

In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

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

*Claimants*

v.

**THE REPUBLIC OF PERU**

*Respondent*

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**PROCEDURAL ORDER No. 9**

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ARBITRAL TRIBUNAL

Prof. Juan Fernández-Armesto (Presiding Arbitrator)

Mr. Stephen L. Drymer

Prof. Brigitte Stern

SECRETARY OF THE TRIBUNAL

Ms. Luisa Fernanda Torres

ASSISTANT TO THE PRESIDENT

Dr. Luis Fernando Rodríguez

Paris, July 20, 2019

## PROCEDURAL BACKGROUND

1. This arbitration arises between Gramercy Funds Management LLC and Gramercy Peru Holdings LLC [**“Gramercy”** or **“Claimants”**] and the Republic of Peru [**“Peru”** or **“Respondent”**] under the United States-Peru Free Trade Agreement signed on April 12, 2006 [the **“Treaty”**]. Claimants and Respondent shall be jointly referred to as the **“Parties”**.
2. On May 22, 2018, the Tribunal and the Parties executed the Terms of Appointment [**“TofA”**], and on June 29, 2018, the Tribunal issued Procedural Order No. 1 [**“PO 1”**].
3. On July 13, 2018, Gramercy submitted its Third Amended Notice of Arbitration and Statement of Claim [**“Statement of Claim”** or **“St. Claim”**]<sup>1</sup>.
4. On August 29, 2018, the Tribunal issued Procedural Order No. 5 [**“PO 5”**], directing the Parties, among other things, to abstain from any action or conduct that may result in an aggravation of the dispute.
5. On December 14, 2018, Peru filed its Statement of Defense and Objections [**“Statement of Defense”** or **“St. Defense”**]<sup>2</sup>.
6. On May 21, 2019, Claimants submitted their Statement of Reply and Answer to Objections [the **“Reply”**]<sup>3</sup>.
7. On June 16, 2019, Peru denounced that, by attaching certain evidence to its Statement of Reply, Claimants have violated PO 1. Peru further denounces Claimants’ breach of the Tribunal’s directions in PO 5, regarding the non-aggravation of the dispute<sup>4</sup>.
8. On June 20, 2019, Claimants asked the Tribunal for directions regarding Peru’s applications<sup>5</sup>.
9. On June 30, 2019, Peru repeated its requests and attached some evidence in support of its position (Docs. R-1020 to R-1027).
10. On July 8, 2019, Claimants submitted their counterarguments on Peru’s applications, attaching some additional exhibits (Docs. CE-753 to CE-757)<sup>6</sup>.
11. On July 14, 2019, Peru insisted on its requests<sup>7</sup>.

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<sup>1</sup> C-32.

<sup>2</sup> R-34.

<sup>3</sup> C-53. With the Tribunal’s leave, Claimants submitted a corrected version of their Statement of Reply and Answer to Objections on July 9, 2019.

<sup>4</sup> R-59 and R-60.

<sup>5</sup> C-61.

<sup>6</sup> C-62.

<sup>7</sup> R-63.

12. Having received the Parties' positions on the matter, the Tribunal hereby issues the following:

### **PROCEDURAL ORDER No. 9**

13. Peru asks the Tribunal to strike from the record some witness statements and expert reports that Claimants attached to their Reply (1.) and to grant relief to prevent Claimants from aggravating the dispute (3.). The Tribunal further addresses certain incidents regarding Ms. Revoredo's expert reports (2.).

#### **1. REMOVAL OF EVIDENCE FROM THE RECORD**

14. Regarding the issue of the removal of evidence, the Tribunal will first summarize each Party's position (1.1 and 1.2) and will then make its decision (1.3).

##### **1.1 PERU'S POSITION**

15. Peru seeks to strike from the record some witness statements and expert reports that Gramercy submitted with its Reply, on grounds that Gramercy deliberately chose to withhold this evidence until the Reply, rather than submitting it together with its Statement of Claim. Peru argues that this course of action breaches PO 1.

16. In particular, Peru asks the Tribunal to strike from the record the following evidence, together with any citations thereto in Gramercy's Reply<sup>8</sup>:

- the witness statements submitted by Robert Lanava (CWS-5); Robert Joannou (CWS-6); and Ana Maria García Alvarado (CWS-7), and
- the expert reports submitted by Prof. Mario Castillo Freyre (CER-9) and Alfredo Bullard (CER-10).

