

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

PROCEDURAL ORDER NO. 1

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

SECRETARY OF THE TRIBUNAL
Marisa Planells-Valero

ASSISTANT TO THE PRESIDENT
Luis Fernando Rodríguez

June 29, 2018

WHEREAS.....	3
I. PROCEDURAL TIMETABLE	3
1. FIRST WRITTEN SUBMISSIONS	3
2. DOCUMENT PRODUCTION PHASE	4
3. SECOND WRITTEN SUBMISSIONS	4
4. HEARING	5
5. POST-HEARING SUBMISSIONS AND STATEMENTS OF COSTS	6
6. ADDITIONAL SUBMISSIONS	6
II. CONDUCT OF THE PROCEEDINGS	6
1. POWERS OF THE ARBITRAL TRIBUNAL AND OF THE PRESIDING ARBITRATOR	6
2. ROUTING OF COMMUNICATIONS AND SUBMISSIONS	7
3. LANGUAGE OF THE ARBITRATION	8
4. WITNESS STATEMENTS AND EXPERT REPORTS	9
5. RECORDING AND TRANSCRIPTS	9
6. DATA SECURITY	9
7. TRANSPARENCY	10
8. AMICUS CURIAE SUBMISSIONS AND SUBMISSIONS BY THE NON-DISPUTING PARTY TO THE TREATY	11

WHEREAS

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 April 17, 2018 the Parties submitted their agreements and respective positions on the contents of a draft Terms of Reference and a draft Procedural Order No. 1 [**“PO1”**]¹.
3. By communication A-2 the Arbitral Tribunal convened a case management conference call, which took place on May 4, 2018. The Parties and the Tribunal discussed the draft Terms of Appointment, the draft PO1, and the Procedural Timetable.
4. On May 22, 2018, the Tribunal and the Parties executed the Terms of Appointment.
5. On June 1, 2018, the Tribunal circulated a draft PO1, seeking the Parties’ final comments. The Parties submitted their positions on June 15, 2018.
6. The following Procedural Order sets out the Tribunal’s decisions after consultation with the Parties.

PRODEDURAL ORDER NO. 1

I. PROCEDURAL TIMETABLE

7. The arbitration shall proceed in accordance with the Procedural Timetable attached hereto as Annex I, except if the Tribunal, at the reasonable request of any Party or on its own initiative, decides that, for good cause, this Procedural Timetable has to be amended.
8. Amendments to the Procedural Timetable will be made by reissuing Annex I.
1. **FIRST WRITTEN SUBMISSIONS**
9. On July 13, 2018, Claimants shall file their Statement of Claim. The Statement of Claim shall set forth the facts, the legal arguments and the relief sought. The Statement of Claim shall also:

¹ C-13 and R-7.

- (i) include as attachments all documents in possession, custody or control of Claimants, on which the Claimants wish to rely;
 - (ii) identify the fact witnesses Claimants wish to present and attach a witness statement prepared in accordance with Section II.4 below;
 - (iii) identify expert witnesses, on whose opinion Claimants wish to rely and attach an opinion prepared in accordance with Section II.4 below;
 - (iv) attach a chronology of the events underlying the dispute, with reference to supporting evidence.
10. Respondent shall present its Statement of Defense on December 14, 2018. The Statement of Defense shall set forth the facts, the legal arguments, any jurisdictional objection or counterclaim (if applicable) and the relief sought. The marshalling of evidence shall follow *mutatis mutandis* the rules established in para. 9 *supra*. To the extent that Respondent's chronology of events diverges from Claimants', Respondent is asked to amend Claimants' chronology as it sees fit.

2. DOCUMENT PRODUCTION PHASE

11. 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.

3. SECOND WRITTEN SUBMISSIONS

12. 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 (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*.
13. Respondent shall file a Statement of Rejoinder (and Reply 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 the Claimants in their Statement of Reply (and Answer to 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 Claimants in its previous pleading. The marshalling of evidence shall follow *mutatis mutandis* their rules established in para. 9 *supra*.
14. Claimants shall file, if applicable, a Rejoinder on Respondent's counterclaims and objections on the date established in the Procedural Timetable of Annex I. The scope of this pleading shall be limited to replying to the argumentation regarding the counterclaims brought and objections raised by Respondent. Absent leave from

the Tribunal for good cause shown, no new argument shall be presented, and no new evidence shall be attached to the Claimants' Rejoinder, except if required to rebut arguments and evidence submitted by Respondent in its previous pleading. The marshalling of evidence shall follow *mutatis mutandis* the rules established in para. 9 supra.

