INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IC Power Ltd and Kenon Holdings Ltd

v.

Republic of Peru

(ICSID Case No. ARB/19/19)

PROCEDURAL ORDER NO. 2
Tribunal's Decision on Respondent's Request for Disclosure of Documents

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Members of the Tribunal
Prof. Luca G. Radicati di Brozolo, President of the Tribunal
Mr. David R. Haigh, Arbitrator
Mr. Eduardo Siqueiros T., Arbitrator

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

May 6, 2020

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I. Introduction

1. This Procedural Order decides on Respondent's requests for disclosure ("**Requests for Disclosure**") by Claimants of:

   (a) the identity of the investors in Tenor Capital Management Company, LP ("**Tenor**"),[1] which is the entity that controls Claimants' third-party funder, Lomo Investment, LP ("**Lomo**"); and

   (b) the operative terms of the funding agreement between Claimants and Lomo (the "**Funding Agreement**").

II. Relevant Procedural History

2. On July 17, 2019, before the constitution of the Tribunal, Respondent requested disclosure by Claimants of certain information concerning *(i)* their third-party funding arrangements for this arbitration and *(ii)* their corporate structure and business operations. Such information was alleged to be necessary to assess "*potential arbitrator conflicts of interest*" and Respondent's rights under the denial of benefits clause (the "**Denial of Benefits Clause**")[2] of Article 10.15 of the Free Trade Agreement between Singapore and Peru ("**FTA**" or "**Treaty**").[3]

3. On August 7, 2019, Claimants replied[4] that *(i)* despite having no obligation to disclose information concerning the Funding Agreement, "*in the spirit of full transparency and*

[1] Respondent's prayers for relief broadly refer to *"all persons having an economic interest in this arbitration, including Tenor's investors*" (see Respondent's letter to ICSID of April 3, 2020, p. 5). Respondent, however, has not identified persons other than Tenor's investors potentially having "*an economic interest*" in this case. Accordingly, in deciding on the Request for Disclosure, the Tribunal will focus on the information concerning those investors Section IV (a) below).

[2] Pursuant to Article 10.15, a party to the FTA may deny the benefits of chapter ten of the FTA to an investor that is an enterprise of the other party and to its investments where the enterprise is "*owned or controlled by persons of a non-Party, and has no substantive business operations in the territory of the other Party*", Exhibit **C-1**.

[3] Respondent's letter to ICSID of July 17, 2019, Exhibit **R-1**, pp. 1-2.

[4] Claimants' letter to ICSID of August 7, 2019, Exhibit **R-2**, p. 2.

cooperation" they accepted to reveal that the funding was provided by Lomo, an "*entity ultimately controlled by*" Tenor and *(ii)* the information concerning Kenon's corporate structure and its (or IC Power's) business operations in Singapore was publicly available since Kenon is listed on the New York Stock Exchange.

4. On September 22, 2019, Respondent replied that it was unsatisfied with such information and reserved its right to raise its requests with the Tribunal once constituted.[5]

5. Having reiterated its disclosure requests at the Tribunal's first session on January 31, 2020, as directed by the Tribunal on February 28, 2020, Respondent submitted its Requests for Disclosure, in which it asserted that Claimants' disclosures on the third-party funding were insufficient and that "*further disclosure both about the funder itself and conditions of its investment [was] necessary to preserve the integrity of the proceeding*"[6] and renewed its request for disclosure of information on Kenon's corporate structure and Claimants' activities in Singapore, which it deemed relevant for the Denial of Benefits Clause.[7]

6. In their response to Respondent's Requests for Disclosure of March 18, 2020 ("**Response**"), Claimants *(i)* confirmed that "*Lomo is a Limited Partnership managed and controlled by Tenor, whose only members are the funds that are also managed by Tenor*" and that no other capital providers are involved in the financing of their claims,[8] but refused to provide further information on the grounds that the request was overbroad and baseless[9] and *(ii)* rejected the request on Kenon's corporate structure and Claimants' activities in Singapore on the grounds that the information is already in Respondent's "*possession and/or is publicly available*".[10]

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[5] Respondent's letter to ICSID of September 22, 2019, Exhibit **R-3**.

