INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SILVER BULL RESOURCES, INC.

Claimant

v.

UNITED MEXICAN STATES

Respondent

(ICSID Case No. ARB/23/24)

DECISION ON THE CLAIMANT'S PROPOSAL TO DISQUALIFY PROF. PHILIPPE SANDS KC

Members of the Tribunal
Mr. Ian Glick KC, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator

Secretary of the Tribunal
Ms. Celeste E. Salinas Quero

Date: Monday, 21 October 2024

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I. INTRODUCTION

1. This Decision rules on the proposal filed by Silver Bull Resources, Inc. ("Silver Bull" or the "Claimant") on 20 August 2024 to disqualify Professor Philippe Sands KC (the "Disqualification Proposal"). The United Mexican States ("Mexico" or the "Respondent") opposes the Disqualification Proposal.

2. In accordance with Article 58 of the ICSID Convention and Rule 23 of the 2022 ICSID Arbitration Rules, the other members of the Tribunal (the "Unchallenged Arbitrators") have made this decision.

II. PROCEDURAL HISTORY

3. On 20 August 2024, the Claimant filed the Disqualification Proposal pursuant to Article 57 of the ICSID Convention. The Claimant invited the Respondent to agree to continue the proceeding while the Disqualification Proposal was under consideration.

4. On the same date, in accordance with Arbitration Rule 22(1), the timetable for the briefing of the Disqualification Proposal was fixed. In accordance with Arbitration Rule 22(2), the ICSID Secretariat (the "**Secretariat**") informed the Parties that the proceeding was suspended until a decision on the Disqualification Proposal was made, except to the extent that the parties agreed to continue the proceeding.

   (a) The Respondent was invited to submit its reply by 10 September 2024;

   (b) Professor Sands was invited to file a statement by 16 September 2024; and

   (c) Each party was invited to file a final written submission by 23 September 2024.

5. On 21 August 2024, the Respondent indicated that it did not consent to the continuance of the proceeding. On the same date, the Secretariat confirmed that the proceeding remained suspended in accordance with Arbitration Rule 22(2).

6. On 10 September 2024, the Respondent filed a reply, accompanied by exhibit R-0001 and legal authorities RL-0001 through RL-0016 (the "Reply"). The Reply was filed in Spanish.

On 11 September, the Respondent filed a corrected version of the Reply, together with an English translation and a corrected version of legal authority RL-0011.

7. On 16 September 2024, Professor Sands filed his statement.

8. On 23 September 2024, the Claimant filed a final written submission and the Respondent gave notice that it had no additional comments.

III. BASIS OF PROPOSAL

9. On 1 August 2024, ICSID published an Award on Damages in *Eco Oro Minerals Corp. v. Republic of Colombia*.[1] The award had appended to it a "Declaration on Costs" (the "Declaration") written by Professor Sands, who is an arbitrator in this present arbitration.

10. On 20 August 2024, as already mentioned, the Claimant made a proposal to disqualify Professor Sands based on the contents of the Declaration.

IV. PARTIES' POSITIONS

11. The Parties' and Professor Sands's respective positions appear in full in their submissions. What follows are summaries which are not intended to be exhaustive.

A. CLAIMANT'S POSITION

12. The Claimant's position is summarised in the following paragraphs.

13. Professor Sands's Declaration (the Claimant says) contains an attack on third-party funding in investor-State arbitration which manifestly demonstrates both the appearance of bias or predisposition against parties with such funding, including the Claimant in this case, and also the appearance of pre-judgement of issues likely to be relevant to the present dispute and on which the Parties have a reasonable expectation that all arbitrators have an open mind, including the nature of Silver Bull as a claimant, its financial ability to bring a claim, and issues of cost allocation. Such circumstances (the Claimant goes on to say) give rise to

[1] ICSID Case No. ARB/16/41.

justifiable doubts as to Professor Sand's impartiality and independence to sit as a member of this Tribunal and warrant his disqualification.[2]

14. The statements and positions advocated by Professor Sands in his Declaration, from the point of view of a reasonable third person, give rise to justifiable doubts as to his impartiality and independence, including an appearance that he has pre-judged the nature and character of the Claimant, and of its claims, because of its need for third-party funding in order to bring its claims.[3]

15. Professor Sands used the Declaration as a platform to impugn third-party funding generally and to criticize what he perceives to be its subversion of investor-State proceedings, and to signal to the international arbitration community at large that, in his view, third-party funding arrangements are improper and contrary to the "overriding purpose" of investor-State arbitration.[4]

