

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

**PROCEDURAL ORDER NO. 5
CONCERNING THE RESPONDENT'S REQUESTS FOR DISCLOSURE**

Members of the Tribunal

Dr. Inka Hanefeld, President of the Tribunal
Mr. David R. Haigh KC, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana

Assistant to the Tribunal

Ms. Charlotte Matthews

9 December 2022

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The Tribunal hereby issues the following Procedural Order No. 5 to address the Respondent's requests for disclosure of certain information set out in its letters dated 6 October 2022 and 4 November 2022.

In **Section A.**, the Tribunal sets out in chronological order the procedural background relating to the Claimant's international legal expert Prof. Christoph Schreuer (**Prof. Schreuer**) and the Claimant's party representatives, including specifically Mr. David Kay (**Mr. Kay**).

In **Section B.**, the Tribunal sets out the Parties' positions on the Respondent's disclosure requests relating to the Claimant's party representatives and Prof. Schreuer.

In **Section C.**, the Tribunal sets out its considerations and decisions on the Respondent's requests for disclosure relating to the Claimant's party representatives and Prof. Schreuer.

A. Procedural Background

1. On 29 June 2022, the Respondent advised that the family circumstances of its international legal expert Prof. Jorge Viñuales (**Prof. Viñuales**) would not allow him to travel to Washington D.C. for the Hearing scheduled to take place in Washington D.C. from 1 September until 15 September 2022.
2. On 11 July 2022, the Respondent requested that the Tribunal allow Prof. Viñuales to appear and be examined by videoconference at the Hearing, and to issue appropriate directions to that effect.
3. On 12 July 2022, the Tribunal advised that absent any objections by the Claimant, at the latest by 15 July 2022, it would decide that Prof. Viñuales' examination at the Hearing be held by videoconference.
4. On 15 July 2022, the Claimant confirmed that it had no objection to Prof. Viñuales' testimony being conducted remotely and advised that its international legal expert Prof. Schreuer would also have to testify remotely due to a recent medical order advising him not to undertake long distance travel in the foreseeable future.
5. On 18 July 2022, the Tribunal confirmed that both Prof. Viñuales and Prof. Schreuer would be examined at the Hearing by videoconference.

6. On 29 July 2022, the Parties provided a first version of their lists of representatives attending the Hearing. Mr. Kay was listed among others in the Claimant's list. His function was described by the Claimant as "*Party Representative*".
7. On 31 August 2022, *i.e.* one day prior to the commencement of the Hearing, the Claimant advised the Tribunal that Prof. Schreuer "*continue[d] to suffer from serious COVID-19 after effects, including difficulty breathing and concentrating*" and that he was "*thus unable to prepare for or testify at the Hearing*" as "*his doctor has recommended that he refrain from working for the foreseeable future.*"¹ The Claimant requested the Tribunal to direct that neither international legal expert, *i.e.* neither Prof. Schreuer for the Claimant, nor Prof. Viñuales for the Respondent, would testify at the Hearing as originally foreseen in Procedural Order No. 4 on the organization of the Hearing and/or that both Parties would have an additional 30 minutes for their opening arguments to further elaborate upon international legal issues.
8. On the same day, the Tribunal indicated that it would provide the Respondent with an opportunity to comment on the Claimant's request of 31 August 2022 at the opening of the Hearing on 1 September 2022. The Tribunal advised that unless the Respondent expressly agreed that both Parties would have an additional 30 minutes for their opening statements, the Tribunal would limit the Parties' opening statements to no more than 3 hours, as foreseen in Section 15 of Procedural Order No. 4.
9. From 1 to 15 September 2022, the Hearing took place in Washington D.C.
10. On the first day of the Hearing, *i.e.* on 1 September 2022, the Tribunal *inter alia* heard the Parties' comments on the Claimant's request to not have any international legal expert testify. In essence, the Respondent submitted that the testimony of Prof. Viñuales should not be affected by Prof. Schreuer's inability to testify and that not hearing Prof. Viñuales would cause serious prejudice to the Respondent's right of defense.² In turn, the Claimant submitted that hearing one international legal expert and not the other would create an

¹ Email from the Claimant to the Tribunal dated 31 August 2022.

