

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. 3
(ON DOCUMENT PRODUCTION)

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, July 12, 2018

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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 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.
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. The following Procedural Order sets out the Tribunal’s decisions after consultation with the Parties.

PROCEDURAL ORDER NO. 3

6. The document production phase, if requested by any Party, shall proceed in accordance with the Procedural Calendar attached as Annex I to the Procedural Order No. 1 [**“PO 1”**].

1. DOCUMENTS

7. 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.

8. The “Definitions” section of the IBA Rules includes the following definition of document:

“‘*Document*’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”.

9. The same definition will be used in this Order and must be used by the Parties in their requests for document production.

2. REQUEST FOR DOCUMENT PRODUCTION

10. The Parties shall submit a Document Production Schedule [**“DPS”**], using the draft model attached hereto as Annex I. For each Document (or category of Document) a single Document Request shall be completed. Document Requests shall be numbered sequentially. The Parties are kindly requested, to adhere to the word limit defined for each cell.

11. The Tribunal recommends that the number of Document Requests per Party does not exceed 25. A Party planning to make more than 25 Document Requests shall announce it two weeks before the submission of the DPS Request (as per the Procedural Timetable), explaining the reasons and need for a number higher than recommended.

12. Each Party will deliver its DPS directly to the counterparty, without copying the Tribunal.

13. Each requested Document must meet the following requirements [**“R”**]:

2.1 “R1”: IDENTIFICATION OF EACH DOCUMENT OR DESCRIPTION OF A NARROW AND SPECIFIC CATEGORY¹

14. The description must be in sufficient detail to identify the requested Document.

15. If the request is for a category of Documents, the following additional requirements must be met:

¹ Art. 3.3 (a) (i) and (ii) IBA Rules.

- a clear and well defined characterization of a narrow and specific category must be provided;
- circumstantial evidence of the putative existence of the category must be marshalled;
- the name of the person, authority or entity which has issued the category of Documents must be provided;
- the initial and the final date of a narrow time period, during which the Documents belonging to the category were issued, must be identified.
- if the category may include email communications, the request shall specify the custodians and search terms for the Documents requested.

16. Any request which does not comply with these requirements shall be rejected *in limine*.

2.2 “R2”: RELEVANT AND MATERIAL²

17. The requesting Party must prove that the Documents are relevant to the case and material to its outcome by identifying the specific paragraph in its submission for which evidentiary support by way of document production is requested.

18. Any request which does not comply with this requirement shall be rejected *in limine*.

19. Documents

- referred to in other Documents that have already been submitted,
- mentioned in witness statements or in expert reports, or
- relied upon by experts to prepare their expert reports (but excluding working papers used by experts),

will, as a general rule, be considered relevant.

20. It is not for a Party to disprove, by way of document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Production with the purpose of disproving the counterparty’s allegations will only be ordered in exceptional circumstances.

2.3 “R3”: NOT IN THE POSSESSION, CUSTODY OR CONTROL OF THE REQUESTING PARTY³

21. The requesting Party must aver that the Documents sought are not in its possession, custody or control, and explain why it assumes that the Documents are in the

² Arts. 3.3 (b) and 9.2 (a) IBA Rules.

³ Art. 3.3 (c) (i) and (ii) IBA Rules.

possession, custody or control of the counterparty. The request will be rejected, if the Documents are located in the premises or under the control of a third party, to which the requesting Party has access.

3. OBJECTIONS

22. The IBA Rules provide for a number of objections to the production of Documents. Further to alleging failure to satisfy any of the previously established requirements (R1 to R3), a Party may object to a request for production in the following cases [“O”]⁴:

3.1 “O1”: LEGAL OR SETTLEMENT PRIVILEGE⁵

23. A requested Party may invoke privilege with regards to Documents prepared by or addressed to counsel, pertaining to the provision of legal advice, and given or received with the expectation that such Documents would be kept confidential.

24. In general, a Document needs to meet the following requirements in order to be granted special protection under legal privilege⁶:

- The Document has to be drafted by a lawyer acting in his or her capacity as a lawyer, or addressed to a lawyer, seeking, discussing or concerning his or her legal advice;
- A relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
- The Document has to be elaborated for the purpose of obtaining or giving legal advice;
- The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.

25. A requested Party may also invoke privilege with regards to Documents prepared by or for a Party or their representative or counsel in anticipation of litigation or arbitration. For the avoidance of doubt, drafts, working papers, or any other documentation created by an expert, and any communications between the expert and a Party or its counsel, for purposes of providing expert evidence in litigation or arbitration, shall be privileged from production and shall not be produced in the arbitration.

26. A requested Party may also invoke privilege regarding Documents prepared in connection with settlement negotiations⁷, including

⁴ Art. 3.5 IBA Rules.

