

UNCITRAL Working Group III

Initial Draft on the regulation of third-party funding

Compilation of comments

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**Possible Reform of Investor-State Dispute Settlement (ISDS) – Initial
Draft Provisions on TPF
Submission from the Government of Canada**

Canada supports the regulation of third-party funding (“TPF”) and the introduction of provisions addressing TPF in the applicable arbitral rules and/or in investment treaties to address concerns or issues that have arisen to date from TPF in investment arbitration. Canada provides comments below on the draft provisions of the initial draft paper on TPF.

A. Definitions (draft provision 1)

Canada agrees with the proposed definitions which are generally in keeping with the recent work on TPF in arbitration and treaty practice addressing TPF. With respect to the definition of “funded party”, Canada questions whether funded party should also include funded State parties. In Canada’s recent investment model agreement, “funded party” is limited to funded investors and not to States that receive TPF to ensure their defence. The circumstances under which a State may have recourse to TPF to defend itself are different than in the case of investors, and the considerations are also different as States are not responsible for initiating the arbitral proceedings.

B. Regulation models (draft provisions 2-6)

At this time, Canada favours a regulation model focussed on disclosure instead of a prohibition on TPF, which would limit access to justice including for potential meritorious cases. A regulation model would mirror the situation in many domestic legal regimes, which do not prohibit but regulate certain forms of TPF either through limitations or disclosure requirements. As TPF in investment arbitration is still relatively recent and the concerns arising from this practice have yet to be fully assessed, it is preferable to proceed on an incremental basis and focus as a first step on addressing the main issues that have arisen to date in relation to TPF. This includes in particular requiring disclosure of TPF to address conflicts of interests and any information related to the TPF that may be relevant to the conduct of the arbitration and/or settlement (i.e. who is making the decisions related to the arbitration), as well as information relevant to security for costs (i.e. whether the TPF will cover any cost award against the funded party).

While Canada does not rule out consideration of certain limits on TPF in investment disputes, the rationale for doing so has not yet clearly been established and it is therefore difficult at this stage to determine the type of restriction that would be appropriate to achieve that objective. There is also a risk that the restriction models proposed in the provisions below would lead to circumvention through other arrangements not currently captured by the definition (e.g. structuring of TPF through equity participation).

C. Disclosure of third-party funding (draft provision 7)

Regarding paragraph 1, Canada is of the view that the existence of a TPF agreement and *the name and address of the third-party funder* should be disclosed.

To the extent that the third-party funder has control over the arbitration and any settlement, there is also a rationale for requiring the disclosure of the party that has this decision making authority. However, article 7(1)(b) as drafted is potentially broader than necessary. For example, it may not be necessary as a matter of course to require the disclosure of the beneficial owner of the third-party funder.

With respect to article 7(1)(c), the disclosure of the terms of the funding agreement and the entirety of the agreement seems overly broad and in conflict with some domestic regimes that generally consider them privileged. We would therefore delete article 7(1)(c) and replace it with a reference to the existence of a third-party agreement. We would also support requiring as a matter of course disclosure of whether the third-party funder is liable for costs in the arbitration (instead of simply providing authority to the tribunal to require disclosure on a discretionary basis under article 7(2)(a)). Indeed, whether the TPF is covering the costs of an adverse award is relevant to determine whether the respondent would be paid in the event of an adverse award and therefore relevant to requests for security for costs. We also note that, as drafted, article 7(2) seems unnecessary if disclosure of the funding agreement and its terms is required under article 7(1)(c).

Concerning paragraph 2, Canada notes that further guidance to tribunals may be necessary as to the purpose or conditions under which the tribunal may require disclosure of additional information.

Linkage with disclosure requirements of the tribunal

On the timing of disclosure in paragraph 1, Canada supports prompt disclosure (as soon as possible as set out in paragraph 3). It is equally important to make clear the continuing nature of the disclosure obligation as addressed in paragraph 4. The provision could be amended to make clear that the continuing obligation to disclose any changes to the information referred to in paragraph 1 occurring after its initial disclosure, includes termination of the TPF arrangement. These disclosure provisions will complement and enable disclosure requirements of tribunal members under the proposed draft Code of Conduct for Adjudicators in International Investment Disputes (version two).

D. Other provisions

1. Scope of covered investor and investment (draft provision 8)

Canada agrees that TPF for a particular case does not transform a third-party funder into an investor with respect to that funding. However, draft provision 8 is overly broad. A third-party funder carrying on business in a host State may in some cases meet the definition of investor under certain treaties in the same way as other lenders. In order to clarify the issue, the following provision may be sufficient: “[f]or the avoidance of doubt, third-party funding in a particular case shall not be considered a covered investment under this Agreement”.

2. Security for costs (draft provision 9)

As a preliminary matter, Canada notes that discussion regarding the applicable standard for ordering security for costs in a case where there is a TPF agreement should take place within the context of the broader discussion on the standard that applies to requests for security for costs.

With respect to the legal standard for ordering security for costs, Canada suggests, in accordance with its 2021 model FIPA, the following: "reasonable grounds to believe that there is a risk the disputing party may not be able to honour a potential award of costs against it."

Canada also favours a modified option B instead of the presumption contained in option A. Option B could be modified to provide guidance to the tribunal to take into consideration various elements including those set out in (a), (b) and (c) of option A in lieu of the presumption that there be security for costs.

3. Code of conduct for third-party funders

Canada welcomes further discussions on the possible implementation of a future code of conduct for TPFs including the provision of confidentiality obligations for TPFs.

**COMMENTS BY THE REPUBLIC OF COLOMBIA ON THE DRAFT PROVISIONS
ON THIRD PARTY FUNDING**

15 September 2021

I. INITIAL REMARKS

Colombia would like to express its gratitude with the UNCITRAL Secretariat for the draft text. The progress made on the points of the agenda would have not been possible without the efforts of everyone involved in the Secretariat's drafting initiatives.

After evolving with the input of the member States of the Working Group, expressed through comments to the working papers, the draft provisions will become a point of reference for States when setting out the legal framework of their foreign investment policy. It is precisely to preserve this beneficial and harmonizing effect that Colombia urges member States to remain ambitious and work towards a doable outcome.

In that sense, Colombia considers that a multilateral instrument must contain the obligation to promptly disclose any funding agreement or other evidence of TPF, as Colombia proposed in its submission (document A/CN.9/WG.III/WP.173). This is a start point where all States can agree with, regardless of their preference for a particular model to address TPF. Whether their posture encompasses minimum restrictions or their absence thereof, extensive regulation or express prohibition of the practice, virtually every State should be in favor of a general obligation of disclosure.

There is no ostensible controversy around the relevance and convenience of studying an obligation to disclose TPF. Indeed, the Secretariat has addressed this

matter, drafting a provision which envisages the obligation of the funded party to disclose information related with the funder.¹ Moreover, major arbitration centers are starting to act pursuant to identify and prevent conflicts of interest related to TPF, one of the Working Group's main points of concern, as stated in the initial draft, through the establishment of a general obligation of disclosure. For example, the ICC arbitration rules (2021), require parties to inform the existence of a TPF agreement.² This is a likely scenario in disputes between private parties. Yet, the case is more convincing in disputes where public interest, like the welfare of a country's population, are at stake. In the context of ISDS, the inclusion of the provision goes beyond mere conflict-of-interest considerations.

The following section addresses the context and the terms in which members of the Working Group could get the most advantage out of a general obligation of disclosure in a multilateral treaty.

II. The general obligation of disclosure in a multilateral treaty: an alternative approach

As members are aware, Colombia submitted a proposal intended to shed light over the possibility of drafting a multilateral convention with the purpose of addressing matters related to ISDS, based in the initiatives of international organizations like the OECD in tax related measures, particularly the "*Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*" or "MLI". This arrangement allowed to preserve the structure and content of existing treaties by permitting States to clarify which agreements were covered by the multilateral instrument, and by incorporating substantial provisions, parallelly applicable to those

¹ Draft provision 7.

² **International Chamber of Commerce, Arbitration Rules, In force as from 1 January 2021.**

"11. 7 In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration."

contained in the covered treaties, some of which the parties could opt-out in certain events, among other options to modulate the contents of the new instrument according to the parties needs and interests.³

Colombia suggested a similar approach to ISDS related matters. Concretely, the proposal aimed at preserving the structure of an agreement consisting on core provisions or minimum standards and opt-out provisions. Once again, we would like to emphasize on the convenience of such method. As it will be explained below, this model fits perfectly for matters such as the regulation of TPF were states agree on the minimums of a legal framework (i.e the obligation of disclosure) but disagree on more concrete aspects (pertaining, for example, restrictions, regulations or scenarios of prohibition).

In the scenario of a multilateral treaty of this nature, the Secretariat's draft provision concerning disclosure is very specific, and it may be construed in a way that does not reflect the common ground between States regarding TPF. In the context of an IIA, where only two or a small group of parties are negotiating, it is easier to discuss and agree on extensive texts such as the ones included the draft provisions. Therefore, Colombia proposes member States the inclusion of a possible core provision (or "minimum standard") with the following wording, based on article 11.7 of the ICC Arbitration Rules 2021, with the aim of including it in a multilateral treaty with the structure proposed by Colombia in 2019:

"Disclosure of Third-Party Funding (TPF):

1. Each party to an Investor-State Dispute under a "covered investment agreement" must promptly inform the arbitral tribunal or the Court [the Adjudicator] and the other party of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or

³ Supra note 1, paras. 4-8 and 19-23.

defenses and under which it has an economic interest in the outcome of the arbitration.

