IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

SERGEI VIKTOROVICH PUGACHEV

Claimant

v.

THE RUSSIAN FEDERATION

Respondent

RESPONDENT'S SECURITY FOR COSTS APPLICATION

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10 February 2017

White & Case LLP

Counsel for the Respondent

I. INTRODUCTION

1. By this Security for Costs application (the "**Application**"), the Respondent seeks an order from the Tribunal requiring the Claimant to provide security for costs in the amount of USD 800,000. Without waiving privilege, the Respondent has already incurred approximately USD 500,000 in fees up to this point in the Arbitration, and it is likely to spend a total of USD 800,000 up to the first round of substantive submissions (whether in respect of jurisdictional matters or otherwise). This Application is sought on the basis of the reasons below.

2. This Application is set out as follows:

> **Section II**: basis for this Application;
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> **Section III**: the Claimant has a low prospect of success in the Arbitration claim;
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> **Section IV**: the Claimant is subject to a worldwide asset freeze and his financial situation is uncertain;
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> **Section V**: there is a risk of non-enforcement of any costs award against the Claimant;
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> **Section VI**: it is fair in the circumstances to require the Claimant to provide for the Respondent's costs in this Arbitration;
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> **Section VII**: the terms of an order that the Claimant pay the Respondent security for costs;
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> **Section VIII**: Respondent's application for disclosure of any third-party funders; and
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> **Section IX**: Request for Relief.

3. The Respondent notes that it has made several requests regarding the Claimant's financial position and no response has been received as of yet. The Respondent first wrote to the Claimant on 17 November 2016, detailing how it understood the Claimant was subject to a worldwide asset freeze and had breached certain orders of the English High Court, and requesting: (i) bank account statements, a schedule of assets, and any other relevant documents establishing the Claimant's current financial situation; (ii) written proof of the Claimant's compliance with the United Kingdom Freezing Order; and that (iii) the Claimant disclose the source of its funding for this Arbitration, including the names and any agreements with third party funders.[1] The Respondent then wrote again in this regard on 6 December

[1] *See* **Exhibit R-15**, Letter from White & Case to Lazareff Le Bars, dated 17 November 2016.

2016, and followed up with a letter of 12 January 2017.[2] The Claimant has made no substantive response to date.

4. Numerous investment arbitration tribunals have applied the "costs follow the event" principle to allocate costs in proportion to the relative success of the parties.[3] This enables a successful respondent-State to recover at least some of the costs associated with its defense in arbitral proceedings. An award on costs in favour of the respondent-State, however, is of no use if the claimant lacks the necessary funds to comply with the order. The Respondent's request for security for costs is clearly justified under these circumstances, as set out below.

II. BASIS FOR THE APPLICATION

5. The 1976 UNCITRAL Rules do not specifically provide for security for costs. However, tribunals constituted under these rules nevertheless consider requests for security for costs as falling within Article 26(1) of the 1976 UNCITRAL Rules. This article provides that "[a]*t the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute*."[4] Article 26(2) of the 1976 UNCITRAL Rules requires that when granting interim protection the tribunal must order the moving party to provide appropriate security for potential costs in connection with the interim measures.[5]

6. In a recent article published by A. Redfern and S. O'Leary, the authors argued that because an application for security for costs is a request for an interim measure, most international arbitral tribunals may verify whether the "*dual requirements*" for interim measures, that is (a) "*urgency*" and (b) "*the risk of serious or irreparable harm to the applicant are satisfied*".[6]

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2 *See* **Exhibit R-17**, Letter from White & Case to Lazareff Le Bars dated 6 December 2016, and **Exhibit R-19**, Letter from White & Case to Betto Seraglini dated 12 January 2017.

3 *See, e.g.,* **Exhibit RL-50**, *SAUR Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Award dated 22 May 2014, paragraphs 405- 407, 410-414; **Exhibit RL-51**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, paragraphs 588, 590; **Exhibit RL-52**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 618-631; **Exhibit RL-53**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008, paragraph 304; **Exhibit RL-54**, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 February 2007, paragraph 402.

4 *See* **Exhibit CL-22**, the full text of 1976 UNCITRAL Arbitration Rules, Art. 26(1) ("*At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods*.").

5 **Exhibit CL-22**, 1976 UNCITRAL Arbitration Rules, Art. 26(2) ("*Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures*.").

6 **Exhibit R-20**, A. Redfern & S. O'Leary, "Why it is time for international arbitration to embrace security for costs" (2016) *Arbitration International*, vol. 32, pp. 397-413, at p. 410.