² Hearing Transcript, Day 1, pp. 12-13.

- imbalance.³ On the same day, the Tribunal decided to hear Prof. Viñuales as originally foreseen, *i.e.* on day 6 of the Hearing.
11. In the subsequent days, the Hearing proceeded with the hearing of the fact witnesses and experts. On day 6 of the Hearing, *i.e.* on 8 September 2022, Prof. Viñuales testified by videoconference and was examined by the Parties and the Tribunal.
 12. In the morning of day 7 of the Hearing, *i.e.* on 9 September 2022, the Claimant submitted a proposal for the disqualification of the President of the Tribunal asserting *inter alia* that the President failed to disclose a relationship with the Respondent's international legal expert and allowed an imbalanced presentation of the Parties' international legal experts by hearing only one of the Parties' international legal experts.
 13. On the same day, the Hearing was suspended.
 14. The Claimant's proposal to disqualify the President was rejected on 11 September 2022 and the proceeding resumed the same day.
 15. On 12 September 2022, the Hearing continued and further experts were examined.
 16. On day 9 of the Hearing, *i.e.* on 14 September 2022, the Respondent indicated that it had come to its attention that Mr. Kay, listed as one of the Claimant's party representatives, seemed to be at least until months prior to the Hearing and within an overlapping time with the proceedings, the Executive Chairman and Chief Investment Officer of Liti Capital, a Swiss fintech private equity company providing *inter alia* litigation financing (**Liti Capital**) and that he presented himself as one of the most successful and in-demand litigation finance strategists in the litigation finance industry.⁴ In essence, the Respondent asserted that any indication that there would be third-party funding of the claim was a sensitive issue. The Respondent requested the Tribunal to order the Claimant to provide information about Mr. Kay's involvement with the Claimant, his connection to I Squared Capital, Liti Capital or any other third-party funder, and to advise whether there is any direct or indirect funding of the claim.⁵ The Tribunal offered the Claimant the opportunity to comment. In essence, the Claimant responded that there was no third-party funding of

³ Hearing Transcript, Day 1, pp. 16-18.

⁴ Hearing Transcript, Day 9, pp. 2608-2615.

⁵ Hearing Transcript, Day 9, p. 2610.

the claim and that Mr. Kay was “*involved with Orazul and acting in an advisory capacity*” as “*special advisor to the Board*”⁶ and confirmed that he no longer had any role with Liti Capital.⁷ The Tribunal advised the Parties that the Respondent could make a written submission on the issue to which the Claimant would be invited to respond.

17. On 6 October 2022, the Respondent addressed a letter to the Tribunal in which it requested the Tribunal to order the Claimant to clarify certain points in relation to the role of its representatives and Mr. Kay in particular as well as Prof. Schreuer’s participation in an in-person conference in September 2022 despite the Claimant’s representation that he was unable to testify at the Hearing due to health reasons.

18. Specifically, the Respondent requested:

A. In connection with Mr. Kay, that the Tribunal order Claimant to provide information and documentary evidence in relation to the following issues:

1) The relationship between Mr. Kay and Claimant and/or any other company related to Claimant, including but not limited to:

a) the extent and length of the relationship between Mr. Kay and Claimant;

b) the extent and length of the relationship between Mr. Kay and Claimant’s related entities;

c) the extent and length of the relationship between Mr. Kay and I Squared Capital;

d) the appointment of Mr. Kay as party representative in this proceeding, who appointed him as such and the time at which it was decided to appoint him;

e) Mr. Kay’s role in this proceeding;

f) the names of Claimant’s representatives whom Mr. Kay advises, in so far as he has been characterised as an “advisor” to Claimant;

g) the scope of such advice;

⁶ Hearing Transcript, Day 9, p. 2612.

⁷ Hearing Transcript, Day 9, p. 2614.

