

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. 7

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, May 10, 2019

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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 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).
4. 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.
5. Following the Parties’ exchanges, on March 8, 2019, the Tribunal issued Procedural Order No. 6 [**“PO 6”**], ruling on each Party’s document production requests.
6. Shortly after, an incident arose between the Parties involving the production of certain documents. Claimants and Peru made a number of submissions on this issue¹. The position of each Party is summarized below.
7. On April 9, 2019, the Parties and the Tribunal held a conference call to address this matter. At the Tribunal’s direction, Claimants filed a further submission on April 16, 2019, and Peru, on April 24, 2019, summarizing their positions and making their final requests².
8. Having considered the arguments of each Party, the Tribunal hereby issues the following Procedural Order.

¹ C-43, R-41, C-44, R-42, R-43, C-45 and R-44.

² C-46 and R-45.

PROCEDURAL ORDER NO. 7

9. The Tribunal will first describe the factual background of this procedural incident (1.), then will summarize Claimants' and Peru's positions (2. and 3.) and, after discussing their merits (4.), will make a decision (5.).

1. FACTUAL BACKGROUND

10. The present incident involves the production of documents responsive to Peru's Document Requests Nos. 7, 8, 20, and 22 [the "**Gramercy Documents**"], as directed by the Tribunal in Annex B of the PO 6.

11. Annex B of PO 6 contains the Tribunal's decisions for the four requests. In each instance, Claimants undertook to produce certain "non-privileged documents" responsive to the request:

- For Document Requests Nos. 7, 8, and 22, the Tribunal took notice of Claimants' undertaking and dismissed the rest of the request submitted by Peru;
- for Document Request No. 20, the Tribunal took notice of Claimants' undertaking and ordered Claimants to produce "Gramercy's annual financial statements and annual balance sheets, as well as audits regarding the Bonds, from 2006 to present".

12. The relevant language of each decision reads as follows:

Document Request No. 7:

"The Tribunal takes notice that Claimants have undertaken to produce "non-privileged corporate documents for certain entities maintaining an indirect interest in the Bonds at issue in the arbitration (see Doc. CE-224A) by virtue of their direct or indirect ownership in GPH, as well as additional non-privileged documents reflecting control of the investment by GFM or its predecessors". Allegations of privilege are governed by PO 3.

As for the rest of the request submitted by Respondent, it is DISMISSED because it does not meet R2".

Document Request No. 8:

"The Tribunal takes notice that Claimants have undertaken to produce "certain non-privileged documents demonstrating the beneficial ownership of the Bonds at issue in the arbitration (see Doc. CE-224A) at dates relevant to the arbitration". Allegations of privilege are governed by PO 3.

As for the rest of the request submitted by Respondent, it is DISMISSED because it does not meet R2".

Document Request No. 20:

“The Tribunal takes notice that Claimants have undertaken to produce “certain non-privileged documents sufficient to demonstrate Gramercy’s valuation of the Bonds at issue in the arbitration (see Doc. CE-224A) for purposes of financial reporting over the relevant period”. Allegations of privilege are governed by PO 3.

As for the rest of the request submitted by Respondent, it meets R1, R2, and R3 and is PARTIALLY GRANTED as narrowed down by the Tribunal: Claimants must produce Gramercy’s annual financial statements and annual balance sheets, as well as audits regarding the Bonds, from 2006 to present”.

Document Request No. 22:

“The Tribunal takes notice that Claimants have undertaken to produce “certain non-privileged periodic statements and newsletters to investors referencing its investment in the Bonds at issue in the arbitration (see Doc. CE-224A) that it produces in the normal course of business”. Allegations of privilege are governed by PO 3.

As for the rest of the request submitted by Respondent, it is DISMISSED because it does not meet R2”.

2. CLAIMANTS’ POSITION

13. Claimants request that the Tribunal issue a confidentiality order subject to which Claimants can produce documents responsive to Peru’s Document Requests Nos. 7, 8, 20, and 22.
14. Regarding Peru’s Document Requests Nos. 7, 8, and 22, Claimants submit that the documents contain sensitive information, including personal data, such as the identity of the Land Bonds’ beneficial owners. This information should not be disseminated outside of these proceedings because:
 - Gramercy owes fiduciary duties to investors to avoid such disclosure;
 - unnecessary public disclosure would prejudice Gramercy’s ability to maintain existing investors or to attract new ones; and
 - the documents comprise commercially sensitive and proprietary information, such as non-public corporate documents relating to the organization, management, and ownership of entities within Gramercy’s fund structure³.
15. As for Peru’s Document Request No. 20 – under which Gramercy must produce balance sheets and other financial statements – the documents contain non-public and proprietary commercial information, including records of financial

³ C-43 and C-46.

performance and asset holdings. Claimants argue that the documents can be commercially harming if made public⁴.

16. Claimants aver that their request complies with PO 3, which entitles a party raising an objection on the grounds of technical or commercial confidentiality to choose, among other alternatives, to request a reasonable confidentiality undertaking from the counterparty⁵.
17. Finally, Claimants have submitted a draft confidentiality order for the Tribunal to adopt⁶.

3. PERU'S POSITION

18. Peru asks the Tribunal to dismiss Claimants' request and order Gramercy to produce immediately the Gramercy Documents in full and without restriction. Peru puts forward the following arguments:
19. *First*, Gramercy is requesting confidentiality restrictions on documents that are relevant and material to key jurisdictional and merits issues, such as documents concerning direct or indirect ownership of its alleged Bonds (Request No. 7); third-party beneficial owners of the Bonds (Request No. 8); financial statements, balance sheets, and audits (Request No. 20) or representations to investors (Request No. 22)⁷.
20. *Second*, as for the standard applicable to this issue, para. 31 of the PO 3 – with express reference to Art. 9.2(e) of the IBA Rules – provides that

“[a] Party may request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality”.