Redfern and O'Leary note however, that this verification is only the "*starting point*" and that the tribunal enquiry "*has to go further than this*".[7]

7. Nevertheless some commentators have argued that "*applications for statement for costs are generally not governed by the standard criteria for interim measures, such as urgency or risk of irreparable harm*."[8] Waincymer for example notes that:

> "*the standard criteria for considering interim measures applications do not normally apply to security for costs. A typical interim measure application such as preserving evidence or assets or enjoining a party against taking a proposed course of action looks for urgency, serious or irreparable harm and a tenable case on the merits. Where security for costs applications are concerned, urgency and injunctive relief is not relevant. The irreparable harm is simply the allegation that a losing claimant will not be able to pay a costs award. As to consideration on the merits, that can remain relevant and is effectively looked at in reverse. The less likely the merit in the claims, the more there might be concern to protect a potential cost award in favor of the responding party*."[9]

8. International commercial arbitration also offers some insight into the applicable factors for requesting security for costs. Gary Born, for example, notes that "[w]*here security for costs may be ordered, tribunals typically consider the financial state of the party from whom security is requested, the extent to which third parties are funding that party's participation in the arbitration (while arguably remaining insulated from a final costs award) and the likely difficulties in enforcing a final costs award*."[10] According to Redfern and O'Leary,

> "*there are three criteria that an international arbitral tribunal should expect to be established before acceding to an application for security for costs: first, that there is a reasonable possibility that the requesting party will succeed in its defense to the claim; secondly, if the requesting party does succeed in its defense, that it is likely to be awarded costs; and thirdly, that there is a risk that those costs will not be paid unless some form of security is ordered. If these criteria are established, then the tribunal must consider whether it is fair and just in all the circumstances that the order be made*."[11]

9. It may also be helpful for the Tribunal to consider the Chartered Institute of Arbitrators' ("**CIArb**") Practice Guidelines for guidance as to the factors it should consider in determining the Application, as the Guidelines represent best practice in international commercial arbitration.

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7 **Exhibit R-20**, A. Redfern & S. O'Leary, "Why it is time for international arbitration to embrace security for costs" (2016) *Arbitration International*, vol. 32, pp. 397-413, at p. 410.

8 **Exhibit R-21**, C. Frutos-Peterson & D. Ziyaeva, "Provisional Measures in ICSID Arbitration: The Irreparable Harm Requirement" in D. Ziyaeva [editor], *Interim and Emergency Relief in International Arbitration* (2016), pp. 209-233, at p. 210, n. 4. *See* also, **Exhibit R-22**, G. Born, *International Commercial Arbitration* (2014), p. 2473.

9 **Exhibit R-23**, J. Waincymer, *Procedure and Evidence in International Arbitration* (2012) p. 647.

10 **Exhibit R-22**, G. Born, *International Commercial Arbitration* (2014), p. 2496 (emphasis added).

11 **Exhibit R-20**, A. Redfern & S. O'Leary, "Why it is time for international arbitration to embrace security for costs" (2016) *Arbitration International*, vol. 32, pp. 397-413, at p. 410.

10. Article 1(2) of the CIArb Guidelines entitled "Applications for Security for Costs" (the "**Guidelines**") provides that:

> "*When deciding whether to make an order for security for costs, arbitrators should take into account the following matters:*
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> *1 – the prospects of success of the claim(s) and defence(s) (Article 2);*
>
> *2 – the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award (Article 3); and*
>
> *3 – whether it is fair in all of the circumstances to require one party to provide security for the other party's costs (Article 4).*"[12]

11. This list of factors is non-exhaustive.[13] The Claimant has failed to satisfy the criteria in the Guidelines, which are addressed more fully below.

III. THE CLAIMANT HAS A LOW PROSPECT OF SUCCESS IN THE ARBITRATION CLAIM

12. As outlined in **Sections II** to **VI** of the Response, the Claimant has failed to substantiate his claims in the Request. The Claimant's vague and haphazard approach only serves as an indication to the way in which the Claimant will seek to prosecute his claim in the Arbitration, projecting a low prospect of success.

13. As an overview of its weaknesses, the Claimant's Request is based upon precarious foundations, with little or no evidence to support the Claimant's factual allegations. In this regard, the Claimant has failed to *prima facie* establish his case and presents no evidence that there is any urgency or necessity in the measures requested. There is no specific action "*in the works*" suggesting that "*immediate (or at least prompt) action is necessary in order to prevent serious damage*" to the Claimant.[14] The Claimant further seeks relief in respect of proceedings worldwide to which the Respondent is not a party. Imposing any interim measures would be a disproportionate burden on the Respondent, due, inter alia, to the vague nature of the relief requested. The Claimant has simply failed to discharge the burden to justify his request.

