

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. 10**  
**(HEARING ORGANIZATION)**

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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  
Ms. Krystle Baptista

Paris, January 28, 2020

## **I. PROCEDURAL HISTORY**

1. Pursuant to Annex I of Procedural Order No. 1, a pre-hearing organizational call between the Parties and the President of the Tribunal was held by telephone conference on 8 January 2020 (the “**Pre-Hearing Call**”). Participating in the telephone conference were:

Arbitral Tribunal:

Prof. Juan Fernández Armesto, President of the Tribunal  
Mr. Stephen L. Drymer, Arbitrator  
Prof. Brigitte Stern, Arbitrator

Assistant to the President:

Ms. Krystle M. Baptista

ICSID Secretariat:

Ms. Marisa Planells-Valero, Secretary of the Tribunal

On behalf of the Claimants:

Mr. Mark W. Friedman, Debevoise & Plimpton LLP  
Ms. Ina C. Popova, Debevoise & Plimpton LLP  
Ms. Floriane Lavaud, Debevoise & Plimpton LLP  
Mr. Guilherme Recena Costa, Debevoise & Plimpton LLP  
Mr. Luis Bedoya Escurra, Rodrigo, Elias & Medrano Abogados  
Mr. James Taylor, Gramercy Funds Management Llc and  
Gramercy Peru Holdings Llc  
Mr. Thomas Norgaard, Gramercy Funds Management Llc and  
Gramercy Peru Holdings Llc

On behalf of the Respondent:

Mr. Jonathan C. Hamilton, White & Case LLP  
Mr. Francisco X. Jijón, White & Case LLP  
Ms. Mónica del Pilar Guerrero Acevedo, Republic of Peru

2. During the call, the Parties and the Tribunal discussed the draft agenda for the Pre-Hearing Call circulated to the Parties on 13 December 2019, and the Parties joint statement of 27 December 2019 advising the Tribunal of any agreements reached on the agenda open items, as well as their respective positions where no agreement was reached.
3. An audio recording of the Pre-Hearing Call was made and deposited in the archives of ICSID. The recording was made available to the Members of the Tribunal and the Parties on 9 January 2020.
4. 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 and Venue**

1. The Hearing is scheduled to take place from 7 to 14 February 2020 (except on 9 February 2020), at the ICSID facilities in Washington, DC.

### **B. Daily Schedule**

2. Each hearing day shall start at 9.30 a.m. and close at 18.00 p.m. There shall be a lunch break of 1 hour, as well as mid-morning and a mid-afternoon breaks, each of 15 minutes (7 hearing hours per day).
3. The hearing schedule will be applied with a certain flexibility to account for circumstances such as delays caused by technical issues or difficulties with interpretation.
4. The Parties will undertake best efforts to avoid partial hearing of fact or expert evidence on a particular day. If needed, the Tribunal may extend a hearing day by up to 30 minutes or postpone the beginning of a witness's or expert's testimony until the following hearing day to avoid extending a witness's or expert's testimony into an additional day, subject to regulation by the Tribunal.

### **C. Time Allocation**

5. Total number of hours reserved for Hearing: 49 hours.
6. Total number of hours reserved for each party (excluding opening statements – see below). Each Party will have 16.5 hours to allocate for witness and expert examination. Time will be counted against a Party during direct and redirect examination of witnesses or experts it has presented (including expert presentations) and cross-examination of the other Parties' witnesses or experts. (33 hours total).
7. Number of hours reserved for opening statements: 2.5 hours each party. (5.0 hours total). Time allocated for opening statements and not used by a Party shall not be added to that Party's total time.
8. Total number of hours reserved for the Tribunal: 11 hours for time spent by the Tribunal in questioning witnesses and experts and for general housekeeping and other procedural discussions, including 1 hour the last hearing day to discuss administrative and post-Hearing matters.
9. Except as provided for the Parties' opening statements, the Parties' time shall be kept with a chess clock system. The Secretary of the Tribunal will keep the time and report at the end of each morning and afternoon session the total time that each Party has used and the amount it has remaining.

10. 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.
11. Once each Party has utilized its time, if further hearing time remains, the Tribunal may extend time in its discretion, respecting the equality between the Parties.

