

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Daniel W. Kappes and Kappes, Cassidy & Associates

(Claimant)

v.

Republic of Guatemala

(Respondent)

ICSID Case No. ARB/18/43

PROCEDURAL ORDER NO. 8
On Disclosure of Third-Party Financing Agreement

Members of the Tribunal

Ms. Jean Kalicki, President of the Tribunal

Mr. John M. Townsend, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Mr. Francisco Grob

Ms. Daniela Argüello

Assistant to the Tribunal

Dr. Joel Dahlquist

28 September 2021

Procedural Order No. 8

I. PROCEDURAL BACKGROUND

1. In a letter of 16 August 2021, the Republic of Guatemala (“**Respondent**” or **Guatemala**”) requested the Tribunal to order Daniel W. Kappes and Kappes, Cassidy & Associates (“**Claimants**”) to: (i) disclose a copy of the third-party financing agreement that reveals the exact identity of the third-party funder in this proceeding and whether the third-party financing agreement covers costs in the event of an adverse award; or (ii) in the alternative, to provide evidence that they have sufficient and readily available assets to cover an adverse award (the “**Request**”).
2. Upon invitation by the Tribunal, Claimants responded by letter of 23 August 2021, objecting to Guatemala’s Request (“**Claimants’ Response**”).
3. In an email of 24 August 2021, Guatemala sought permission to respond to Claimants’ Response; by emails of the same date, Claimants objected, and Guatemala reiterated its request for leave to respond, and that Claimants inform the Tribunal whether the Funding Agreement makes a provision to pay an award in favor of Guatemala.
4. On 25 August 2021, having considered the Parties’ communications, the Tribunal: (i) granted Guatemala’s request to respond to Claimants’ Response by 31 August 2021; (ii) invited Claimants to present any further observations by 7 September 2021; and (iii) informed the Parties that the Tribunal expected to receive no further submissions concerning this matter.
5. Guatemala filed its response on 31 August 2021 (“**Guatemala’s Response**”), followed by Claimants’ reply of 7 September 2021 (“**Claimants’ Reply**”).

II. THE PARTIES’ POSITIONS

A. Guatemala’s Position

6. Guatemala initially asked the Tribunal either to order Claimants to disclose a copy of the third-party financing agreement that reveals the exact identity of the third-party funder in this proceeding and the terms of the financing agreement, or to provide evidence that they have sufficient and readily available assets to cover an adverse award.
7. Guatemala subsequently amended its request to seek an order that Claimants “disclose the exact identity of the funder and whether the third-party financing agreement covers costs in the event of an adverse award.”¹

¹ Guatemala’s Response, p. 14.

i. Concerns about non-payment of an award

8. First, Guatemala expresses concern that Claimants will not be able to pay an adverse award because they disclosed in their letter of 28 January 2019 that their claims were “being funded by an affiliate of Burford Capital,”² but did not provide a copy of the financing agreement or disclose the name of the affiliate. Guatemala notes that Claimants’ letter contained no indication that the third-party funder had accepted liability in the event of an adverse award, and argues that Claimants’ financial position puts into question whether they otherwise would have sufficient assets to cover such an award.

9. Second, Guatemala argues that Claimants might refuse to pay an adverse award on the basis that they disagreed with the determination. According to Guatemala an example of this behavior is the fact that “[d]espite admitting that they continued to illegally exploit the mine after suspension of the license, Mr. Kappes has refused to have Exmingua pay the fine imposed. In his most recent witness statement, he cites that he and KCA are unwilling to pay the fine because he believes the decision to suspend the mining license was ‘unjustified.’”³

10. Guatemala adds that “Claimants’ financial positions also pose a risk.” According to Guatemala, “KCA is a relatively small company, with cash or cash equivalent assets for KCA and its subsidiaries totaling [REDACTED]”
[REDACTED]
By contrast, Guatemala says, if “Claimants simply provide the assurances Guatemala is seeking, there would be no need for further discussion.”⁶

11. Finally, Guatemala takes issue with Claimants’ assertion that it has not established that Claimants would be unable to pay an adverse award. According to Guatemala, this is not necessary at this stage because it is not requesting security for costs, and the “circumstances here are sufficiently compelling to require disclosure of this basic information.”⁷ Guatemala adds that many third-party financing agreements, especially those involving Burford Capital or its affiliates, do not cover an eventual adverse award.⁸ Citing, *Muhammet Çap v. Turkmenistan*, it states that this scenario can lead to the real possibility of an “arbitral hit and run.”⁹

² Guatemala’s Request, p. 2, citing Claimants’ letter to the ICSID Secretary-General, 28 January 2019.