[6] Requests for Disclosure, p. 2. Initially, by the Requests for Disclosure Claimants also sought information concerning "*all entities in the ownership and/or control chain between Lomo and Tenor*" and any entities "*who are significant investors*" in Lomo (Request for Disclosure, p. 3). In the Reply, however, Respondent stated that, based on Claimants' assertions in its Response about the ownership and control of Lomo, it was prepared to consider its request satisfied (Reply, footnote 3).

[7] Requests for Disclosure, p. 6.

[8] Response, p. 3.

[9] Claimants' position is described in detail in Section III (b) below.

[10] Response, p. 9. Claimants pointed out, in particular, that Kenon, as a publicly traded company, is subject to the regulations of the US Security and Exchange Commission, which require it to disclose: (i) the identity of all shareholders owning 5% or more of the shares of the company, as well as the citizenship or place of organization of such shareholders; (ii) information regarding entities having a significant influence over the company (*i.e.* entities

7. In its reply to the Response of April 3, 2020 ("**Reply**"), Respondent insisted on its request for disclosure of Claimants' third-party funding arrangements but "*suspended*" those for information on Kenon's corporate structure and Claimants' activities in Singapore[11] in light of Claimants' explanations.

8. In their rejoinder to the Reply of April 13, 2020 ("**Rejoinder**"), Claimants again called for the dismissal of all Respondent's pending requests for disclosure.[12]

III. The Parties' Positions

(a) Respondent

9. Respondent alleges that the information on Lomo and Tenor provided by Claimants so far is insufficient for "*purposes including conflicts checks*"[13] and requests disclosure of *(i)* the identity of Tenor's investors and *(ii)* the operative terms of the Funding Agreement.[14]

10. Disclosure of the identity of Tenor's investors is deemed necessary in order to allow anyone involved in the arbitration, including the Tribunal and its Assistant, to assess potential conflicts of interest. Respondent relies on the IBA Guidelines on Conflicts of Interest ("**IBA Guidelines**"),[15] which equate a third-party funder to the funded party and thus require disclosure of the funder's identity because it has "*a direct economic interest*" in the arbitration.[16] Since Tenor's investors have an "*economic interest in the award*", their identity must be disclosed too.[17]

11. For Respondent the identity of Tenor's investors is relevant because they stand to benefit financially from a potential award in favor of Claimants. Claimants' position that they do

with the power to participate in the company's financial and policy decisions, without exercising control over those policies); and (iii) information regarding the operations carried out by the company.

[11] Reply, pp. 4-5.

[12] Claimants' letter to ICSID of April 13, 2020.

[13] Reply, p. 2.

[14] Reply, p. 5. See also Requests for Disclosure, p. 3.

[15] Requests for Disclosure, pp. 2-3; Reply, p. 2.

[16] IBA Guidelines, General Standards 6(b) and 7(a).

[17] Requests for Disclosure, pp. 2-3; Reply, p. 2.

not possess the requested information emphasizes the problems of third-party funding, which allows a party to be involved in the arbitration even though it can "*hold itself out*" of the Tribunal's reach. It is "*not Respondent's or the Tribunal's problem*" if Claimants' funder is unable to disclose information necessary to ensure the impartiality and independence of the Tribunal Members.[18]

12. Respondent also requests disclosure of the terms and conditions of the Funding Agreement, which it would keep confidential, because it is entitled to know "*with whom [it] is actually dealing in this arbitration*"[19] and such disclosure is necessary to make decisions "*about how to handle important aspects of this dispute*",[20] such as whether to request a bifurcation, settle the claim or abandon the proceedings. If the Funding Agreement gives the funder control over such issues, it would be pointless for Respondent to discuss them with Claimants rather than directly with the funder.[21] The argument that those eventualities would never arise misses the point.[22]

13. Finally, for Respondent disclosure of the Funding Agreement is also necessary to assess the need for an application for security, as Claimants' recourse to third-party funding indicates a potential lack of the financial resources to comply with an adverse award.[23] Respondent's risks in such a scenario would be mitigated if the Funding Agreement imposes on the funder an obligation to bear all or part of Claimants' costs under such an award.[24]

[18] Reply, p. 2 and footnote 4.