17. The arguments for this request are the following:

18. *First*, in PO 1, the Tribunal ordered that Gramercy's Statement of Claim had to include all arguments, documents, witness statements, and expert reports on which Gramercy wished to rely. "Absent leave from the Tribunal for good cause", PO 1 reads, "no new argument shall be presented, and no new evidence shall be attached, except if required to rebut arguments and evidence submitted by the Respondent in its previous pleading"<sup>9</sup>.

19. *Second*, Gramercy submitted an 82-page Statement of Claim along with only 58 exhibits, a witness statement by its one witness, a legal expert report and a quantum report. By contrast, its Statement of Reply attached a thousand new documents, and six witness statements including five from new witnesses<sup>10</sup>:

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<sup>8</sup> R-59, p. 10.

<sup>9</sup> R-59, p. 1.

<sup>10</sup> R-59, p. 1.

- Gramercy Executives Lanava and Joannou: Gramercy submits new declarations by two Gramercy executives; CCO Robert Lanava discusses issues of alleged bond acquisition, ownership, and holdings and CFO Robert Joannou discusses bond valuation; these are not newly available witnesses and these issues arose as early as 2016, thus, they could have participated as part of the initial submission<sup>11</sup>.
  - Gramercy Bondholder García: Gramercy submits a new declaration by Ana María García, discussing her sale of Bonds to Gramercy; her relationship with Gramercy dates back over a decade<sup>12</sup>.
  - With its prior submission, Gramercy submitted expert reports by Ms. Revoredo. Due to health reasons, Gramercy has now abandoned Ms. Revoredo, but seeks to rely on her while refusing to make her available at the hearing; the substitute expert's report by Mr. Castillo addresses some new arguments about the same topics, "inverting" Peru's fundamental right to respond in the process<sup>13</sup>.
  - Gramercy submitted a new expert report by Mr. Bullard, who sets out entirely new Peruvian legal arguments under the 2014 and 2017 Supreme Decrees implementing the Bondholder Procedure and Bond acquisitions under Peruvian law; this report raises entirely new theories about the legality of Peru's Supreme Decrees, which had never been raised in this proceeding by Gramercy, or by Peru, despite each of the relevant Decrees predating the Statement of Claim<sup>14</sup>.
20. *Third*, Gramercy has deprived Peru of a full and fair opportunity to prepare its case, in violation of fundamental principles of due process. Peru's Statement of Defense, filed in 2018, responded to Gramercy's Statement of Claim, which as mentioned did not contain or refer to the arguments, documents, witnesses and experts summarized above. Peru now has only one remaining opportunity to mount a defense as to the entirely new range of arguments, documents, witnesses and experts presented for the first time in Gramercy's Reply<sup>15</sup>.
21. *Fourth*, Peru was denied a fair opportunity to develop document production requests relevant to rebutting new arguments or cross-examining new witnesses and experts presented for the first time in Gramercy's Reply<sup>16</sup>.
22. *Fifth*, Peru has less time than it would have had to respond<sup>17</sup>.

## 1.2 CLAIMANTS' POSITION

23. Claimants ask the Tribunal to dismiss Peru's request, for the following reasons:

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<sup>11</sup> R-59, p. 4.

<sup>12</sup> R-59, p. 4.

<sup>13</sup> R-59, p. 4.

<sup>14</sup> R-59, p. 4.

<sup>15</sup> R-59, p. 5.

<sup>16</sup> R-59, p. 5.

<sup>17</sup> R-59, p. 5.