³ Guatemala’s Response, p. 6. (quoting Kappes II Statement, ¶ 79).

⁴ Guatemala’s Response, p. 6.

⁵ Guatemala’s Response, pp. 6-7.

⁶ Guatemala’s Response, p. 7.

⁷ Guatemala’s Response, p. 5.

⁸ *Ibid.*

⁹ *Ibid* (citing *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015) (“*Muhammet Cap*”), ¶ 12.

ii. Concerns based on a broader context

12. Guatemala seeks to place its disclosure request within a broader context.
13. First, it says that many States have been struggling to obtain payments of awards issued in their favor,¹⁰ and that Guatemala itself faced this situation in *IC Power Asia Development Ltd. v. Republic of Guatemala*.¹¹ Guatemala notes that the claimant in *IC Power* was represented by White & Case, the same counsel that represents Claimants in this case, and contends that this fact makes the risk of non-payment more palpable here.¹² Indeed, Guatemala says, the tribunal in *Muhammet Çap* “found non-payment by another claimant using the same counsel for costs owed to the same State [to be] relevant to its determination of whether to order the disclosure.”¹³ These cases “provide real-life examples of why States are in a uniquely vulnerable position when it comes to adverse costs awards. The rate of non-payment by investors of adverse awards is high, further justifying the importance of obtaining these assurances before an award is issued.”¹⁴ Respondent adds that in this case it also has filed a counterclaim, which exposes it to further risk of non-collection beyond just its costs of defending against the Claimants’ claims.¹⁵
14. Guatemala argues that States find themselves in a precarious position, especially when a third-party funder is involved, because of “the difficulty for the respondent State in establishing the factual basis of any application it would make for security for costs and the counterpart difficulty for an arbitral tribunal to ensure the enforceability of any future order for costs that a tribunal might award against an impecunious claimant whose third-party funder could well disappear at any time.”¹⁶ It adds that “[s]ince third-party funding is not regulated and third-party funders are not parties to the arbitration, there is little in the way for funders to reap all the upsides while avoiding any liability, creating a perfect situation for an ‘arbitral hit and run.’”¹⁷ Further, according to Guatemala “[d]eveloping countries, such as Guatemala, are particularly vulnerable, considering that a majority of claims are brought against them at a significant cost to their constituents.”¹⁸
15. Guatemala rejects Claimants’ argument that investors face similar risks in collecting on awards, noting that States (unlike investors) cannot declare bankruptcy, and the risk of investor bankruptcy means that States face a more challenging prospect in recovering costs. Thus, “[i]n enforcing awards, it should be undisputed that States and investors are not

¹⁰ Guatemala’s Request, p. 2 (citing Memorandum from the Acting Minister of Economy and Finance for the Republic of Panama to ICSID’s Secretary General, 12 September 2016, p. 3).

¹¹ See Letter from Guatemala to PCA in *IC Power Asia Development Ltd. v. Guatemala*, PCA Case No. 2019-43, 11 February 2021 (“*IC Power*”).

¹² Guatemala’s Request, p. 2.

¹³ Guatemala’s Response, p. 8 (citing *Muhammet Çap*, ¶¶ 2, 11).

¹⁴ Guatemala’s Response, p. 8.

¹⁵ Guatemala’s Request, p. 2.

¹⁶ Guatemala’s Response, p. 3.

¹⁷ Guatemala’s Response, p. 4.

¹⁸ Guatemala’s Response, p. 4.

similarly situated, and any assertion by Claimants to attempt to assimilate the two should be flatly rejected.”¹⁹

