

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. 12
**(ORGANIZATION OF THE POST-
HEARING ORAL ARGUMENTS)**

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
Ms. Krystle Baptista

Paris, November 5, 2020

I. PROCEDURAL HISTORY

1. On October 7, 2020, the Tribunal proposed that in light of the health and safety concerns and the current restrictions on travel and movement resulting from the COVID-19 pandemic, and given that the Post-Hearing Oral Arguments (the “Hearing”) will consist of the Parties’ submissions and the Tribunal’s questions without witness interpretation, the Hearing be held remotely via Zoom with simultaneous interpretation into English/Spanish.
2. On October 13, 2020, the Parties, *inter alia*, agreed to hold the Hearing remotely and made proposals regarding the Hearing schedule.¹
3. On October 21, 2020, after considering the Parties’ positions, the Tribunal proposed an alternative schedule for the Hearing, and confirmed that if the Parties would find it helpful, the President of the Tribunal would be available to hold a pre-hearing conference call with the Parties on November 3, 2020.
4. On October 27, 2020, the Secretary of the Tribunal circulated a draft of the present procedural order concerning the organization of the Hearing, to which the Parties provided their comments on October 30, 2020.
5. On October 28, 2020, the Secretary of the Tribunal invited the non-disputing Party (NDP) to provide the name and affiliation of the representatives of the NDP interested in attending the Hearing. The NDP provided its list of attendees on October 30, 2020.
6. Having considered the Parties’ positions, this Order sets out the Procedural Rules that the Parties have agreed upon and/or the Tribunal has determined will govern the conduct of the Hearing.

II. ORDER

A. Date

7. The Hearing shall take place on November 17 and 18, 2020.

B. Format and Virtual Platform

8. Given the exceptional circumstances created by COVID-19 pandemic, and as agreed by the Parties, the Hearing shall be held by videoconference via the Zoom virtual platform. The Zoom platform shall be operated by an external service provider retained by ICSID to supply hosting for the sessions, recording services and technical support.²

¹ C-91 and R-93.

² On November 4, 2020, ICISD provided the Parties with a quote of the costs that the provider charges for its services, following the Parties’ joint request of October 30, 2020.

9. The details and link of the Hearing shall be timely provided by ICSID prior to the commencement of the Hearing.

C. Agenda

10. In order to accommodate the time zones of all hearing participants, the Hearing will start at 9:00 AM (EST)/ 15:00 PM (CET) on both days.
11. The order of proceedings and structure of the Hearing will be as indicated in the Agenda incorporated as **Annex A**.
12. The agenda established in Annex A shall be subject to any such modification as the Tribunal may deem necessary or appropriate in the course of the Hearing, in particular, on account of any delay or interruption due to technical difficulties.

D. Time Allocation

13. Total number of hours reserved for Hearing: 7 hours and 30 minutes. After excluding the time reserved for breaks (15 minutes on Day 1 of the Hearing and 45 minutes on Day 2 of the Hearing), there will be a total of 6 hours and 30 minutes of working time. Such working time shall be allocated as follows: (i) 30 minutes are reserved for housekeeping and slippage; (ii) 1 hour is reserved for the Tribunal's questions at the end of Day 2 of the Hearing; (iii) the remaining time shall be equally divided between the Parties, such that each Party shall have a total of 2 hours and 30 minutes available for their oral submissions.
14. Time spent during questions posed by the Tribunal and on answers to those questions, as well as time for administrative or organizational matters will not be counted against the time of any Party. Time spent dealing with objections from a Party shall not be counted against any Party's time.
15. The Secretary of the Tribunal shall keep the time, under the direction of the Tribunal, and will advise the Parties of the total daily time used.

E. Demonstrative Exhibits

16. The Parties may make use of demonstrative exhibits in support of oral arguments, provided they do not contain materials not in the record.
17. Section 25 of Procedural Order No. 1 shall apply. For ease of reference, the Parties are reminded that "demonstrative exhibits (such as PowerPoint slides, charts tabulations, etc.) may be used at any hearing, provided they contain no new evidence".
18. To account for the virtual nature of the Hearing, Section 25 of Procedural Order No. 1 is amended such that: (i) hard copy submission of demonstratives is not required; and (ii) an electronic copy of each demonstrative (or a declaration confirming that the Party does not wish to use any demonstrative) shall be distributed by the Party intending to use it via an electronic mail sent to the entire

case email distribution for each Party, the Secretary of the Tribunal, the Members of the Tribunal and to the court reporter, no later than 30 minutes prior to the respective argument, in PDF format, in order to facilitate offline access to the demonstrative by the Hearing Participants.