14. Moreover, both in respect of the Claimant's overall claims and his Request, the Respondent has identified serious problems in its Response in respect of both jurisdiction and the merits. It would be unfair for the Respondent to continue defending such claims with no prospect of recovering its costs.

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12 **Exhibit RL-55**: CIArb Guidelines.

13 **Exhibit RL-55**: Article 1(3) of the CIArb Guidelines

14 **Exhibit CL-33**. G. Born, "Chapter 11: Provisional Measures in International Arbitration", International Arbitration: Law and Practice, Second Edition, (2015) at 13.

IV. THE CLAIMANT IS SUBJECT TO A WORLDWIDE ASSET FREEZE AND HIS FINANCIAL SITUATION IS UNCERTAIN

15. It is clear from the Claimant's financial state that there will likely be difficulties in satisfying an adverse costs award. This is particularly relevant in light of the worldwide Freezing Order issued by Mr Justice Henderson on 11 July 2014 in the English High Court. By this order, which can be enforced worldwide, up to £1.2 billion (US$ 2 billion) of the Claimant's assets were frozen.[15] The Respondent considers that the Claimant would be permitted to pay security for costs, pursuant to the exceptions detailed under section 11 of the Freezing Order.[16] The Respondent is not confident that if awarded at the conclusion of these proceedings, a costs order against the Claimant would be easily enforceable, and is concerned about recovering its costs when proceeding with this Arbitration.

16. The Claimant presents a shadowy picture of his financial situation. His failure to respond to the Respondent's queries as to his current financial situation, along with his propensity to engage in underhand dealings involving holding companies[17] does not fill the Respondent with confidence at the prospect of recovering any amount in costs from the Claimant.

17. For example, the Claimant was "*unable to recall*"[18] what happened to certain monies when questioned in the English proceedings about transfers in breach of the Freezing Order, and the "*inadequacy of his responses*"[19] in relation to this only serve to illustrate his evasive attitude to his financial affairs. As the Claimant's "*evidence on many topics changes depending on what he perceives to be the most useful version of events at any given time*",[20] even if he were to give an assurance as to his financial situation, it appears that nothing he says can be relied upon. Mr Justice Mann was of a similar view when he stated that the Claimant's assurance "*that he has not dissipated is, in circumstances such as those in the present case, of no more weight than a statement by* [Mr Pugachev] *himself.*"[21]

18. It is further clear from judgments issued in the English proceedings that the Claimant uses *"elaborate structures*" to hold assets, which the High Court judge saw as "*evidence of a*

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15 The Claimant can apply for a variation of the order under section 11(3).

16 *See* **Exhibit C-20**, section 11.

17 For example, see the transfer referred to between Luxury Investments SA and Luxury Consulting Limited at paragraph 35 of the **Response to the Second Preliminary Application**; and the dealings cited as breaches of the freezing order in **Exhibit RL-17** at Allegation B1, Allegation B5, Allegation D1, Allegation D2 and Allegation D3.

18 **Exhibit RL-17**, paragraph 202.

19 **Exhibit RL-17**, paragraph 188.

20 **Exhibit RL-17**, Judgment of Mrs Justice Rose, [2016] EWHC 192 (Ch) paragraph 49.

21 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraph 235. *See* also paragraph 225.

desire to shield assets from view."[22] The Respondent is concerned that there is a real risk of further breaches of the Freezing Order and a dissipation of the Claimant's assets, and as such that it will not be able to enforce a costs order.

19. In the English proceedings, the Claimant was ordered to provide a schedule of assets, which he disclosed to be valued at US$70 million.[23] That was in 2014, and the Respondent does not know the current financial state of the Claimant (despite the Respondent's requests). The Claimant states in his Request that his situation is allegedly a "*question of survival both personally and economically*", and he has "*already lost almost all of what he built over a lifetime*."[24] These assertions suggest the Claimant lacks available assets, indicating a risk of non-compliance with an adverse costs order. This state of uncertainty requires the Tribunal to award security for costs in the Respondent's favour.