16. Finally, Guatemala rejects Claimants’ assertion that Guatemala’s conduct in the *TECO v. Guatemala* case demonstrates that it is Claimants, and not Guatemala, who face a “substantial risk” of non-payment. It argues that (i) “Claimants are only able to point to one award, which was ultimately paid by Guatemala”; (ii) Guatemala in that case simply availed itself of procedural remedies in the course of annulment and subsequent litigation, which are valid exercises of a State’s rights; (iii) “investors, including TECO have availed themselves of these same remedies to safeguard their rights”; and (iv) “[t]here is no indication that Guatemala has engaged in any abuse of process by exercising those rights and no case cited in which Guatemala failed to abide by its international obligations when it comes to compliance with international arbitration awards.”²⁰

iii. Concerns based on the alleged “frivolity” of Claimants’ claims

17. Guatemala argues that there is a real likelihood of an award against Claimants in this case. In its view, Claimants have failed to show that they have a protected investment, since “they made the investment without due diligence, without obtaining all the necessary permits, and proceeded to make an investment wilfully blind to the social risk already present.”²¹ Claimants’ claims are also flawed on the merits, Guatemala says: “they have proceeded to bring frivolous claims against the State, including an FET claim based on legitimate expectations when the Treaty clearly excludes such claims and a claim for full protection and security without a scintilla of credible evidence.”²²
18. Guatemala rejects as baseless Claimants’ objection that Guatemala is asking the Tribunal to engage in an inappropriate preliminary determination of the merits. In its view, tribunals considering interim measures requests regularly review claims to make a *prima facie* determination of whether there is a reasonable possibility that the requesting party will succeed, and such an exercise is not itself inappropriate. Indeed, “Claimants do not dispute that frivolous claims generally warrant an allocation of costs against the respondent.” In any event, Guatemala states that it is not asking the Tribunal to engage in such a determination, since at this point it is seeking only disclosure of information.²³

iv. Timing of the Request

19. Guatemala rejects Claimants’ argument that its request is untimely. First, in its view, there is no timeliness requirement for this type of request, which has been brought in all stages of

¹⁹ Guatemala’s Response, p. 9.

²⁰ Guatemala’s Response, p. 9 (discussing *TECO Guatemala Holdings v. Republic of Guatemala*, ICSID Case No. ARB/10/23, available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/10/23>) (“*TECO*”).

²¹ Guatemala’s Request, p. 2; *see also* Guatemala’s Response, p. 9.

²² Guatemala’s Request, p. 2; *see also* Guatemala’s Response, pp. 9-10.

²³ Guatemala’s Response, p. 10.

other arbitrations; second, there is no prejudice to Claimants.²⁴ Guatemala points out that although it “is not obligated to explain any alleged delay, the primary reason it is raising this request now is a direct result of its current difficulty in trying to collect an adverse cost award in the *IC Power v. Guatemala case*, where White & Case is also acting as counsel.”²⁵

v. Scope of the Request

20. Guatemala asserts that the scope of its request is reasonable, and rejects as unfounded Claimants’ “assertion that Guatemala is using this request to obtain confidential information.” It observes that Claimants “have not expressly stated that the financing agreement is subject to confidentiality,” and in any event that there are different ways to protect legally privileged information.²⁶
21. In its Response, Guatemala contends that the requested information is especially appropriate in this case because (i) “Claimants admittedly have a third-party funder but continue to unjustifiably refuse the disclosure of the most basic of details of that funding agreement,” and (ii) “Claimants cannot otherwise show that they have sufficient assets to cover an adverse award.” In Guatemala’s view this constitutes risk of non-payment, “coupled with the fact that Guatemala is currently facing difficulties in recovering costs from another arbitration in which that claimant was also represented by counsel in these proceedings.”²⁷ Citing Gavan Griffiths’ separate opinion in *RSM v. St. Lucia*,²⁸ Guatemala argues that “Claimants have not shown any compelling interest that can override the need for transparency and protection of the integrity of these proceedings,”²⁹ and that it would be “unjustified to burden the Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent’s favor.”³⁰ It further adds that Claimants’ refusal to disclose the exact identity of the funder and whether an adverse cost award would be covered is sufficient to raise concerns of non-payment and thus there is no basis to argue that Guatemala is on a “fishing expedition.”³¹

vi. Applicable Standard

22. Finally, Guatemala argues that the Tribunal should not apply a standard applicable to that for security for costs, in order to determine the present application for disclosure of the relevant terms of the Financing Agreement. According to Guatemala, “Claimants attempt to conflate the issues to prematurely impose a higher standard, but the Tribunal should maintain a clear distinction between the requirements for security [for] costs and those which warrant

²⁴ Guatemala’s Response, p. 3.

²⁵ *Ibid.*

²⁶ Guatemala’s Response, p. 7.

²⁷ Guatemala’s Response, p. 1.

²⁸ *RSM Production Corporation v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on St. Lucia’s Request for Security for Costs, Opinion of Mr. Griffith (13 August 2014) (“*RSM*”).