2. Provisions of a covered investment agreement establishing the following requirements shall apply:

- a. The termination of the proceedings following the failure to promptly disclose funding agreements;
- b. The failure to promptly disclose funding agreements will cause the suspension of the proceedings until the parties have the opportunity to send considerations to the Tribunal regarding the revelations, and the Tribunal decides whether to adjust the procedure accordingly or terminate the proceedings; or
- c. Third party funding is prohibited, and its revelation will cause the termination of the proceedings.

3. Provisions of a covered investment agreement establishing the following requirements regarding the allocation of costs shall apply:

- a. If the funded party fails to comply with the obligations in this provision, the tribunal shall take the fact into account when making a decision on the costs of the proceeding.

This is an initial draft for comments until 30 July. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject “Comments on TPF initial draft”.

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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on third-party funding

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I. Background

1. At its thirty-seventh and thirty eighth sessions, the Working Group considered that it would be desirable to address the legal framework pertaining to third-party funding in ISDS in light of the impact of third-party funding on both the proceedings and the ISDS regime. Possible options for reform were discussed, and the Secretariat was requested to prepare draft provisions on third-party funding ([A/CN.9/1004](#), paras. 80-94 and 97; see also [A/CN.9/970](#), paras. 17-25).¹

2. Accordingly, this note contains draft provisions on third-party funding for the consideration by the Working Group.

3. Regulations on third-party funding may be implemented through various means, such as through inclusion in investment treaties, in arbitration rules, in domestic legislation or in a multilateral treaty on ISDS reform ([A/CN.9/1004](#), paras. 95 and 97; see also [A/CN.9/WG.III/WP.194](#)). The draft provisions in this note have been prepared for inclusion in investment treaties and would need to be adjusted if they were to be part of a different type of instrument. The reference to a “Party” in the draft provisions refers to a contracting Party of an investment treaty (such as a State or a regional economic integration organization).

[EU and its Member States: The EU and its Member States thank the UNCITRAL Secretariat for the important work done with the production of this draft note. The EU and its Member States would like to make the following comments to the draft.

As a first preliminary comment, it may appear useful to clarify which provisions address third-party funding of both claimants and respondents, and which provisions only address the funding of claimants. While the disclosure obligations (Part C) should apply to both claimants and respondents, it seems that the described regulation models (Part B) principally target claimants.

Second, the EU and its Member States would like to note that while the disclosure and potential regulation of third-party funding can contribute to improving the current regime of investor-State dispute settlement, it cannot do so to the same extent as a structural reform. The creation of a permanent dispute settlement mechanism and an advisory center remain the better options for preventing abusive dispute settlement practices and conflicts of interest while guaranteeing access to justice for valid claims.]

II. Draft provisions on third-party funding

A. Definitions

DRAFT PROVISION 1 (Definitions)

1. “Proceeding” means any procedure to resolve a dispute between an investor of a Party and another Party.

¹ This Note was prepared with reference to a broad range of published information on the topic, including: [Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration \(2018\)](#) (“ICCA Report”); [Handbook on Third-Party Funding in International Arbitration](#) edited by Nikolaus Pitkowitz (2018) (“Pitkowitz”); [Third-Party Funding in International Arbitration](#) by Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017) (“Nieuwveld & Sahani”); [The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement](#) by Brooke Guven and Lise Johnson (2019) (“Guven & Johnson”); [Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement](#) submitted by CCSI/IIED/IISD (2019) (“CCSI/IIED/IISD Joint Submission”); [A Framework for Understanding Practice and Policy Regarding Third-Party Financing in ISDS](#) by Stavros Brekoulaki and Catherine Rogers (2019) (“Brekoulaki & Rogers”) and other publications by the Academic Forum (available [here](#)). Reference was also made to the ICSID Rules and Regulations Amendment - [Working Paper #4, Proposals for Amendment of the ICSID Rules](#) (“ICSID Working Paper #4”).

2. “Third-party funder” is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides funding for the proceeding.

3. “Funded party” is a party to a dispute that benefits from third-party funding by entering into a funding agreement on its own or through its affiliate or its representative.

4. “Third-party funding” is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

4. Draft provision 1 provides definitions of some key terminology, as the effectiveness of any regulation on third-party funding would depend on a clear definition thereof (A/CN.9/1004, para. 86). The definitions would need to be adjusted depending on the intended model and scope of regulation.² The Working Group may wish to consider whether any additional terminology would need to be defined.

5. In relation to paragraph 1, the Working Group may wish to consider whether it would be necessary to indicate the dispute resolution method and the legal basis of the proceedings. It should, however, be noted that a regulation could apply to ISDS generally, including arbitration, mediation³ and any other ADR mechanism, and regardless of whether the dispute is based on a treaty or a contract.

[EU and its Member States: The EU and its Member States welcome the preciseness of addressing upfront the definitions and the scope. A broadened scope of application of provisions addressing third-party funding to all forms of ADR may be useful since risks of conflicts of interest can exist whenever a neutral person mediates or adjudicates. Thus, similar issues of involving third-party funders may occur in other forms of ADR and mediation. The EU and its Member States would also support including contract disputes into the scope of application of the provisions and invite Delegations to reflect on whether disclosure of third-party funding may also be beneficial in the context of State-to-State dispute settlement proceedings.]

6. In relation to paragraph 2, the Working Group may wish to note that the phrase “enters into an agreement to provide funding” intends to capture instances where the funder has yet to provide the funding to the disputing party.⁴

[EU and its Member States: The EU and its Member States note that it may be desirable to specify in paragraph 2 that “third-party funder” “is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides funding for the proceeding to the benefit of a disputing party”. This clarification excludes other forms of more general financial support that may be provided to the dispute settlement mechanism.

The EU and its Member States welcome the suggested definition of third-party funder, including the coverage of a funder that “otherwise provides funding for the proceeding”. To foster clarity and legal security, it may be useful to specify what is meant by this term, e.g., that third-party funding does not require an explicit funding agreement. A commentary could address such specification.]

² For example, the CCSI/IIED/IISD Joint Submission provides a broad definition, based on which disclosure requirements apply to all third-party funding. The prohibition clause is then limited to non-recourse, outcome-contingent third-party funding.

³ See Draft Rule 12 of the amended ICSID Conciliation Rules in ICSID Working Paper #4, p. 88.

⁴ See ICCA Report, p. 50. See also Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) (provisionally in force since 21 September 2017), Article 8.1; and Canada-Chile Free Trade Agreement (“CCFTA”) (in force since 5 February 2019), Article G-23 bis (3).

7. While recently adopted investment treaties usually do not define the term “funded party” separately,⁵ paragraph 3 attempts to address “indirect funding”,⁶ where a funding agreement is entered into by an affiliate or a representative of the disputing party for the benefit of the disputing party. The Working Group may wish to consider whether the term “funded party” should be limited to claimant investors or also encompass States, though this would largely depend on the regulation model.

[EU and its Member States: The EU and its Member States support the inclusion of a definition of the term “*funded party*”. However, the current paragraph 3 does not include the second alternative of the definition of a “*third-party funder*” in paragraph 2, i.e., “*or otherwise provides funding for the proceeding*”. It appears useful to address this second alternative in paragraph 3 as well, to assure coherence between paragraphs 2 and 3. The following wording of paragraph 3 could be useful: “*Funded party*” is a party to a dispute that benefits from third-party funding by entering into a funding agreement on its own or through its affiliate or its representative, or that otherwise benefits from funding provided by a third-party funder.”]

8. Paragraph 4 clarifies that the purpose of third-party funding is to provide financing for the costs of the proceeding.⁷ The phrase “direct or indirect” is meant to cover circumstances where the disputing party might not be a party to the funding agreement but still a beneficiary of the funding arrangement (see para. 7 above). The words “or equivalent support” are meant to cover non-financial support.⁸ The phrase “in return for remuneration dependent on the outcome of the proceedings” refers to commercial financing,⁹ whereas the phrase “a donation or grant” refers to forms of non-profit funding (A/CN.9/1004, para. 87).¹⁰ The inclusion of the latter would largely depend on the regulation models outlined below, particularly as non-profit funding and funding by development organizations such as the [African Legal Support Facility \(ALSF\)](#), the [International Development Law Organization \(IDLO\)](#) and a multilateral advisory centre, should one be established, would not present the same concerns as commercial funding.

9. The Working Group may wish to consider whether certain funding arrangements should be excluded from the definition, such as funding by legal counsel or parties’ representatives.¹¹ In conjunction, it may wish to consider whether the definition should expressly cover (i) equity financing (for example, where the funder purchases shares in a disputing party or creates a special purpose vehicle jointly with that party) and (ii) instances where the third-party funder owns or invests in a law firm representing a disputing party.¹²

[EU and its Member States: The EU and its Member States can support the definition of “*third-party funding*” in paragraph 4, which is similar to the EU’s treaty practice.

⁵ See, for example, European Union-Singapore Investment Protection Agreement (“EU-Singapore”) (signed on 19 October 2018), Article 3.1.; EU-Vietnam Investment Protection Agreement (“EU-Vietnam”), Article 3.37.

⁶ Regarding a definition of the “beneficial owner”, see CCSI/IIED/IISD Joint Submission, p. 5, footnote 7.

⁷ See Draft Rule 14 of the amended ICSID Arbitration Rules; EU-Singapore, Article 3.1 (2)(f); and IBA Guidelines on Conflicts of Interest (“IBA Guidelines”), Explanation to General Standard 6(b): “contributing [...] to the prosecution or defence of the case”.