4. HEARING

15. The Parties have agreed that the evidentiary hearing [**"Hearing"**] shall be held at the seat of the arbitration unless otherwise agreed by the Parties.
16. The Hearing shall take place at the dates set out in the Procedural Timetable attached as Annex I.
17. Pursuant to Art. 10.21(2) of the Treaty, the Tribunal shall conduct the Hearing open to the public and shall determine, in consultation with the Parties, the appropriate logistical arrangements in a procedural order.
18. The rules set forth in this section for fact witness shall equally apply to the testimony of expert witnesses *mutatis mutandis*.
19. Any person who has produced a witness statement may be called to the Hearing for examination or cross-examination at the dates established in Annex I.
20. No witness called by a Party shall be allowed to testify unless a written witness statement has been provided from that witness together with the written submission relying on such witness statement. In the witness statement and prior to giving oral evidence at the hearing, each witness shall affirm that his or her written and oral statements are true, correct, and materially complete.
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.
22. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements and the examinations.
23. Each Party shall be responsible for summoning those of its own witnesses who have been called to the Hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not insist on his or her appearance.
24. The Tribunal may call for examination any witness, even if not called by the Parties. The Tribunal may also exclude any witness from examination, if it finds that the witness's appearance is not necessary for the adjudication of the case.
25. Demonstrative exhibits (such as Power Point slides, charts, tabulations, etc.) may be used at the Hearing, provided they contain no new evidence. Each Party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The Party submitting such exhibits shall provide them in hard copy to the other Party,

the Tribunal Members, the Secretary of the Tribunal, the President's Assistant, the court reporter(s), and the interpreter(s) at the Hearing.

26. The costs of the Hearing will be paid from the deposits made by the Parties, without prejudice to the Tribunal's decision as to which Party will ultimately bear these costs.

5. POST-HEARING SUBMISSIONS AND STATEMENTS OF COSTS

27. The scope and format of post-hearing submissions, if any, will be determined by the Tribunal at the end of Hearing, upon consultation with the Parties. In any event, any such submissions shall not contain new evidence, documents, sources, witness statements or expert reports or opinions, absent extraordinary circumstances.
28. Should any Party wish to submit a request under Art. 10.20(9)(a) of the Treaty, it shall do so together with its post-hearing submission. The Tribunal will determine, upon consultation with the Parties, the procedural arrangements to deal with this request.
29. Statements of costs shall be filed simultaneously on a date to be agreed by the Tribunal with the Parties at the end of the Hearing.

6. ADDITIONAL SUBMISSIONS

30. Neither Party shall be permitted to submit outside of the Procedural Timetable any additional or responsive written submission, document, or legal authority, absent a showing of exceptional circumstances and good cause through an application to the Tribunal, which will decide on the request after hearing the counterparty.
31. A Party attempting to submit such additional documents may not annex the documents when it makes its request to show good cause.

II. CONDUCT OF THE PROCEEDINGS

1. POWERS OF THE ARBITRAL TRIBUNAL AND OF THE PRESIDING ARBITRATOR

32. The Tribunal and the Parties understand that time periods fixed in Annex I are ample and sufficient for the preparation of the submissions. Consequently, the Tribunal, or the Presiding Arbitrator on its behalf, will not grant any time extensions except *sua sponte* in reasonable circumstances, or for good cause upon a Party's reasoned request.
33. Time extensions that imply a cancellation of the Hearing will only be granted in exceptional circumstances.
34. The Presiding Arbitrator shall be entitled to sign procedural orders and other documents on behalf of the Arbitral Tribunal, after consultation with the co-arbitrators.

35. Any procedural order of the Arbitral Tribunal may, at the request of a Party or on the Arbitral Tribunal's own initiative, be varied if the circumstances so require for the proper conduct of the arbitration proceeding.

36. The Tribunal may meet at any location it considers appropriate for deliberations.

2. ROUTING OF COMMUNICATIONS AND SUBMISSIONS

37. Communications shall be sent to all Members of the Tribunal, the Secretary of the Tribunal, the President's Assistant, and the Parties by email.

38. Communications to be filed simultaneously will be advanced by email to the Tribunal, the President's Assistant, and the Secretary of the Tribunal, who will forward them to the counterparty in due course.

39. On the relevant filing date [the "**Filing Date**"], a Party shall submit by email an electronic version of its main submission, witness statements, and expert reports.

40. On the supplemental filing date [the "**Supplemental Filing Date**"], seven (7) days after the Filing Date, a Party shall submit:

(a) hard copies of the main submission, witness statements, and expert reports; and

(b) electronic versions of the main submission and all supporting documents (fact evidence, legal authorities, expert reports, and witness statements) on a USB drive.

41. The official date of receipt of the Parties' submissions or communications shall be the day on which the electronic version is sent to the Arbitral Tribunal and the Secretary.