²⁹ Guatemala’s Response, pp. 1-2.

³⁰ Guatemala’s Response, p. 2.

³¹ Guatemala’s Response, p. 2.

the disclosure of the terms of the financing agreement.”³² Contrary to Claimants’ assertion, “exceptional circumstances should not be required to order the disclosure of the terms of the financing agreement”; to the contrary, Guatemala contends that there is a growing trend towards disclosure in arbitral cases and arbitral rules.³³ It also notes that some of the cases cited by Claimants “acknowledge [that] transparency and protecting the integrity of the proceedings warrants at a very least the disclosure of the identity of the funder, either on the part of the claimants who voluntarily disclosed, or the tribunals that ordered disclosure.”³⁴ Other cases cited by the Claimants did not expressly find that the terms of the third-party funding agreement were irrelevant.³⁵ Finally, in some of the further cases cited by Claimants, tribunals inappropriately applied the same standard for security for costs to deny disclosure,³⁶ failed to indicate “why the disclosure of the mere existence or not of coverage for adverse costs in a funding agreement should affect ‘access to justice,’”³⁷ and failed “to properly distinguish the case of *Muhammet Çap* by misinterpreting the facts that led to the tribunal’s decision in that case.”³⁸

23. Guatemala rejects as irrelevant to the present Request Claimants’ arguments that the Request “portends a security for costs application,” because the Request is not such an application.³⁹ Moreover, Guatemala adds that “any request for security for costs in a case like this, where Claimants have revealed the existence of a third-party funding agreement, could depend on whether Claimants divulge the terms of the agreement or otherwise provide the necessary assurances.”⁴⁰ In any event, Guatemala notes that “the relevant standard for a security for costs application to succeed is the one identified under Article 10.20.8 of CAFTA-DR, Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1), none of which expressly reference exceptional circumstances,” the standard Claimants say should apply.⁴¹

B. Claimants’ Position

24. In response to Guatemala’s Request, Claimants argue that: (i) the Request “to disclose a copy of the Funding Agreement or provide evidence demonstrating assets to cover an adverse

³² Guatemala’s Response, p. 11.

³³ *Ibid.*

³⁴ Guatemala’s Response, p.12 (citing *Bacilio Amorrortu (USA) v. The Republic of Peru*, PCA Case No. 2020, Procedural Order No. 2 on Request for Disclosure of Funding Agreement (19 October 2020) (“*Bacilio*”), ¶ 6 and *South American Silver Ltd. (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (11 January 2016) (“*South American Silver*”), ¶ 79).

³⁵ Guatemala’s Response, p. 12 (citing *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural No. 13 (21 February 2013) (“*Guaracachi*”), ¶ 10 and *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) (“*Teinver*”), ¶ 26).

³⁶ Guatemala’s Response, p.12 (citing *South American Silver*, ¶ 79).

³⁷ Guatemala’s Response, p.12 (citing *Bacilio*, ¶ 11).

³⁸ Guatemala’s Response, p.12 (citing *Muhammet Çap*, ¶¶ 2, 11).

³⁹ Guatemala’s Response, p. 13.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

award is stale”⁴²; (ii) Guatemala provides no support for claiming it has “‘every reason’ to be concerned about the Claimants’ ability to pay an adverse cost award;”⁴³ (iii) “that ‘[other] States have not received payment of cost awards and that an unrelated claimant in an unrelated arbitration has failed to pay a cost award to Guatemala is wholly irrelevant and does not provide any basis for Respondent’s requests”⁴⁴; (iv) “Respondent’s argument that the likelihood of an adverse award against Claimants’ purported ‘frivolous claims’ and the success of Guatemala’s counter-claim in this proceeding is high is entirely baseless”⁴⁵; (v) “Respondent’s reference to ‘a number of tribunals [that] have ordered the disclosure of third-party funding agreements at the request of States’ fails to support its request”⁴⁶; and (vi) Guatemala’s letter portends a security for costs application, but there would be no grounds for such relief at this stage in the proceeding.⁴⁷