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- h) from whom Mr. Kay receives instructions;*
- i) the financial terms of the relationship between Mr. Kay and Claimant and /or any other company related to Claimant, including I Squared Capital.*
- j) Considering that there is little information regarding Claimant's alleged representatives included in the list of Participants to the Hearing, Respondent requests all the above-items as regards Gino Sangalli, Javier Garcia and Jose Arango Lopez de Letona.*

2) The funding of the present proceeding, including but not limited to:

- a) whether Claimant's claim is in any way financed by funds other than Claimant's own funds;*
- b) how the costs of this proceeding have been funded so far;*
- c) any agreement as regards the funding of Claimant's claim;*
- d) whether there is any success fee included in the terms of the legal fees related to this proceeding;*
- e) whether Mr. Kay and /or any of the entities he has worked for or advised have made or will make any contribution to the financing of this proceeding;*
- f) whether Mr. Kay and/or any of the entities he has worked for or advised have any interest in the outcome of this proceeding;*
- g) whether this proceeding is in any way linked to any cryptocurrency activity.*

3) The relationship between Mr. Kay and counsel for Claimant, White & Case, including but not limited to:

- a) the list of cases in which Mr. Kay and /or Tenor Capital and/or Liti Capital and/ or White & Case have acted together in investment disputes, including the length of such involvements;*
- b) any agreement between White & Case and Mr. Kay and /or a litigation funding entity regarding the present arbitration.*

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c) Considering that there is little information regarding Claimant's alleged representatives included in the list of Participants to the Hearing, Respondent requests all the above-items as regards Gino Sangalli, Javier Garcia and Jose Arango Lopez de Letona.

4) Any potential conflicts of interest, considering Mr. Kay'[sic] active involvement in other investment arbitrations, including but not limited to:

a) the list of entities involved in investment disputes for which Mr. Kay was or has been a representative or to which Mr. Kay provided or has provided legal or financial advice from 9 February 2015 (three years prior to the Notification of the Dispute dated 9 February 2018) to date;

b) to the extent not covered by the prior item, the list of entities for which Mr. Kay was or has been a representative or to which Mr. Kay provided or has provided legal or financial advice from 9 February 2015 (three years prior to the Notification of the Dispute dated 9 February 2018) to date;

c) the type, extent and length of the relationship between Mr. Kay and Tenor Capital and /or Liti Capital and/or any other litigation funding entity from 9 February 2015 (three years prior to the Notification of the Dispute dated 9 February 2018) to date.

d) Considering that there is little information regarding Claimant's alleged representatives included in the list of Participants to the Hearing, Respondent requests all the above- items as regards Gino Sangalli, Javier Garcia and Jose Arango Lopez de Letona.

B. In connection with Prof. Schreuer, that the Tribunal order Claimant to provide clarifications on Prof. Schreuer's situation in relation to Claimant's failure to make him available for the Hearing.

19. On 7 October 2022, the Tribunal invited the Claimant's comments to the Respondent's letter of 6 October 2022 within one week.

20. On 12 October 2022, the Claimant requested an extension of time of one week to comment on the Respondent's letter.
21. On the same day, the Tribunal granted the Claimant the requested extension of time to comment on the Respondent's letter.
22. On 21 October 2022, the Claimant submitted its comments on the Respondent's letter of 6 October 2022 as well as a declaration by Prof. Schreuer detailing the progression of his COVID-19 illness and the reasons why he was unavailable to prepare for and testify at the Hearing.
23. On 24 October 2022, the Tribunal invited the Respondent's comments on the Claimant's letter of 21 October 2022 by 4 November 2022 and the Claimant's subsequent comments thereto by 18 November 2022.
24. On 4 November 2022, the Respondent submitted its additional comments. Therein, the Respondent:
 - a) request[ed] that the Tribunal order Claimant to produce the information and documentary evidence pursuant to Arbitration rules 19, 34(2)(a) and 34(3), as per Respondent's request in its letter of 6 October 2022;*
 - b) reserve[d] its right to make further enquiries or comment on the information and documents produced by Claimant;*
 - c) further reserve[d] all its rights and remedies in relation to the issues raised in this letter, including its right to request a security for costs, subject to any responses it may receive from Claimant; and*
 - d) request[ed] the Tribunal to weight [sic] the probative value of Prof. Schreuer's report pursuant to Arbitration Rule 34(1), considering the circumstances related to his non-appearance at the Hearing.*
25. On 18 November 2022, the Claimant submitted its additional comments.

