedly found, “extraordinary measure[s] which should not to be granted lightly.” *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 of October 28, 1999, **Doc. CA-49**, ¶ 10. Tribunals should only grant these extraordinary measures when faced with exceptional circumstances that “affect the parties’ rights before they have had an opportunity to present their cases.” Gary Born, *International Commercial Arbitration* (2nd Ed. 2014), **Doc. CA-57**, p. 2474, n. 276.

26. The Tribunal may consider granting a request for interim measures only if the applicant satisfies the requirements set forth in the Treaty and the UNCITRAL Rules. As the requesting party, Peru bears the burden of proving that these criteria are satisfied in this case. Namely:

- a) Pursuant to Article 10.20.8 of the Treaty, Peru must demonstrate that the measures are necessary to “preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective.” **Doc. CE-139**, Treaty, Art. 10.20.8.
- b) Under Article 26.3(a) and (b) of the UNCITRAL Rules, Peru must “satisfy the arbitral tribunal” that: (1) “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered”; (2) “such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”; and (3) “[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.” **Doc. CE-174**, UNCITRAL Rules, Art. 26.3(a)-(b).

27. Peru must demonstrate that it has met all of these elements. As such, interim measures may be granted only if they either preserve the rights of a disputing party, or ensure that the Tribunal’s jurisdiction is made fully effective, and then only if failure to do so would cause

irreparable harm. Further, the Tribunal must also be satisfied that such irreparable harm *substantially* outweighs the harm likely to result to the other party if the measure is granted, and that there is a reasonable possibility that the requesting party will prevail on the merits of the claim. While each of these constitutes a separate requirement, given the facts at issue in this case, the first two requirements are discussed together for convenience in Section III.B.1 below.

B. Peru Cannot Meet the High Standard for Interim Measures

28. Peru has not demonstrated—or even attempted to demonstrate—that it can satisfy this high standard for interim measures. *First*, Peru has not demonstrated that the requested measures operate to preserve any valid right or to ensure the Tribunal’s jurisdiction, nor has it shown that *any* harm is likely to result if the requested measures are not ordered, much less irreparable harm. *Second*, any speculative harm Peru might allege does not outweigh the harm Gramercy would certainly suffer if the Tribunal granted Peru’s request. *Finally*, Peru has not demonstrated a reasonable possibility that it will succeed on the merits of the claim.

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

29. Despite Gramercy’s repeated requests that Peru articulate the harm that it would suffer, and the specific actions it alleges would result in that harm, Peru has failed to do so. Instead, Peru has vaguely claimed that Gramercy’s conduct “threatens the integrity of this proceeding” and “disrupts the status quo because it has been aimed at undermining a legitimate bondholder procedure in Peru,” and has attempted to justify each of the requested measures by invoking a broad notion of “non-aggravation.” **R-7**, Letter from Peru to the Tribunal, April 17, 2018, p. 4. These nonspecific and unsubstantiated complaints cannot constitute the kind of serious and irreparable harm that might provide a foundation for interim measures.

30. *First*, none of these allegations demonstrates that a valid right held by Peru that will be harmed as a result of Gramercy’s conduct. Based on Peru’s submissions to date, and its representations to the Tribunal on the May 4, 2018 conference call, Peru appears to equate “aggravating” conduct with conduct that criticizes or questions its actions or policies and that it finds to be subjectively annoying or inconvenient. *See, e.g.*, **R-7**, Letter from Peru to the Tribunal, April 17, 2018. Yet, a government has no right to silence such questioning or criticism, nor does Peru have a “right” to be spared from embarrassment because the actual facts contradict its preferred narrative. Further, Peru’s reference to the “status quo” notwithstanding, the concept of “non-

aggravation” does not grant a party “a sweeping right to freeze all circumstances.” *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. Indeed, Peru’s stated concern about the “status quo” of its “legitimate” bondholder procedure is particularly dubious given that it is *Peru* that has continued to alter the status quo for Gramercy and other bondholders, including by issuing two new Supreme Decrees after Gramercy had already commenced this arbitration. **Doc. CE-269**, Supreme Decree N° 034-2017-EF; **Doc. CE-275**, Supreme Decree N° 242-2017-EF; **Doc. CE-276**, Supreme Decree N° 242-2017-EF (corrected). These continued interventions themselves have generated the kind of publicity that Peru claims aggravates the dispute.