25. In their Reply to Guatemala’s Response, Claimants continue to oppose Guatemala’s request and reiterate their position that the Tribunal should deny Guatemala’s amended request for the following reasons: (i) Guatemala’s request is untimely; (ii) Guatemala’s purported concerns about Claimants’ inability to pay an adverse award are unsubstantiated; (iii) Guatemala does not face a “higher” risk of non-payment; (iv) Guatemala’s submissions on the alleged “frivolity” of Claimants’ claims are wrong but in any event irrelevant; and (v) no further disclosure is warranted by Claimants.⁴⁸

i. Concerns about non-payment of an award

26. First, Claimants argue that Guatemala has not established that they would be unable to pay an adverse award. In Claimants’ view, the “Respondent should not be permitted to engage in a fishing expedition to obtain confidential information to which it is not entitled.”⁴⁹ Claimants add that during the document production phase, Claimants “produced KCA’s financial statements and tax returns from 2008 to 2020” at Guatemala’s request, and these documents establish that “KCA is a well-established, reputable company,”⁵⁰ which generated [REDACTED]
27. Second, Claimants reject as baseless Guatemala’s suggestion that there is an enhanced risk of non-payment because Claimants are represented by the same counsel as the claimant in *IC Power*. Guatemala does not allege that Claimants have failed to pay cost awards to other States, or that Claimants have a track-record of non-payment in other proceedings; moreover,

⁴² Claimants’ Response, p. 1.

⁴³ Claimants’ Response, p. 2.

⁴⁴ *Ibid.*

⁴⁵ Claimants’ Response, p. 3.

⁴⁶ *Ibid.*

⁴⁷ Claimants’ Response, p. 4.

⁴⁸ Claimants’ Response, p. 2.

⁴⁹ Claimants’ Response, p. 2.

⁵⁰ *Ibid.*

⁵¹ Claimants’ Reply p. 4 (citing KCA’s Income Statement for the Three and Twelve Months Ended 31 December 2020 (KCA-9579), at 5 [REDACTED])

“Respondent’s assertion that there are allegedly ‘sufficient similarities’ between *IC Power v. Guatemala* and the present proceeding to make the risk of nonpayment ‘palpable’ – ‘considering the parties involved’”⁵² is untrue.⁵³ Claimants add that they are not a party to the *IC Power* case and have no connection with the claimant in that case, and that although one White & Case lawyer “has (at times) been *involved as counsel* in both proceedings, neither that lawyer nor White & Case is a *party* to either proceeding.”⁵⁴ Further, Guatemala’s assertion “that these cases involve ‘most likely the same third-party funder’ is a mere conjecture.”⁵⁵

28. Indeed, according to Claimants, it is they who face substantial risk that Guatemala will not pay an adverse award. Citing *TECO v. Guatemala*, Claimants argue that Guatemala paid damages to TECO only after converting its ICSID award into a U.S. court judgment, and that “Guatemala ‘dragged out’” those court and enforcement proceedings after the U.S. court issued a judgment in TECO’s favor.⁵⁶ According to Claimants, “Guatemala only paid TECO’s award after TECO froze funds in a bank account, subjecting Guatemala to the risk of defaulting on its sovereign debt payments.”⁵⁷
29. Third, Claimants argue that Guatemala has not met the burden of showing any justifiable doubt about non-payment to warrant the relief it seeks. Contrary to Guatemala’s argument, and citing *Hope Services v. Cameroon*,⁵⁸ Claimants argue that third-party funding is a common practice in international arbitration and its “mere existence” “does *not* evidence a claimant’s impecuniosity or insolvency.”⁵⁹ Claimants add that the *RSM v. St. Lucia* case is completely different to the present case, because there “the claimant had failed to comply with a cost award rendered against it in another ICSID case.”⁶⁰
30. Moreover, Guatemala’s assertion that Claimants have a propensity for non-payment and failure to follow Guatemalan court rulings is wrong, and in any event is inappropriate for resolution at this juncture. Claimants note that the fine to which Guatemala refers “relates to compliance with one of the very measures which are being challenged in this Arbitration,” which moreover “is Exmingua’s and not the Claimants”⁶¹; they object to Guatemala’s “request for the Tribunal to decide on the merits of this dispute to make determinations it claims are relevant to its current request.”⁶²

⁵² *Ibid.*

⁵³ Claimants’ Response, p. 2.

⁵⁴ *Ibid.* (emphasis in original).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* (citing *TECO*).

⁵⁷ *Ibid.*

⁵⁸ *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4 (Decision on Respondent’s Request for Security for Costs) (12 May 2021) ¶ 69.

⁵⁹ Claimants’ Reply, p. 3.

⁶⁰ Claimants’ Reply p. 3 (citing *RSM*, ¶ 86).