B. The Parties' positions

1. The Respondent's position

26. **The Respondent's position with respect to Mr. Kay.** To support its requests set out in paras. 18 and 24 above, the Respondent relies on ICSID Arbitration Rules 19, 34(2)(a) and 34(3). The Respondent submits that Mr. Kay, who appeared during the Hearing as one of the Claimant's alleged representatives, is actually a very active and in-demand litigation finance strategist in the litigation finance industry.
27. The Respondent avers that Mr. Kay's professional experience includes having been "*Funding Partner and Portfolio Manager of a billion US dollar private equity fund working in the litigation finance space, . . . routinely tasked with monetizing awards valued in the hundreds of millions of US dollars.*"⁸ Specifically, the Respondent points to:
- (i) Mr. Kay's role as partner and portfolio manager of the international and commercial arbitration fund focusing on dispute management and arbitration-based investments at Tenor Capital Management LP (**Tenor Capital**); and
 - (ii) Mr. Kay's role as chief investment officer and chairman of the Advisory Board of Liti Capital, a "*Swiss private equity company specializing in litigation funding that has 'tokenized' its equity shares by setting up on the blockchain using Ethereum's ERC20*" and offering "*litigation funding services.*"⁹
28. The Respondent adds that counsel for the Claimant, which attempted to clarify the role of Mr. Kay at the Hearing by stating that he is "*a special advisor to the Board, providing assistance on various matters, including with respect to this case,*" did not clarify which board they referred to and thus did not provide a satisfactory or accurate explanation. Furthermore, the Respondent adds that the Claimant is a shell company that has "*no business in Spain*" as per the admission of its witness, Ms. Bertone.

⁸ Liti Capital S.A., White Paper Version 10.0, p. 26, at <https://liticapital.com/wp-content/uploads/2021/06/Liti-Capital-White-Paper-v1.0.0.pdf> (A RA-479).

⁹ Liti Capital's website, About Liti Capital, at <https://liticapital.com/about-us-v-1/> (last visited on 5 Oct. 2022) (A RA-483).

29. In addition, the Respondent refers to a number of investment arbitrations in which Mr. Kay participated as a party representative, including the case of *IC Power Asia Development Ltd. v. Republic of Guatemala*,¹⁰ in which the controlling company of IC Power was I Squared Capital, as in the case at hand. Mr. Kay is also listed as a board member of three apparently unrelated companies involved in investment arbitrations: *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, *Eco Oro Minerals Corp. v. Republic of Colombia*, and *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*.¹¹ Furthermore, the Respondent points to the fact that counsel for the Claimant was also counsel in cases where Mr. Kay appeared as representative and that Mr. Kay mentioned in an interview that White & Case was a firm he turned to when funding a claim.
30. The Respondent adds that in *Gabriel Resources v. Romania*,¹² there were concerns as to the participation of a representative of Tenor Capital and the tribunal ordered his exclusion from the hearing because it considered that this person was not actually a party representative.
31. In response to the Claimant's comments furnished in its letter of 21 October 2022, the Respondent submits that it is deeply concerned that it is I Squared Capital that is being advised by Mr. Kay. It also submits that the Claimant provided false information in its list of participants as Mr. Kay is not a true party representative but a person whose "*principal business is [...] the filing of claims against States for profit*" and that such a situation affects the integrity of the arbitration process. According to the Respondent, the Claimant's insistence that "*there is no third-party funding in these proceedings*" does not rule out the existence of other funding arrangements with another denomination or format.
32. Furthermore, the Respondent submits that the Claimant's failure to provide its own financial statements or any other evidence about its solvency and ability to afford the arbitration and, potentially, an award on costs against the Claimant as well as the uncertainty as to how the arbitration is being funded raises concerns that the Claimant may disappear and evade paying the costs of this arbitration. The Respondent avers that there

¹⁰ *IC Power Asia Development Ltd. v. Republic of Guatemala*, PCA Case No. 2019-43, Award, 7 October 2020, ¶¶ 341-342 (AL RA-329).