⁵ Art. 9.2 (b) IBA Rules.

⁶ *Vito G. Gallo v. The Government of Canada*, NAFTA-UNCITRAL, Procedural Order No. 3, April 8, 2009, para. 47.

⁷ Art. 9.3 (b) IBA Rules.

- oral or written statements submitted to the other side during negotiations, and
 - internal Documents prepared specifically for negotiations,
 - drafts or final versions of any settlement agreements.
27. In case an objection under O1 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:
- to deliver to the requesting Party a “**Privilege Log**”, drafted in accordance with Annex II, identifying the Documents affected, or
 - to deliver to the counterparty the requested Documents with the confidential information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.
28. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.2 “O2”: PRODUCTION IS UNREASONABLY BURDENSOME⁸

29. The requested Party may object to the production of Documents on the basis that it would impose an unreasonable burden. In making its decision, the Tribunal will weigh time and cost of producing the Documents against their expected evidentiary value. The Tribunal may also reduce the scope of production to avoid unreasonable burden.

3.3 “O3”: LOSS, DESTRUCTION OR INEXISTENCE⁹

30. The requested Party may object to the production of Documents if it shows, with reasonable likelihood, that they have been lost or destroyed, or do not exist for other reasons.

3.4 “O4”: TECHNICAL OR COMMERCIAL CONFIDENTIALITY¹⁰

31. A Party may request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality.
32. In case an objection under O4 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:
- to deliver to the requesting Party a Privilege Log, drafted in accordance with Annex II, identifying the Documents affected, or

⁸ Art. 9.2 (c) IBA Rules.

⁹ Art. 9.2 (d) IBA Rules.

¹⁰ Art. 9.2 (e) IBA Rules.

- to deliver to the counterparty the requested Documents with the confidential information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.
33. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.5 “O5”: SPECIAL POLITICAL OR INSTITUTIONAL SENSITIVITY¹¹

34. A Party may request that a Document should not be produced, alleging grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Tribunal determines to be compelling.
35. In case an objection under O5 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:
- to deliver to the requesting Party a Privilege Log, drafted in accordance with Annex II, identifying the Documents affected, or
 - to deliver to the counterparty the requested Documents with the confidential information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.
36. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

3.6 “O6”: PRODUCTION WOULD AFFECT THE FAIRNESS OR EQUALITY OF THE PROCEDURE¹²

37. Documents will not be ordered to be produced when the Tribunal finds considerations of procedural economy, proportionality, fairness or equality of the Parties that it determines to be compelling.

4. PROCEDURE

4.1 DPS RESPONSE

38. On the date identified in the Procedural Calendar, each Party shall return directly to the counterparty the initial DPS, indicating which requests it will voluntarily comply with, and which requests it rejects [**“DPS Response”**],
- arguing that such requests do not meet any or some of the Requirements R1 through R3; or

¹¹ Art. 9.2 (f) IBA Rules.

¹² Art. 9.2 (g) IBA Rules.

- raising one or more of the Objections O1 through O6.

39. On the same date, each Party shall produce all “**Non-Contested Documents**” which have been requested (together with the DPS Response and the 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). Non-Contested Documents shall only be delivered to the requesting Party, without copying the Tribunal. The requesting Party may marshal any of these Non-Contested Documents as evidence with the following written submissions.

4.2 DPS RESPONSE TO OBJECTIONS

40. On the date identified in Procedural Calendar, the requesting Party shall file a response to the Objections O1 through O6 raised by the counterparty. The requesting Party may withdraw or limit its requests on account of the Objections raised. The requesting Party may additionally object to the extent and appropriateness of the Privilege Log or the redaction of Documents produced by the counterparty.
41. The requesting Party shall formalize its response in the DPS [“**DPS Response to Objections**”].
42. For the avoidance of doubt, the requesting Party shall refrain from replying to the arguments raised by the requested Party regarding Requirements R1 to R3.
43. On that same date, each Party shall submit its DPS (including its own requests, the objections of the counterparty, its own responses to the objections and the counterparty’s Privilege Log) to the Tribunal.

4.3 DECISION ON DPS

44. The Tribunal will endeavour to issue its decision by the date established in the Procedural Calendar. Such decision will be formalized in the requesting Party’s DPS.

4.4 PRODUCTION OF REMAINING DOCUMENTS AND AFFIDAVITS

45. Each Party shall produce all “**Contested Documents**”, in compliance with the decision adopted by the Tribunal, on the date established in the Procedural Calendar. Contested Documents shall only be delivered to the counterparty, without copying the Tribunal. The receiving Party may marshal any of such Contested Documents as evidence with the following written submissions.
46. 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.