⁶¹ Claimants’ Reply p. 4.

⁶² *Ibid.*; see also Claimants’ Response, p. 3.

ii. Concerns based on a broader context

31. According to Claimants, sovereign States like Guatemala do not face a “higher” risk of non-payment than investors. Guatemala “ignores the vast difference in the legal status and financial resources of sovereign States and private companies,” and “also ignores the obvious point that States can – and often do – resist attachment of assets on sovereign immunity grounds, a tactic unavailable to claimant investors.” Claimant adds that “it is difficult to imagine that non-payment of an adverse costs award would have any meaningful effect on a State’s budget, whereas non-payment of an arbitration award to a private party, coupled with earlier losses caused by the State’s violation of its treaty obligations, may well have a devastating financial impact on a claimant investor.” Further, Claimants add that Guatemala’s assertion that Claimants can always declare bankruptcy, transfer their assets to shell companies and pursue evasive tactics is purely speculative, ignoring the fact that “neither Claimant is a shell or a special purpose vehicle, created for the purpose of investing in Guatemala.”⁶³

iii. Concerns based on the alleged “frivolity” of Claimants’ claims

32. Claimants reject as “entirely baseless” Guatemala’s arguments about the likelihood of an eventual award against their “purported ‘frivolous claims’ and the success of Guatemala’s counter-claim in this proceeding.” In their view, these arguments are refuted “by the evidence and arguments set forth in Claimants’ Memorial and Reply.” In any event, Claimants say, it is “inappropriate for the Tribunal, at this stage of the proceeding, to make preliminary determinations as to the merits of the case.”⁶⁴ For example, “Guatemala asks the Tribunal to make final determinations as to key disputed issues in this case, such as whether Exmingua obtained all necessary permits to operate the mine, whether Claimants have proven the existence of blockades, and whether Guatemala provided appropriate police protection to Claimants’ investment. Such determinations are clearly unable to be made at this stage.”⁶⁵

iv. Timing of the Request

33. Claimants argue that Guatemala’s Request is stale. Claimants themselves say they voluntarily informed Guatemala three years ago that “their claim was being funded by an affiliate of Burford Capital,”⁶⁶ yet Guatemala never requested a copy of the Financing Agreement or disclosure of the name of the affiliate. Further, Claimants were not ordered or obliged to disclose such information. Guatemala fails to provide reasons for the delay in making its Request and “fails to identify any recent factors or developments that would warrant disclosure of additional information regarding the Funding Agreement or evidence demonstrating assets to cover an adverse award.”⁶⁷

⁶³ Claimant’s Reply, p. 5.

⁶⁴ Claimants’ Response, p. 3; Claimants’ Reply, p. 6.

⁶⁵ Claimants’ Reply, p. 6.

⁶⁶ Claimants’ Response, p.1 (citing Claimants’ letter to ICSID, 28 January 2019).

⁶⁷ Claimants’ Response, p.1.

34. In its response, Guatemala “now acknowledges that its request is made for the purpose of deciding whether to proceed with an application for security for costs.”⁶⁸ But in Claimants’ view, any disclosure application for that purpose should have been made urgently and without delay.⁶⁹ Claimants cite *Ballantine v. the Dominican Republic*,⁷⁰ where the Dominican Republic made its request for disclosure “on the same hearing day that it discovered that claimants were receiving third-party funding.”⁷¹ By contrast, in this case “Guatemala made its present request nearly three years after Claimants voluntarily informed it about the existence of third-party funding.”⁷²
35. Claimants observe that Guatemala’s further assertion that its delay is justified by “its recent difficulties with the recovery of adverse costs in *IC Power v. Guatemala*, remains unconvincing and cannot justify Respondent’s delay.” Claimants reiterate that neither Claimants nor their counsel are parties to the *IC Power* proceeding and they have no connection to the claimant in that case.⁷³

v. Scope of the Request

36. Claimants state that Guatemala’s Request is not reasonable in scope, but rather goes beyond what tribunals have required in other cases. According to Claimants, the majority of tribunals have found that “the disclosure of information about third-party funding is made solely for the purpose of assisting the tribunal in avoiding a conflict of interest.”⁷⁴ In this case the disclosure was made on 28 January 2019, and since then the Tribunal has not asked for disclosure of the name of the precise affiliate. In these circumstances, Guatemala is not entitled to receive any further information and should not be permitted to engage in a fishing expedition to obtain it.⁷⁵
37. Claimants argue that Guatemala fails to rebut arbitral decisions, like *Teinver v. Argentina*⁷⁶ and *Guarachi v. Bolivia*,⁷⁷ where “the tribunals *rejected* the requests for the disclosure of these very terms, holding that disclosure concerning the existence of funding and the name of the funder was sufficient.”⁷⁸

⁶⁸ Claimants’ Reply, p. 2.