31. Despite Peru’s protestations to the contrary, engaging in and promoting truthful public discussion on matters of public concern does not amount to “aggravation” affecting the rights of the parties to the dispute. In fact, tribunals faced with requests to restrict public disclosures or discussion of cases have concluded that sweeping restrictions on public discussion even about the arbitration itself are not warranted to avoid “aggravation” of the dispute. *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, 2006, **Doc. CA-55**, ¶ 114 (stating that the parties were allowed to “engage[] in general discussion about the case in public”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of September 29, 2006, **Doc. CA-47**, ¶ 163(d) (clarifying that “[f]or the avoidance of doubt, the parties may engage in general discussion about the case in public”).

32. Rather, the concept of non-aggravation addresses serious conduct that threatens to prevent a party from pursuing the arbitration or to dramatically transform and worsen the very nature of the dispute presented to a tribunal. As such, tribunals that have granted interim measures to prevent “aggravation” of a dispute have most frequently done so when faced with extreme and coercive scenarios, such as the threatened arrest of key individuals involved in a case or the imminent seizure and destruction of a protected investment. In *Teinver*, for example, the tribunal issued provisional measures on the basis of non-aggravation because the respondent State was publicizing the filing of criminal investigations and charges against claimants’ counsel, which placed “substantial pressure” on counsel and thereby “threaten[ed] to affect Claimants’ right to be represented by counsel of their choice in this arbitration.” *Teinver S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures of April 8, 2016, **Doc. CA-54**, ¶ 205. In *Burlington and Perenco*, the tribunals ordered provisional measures on the basis of non-aggravation because the applicants were facing the imminent destruction of their ongoing investment as a result of the respondent State’s threatened conduct—namely, coercive seizure of the applicants’ entire oil production that

would render their business “crippled, if not destroyed.” *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 of June 29, 2009, **Doc. CA-48**, ¶ 65; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures of May 8, 2009, **Doc. CA-52**, ¶ 53.

33. Here, by contrast, the conduct to which Peru objects amounts at best to an inconvenience or potential embarrassment to Peru, and its subjective assessment of Gramercy’s legitimate conduct as an “attack campaign” is far from sufficient to show that any of Gramercy’s conduct amounts to “aggravation” as that term is used in the “non-aggravation” cases. **R-7**, Letter from Peru to the Tribunal, April 18, 2018. Absent a showing of an actual harm, tribunals have declined to order interim measures. *See Valle Verde v. Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures of January 25, 2016, **Doc. CA-56**, ¶ 92.

34. Moreover, Gramercy could not inflict that kind of harm even if it aspired to do so. Peru is a sovereign nation of over 31 million people, with a US \$190 billion economy and an annual budget of over US \$65 billion. As a sophisticated player in the international arena and a sovereign state with official representatives throughout the world, Peru has a substantial amount of influence in the media, with the public at large and with other countries and multilateral institutions. By contrast, Gramercy is a 60-person financial institution in Greenwich, Connecticut, primarily based in a single two-story building, which manages investments for institutional investors, primarily pension funds and universities. Unlike States in investment arbitration, Gramercy has no power to take steps like threatening company officers or witnesses with criminal prosecution, commencing burdensome tax investigations, amending the law to undermine the other party’s rights, seizing the other party’s property, fomenting violence against individuals associated with the adversary and other similar exercises of expansive police powers to thwart an arbitration. Peru’s repeated attempt to portray itself as a powerless victim against a modest-sized private entity like Gramercy is convenient rhetoric, but is not grounded in reality.

35. *Second*, Peru has similarly failed to demonstrate that the measures requested are necessary to ensure that the Tribunal’s jurisdiction is made fully effective. While Peru makes reference to the “integrity of the proceedings,” none of the alleged conduct by Gramercy affects the contours of the legal dispute before the Tribunal, or alters the Tribunal’s power to decide that dispute.