20. The Respondent understands that the Freezing Order remains in place to this day.[25] Despite this, it is notable that there has so far been no proof of the Claimant's compliance with the Freezing Order.[26] he Claimant appears to suggest he has a choice as to whether to comply with the Freezing Order: "*Mr Pugachev is therefore left with two bad choices: (i) continue with this arbitration and comply with the UK Freezing Order which will enable Russia to seek enforcement against Mr Pugachev's assets whenever or wherever it sees fit, or (ii) stop this arbitration in order to have nothing to declare and preserve his remaining assets for as long as this can last*."[27] Indeed, the Claimant has sought to argue that the UK proceedings which resulted in the Freezing Order constitute a breach of the France-USSR BIT,[28] which suggests that he does not intend to comply with the Freezing Order.

21. Whilst it is unclear whether the Claimant has complied with the Freezing Order, its very existence provides a strong indication as to the Claimant's financial state. The court's rationale for making the Freezing Order shows the Claimant is not likely to comply with an adverse costs order: freezing orders are granted where it is shown that there is a real and substantial risk of the respondent's assets being dissipated, and the applicant has both an underlying legal or equitable right, and a good arguable case.[29] As explained by Mr Justice Mann in refusing to discharge the Freezing Order on the Claimant's application, a Freezing

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22 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraph 227.

23 *See* **Exhibit RL-31**, Judgment of Mr Justice Mann [2014] EWHC 4336 (Ch).

24 **Request**, paragraphs 171 and 324.

25 *See* **Exhibit RL-17**.

26 *See* paragraph 160. The Claimant has submitted no proof of his compliance with the freezing order, despite the Respondent's repeated requests for assurance.

27 **Request**, paragraph 221.

28 **Request**, paragraph 172.

29 *See* paragraph 126 of the Response.

Order is "*not to be lightly sought and will not be granted on flimsy evidence*" and "*has to be supported by evidence demonstrating a risk of dissipation*."[30] In seeking the Freezing Order, the applicants (the DIA and IIB) relied on the following four matters as demonstrating a risk of dissipation:

> *i) It was said that the evidence showed that Mr Pugachev took steps actively to conceal the bank's true financial condition, extracted money for his own benefit (or for the benefit of companies controlled by him), and took steps to release assets from security (a reference to the release of the EPK pledges). A considerable body of evidence was relied on in support of this averment.*
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> *ii) It was said there was good evidence that Mr Pugachev regularly used corporate structures and offshore holdings (and trusts) to conceal the true ownership of assets.*
>
> *iii) It was said that Mr Pugachev was prepared to make false and misleading statements about his control or ownership, including what was said to be a pretence that he had given up control of the bank (subsequent to various pronouncements of the bank in prospectuses and other documents), and that he had no interest in a French chateau which is used by him as a holiday home.*
>
> *iv) He has substantial means and can move assets around jurisdictions with ease. When pursued in Russia he removed himself, and some of his assets from there.*[31]

22. The points above demonstrate the basis on which the Freezing Order was granted (and upheld on review),[32] and show the extent to which the Claimant has previously concealed assets. In this context it is again clear that the Claimant is not likely to comply with an adverse costs order.

V. RISK OF NON-ENFORCEMENT OF ANY COSTS AWARD

23. In addition to the above, a real risk of non-enforcement of any costs award also arises from the Claimant's failure to comply with at least twelve orders issued by the English High Court and any other international or domestic legal proceedings he has been a party to.[33] The Claimant has shown a tendency to act in bad faith with regard to orders issued against him, such as fleeing the jurisdiction despite an order for him to hand over his passports, and being subject to a Contempt of Court Order and an imprisonment sentence of the maximum of two years.[34] The Claimant also refuses to comply with the Tribunal's request that the parties refrain from public statements and disclosure of information, stating that "*it is clear that such*

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30 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraphs 218, 221 and 238.

31 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraph 222.

32 **Exhibit RL-31**, Judgment of Mr Justice Mann, [2014] EWHC 4336 (Ch), paragraph 245.

33 *See* **Exhibit RL-17**.

34 *See* **Exhibit RL-17**.

containment and restraint is impossible in the circumstances".[35] The Claimant's cavalier attitude towards compliance demonstrates a real risk of non-enforcement of an adverse costs award.