⁸ See, for example, ICCA Report, p. 50; Another approach would be to add a phrase such as “and other equivalent funding mechanisms” as a catch-all phrase to prevent the undermining of the definition and guarantee the efficient implementation of any regulation; The IBA Guidelines defines funding as “contributing funds, or other material support”.

⁹ For EU-Singapore, Article 3.1 – “in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled, or in the form of a donation or grant”; CCFTA, Article G-23 bis - “either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute”; draft Rule 14 of the amended ICSID Arbitration Rules - “in return for remuneration dependent on the outcome of the proceeding”.

¹⁰ For a broad definition, see CCSI/IIED/IISD Joint Submission. For an example of non-profit funding, see Philip Morris v. Uruguay, where the Bloomberg Foundation and its ‘Campaign for Tobacco-Free Kids’ provided funding for the Uruguayan government. See also ICCA report, p. 96 and Nieuwveld & Sahani, pp. 4, 5.

¹¹ Draft Rule 14(2) of the amended ICSID Arbitration Rules provides that “[a] non-party referred to in paragraph (1) does not include a representative of a party”. See also ICCA Report, p. 50; and draft provision 3 (b) in the CCSI/IIED/IISD Joint Submission.

¹² See ICCA Report, p. 35 and 36.

In addition, the EU and its Member States would not support excluding funding by legal counsels or the parties' representatives from the definition of third-party funding. The opposing party and the arbitral tribunal may have a reasonable interest in knowing who is financially responsible for the claim.

Finally, the EU and its Member States do not, at first sight, see the need to address expressly (i) equity financing and (ii) instances where the third-party funder owns or invests in a law firm representing a disputing party since it is their understanding that the reference to "indirect" funding in paragraph 4 and the term "otherwise providing funding" in paragraph 2 should cover these groups. It may be sufficient to address these groups expressly in a commentary to the text.]

B. Regulation models

10. This section sets forth the various models for regulating third-party funding. In considering the different models, the Working Group may wish to take into account a number of factors, including but not limited to the need to ensure the integrity of the proceedings by preventing any abuse and the benefit that third-party funding could have for claimants with insufficient financial resources, particularly small and medium-sized businesses, to raise claims (A/CN.9/1004, para. 85).

[EU and its Member States: When addressing potential problems arising from third-party funding, the EU and its Member States consider it indeed important to bear in mind that third-party funding is important for the purpose of providing access to justice for small and medium-sized businesses.

The EU and its Member States note that the following draft provisions on regulating third-party funding only address the situation where a claimant enjoys funding (potential applications to respondent are only referred to in the commentary). Thus, it may be desirable to place any potential provisions regulating third-party funding in a separate chapter that only addresses funded claimants (*see* EU's and its Member States' comment above on para. 3).]

1. Prohibition models

General

11. One regulation model is to prohibit third-party funding in ISDS (A/CN.9/1004, para. 81).¹³ Such prohibition could address the concern that third-party funding aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed.

DRAFT PROVISION 2 (Prohibition model)

Option A – A general provision prohibiting third-party funding

A claimant shall not enter into an agreement on, or receive, third-party funding.

Option B – Condition for the submission of a claim

A claim may be submitted only if the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option C – Requirement for the consent

The consent of the respondent requires that the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option D – Denial of benefits

A Party may deny the benefits of this investment treaty to an investor of another Party that raises a claim if the investor has entered into an agreement on or received third-party funding.

¹³ See Submissions from the Government of South Africa (A/CN.9/WG.III/WP.176) and the Government of Morocco (A/CN.9/WG.III/WP.161,). See also A/CN.9/WG.III/WP.172 - Third-party funding, paras. 15-19.

12. The table above provides different options to implement the prohibition model. Option A would include a general provision prohibiting third-party funding.¹⁴ Such a provision would oblige the disputing parties to refrain from seeking third-party funding in an ISDS proceeding. The Working Group may wish to consider whether all “disputing parties” should be subject to the prohibition in option A.

13. Option B would require the non-existence of third-party funding as a condition for submitting a claim. The text of option B can also be incorporated into a general provision addressing procedural and other requirements for submissions of a claim.¹⁵ Option C would indicate that the consent of the respondent State is subject to the requirement that the claimant has not received and will not seek to receive third-party funding. Such language could be incorporated into a provision addressing consent found in recent investment treaties.¹⁶ Failure to comply with the requirements in option B and C would likely result in the claim being dismissed or the tribunal deciding that it lacked jurisdiction.

14. Option D is modelled on denial of benefit clauses found in investment treaties. Through such clauses, States have denied the benefits under investment treaties to certain categories of investors that the investment treaties did not intend to protect, for example, claimants that are “controlled by nationals of a third State”¹⁷ and/or “do not have a real economic connection with the home State”¹⁸. A denial of benefit clause has been used by States to “counteract strategies that seek the protection of particular treaties by acquiring a favourable nationality”,¹⁹ in other words, to prevent forum shopping and freeriding of the benefits under the investment treaty. Similarly, denying the benefits of a claimant with third-party funding could prevent the abuse of rights and safeguard the economic development objectives States pursue in investment treaties.²⁰ The application of option D could either take effect at the level of jurisdiction of the tribunal or the admissibility of the claim.²¹

15. Draft provision 2 would need to be accompanied by a provision on sanctions if third-party funding is obtained despite the general prohibition (see draft provision 6 below).

16. Should any of the above-mentioned approaches be taken, the Working Group may wish to exclude from the scope of the regulation non-profit funding and funding provided to respondent States (see paras. 8-9 above). The Working Group may also wish to consider excluding contingency arrangements and funding provided by an affiliate of the disputing party.²² Concerns that the prohibition of third-party funding could limit small and medium-sized enterprises and impecunious claimants from raising claims under investment treaties could be addressed through legal aid mechanisms.

[EU and its Member States: The EU and its Member States would not support a general prohibition of third-party funding. Any of the suggested prohibition models would undermine the need and use of third-party funding in providing and guaranteeing access to justice, in particular for small and medium-sized companies. The ISDS system is currently

¹⁴ See Argentina - United Arab Emirates BIT (2018), Article 24 - “Third party funding is not permitted”.

¹⁵ See EU-Vietnam, Article 3.35, Australia-Hong Kong Investment Agreement (“Australia-HK”), Article 26-27; Free Trade Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”), Article 14.D.3.

¹⁶ See EU-Vietnam, Article 3.36; Australia-HK, Article 24; and USMCA, Article 14.D.5.

¹⁷ Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award (5 June 2012), para. 354.

¹⁸ ‘Denial of Benefits’ Clause in Investment Treaty Arbitration by Loukas Mistelis and Crina Baltag, Queen Mary University of London, School of Law Legal Studies Research Paper No. 293/2018 (“Mistelis & Baltag”), p. 1.

¹⁹ Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edition, 2012), p. 55.

²⁰ See Mistelis & Baltag, p. 2; See also Guven & Johnson, p. 42, 43.

²¹ See Mistelis & Baltag, p. 2, 18. “Distinguishing between jurisdiction and merits has relevant practical consequences. When arbitral tribunal considers a matter to pertain to its jurisdiction, that decision may be challenged under the appropriate available mechanism. As such, erroneously considering an issue pertaining to jurisdiction, could ‘result in an unjustified extension of the scope for challenging the awards.’”

²² For a drafting example, see CCSI/IIED/IISD Joint Submission.

lacking an appropriate alternative in form of legal aid mechanisms available to small and medium-sized companies and natural persons. Thus, alternative models should be favoured.

Additionally, the EU and its Member States would like to outline their understanding that third-party funding and abuse of process are different concepts. The use and arrangements of third-party funding may, in certain circumstances, amount to abuses of process, but such practices do not justify a general prohibition of all forms of third-party funding.]

2. Restriction models

17. Another regulation model would be to permit or restrict certain types of third-party funding (A/CN.9/1004, paras. 82 and 83). Such a model could provide for more flexibility than the prohibition model, while addressing the concerns mentioned above (see para. 11 above). While there could be a number of variants, the Working Group may wish to consider the following models:

- Third-party funding is allowed only when it is necessary for the claimant to bring its claim (draft provision 3 - access to justice model) (A/CN.9/1004, paras. 82 and 83)
- Third-party funding is allowed only when the investment is in compliance with sustainable development requirements (draft provision 4 - sustainable development model)
- Third-party funding is generally allowed unless specified (draft provision 5 restriction list model)

(a) Access to justice model

18. Under the access to justice model, third-party funding would be permitted if the funding is necessary for the claimant to bring its claim, particularly, micro, small and medium-sized enterprises (MSMEs).

DRAFT PROVISION 3 (Access to justice model)

- 1. Third-party funding is permitted if the claimant can demonstrate that it is pursuing the claim in good faith and is not in a position to pursue its claim without third-party funding.*
- 2. The tribunal shall grant the permission in paragraph 1 upon receiving the request from the claimant, which shall be submitted with the notice of arbitration and prior to entering into an agreement on or receiving third-party funding.*

19. Under draft provision 3, the claimant is required to demonstrate that it is pursuing the claim in good faith and that, without third-party funding, it is not possible to afford to bring its claim. Accordingly, if the third-party funding was obtained merely for business purposes (for example, to manage risks or to deduct the cost of the proceedings from its balance sheet), it would not be able to obtain a permission. The Working Group may wish to note that it may be difficult to demonstrate the impecuniosity of the claimant (A/CN.9/1004, para. 83).²³ and more generally that third-party funding is “necessary” to pursue the claim. As to the drafting, paragraph 1 can also be rephrased along the following lines: “Draft provision 2 does not apply if the claimant ...” The Working Group may also wish to consider adding “prospects of success” as another criterion, often found in legal aid schemes.²⁴

20. Under the access to justice model, procedural rules for granting permission may need to be prepared. Paragraph 2 stipulates that the tribunal would grant permission upon a request by the party seeking to obtain third-party funding. The Working Group may wish to consider whether other authorities should be involved, particularly if the request is made prior to the constitution of the tribunal. Paragraph 2 also requires the claimant to make the

²³ See ICCA Report, p. 20.