19. Demonstrative exhibits shall be produced during the Hearing through the share screen feature of the virtual platform, which allows viewing both the speaker and the relevant document simultaneously.
20. The Parties understand that demonstrative exhibits are not an opportunity to submit, nor should they resemble supplementary briefs. Demonstrative exhibits shall indicate the source of the information contained therein through references to the record. Any effort to use demonstrative exhibits shall be regulated by the Tribunal.
21. In addition, promptly after the conclusion of the Hearing day in which the corresponding demonstrative exhibit is used, the Parties shall upload each demonstrative exhibit to the case folder in the electronic file sharing system (“BOX”), with the required CD-__ or RD-__ number.

F. Interpretation

22. Pursuant to paragraphs 52 and 53 of Procedural Order No. 1, the Hearing will be conducted in Spanish and English. There shall be simultaneous Spanish-English and English-Spanish interpretation throughout the Hearing.
23. The costs of interpretation services will be paid from the deposits made by the Parties, without prejudice to the decision of the Tribunal as to the allocation of costs.

G. Audio Recording and Transcripts

24. Pursuant to Section 59 of Procedural Order No. 1, sound recordings will be made of the Hearing as well as verbatim transcripts in the two procedural languages.
25. ICSID will arrange for an audio and video recording of the Hearing through an external service provider retained by ICSID to manage the hosting and recording services for the virtual Hearing.
26. The Hearing Participants shall have real-time access to the English and Spanish transcripts through an online connection provided by the relevant court reporter. Participants shall access the transcript from their own devices, either by clicking the relevant link in a browser window other than the browser window used to view the virtual Hearing room, or, should they prefer otherwise, by clicking the link on a device other than the device being used to connect to the virtual Hearing room. The details to access the transcript shall be provided by ICSID before commencement of the first Hearing day.

27. Electronic versions of the transcripts will be provided to the Parties and the Tribunal on a same-day basis.
28. The Parties shall agree on any major corrections to the transcripts within 45 days of the date of receipt of the sound recordings or transcripts, whichever is last. The agreed corrections may be entered by Parties in the transcripts. The Tribunal shall decide upon any disagreement between the Parties on this matter and any correction adopted by the Tribunal shall be entered by the Parties.

H. Statements on Costs

29. The Tribunal will provide guidance as to the approach and level of detail required for the Statement of Costs the last day of the Hearing.

I. Attendance of the “non-disputing Party”

30. As confirmed on October 30, 2020, the NDP will be attending the Hearing.

J. Transparency

31. In accordance with Article 10.21(2) of the Treaty, and paragraph 17 of Procedural Order No. 1, the Hearing shall be open to the public. The Tribunal may hold portions of the Hearing in private to the extent necessary to ensure the protection of confidential information.
32. To account for its virtual nature, the Hearing will be video recorded, and the video recording will be streamed in the English and Spanish languages on the ICSID website as soon as possible after the conclusion of the Hearing. An announcement to this effect will be published on the ICSID website.
33. Before streaming the recording on the ICSID Website and in order to avoid public disclosure of confidential information, the recording will be edited after the hearing in accordance with the Confidentiality Protocol of January 27, 2020 which is modified as follows:
 - At any time during the Hearing, the Parties may request that a part of the Hearing be held in private. To this effect, a Party shall orally alert the Tribunal each time it intends to refer to “protected information” during the Hearing.
 - If the other Party has an objection to the request, it shall immediately alert the Tribunal, which shall hear the Parties and decide on the matter. The discussion between the Parties and the Tribunal shall be held privately and excluded from the recording;
 - Resumption of the non-confidential part of the hearing shall be orally requested by the same Party which made the confidentiality request or by the other Party, if it deems it necessary;
 - The Tribunal shall rule on any dispute between the Parties in that respect;

- Exceptionally, either Party may request that a specific section of the Hearing be considered confidential and therefore excluded from the recording after the allegedly “protected” information has been discussed, addressed or shown by the Party (“ex-post confidentiality requests”). The Party making the ex-post confidentiality request shall be responsible for providing to the Tribunal, the Secretary of the Tribunal and the opposing Party the exact period of time which it seeks to be removed from the recording. If the opposing Party has an objection to such request, the Tribunal shall decide after hearing both Parties;
- To account for the virtual nature of the Hearing, and pursuant to Procedural Order No. 8, the NDP will be invited to temporarily leave the hearing room when confidential information is about to be covered. The NDP will be invited back into the hearing room through the *waiting room* feature following resumption of the non-confidential part of the Hearing;
- The Parties will edit the recording and the transcripts to exclude the information marked as “protected” throughout the Hearing and send them to ICSID for publication. The Tribunal will decide if there are any pending disagreements.