24. *First*, PO 1 expressly confers on Gramercy the right to file a Statement of Reply to “reply[] to the argumentation set forth by Respondent in its Statement of Defense”, and to include in such Reply any “new argument” and “new evidence” that are “required to rebut arguments and evidence submitted by the Respondent in its previous pleading”. Each Party is thus permitted to submit “new” arguments and evidence during the second round of written submissions as long as those arguments and evidence are required “to rebut arguments and evidence” made in the other Party’s previous submission<sup>18</sup>. The Parties’ right to present additional evidence after the first round of pleadings is evident also from the fact that, as is common practice, the Parties had the opportunity to request production of documents<sup>19</sup>.
25. PO 1 imposes no limits either on the length of the Parties’ written submissions or on the number of witnesses and experts. Furthermore, Peru’s Statement of Defense and Objections included five expert reports, two fact witness statements, and over a thousand supporting exhibits and authorities. All of the exhibits to Gramercy’s Reply had already been produced to Peru as part of the document exchange process or were previously available to Peru<sup>20</sup>.
26. *Second*, Peru’s Statement of Defense and Objections was the first time that Peru articulated its position in response to Gramercy’s claims, including certain arguments about the basis for or *bona fides* of Gramercy’s investment in the Land Bonds, Gramercy’s own market-based valuation of the bonds, the Supreme Decrees’ compliance with Peruvian administrative and constitutional law or with international norms, the sufficiency of the evidence Gramercy had presented, and various other matters. It was also the first time that Peru formally raised objections to the Tribunal’s jurisdiction and the admissibility of Gramercy’s claims<sup>21</sup>.
27. All of the challenged evidence is appropriately responsive to Peru’s Statement of Defense and Objections to Jurisdiction. Peru has not shown otherwise and has not proven even a single instance in which the five challenged witness statements and expert reports were not responding to some issue that Peru itself presented. Peru has not identified even a single instance where Gramercy’s experts or witnesses have allegedly testified about issues unrelated to or beyond the scope of arguments Peru raised in its Statement of Defense and Objections<sup>22</sup>. In particular:
- Mr. Lanava’s witness statement is responsive: Mr. Lanava is Gramercy’s Chief Compliance Officer; in his statement, he expressly states that he responds to Peru’s allegations in its Statement of Defense that Gramercy “did not validly acquire title to the Peruvian Agrarian Reform Bonds at issue in this arbitration” and that neither of the Claimants “qualifies as an ‘investor’ under the relevant provisions of the Treaty”<sup>23</sup>.
  - The witness statement of Mr. Joannou, Gramercy’s Chief Financial Officer, is equally responsive: Mr. Joannou submits a statement rebutting Peru’s

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<sup>18</sup> C-62, p. 3.

<sup>19</sup> C-62, p. 3.

<sup>20</sup> C-62, pp. 3 and 4.

<sup>21</sup> C-62, p. 4.

<sup>22</sup> C-62, p. 2.

<sup>23</sup> C-62, p. 5.

challenge to Gramercy’s valuation and accounting of the Land Bonds, which Peru raised for the first time in its Statement of Defense through fact and expert evidence<sup>24</sup>.

- Ms. García – a bondholder who sold her Land Bonds to Gramercy – rebuts Peru’s accusation that Gramercy’s purchase of the Land Bonds was somehow tainted by fraud or illegality; Peru’s denial that Gramercy actually bought, or paid money for, the Land Bonds; and Peru’s denial that Gramercy made a sufficient “contribution” “in Peru” to qualify for protection under the Treaty<sup>25</sup>.
- The expert report of Dr. Bullard is similarly responsive to arguments Peru itself raised<sup>26</sup>.

28. *Third*, Peru has not proven any prejudice given that Peru has now the equivalent right to present materials “required to rebut arguments and evidence submitted by [Gramercy]” in its Reply. Consistent with paragraph 13 of PO 1, Peru has four months following the Reply to file its Rejoinder and to respond to the challenged evidence. Barring unforeseen circumstances, Peru will also be able to call Gramercy’s “new” witnesses and experts for cross-examination at the hearing<sup>27</sup>.

29. Excluding the witness statements and expert reports in question would suppress significant elements of Gramercy’s substantive response to Peru’s evidence and arguments, depriving Gramercy of its fundamental right to due process<sup>28</sup>.

### 1.3 THE TRIBUNAL’S DECISION

30. Peru asks the Tribunal to strike from the record, together with any citations thereto<sup>29</sup>, the witness statements submitted by Robert Lanava (CWS-5); Robert Joannou (CWS-6); Ana Maria García Alvarado (CWS-7), and the expert reports submitted by Prof. Mario Castillo Freyre (CER-9) and by Alfredo Bullard (CER-10) [the “**Testimonial Evidence**”]. Peru argues that Gramercy deliberately chose to withhold this evidence until its Reply, rather than submitting it together with its Statement of Claim. Peru argues that this course of action breaches PO 1 and, therefore, the Testimonial Evidence should be stricken out.