⁶⁹ *Ibid.* (citing *Bay View Group LLC and the Spalena Co. LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 6 on the Respondent’s Request for Security for Costs (28 Sept. 2020), ¶ 63).

⁷⁰ *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 16 (2 October 2018) (“*Ballantine*”), ¶¶ 3-7.

⁷¹ Claimants’ Reply, p. 2.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*; see also Claimants’ Response, pp. 3-4 (citing *Guaracachi*, ¶ 8; *Teinver*, ¶¶ 24-26; *South American Silver*, ¶¶ 79-82; and *Bacilio*, ¶ 11).

⁷⁵ Claimants’ Reply, pp. 6-7.

⁷⁶ *Teinver*, ¶¶ 24-26.

⁷⁷ *Guaracachi*, ¶ 8.

⁷⁸ Claimants’ Reply, p. 7 (emphasis added).

vi. Applicable Standard

38. Claimants argue that “Respondent’s reference to ‘a number of tribunals [that] have ordered the disclosure of third-party funding agreements at the request of States’ fails to support its request.”⁷⁹ Claimants invoke the ICSID Rules Amendments Working Papers, which they say describe existing treaty practice, and the Report of ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, for the proposition that at most investors are required to disclose the existence of funding and the name of the funder – which in their view they already have done.⁸⁰ Moreover, citing *Bacilio Amorrorotu (USA) v. Peru*, Claimants add that Tribunals “have recognized that use of third-party funding does not indicate an inability to pay an adverse costs award, and that, absent evidence of bad faith, claimants should not be made to prove their financial capacity to meet a potential adverse costs award.”⁸¹
39. In Claimants’ view, Respondent’s Request “portends a security for costs application,”⁸² but “there are no exceptional circumstances that could justify granting security for costs,” nor is there a “recent trend for lowering the standard for granting security for costs.”⁸³ There is no track record of Claimants’ non-payment of costs awards in prior proceedings, nor of any improper or abusive behavior during the proceedings or any evidence of dissipation of Claimants’ assets. Citing the tribunal in *South American Silver*, Claimants point out that “if exceptional circumstances required to order security for costs are not present then ‘it is not relevant [] to determine whether the third-party funder would assume or not an eventual costs award’.”⁸⁴ To the contrary, “the majority of recent decisions acknowledge that third-party funding is a ‘common practice’ in international arbitration and does not constitute an exceptional factor that could justify granting security for costs, even where the funding agreement excludes the assumption of costs of the opposing party.”⁸⁵
40. Claimants also reject Guatemala’s contention that there is a “growing trend” in recently adopted arbitration rules and agreements to favor disclosure of the terms of third-party agreements. Claimants point out that in fact the “vast majority of arbitration rules and model investment agreements that were adopted in 2021 only require claimants to disclose the existence of third-party funding and the identity of the funder.”⁸⁶ Claimants add that, contrary to Guatemala’s assertion, the drafting notes of ICSID’s Working Group “show that the Group repeatedly rejected suggestions to expand the extent of mandatory disclosure arguing that to do so would be excessive, as the current system provides ‘ample information for arbitrators to assess whether they have a conflict.’”⁸⁷ Claimants observe that “Guatemala did not support requiring disclosure beyond the fact of funding and the name of any third-

⁷⁹ Claimants’ Reply, p. 7.

⁸⁰ *Ibid.*

⁸¹ *Bacilio*, ¶ 11.

⁸² Claimants’ Response, p. 4.

⁸³ Claimants’ Reply, pp. 8-9.

⁸⁴ Claimants’ Response, p. 4 (citing *South American Silver*, ¶¶ 80-81).

⁸⁵ Claimants’ Reply, p. 9.

⁸⁶ Claimants’ Reply, p. 7.

