

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. 6**  
**(ON THE PRODUCTION OF DOCUMENTS)**

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

SECRETARY OF THE TRIBUNAL  
Ms. Marisa Planells-Valero

ASSISTANT TO THE PRESIDENT  
Dr. Luis Fernando Rodríguez

Paris, March 8, 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, and on June 29, 2018, the Tribunal issued the Procedural Order No. 1 [**“PO 1”**].
3. Paragraph 11 of the PO 1 provides that the document production phase, if requested by any Party, shall be conducted in accordance with a procedural order issued by the Arbitral Tribunal after consultation with the Parties.
4. On July 2, 2018, the Tribunal circulated a draft Procedural Order No. 3, on document production, seeking the Parties’ comments. The Parties submitted their positions on July 9, 2018.
5. On July 12, 2018, the Tribunal issued Procedural Order No. 3 [**“PO 3”**], setting the rules on the production of documents. Attached to PO 3 were the document production schedules (Annex I), a template for a privilege log (Annex II), and template affidavits (Annexes III and IV).
6. On July 13, 2018, Claimants submitted their Statement of Claim.
7. On December 14, 2018, Peru submitted its Statement of Defense.
8. The document production phase started on January 11, 2019, when the Parties simultaneously submitted their Document Production Schedules [**“DPS”**], in accordance with the Procedural Timetable.
9. On February 1, 2019, the Parties simultaneously submitted their responses to the Document Production Schedules [**“DPS Responses”**].
10. On February 8, 2019, the Parties exchanged their DPS Response to the Objections raised by the other Party and produced the non-contested documents.
11. On February 15, 2019, the Parties submitted to the Tribunal the final version of their DPSs. Together with its DPS, Peru included an additional communication (R-36), making some arguments and observations on the Parties’ document production requests. In the following days the Parties exchanged some allegations on Peru’s communication R-36, which are discussed below<sup>1</sup>.
12. Paragraph 44 of PO 3 provides that the Tribunal will endeavor to issue its decision on document production by the date established in the Procedural Calendar.

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<sup>1</sup> R-37, C-40, C-41 and Peru’s email dated February 22, 2019.

13. Having considered the position of each Party, the Tribunal hereby issues the following Procedural Order.

### **PROCEDURAL ORDER NO. 6**

#### **1. RULES AND GUIDELINES ON DOCUMENT PRODUCTION**

14. This Order is made in accordance with PO 3, which establishes the rules for the Tribunal to decide on document production requests. PO 3 must be read jointly with this Order.
15. Paragraph 7 of PO 3 provides that the Parties shall be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) [**“IBA Rules”**] for the production of documents in this arbitration.
16. The Tribunal has made this Order pursuant to the rules set out in PO 3. The reasons for the Tribunal’s decision are contained in the attached Annex A (for Claimants’ requests) and Annex B (for Respondent’s requests).

#### **2. CLAIMANTS’ REQUEST TO DISREGARD COMMUNICATION R-36**

17. On February 15, 2019, the Parties filed the final version of their DPS. Attached to its DPS, Peru included an additional communication (R-36), making some further arguments and observations on the Parties’ document production requests (the **“Additional Allegations”**).
18. On February 20, 2019, Claimants submitted a communication (C-40), asking the Tribunal to either disregard the Additional Allegations or grant Claimants an opportunity to respond to them<sup>2</sup>. Claimants contend that Peru’s unsolicited submission was not made in accordance with PO 3. The same day Peru filed communication R-37, opposing Claimants’ request<sup>3</sup>.
19. On February 21 and 22, 2019, Claimants and Respondent, respectively, exchanged another round of short communications denying each other’s allegations<sup>4</sup>.
20. On March 5, 2019, Claimants reiterated their request that the Tribunal disregard the Additional Allegations. On March 6, 2019, Peru reiterated its opposition to Claimants’ request<sup>5</sup>.
21. In this regard, the Tribunal notices that PO 3 describes in detail the rules and the procedure for the document production phase. Its paras. 10 to 44 establish specific directions for each Party to make its arguments and counter-arguments on each request. PO 3 also attaches a template “document production schedule” and other annexes that the Parties are expected to fill in without altering its format.

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<sup>2</sup> C-40.

<sup>3</sup> R-37.

<sup>4</sup> C-41 and Peru’s email dated February 22, 2019.

<sup>5</sup> C-42 and R-39.

22. Peru's Additional Allegations is a nine-page-long document submitting arguments and counter-arguments on the Parties' document production requests. The Additional Allegations thus amount to an unexpected, additional submission that falls outside the Tribunal's directions set out in PO 3. Therefore, the Tribunal has not taken the Additional Allegations into account in making the decisions on document production contained in this Order.
23. Furthermore, the Tribunal observes that, under Procedural Order No. 5 ["**PO 5**"], the Parties remain under an ongoing obligation to abstain from any action or conduct that may result in an aggravation of the dispute<sup>6</sup>. As directed, they should approach the Tribunal *ex ante* and request additional guidance if in doubt whether a specific action or conduct might result in a violation of this duty<sup>7</sup>.
24. Finally, the Tribunal trusts that the Parties will act in good faith and will cooperate actively to achieve a rapid, efficient, and final solution of the present dispute<sup>8</sup>.

### **3. DECISION**

25. The Arbitral Tribunal takes notice of both Parties' document production requests and allegations and decides as follows:
26. Each Party shall follow and observe the decisions set out in the Annexes attached to this Procedural Order.
27. In accordance with the Procedural Timetable, the documents must be produced no later than **March 22, 2019**.
28. Documents shall only be delivered to the counterparty, without copying the Tribunal. The receiving Party may submit such documents as evidence in the next written submissions, if it so wishes.
29. If the requested Party has raised, and the Tribunal has accepted, objections O1, O4 or O5 with regard to certain Documents, the requested Party may opt between delivering together with the Contested Documents a Privilege Log (identifying the date, the issuer, the recipient and a summary description of any Document or part of a Document for which privilege is claimed, and drafted in accordance with Annex II) or redacted Documents.
30. Pursuant to the Procedural Timetable, each Party will deliver to its counterparty and to the Tribunal by **March 22, 2019**, the following "Affidavits":
  - a first Affidavit signed by the chief legal officer of such Party drafted in accordance with Annex III to PO 3 and
  - a second Affidavit signed by the head external legal counsel to such Party drafted in accordance with Annex IV to PO 3.

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<sup>6</sup> PO 5, para. 77.

<sup>7</sup> PO 5, para. 63 and 77.

<sup>8</sup> PO 5, para. 62.

31. If a Party, without satisfactory explanation, and in contravention of the Tribunal's instructions, fails to produce a Document, the Tribunal may infer that such Document is adverse to the interest of that Party. Likewise, if a Party absent satisfactory explanation fails to deliver any of the Affidavits, the Tribunal will make appropriate inferences.

On behalf of the Arbitral Tribunal

[signed]

Juan Fernández-Armesto  
Presiding Arbitrator

Place of Arbitration: Paris, France  
Date: March 8, 2019