16. In the present case, the Claimant is relying on third-party funding to finance its claims against Mexico. Self-financing had begun significantly to dilute the shareholding of the company and the Board of Directors determined that it was in Silver Bull's best interests to proceed with external financing.[5]

17. Professor Sands says, amongst other things, that "[t]he 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", and that "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".[6] He says that "[t]he risk is even greater when 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 required to contribute to the costs of the opposing party if the claim fails."[7] This creates what he describes as a "gambler's

[2] Disqualification Proposal, paragraph 1.3, Additional Submission, paragraph 1.3.
[3] Disqualification Proposal, paragraph 1.3, Additional Submission, paragraph 1.3.
[4] Disqualification Proposal, paragraph 4.1.
[5] Disqualification Proposal, paragraph 4.10.
[6] Disqualification Proposal, paragraph 4.5, citing Declaration on Costs, C-0154, paragraph 11. See also Additional Submission, paragraph 2.2.
[7] Disqualification Proposal, paragraph 4.5, citing Declaration on Costs, C-0154, paragraph 11.

Nirvana" which can be used "as a means of financial speculation without any possibility of making costs awards against those funders" which he describes as "deeply problematic".[8] Moreover, he says that "funders may be closely engaged in the conduct of proceedings which can be burdensome, time-consuming and sensitive", and that their involvement "may add to the costs of the proceedings".[9] Arbitration proceedings of this kind were not, he says, "envisaged to be a system of leverage financial speculation and financial gains by third parties". He warns that such funding may "serve to undermine confidence in an important system, and foster perceptions that it lacks essential legitimacy".[10]

18. An informed third person could reasonably conclude that Professor Sands comments in the Declaration evince the appearance of at least three unfavourable views of the Claimant and its claims:[11]

    (a) that the claims are being used to "leverage financial speculation and financial gains" by a third party;

    (b) that the claims are being "controlled or directed by a third-party funder which has no prior relationship with a purported investment or the host-State"; and

    (c) that the Claimant's third-party funding arrangements will render the conduct of the proceedings "burdensome, time-consuming and sensitive", as well as more costly.

19. Indeed, any reasonable third party would consider that Professor Sands has taken a dim, if not hostile, view of the Claimant and its claims because of Claimant's need to rely on third-party funding to pursue justice;[12] and that the support of the third-party funder serves "to undermine confidence in an important system, and foster perceptions that it lacks essential legitimacy".[13]

20. The "combination of words chosen by" Professor Sands "and the context in which he uses them" have the overall effect of painting an unfavourable view of the Claimant and its claims

[8] Disqualification Proposal, paragraphs 1.2, 4.6, citing Declaration on Costs, C-0154, paragraph 12. See also Additional Submission, paragraph 2.3.
[9] Disqualification Proposal, paragraph, 4.6, citing Declaration on Costs, C-0154, paragraph 12.
[10] Disqualification Proposal, paragraph, 4.8, citing Declaration on Costs, C-0154, paragraph 13.
[11] Disqualification Proposal, paragraphs 4.11, 4.12. See also Additional Submission, paragraph 2.3.
[12] Disqualification Proposal, paragraph 4.13.
[13] Disqualification Proposal, paragraph 4.13, citing Declaration on Costs, C-0154, paragraph 13.

in such a way as to give a reasonable and informed third party justifiable doubts as to his impartiality in this case:[14] see *Perenco Ecuador Limited v. The Republic of Ecuador and Empresa Estatel Petróleos del Ecuador*.[15]

21. ICSID, like a number of other arbitral institutions, has formally recognised the role of third-party funding but, as the Declaration reflects, Professor Sands does not have the "openness of mind" to consider the legitimate purposes of such funding.[16] Indeed, Professor Sands appears to suggest that third-party funding has led to an increase in unmeritorious claims and to view funded cases with preconceived suspicion.[17]

22. In his view, "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".[18] Tribunals, he says, "should be able to make a costs order against a third-party funder".[19] He also appears to advise that the successful party should bring legal proceedings against the funder to "recover its costs from a third party funder that has contributed to significant expenses being incurred in unsuccessful claims".[20] This proposal reflects a prejudgment on the issue of costs. It gives rise to the appearance that he has inappropriately prejudged issues of cost allocation and liability for costs. In particular, if the Claimant were unsuccessful in its claims against Mexico, his position is that the Tribunal "should be able to make a costs order against" both the Claimant and its third-party funder. The Claimant has a reasonable expectation of an open mind on such issues, which Professor Sands does not have in cases where, as here, the Claimant requires third-party funding to pursue its claims.[21]