⁸⁷ Claimants’ Reply, p. 8.

party funder ‘as a sign of good faith’ on behalf of the claimant,”⁸⁸ and that here Claimants already voluntarily made such good faith disclosure.⁸⁹

III. THE TRIBUNAL’S ANALYSIS

41. In the Tribunal’s view, the Parties have overcomplicated the present issue with extended briefing about security for costs applications that is at best premature. Respondent has not filed any such application. If and when ever filed, the Tribunal will address it based on its own merits, taking into account the evidence and arguments then made and considering all applicable circumstances, including the then-applicable stage of these proceedings.
42. The Tribunal now has before it simply a disclosure request. That request is no longer for production of a document (Claimants’ third party funding agreement). Rather, it is in the nature of an interrogatory, seeking disclosure of two discrete items of information: “the exact identity of the funder and whether the third-party financing agreement covers costs in the event of an adverse award.”⁹⁰ These two requests raise different issues.
43. As to the first – the “exact identity of the funder” – it is not clear why the matter is controversial. Claimants’ own submissions concede that it is commonplace to require disclosure of a funder’s identity. This not only allows proper conflicts checks to be run, but also serves reasonable expectations of transparency: it enables both the disputing parties and their tribunal to know who stands (at least financially) behind the prosecution of claims. In this case, Claimants appear to accept this in principle, as they voluntarily identified to ICSID, early in these proceedings, the fact of using outside funding and the general affiliation of their funder (that it was “an affiliate of Burford Capital”⁹¹).
44. There is no doubt that Respondents were slow to object to the generality of that reference, and to request disclosure of the funder’s exact identity. But at the same time, Claimants do not assert that they have suffered any *prejudice by the passage of time*, such that providing the name of their funder would be more problematic now than it might have been at the outset of the case. Nor, for that matter, do they argue that the request would have been objectionable as *a matter of principle*, even had it been more timely made. Certainly, given Claimants’ own voluntary sharing of the general affiliation of the funder, it does not appear that they insist on a right of total confidentiality regarding the use and identity of a third-party funder.
45. In these circumstances, the Tribunal sees no basis for the particular line in the sand that Claimants have drawn, agreeing to disclosure of the funder’s general affiliation but not its exact identity. Respondent’s request for disclosure of the exact identity is therefore granted.

⁸⁸ *Ibid.* (citing Guatemala’s Second Observations on Proposed Amendment to the ICSID Rules dated 10 June 2019, at 3-4, available at https://icsid.worldbank.org/sites/default/files/amendments/state_input/Guatemala_CommentsWP2_06.11.2019.pdf).

⁸⁹ Claimants’ Reply, p. 8 (citing Claimants’ letter to ICSID, 28 January 2019).

⁹⁰ Guatemala’s Response, p. 14.

⁹¹ Claimants’ letter to the ICSID Secretary-General, 28 January 2019.

46. Respondent’s second request, for Claimants to disclose whether their third-party financing agreement requires the funder to cover any costs that may be imposed on the Claimants in the event of an adverse award, raises different issues. Respondent suggests that the answer this question may facilitate its decision-making on whether to file an application for security for costs, presumably in the sense that (a) a positive answer – that there is meaningful cover for costs – might obviate the need to bring such an application, and (b) a negative answer – that there is no such cover – would strengthen its determination to proceed with an application.
47. In the Tribunal’s view, however, knowing the answer to this question is not an essential predicate for any application that Respondent may choose to make. Parties in comparable situations sometimes make security for costs applications on an *arguendo* basis, in the absence of any positive evidence that an outside costs cover exists. That option remains available to Respondent. Of course, the possible absence of a funder costs cover may or may not prove relevant to the outcome of a putative security for costs application, and the Tribunal expresses no view on the likely success of such an application. It would be inappropriate for the Tribunal to express any view on an application which has not even been made.
48. For these reasons, the Tribunal sees no need to order disclosure of the terms of Claimants’ third party funding agreement, as they relate either to any direct obligations of the funder or to the possible existence of after-the-event insurance that would cover an adverse award of costs. The present record enables the Respondent to make its own decision whether to present a security for costs application. It is not the role of the Tribunal to assist it in that determination, or to presage the possible outcome of any putative application that in future may be made.

IV. ORDER

49. For the reasons set out above, the Tribunal:
- Grants Respondent’s Request that Claimants disclose the exact corporate name of their third-party funder; and
 - Denies Respondent’s Request that Claimants disclose whether their third-party financing agreement covers any costs that may be imposed on the Claimants in the event of an adverse award.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 28 September 2021