36. As observed by the Tribunal in *Nova Group*, procedural integrity includes “the right of the parties to present their respective positions to the Tribunal, which includes the absence of undue interference with their access to witnesses and evidence.” *Nova Group* PO 7, **Doc. CA-50**, ¶ 235. Similarly, the *Plama* tribunal held 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.” *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of September 6, 2005, **Doc. CA-53**, ¶ 40; *see also Teinver* Decision on Provisional Measures, **Doc. CA-54**, ¶ 177. Unlike in other cases where tribunals have intervened to protect “procedural” rights—such as the *Teinver* case, discussed above—the conduct alleged in this case has no effect on the Tribunal’s authority to hear the dispute, or on the parties’ ability to present their respective cases before the Tribunal.

37. *Third*, 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. *See cf. R-7*, Letter from Peru to the Tribunal, April 18, 2018, p. 4. In those cases, the tribunals ordered narrowly targeted measures intended to address a specific issue that threatened to interfere with the parties’ rights in the dispute. For example, in *Teinver*, the tribunal’s order prohibited publicizing the particular criminal investigation against claimant’s counsel. *Teinver* Decision on Provisional Measures, **Doc. CA-54**, ¶ 210. In both *United Utilities* and *Biwater*, the tribunals prohibited the publication of certain specific documents submitted in the arbitration, where there was no requirement of publication and the parties had not otherwise consented to such publication. *See, e.g., United Utilities* Decision on Provisional Measures, **Doc. CA-55**, ¶ 114; *Biwater* PO 3, **Doc. CA-47**, ¶¶ 163(a)-(b)

38. By contrast, the measures requested by Peru here are broad, far-ranging, and impermissibly vague, using language that is far from “reasonabl[e],” or “focused.” *See R-7*, Letter from Peru to the Tribunal, April 18, 2018, p. 4. For example:

- a) Peru requests that the Tribunal enjoin the Parties from “using the press or social media in an offensive manner to apply undue pressure,” without defining the standard that would make such conduct “offensive” or constitute “undue pressure,” leaving it open for Peru to attempt to restrain conduct that it finds subjectively embarrassing. *See id.*
- b) Peru’s requests that the Parties refrain from “interfering” with “public officials or public events” and “diplomatic relations and/or public institutions,” without defining what it considers to be such “interference,” but by which it apparently means to bar any contacts with an incredibly broad range of actors, at an equally broad range of public events. *See id.*
- c) Peru further seeks to bar, without justification or definition, conduct that can “politicize the dispute,” which, given the widespread public interest in the Land Bonds, could potentially

encompass just about any statement about them, and which Peru itself could hardly avoid doing after having unilaterally issued and touted to the public no less than four Supreme Decrees since 2014. *See id.*

39. The “non-disputing party” measures are similarly broad—effectively preventing Gramercy from speaking to U.S. representatives regarding the dispute—and similarly baseless. Peru has not demonstrated any reason why conversations between Gramercy and U.S. representatives—either directly or through lobbyists—are likely to result in harm to its rights or to the Tribunal’s jurisdiction. Rather, “often an appropriate intervention by representatives of the investor’s home country can help to settle an investor-state dispute.” *See* Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd Ed. 2015), **Doc. CA-58**, p. 409. In addition, as noted previously, Peru’s treatment of the Land Bonds is an issue of concern not only for Gramercy, but also for many American stakeholders, including a number of U.S. pension funds. To prevent democratically elected representatives from speaking freely to Gramercy about issues affecting their constituents goes far beyond any relief that is warranted or that is within the Tribunal’s power to order, and would go against the parties’ fundamental right to criticize government policies.

40. Further, Peru itself engages external lobbyists to address the U.S. government, including the engagement of a Washington D.C.-based firm the same week the Tribunal was constituted. **Doc. CE-277**, Registration Statement Pursuant to the Foreign Agents Registration Act, February 12, 2018. This is of course in addition to the constant presence that Peru maintains in Washington D.C.—and the access to U.S. government officials that it enjoys—by virtue of its status as a sovereign state, with a fully functioning embassy staffed by experienced diplomats charged with promoting Peru’s interests in the United States and protected by diplomatic immunity.