21. Gramercy has not met this high threshold for the following reasons:
 - Gramercy seeks to protect the identity of beneficial owners; however, this is not a compelling ground, because the identity of those who hold an interest in the Bonds is a fundamental issue that must be fully disclosed and considered; in fact, Gramercy has not explained what alleged “fiduciary duties to its investors” require confidentiality⁸;
 - Gramercy also seeks confidentiality for its fund terms, structures and holdings specific to the Land Bonds, an information that supposedly provides a “competitive edge” to the Claimants; yet Gramercy has not articulated what competition it faces since it is the sole fund alleged to have acquired Bonds⁹.

⁴ C-46, p. 2.

⁵ C-46, p. 3. See PO 3, paras. 31 to 33.

⁶ Annex to C-46.

⁷ R-45, p. 1.

⁸ R-45, p. 2.

⁹ R-45, p. 2.

4. TRIBUNAL'S DISCUSSION

22. Claimants request that the Tribunal issue a confidentiality order subject to which they can produce the Gramercy Documents¹⁰. Peru asks the Tribunal to dismiss the request and order Gramercy to produce immediately all the documents in full and without restriction¹¹.

23. The main question the Tribunal must address is whether the Gramercy Documents have a confidential nature, which would prevent Peru from freely using or disseminating them outside this arbitration, once Claimants have produced them to its counterparty.

24. The Tribunal concludes that the Gramercy Documents are confidential.

25. Starting with the applicable standard, neither the UNCITRAL Rules nor the Treaty (which govern the procedural aspects of this arbitration) offer a solution on point. Yet the issue is indeed addressed by the IBA Rules on the Taking of Evidence in International Arbitration (2010) [the “**IBA Rules on Evidence**”], which the Parties agreed to use as a general guidance in these proceedings – as is common practice in international arbitration. Paragraph 63 of the TofA provides that

“[t]he Tribunal may consider but is not bound by the IBA Rules on the Taking of Evidence in International Arbitration (2010) and the IBA Guidelines on Party Representation in International Arbitration (2013)”.

26. Similar language was included in PO 3. Its para. 7 reads as follows:

“The Parties agree to 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”.

27. The IBA Rules on Evidence provide as a general principle that documents produced in an arbitration must be kept confidential and their use shall be restricted to the procedure in which production was ordered. The only requisite, relevant to this discussion, set by Art. 3(13) of the IBA Rules on Evidence is that the documents produced are not “in the public domain”:

“**Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration.** This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration”. [Emphasis added]

¹⁰ C-46, p. 3.

¹¹ R-45, p. 3.

28. In this case, Gramercy avers that the Gramercy Documents are non-public, justifying its demand for a confidential undertaking. In particular, Claimants have stated that the documents relating to the organization, management, and ownership of entities within Gramercy’s fund structure are “non-public corporate documents [...] all of which is commercially sensitive and proprietary information”¹² that “contains both sensitive information about third parties and confidential business information”¹³. As for the records of financial performance and asset holdings, Gramercy argues that they “contain non-public and proprietary commercial information [...] which may be commercially damaging if made public”¹⁴.
29. The Tribunal further notes that there is no specific evidence in the record disproving the “non-public” nature of the Gramercy Documents; *i.e.* proving that the Gramercy Documents are in the public domain. Absent any convincing evidence in this regard, the Tribunal does not find any reason for deviating from the general rule established in Art. 3(13) of the IBA Rules on Evidence, under which the Gramercy Documents qualify as confidential.
30. In addition, other rules involved in this arbitration reinforce this conclusion. The present proceedings, as envisioned by the Parties and the Tribunal in accordance with the Treaty, strike a balance between transparency and confidentiality. The production of documents in particular has not been subjected to express duties of transparency.
31. Paras. 66 and 67 of PO 1 provide that ICSID shall publish on its website a record of the proceedings, together with certain pleadings and documents filed in this arbitration¹⁵. However, fact exhibits and legal authorities submitted to the Tribunal are not included on the list of documents to be published, neither are the documents exchanged between the Parties in the document production phase. The relevant provision (para. 66 of PO 1) includes the following items only:
- “(a) the notice of intent;
 - (b) the notice of arbitration;
 - (c) pleadings, memorials, and briefs submitted to the Tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 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”.

¹² C-43, p. 2.

¹³ C-46, p. 1.

¹⁴ C-46, p. 2.

¹⁵ In accordance with Art.10.21 of the Treaty and para. 69 of the TofA.

32. In line with the above, protecting confidentiality has been one of the Parties' concerns in these proceedings, as shown in paras. 63 to 65 of PO 1 (dealing with data security measures) or paras. 66 to 71 of PO 1, which regulate a procedure to prevent the disclosure of protected information.
33. For all the foregoing, the Tribunal finds, in line with the recommendation of the IBA Rules on Evidence, that non-public documents produced in an arbitration must be kept confidential and must be used only in that arbitration. There seems to be no basis to deviate from such principle.
34. In conclusion, the Tribunal finds that the Gramercy Documents are confidential. The Tribunal and the Parties must keep them so and use them only in connection with this arbitration.

5. DECISION

35. The Tribunal concludes that the Gramercy Documents are confidential.
36. Based on this decision, the Tribunal invites the Parties to confer and enter, **by May 31, 2019**, into a confidentiality agreement for the production of the Gramercy Documents.
37. Should the Parties be unable to reach an agreement, each Party will simultaneously submit **by June 7, 2019**, a draft of the confidentiality order it would like the Tribunal to issue, together with a short explanation in support of the wording suggested.

On behalf of the Arbitral Tribunal

[Signed]

Juan Fernández-Armesto
Presiding Arbitrator