²⁴ [Global Study on Legal Aid - Global Report](#) (2016), United Nations Development Programme (UNDP), United Nations Office on Drugs and Crime (UNODC).

request in its notice of arbitration and prior to entering into an agreement on or receiving funding. In so doing, the claimant would need to disclose information as required in draft provision 7.

21. Draft provision 3 may need to include additional procedural rules to address: (i) circumstances where there is a change in the funding arrangement after the permission is granted; (ii) the consequences of the tribunal not granting the permission; and (iii) the consequences if the claimant proceeds to obtain third-party funding despite the tribunal not granting the permission (see draft provision 6 on possible sanctions).

[EU and its Member States: The EU and its Member States would not favour permitting third-party funding only in scenarios where it is necessary to submit a claim. There may be valid grounds for disputing parties to resort to third-party funding in good faith and non-abusive manner even if not strictly necessary. Provisions preventing abuses of process and frivolous claims are currently being discussed in a cross-cutting issue's context. Those provisions should also allow to prevent abusive third-party funding practices.

Additionally, the EU and its Member States question whether the prerequisite of demonstrating that the claim is “*in good faith*”, in paragraph 1, would result in a threshold that is too burdensome, especially with the purpose of third-party funding to enable access to justice.]

(b) Sustainable development model

22. Under the sustainable development model, a claimant would be allowed to seek third-party funding, if its investment meets pre-defined sustainable development requirements of the respondent State. This reflects the trend that States, in particular developing countries, are seeking to balance in their investment treaties the protection of investors on the one hand and the sustainable development agenda on the other. By allowing only investors that contribute to sustainable development to obtain third-party funding, this model would allow States to prioritize and promote such investments, for example, those with the purposes of protecting the environment or mitigating climate change.

DRAFT PROVISION 4 (Sustainable development model)

Third-party funding is permitted if the claimant can demonstrate that its investment is in compliance with [applicable sustainable development provisions].

23. Under draft provision 4, the claimant will be permitted to obtain third-party funding by demonstrating that its investment is or was made in compliance with the applicable sustainable development provisions. In taking this approach, it may be necessary to include procedural rules similar to draft provision 3(2) (see para. 21 above).

24. As to the drafting, draft provision 4 can also be phrased to provide that draft provision 2 on general prohibition does not apply when the claimant demonstrates that its investment is in compliance with sustainable development requirements.

25. Furthermore, it would be possible to combine draft provisions 3 and 4.

[EU and its Member States: In view of the EU and its Member States, the sustainable development model in the context of regulation third-party funding raises a number of practical issues. Promoting investments that contribute to sustainable development is an important aspect of the EU's and its Member States' investment policy. However, such objectives are usually pursued through the inclusion of sustainable development provisions into investment treaties rather than through the lens of process-financing. Additionally, deciding on whether or not a particular investment complies with applicable sustainable development provisions may require lengthy deliberations and fact-finding activities, which could not always be addressed upfront at the beginning of the proceedings.]

Restriction list model

26. Under the restricted list model, third-party funding would generally be allowed whereas certain types would be prohibited. A list of the types of third-party funding that are not

allowed would be provided in the regulation. Compared to the access to justice model and the sustainable development model, this approach could provide more flexibility to the parties in obtaining third-party funding for a number of different purposes.

[EU and its Member States: The EU and its Member States consider that a balance needs to be found between the reasons for prohibiting third-party funding in certain cases (i.e., primarily the risk of abuse of process) and the positive contributions third-party funding can have in certain other cases (i.e., providing access to justice). Thus, regarding the current proposals of paragraphs 1(a)–1(c), discussions should focus on merely paragraphs 1(b) and (c). In the understanding of the EU and its Member States, paragraph 1(a) would *de facto* prohibit most of the existing third-party funding models and, therefore, appears overly broad.

With this background, the EU and its Member States wonder if a more generally drafted clause allowing tribunals to address abusive third-party funding practices would be a preferable approach (to the extent that this function cannot already be fulfilled by the provisions on frivolous claims discussed in other settings). Such a provision could cover the scenarios addressed by the current draft provisions 5 and 6, and read as follows: “*If the [tribunal] [court] is convinced that third-party funding is used in a form that amounts to an abuse of process, the [tribunal] [court] may take appropriate measures, including the suspension or termination of the proceedings.*”]

DRAFT PROVISION 5 (Restriction list model)

1. Third-party funding is permitted unless:

- (a) the funding is provided on a non-recourse basis in exchange for a success fee and other forms of monetary remuneration or reimbursement wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings;*
- (b) the expected return to be paid to the third-party funder exceeds a reasonable amount;*
- (c) the number of cases that the third-party funder funds against the respondent State with regard to the same measure exceeds a reasonable number;*
- (d) ...*

2. Upon disclosure of the information required in draft provision 7, the tribunal, upon request of a party or on its own initiative, shall determine whether the third-party funding is not permissible in accordance with paragraph 1.

27. Draft provision 5, paragraph 1 provides the types of third-party funding that would not be permitted. Paragraph 1(a) intends to cover speculative funding ([A/CN.9/1004](#), para. 82). The Working Group may wish to note that paragraph 1(a), as drafted, could restrict most commercial funding, in which case, the following subparagraphs might not be necessary.

[EU and its Member States: The EU and its Member States understand the current wording of paragraph 1(a) to exclude most of the currently available forms of third-party funding. With regard to a single funded case, this approach would not be in line with the purpose to provide access to justice for small and medium-sized businesses. Therefore, paragraph 1(a) would not be supported in this regard.

However, where the funding is part of a portfolio, the situation may be different. Here, the decisive question would be what the nature and objective of the portfolio funding is. If the funding of a portfolio of proceedings aims to exert political pressure against a particular measure, it may well constitute an abuse of process. However, the funding of a portfolio of proceedings may also be helpful for small and medium-sized companies to obtain funding in cases of small-sum claims. Further reflexion and discussion on this point may be useful.]

28. Paragraph 1(b) aims to cover third-party funding where the amount of the expected return is excessive or above a certain threshold. An alternative approach would be to provide a rule limiting the amount or percentage of return, instead of prohibiting third-party

funding entirely.²⁵ Paragraph 1(c) aims to cover third-party funding, where the funder has already provided funding for a number of claims against the same respondent State with regard to the same measure. This would limit the number of cases that a third-party funder can fund against a particular State, which was viewed as a concern as it could increase the existing imbalance to the detriment of those States, as the funder could have an influence on the outcome of those cases.

[EU and its Member States: The EU and its Member States understand the consideration that there might be a risk of an increased number of cases when third-party funding is used in an abusive manner. However, the abusive practices targeted by paragraphs 1(b) and 1(c) might be better addressed through a more general provisions allowing tribunals to address situations of abuses of process (*see* comment above after para. 26). The reason for this is that any future provision regulating third-party funding should balance the involved interests, including the advantage of third-party funding in providing access to justice.]

29. Paragraph 1 only provides some examples and the Working Group may wish to consider which other types of funding should be included in the list, for instance, claims that are frivolous or without legal merit, in bad faith or with political purposes (A/CN.9/1004, para. 82). If a separate provision is developed to dismiss frivolous claims, the existence of third-party funding could be an element to be considered in determining whether the claim was frivolous or not.

30. Regardless of whether the third-party funding falls within the category of those listed in paragraph 1, it would be subject to the same disclosure requirements in draft provision 7. Similar to other restriction models, additional procedural rules would need to be developed. For example, draft provision 5(2) stipulates that the tribunal shall determine whether the third-party funding is not permissible under paragraph 1. The Working Group may wish to consider the following issues:

- Whether such determination should be mandatory upon disclosure;
- How the tribunal could obtain information not subject to disclosure that would allow the tribunal to make the determination (for example, information on the funder's return and involvement in other cases involving the respondent State – see draft provision 7(2));
- Whether the determination should be upon the request of a party or on the initiative of the tribunal and, if so, the time frame for making the request;
- Whether any other authority shall make the determination prior to the constitution of the tribunal; and
- The consequences if the third-party funding is found to fall under the category in paragraph 1 (see draft provision 6).

[EU and its Member States: The EU and its Member States suggest that the Working Group III may consider including the standard of proof or demonstration for any claim resulting in the prohibition of third-party funding. Thereby, the rules gain legal clarity.

The above-mentioned general clause (*see* the EU's and its Member States' comment on para. 26) includes a high standard of proof by articulating that the arbitral tribunal must be "*convinced*". Since the allegation of abusive conduct is an allegation with serious impacts on the proceedings, a relatively high standard of proof appears favourable.]

3. Legal consequences and possible sanctions

31. The legal consequences of a party entering into or being provided with third-party funding that is not permitted would differ depending on the regulation model. For example, the claim may be inadmissible or the tribunal might lack jurisdiction to consider the case (*see* para. 13 above).

²⁵ Submission by the Government of Turkey (A/CN.9/WG.III/WP.174), p. 3 - "... [T]he amount of the return that would be taken by the funder should be limited to a reasonable portion of compensation".