24. As an example, the Claimant was found in breach of the Freezing Order for seeking financing to fund the current Arbitration claim without consent. The Claimant (as assignor) entered into an agreement with Wiltshire Resident Trust (as assignee) and Maru Ltd., as guarantor to fund his legal and other expenses in regard to this Arbitration.[36] As the High Court explained, the Freezing Order entitles the Claimant to only "*use frozen assets for paying his legal expense in accordance with* [its] *terms* […] *which put in place important safeguards for the court and the Bank*."[37]

25. The Claimant violated the Freezing Order by obtaining funds for legal services from Wiltshire Resident Trust without seeking the consent of IIB or the High Court to enter into such an agreement.[38] It is clear from the Claimant's behavior in this regard that he freely ignores orders issued against him, and this poses a real risk of non-enforcement of any costs award against the Claimant.

VI. IT IS FAIR IN THE CIRCUMSTANCES TO REQUIRE THE CLAIMANT TO PROVIDE FOR THE RESPONDENT'S COSTS IN THIS ARBITRATION

26. It is clear from the points detailed above (and set out in the Response) that it is fair to require the Claimant pay security for costs. The Claimant has (i) a low prospect of success in this Arbitration, (ii) a lack of liquidity under the worldwide asset freeze, and (iii) an uncertain financial situation, suggesting a risk of unenforceability of any future adverse costs award.

27. The Respondent has requested (on 17 November 2016, 6 December 2016 and again on 12 January 2017[39]) but has not received any assurance or evidence from the Claimant that he will be in a position to reimburse the Respondent for its legal fees and expenses should it succeed in its defense. The uncertainty of the Claimant's financial situation means it is imperative that security for costs is ordered at this early stage of the Arbitration. The Respondent would not be making this application unless it had a real and urgent reason requiring it to do so. This is

35 **Exhibit R-24**, Letter from Lazareff Le Bars to White & Case, dated 24 November 2016. *See* also the Claimant's television interviews, at **Exhibit R-11** and **Exhibit R-12**.

36 *See* **Exhibit RL-17**, paragraph 156.

37 *See* **Exhibit RL-17**, paragraph 165.

38 *See* **Exhibit RL-17**, paragraph 159.

39 *See* **Exhibit R-15**, Letter from White & Case to Lazareff Le Bars, dated 17 November 2016; **Exhibit R-17**, Letter from White & Case to Lazareff Le Bars, dated 6 December 2016; and **Exhibit R-19**, Letter from White & Case to Betto Seraglini, dated 12 January 2017.

in contrast to the Claimant's application, whereby he claims that the Respondent has "*bluntly declared that it intends not to abide by international awards*", with no evidence to support this, and that he has "*incurred very heavy costs […] in the various proceedings initiated by Russia before several jurisdictions*".[40] Neither of these unsupported statements justifies a security for costs application in favour of the Claimant.

28. As demonstrated by the Response to the Claimant's Request, the Claimant has failed to substantiate his claims under the Request. The claims have been made in a vague and haphazard manner, which indicates the way in which the Claimant will seek to prosecute his claim the Arbitration itself. Indeed, from publicly available sources it appears that many of the matters the Claimant refers to have been extensively litigated in the English courts, as detailed in **Section V(B)** of the Response, and it is a waste of both time and costs to repeat them before this Tribunal.

29. The Claimant's behavior so far also serves as an indication as to his cavalier attitude in these proceedings. The Claimant has failed to respond to several of the Respondent's letters and requests, and has distributed false information and made public statements in the press about the Respondent and the Arbitration in breach of an order by the Tribunal prohibiting public statements and disclosure of information about this Arbitration.[41] It is clear that in the circumstances it would be fair to require the Claimant to provide for the Respondent's costs in this Arbitration.

VII. TERMS OF AN ORDER THAT THE CLAIMANT PAY SECURITY FOR COSTS

30. Should the Tribunal be minded to make an order for security, the Respondent would suggest that this takes the form of (a) a payment of USD 800,000 into an account of White & Case LLP within 14 days of the Tribunal's order and (b) an undertaking by White & Case LLP (i) to hold those monies subject to the further directions of the Tribunal and (ii) to pay the monies over to the Respondent in the event that the Tribunal so directs.

31. The sum of USD 800,000 as an initial deposit, with the possibility to increase this amount via an application as necessary, is an estimate of the costs the Respondent considers that it will likely incur in this Arbitration prior to the first round of substantial submissions. This is in stark contrast to the Claimant's request for security for claim at the amount of USD 6 billion

40 **Request**, paragraph 330.

41 **Exhibit R-16**, Letter from White & Case to Lazareff Le Bars dated 14 December 2016.

and his equally unsupported request for EUR 10 million as security for costs, as also reflected in the Response.[42] The Respondent reserves the right to seek further security in due course.