K. Virtual Hearing Protocols

i. Pre-Hearing Trial Run

34. A trial run of the video conferencing system with all the Hearing participants will be conducted on November 10, 2020 at 10:00am (EST)/ 16:00pm (CET).
35. To ensure the efficient conduct of the trial run, all participants shall strive to replicate the conditions under which they will participate in the Hearing:
 - (i) To the extent possible, at least one participant per device or connection to be used at the Hearing should attend the trial run.
 - (ii) Each participant shall join the trial run with the same devices and internet connection that they intend to use during the Hearing, and from the same physical location.
 - (iii) All participants shall join the trial run through the *waiting room* feature and shall follow the same identification procedure as for the Hearing itself (Paras. 37-38 *infra*).
 - (iv) During the trial run, each of the functions of the videoconference platform intended to be used at the Hearing shall be tested (e.g., presentation of documents via shared screen).
 - (v) During the trial run, the Parties shall not address the substance of any matter scheduled for discussion at the Hearing but may raise before the Tribunal any procedural issues pertaining to the organization of the Hearing, if necessary.

j. Participants

36. Each Party shall provide a list of the persons who will attend the Hearing by no later than **November 11, 2020**, using the format in **Annex B (“List of Participants”)**.
37. The List of Participants shall (i) include the user name and e-mail that each participants will use in the videoconference; (ii) designate the speakers (“**Active Participants**”) for each Party, and identify the others as Passive Participants; (iii) indicate the location from which each of their participants (including counsel and Party representatives) will join the videoconference, confirming that adequate connectivity or technology is available at that location; and (iv) indicate if several participants will use one and the same camera/connection.
38. In order to facilitate identification, participants shall join the videoconference showing a username that enables them to be readily identified, in the following format: (C) [first name and last name] (for participants on behalf of Claimants), and [R] [first name and last name] (for participants on behalf of Respondent). As regards participants joining collectively from a conference room, the connection of the relevant room shall be identified as “[C] / [R] – Room [Name]”, as applicable.
39. Access to the videoconference shall be restricted to the participants mentioned in the List of Participants. Any person not included in the List of Participants shall not be admitted, unless otherwise decided by the Tribunal upon request of either Party. All Hearing participants bear an ongoing duty to warn of the presence of any other person on the videoconference.
40. Participants shall join the videoconference 15 minutes in advance of the start of the relevant Hearing day, to facilitate their identification and deal with any technical contingencies.
41. Each Party shall identify its representatives at the opening of each day.
42. Participants will join the videoconference through a “*waiting room*” managed by the external provider retained by ICSID to provide virtual *hosting* services. After having been identified, participants will be assigned to the appropriate “*breakout room*” until the Hearing commences. The identification protocols shall be practiced during the trial run mentioned in paragraphs 34-35 *supra*.

k. Internet Connection and Devices

43. The Parties are responsible for ensuring connection to the videoconference through a stable internet connection offering sufficient bandwidth and uses a camera, microphone, and speaker of adequate quality.
44. The virtual platform shall offer participants a dial-in telephone audio option, which shall be used as a default connection mechanism in the event that any

participant experiences difficulties with computer connection. The Parties are aware that the dial-in telephone audio connection via Zoom only grants access to the main audio channel (“floor”), and not to the channels of every language of interpretation.

45. While not indispensable, for the sake of convenience, participants should have at least two screens, preferably three (it may be a computer with multiple screens, or a combination of devices such as a computer and a tablet). The first screen shall be used to connect to the videoconference, the second to view the transcript/s, and the third to readily view documents submitted online during the videoconference, or access and view documents offline.
46. Participants, especially Active Participants, are also encouraged to use a headset which incorporates a microphone for better sound quality. If not available, Active Participants shall ensure to speak close to the microphone.

I. Videoconference Etiquette

47. Once admitted to the videoconference, and barring technical issues or other exceptional circumstances, the Parties’ lead counsel and representatives should remain connected throughout the Hearing day.
48. All Participants shall mute their audio feature, except where they shall intervene orally. In the event that the conduct of the Hearing is disrupted by background noise, the technical support team in charge of hosting the Hearing shall be able to mute the audio of such participant/s, under the control of the Tribunal.
49. As established above, in the List of Participants (**Annex B**), the Parties shall appoint the participants that will act as speakers at the Hearing (“**Active Participants**”).
50. Subject to success of the trial run, in principle, the Tribunal, the Secretary of the Tribunal, and the Assistant to the President shall have the video feature enabled at all times, Active Participants shall have the video feature enabled while presenting oral argument and during colloquy, and all other Participants should have their video feature disabled in order to preserve internet bandwidth.
51. Insofar as possible, the Parties shall circulate the speaking notes (if any) *directly* to the court reporters and the interpreters (*without* copying the other Party, the Tribunal, the Secretary of the Tribunal or the Assistant to the President) prior to the start of any relevant session.
52. In order to facilitate the accurate transcription and interpretation of the Hearing, speakers shall speak slowly and with pauses between phrases.
53. Participants should join the Hearing from a location without background noise and with adequate lighting. Active Participants should avoid sitting with a window or source of light behind them.