[19] Reply, p. 3.

[20] Requests for Disclosure, p. 3.

[21] Response, pp. 5-6.

[22] Reply, p. 3.

[23] Reply, p. 3. See also Requests for Disclosure, p. 4.

[24] Reply, p. 3. See also Requests for Disclosure, p. 4. Respondent also argued that the Funding Agreement is important to determine whether funding is provided on a non-recourse basis, thus amplifying the funder's economic interest in this arbitration (Requests for Disclosure, pp. 3-4). This argument is moot in light of Claimants' confirmation that funding is provided on a non-recourse basis (Response, pp. 4-5).

(b) Claimants

14. Claimants request the dismissal of both Requests for Disclosure on the grounds that the information disclosed on Lomo and Tenor is not only sufficient, but even "*beyond that which is necessary*" for conflict checks.[25]

15. As to the identity of Tenor's investors, Claimants maintain that Respondent's concerns over the Tribunal's impartiality and independence "*ring false*".[26] Despite knowing the existence of the Funding Agreement and the identity of the funder, Respondent failed to include either Lomo or Tenor in the Parties' joint list of entities to be considered by the President of the Tribunal for potential conflicts of interest. Claimants note also that none of the Tribunal Members declared a conflict after receiving the information on Claimants' funder.

16. In any event, Claimants argue they have no obligation under the ICSID Rules or the Treaty to disclose the identity of their capital provider.[27] The request for information on Tenor's investors runs counter to the "*consensus position*" of international tribunals and commentators that, "*absent exceptional circumstances, no other information except the existence and identity of third-party funders [is] required for the purposes of analyzing conflicts of interest*".[28] Claimants add that Respondent has mentioned no authority in support of a broader disclosure.[29]

[25] Rejoinder, p. 4.

[26] Response, p. 2; Rejoinder, p. 1.

[27] Response, footnote 3.

[28] Response, p. 2 mentioning the *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018* ("**ICCA-Queen Mary Report**"), **Annex 15**, p. 95; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 10, December 17, 2012, **Annex-8**, §§ 79-80; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 13, February 21, 2013, **Annex-9**, § 8; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No. 10, January 11, 2016, **Annex-13** §§ 80-82; *ICSID's Working Paper #3 on the Proposals for Amendment of the ICSID Rules* (ICSID Working Paper #3), August 2019, available at: https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf., p. 295, and *ICSID's Working Paper #4 on the Proposals for Amendment of the ICSID Rules* (ICSID Working Paper #4), February 2020, available at: https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf, p. 299. See also Claimants' letter to ICSID of April 13, 2020, p. 2.

[29] Rejoinder, p. 3.

17. Claimants also rely on the decision in *Suez et al v. Argentina* on the challenge against Professor Kaufmann-Kohler for her role as director of a bank with investments in certain claimants,[30] which found that the arbitrator's relationship with those entities was too remote to raise a conflict because, among other things, she had no control over the bank's investments. Applying that rationale in this case, the identity of Tenor's investors must be considered irrelevant, as they have no control over Tenor's investments.[31]

18. Claimants also call for the rejection of Respondent's request because *(i)* Claimants do not have the information sought, *(ii)* the Tribunal has no power to compel Tenor, a third party, to disclose that information and, in any event, *(iii)* US regulations prevent Tenor from disclosing it.[32] A party's decision to resort to third-party funding cannot be influenced by the funder's ability to meet future requests for disclosure.[33]