DRAFT PROVISION 6 (Sanctions)

If a claimant enters into an agreement on or receives third-party funding, which is not permissible under these provisions, the tribunal may:

- (a) order the claimant to terminate the third-party funding agreement and/or return funding received;*
- (b) suspend or terminate the proceeding;*
- (c) consider the non-compliance in allocating the costs of the proceeding;*
- (d) ...*

32. Draft provision 6 provides examples of measures that a tribunal (or any other authority) could take, should it determine that the third-party funding was not permissible under the draft provisions. It would need to be adjusted in accordance with the different regulation models and options therein.

33. The Working Group may wish to consider whether the measures outlined in draft provision 6 are appropriate and whether any other measures should be added.²⁶ It would be possible for the tribunal to take one or more measures on the list to rectify the situation. The Working Group may wish to confirm that such measures by the tribunal would not require a request by the respondent party and can be taken on its own initiative.

34. The Working Group may wish to further consider whether attempts by the claimant with the intent or effect of circumventing the regulation on third-party funding (for example, by structuring the funding arrangements, whether through debt, equity, or otherwise) should also be subject to the same sanction measures.²⁷

35. While draft provision 6 focuses on measures that can be taken by the tribunal, it could be anticipated that an award or a decision rendered by the tribunal, despite the existence of third-party funding that was not permissible under the regulation, could be set aside or annulled.

[**EU and its Member States:** If sanctions are foreseen, careful consideration might need to be given to the interplay of a tribunal's decision and the law applicable to the funding arrangements. Also, under existing dispute settlement rules, tribunals can usually already take into account the conduct of the parties in decisions on cost allocation.]

C. Disclosure of third-party funding

36. Disclosure is required generally for addressing the risk of conflicts of interest or the lack of transparency and a number of existing investment treaties and arbitration rules include rules on disclosure of third-party funding. ICSID is also considering requiring disclosure of third-party funding in its Rules and Regulations Amendment Process to address the potential risk of conflicts of interest.²⁸

37. Requiring disclosure could be a stand-alone regulation model. However, the implementation of other regulation models mentioned in sections A and B would need to be based on the disclosure of certain information. This is because without the information disclosed, it would not be possible to determine whether the third-party funding is permissible or not. Depending on the approach to be taken, disclosure may be a pre-requisite for obtaining approval from the tribunal to seek third-party funding. It is in this context that the Working Group may wish to consider disclosure requirement as outlined below ([A/CN.9/1004](#), para. 89).

²⁶ See for example Indonesia-Australia Comprehensive Economic Partnership Agreement (2020) ("Indonesia-Australia"), Article 14.32 (3).

²⁷ See CCSI/IIED/IISD Joint Submission.

²⁸ See ICSID Working Paper #4, pp. 294-296.

DRAFT PROVISION 7 (Disclosure)

1. The funded party shall disclose to the tribunal and the other disputing parties the following information:

- (a) the name and address of the third-party funder;*
- (b) the name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder; and*
- (c) the funding agreement or the terms thereof.*

2. In addition to those set forth in paragraph 1, the tribunal may require the funded party to disclose the following information:

- (a) whether the third-party funder agreed to cover the costs of an adverse cost award;*
- (b) the expected return amount of the third-party funder;*
- (c) any rights of the third-party funder to control or influence the management of the claim, the proceedings and to terminate the funding arrangement;*
- (d) number of cases that the third-party funder has provided funding for claims against the respondent State;*
- (e) any agreement between the third-party funder and the legal counsel or firm representing the funded party; and*
- (f) any other information deemed necessary by the tribunal.*

3. The funded party shall disclose the information listed in paragraph 1 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement claim, as promptly as possible after the agreement is entered into. The funded party shall disclose the information requested by the tribunal in accordance with paragraph 2 as promptly as possible after such request.

4. If there is any change in the information disclosed in accordance with this provision, the funded party shall immediately notify the tribunal and the other disputing parties.

5. If the funded party fails to comply with the obligations in this provision, the tribunal may:

- (a) suspend or terminate the proceedings;*
- (b) take the fact into account when making decision on the costs of the proceeding;*
or
- (c) take any other appropriate measure.*

Parties involved

38. Paragraph 1 requires the funded party to disclose certain information. The Working Group may wish to consider whether both claimants and respondent States should be subject to the same requirement (see para. 7 above), as respondent States may already be subject to disclosure requirements under domestic law ([A/CN.9/1004](#), para. 84).

39. Paragraph 1 further reflects the view that disclosure should be made to the arbitral tribunal and the other disputing parties ([A/CN.9/1004](#), para. 91),²⁹ which is in line with provisions in recently adopted investment treaties.³⁰ The Working Group may wish to consider whether rules need to be prepared for disclosing the information prior to the constitution of the tribunal, for example, in the notice of arbitration to an administering institution, appointing or other authority. In that case, that entity that received the

²⁹ The ICCA Report suggests disclosure only to the tribunal, the arbitral institution and appointing authority (if any). See ICCA Report p. 14.

³⁰ CETA, Article 8.26; EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8.

information from the funded party would need to transmit the information to potential candidates and the tribunal once it is constituted.

[EU and its Member States: The EU and its Member States support the approach to require disclosure to the arbitral tribunal and the other party, as well as to the administering institution in the scenario where a tribunal or a division of a court may not yet have been established. In the view of the EU and its Member States, both claimants and respondents should be subject to the same disclosure requirements. The risk of conflicts of interest exists for either claimant or respondent.]

Scope of disclosure

40. There was general agreement in the Working Group that the existence of third-party funding and the identity of the third-party funder should be disclosed ([A/CN.9/1004](#), para. 89). Accordingly, paragraph 1(a) requires the disclosure of the name and the address of the third-party funder, in line with recently adopted investment treaties.³¹ The proposed ICSID rules provides for the disclosure of the name and address of the funder to the parties and arbitrators.

41. Paragraph 1(b) requires the disclosure of the name and address of the beneficial owner of the third-party funder as well as the name and address of any person with decision-making authority for or on behalf of the third-party funder (for example, an investment manager or advisor). This could assist in identifying potential conflicts of interest, particularly when the funding is channelled through a special purpose vehicle ([A/CN.9/1004](#), para. 89).³² The Working Group may further wish to consider the extent to which such kind of information should be subject to disclosure requirements.

42. Paragraph 1(c) requires the disclosure of the funding agreement or the terms thereof. The Working Group may wish to consider whether there should be any exceptions to the disclosure requirement, in particular agreements that may be subject to other disclosure requirements. Some examples may be pro bono assistance arrangements, contingency arrangements, or inter-corporate financing agreements ([A/CN.9/1004](#), para. 87).³³

43. Paragraph 2 reflects the view that the tribunal should have the discretion to determine the extent of disclosure beyond the existence and identity of the third-party funder based on the circumstances of the case (see [A/CN.9/1004](#), para. 90). It also reflects the fact that depending on the regulation model, the information required by the tribunal may differ (for example, subparagraph (d) in relation to draft provision 5(1)(c)). The proposed ICSID rules on disclosure also provides the tribunal with the power to order the disclosure of further information if deemed necessary.³⁴

44. The Working Group may wish to consider whether any of the information listed in paragraph 2 should be moved to paragraph 1, yet taking into account that in the regulation models, the funded party would be incentivized to provide relevant information to the tribunal to ensure that it will be permitted to obtain third-party funding.

[EU and its Member States: The EU and its Member States highly appreciate and welcome the inclusion of the beneficial owner of the funder in the initial scope of disclosure. However, in the view of the EU and its Member States, this initial disclosure should not automatically include the funding agreement, i.e., paragraph 1(c). Disclosing the funding agreement may from the outset put one of the disputing parties into a strategic disadvantage that could be abused by the other party. Hence, the funding arrangement should only be disclosed if there are specified reasons to do so. Thus, paragraph 1(c) is better placed in paragraph 2.

³¹ EU-Singapore, Article 3.8; CCFTA, Article G-23 bis; Argentina-Chile Free Trade Agreement (2017) Article 8.27; Indonesia-Australia, Article 14.32; CETA, Article 8.26; EU-Vietnam, Article 3.37.

³² See Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388 (2016).

³³ See ICCA Report, p. 96, referring to the example of General Standard 7(a) of the IBA Guidelines, which provides that disclosure for the purpose of assessing conflicts applies not only to a party, but also to “another company of the same group of companies [as the party], or an individual having a controlling influence on the party in the arbitration”; See also draft provision 3(c) in the CCSI/IIED/IISD Joint Submission.

³⁴ “[...] The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding.” See ICSID Working Paper #4, p. 295:

Regarding paragraph 2(f), the EU and its Member States would like to add that disclosure might include the involvement of any external counsel or law firm that acts for the third-party funder in evaluating the claim.]

Timing and means of disclosure

45. Paragraph 3 reflects the view that disclosure should be made at an early stage of the proceedings or as soon as the funding agreement is concluded (A/CN.9/1004, para. 89). While paragraph 3 requires disclosure to be made in the statement of claim to cater for ad hoc arbitration, if there were to be an administering institution, disclosure could be made earlier possibly in the notice of arbitration (see para. 39 above). Provisions in recently adopted IIAs generally require that disclosure is made at the time of the submission of the claim or immediately after the funding is received or a funding agreement is concluded.³⁵ Paragraph 3 also requires the funded party to disclose the information requested by the tribunal as promptly as possible after the request.

46. Paragraph 4 reflects the view that the disclosure requirement should continue throughout the proceedings (A/CN.9/1004, para. 89) and requires the funded party to notify the tribunal and the other parties of any changes.

[EU and its Member States: The EU and its Member States appreciate the approach to demand disclosure when submitting the claim.]