31. Gramercy opposes the request.

32. Paragraph 12 of the PO 1 addresses the issue at stake. The provision sets out the standard for the admissibility of the evidence that Claimants submitted with their Statement of Reply:

“Claimants shall file a Statement of Reply (and Answer to any counterclaims and/or objections, if applicable) on the date established in the Procedural Timetable of Annex I. The scope of this pleading shall be limited to replying to the argumentation set forth by Respondent in its Statement of Defense

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<sup>24</sup> C-62, p. 6.

<sup>25</sup> C-62, p. 7.

<sup>26</sup> C-62, p. 7.

<sup>27</sup> C-62, p. 2.

<sup>28</sup> C-62, p. 2.

<sup>29</sup> R-59, p. 10.

(including any counterclaims and/or objections, if applicable). Absent leave from the Tribunal for good cause, **no new argument shall be presented, and no new evidence shall be attached, except if required to rebut arguments and evidence submitted by the Respondent in its previous pleading.** The marshalling of evidence shall follow *mutatis mutandis* the rules established in para. 9 *supra*". (emphasis added)

33. The provision makes thus clear that the applicable standard for admitting the Testimonial Evidence is that such evidence must "rebut arguments and evidence submitted by the Respondent in its previous pleading", i.e. in Peru's Statement of Defense. Otherwise Claimants have to seek the Tribunal's leave to introduce the new evidence.
34. The Tribunal has reviewed the Testimonial Evidence and, in light of its content and the Parties' arguments, has made an individual determination of whether or not each witness statement or expert report aims to "rebut" arguments and evidence from Peru's Statement of Defense. Such review has been carried out without assessing the probative value or relevance of the evidence, which is a task the Tribunal will undertake at a later stage, when making its final decision in this arbitration.
35. The Tribunal concludes that the Testimonial Evidence is responsive to arguments and evidence submitted in Peru's Statement of Defense. Therefore, there are no grounds to exclude such Testimonial Evidence.
36. The following paragraphs summarize the Parties' arguments and the Tribunal's analysis for each witness statement and expert report.

Witness statements by Robert Lanava (CWS-5)

37. Peru argues that, in his statement, CCO Robert Lanava – a Gramercy executive – discusses issues of the alleged bond acquisition, ownership, and holdings. Therefore his testimony should have been submitted with Claimants' Statement of Claim<sup>30</sup>.
38. Claimants reply that Peru has not demonstrated that the testimony of Mr. Lanava is non-responsive. Mr. Lanava's witness statement explicitly states that he is responding to some of the allegations made by Peru in its Statement of Defense, namely, that Gramercy "did not validly acquire title to the Peruvian Agrarian Reform Bonds at issue in this arbitration" and that neither of the Claimants "qualifies as an 'investor' under the relevant provisions" of the Treaty<sup>31</sup>.
39. The Tribunal concurs with Claimants.
40. Mr. Lanava's statement expressly mentions Peru's allegations that Gramercy did not validly acquire title to the Peruvian Agrarian Reform Bonds and that Claimants do not qualify as an "investor" under the Treaty. He then testifies to facts that he "understand[s] may be relevant to these arguments". These are all issues that Peru discusses in its Statement of Defense<sup>32</sup>. Since his testimony tries to "rebut

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<sup>30</sup> R-59, p. 4.

<sup>31</sup> C-62, p. 5, and CWS-5, para. 5.

<sup>32</sup> St. Defense, pp. 63 to 81.

arguments and evidence submitted by the Respondent in its previous pleading”, as required by PO 1, para. 12, the evidence has to be admitted.

Witness statement by Robert Joannou (CWS-6)

41. Peru avers that the testimony of CFO Robert Joannou, another Gramercy executive, should be stricken out of the record since he discusses bond valuation, an issue that arose as early as 2016<sup>33</sup>.
42. Claimants reply that Peru has not demonstrated that the testimony of Mr. Joannou is, in fact, non-responsive. Mr. Joannou submits a statement rebutting Peru’s challenge to Gramercy’s valuation and accounting of the Land Bonds, which Peru raised for the first time in its Statement of Defense through both fact and expert evidence<sup>34</sup>.
43. The Tribunal agrees with Claimants.
44. In his statement, Mr. Joannou refers expressly to Peru’s Statement of Defense and some of its content, even citing to precise paragraphs of this pleading, such as paras. 52 to 54 and 303 to 305. Moreover, Mr. Joannou also mentions and testifies as to some facts addressed by the Respondent’s Quantum Expert Report (RER-5, paras. 76, 122-24)<sup>35</sup>. His testimony satisfies PO 1, para. 12, since he tries to “rebut arguments and evidence submitted by the Respondent in its previous pleading”; thus it has to be admitted.