19. As to the terms and conditions of the Funding Agreement, Claimants reiterate that "*financing terms are very clearly not relevant to determining conflicts of interest*"[34] and their disclosure is not warranted by Respondent's additional arguments. Concerns over the identity of Respondent's "*true counterparty*" in the arbitration are baseless, given that the rights and claims under the Treaty belong not to a third party, but to Claimants who are the only entities Respondent is dealing with in this case.[35]

20. In response to the argument that disclosure is necessary to understand the funder's control over "*key steps of the arbitration*", such as bifurcation, settlement or withdrawal of the claims,[36] Claimants note that *(i)* the Parties have agreed that there will be no bifurcation; *(ii)* Respondent has shown no interest in a settlement, but Claimants would be glad to "*sit[…] on the other side of the table*" if it wished to discuss one now and *(iii)* Claimants have no intention of withdrawing their claims.[37] In any event, Respondent is not entitled

[30] Response, p. 3.

[31] Response, p. 4.

[32] Rejoinder, p. 2. See also Response, pp. 3-4.

[33] Rejoinder, footnote 6.

[34] Response, p. 4, making reference also to the ICCA Queen Mary Report, **Annex-15**, p. 118.

[35] Rejoinder, p. 5.

[36] See § 12 above.

[37] Rejoinder, p. 5. See also Response, pp. 5-6.

to know whether, under the Funding Agreement, Claimants have to inform or consult the funder in respect of such procedural steps.[38]

21. Finally, Claimants contest Respondent's need to understand whether their funder is committed to satisfy an adverse award against Claimants in order to determine whether an application for security is warranted.[39] First, there is no basis for a request of security for a hypothetical counterclaim because Respondent cannot bring a counterclaim under the Treaty.[40] Second, it is wrong that the terms of a third-party funding agreement may be relevant to a determination of security for costs. International tribunals[41] have consistently held that applications for security can be granted only exceptionally, where a party is shown to be unwilling and unable to satisfy a potential adverse award and the existence and terms of third-party funding agreements are *per se* irrelevant for the establishment of those circumstances and need not be disclosed. In any event, Respondent does not contest that Claimants are solvent and have the resources to meet a potential adverse award.[42]

IV. Analysis

22. The Tribunal's authority to make disclosure orders is governed by Article 43 of the ICSID Convention and Rule 34(2) of the ICSID Rules, which provide respectively as follows:

> Article 43
>
> Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,
>
> (a) call upon the parties to produce documents or other evidence, and
>
> […]

[38] Rejoinder, p. 5.

[39] Rejoinder, p. 5.

[40] Response, p. 6.

[41] *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, **Annex-11**; *EuroGas In. and Belmont Resources Inc v. Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No 3, June 23, 2015, **Annex-12**; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No 10, January 11, 2016, **Annex-13**. See also the case law cited in footnote 29, p. 8 of the Response.

[42] Response, pp. 7-8; Rejoinder p. 6.

Rule 34(2)

The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts;
[…]

23. Moreover, arbitral tribunals have held that they have an inherent power to order disclosure of documents or information whenever necessary to safeguard a party's rights or the integrity of the arbitral proceedings.[43]

24. In light of the above, the Tribunal considers that it has authority to make disclosure orders of the nature requested by Respondent, if needed to preserve the latter's rights or the integrity of the proceedings. To decide whether issuing such orders is justified in the circumstances, the Tribunal will address first the Request for Disclosure of the identity of Tenor's investors (Section IV (a)), and then the one concerning the terms and conditions of the Funding Agreement (Section IV (b)).

(a) The Request for Disclosure of the Identity of Tenor's Investors

25. Respondent requests disclosure of the investors in Tenor in order to allow the Members of the Tribunal and the Assistant to assess potential conflicts of interest and thus to preserve the integrity of the proceedings.