42. The materials submitted on the Supplemental Filing Date shall include one (1) hard copy of the main submission, witness statements, and expert reports² and one (1) USB drive to each Member of the Tribunal, the Secretary of the Tribunal, the President's Assistant, and the opposing Party.

43. The Tribunal and the President's Assistant would appreciate it if the main submissions, witness statements, and expert reports are submitted in DIN A 4 format or US equivalent, printed on both sides.

44. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party, in which case the Tribunal will determine whether authentication is necessary. The Tribunal shall have discretion as to the admissibility and evidentiary weight of said documents.

45. All submissions and evidence in PDF format shall be searchable. Excel spreadsheets must show the *formulae* used.

² Except for Prof. Stern, who requests to be sent only the Main Submissions in DIN A 4 (or US equivalent) format and printed on both sides (no need for printed versions of the witness statements and expert reports).

46. Translations of any document submitted by the Parties are to be filed in the same tab as the original text so that it constitutes a single electronic document.

3. LANGUAGE OF THE ARBITRATION

47. English and Spanish are the procedural languages of this arbitration. For purposes of efficiency, the utilization of such languages shall be carried out as set forth below.

48. Routine procedural correspondence among the Parties, the Tribunal, the Secretary, and the President's Assistant may take place in either procedural language.

49. Written submissions shall comprise the following documents and shall be made as follows:

- (a) Pleadings, witness statements, and expert reports in both procedural languages, one language on the Filing Date of the submission and a translation into the other procedural language submitted on the Supplemental Filing Date.
- (b) Factual exhibits, legal authorities, and annexes submitted in either English or Spanish need not be translated, unless a translation is specifically requested by the Tribunal.
- (c) Factual exhibits, legal authorities, and annexes may be submitted in any other language, provided they include a translation into English and Spanish with respect to the specific relevant part thereof. The Tribunal may require a fuller or a complete translation at the request of any Party or on its own initiative.

50. Translations need not be certified unless there is a dispute as to the content of a translation, in which case the Tribunal will decide. The governing language of a document shall be its original language.

51. The testimony of a witness or expert called for examination who testifies in one of the procedural languages shall be interpreted simultaneously into the other procedural language, with ICSID arranging for suitable interpreters.

52. The testimony of a witness or expert called for examination who testifies in any language other than English or Spanish shall be interpreted simultaneously into English and Spanish, with ICSID arranging for suitable interpreters.

53. The Parties will notify the Tribunal, as soon as practicable, and no later than at the pre-hearing organizational meeting, which witnesses or experts require interpretation. The costs of interpretation services will be paid from the deposit made by the Parties, without prejudice to the decision of the Tribunal as to the allocation of costs.

54. The Tribunal may render any order, decision, or award in either procedural language.

4. WITNESS STATEMENTS AND EXPERT REPORTS

55. The Parties may submit any witness statements together with their written submissions. If a Party has submitted evidence from witnesses, it shall make that witness available for cross-examination, if requested.
56. Each witness statement shall be signed and dated by the submitting witness, and state the witness's name, date of birth, present address, relation to the Parties, and involvement in the case. In the statement each witness shall affirm that his or her written and oral statements are true, correct, and materially complete.
57. The Parties may submit any expert reports together with their written submissions. If a Party has submitted an expert report or opinion, it shall make that expert available for cross-examination, if requested.
58. Each expert report shall be signed and dated by the submitting expert, and state the expert's name, date of birth, present address, statement of independence, and involvement in the case. In the statement each expert shall affirm that his or her written and oral statements are true, correct, and materially complete.

5. RECORDING AND TRANSCRIPTS

59. Sound recordings shall be made of the Hearing and of conference calls held by the Tribunal with the Parties.
60. Transcript(s) in English and Spanish shall be made of the Hearing.
61. Unless otherwise agreed by the Parties or ordered by the Tribunal, the transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.
62. The Parties may review and propose corrections to the written transcripts. In the event of disagreement with the written transcript, the audio recording in the original spoken language controls. In case of disagreement between the Parties with respect to the audio, the Tribunal shall decide upon such disagreement.

6. DATA SECURITY

63. All communications and submissions in these proceedings shall be transmitted using only secure email accounts used primarily for business purposes and USB drives and file transfer platforms that are duly encrypted.
64. In the event that any Party becomes aware of an actual or reasonably suspected data breach, i.e., unauthorized or unintentional access to any documents disclosed in connection with the arbitration, that Party shall immediately notify the Tribunal and the other Party.
65. In case of special need, the Parties may agree upon or request from the Tribunal any further cybersecurity measures.