41. Peru’s attempt to justify this extraordinary restriction by reference to the Treaty’s recognition of certain rights accruing to the “Non-Disputing Party” to the proceeding—namely, an affirmative right to information and limited rights of intervention—must fail, as it turns the intended purpose of these provisions on its head. The Treaty’s designated term “Non-Disputing Party,” which it uses to distinguish the Treaty Party that is not a party to the investment dispute from the Respondent, appears in two operative provisions. *First*, Article 10.21 requires the Respondent to provide all submissions, orders, awards, and transcripts directly to the non-disputing party, in addition to making them available to the general public. **Doc. CE-139**, Treaty, Art. 10.21. *Second*, Article 10.20 provides that non-disputing parties may make certain oral and written submissions to the tribunal, and that at the request of a party to the dispute the tribunal may provide the parties and the non-disputing party with its proposed award or order prior to

issuance. *Id.*, Arts. 10.20.2, 10.20.9(a). Nowhere do these provisions provide that the investor is prevented from speaking to its country of nationality in any way. Rather, the requested measures are completely at odds with both the text and purpose of these provisions, which encourage transparency in particular with respect to the non-disputing party.

42. Peru's further request that the Tribunal bar Gramercy from even non-legal communications with anyone other than its external legal counsel is similarly unprecedented. Principal-to-principal conversations are common, and frequently encouraged, between parties to a contentious dispute. Further, the "history" presented by Peru omits entirely its own course of conduct throughout these proceedings, which has been cryptic, inconsistent, and at times underhanded. While Peru has repeatedly represented to Gramercy its interest in consulting and seeking an amicable resolution to the dispute, it has acted entirely at odds with those representations, continually finding reasons to evade all attempts at meaningful and substantive conversations, and Gramercy's attempts to communicate directly with Peru have frequently been in response to its frustrating failure to receive clear (or any) responses from the so-called "designated channel." *See, e.g.*, **Doc. CE-273**, Email from Gramercy's Counsel to Peru's Counsel, March 7, 2017.

43. 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, or illustrated how doing so can aggravate the dispute. Indeed, the relief requested is particularly extraordinary given that Gramercy has business interests and investments in Peru outside of those at issue in this arbitration. Peru's representatives are, of course, free to decline to speak with Gramercy. However, there is simply no basis for the Tribunal to *order* Gramercy to refrain from all potential direct contact with every person who has a position in the Peruvian government. Of course, as stated during the First Procedural Conference, Gramercy again reiterates that all legal communications related to this arbitration should be communicated through the Parties' respective counsel, as is normally the case, and as the Parties have done.

44. *Finally*, rather than attempting to demonstrate how the measures presented are necessary to avoid irreparable harm, Peru instead seeks to justify its extraordinary request by pointing to the "objective of Treaty proceedings." **R-7**, Letter from Peru to the Tribunal, April 17, 2018, p. 5. Yet the measures requested by Peru are entirely at odds with the objective of *this* Treaty, which provides for dispute settlement against a backdrop of transparency, reflecting both State Parties' commitments to freedom of expression. *See, e.g.*, **Doc. CE-260**, U.S. Constitution, First Amendment; **Doc. CE-72**, Peru's Constitution, Art. 2.4. This principle—under which responsible democracies respond to criticism, rather than attempt to silence it—stands in stark contrast to Peru's current extraordinary request. Peru cannot seriously contend that the Treaty insulates it against speech that it does not like, yet that is what its

position boils down to. The Treaty required Gramercy as a price for commencing arbitration to waive rights to seek legal recourse in other fora; it did not require Gramercy also to waive its right to free speech and to comment on matters of public concern.

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

45. While Peru has not demonstrated that it would suffer any actual and legally relevant harm without the requested relief, Peru's requested relief would result in serious harm to Gramercy. As such, any harm alleged by Peru does not outweigh the likely harm to Gramercy.

46. When assessing whether interim measures are warranted in a case, the Tribunal "is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties." *Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures of September 2, 2008, **Doc. CA-51**, ¶ 79. Here, Gramercy would suffer substantial harm if the measures requested are granted, both in being deprived of its rights to speak freely on matters of public concern and to democratically elected representatives and to institutions, as well as due to prejudice suffered from Peru's continuing conduct.