Witness statement by Ana Maria García Alvarado (CWS-7)

45. Peru submits that Ms. García Alvarado’s witness statement must be rejected, because she discusses her sale of Bonds to Gramercy, despite the fact that her relationship with Gramercy dates back over a decade<sup>36</sup>.
46. Claimants reply that Peru has not demonstrated that the testimony of Ms. García is non-responsive. Ms. García is a bondholder who sold her Land Bonds to Gramercy. Her testimony rebuts Peru’s accusation that Gramercy’s purchase of the Land Bonds was somehow tainted by fraud or illegality; Peru’s denial that Gramercy actually bought, or paid money for, the Land Bonds; and Peru’s denial that Gramercy made a sufficient contribution in Peru to qualify for protection under the Treaty<sup>37</sup>.
47. The Tribunal agrees with Claimants.
48. Ms. Garcia’s statement explicitly cites to and addresses some allegations made by Peru in its Statement of Defense, in particular, concerning the payment to the bondholders for the bonds<sup>38</sup>. Her statement is thus responsive to “arguments and

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<sup>33</sup> R-59, p. 4.

<sup>34</sup> C-62, p. 6.

<sup>35</sup> CWS-6, para. 4.

<sup>36</sup> R-59, p. 4.

<sup>37</sup> C-62, p. 7.

<sup>38</sup> CWS-5, paras. 5 and 6, and St. Defense, paras. 5, 62, 72, *inter alia*.



evidence submitted by the Respondent in its previous pleading” and must therefore be admitted.

Expert report submitted by Alfredo Bullard (CER-10)

49. Peru avers that Mr. Bullard’s expert report should be rejected because it sets out entirely new Peruvian legal arguments under the 2014 and 2017 Supreme Decrees implementing the Bondholder Procedure and Bond acquisitions. It also allegedly raises entirely new theories about the legality of Peru’s Supreme Decrees<sup>39</sup>.
50. Claimants reply that Peru has not demonstrated that the testimony of Mr. Bullard is non-responsive. In its Statement of Defense, Peru itself invoked the Supreme Decrees’ alleged compliance with Peruvian administrative and constitutional law and with international standards for claims processes as a defense to Gramercy’s claims<sup>40</sup>.
51. Again, the Tribunal concurs with Claimants.
52. Mr. Bullard explains at the outset of his report that he is giving his legal opinion on “the validity of Gramercy’s acquisition of Peruvian Agrarian Land Reform Bonds” from several individual bondholders, about the “deficiencies in the administrative process that led to the issuance of the Ministry of Economy and Finance ... Supreme Decrees 017-2014-EF, 019-2014-EF, 034-2017-EF and 242-2017-EF and the consequences of those deficiencies”. These are all issues discussed by Peru in its Statement of Defense<sup>41</sup>. Therefore, his testimony satisfies PO 1, since he tries to “rebut arguments and evidence submitted by the Respondent in its previous pleading”, as required by para. 12, and must therefore be admitted.

Expert report submitted by Prof. Mario Castillo Freyre (CER-9)

53. Peru asks the Tribunal to reject Prof. Castillo’s expert report on grounds that it introduces “new arguments, inverting Peru’s fundamental right to respond in the process”<sup>42</sup>.
54. Claimants reply that Peru has not demonstrated that the testimony of Prof. Castillo is non-responsive. On the contrary, Prof. Castillo responds to Dr. Hundskopf’s expert report (RER-2, submitted with the Statement of Defense), in which he denies that there was “uncertainty” about the current value principle in Peruvian law and contending that the 2013 CT Order complied with Peruvian law<sup>43</sup>.
55. The Tribunal agrees with Claimants.
56. In his testimony, Prof. Castillo explicitly states that he “was hired to provide an opinion and respond to the Expert Report of Dr. Oswaldo Hundskopf Exebio dated December 14, 2018 ... which addresses “the legal framework applicable to the

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<sup>39</sup> R-59, p. 4.

<sup>40</sup> C-62, p. 8.

<sup>41</sup> CER-10, para. 15, and St. Defense, paras. 110-111, 274-276, 279.

<sup>42</sup> R-59, p. 4.