**D. Order of Proceedings**

12. General Order (sequence of presentations and examinations): As agreed by the Parties, the Order will be as follows: (i) Claimants' fact witnesses, (ii) Respondent's fact witnesses, (iii) Claimants' Experts, and (iv) Respondent's experts.
13. The general structure of the Hearing is indicated as **Annex A**.

**E. Hearing Materials**

**a. Electronic Core Bundle**

14. As agreed by the Parties, there shall be a single Electronic Core Bundle in USB form, to be prepared jointly by the Parties.
15. The Electronic Core Bundle shall contain all pleadings, witness statements, exhibits and legal authorities on file to date, with a unified hyperlinked index. It shall not contain any document not previously filed. The hyperlinked index shall identify with **RED** material that has been designated as "protected information." (See, Treaty, Articles 10.21(2), 10.21(4)). Protected information shall be marked as **[CONFIDENTIAL]** in addition to being identified in **RED**.
16. The Parties will endeavor to distribute the Electronic Core Bundle USB as soon as possible (if feasible, **on or around Tuesday January 28, 2020**) to (i) each Member of the Tribunal (3 copies); (ii) the Assistant to the President, (iii) the Secretary of the Tribunal (2 copies); and (iv) additional copies shall be available at the Hearing for the English court reporter (1 copy), the Spanish court reporter (1 copy) and the interpreters (1 copy).
17. There shall be no hard copy Core Bundle.

**b. Examination Bundles**

18. At the beginning of each witness or expert direct examination, the Party who is putting forward the witness or expert will provide the witness or expert with copies of his or her statements or reports.

19. The Party cross-examining the witness or expert will distribute copies of a witness bundle, containing the exhibits (or relevant extracts) upon which the Party will rely during its examination to: the other Party (2 copies), the witness or expert (1 copy) and to the interpreters (1 copy). No examination bundles are to be provided for the Tribunal, the Assistant to the President of the Tribunal, the Secretary of the Tribunal and the Court Reporters.
20. The fact that an exhibit is not in the examination bundle will not prevent the examiner from using such exhibit during the witness examination.
21. Protected information shall be marked as **[CONFIDENTIAL]** in addition to being identified in **RED**.
22. For any examination by video conference, the Parties will provide a hard copy Examination Bundle to the witness or expert (1 copy), to the other Party (1 copy in Peru and 1 copy in Washington D.C.), and to the interpreters (1 copy).

**c. Demonstrative Exhibits**

23. The rules regarding demonstrative exhibits are set out in Section 25 of Procedural Order No. 1. 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”.
24. The Parties shall number their demonstrative exhibits consecutively as CD-1, CD 2, etc., (for Claimants) or RD-1, RD-2, etc. (for Respondent). Demonstrative exhibits must indicate from which legal authorities or documentary exhibits they are derived.
25. The Parties will provide a hard copy of any Demonstrative Exhibits at the beginning of the respective argument or presentation, to the Tribunal, the assistant to the President and the Secretary of the Tribunal, (5 copies), the other Party (4 copies), the court reporter (1 copy), and the interpreters (1 copy).
26. 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 for purposes of examination shall be regulated by the Tribunal.
27. 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. Witness and Expert Examinations**

28. The Parties have provided the notices of witnesses and experts to be examined in accordance with the Procedural Calendar as amended on November 8, 2019, and of the language in which each witness and expert will testify.
29. The following witnesses will be examined via video conference:
- Claimants' Witnesses:
    - Prof. Mario Castillo Freyre (*Spanish*)
  - Respondent's Witnesses:
    - Ambassador Luis Miguel Castilla (*Spanish*)
    - Mr. Carlos Herrera (*Spanish*)
30. Each Party will make physical arrangements for the examination of its own witness(es). Representatives of both Parties will attend the examinations.
31. The Tribunal does not wish to examine any witness or expert not called by the Parties.
32. Direct testimony of fact witnesses may proceed for a period of up to 15 minutes to introduce the witness and existing testimony, affirm and/or correct written statements, and ask questions regarding submissions made by the opposing Party since the witness submitted his or her last statement, subject to regulation by the Tribunal.
33. Direct testimony expert witnesses may proceed for a period of up to 30 minutes (45 minutes for quantum experts) to introduce the expert and existing testimony, affirm and/or correct written reports, and ask questions regarding submissions made by the opposing Party since the expert submitted his or her last report, subject to regulation by the Tribunal.
34. The rules and procedure concerning the conduct of examinations are established in paragraphs 18 to 24 of Procedural Order No. 1, and as follows:
- a. The questioning of witnesses and experts shall be managed by one questioner.
  - b. Scope of examination:
    - Witnesses and experts giving oral evidence shall first be asked to confirm their statement or report and may then be examined by counsel for the Party that is presenting the witness for "examination-in-chief" which may not introduce new matters not already covered by the written statement or report.

