DECLARATION ON COSTS

PROFESSOR PHILIPPE SANDS KC

1. I am in full agreement with the conclusions of the Award on Damages.

2. The Claimant having failed in its claim on Damages, the Award could potentially order the Claimant to meet the reasonable legal fees and other costs incurred by the Respondent. However, the Claimant has been successful in part, on its claims regarding issues of Jurisdiction (unanimously) and aspects of Liability (by a majority). For this reason, I agree that it is reasonable that each Party should bear half the costs of the proceedings, and cover its own legal fees and other costs.

3. That might be the end of the matter, but it is necessary to say something about the legal costs incurred by the Parties in these proceedings.

4. The Respondent has incurred total costs of just under US$6.3 million. This appears to be somewhat higher than the mean costs for respondents in investor-State proceedings,[1] but given the various stages of the proceedings, and the time they have taken, it is within the bounds of reasonableness.

5. The Claimant, on the other hand, has incurred total costs of just under US$33.3 million. This is, by any reasonable standard, a jaw-dropping figure. In the context of facts and an environmental context which ought to have caused any reasonable lawyer to alert the Claimant to the serious risk of failure, the amount is indecent. Having been involved as counsel in dozens of investor-State cases, and an equal number as counsel in inter-State cases at the International Court of Justice and other international courts and tribunals, often involving matters of far greater complexity but being litigated at a far lower cost, I have trouble understanding how it is possible to rack up such legal costs. By way of comparison, a 2021 report found that the mean costs for claimants in investor-State disputes was US$6.4 million – around 20% of the Claimant's costs here.[2]

6. There is much that could be said about a decision to expend such a sum of money on a case with such limited prospects of material success. I shall make just two points.

7. The *first* concerns the expense incurred in retaining the assistance of Compass Lexecon, at a cost of US$2,885,733.87. Compass Lexecon produced two reports for the case. One was 88 pages long, the other 70 pages. The principal drafters of these pages were examined at the hearing on damages, for no more than one day. They valued the loss suffered by the Claimant at US$ 696 million. A majority of the Tribunal ruled that

[1] BIICL-Allen & Overy, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration' (2021), pp. 9-15, which finds that the mean costs for respondents in 2021 was US$ 4.7 million.
[2] *Ibid*.

'it can award no damages from Colombia's breach of Article 805, or for any remediation costs'. It is apparent from the Award on Damages that the Tribunal obtained no assistance from that company's work.

8. In this regard, it is to be noted that at paragraph 920(4)(d) in its Decision on Quantum, the Tribunal addressed a specific question to both parties: 'How can Eco Oro's loss of opportunity to apply for an environmental licence to allow exploitation be valued? On what basis is the quantum of that loss, if any, to be assessed?'.[3] Neither the Claimant nor Compass Lexecon offered the Tribunal any material assistance to help it to answer the question it posed. Perhaps Compass Lexecon was instructed not to answer the question. Perhaps Compass Lexecon was unable to answer the question. Perhaps Compass Lexecon knew that the answer to the question was: zero. For US$2.8 million, it is not unreasonable for a Tribunal to expect to receive an answer to the question. Indeed, the failure to provide the Tribunal with an answer to this question made its task more difficult and contributed to the length of the quantum phase.

9. The *second* concerns the Claimant's request that it be reimbursed for 'a portion of the costs that Eco Oro had no option but to incur to obtain financing to enable it to pursue the arbitration'.[4] This portion is said to amount to US$4,492,899.48. Since the Tribunal has declined to make an order in favour of the Claimant, this claim falls away, and no view is expressed as regards the principle of whether such costs could have been included in an order.

10. Nevertheless, the Claimant's request raises issues concerning the financing of proceedings such as these, including by third parties. The Claimant asserted that 'Absent financing from third parties, [it] would have had no means to bring its claims against Colombia.'[5] In this case the third party funding included financial support in the amount of an investment in the Claimant of US$14 million provided by Trexs Investments, LLC, an entity managed by Tenor Capital Management Company, L.P.[6] This investment entitled the investor to up to 'to 51% of the gross proceeds of the Arbitration'.[7]