26. The Tribunal agrees with Respondent that third-party funding may be a source of conflicts of interest and that, therefore, parties must disclose the name of their funders. Indeed, international tribunals have ordered disclosure of that information in order to preserve the

[43] See *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016 **Annex 13**, § 79; ICCA Queen Mary Report, **Annex 15**, pp. 81; 84. See also *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4, February 27, 2020, § 104; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3, April 12, 2017, § 44-45; *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3, June 12, 2015, § 6; E. DE BRABANDERE, '*Mercantile Adventurers'? The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, in Grotius Centre Working Paper 2016/059 IEL, p. 8.

integrity of the arbitration.[44]

27. The Tribunal, however, believes that, absent special circumstances, the parties have no duty to disclose information on other entities or individuals connected with the funder, such as, in this case, the investors in Tenor.

28. Claimants have drawn the Tribunal's attention to several authorities showing that disclosure of the funder's identity is sufficient for assessing conflicts of interest. For instance, the ICCA-Queen Mary Report indicates that, absent exceptional circumstances, there is no requirement to disclose other information than the identity of the third-party funder,[45] defined as the party which "*enters into [the funding] agreement*".[46] Recent treaties dealing with third-party funding contain similar language. For instance, the *Comprehensive Economic and Trade Agreement between Canada and the European Union* (CETA) only requires disclosure of "*the name and address of the third-party funder*",[47] i.e. the entity or individual that "*enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings*".[48] Finally, the ICSID Working Papers have endorsed the position that only the existence of funding and the name of the funder are relevant for assessing conflicts of interest.[49] These authorities, which strike a fair balance between protecting procedural integrity and avoiding overbroad disclosures, show that information on the funder's identity is generally sufficient for assessing conflicts.

29. By contrast, Respondent has provided no authority for its request for a broader disclosure. It only relies on the IBA Guidelines, which, actually, support Claimants' position. The IBA Guidelines require parties to disclose the identity of any third party having a "***direct***

[44] See, for instance, *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No. 10, January 11, 2016, **Annex-13**, §§ 70 and 79.

[45] ICCA-Queen Mary Report, **Annex-15**, p. 95.

[46] ICCA-Queen Mary Report, **Annex-15**, Principle A.3 (emphasis added).

[47] Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), signed on October 30, 2016; provisionally in force since September 21, 2017, Art 8.26(1) (available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/).

[48] *Ibid*, Art. 8.1 (emphasis added).

[49] *ICSID Working Paper #3 on the Proposals for Amendment of the ICSID Rules* (ICSID Working Paper #3), August 2019, available at: https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf., p. 295 ; *ICSID Working Paper #4 on the Proposals for Amendment of the ICSID Rules* (ICSID Working Paper #4), February 2020, available at: https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf, pp. 294-295.

economic interest" in the dispute.[50] It is on that basis that they must disclose the identity of a third-party funder. Investors in the entities controlling a third-party funder, such as Tenor's investors, cannot be considered to have a *direct* economic interest in the award. In this case, for instance, there are at least three entities, *i.e.* Tenor, Lomo and Claimants themselves, separating those investors from any money that may be awarded by the Tribunal. It follows that, rather than providing a basis for Respondent's Requests for Disclosure, the IBA Guidelines undermine it.

30. As mentioned, disclosure of further information besides the funder's identity may be justified in exceptional circumstances, for instance if the capital provider interposes an SPV between itself and a party to proceedings. In such a case the other party and the arbitral tribunal are entitled to know who stands behind that vehicle since, otherwise, funders wanting to conceal their identity would be able to do so very easily. However, Respondent has provided no evidence that exceptional circumstances exist in this case justifying not only the disclosure of the funder's controlling entity, but also that of investors in that entity.

31. In light of the above, the Tribunal sees no reason to order the disclosure requested by Respondent. Claimants' disclosure of the name of both the funder, *i.e.* Lomo, and even of its controlling entity, *i.e*. Tenor, is sufficient to safeguard the integrity of the proceedings. The Tribunal Members and the Assistant have already confirmed that they have no relationship with those entities.