- The witness or expert may then be examined by counsel for the opposing Party (“cross-examination”), under the control of the Arbitral Tribunal. Cross-examination shall be limited to the scope of the written and oral direct testimony of the relevant witness or expert. If a Party wishes to examine a witness or experts on issues outside of the scope of his or her written and oral direct testimony, it shall submit an application to that effect to the Tribunal, which will decide on the request after hearing the other Party.
- Subsequently counsel for the Party offering the witness or expert may examine the witness or expert limited to matters that arose during cross-examination (“redirect examination”).
- Any potential re-cross examination shall be subject to the strict regulation of the Tribunal.
- The members of the Tribunal shall have the right to pose questions during or after the examination of any witness.

c. Sequestration:

- Fact witnesses may not attend the hearing, including the opening argument, before their examination.
- Expert witnesses may attend the hearing at any time, including during opening argument.
- If a witness or expert’s examination is interrupted and must continue on the following session, the witness or expert may not speak or contact any of the Parties, their representatives or counsel until the examination is completed.

d. Examination of Peru’s Quantum Experts:

- As agreed by the Parties, Mr. Kaczmarek will be the leading expert, and will respond in principle, except in cases where he defers the totality of the answer to his partner, Ms. Kunsman. If the answer is provided by Ms. Kunsman, Mr. Kaczmarek shall refrain from adding any comment.

**G. Interpretation**

35. 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.
36. The Parties shall provide **by January 29, 2020** a focused list of key individuals and terms solely for the convenience of the interpreters. This list is not for the Tribunal and does not constitute any admission with respect to relevance or

materiality or with respect to the meaning, interpretation, or implications of any term.

37. 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.

#### **H. Audio Recording and Transcripts**

38. 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.
39. ICSID has made arrangements to have English and Spanish verbatim transcripts available in real-time using Live Note or a similar software during the Hearing.
40. Electronic versions of the transcripts will be provided to the Parties and the Tribunal on a same-day basis.
41. 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.

#### **I. Post-Hearing Briefs**

42. The Tribunal will provide guidance as to the approach and level of detail required for the Post-Hearing Briefs the last day of the Hearing.

#### **J. Statements on Costs**

43. 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.

#### **K. Attendance of the “non-disputing Party”**

44. The Tribunal has not received any communication from the non-disputing Party informing of its intent to make an oral submission during the Hearing within the deadline established in the Procedural Calendar (as amended on 8 November 2019).

#### **L. Transparency**

45. In accordance with Article 10.21(2) of the Treaty, and paragraph 17 of Procedural Order No. 1, the Hearing will 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.



46. The Hearing will be streamed with a one-hour delay for viewing in an overflow room. The Hearing will be streamed in the overflow room only in one language. The Hearing will also be streamed in the English and Spanish language with a one-hour delay on the ICSID Website. An announcement to this effect shall be published on the ICSID Website.
47. During the Hearing, any information designated by one or both of the Parties as being confidential will be protected by muting the video stream and indicating to the viewer(s) that the Hearing is being temporarily held privately. The required mechanics for the Parties to alert the Tribunal about the use of confidential information during the Hearing are addressed in the Protocol attached hereto as **Annex B**.
48. To minimize the number of interruptions, the Parties are invited to organize the topics addressed during their oral statements and witness/expert examinations so that those which involve “protected information” are grouped together, wherever possible.

#### **M. Logistical Details**

49. The logistical details (e.g., confirmation of Hearing room and break-out room, list of Hearing participants, set up details, court reporting arrangements, internet access, audio-visual equipment and catering orders) will be handled through correspondence directly by the ICSID Hearing Organization Team.

[signed]

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Prof. Juan Fernández-Armesto  
Presiding Arbitrator

Place of Arbitration: Paris, France

Date: January 28, 2020