Non-compliance and possible sanctions

47. In light of views that clearly defined and strictly applied sanctions for non-compliance of the disclosure requirement would ensure an effective enforcement of those requirements (A/CN.9/1004, para. 92), paragraph 5 lists the possible sanctions that the tribunal could impose (see also draft provision 6). Recent investment treaties have provided that the tribunal could suspend or terminate the proceedings,³⁶ take into account the non-compliance in its decision on costs,³⁷ or take any measure to be determined by it.³⁸

[EU and its Member States: The EU and its Member States would like to raise the question of whether concrete consequences need to be set out in detail. In addition, regarding paragraph 5(b), there are no automatic links between the obligation to disclose the funding and the costs of the proceedings. Such links may only exist if non-disclosure causes delay of the proceedings, increases the overall costs or amounts to an abuse of process. As referred to earlier, such conduct of the parties can already be taken into account by tribunals when allocating costs.

The EU and its Member States, therefore, suggest replacing paragraph 5 with a general clause, based on the current proposal. Such general clause could read as follows: “*If the funded party fails to comply with the obligations set out in this Article, the tribunal may take appropriate and necessary measures, which may include, upon request of the other disputing party, the suspension or termination of the proceedings.*”]

Linkage with disclosure requirements of the tribunal

48. It may be necessary to consider the relationship between the disclosure requirements in draft provision 7 and disclosure requirements of tribunal members (A/CN.9/1004, para. 91).³⁹ For example, article 10(2)(a)(iv) of the proposed draft Code of Conduct for Adjudicators in International Investment Disputes (version two) requires adjudicators to disclose any financial, business, professional, or personal relationship within [the past five years] with any third-party funder with a financial interest in the outcome of the proceeding and identified by a party. Furthermore, they are required to make the disclosure prior to or upon accepting appointment (article 10(3) of the draft Code of Conduct). In order to do so,

³⁵ See for example EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8; Indonesia-Australia, Article 14.32 (2); draft Rule 14(3) of the amended ICSID Arbitration Rules.

³⁶ See Indonesia-Australia, article 14.32 (3).

³⁷ See EU-Vietnam, Article 3.37 (3); CIETAC International Investment Arbitration Rules (2017), Art. 27 (3).

³⁸ See Argentina-Chile Free Trade Agreement (2017), Article 8.27(2).

³⁹ See, for example, Indonesia-Australia, Annex 14-A: Code of Conduct of Arbitrators, Disclosure Obligations. See the proposed arbitrator declaration in accordance with draft rule 19(3)(b) of the amended ICSID Arbitration Rules.

the proposed adjudicator would need to be aware of the identity of the third-party funder. The Working Group may wish to consider whether any rule would need to be developed to address this interplay.

[EU and its Member States: At this stage, the EU and its Member States are not convinced about the necessity to address the relationship between the parties' disclosure of third-party funding and the disclosure requirements of tribunal members. From the EU's and its Member States' point of view, the tribunal members' obligation to disclose potential conflicts of interest is a separate obligation rooted in different rules, and both set of rules should be able to function well together.]

Public disclosure

49. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration do not address the publication of information or documents about third-party funding. The Working Group may wish to consider whether any of the information disclosed in accordance with draft provision 7 should also be made available to the public similar to the procedural information under the Transparency Rules.⁴⁰

[EU and its Member States: The EU and its Member States would support the inclusion of information related to third-party funding among the documents disclosed under application of the UNCITRAL Transparency Rules, subject to the exceptions listed in Article 7 of the UNCITRAL Transparency Rules, such as the protection of confidential business information.]

D. Other provisions

1. Scope of covered investor and investment

DRAFT PROVISION 8 (Investment and investor of a Party)

For the avoidance of doubt, third-party funding shall not be considered as covered investment under this [Agreement] and a third-party funder shall not be considered an investor of a Party.

50. Draft provision 8 clarifies that third-party funding shall not be construed as an investment protected under investment treaties and furthermore that a third-party funder would not be considered as an investor. The provision aims to preclude third-party funders from raising claims against a State on the basis of any loss or damage suffered by funding another claimant.

[EU and its Member States: The EU and its Member States agree that, as a matter of principle, third-party funding would not qualify as an investment under most existing investment treaties and remain open to consider and discuss this draft provision.]

2. Security for costs

DRAFT PROVISION 9 (Security for costs)

Option A

When a party has entered into an agreement on or been provided third-party funding, the tribunal shall order the funded party to provide security for costs, unless the funded party demonstrates that:

- a) the respondent State was responsible for its impecuniosity; or*
- b) it is not able to pursue its claim without the third-party funding; and/or*
- c) the third-party funder would cover any adverse cost decision against the funded party.*

Option B

⁴⁰ See CCSI/IIED/IISD Joint Submission, p. 5.

When a party has been provided third-party funding, the tribunal may order the funded party to provide security for costs.

51. Draft provision 9 addresses the ordering of security for costs where a party has received third-party funding. One of the objectives is to address concerns regarding the respondent States' inability to recover their costs, particularly when an impecunious claimant had brought the claim with the support of third-party funding (A/CN.9/1004, para. 94). The options reflect the different views expressed during the Working Group.

52. Option A reflects the view that security for costs should be mandatory when there is third-party funding,⁴¹ unless the funded party could justify that the ordering of the security for costs would be inappropriate. The Working Group may wish to consider whether such justifications should be provided (without which, the existence of third-party funding would make security for costs mandatory) and whether the list of justification in option A are adequate. Option B reflects the view that mere existence of third-party funding would not be sufficient to justify ordering security for costs (A/CN.9/1004, para. 94) and provides flexibility to the tribunal. Option B could be supplemented by a rule that the existence of third-party funding is not by itself sufficient to justify an order for security for costs.

53. If a general provision on security for costs is to be prepared,⁴² draft provision 9 could possibly be merged with that provision, similar to those found in recent investment treaties stating that the tribunals shall take third-party funding into consideration when deciding to order security for costs.⁴³

54. The Working Group may wish to consider whether further guidance should be provided with regard to the amount of security to be ordered, including staggered or flexible mechanisms.

[EU and its Member States: The EU and its Member States note that Option A is different from the approach currently emerging within the ICSID reform process. Only Option B would be compatible with this approach. The EU and its Member States suggest that the Working Group aligns its provisions with the approach taken in ICSID Working Paper #5, Rule 53(4) ICSID Arbitration Rules: *"The tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding."*

Thus, the EU and its Member States favour an approach that includes a general provision on security for costs covering all circumstances including third party funding.]

3. Allocation of costs

DRAFT PROVISION 10 (Allocation of costs)

Option A

⁴¹ See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10 - Security for costs should be a mandatory requirement in cases funded by third parties.

⁴² See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10; Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179), p. 5; Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182), p. 6.

⁴³ EU-Vietnam, Article 3.37 – "When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected". For a different approach, see ICCA Report, p. 16:

D. Principles on Security for Costs

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including "after-the-event" (ATE) insurance, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall not be included in the costs of the proceedings, unless determined otherwise by the tribunal.

Option B

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall be borne by the funded party and cannot be allocated to the other party, unless determined otherwise by the tribunal.

55. Draft provision 10 reflects the view that costs related to third-party funding (including the return paid to the third-party funder) should not be recoverable (A/CN.9/1004, para. 93).⁴⁴ The costs of the ISDS proceedings that can be allocated among the parties vary depending on the applicable rules, which also provide for a range of ways to allocate such costs. However, they generally do not address whether third-party funding expenses can be recovered.⁴⁵

56. For example, article 40(2) of the UNCITRAL Arbitration Rules only mentions that legal or “other costs” incurred by the party in relation to the proceedings are to be included in the costs of arbitration as long as the arbitral tribunal determines that the amount of such costs is reasonable.⁴⁶ Article 42 of the UNCITRAL Arbitration Rules provides that the costs of the arbitration shall in principle be borne by the unsuccessful party or parties, while the arbitral tribunal may apportion each of such costs between the parties if deemed reasonable.

57. There can be a number of ways to ensure that expenses relating to third-party funding cannot be recovered. One would be to exclude such expenses from the definition of the costs of the proceedings as provided for in option A. Another would be to provide a rule that such expenses are to be borne by the funded party and thus not recoverable, as stipulated in option B. Both options provide discretion to the tribunal to determine otherwise, for example, when it considers reasonable to include the expenses as the costs of the proceedings or to allocate such expenses.

58. If general provisions on costs and allocation thereof are to be prepared, draft provision 10 could possibly be merged with those provisions.

59. The Working Group may wish to consider whether a separate provision should be prepared allowing the tribunal to allocate the costs of the proceedings to a third-party funder, particularly where the respondent State is not able to recover costs from the funded

⁴⁴ The funded party is typically obliged to pay the funder a return under the funding agreement, if successful, and might seek to recover these funding costs from the unsuccessful party. The question of the recoverability arises when tribunals determine the scope of the costs incurred by a party to be shifted to the other party.

⁴⁵ See USMCA, Section 14.D.13 (4); Australia-HK, Article 35. With a broader provision see SIAC Investment Arbitration Rules (2017), according to which third-party funding shall be considered in the decision on costs allocation; See also ICCA Report, p. 15:

C. Principles on Final Award (Allocation) of Costs

C.1. Generally, at the end of an arbitration, recovery of costs should not be denied on the basis that a party seeking costs is funded by a third-party funder.

C.2. When recovery of costs is limited to costs which have been “incurred” or “directly incurred”, the obligation of a party to reimburse the funder in the event of a successful outcome is generally sufficient for a tribunal to find that the costs of a funded party come within that limitation.