11. Third party funding is said by some to have an important role in ensuring that parties of limited means are able to pursue claims and vindicate their rights. That may be true, in some cases, but in my view that justification cannot be invoked in this one. I have the most serious concerns regarding such arrangements. The overriding purpose of investor-State proceedings is to allow claimants to bring claims and recover losses when the host State has breached its investment obligations. Yet there is a real risk of that purpose being subverted when claims are controlled or directed by a third-party funder which has no prior relationship with the purported investment or the host State. The risk is even greater where the third-party funder is entitled to recover a significant proportion, or even a majority, of any damages awarded by a tribunal, and is not

[3] Award on Damages, para. 134 *et seq*.
[4] Claimant Submission on Costs, 8 March 2024, para. 13.
[5] *Ibid*., para. 17.
[6] *Ibid*., para. 18, Eco Oro Minerals Corp., Press Release titled "Eco Oro Minerals Announces Investment by Tenor Capital", 22 July 2016, **R-1**; available at https://www.juniorminingnetwork.com/junior-miner-news/press-releases/880-cse/eom/22636-eco-oro-minerals-announces-investment-by-tenor-capital.html.
[7] *Ibid*.

required to contribute to the costs of the opposing party if the claim fails. Dr Kamal Hossain put the point well in his dissenting opinion in *Teinver v Argentina*:

> "The BIT is not intended to enable payment of awards to third party funders who are not 'investors' and who have no protected 'investment', and who only come into the [dispute] to advance funds in order to speculate on the outcome of a pending arbitration".[8]

12. I welcome the move towards greater transparency of third-party funding arrangements, as well as consideration by UNCITRAL Working Group III on a range of related issues, including conditions on the availability of third-party funding,[9] although these initiatives may well be too little, too late. The current inability of tribunals to make cost awards against third-party funders is a real and serious issue, and has attracted the concern of arbitrators in previous cases.[10] In my view, the creation of a "gambler's Nirvana"[11] by allowing third-party funders to use investor-State dispute settlement as a means of financial speculation without any possibility of making costs awards against those funders is deeply problematic. Such funders may be closely engaged in the conduct of proceedings which can be burdensome, time-consuming and sensitive.[12] Their involvement may add to the costs of the proceedings. For that reason, as a matter of principle, a tribunal should be able to make a costs order against a third-party funder. Nor do I see any reason, as a matter of principle, why a successful party should not be able to bring legal proceedings – in such fora as may be available, at the national or international level - to recover its costs from a third party funder that has contributed to significant expenses being incurred in unsuccessful claims. Such approaches are increasingly finding favour with domestic courts and with individual arbitral institutions.[13]

13. Arbitration proceedings of this kind are a form of privatised 'justice'. The proceedings can be costly, especially where there is a need for specialist knowledge. Yet it is surely incumbent on all involved in the system to keep in mind its original and aspirational mandate: to offer an effective and fair system to resolve serious disputes between foreign investors and host States, in a manner that is efficient, cost-effective and consistent with rules agreed by States. Those who designed it and put it in place had good intentions. It was not envisaged to be a system to leverage financial speculation and financial gains by third parties. A case such as this, incurring vast financial and human resource costs, and which could not have been brought without the support of a third-party funder, will, I fear, serve to undermine confidence in an important system,

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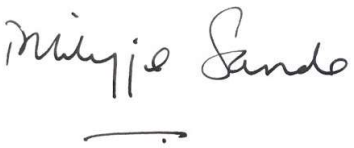
[8] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Dissenting Opinion of Kamal Hossain, 13 July 2017, para. 72.
[9] See e.g. ICSID Arbitration Rules (adopted 2022) Rule 14; UNCITRAL, 'Reports of Working Group III on the work of its forty-third session' (7 October 2022) UN Doc. A/CN.9/1124, p. 24; UNCITRAL, 'Possible reform of investor-State dispute settlement: Draft Provisions on procedural reform' (11 July 2022) UN Doc. A/CN.9/WG.III/WP.219, p. 12-21.
[10] *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Assenting Reasons of Gavan Griffith on the Saint Lucia's Request for Security for Costs, 13 August 2014, paras. 13-14.
[11] *Ibid*.
[12] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018), p. 28.
[13] See e.g. *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144; Article 35 SIAC Arbitration Rules 2017.

and foster perceptions that it lacks essential legitimacy and will, without fundamental reform, soon take the path of investor-state arbitration under the NAFTA and the Energy Charter Treaty.



Philippe Sands

4 April 2024