[14] Disqualification Proposal, paragraph 4.14. See also Additional Submission, paragraph 2.10.
[15] ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator, 8 December 2009, CL-0120, paragraph 48.
[16] Disqualification Proposal, paragraph 4.17.
[17] Disqualification Proposal, paragraph 4.18. See also Additional Submission, paragraph 2.8.
[18] Disqualification Proposal, paragraph 4.21, citing Declaration on Costs, C-0154, paragraph 12.
[19] Disqualification Proposal, paragraph 4.21, citing Declaration on Costs, C-0154, paragraph 12. See also Additional Submission, paragraph 3.2.
[20] Disqualification Proposal, paragraph 4.21, citing Declaration on Costs, C-0154, paragraph 12. See also Additional Submission, paragraph 3.2.
[21] Disqualification Proposal, paragraph 4.22. See also Additional Submission, paragraphs 3.2, 3.3.

23. Professor Sands's comments here go well beyond the language used by Dr. Gavan Griffith in *RSM Production Company v. Saint Lucia*.[22] Professor Sands not only questions the legitimacy and propriety of third-party funding arrangements, but he questions the merits and *bona fides* of funded claims, suggesting that third-party funding has led to an increase in costly, unmeritorious claims. The Declaration effectively consists of a polemic against all third-party funding arrangements, no matter how sensibly budgeted, financially apportioned, or what safeguards have been put in place to ensure the claimant maintains control of the conduct of the proceedings with its appointed counsel.[23]

B. THE RESPONDENT'S POSITION

24. The Respondent's position is summarised in the following paragraphs.

25. The parties appear to agree (the Respondent says) that a party seeking the disqualification of an arbitrator must demonstrate that a reasonable third party would conclude, based on an objective assessment of the facts, that it is evident or obvious that the arbitrator whose disqualification is being sought lacks the impartiality and independence necessary to decide the case.[24] However, for a disqualification proposal to succeed, "there must be a showing that [the opinion expressed by the arbitrator] or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved such as a witness or fellow arbitrator".[25] The mere fact that the Claimant does not share Professor Sands's opinion on third-party funding is not a sufficient reason to propose his disqualification on the grounds of an apparent bias against it. Thus, the fact that Professor Sands has expressed views on third-party funding, and that the Claimant has resorted to such funding, is not sufficient to disqualify him, as those facts alone would not

[22] ICSID No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith Q.C., CL-0126, 23 October 2014.
[23] Disqualification Proposal, paragraphs 4.23-4.25. See also Additional Submission, paragraph 2.5.
[24] Reply, paragraph 4.
[25] Reply, paragraph 5, citing ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, RL-0001, ¶¶ 44-46.

lead a reasonable person to conclude that Professor Sands manifestly lacks impartiality or that he has prejudged any aspect of this dispute.[26]

26. Professor Sands's comments bear no relation to the issues that the Claimant identifies as indicative of a manifest lack of impartiality in this arbitration and they do not relate to any of the parties to it, or their counsel, or the subject matter of this dispute. They are general comments on third-party funding and the impact it has on investment arbitration in general.[27] In this regard Professor Sands expresses a legitimate and genuine concern that is shared by other arbitrators, States and practitioners in the arbitral community. All the arbitrators in *Eco Oro*, including Professor Sands, concluded it was reasonable for each party to bear half of the arbitration costs and its own legal costs. This demonstrates there was no bias by Professor Sands against the claimant even in that case – the very case in the context of which he penned his Declaration – for resorting to third-party funding.[28]

27. Indeed, Professor Sands also accepts in his Declaration that third-party funding can play an important positive role in ensuring that parties with limited resources are able to bring their claims and defend their rights.[29] His main concern related to the exorbitant amount of costs claimed in what he considered to be "a case with such limited prospects of material success".[30]

28. Professor Sands's view that, in principle, a tribunal should be able to make an award on costs against a third-party funder, if implemented, would not prejudice a claimant party.[31]

29. For an arbitrator to have a position on third-party funding is not the same as being biased against parties that resort to such funding. As Dr. Christopher H. Schreuer and others point out in "the ICSID Convention: A Commentary (2nd edition)", "the arbitrator's doctrinal opinions "expressed in the abstract without reference to any particular case do not affect the arbitrator's impartiality and independence"."[32]

[26] Reply, paragraph 5.
[27] Reply, paragraph 9.
[28] Reply, paragraphs 10, 11.
[29] Reply, paragraph 12.
[30] Reply, paragraph 13, citing Declaration on Costs, C-0154, paragraph 6.
[31] Reply, paragraph 16.
[32] Reply, paragraph 21, citing Christopher H. Schreuer, et. al., The ICSID Convention: A Commentary, Second Edition, Cambridge University Press, (2009), RL-0002, p. 1205.

30. Professor Sands's comments in the Declaration do not relate to the Claimant here or to its claims, but only to a potential risk that may arise in certain cases, precisely because of the different incentives of claimant parties and the companies that fund them.[33]

31. In the present case the Claimant has publicly revealed the details of its arrangement with its third-party funder, and it has represented that it continues to have "complete control over the conduct of the international arbitration proceedings, insofar as the proceedings relate to the Company's claims, and continues to have the right to settle with Mexico, discontinue proceedings, pursue the proceedings to a merits hearing and take any action the Company considers appropriate to enforce the resulting arbitral award." There is no reason to believe that Professor Sands will ignore this in the event that such questions become material.[34]

32. The Declaration is concerned with cases where a third-party funder may closely participate in the conduct of proceedings which may make them burdensome, time-consuming and sensitive, and more costly.[35]

33. The Declaration is not related to the facts, the jurisdiction, the merits or damages in this arbitration where the determination of costs depends on the Tribunal's decision on the merits of the case and the conduct of the parties during the proceedings. Concerns about prejudgment of costs are unfounded, given that Professor Sands himself acknowledges that third-party funding may be important in some cases.[36]

34. The tone of Professor Sands's statements remains within reasonable bounds for an arbitrator and does not demonstrate a manifest lack of impartiality such as to compromise his ability to decide this case neutrally.[37]

35. Third-party financing is a widely discussed topic and it is reasonable for Professor Sands to have an opinion on the issue. But there is no reason to assume that he would take a position

[33] Reply, paragraph 23.
[34] Reply, paragraph 24, citing Form 10-K filed by the Claimant with the United States Securities and Exchange Commission, C-0137, p. F-13.
[35] Reply, paragraph 24.
[36] Reply, paragraph 26.
[37] Reply, paragraph 31.

that would prejudice the Claimant on the merits, jurisdiction or damages in this case simply because the Claimant has resorted to third parties to fund its claim.[38]

36. In *Perenco* the arbitrator was found to have made pejorative comments against one of the parties to the arbitration. The Declaration contains no pejorative comments against anyone, much less the Claimant or its counsel in this case.[39]

37. In *Burlington Resources Inc. v. Republic of Ecuador*,[40] the impugned arbitrator, in the course of offering explanations, made remarks questioning the ethics of counsel for Ecuador. Professor Sands has not questioned the ethics of the Claimant or its counsel.[41]

38. Arbitrators often express views on a variety of topics, including third party funding, at conferences, in academic papers, and in their decisions and awards. If the Claimant's proposed standard were followed, any arbitrator who has publicly expressed views about third-party funding would be ineligible to sit on a tribunal in any case involving such financing.[42]

V. SUMMARY OF PROFESSOR SANDS' STATEMENT

39. The expression of a view on an academic or policy issue does not, in itself, justify disqualification.[43]

40. The Declaration was focused on the issue of costs and touches on third party funding in that regard. Professor Sands has serious concerns about the exponential rise in the costs of arbitrating investor-State disputes, and the role of third-party funders in contributing to that. His views, like those of others, are public and easily accessible and will have been known, or could have been known, to both parties prior to his appointment.[44]

41. In the Declaration Professor Sands accepts that third-party funding has a role in investor-State arbitration and may be justified in certain circumstances. He also accepts that tribunals cannot

[38] Reply, paragraph 41.
[39] Reply, paragraph 46.
[40] ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, December 13, 2013, CL-123, paragraph 20.
[41] Reply, paragraph 52.
[42] Reply, paragraph 53.
[43] Statement, paragraph 3.
[44] Statement, paragraph 4.

currently make awards of costs against third-party funders. Nonetheless he accepted the Tribunal's unanimous view in *Eco Oro* as to the allocation of costs between the parties. He expressed his concern in the form of the Declaration rather than as part of the main Award because of his understanding that the future of third-party funding was a live issue of policy but not one that was relevant to the determination of any issue in that case.[45]

42. The remarks were tied specifically to the costs incurred by the claimant in *Eco Oro*. Professor Sands has not formed any view on the issue of costs, including third-party funding, in the present case, nor could he do so until the very end of the proceedings when costs will be quantified and the subject of argument by the parties.[46]

43. He has sat on many cases in which one party has received third-party funding. Its existence has never made any impact on his view and conclusion as to any issue of jurisdiction, liability, damages, quantum or costs (save in the limited situation of an application for security for costs, in so far as the ability of a party to meet a future order might arise).[47]

44. The future wellbeing of any system of law and dispute settlement, including investor-State arbitration, rests in part on constructive and open criticism from those involved in the system as well as from those observing the system from outside. Such internal criticism would not be possible if arbitrators were routinely disqualified for expressing their views on matters of policy.[48]

VI. ANALYSIS

1. Timeliness

45. Arbitration Rule 22(1) provides in relevant part that:

> "(1) A party may file a proposal to disqualify one or more arbitrators ("proposal") in accordance with the following procedure:
>
> (a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after […]

[45] Statement, paragraph 5.
[46] Statement, paragraph 6.
[47] Statement, paragraph 7.
[48] Statement, paragraph 8.

> (ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based."

46. The Declaration on which the disqualification proposal is based was made by Professor Sands on 4 April 2024 but only published on 1 August 2024. The disqualification proposal was made on 20 August 2024 and thus made within 21 days after the date on which the Claimant first knew or first should have known of the facts on which it is based.

2. Merits

Introduction

47. Convention Article 57 allows a party to propose the disqualification of any tribunal member. It reads in relevant part as follows:

> "A party may propose to a […] Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."

48. Convention Article 14 provides:

> "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

49. It is not in dispute that, not only must ICSID arbitrators be independent and impartial, but they must appear so to reasonable third parties. An arbitrator will be found to manifest a lack of the qualities referred to above if it is determined that a reasonable party, having knowledge of all the relevant facts and circumstances, would conclude from them that the arbitrator did not appear to be impartial or independent. Indeed, we accept that an arbitrator would not appear to be impartial or independent if those facts and circumstances gave rise to justifiable doubts as to his impartiality or independence. The standard is an objective one.

50. In the present case, the hypothetical reasonable third party is someone who:

(a) reads the entire Declaration;

(b) considers it as a whole, and in the context of the award to which it is appended;

(c) is aware of the issues relating to third-party funding and that they are a matter of debate amongst investor-State arbitrators, scholars, practitioners and parties,

(d) with all that in mind, asks him or herself whether, looking at the matter fairly, the Claimant's allegations in the Disqualification Proposal are made out.

51. The crux of those allegations, as already mentioned and as summarised by the Claimant itself, are that:

> "Professors Sands's attack on third-party funding in investor-State arbitration demonstrates (i) the appearance of bias or predisposition against parties with such funding, including the Claimant in this case, and (ii) the appearance of pre-judgment of issues likely to be relevant to the present dispute and on which the Parties have a reasonable expectation of an open mind, including the nature of [Silver Bull] as a Claimant, its financial ability to bring a claim, and issues of cost allocation."[49]

There is, it should be noted, no allegation of actual bias.

The Declaration

52. The Declaration was made in the context of a case in which the claimant succeeded on jurisdiction and in establishing a breach of the Free Trade Agreement between Canada and the Republic of Colombia, but failed to establish that any loss flowed from that breach. As a result, the tribunal determined that each party should bear half the costs of the proceedings, and pay its own legal fees and other costs.

53. What prompted the Declaration was the fact that, whereas the respondent had incurred total costs of just under US$6.3 million, the claimant, which was supported by third-party funding, had incurred total costs of US$33.3 million. This was much higher than a 2021 report had found to be the mean costs for claimants in investor-State disputes (US$6.4 million).

[49] Disqualification Proposal, paragraph 1.3 and see also the headings to Sections 2 and 3 of its Additional Submission of 23 September 2004.

Moreover, these costs had been incurred in a case where, in Professor Sands's view, the claimant had only had "limited prospects of material success".

54. Professor Sands made two points about these costs. The first, which concerns the amount spent on two expert reports, is immaterial to this Decision. The second, however, concerned the fact that the claimant had claimed (though not, of course, recovered) US$4,492,899.48 as part of the costs it had incurred "to obtain financing to enable it to pursue the arbitration".

55. Moreover, *Eco Oro*'s third-party support included some US$14 million for which the funder was entitled to up to "51% of the gross proceeds of the arbitration".

56. It was in this context that Professor Sands wrote this (footnotes omitted):

> "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 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 payments 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".
>
> 12. … 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. In my view the creation of a "gambler's Nirvana" 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. 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 the 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. 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, 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."[50]

The reference to a "gambler's Nirvana" is a quotation from Gavin Griffith QC in *RSM Production Corporation*.

57. It is important to observe that the discussion begins with a recognition that, in some cases, third-party funding may be justified because it enables impecunious parties to assert their rights. However, the starting point of Professor Sands's critique of its use is that, in his opinion, in *Eco Oro*'s case that justification does not apply.

58. What he is expressing concern about is, teasing out his themes:

[50] Footnote omitted.

(a) The risk that the purpose for which investor-State proceedings exist may be "subverted" if claims are controlled or directed by a funder otherwise unconnected with the case of the host State and that such involvement may make the proceedings more costly.

(b) That this risk is exacerbated where the funder stands to receive much of the damages but has no liability to contribute to the costs of the winning party if the claim fails, which makes third-party funding a form a financial speculation for funders.

(c) The risk that cases brought at vast cost supported by third-party funders, and where such funders bear no risk of paying the opposing party's costs, will delegitimise the system of investor-State arbitration under ICSID.

59. Professor Sands's suggested remedy is that, one way or another, a third-party funder should be liable to pay the costs of the successful party if the claim which the funder has financed fails. Though it is of course implicit in everything he says that he is well aware that currently no such liability exists in ICSID proceedings.

60. As regards the particular facts of *Eco Oro*, it is plain that Professor Sands believes there was no justification for a party to incur vast costs which it could not otherwise afford in pursuing a case that only ever had "limited prospects of success" merely because it had the support of a third-party funder who was entitled to much of any of the proceeds received (if its client, the funded party, prevailed) and who was free of any risk of having to pay the other party's costs (if it did not).

61. What Professor Sands does *not* say is:

(a) that third-party funding is always unjustified or necessarily undesirable;

(b) that he thinks the worse of every party which obtains third-party funding, or of every claim brought with the assistance of such funding, or of every-third party funder;

(c) that those who litigate with third-party funding support are likely to bring unmeritorious or excessively expensive claims; or

(d) that third-party funders always, or even usually, have a malign control or influence over the conduct or the cost of the proceedings which they help to finance.

Conclusion

62. On a fair reading of the Declaration as a whole, Professor Sands does not show bias, or a predisposition, or the appearance of bias or predisposition, against parties in general who obtain third-party funding in order to pursue their claims. His concerns are directed at what he sees as certain risks created by the system of third-party funding, not at all claims brought with the benefit of third-party funding.

63. The Declaration cannot fairly be read as suggesting that claims supported by third-party funding are necessarily exaggerated or used to leverage financial speculation and financial gain, or controlled or directed by the third-party funder (whatever its relationship, if any, with the purported investment or the host-State), or that the arrangements will necessarily render the conduct of the proceedings burdensome, time-consuming and sensitive, as well as more costly. Professor Sands clearly asserts there is a risk that all or any of these might be the case, but his acceptance that third-party funding may be justified is inconsistent with him either saying or believing that any of these things are always true in cases other than *Eco Oro*.

64. Nor does Professor Sands appear to show any prejudgment of any issues relating to the costs of this arbitration. The only party whose financial position he touches upon in the Declaration is *Eco Oro*. He does not generalise from this as to the financial position of others who might obtain third-party funding. Nor, of course, does he say anything about Silver Bull or its financial position.

65. If tribunals considered themselves competent to make cost orders against third-party funders of unsuccessful parties, and if they did in fact make such orders, then there might be some force to a complaint if Professor Sands had said that tribunals ***should*** make such orders. In fact all he has argued is that tribunals should be able to make such orders, not that they should always make them. Moreover, as noted above, tribunals do not have such powers, and it goes nowhere to accuse an arbitrator of prejudging an issue that will not, indeed cannot, arise in this arbitration.

66. In short, we do not think a reasonable third party would consider that the contents of the Declaration manifestly exhibit bias or the appearance of bias against the Claimant (or those funding the Claimant) or give rise to justifiable doubts about Professor Sands's independence

or impartiality as an arbitrator in this arbitration in relation to any question that might have to be determined by the Tribunal.

VII. DECISION

67. Having considered the facts alleged and the arguments made by the parties, and for the reasons stated above, we decide that:

    (a) The Claimant's Disqualification Proposal to Professor Sands is dismissed.

    (b) As from the date of this Decision, the suspension of the proceeding is, in accordance with Arbitration Rule 22(2), terminated.

[Signed]	[Signed]
Mr. Ian Glick KC	Mr. Stephen L. Drymer