<sup>43</sup> C-62, p. 9.

bonds issued during the Agrarian Reform”. He also admits that he has been “asked to analyze the Order of the Constitutional Tribunal dated July 16, 2013” and several Supreme Decrees that, as Dr. Hundskopf concludes, are “coherent under Peruvian law with the application of the current value principle to the Agrarian Bonds as well as the jurisprudence of the Constitutional Tribunal”<sup>44</sup>. Since the report seeks to “rebut arguments and evidence submitted by the Respondent in its previous pleading”, as required by PO 1, para. 12, it must be admitted.

## **2. EXPERT REPORT SUBMITTED BY MS. REVOREDO (CER-2 AND CER-5)**

57. There is also an additional evidentiary incident that the Tribunal would like to address.
58. In previous pleadings Claimants submitted two expert reports on Peruvian law prepared by Ms. Delia Revoredo, marked as CER-2 and CER-5.
59. On May 22, 2019, Ms. Revoredo sent a letter to the Tribunal advising that “*por razones de salud me he visto obligada a cesar mi participación en el presente procedimiento*”. She also affirmed her report in its entirety and said that she is available to address questions from the Tribunal about her report in writing. Her letter attached a signed note from her doctor, explaining her diagnosis and the doctor’s advice.
60. Both in their Statement of Claim and their Reply, Claimants have repeatedly cited to Ms. Revoredo’s expert reports<sup>45</sup>. Gramercy further encourages the Tribunal to take into account her written report and give it the weight that the Tribunal considers appropriate in light of the fact that she is not able to give oral evidence<sup>46</sup>.
61. Peru states that it reserves the right to call her for cross-examination<sup>47</sup>.
62. As for this issue, the Tribunal will proceed as provided for in para 21 of PO 1, which addresses this situation as follows:

“21. The Arbitral Tribunal may consider the statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, and allocating appropriate weight to the evidence”<sup>48</sup>.

## **3. AGGRAVATION OF THE DISPUTE**

63. Regarding the issue of aggravation of the dispute, the Tribunal will first summarize each Party’s position (**3.1** and **3.2**) and will then proceed to make its decision (**3.3**).

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<sup>44</sup> CER-9, para. 11.

<sup>45</sup> St. Reply, paras. 241, 423 or 427, and St. Claim (third amended version), paras. 18, 55, 79 or 179, *inter alia*.

<sup>46</sup> C-62, p. 10.

<sup>47</sup> R-59, p. 4.

<sup>48</sup> The rule is applicable to experts and expert reports under PO 1, para. 18: “The rules set forth in this section for fact witness shall equally apply to the testimony of expert witnesses *mutatis mutandis*”.

### 3.1 PERU'S POSITION

64. Peru complains that Gramercy have repeatedly breached the Tribunal's directions under PO 5 by aggravating the dispute through several actions, which include ongoing lobbying, disregard for the designated channels of communication, distributing misinformation, and interfering with the established channels of communication. Peru asks the Tribunal to "fashion such relief as may be necessary to ensure compliance with the standing prohibition against any action or conduct that may result in the aggravation of the dispute and to protect the integrity of the proceeding"<sup>49</sup>.
65. *First*, the aggravating actions with regard to the US Government allegedly are the following:
- Disclosure forms for the third and fourth quarters of 2018 and first quarter of 2019 confirm that Gramercy's efforts to politicize the dispute across government branches and agencies has continued since the Tribunal's non-aggravation order – paying over US\$440,000 in recent months to continue lobbying the Office of the President, Office of the Vice President, U.S. Department of State, U.S. Senate, and U.S. House of Representatives<sup>50</sup>.
  - On February 1, 2019, some members of the U.S. Congress sent a letter to U.S. Secretary of State Michael Pompeo regarding the Bonds, asking the Secretary to "use all available means," including "blocking Peru's admittance into the OECD" in order to "encourage" Peru to negotiate; a second letter regarding the Bonds, dated 2 May 2019, was sent by other members of the U.S. Congress to Secretary Pompeo<sup>51</sup>.
  - A Peru representative recently received an unsolicited call from the U.S. Senate regarding the Bonds; among other things, the caller stated that Gramercy lobbyists have continued to lobby, and made the argument that counsel to Peru is blocking a resolution of this matter<sup>52</sup>.
  - On April 11, 2019, letter from the Governor of Pennsylvania to the Ambassador of Peru regarding the Bonds references American workers in Pennsylvania who have "invested" through "pension plans"<sup>53</sup>.
66. *Second*, Gramercy continues to publicly disseminate misinformation about Peru and the Bonds, and refuses to correct or withdraw previous misinformation. For example, the Gramercy-created organization Peruvian-American Bondholders for Justice (PABJ) has recently created the website [protectourpensionsnow.org](http://protectourpensionsnow.org), which has been mentioned in both American and Peruvian press in recent weeks. The website publishes misinformation, such as that "[t]he Peruvian government defaulted on billions of dollars' worth of sovereign land bonds and now refuses to repay the Americans who are owed" and "the pension funds of hardworking

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<sup>49</sup> R-59, p. 10.