7. TRANSPARENCY

66. In accordance with Art. 10.21 of the Treaty and Section X of the Terms of Appointment, ICSID shall maintain a record of the procedural details for the proceeding on its website and publish the documents set forth in Art. 10.21(1) of the Treaty, including the following:
- (a) the notice of intent;
 - (b) the notice of arbitration;
 - (c) pleadings, memorials, and briefs submitted to the Tribunal by a Party and any written submissions submitted pursuant to Art. 10.20.2 and 10.20.3 and Art. 10.25 of the Treaty;
 - (d) minutes or transcripts of the Hearing;
 - (e) orders, awards, and decisions of the Tribunal; and
 - (f) terms of appointment.
67. The Secretary of the Tribunal, on behalf of ICSID, will be in charge, under the Tribunal's directions, of all the administrative tasks regarding transparency and publicity of these proceedings, in accordance with the Treaty.
68. The Respondent undertakes to promptly transmit the public documentation to the non-disputing party to the Treaty in accordance with Art. 10.21(1).
69. As per Art. 10.21(2) of the Treaty, any Party that intends to use information designated as protected information in the Hearing shall so advise the Tribunal. The Tribunal shall make appropriate arrangements to protect the information from disclosure.
70. Any protected information that is submitted to the Tribunal shall be protected from disclosure in accordance with the procedures set out in paras. 10.21(4) of the Treaty, in particular:
- (a) Any Party claiming that certain information in a document constitutes protected information shall clearly designate the information at the time it submits it to the Tribunal, together with a redacted version of the document that does not contain such information. Only the redacted version shall be made public.
 - (b) The Tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the Tribunal determines that such information was not properly designated, the Party that submitted the information may
 - withdraw all or part of its submission containing such information, or
 - agree to resubmit complete and redacted documents with corrected designations in accordance with the Tribunal's determination.

In either case, the other Party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn by the Party that first submitted the information or redesignate the information consistent with the corrected designation.

(c) Neither the Parties nor the Tribunal shall disclose any protected information so designated in accordance with this section.

71. The Tribunal will decide any disagreement between the Parties regarding the enforcement of these rules on transparency.

8. AMICUS CURIAE SUBMISSIONS AND SUBMISSIONS BY THE NON-DISPUTING PARTY TO THE TREATY

72. In accordance with Art. 10.20(2) of the Treaty, the non-disputing Party to the Treaty may make oral and written submissions to the Tribunal regarding the interpretation of the Treaty.

73. In accordance with Art. 10.20(3) of the Treaty, the Tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. Each submission shall identify the author and any person or entity that has provided, or will provide, any financial or other assistance in preparing the submission.

74. The Procedural Timetable sets a deadline for the filing of any third-party submissions. The Tribunal shall establish in a procedural order, upon consultation with the Parties, all the other procedural arrangements for introducing these submissions into the record and for the Parties to react to them.

[signed]

Juan Fernández-Armesto
Presiding Arbitrator

Date: June 29, 2018

PROCEDURAL ORDER NO. 1 – ANNEX I

Procedural Timetable

Procedural action	Party required to act	Deadline
Statement of Claim	Claimants	July 13, 2018
Statement of Defense (including any counterclaims and/or objections)	Respondent	December 14, 2018 (+ 5 months)
Document Production (if requested)		
DPS Request	Both Parties	January 11, 2019 (+1 month aprox.)
DPS Response	Both Parties	February 1, 2019 (+3 weeks)
Production of non-contested Documents	Both Parties	February 8, 2019 (+1 week)
DPS Response to Objections	Both Parties	February 8, 2019 (+1 week)
Submission of the final DPS schedule	Both Parties	February 15, 2019 (+1 week)
Decision on DPS	Tribunal	March 8, 2019 (+3 weeks)
Production of contested Documents and Affidavits	Both Parties	March 22, 2019 (+2 weeks)
Statement of Reply		
Statement of Reply (and Answer to any counterclaims and/or objections)	Claimants	May 14, 2019 (+5 months after the St. Defense)
Statement of Rejoinder (and Reply to any counterclaims and/or objections)	Respondent	August 30, 2019 (+3.5 months)
Claimants' Rejoinder on any counterclaims and/or objections	Claimants	October 30, 2019 (+2 months)

Deadline for submissions from <i>amici curiae</i> and the non-disputing Party to the Treaty		November 15, 2019
Notification of witnesses to be called to the Hearing	Both Parties	6 weeks before the hearing aprox.
Pre-Hearing Conference	Both Parties	5 weeks before the hearing
Hearing	All	February 10–14, 2020 (one-week duration)
Post-Hearing Submissions	Both Parties	TBD at the end of the Hearing
Statement on costs	Both Parties	TBD at the end of the Hearing

Date: June 29, 2018