¹¹ *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/15/31), Case Details, at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/31> (A RA-488).

¹² *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Transcripts Hearing Day 3, 4 December 2019, 720:16-721:20 (A RA-489).

are strong reasons to believe that upon an adverse award, the Claimant will disappear and leave Argentina to cover the costs of the proceeding. In *IC Power v. Guatemala*, a case where I Squared Capital was also the claimant's parent company, Mr. Kay appeared as party representative, and White & Case was counsel for the claimant, the respondent has been unsuccessful at recovering the costs of the arbitration from the claimant. In *Walam Energy v. Kenya*, a case in which Mr. Kay also appeared as a party representative and Tenor Capital was the third-party funder, the annulment proceedings initiated by the claimant were discontinued for lack of payment of the required advances.

33. In light of all these facts, the Respondent submits that utmost transparency be demanded of the Claimant and its representatives.
34. **The Respondent's position with respect to Prof. Schreuer.** To support its requests set out in paras. 18 and 24 above, the Respondent submits that Prof. Schreuer was the keynote speaker at a conference held at the University of Vienna on 19 and 20 September 2022, almost contemporaneously with the Hearing in this case, despite the Claimant's representation that Prof. Schreuer was suffering from serious COVID-19 after effects and would thus not be able to testify remotely at the Hearing because he was not "*physically and mentally able to do so*" and "*his doctor had advised him that he . . . could not work for the foreseeable future.*"¹³
35. According to the Respondent, the Claimant relied on Prof. Schreuer's situation to try to prevent Respondent from presenting Prof. Viñuales at the Hearing.
36. The Respondent concludes that Prof. Schreuer's participation in a high-level event around the same time as he was scheduled to give oral testimony in these proceedings calls for some explanation from the Claimant.
37. In response to the Claimant's comments furnished in its letter of 21 October 2022, the Respondent requested the Tribunal to weigh the probative value of Prof. Schreuer's report pursuant to ICSID Arbitration Rule 34(1), considering the circumstances related to his non-appearance at the Hearing and how the Claimant sought to use such incident to its advantage in the context of the Claimant's challenge of the President of the Tribunal. The Respondent

¹³ Hearing Transcript, Day 1, pp. 16-17.

also requested the Tribunal to take into account “*the position adopted by the tribunal in Renergy v. Spain.*”

2. The Claimant’s position

38. **The Claimant’s position with respect to Mr. Kay.** The Claimant submits that there are no reasons to compel the disclosure of information and documentary evidence concerning Mr. Kay or other party representatives of the Claimant.
39. The Claimant submits that the Respondent has not articulated any legal basis for requesting information or documents concerning the representatives of parties in ICSID proceedings. According to the Claimant, neither the ICSID Convention, the ICSID Rules, nor the BIT requires any type of disclosure in connection with party representatives and the IBA Guidelines on Party Representation only require that “*Party Representatives should identify themselves to the other Party or Parties and the Arbitral Tribunal,*” which the Claimant has done prior to the commencement of the Hearing. The Claimant notes that no conflict of interest was then raised either by the Tribunal or Argentina.
40. The Claimant explains that there is no third-party financing, financing by a legal representative, equity financing, or any other financing arrangement for this arbitration outside of the Claimant’s funds in these proceedings and there is thus no reason for the Claimant to provide any clarifications with respect to Mr. Kay’s relationships or involvement with the funding of other proceedings. According to the Claimant, Mr. Kay is properly listed as a representative of the Claimant.
41. The Claimant also clarifies that Mr. Kay himself is not presently engaged in the funding of any litigation or arbitration of any kind nor does he have any position or role within either Liti Capital or Tenor Capital.
42. In addition, the Claimant states that there is no basis for the Respondent’s request for the disclosure of information or documents belonging to entities that are not parties to this case or privy to the issues in dispute. Furthermore, since Mr. Kay is a representative of the Claimant, any information and documents concerning his relationship with Counsel for Claimant are on their face privileged and/or confidential and thus, not subject to disclosure. The Claimant adds that the Respondent bears the burden of demonstrating what conflict, if

any, exists with respect to the participation of Mr. Kay as party representative, which the Respondent has failed to discharge.