<sup>50</sup> R-59, p. 6.

<sup>51</sup> R-59, p. 7.

<sup>52</sup> R-59, p. 7.

<sup>53</sup> R-59, p. 8.

Americans ... invested in good faith in these bonds. And now they could lose millions in retirement savings”<sup>54</sup>.

67. *Third*, Gramercy has repeatedly sought to circumvent Peru’s counsel. Gramercy has disregarded the established channels of communication through counsel, despite Peru’s myriad requests and rules of professional responsibility. Among other examples, Gramercy sought to disparage counsel to the Office of the Presidency of Peru, to no avail<sup>55</sup>.
68. *Fourth*, Gramercy’s continuing aggravation of the dispute threatens the legitimacy of the proceeding and harms Peru; contravenes the objective of ISDS to depoliticize the process of resolving international disputes through a neutral procedural mechanism; and interferes with Peru’s ability to prepare its defense and present its case<sup>56</sup>.

### **3.2 CLAIMANTS’ POSITION**

69. Claimants ask the Tribunal to dismiss Peru’s request.
70. *First*, the non-aggravation doctrine is intended to guard against serious actions that threaten the Tribunal’s ability to resolve the dispute or to fashion relief, such as threatening to imprison witnesses, to destroy businesses, to confiscate evidence and the like. Nothing like that kind of conduct is at issue here<sup>57</sup>.
71. *Second*, Peru does not explain how Gramercy has aggravated the dispute, or violated channels of communication, by reason of the fact that U.S. officials have continued to take an active interest in Peru’s resolution of its Land Bonds debt. Rather, these are fair and legitimate communications that are encouraged in a democratic society. Attempting to restrict these types of communications in the name of “aggravation” runs counter to basic principles of democracy and transparency – particularly given that such communications do not result in any corresponding harm to Peru or interfere with this arbitration in any way<sup>58</sup>.
72. Furthermore, it is not clear how the two letters Peru cites from members of U.S. Congress to the U.S Secretary of State are relevant to “aggravation” or “channels of communication,” or could otherwise affect the integrity of the proceedings in any way. Neither Gramercy nor Peru is a party to these communications, which are internal to the U.S. government – and, as such, removed from these proceedings and well beyond the Tribunal’s mandate<sup>59</sup>.
73. As for the few specific examples Peru invokes of alleged communications from U.S. officials to Peruvian officials, none of these communications were made by

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<sup>54</sup> R-59, p. 8.

<sup>55</sup> R-59, p. 8.

<sup>56</sup> R-59, p. 9.

<sup>57</sup> C-62, p. 13.

<sup>58</sup> C-62, p. 14.

<sup>59</sup> C-62, p. 14.

Gramercy or its representatives, rendering them irrelevant to the issue of “channels of communication”<sup>60</sup>.

74. *Third*, although Peru may find such interest in its treatment of the Land Bonds inconvenient or annoying, truthful public discussion about matters of public concern, without much more, simply cannot constitute “aggravation” affecting the rights of the parties to the dispute<sup>61</sup>.
75. *Fourth*, Peru does not say anything about meetings that its own representatives have had with U.S. representatives to discuss the Land Bonds. For instance, Gramercy understands that, on the very same day that Peru submitted R-59, the new Peruvian Ambassador to the United States, Hugo de Zela, met with multiple members of the U.S. Congress to discuss the Land Bonds, at meetings that were scheduled at the request of Ambassador de Zela<sup>62</sup>.
76. Peru has also continued representing to U.S. regulators that the Land Bonds debt simply does not exist for purposes of assessing its creditworthiness – a conduct that is far more of an impediment to resolving the dispute than anything Peru alleges Gramercy has done<sup>63</sup>.