32. For the reasons above, the Respondent respectfully asks that the Tribunal makes an order in the terms requested.

VIII. RESPONDENT'S APPLICATION FOR DISCLOSURE OF ANY THIRD-PARTY FUNDERS

33. As explained above, the Respondent has repeatedly requested that the Claimant disclose the source of its funding for this Arbitration, including the names and any agreements with third party funders.[43] The Respondent has also requested clarification regarding the involvement of Mr Michael McNutt in these proceedings. Mr McNutt was named as a 'Senior Litigation Advisor' for the Claimant and was described as a "*legal assistant and financial expert*". However, he appears to have no legal background. It was therefore unclear (i) what his role was, and (ii) whether Mr McNutt was involved in the financial matters of the proceedings, including financing of the arbitration proceedings, and whether he has a financial interest in the outcome of the case.[44] To date, the Claimant has failed to confirm whether it is receiving third party funding, let alone the names and any agreements with third party funders. The Respondent thus seeks the disclosure of the names and any agreement with third-party funders.

34. In *Muhammet Çap & Sahil v Turkmenistan*, for example, the tribunal ordered the claimant to confirm the existence of third party funders and "*the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration*."[45] In reaching its decision, the tribunal noted "*the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder*".[46]

35. Likewise, in *South American v Bolivia*, the tribunal ordered the Claimant to inform the tribunal of the name or names of any third party funder.[47] In particular, the tribunal granted

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42 *See* **Request**, paragraph 347(6)(i); see also **Request**, **Section VII(B)**.

43 *See* **Exhibit R-15**, Letter from White & Case to Lazareff Le Bars, dated 17 November 2016.

44 **Exhibit R-25**, Letter from White & Case to Lazareff Le Bars, dated 8 December 2016.

45 **Exhibit RL-56**, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID, Procedural Order No. 3, 12 June 2015, paragraph 13.

46 **Exhibit RL-56**, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID, Procedural Order No. 3, 12 June 2015, paragraph 9.

47 **Exhibit RL-49**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paragraph 85.

Bolivia's request for "*the disclosure of the name of the funder… for purposes of transparency*".[48]

36. Although the *South American v Bolivia* tribunal rejected Bolivia's request for the disclosure of the terms of the financing, it recognized that "*additional circumstances*" could warrant disclosure of the terms of a third-party funding agreement.[49] Such disclosure is warranted in the present dispute given the nature of the Claimant's conduct and other circumstances described above.

37. The Respondent thus requests that the Tribunal order the Claimant to disclose the name of any third party funders as well as the terms of any funding arrangement.

IX. REQUEST FOR RELIEF

38. The circumstances as set out above detail the reasons why the Application should be granted.

39. The Respondent has not received any evidence, or indeed any assurance, from the Claimant that he will be in a position to reimburse the Respondent for its legal fees and expenses should it succeed in its defense. Indeed, it appears that even if such assurances were provided it could not be relied upon. The uncertainty of the Claimant's financial situation means it is imperative that security for costs is ordered at this early stage of the Arbitration.

40. A further relevant consideration is the paucity of the Claimant's claims as detailed in the Response. It would be unfair for the Respondent to defend such a meritless claim with no prospect of recovering its costs. Without prejudice to the Respondent's future submissions, any claims brought under the BIT hinge on jurisdictional and other points which must first be established.

41. Moreover, already in this Arbitration the Claimant has requested two Preliminary Orders from the Tribunal, both of which have been rejected. Responding to these Preliminary Applications has involved a substantial commitment of both time and costs for the Respondent. For example, the meandering Request is over 100 pages long, and was served (seemingly deliberately) at the last minute before the holiday period with no advance warning despite the Notice of Arbitration having been issued nearly one and a half years ago.

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48 **Exhibit RL-49**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paragraph 79.

49 **Exhibit RL-49**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paragraph 82.

42. The Respondent is unwilling to take the risk of an unenforceable costs order (against a Claimant with an uncertain financial situation who is bound by a Freezing Order) with regard to costs in the Arbitration as a whole. If the relief requested is not granted, the prejudice to the Respondent, namely the future non-enforcement of any costs award made in its favour, is obvious. The circumstances of this case clearly support granting the Respondent's reasonable application for security for costs.

43. The Respondent respectfully submits that the Tribunal make an order:

i) requiring the Claimant to provide security for costs in the amount of USD 800,000; and

ii) requiring the Claimant to disclose the name of any third party funders as well as the terms of any funding agreement.

Respectfully submitted this 10th day of February 2017.

White & Case LLP, Counsel for the Respondent