47. Gramercy has a significant stake in the Land Bonds, and, given the disaggregated nature of many other bondholders, is uniquely positioned to play a role in the public debate and decision-making that will continue in Peru regardless of what happens in the context of this arbitration. However, if the requested measures are granted, Gramercy alone will be barred from participating in this debate to defend its interests. Unlike the speculative "harms" Peru may allege, this harm to Gramercy would be truly irreparable, as Peru would be able to continue promoting its misrepresentations about the Land Bonds and its own public finances while Gramercy would be left unable to correct the record, at prejudice to its rights.

48. Indeed, Gramercy's past experiences with Peru, including prior attempts to consult in good faith in an effort to facilitate amicable resolution of the dispute, provide additional evidence that it will be prejudiced if the Tribunal grants Peru's application. On the two prior occasions when Gramercy voluntarily accorded Peru the very relief that it now seeks, Peru took advantage of that extended hand to prejudice Gramercy.

49. *First*, as of mid-July 2016, Gramercy voluntarily ceased all public statements related to the Land Bonds as a courtesy to Peru's new administration. In return, Peru took advantage of this silence when then-President Pedro Pablo Kuczynski conducted a widely broadcast interview with *LatinFinance* during his first month in office—conducted in English, and thus clearly designed for international consumption—in

which he denied the existence of any debt owed to Gramercy, and used the authority of his office to announce: “I don’t think we owe [Gramercy] anything.” See **Doc. CE-266**, LatinFinance, *Peru’s PPK: “I don’t think we owe [Gramercy] anything,”* August 22, 2016.

50. *Second*, as Peru has repeatedly mentioned, the Parties entered into a “Consultation Agreement” from November 18, 2016 until February 28, 2017. Peru conveniently omits, however, that although Gramercy respected this “Consultation Agreement” and refrained from making public statements regarding the dispute, Peru used the occasion to unilaterally issue a new Supreme Decree on the day the Agreement expired, which substantially changed the valuation formula applicable to the Land Bonds—and thus materially affected Gramercy’s rights—without any prior notice to or consultation with Gramercy. **Doc. CE-269**, Supreme Decree N° 034-2017-EF. Despite Gramercy’s repeated subsequent requests for clarification of the Decree, which on its face was unclear, Peru declined to respond in substance. **Doc. CE-270**, Letter from Gramercy’s Counsel to Peru’s Counsel, March 1, 2017; **Doc. CE-271**, Email from Peru’s Counsel to Gramercy’s Counsel, March 2, 2017; **Doc. CE-272**, Email from Gramercy’s Counsel to Peru’s Counsel, March 2, 2017; **Doc. CE-273**, Email from Gramercy’s Counsel to Peru’s Counsel, March 7, 2017.

51. This type of conduct by Peru—which may materially affect issues going to the very heart of this dispute—is far more harmful to Gramercy’s rights in this dispute than any of the conduct Peru attributes to Gramercy could possibly be to Peru’s rights. Peru’s own conduct thus demonstrates its own proclivity for aggravating the dispute during the periods when Gramercy has voluntarily abided by the measures that Peru now asks the Tribunal to order.

52. Peru’s track record of taking advantage of Gramercy’s silence to advance its own Land Bonds narrative, and to even deny the existence of its debt to Gramercy, clearly demonstrates that it does not wish to avoid aggravating the dispute. Instead, what Peru seeks is a tilted playing field that will allow it to use its vastly superior resources and long head start to impair the rights of Gramercy and all bondholders. By forcing Gramercy to remain silent on the issue of the Land Bonds, Peru will advance its agenda of erasing this issue from history, rendering any possible resolution of the dispute—including amicable resolution or eventual payment of an adverse award—significantly less likely.

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

53. Peru has not demonstrated a reasonable possibility that it will prevail on the merits of the claim upon which it seeks relief. 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.

54. Further, as set forth in detail in Gramercy’s Second Amended Notice of Arbitration and Statement of Claim, Gramercy’s claims are clearly founded on Peru’s actions in violation of the Treaty. In particular, Peru’s actions constituted an expropriation of Gramercy’s investment, a denial of fair and equitable treatment, a denial of national treatment, and a denial of effective means. Peru has yet to even address any of Gramercy’s arguments on the merits, or to provide any justification whatsoever for, among others, the procedural misconduct surrounding its Constitutional Tribunal decision and the deeply flawed formulas set forth in its various Supreme Decrees—formulas that, while ostensibly designed to calculate “current value,” in fact result in a drastic reduction of the bonds’ value. That is because there is no such justification or explanation.