m. Break-Out Rooms and Team Communication

54. During the Hearing breaks, the Parties shall make use of the “*breakout room*” feature within the videoconference platform to avoid delays associated with admitting participants to the videoconference and to enable to promptly reconvene all participants following breaks.
55. In the List of Participants (**Annex B**), the Parties shall clearly designate the “*breakout room*” which the relevant participant should be assigned to, using C (for Claimants’ Room) and R (for Respondent’s Room).
56. Each Party shall make its own arrangements for private communication within its team during the Hearing by instant messenger or other appropriate means. Zoom’s chat feature shall only be used to communicate with the technical support team.

n. Technical Difficulties

57. In the List of Participants, each Party shall designate one of its representatives to act as the contact person in case of an emergency during the videoconference (“**Technical Emergency Contact**”). This person shall be in charge of communicating with the technical support team to fix any technical issue that might arise. Each Party’s Technical Emergency Contact shall be responsible for advising the Tribunal and ICSID if an essential participant on his/her side is disconnected or otherwise cannot participate.
58. The Tribunal may temporarily or permanently suspend the Hearing if it considers that the functioning of the videoconference system is inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. The Parties are requested to bear in mind that full recordings and transcripts shall be available, mitigating any prejudice arising from the failure of any given participant to be able to follow the entire Hearing on the videoconference platform.
59. The above provisions on etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

[signed]

Prof. Juan Fernández-Armesto
Presiding Arbitrator

Place of Arbitration: Paris, France
Date: November 5, 2020

ANNEX A
Hearing Agenda

Tuesday, November 17, 2020

EST	CET	PROCEDURAL STEP
09:00 AM	15:00 PM	Procedural Matters [max. 15 min.]
09:15 AM	15:15 PM	Claimants' Presentation [max. 150 min.] with a 15-minute break approximately half-way through
12:00 AM	18:00 PM	End of Day 1

Wednesday, November 18, 2020

EST	CET	PROCEDURAL STEP
09:00 AM	15:00 PM	Procedural Matters [max. 15 min.]
09:15 AM	15:15 PM	Respondent's Presentation [max. 150 min.] with a 15-minute break approximately half-way through
12:00 AM	18:00 PM	Break [30 min.]
12:30 AM	18:30 PM	Tribunal's Questions [max 60 minutes]
13:30 PM	19:30 PM	End of Day 2

ANNEX B

**GRAMERCY FUNDS MANAGEMENT LLC AND GRAMERCY PERU HOLDINGS LLC v. REPUBLIC OF PERU
 (ICSID CASE NO. UNCT/18/2)**

POST-HEARING ORAL ARGUMENTS
 November 17-18, 2020
 Video Conference

LIST OF PARTICIPANTS

A/ P ³	TRIBUNAL		
A	Prof. Juan Fernández Armesto	President	jfa@jfarmesto.com
A	Mr. Stephen L. Drymer	Co- Arbitrator	sdrymer@woods.qc.ca
A	Prof. Brigitte Stern	Co-Arbitrator	brigitte.stern@jstern.org

ASSISTANT TO THE PRESIDENT			
P	Ms. Krystle M. Baptista	Assistant to the President	kbs@jfarmesto.com
ICSID SECRETARIAT			
A	Ms. Marisa Planells-Valero	Secretary of the Tribunal	mplanellsvalero@worldbank.org

CLAIMANTS			
	Mr./Ms. First Name/ Last Name	Affiliation	Email
	<i>Counsel:</i>		
	<i>Parties:</i>		

³ Use “A” for Active Participants and “P” for Passive Participants.

RESPONDENT		
Mr./Ms. First Name/ Last Name	Affiliation	Email
<i>Counsel:</i>		
<i>Parties:</i>		

COURT REPORTERS		
Mr./Ms. First Name/ Last Name	Affiliation	Email
P		
P		

INTERPRETERS		
Mr./Ms. First Name/ Last Name	Affiliation	Email