### 3.3 THE TRIBUNAL’S DECISION

77. Peru requests the Tribunal to order the Parties to abstain from any action or conduct that may result in an aggravation of the dispute.
78. In its communication A-11, dated May 10, 2018, the Tribunal provisionally instructed both Parties to abstain from any action or conduct that may result in an aggravation of the dispute. This instruction was restated in PO 5, in which the Tribunal ordered that

“both Parties shall abstain from any action or conduct that may result in an aggravation of the dispute; if in doubt whether a specific action or conduct might result in the violation of the above order, both Parties are recommended to approach the Tribunal *ex ante* and request additional guidance”.
79. First and foremost, the Tribunal now confirms such direction for the duration of the entire proceeding, as this is a basic principle underpinning any investment arbitration. The Tribunal notes with regret that none of the Parties has made use of the Tribunal’s recommendation to ask for additional guidance, *before* engaging in conduct that the other Party or the Tribunal may consider to be in violation of PO 5. If the Parties had heeded this advice, this procedural incident could have been avoided or at least mitigated.
80. Respondent and Claimants engage in a myriad of accusations that the other Party has aggravated the dispute through different actions, which include lobbying,

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<sup>60</sup> C-62, p. 15.

<sup>61</sup> C-62, p. 14.

<sup>62</sup> C-62, p. 16.

<sup>63</sup> C-62, p. 16.

distributing misinformation, and interfering with the established channels of communication<sup>64</sup>.

81. On the one hand, Claimants move the Tribunal to dismiss Peru's complaints. On the other, Peru is not seeking any clear-cut, specific relief from the Tribunal. Its exact wording is that the Tribunal "fashion such relief as may be necessary to ensure compliance with the standing prohibition against any action or conduct that may result in the aggravation of the dispute and to protect the integrity of the proceeding"<sup>65</sup>.
82. Having considered all the circumstances and the Parties' positions and allegations, the Tribunal would like to bring to emphasize the following considerations:
83. *First*, the Parties must abstain from any action that *may* result in an aggravation of the dispute. The Tribunal continues to trust and expect that the Parties will act in good faith and will continue to cooperate actively to achieve a rapid, efficient, and final solution of the present dispute. As explained in PO 5, "[t]he duty of non-aggravation of the dispute is a principle that any party in an investment arbitration must observe at all times"<sup>66</sup>.
84. Once Parties have entrusted the adjudication of their dispute to a legally regulated procedure, the most sensible course of action is to cooperate with its efficient management, by avoiding unreasonable, external disruptions. In this arbitration, the Parties have been, and will continue to be, given full opportunity to present their case, so that the Tribunal can issue in due course a legally enforceable award that brings the dispute to an end. Within this context, any action that could potentially exacerbate the controversy, grossly vex the Parties or their counsel, or encumber the arbitration amounts to a waste of resources and a violation of the Tribunal's directions.
85. *Second*, looking at the list of facts that the Parties have discussed regarding the aggravation of the dispute, the Tribunal would like to emphasize the significance of maintaining the relationship between each Party and its counsel free from outside interference. The relation between an attorney and its client is of a fiduciary nature. The client puts its confidence, good faith, reliance, and trust in its counsel to obtain help, advice, and protection. Nobody is authorized to interfere – directly or indirectly – in this relationship with the purpose of damaging or even questioning it. The prohibition is specially strict as regards the counterparty and the counterparty's counsel. To the extent that such interference might have happened in this arbitration, such course of action is improper and should not occur again.
86. *Finally*, the Tribunal reaffirms its decision in para. 77 of the PO 5: if any of the Parties has any doubt whether a specific action it intends to adopt might result in

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<sup>64</sup> R-59 and C-62.

<sup>65</sup> R-59, p. 10.

<sup>66</sup> PO 5, para. 60, citing to *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3, January 27, 2010, para. 86 (Doc. RA-14). See also, *Anglo-Iranian Oil Co. Case*, Order of July 5, 1951: I.C.J. Reports 1951 (Doc. RA-3) or *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006 (Doc RA-11).

the violation of the above order, the Tribunal encourages such Party to approach the Tribunal *ex ante* and request additional guidance.

On behalf of the Arbitral Tribunal,

\_\_\_\_\_[Signed]\_\_\_\_\_  
Juan Fernández-Armesto  
Presiding Arbitrator

Place of Arbitration: Paris, France  
Date: July 20, 2019