43. According to the Claimant, the Respondent's requests for information on the Claimant's other representatives are equally unfounded.
44. Finally, the Claimant submits that there is no evidence that it will "*disappear*" and avoid obligations vis-à-vis these proceedings.
45. **The Claimant's position with respect to Prof. Schreuer.** The Claimant has submitted a statement in which Prof. Schreuer explains the reasons why he was unavailable to provide oral testimony at the Hearing. Prof. Schreuer explains that the lasting effects of the COVID-19 infection he experienced in July 2022 prevented him from testifying at the Hearing. With respect to his participation at a conference at the University of Vienna, Prof. Schreuer notes that he had prepared a draft of his keynote speech prior to the onset of his COVID-19 infection, and while he had alerted the conference organizers of the possibility of him not being able to attend the conference, Prof. Schreuer explains that he felt sufficiently able to attend the conference and read the keynote address that he had prepared months before. The Claimant submits that there is a considerable difference between reading a speech that has been drafted months in advance and preparing for and providing expert testimony while experiencing severe health limitations.
46. The Claimant also strongly rejects any suggestions of impropriety or that the Claimant sought to use Prof. Schreuer's unavailability to its advantage. The Claimant adds that there was nothing beneficial or convenient to its inability to present its international law expert, which it itself had called for direct testimony after Respondent did not designate him for cross-examination.
47. The Claimant rejects the notion that Prof. Schreuer's testimony should be given any less weight due to his unavailability to testify due to health concerns. The Claimant recalls that paragraph 18.10 of Procedural Order No. 1 provides that a party that does not call for direct examination of a particular expert, "*shall not be deemed to have withdrawn the evidence given in the relevant [report].*" In those circumstances, the Claimant submits that the Tribunal will "*assess the weight of the written statement taking into account the entire record and all the relevant circumstances.*"

C. The Tribunal's considerations

48. The Tribunal has duly considered the Parties' positions on the disclosure requests.

1. The Tribunal's decision on the Claimant's representatives

49. With respect to the Respondent's requests for information regarding third-party financing, the Tribunal is mindful that although there exists no procedural duty to disclose third party funding under the rules in force in these proceedings, there has been a wide policy debate in the international arbitration community on third-party funding involving concerns of transparency, conflicts of interest and legitimacy, and growing consensus that third-party funding should be disclosed in international investment arbitration proceedings. The Tribunal notes that the ICSID Rules in their 2022 revision, although not applicable in this dispute, which is also undisputed by the Parties, have clarified that parties have an obligation to disclose the name and address of any third-party funder, and where relevant the names of the persons and entities that own and control the funder, and that tribunals may order the disclosure of further information regarding the funding agreement and the provider of funding.¹⁴

50. It is undisputed that Mr. Kay has appeared as party representative in other investment arbitrations, has a professional background in the funding of international investment arbitrations and has sustained professional relationships with counsel from White & Case LLP. However, in this case, the Tribunal notes that the Claimant has clarified that there is no third-party financing, financing by a legal representative, equity financing, or any other financing arrangement for this arbitration outside of Claimant's funds in these proceedings. The Tribunal finds no reason to question the Claimant's statements and finds no ground to order the Claimant to produce the information requested in the Respondent's requests (A)(2) and (A)(3)(b) of its letter of 6 October 2022.

51. With respect to the remaining information requested by the Respondent in its requests (A)(1), (A)(3)(a) and (c) and (A)(4) of its letter of 6 October 2022, the Tribunal notes that the applicable rules only provide that "[e]ach party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to

¹⁴ ICSID Arbitration Rule 14 (2022).