32. For the sake of completeness, the Tribunal notes that, in any event, it would have been unable to order disclosure of the identity of Tenor's investors. It is trite that arbitral tribunals can only order disclosure by a party that has the relevant information[51] or can

[50] IBA Guidelines, General Standard 6(b) and 7(a) (emphasis added).

[51] Many institutional arbitration rules include express provisions to this effect. See, for instance: LCIA Arbitration Rules (2014), Art. 22.1(iv) granting the arbitral tribunal the power to "*to order any party to make any documents, goods, samples, property, site or thing* ***under its control*** *available for inspection by the Arbitral Tribunal*" and Art. 22.1(v), granting the arbitral tribunal the power "t*o order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents* ***in their possession, custody or power*** *which the Arbitral Tribunal decides to be relevant*" (emphasis added); SIAC Rules (2016), rule 27(f), granting the arbitral tribunal the power to "*order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document* ***in their possession or control***" (emphasis added). See also IBA Rules of on the Taking of Evidence, Article 3.7, granting the arbitral tribunal the power to order a party to produce "*any requested Document in its* ***possession, custody or control***" (emphasis added).

obtain it by making reasonable enquiries.[52] The Tribunal has no grounds to doubt Claimants' assertion that they have no information regarding Tenor's investors[53] and are unable "*to compel*" Tenor to disclose it.[54] Against this background, the Tribunal could not have ordered Claimants to produce information on Tenor's investors even if it had considered it relevant.

(b) The Request for Disclosure of the Terms and Conditions of the Funding Agreement

33. In support of the request for disclosure of the Funding Agreement's terms and conditions, Respondent contends that those terms and conditions would *(i)* reveal Respondent's true opposing party in this arbitration, *i.e*. who is "*actually sitting across the table*",[55] *(ii)* show whether the funder controls Claimants' essential procedural decisions and whether it would make sense for Respondent to engage in discussions with them, rather than the funder, over "key aspects" of the proceedings; and *(iii)* help Respondent determine the need to apply for security.[56]

34. None of these justifications appears relevant to the Tribunal. As to the first one, insofar as Claimants retain, as they say they have done,[57] their rights and claims under the Treaty, *i.e.* insofar as they do not assign them to third parties, there can be no doubt that they are, from both a procedural and a substantive point of view, Respondent's true opposing parties, *i.e.*

[52] See IBA Rules of on the Taking of Evidence, Article 3.9, which expressly regulates the request for disclosure from a person or entity who is not a party to the arbitration and that requires each party to the arbitration to take "*whatever steps are legally available*" to obtain the documents; and Article 3.10 which grants the arbitral tribunal the power to "*request any Party to produce documents*" or to "*request any Party to **use its best efforts** to take […] any step that it considers appropriate to obtain Documents from any person or organisation*" (emphasis added). With specific reference to conflicts of interest issues, see also IBA Guidelines, General Standard 7(b), according to which: "*In order to comply with General Standard 7(a), a party shall provide **any information already available to it** and shall perform a **reasonable search** of publicly available information*" (emphasis added).

[53] Response, p. 4. See also Rejoinder, p. 2.

[54] Response, p. 4. The Tribunal agrees with Respondent that a party "*should not secure funding from an entity that is unable to provide*" relevant information (Reply, footnote 4). But, even if the Tribunal had considered the identity of the funder's investors a relevant information to disclose, Claimants could not have anticipated that at the time it entered into the Funding Agreement. As far as the Tribunal is aware, there is not a single precedent discussing the relevance of that type of information or ordering its disclosure.

[55] Requests for Disclosure, p. 2. See also Reply, p. 3.

[56] See §§ 12-13 above.

[57] Response, p. 6.

those "*actually sitting across the table*". Any hypothetical obligation under the Funding Agreement to consult the funder prior to disposing of those rights and claims does not change this. The first justification adduced in support of disclosure of the Funding Agreement is therefore unavailing.