C.3. The question of whether any of the cost of funding, including a third-party funder’s return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure.

C.4. In the absence of an express power, in applicable national legislation or procedural rules, a tribunal would lack jurisdiction to issue a costs order against a third-party funder.

⁴⁶ See for example UNCITRAL Arbitration Rules, Article 40 – “2. The term “costs” includes only: [...]”

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; [...]”

party (A/CN.9/1004, para. 93). Without such a provision, a tribunal would generally lack the authority to allocate costs to the third-party funder, as it is not a party to the dispute.⁴⁷

[EU and its Member States: The EU and its Member States would like to invite further reflection and discussion about draft provision 10, in particular whether the same rule should apply to fees arising from third-party funding and the return paid to the third-party funder.]

4. Code of conduct for third-party funders

60. The Working Group may wish to consider whether a code of conduct for third-party funders should be prepared, which could be based on existing initiatives.⁴⁸ Some issues that could be addressed in such a code are:

- Disclosure, particularly of any conflict of interest;
- Transparency requirements with regard to the conduct of their business;
- Limitation on the return to be paid to the funder (for example, a maximum percentage of the amount awarded or claimed);
- Limitation on the control that the funder could have over the proceedings;
- Limitation on the number of claims that a funder could provide to support claims against a single State; and
- Due diligence on claims to prevent the funding of frivolous claims.

[EU and its Member States: In general, the EU and its Member States welcome the idea to establish a code of conduct for third-party funders. However, given resource constraints, such a code of conduct should currently not be a priority for UNCITRAL Working Group III. Other fora may be also be well placed for this task.]

E. Collection of data

Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.

⁴⁷ See ICCA Report, p. 161.

⁴⁸ See Hong Kong Code of Practice for Third Party Funding of Arbitration issued December 7, available at https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf; See Code of Conduct for Litigation Funders by the Association of Litigation Funders, available at <https://associationoflitigationfunders.com/code-of-conduct/>.

Israel's Preliminary Comments on the Draft provisions on third-party funding

Israel wishes to express its sincere appreciation to UNCITRAL Secretariat for the excellent initial draft on Draft provisions on third-party funding. We view this document as adequately providing an initial basis for consideration of the most suitable reform options for adoption in order to mitigate the serious concerns recognized by the working group as arising from the issue of non-party funding of ISDS litigation.

Given the initial nature of the document as explicitly provided in its headline, our views in the following comments are only intended to provide initial views on the outstanding issues the document highlights. Israel's formal position is however still under review and will be presented at the appropriate time.

On this backdrop, Israel would like to offer the comments on the Draft provisions on third-party funding without prejudice to its final position:

Overall:

Israel views third-party funding (hereunder TPF) as an issue of significant importance in the framework of the process of reform of ISDS under the Working Group III's mandate. Our view is that if a balanced approach is taken, it could serve as a legitimate tool for investors aiming to protect their rights under international investment agreements (IIAs). Balanced TPF articles could also serve states that have signed those IIAs as a mean of ensuring their investors' rights abroad given the reciprocal nature of IIAs as promoting and protecting foreign investments.

Israel therefore favours a balanced approach towards the issue of TPF in ISDS. In that sense we initially support the ability to provide TPF for bona-fide claims by eligible investors that should not be excessively limited by the draft articles. This should be done while allowing states and ISDS tribunals through certain transparency requirements to prevent, to the extent possible, the use of TPF for illegitimate purposes such as the filing of frivolous claims and the creation of an unwanted regulatory chill.

On this backdrop, we are honoured to provide the following initial comments:

Draft Provision 1 (Definitions):

Par (1) - With regards to the term "Proceedings", our view is that the term and the scope of the draft articles should be aimed at applying to ISDS proceedings under an IIA or similar. Our main concern is that the current definition might create a confusion with regards to proceedings under domestic law, where other rules of procedure with regards to third party funding apply.

Par (4) – We consider that for greater certainty, with regards to the methods of TPF the Draft provisions apply to, it would be preferable to insert the wording "*financial or non-financial*" before the word "grant". Our view is that this wording could assist in covering the majority of methods for administering TPF.

Draft Provisions 3, 4, 5 & 6 (prohibiting model, restricting models and sanctions):

As outlined by our general approach in the above, Israel initially objects to the idea of a prohibition or a meaningful restriction on TPF. However, given our approach to the flexible nature of the reform with regards to adoption of its options (as expressed in our submission A/CN.9/WG.III/WP.163 together with other Working Group members), we welcome further discussion and developments of all the models the draft provides for, together with the possible sanctions. We therefore do not object to the inclusion of the models and the sanctions in the draft at this stage.

Draft provision 7 (disclosure):

General – With regards to the issue mentioned in paragraph 48 of the working document on the Draft provisions, we support and welcome a discussion on the development of a rule which will provide that the name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest.

Subparagraph (2) - As outlined in the above, since we view TPF at this stage, provided for in a balanced form, as a legitimate tool, we consider that the aspect of disclosure is of outmost importance for the purpose of obtaining this balance. Our view is that further transparency will assist in strengthening the legitimacy of TPF as a tool for enhancing the efficiency of the ISDS regime. We therefore propose to add to the mandatory disclosures enumerated in subparagraph 1, the provision of a detailed description of the third party funder, which will include, *inter alia*, information regarding its ownership structure and stakeholders (where applicable and in case where the funder is a legal person) as well as its potential stake in the outcome of the proceedings. We therefore suggest that the chapeau of subparagraph 2 should read as follows:

"2. Where applicable, the funded party shall disclose to the tribunal and the other disputing parties the following information:"

Subparagraph 5 – We consider the current drafting to be lacking the necessary strength for reflecting the severity of failing to comply with the requirements for disclosure, Given their importance for achieving balance. We therefore consider that the word "may" in the chapeau of the subparagraph should be replaced by "shall", thus by obligating the tribunal to take action upon making a finding of failure to comply with the disclosure obligations. We also request a discussion of the issue of the consequences of a finding that there was failure to comply with the disclosure requirements after the rendering of the award. On this point, we would appreciate further clarification on whether such finding could be taken into account in decision for costs or may serve as a basis for annulment procedures.

**The United Nations Commission on International Law
Working Group III (Investor-State Dispute Settlement Reform)**

***Comments from the Government of the Republic of Korea
on the Draft Provisions on Third-Party Funding***

I. General remarks

The Republic of Korea (“Korea”) sincerely appreciates the United Nations Commission on International Law (“UNCITRAL”) Secretariat for the preparation of the draft provisions on Third-Party Funding (“TPF”).

Korea welcomes the efforts of the Working Group III (the “Working Group”) to reflect in the draft provisions various opinions with regard to TPF provided in the previous Working Group meetings. Korea views that a sophisticated and balanced approach to TPF regulations is needed in order to prevent conflict-of-interest issues and potential abuse of process, and it also takes note of the recent developments in TPF restrictions in other fora—e.g., the current ICSID Rule Amendment discussions and 2021 ICC Arbitration Rules.

Taking into account that the draft provisions have been prepared for inclusion in investment treaties, Korea hereby provides its preliminary observations as these draft provisions may serve as a model text for States’ adoption, whether in full or in part. It is Korea’s understanding that a separate discussion within the Working Group on the mechanism for proper enforcement of the TPF practice will take place at a later point in time and that the member States will be able to share their thoughts in that regard at an appropriate juncture. All views shared in this submission are without prejudice to Korea’s future position on TPF.

II. Draft provisions on third-party funding

A. Definitions

1. Draft Provision 1 (Definitions)

Korea understands that the term “equivalent support” would include non-financial support,¹ and thus it would be helpful to make such intent clearer in the draft provision with an appropriate language. In response to the Secretariat’s inquiry in paragraph 9 of the commentary,² Korea expresses its view that any kinds of funding arrangements should be covered in the definition including funding by legal counsel or parties’ representatives. This is because such funding, in practice, could have the same or similar effect as with TPF and can equally give rise to issues such as conflict of interest.

¹ Draft provisions on third-party funding, para. 8.

² Draft provisions on third-party funding, para. 9.

B. Regulation models

2. Draft Provision 3 (Access to justice model)

With respect to draft provision 3(1), Korea suggests adding a requirement for the claimant to ensure that neither the existence of TPF nor the third-party funder will interfere with the conduct of the proceeding in an unjustified manner or beyond what has been already disclosed. This is based on Korea's understanding that a claimant would be required to disclose all relevant material information relating to TPF from the inception of the proceeding.

Regarding draft provision 3(2), Korea would like to make two points. First, a notice of arbitration is usually submitted prior to the constitution of an arbitral tribunal, and the preparation of a notice of arbitration itself may require extensive research and writing along with sizable costs. As pointed out in the commentary,³ consideration may need to be given to such a situation where a party's access to arbitration may be hindered due to the lack of funding for the preparation of a notice of arbitration or the proceeding prior to the constitution of the tribunal.

Second, whether the tribunal shall grant the permission in paragraph 1 would partly depend on the relevant information disclosed to the tribunal pursuant to draft provision 7. Therefore, adding a reference to the disclosure pursuant to draft provision 7 may be helpful so that the tribunal takes into account not only the requests from the claimant but also all the relevant information available to the tribunal when granting the permission in draft provision 3(1).

3. Draft Provision 5 (Restriction list model)

Korea notes that under the restriction list model, TPF would be generally allowed except for certain types⁴ as prohibited in sub-paragraphs (a) through (c). Based on the draft provision and the commentary, this draft provision appears to be a stand-alone model, exclusive of the other models. Still, for the effective operation of the draft provisions on TPF, it would be worthwhile to look into the relations between the access to justice model and the restriction list model.