*the Secretary-General, who shall promptly inform the Tribunal and the other party.*¹⁵ The applicable rules do not contain any obligation upon parties to disclose information of the wide-ranging sort that the Respondent has requested.

52. Even though the Tribunal has procedural discretion to call upon the Parties to produce documents at any stage of the proceeding pursuant to paragraph 16.5 of Procedural Order No. 1, ICSID Rule 34(2) and Article 43 of the ICSID Convention, the Tribunal finds that the Respondent has not articulated a specific basis or reason for which the requested information should be ordered. The Tribunal finds that this is even more the case with respect to the information requested with respect to Messrs. Sangalli, Garcia and Arango Lopez de Letona. The Tribunal also accepts that some of the requested information may be confidential or covered by privilege.
53. In addition, the Tribunal notes that the revised ICSID Rules do not provide for the wide-ranging transparency that the Respondent requests. The same is true for other rules such as the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.
54. While the *Gabriel Resources v. Romania* case referred to by the Respondent allowed the exclusion of a person affiliated with Tenor Capital from the hearing, the Tribunal notes that the issue did not concern a wide-ranging request for information about the individual and his relationship with other entities. The issue in that case was whether he should be allowed to attend an ongoing hearing when he had already been identified as being affiliated with Tenor Capital, *i.e.* a non-party to the proceeding.¹⁶ The Tribunal thus considers that the situation that arose in *Gabriel Resources v. Romania* is different from the one at hand.
55. Finally, the Tribunal has taken note of the Respondent's reservations of rights set out in its letter of 4 October 2022. While the Tribunal has duly noted the Respondent's concerns regarding *inter alia* the Claimant's alleged potential evading of the costs of the arbitration should its claim be rejected, the Tribunal is of the view that the Respondent's reservation of rights cannot constitute a proper basis for the disclosure of the information it requests.

¹⁵ ICSID Arbitration Rule 18 (2006).

¹⁶ *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Transcripts Hearing Day 3, 4 December 2019, 720:16-721:20 (A RA-489).

2. The Tribunal’s decision on the Respondent’s requests relating to Prof. Schreuer

56. The Tribunal has taken note of the clarifications provided by the Claimant and Prof. Schreuer on the circumstances of his non-participation in the Hearing. The Tribunal finds that the Respondent’s request (B) set out in its letter of 6 October 2022 is therefore resolved.
57. The Tribunal also rejects the Respondent’s request (d) set out in its letter of 4 November 2022 pursuant to which the Tribunal should consider the weight of Prof. Schreuer’s report against the background of his non-appearance at the Hearing. In this regard, the Tribunal recalls that paragraph 18.15 of Procedural Order No. 1 provides that “[t]he Tribunal may consider the written statement of a[n] [expert] who provides a valid reason, to the Tribunal’s satisfaction, for failing to appear when summoned to a hearing having regard to all the surrounding circumstances, including the fact that the [expert] was not subject to cross-examination.” The Tribunal finds that Prof. Schreuer has provided a valid reason not to appear at the Hearing and will therefore assess all of the evidence of the record with care, including the expert report of Prof. Schreuer. The Tribunal thus finds no reason to grant the Respondent’s request.
58. Finally, with respect to the Respondent’s request that the Tribunal take into account “*the position adopted by the tribunal in Renergy v. Spain*,” the Tribunal notes that the Respondent has not provided a clear reference to an issue decided by that tribunal or how such case was relevant to the issue of Prof. Schreuer’s evidence in these proceedings. Accordingly, the Tribunal has not considered “*the position adopted by the tribunal in Renergy v. Spain*” in relation to Prof. Schreuer’s evidence in these proceedings.

D. The Tribunal’s Order

59. Based on the considerations set out above, the Tribunal:
- (a) decides to reject the Respondent’s requests (A) set out in its letters of 6 October 2022 and its requests (a) and (d) set out in its letter of 4 November 2022;
 - (b) decides that the Respondent’s request (B) set out in its letter of 6 October 2022 is resolved;

- (c) has taken note of the Respondent's reservation of rights made in its letter of 4 November 2022 in its requests (b) and (c).

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 9 December 2022