35. The same holds true for the second justification. As clarified above,[58] a disclosure order is only justified if instrumental to preserving a party's right or the integrity of the proceedings. Claimants' potential obligation to inform or consult the funder before making relevant decisions – including on "*key aspects*" of the proceedings, such as those mentioned by Respondent[59] – creates no conceivable prejudice for Respondent, nor does it threaten the integrity of the proceedings. In fact, it is relatively common for a party's decisions to be influenced or controlled by entities not directly involved in the arbitration or litigation. For instance, a party to proceedings may have to consult its parent company or other entities of the group to which it belongs before taking relevant procedural steps. It does not follow that the other party is entitled to have access to any internal arrangements between those entities or to obtain information about the relevant decision-making process. Hence, not even Respondent's second ground for its Request for Disclosure has merit.

36. The third justification for the request – that Respondent needs to know the Funding Agreement's terms in order to assess whether to apply for security – is equally unpersuasive.

37. The Tribunal believes that, as part of its broader right to obtain whatever information is necessary to preserve its rights, Respondent is in principle entitled to information relevant to apply for a security. However, the Funding Agreement's terms and conditions are not relevant for such an application. ICSID tribunals have consistently held that security for costs can be granted only in exceptional circumstances, when a party may be unwilling and unable to comply with an adverse award,[60] and that the existence of third party funding

[58] See §§ 22-24 above.

[59] See § 12 above.

[60] See *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, **Annex-11**; *EuroGas Inc. and Belmont Resources Inc v. Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No. 3, June 23, 2015, **Annex-12**; See also *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No. 10, January 11, 2016, **Annex-13**; *Guaracachi America, Inc and Rurelec v. The Plurinational State of Bolivia*, PCA Case No 2011-17, Procedural Order No. 14, March 11, 2013, **Annex-10**; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6) Tribunal's Decision on Respondent's

does not *per se* justify a security for costs.[61] The Tribunal sees no reason why the same reasoning should not apply also to security for claims (nor has Respondent provided any reason for making a distinction). If the funded party is impecunious, then the funding terms and conditions, and particularly the existence of a funder's commitment to satisfy an adverse award, may be relevant to assessing the ability to meet an adverse award. But Claimants have expressly confirmed, without being challenged by Respondent, that they are solvent, going concerns and have sufficient resources to fund this arbitration.[62] As is not unusual, they have resorted to third-party funding only for corporate finance reasons.[63] Since, as things stand, there is no evidence that Claimants might be unable to meet their obligations under a future award, a disclosure of the Funding Agreement is not warranted.

38. In light of the above, the Tribunal concludes that there is no basis to uphold Respondent's Request for Disclosure of the Funding Agreement's terms and conditions.

Application for Security for Costs, October 14, 2010, **Annex-5**; *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 on Provisional Measures Concerning Security for Costs, May 3, 2012, **Annex-6**; *Libananco Holdings Co. Limited v. The Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, June 23, 2008, **Annex-4**.

[61] See in particular *EuroGas Inc. and Belmont Resources Inc v. Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No. 3, June 23, 2015, **Annex-12**, § 123: "*The Tribunal is of the view that […] third party funding – which has become common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order for security for costs*". For similar reasoning see also *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, January 11, 2016, **Annex-13**, § 69-82; *Guaracachi America, Inc and Rurelec v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, March 11, 2013, **Annex-10**, § 7.

[62] Response, p. 7; Rejoinder, p. 6.

[63] Response, p. 7.

V. Decision

39. For the reasons set out above, the Tribunal:

a. Rejects Respondent's request for disclosure of the identity of the investors in Tenor Capital Management Company, LP;

b. Rejects Respondent's request for disclosure of the operative terms of the funding agreement between Claimants and Lomo Investments LP; and

c. Reserves its decision on the costs of this interlocutory phase for a later stage of the proceedings.

[signed]

Prof. Luca G. Radicati di Brozolo
President of the Tribunal