47. On the same date, each Party will deliver to its counterparty and to the Tribunal, the following “**Affidavits**”:
- a first Affidavit signed by the chief legal officer of such Party drafted in accordance with Annex III and
 - a second Affidavit signed by the head external legal counsel to such Party drafted in accordance with Annex IV.
48. 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.

5. ALLOCATION OF COSTS

49. In its decision on costs, the Tribunal shall make a special allocation of costs with regard to the Document production exercise, taking into consideration the reasonableness of Requests and Objections, each Party’s willingness to produce the Documents under its control and the relative success of each Party.
50. Parties shall identify separately in their statements of costs those incurred in preparing their DPS Requests and DPS Responses, and those incurred in the search and delivery of requested Documents.

[signed]

Juan Fernández-Armesto
Presiding Arbitrator

Place of Arbitration: Paris, France
Date: July 12, 2018

ARMESTO & ASOCIADOS

ÁRBITROS

Procedural Order No. 3 – Annex I
DOCUMENT PRODUCTION SCHEDULE
Gramercy v. Peru – UNCT/18/2

Requesting Party:

Requested Party:

Document Request No. 1.		
R1: Description of requested Documents (max. 200 words)		
<u>Requesting party</u>	<u>Requested party</u>	<u>Tribunal</u>
Time frame of issuance		
R2: Relevance and materiality (max. 250 words)		
<u>Requesting party</u>	<u>Requested party</u>	<u>Tribunal</u>
Reference in Memorial (paras.)		
R3: Not in possession of requesting party (max. 100 words)		
<u>Requesting party</u>	<u>Requested party</u>	<u>Tribunal</u>
O1: Legal or settlement privilege (max. 250 words)		
<u>Requested party</u>	<u>Requesting party</u>	<u>Tribunal</u>
O2: Production is unreasonably burdensome (max. 200 words)		
<u>Requested party</u>	<u>Requesting party</u>	<u>Tribunal</u>
O3: Loss or destruction (max. 100 words)		
<u>Requested party</u>	<u>Requesting party</u>	<u>Tribunal</u>
O4: Technical or commercial confidentiality (max. 200 words)		
<u>Requested party</u>	<u>Requesting party</u>	<u>Tribunal</u>
O5: Special political or institutional sensitivity (max. 250 words)		
<u>Requested Party</u>	<u>Requesting party</u>	<u>Tribunal</u>
O6: Production affects fairness or equality of procedure (max. 100 words)		
<u>Requested party</u>	<u>Requesting party</u>	<u>Tribunal</u>
Tribunal's Decision		

Add request

PRIVILEGE LOG

Requesting party:

Requested party:

Doc. No.	Date of issuance	Author/Sender	Recipient(s), including any individuals in copy	Brief description of the Document or Category of the Documents	Objection

Gramercy v. Peru – UNCT/18/2

Annex II to Procedural Order No. 3

AFFIDAVIT

My name is , of . This Affidavit is issued in accordance with Procedural Order No. [...] in the arbitration between Gramercy Funds Management LLC and Gramercy Peru Holdings LLC against the Republic of Peru (UNCT/18/2). Terms defined in Procedural Order No. [...] have the same meaning when used in this Affidavit.

I declare that, to the best of my knowledge and belief:

- (i) Requested party has carried out a reasonable search of the Documents which it was ordered or voluntarily undertook to produce;
- (ii) No Document which Requested party was ordered or voluntarily undertook to produce has been destroyed or concealed;
- (iii) All Documents for which privilege has been claimed, or which have been withheld based on technical or commercial confidentiality, or special political or institutional sensitivity, meet the requirements established in Procedural Order No. [...];
- (iv) Requested party has produced all Documents which it was ordered or voluntarily undertook to produce (except for the privileged or confidential Documents duly identified in the Privilege Log).

Date:

AFFIDAVIT

My name is , external legal counsel of . This Affidavit is issued in accordance with Procedural Order No. [...] in the arbitration between Gramercy Funds Management LLC and Gramercy Peru Holdings LLC against the Republic of Peru (UNCT/18/2). Terms defined in Procedural Order No. [...] have the same meaning when used in this Affidavit.

I declare that:

- (i) I have explained to the Requested party (a) its obligation not to destroy or conceal any Document potentially relevant to the above-referred arbitration, and (b) the necessity of producing, and the potential consequences of the failure to produce, any Document which Requested party has been ordered or voluntarily has undertaken to produce;
- (ii) I have advised Requested party to carry out a reasonable search, and to produce all Documents it was ordered or it voluntarily undertook to produce (except for the privileged or confidential Documents duly identified in the Privilege Log);
- (iii) To the best of my knowledge and belief, and after due enquiry, all Documents for which privilege has been claimed, or which have been withheld based on technical or commercial confidentiality, or special political or institutional sensitivity, meet the requirements established in Procedural Order No. [...].

Date:
