

PCA Case No. 2020-11

**IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES – PERU TRADE
PROMOTION AGREEMENT, ENTERED INTO FORCE ON FEBRUARY 1, 2009**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2013 (the “UNCITRAL Rules”)**

- between -

BACILIO AMORRORTU (USA)

(the “Claimant”)

- and -

THE REPUBLIC OF PERU

(the “Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 2

Request for Disclosure of Funding Agreement

Tribunal

Judge Ian Binnie, CC, QC (Presiding Arbitrator)
Prof. Bernard Hanotiau
Mr. Toby Landau, QC

Registry

Permanent Court of Arbitration

October 19, 2020

I. Background

1. By letter dated September 25, 2020, the Respondent requested that the Tribunal order the Claimant:
 - (i) To disclose the names of any funder(s) with whom Mr. Amorrortu or [his] legal representatives may have entered or plan to enter into an agreement in relation to this case;
 - (ii) To confirm that the funding arrangement includes payment of an adverse cost award;
 - (iii) To provide copies of the relevant provision from the funding agreement(s) relating to (i) cost awards, and (ii) aspects of the conduct, termination, or settlement of the present arbitration that require funder approval.
2. By letter dated October 2, 2020, the Claimant (i) confirmed “that he is relying on the assistance of a third party to pay for the costs of these proceedings”; (ii) offered to disclose the identity of the funder to the Tribunal and the Respondent under certain conditions; and (iii) requested that the Tribunal dismiss the Respondent’s request that it disclose certain terms of the funding agreement.
3. By letter dated October 6, 2020, the Respondent commented on the Claimant’s letter of October 2, 2020 and reiterated its request, as set out in its letter of September 25, 2020.

II. Analysis

4. The Tribunal has before it an application from the Respondent dated September 25, 2020 for disclosure of the Claimant’s Third Party Funding Agreement, as set out above.
5. The Respondent states that Mr. Amorrortu is a “natural person whose financial circumstances and background in the business world are not publicly known or available” and, in light of the “high costs involved in pursuing and defending investment arbitrations”, disclosure at this stage is necessary and appropriate “to avoid a conflict of interest with the arbitrators” and “ensure the integrity of the arbitration proceedings”, by which is meant the degree of control if any to be exercised by the funder over “possible negotiations or otherwise terminating the proceedings.” Moreover, the Respondent wishes to have clarified “the basis on which the Respondent’s potential application for security for costs would be made” and “to avoid a situation where in the event of an adverse cost award [the Claimant] would be unable to pay because the third party funder would have disappeared as it was not a party to the arbitration” – citing generally *Muhammet Cap et al v Turkmenistan*, ICSID Case No ARB /12/6, Procedural Order No. 3 (June 12, 2015).
6. The Claimant does not dispute the authority of the Tribunal to order disclosure. He offers to provide the name of the funder to the members of the Tribunal, principally with the goal of identifying potential conflicts of interest. The Claimant has also offered to disclose the name of the funder to the Respondent, subject to an undertaking of confidentiality. However, the Claimant objects to disclosure of the terms of the funding agreement because “a claimant is not required to demonstrate sufficient financial standing to meet an adverse costs award ... as a precondition of pursuing an investor state arbitration”, citing *Hesham Talaat M. Al-Warraq v Indonesia*, UNCITRAL, June 21, 2012 at para. 109. Indeed, in the Claimant’s view, the participation of a third party funder confirms that in the eyes of a diligent third party his claim has merit. The Claimant regards the timing and content of the Respondent’s request as “suspicious”.
7. By a reply dated October 6, 2020, the Respondent contends that the existence of third party funding represents a “shifting away from the Claimant” of the risk of costs and “could result in a “arbitral hit-and-run” at the Respondent’s expense. The Respondent denies “suspicious” circumstances.

8. In the Tribunal's view, the identity of the third party funder should be disclosed both to the Tribunal and to the Respondent. The information may be designated as confidential under para. 9.4 of Procedural Order No. 1. Such disclosure is sufficient to deal with potential conflicts of interest.
9. The Respondent indicates that an undertaking by the third party funder to pay an adverse costs award (or its absence) may be relevant to its potential application for security for costs. The Respondent does not put forward any evidentiary basis to fear that the Claimant lacks the means to pay an award of costs. It points out that Mr. Amorrortu is "a natural person suing Peru in his personal capacity ... unlike a company which may have access to ongoing corporate revenue or to shareholder funds". The Tribunal is unwilling to make this inference. Indeed, the fact Mr. Amorrortu is putting his personal finances on the line may be of greater assurance than if the claim was being brought by a shell company "without access to ongoing corporate revenue or to shareholder funds." The fact of third party funding does not imply that Mr. Amorrortu is impecunious. There are numerous other reasons why a claimant may seek third party funding, including risk management and validation by a more objective third party of the merits of the claim.
10. With respect to Mr. Amorrortu's ability to pursue settlement negotiations or otherwise terminate the proceedings without the permission of the third party funder, the Respondent has not indicated any reason for concern apart from the very existence of the third party funder. Third party funding arrangements vary. There is no onus on the Claimant to demonstrate that in this case he is free to negotiate and terminate the arbitration as he sees fit.
11. In the Tribunal's view, there is a potentially important "access to justice" issue. If the Claimant can meet the jurisdictional prerequisites to have his claim arbitrated (a matter which is still to be determined) there is no additional requirement that he prove financial capacity to meet any potential adverse costs award or that he is the master of his own litigation. It is for the Respondent to establish the need for special protective measures. In the case of *Muhammet Cap et al v Turkmenistan*, for example, relied on by both Parties, the Tribunal noted in para. 11 that in a separate case involving the Claimant the award of costs to Turkmenistan was not paid "even though the Claimant has funded the annulment proceedings". There is no allegation of bad faith against Mr. Amorrortu, nor any other circumstance raised by the Respondent to justify more ample disclosure except for the simple fact that the Claimant has entered into a third party funding agreement.
12. In the circumstances, the Claimant is ordered to disclose the identity of the third party funder to the Tribunal and the Respondent no later than **Friday, October 23, 2020**. The Respondent's application is otherwise dismissed.

Place of Arbitration: Paris, France



Judge Ian Binnie, CC, QC
(Presiding Arbitrator)

On behalf of the Tribunal