55. While the Tribunal of course need not and should not prejudge the dispute, it is undeniable that in the arbitration’s current posture the Tribunal would have no basis at all to conclude that Peru had 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 Would Have to Be Mutual and Equally Prevent Peru from a Wide Range of Activities

56. Although Peru has formulated its request as applying equally to both Parties, it is in fact anything but a mutual order. Rather, Peru’s repeated justifications for the proposed measures and its course of conduct thus far make clear that what it is truly seeking is to silence Gramercy’s legitimate criticism of its actions while allowing Peru to continue falsely representing the status of the Land Bond debt and the actions it has taken in respect of the debt. The Tribunal has no basis to order such one-sided relief. Rather, if the Tribunal were to order measures restricting public or private commentary, such an order would have to be truly mutual, as has typically been the case in prior awards. *See, e.g., United Utilities Decision on Provisional Measures, Doc. CA-55, ¶ 114.*

57. For example, while Peru clearly takes issue with Gramercy’s public criticism of the procedure set forth in the Supreme Decrees, including Peru’s complete lack of transparency as to the functioning of that process and its continued reliance on the forgery-tainted 2013 CT Order, Peru evidently sees no problem with continuing to tout this as a “legitimate bondholder procedure”—a contention with which Gramercy deeply disagrees. *See R-7, Letter from Peru to the Tribunal, April 17, 2018, p. 5* (stating that Gramercy’s conduct is “aimed at undermining a legitimate bondholder procedure in Peru”). Peru does so even in the

wake of a criminal investigation surrounding the 2013 CT Order—the results of which continue to validate Gramercy’s well-founded concerns, including as recently as yesterday. *See Doc. CE-278, El Comercio, Prosecutor Asks for Three Years in Prison for Adviser to the Constitutional Tribunal*, May 31, 2018.

58. As another example, while Peru cites as “aggravating” conduct statements relating to Peru’s lack of compliance with international reporting standards by virtue of its misrepresentation of the Land Bond debt, it clearly has no intention of ceasing to make the same misrepresentations about its public debt—rather, it has doubled down on those positions. *See, e.g., R-2, Response of the Republic of Peru, ¶ 8* (“Peru has adopted a reliable approach to the management of external debt and achieved widespread praise for its reliability as an issuer of contemporary sovereign debt”).

59. Peru has every right to disagree with Gramercy’s positions. But it does not have the right to silence Gramercy while continuing to freely represent positions that Gramercy believes are untruthful and materially detrimental to its rights. Here, equal treatment requires that if the Tribunal sees fit to order a “gag order” of the kind sought by Peru, such an order must also prevent Peru from making the types of representations discussed above. For example, if Gramercy is prevented from speaking publicly about the status of the Land Bonds, so too must Peru cease from 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, since its material omissions relating to the Land Bonds are just as likely to “aggravate” the dispute as Gramercy’s affirmative statements on the same subject. In addition, Peru should be restrained from making any affirmative statements about the Land Bonds and the absence of a dispute with its creditors. Further, if Gramercy is not entitled to criticize the bondholder procedure, Peru must equally be restricted from making representations about the “legitimacy” of that procedure.

60. It is clear that Peru intends the requested measures to operate as a gag order on Gramercy. Such one-sided order would unduly prejudice Gramercy without basis or justification. To the extent the Tribunal sees fit to order any relief, it should tailor such relief to equally restrict Peru from engaging in the type of conduct described above.

IV.

CONCLUSION

61. The extraordinary measures sought by Peru are baseless, are unduly broad, and would unfairly infringe upon Gramercy's rights. Peru has effectively requested a blanket gag order that prevents Gramercy from speaking to, among others, its own government representatives, unjustifiably restricts any public communications, and undermines the principle of transparency set forth in the Treaty. Gramercy thus requests that the Tribunal decline to include such language in a Procedural Order, or alternatively, to order truly mutual relief, and to grant Gramercy costs.

62. Gramercy reserves all rights.

Respectfully submitted,



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New York, New York, USA, June 1, 2018