Draft provision 5(2) allows the tribunal to determine whether to permit TPF "upon request of a party or on its own initiative" which Korea can agree with. Should a party to the proceeding be allowed to raise objections or request the tribunal to conclude that TPF is not permissible, a reference may be added somewhere in the draft provisions to provide that such objections may also be permitted prior to the constitution of the tribunal. As to which other authority may make the determination on TPF prior to the constitution of the tribunal,⁵ the regulation in the existing investment treaty, if any, may be of reference—*e.g.*, a designated appointing authority. Furthermore, the "upon request of a party or on its own initiative" element can be considered

³ Draft provisions on third-party funding, para. 20.

⁴ Draft provisions on third-party funding, para. 26.

⁵ Draft provisions on third-party funding, paras. 20, 30.

in other draft provisions, such as draft provision 6 on whether the tribunal may impose sanctions upon request of a party or on its own initiative.⁶

4. Draft Provision 6 (Sanctions)

Attempts by the claimant with the intent or effect of circumventing the regulation on TPF⁷ may be considered as the subject of sanctions. This would also violate the “good faith” requirement under draft provision 3, though identification of such intent or bad faith may be difficult; it would, in part, depend on the information disclosed in relation to the proceeding, which can be insufficient.

C. Disclosure of third-party funding

5. Draft Provision 7 (Disclosure)

In terms of the timing of disclosure, as prescribed in draft provision 7(3), Korea is of the view that it would be reasonable to require such disclosure (i) at the time of the submission of a notice of arbitration or prior to the constitution of the arbitral tribunal—*i.e.*, early in the proceeding; or (ii) immediately after a TPF agreement enters into force—likewise, as early in the proceeding as possible. The determination of the exact timing of the disclosure requirement should also involve consideration of the regulation models as draft provision 3.

Regarding draft provision 7(4), Korea understands that the disclosure requirement as well as the requirement to notify the tribunal and the other parties of any changes in the information disclosed earlier are to continue to be applied throughout the proceedings.⁸ For clarity, it would be helpful to make this explicit in the draft text.

Draft provision 7(5) lists some sanctions that the tribunal may be able to impose. Korea believes it is geared towards prescribing sanctions for non-compliance with the disclosure requirement in draft provision 7. For clarity, Korea would like to inquire how draft provision 7(5) interplays with draft provision 6 on sanctions, including (i) whether there can be multiple sanctions—for example, one for failure of disclosure under draft provision 7 and another for violation of the TPF regulation under other draft provision(s)—and (ii) whether the draft texts in both draft provisions should match.

D. Other provisions

⁶ Draft provisions on third-party funding, para. 33.

⁷ Draft provisions on third-party funding, para. 34.

⁸ Draft provisions on third-party funding, para. 46.

6. Draft Provision 10 (Allocation of costs)

It is Korea's understanding that the expenses from TPF cannot be regarded as the cost of the proceedings. However, it would be necessary to consider whether making this point explicit as a draft provision would have an impact on the interpretation of the existing rules on costs.

To avoid situations where a respondent State is unable to recover costs from the funded party, preparing a separate provision allowing the tribunal to allocate the costs of the proceedings to a third-party funder⁹ may be helpful, potentially by minimizing abusive uses of TPF.

⁹ Draft provisions on third-party funding, para. 59.

Unofficial translation by the Secretariat

COMMENTS OF THE MOROCCAN DELEGATION ON THE DRAFT PROVISIONS ON THIRD-PARTY FUNDING PREPARED BY THE UNCITRAL SECRETARIAT.

The Moroccan delegation thanks the UNCITRAL Secretariat for preparing draft provisions on third party funding (TPF) illustrated by its comments which summarize the discussions of Working Group III on TPF at its previous sessions.

While supporting the draft provisions on TPF prepared by the UNCITRAL secretariat, the Moroccan delegation wishes to raise the following comments:

Scope:

A provision should be envisaged on the scope which specifies the areas to be covered by the text. In this context, it should be specified whether TPF relates only to arbitration or also to alternative of ISDS such as mediation and conciliation which may give rise to the granting of compensation in favor of one of the parties to the dispute as part of a friendly resolution of the dispute.

A / Draft provision relating to definitions:

Paragraph 3: The term “representative” of the funded party should be defined.

Paragraph 4: In order to avoid an overlap or redundancy between the definition "third-party funder" and the definition of "third-party funding", it is proposed to replace the definition of "third-party funding" by a definition relating to the term "funding agreement" which specifies in particular the nature of the funding (for-profit or non-profit funding; direct or indirect funding), the objectives of the financing, the obligations of the parties to the funding agreement, etc.

It should be clarified what is meant by the expression "equivalent support", whether it is expertise, know-how or advice or otherwise.

Provide a definition of SMEs to specify what is meant by an SME, and this in view of the size differences that exist between developed and developing economies (e.g. an SME in the United States of America may be considered a large enterprise in developing countries or LDCs).

B / Regulatory models:

It should be recalled that the Moroccan delegation had underlined in its communication no. WP.161 that TPF cannot play a constructive role in ISDS as long as it is not regulated and therefore it had proposed to consider a ban on third-party funding (TPF) pending the adoption of international rules governing its mode of operation.

However, insofar as Working Group III decided to establish a legal framework relating to TPF, the Moroccan delegation while supporting this decision proposes to set up an instrument relating to TPF which allows this mode of funding to be authorized under certain conditions, in order to prevent TPF from turning into an instrument of speculation instead of being a means to help investors who do not have sufficient financial resources to present claims to international arbitration.

In this context, the TPF must be authorized in particular for SMEs and companies which prove that they are in a financial situation which does not allow them to access international arbitration.

Likewise, in order to strengthen the legal framework for TPF, the Moroccan delegation proposes to provide:

- A provision stipulating that the tribunal, for each submission of a claim by the investor, asks the latter, on its own initiative or upon the initiative of the respondent, whether it has concluded an agreement on or received third-party funding.
- A provision stating that in the event that the investor has entered into an TPF agreement, the investor must agree to disclose all information regarding the TPF. The investor's prior written consent to disclose the required information on TPF must be a sine qua non for proceeding with the procedure.
- A provision stipulating that TPF would only be authorized if the investor demonstrates to the tribunal that its claim is submitted in good faith and that its recourse to TPF is justified by the fact that it does not have sufficient financial resources to cover the costs of arbitration;

C-Disclosure of Third-Party Funding:

Disclosure is an important procedure in TPF to ensure transparency and predictability in the proceedings and to avoid conflicts of interest.

To this end, the Moroccan delegation proposes the following regarding draft provision 7 (disclosure):

- Provide specific and short deadlines for the disclosure of the information provided for in paragraphs 1 and 2 of draft provision 7, in the event that the financing agreement is concluded after the submission of the request;
- among the information to be published and which should be stipulated in the draft provision 7, paragraph 2, the irrevocable commitment of the funder to assume a possible cost order against the investor.

Miscellaneous provisions to be included in the TPF draft provisions:

- A provision concerning the possible conflict of interest between the funder and a member of the arbitral tribunal and the procedure to be followed in the event of confirmation of this conflict of interest;
- A provision providing that if the beneficiary of the TPF does not comply with the conditions relating to recourse to TPF, the court shall suspend the proceedings for a period not exceeding 60 days in order to allow the party benefiting from the TPF to fulfil the conditions for using TPF. If these conditions are not met in this period, the court will have to order the termination of the proceedings;
- A provision stipulating that in the event that the court orders the termination of the proceedings, the party not complying with the conditions of the TPF will bear all legal costs and expenses as well as the costs of the proceeding and the tribunal will order that party to reimburse the expenses and costs incurred by the other party related to the proceedings.

This is an initial draft for comments until 30 July. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject “Comments on TPF initial draft”.
Email addresses: jaesung.lee@un.org; david.probst@un.org

Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on third-party funding

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Singapore: As a general comment, Singapore welcomes efforts to address third-party funding in ISDS. Singapore recognises the potential risks of conflicts of interest that third party funding may bring, especially when there is no transparency. This could affect the perceived or actual independence of arbitrators and the integrity of the process. We would certainly want to avoid putting arbitrators in the unenviable position of not knowing for sure whether they are in any position of conflict as a result of third-party funding. Therefore, the right balance to be struck is the development of a set of disclosure obligations on third-party funding. We do not support prohibiting third-party funding in its entirety or limiting circumstances in which third-party funding may be sought, as this risks stymieing access to justice.

Separately, we note that the discussions on third-party funding in the ICSID Rules Amendment Process are at a fairly advanced stage. Where relevant, we have referred to the draft ICSID Amended Arbitration Rules in our comments.

I. Background

1. At its thirty-seventh and thirty eighth sessions, the Working Group considered that it would be desirable to address the legal framework pertaining to third-party funding in ISDS in light of the impact of third-party funding on both the proceedings and the ISDS regime. Possible options for reform were discussed, and the Secretariat was requested to prepare draft provisions on third-party funding (A/CN.9/1004, paras. 80-94 and 97; see also A/CN.9/970, paras. 17-25).¹
2. Accordingly, this note contains draft provisions on third-party funding for the consideration by the Working Group.
3. Regulations on third-party funding may be implemented through various means, such as through inclusion in investment treaties, in arbitration rules, in domestic legislation or in a multilateral treaty on ISDS reform (A/CN.9/1004, paras. 95 and 97; see also A/CN.9/WG.III/WP.194). The draft provisions in this note have been prepared for inclusion in investment treaties and would need to be adjusted if they were to be part of a different type of instrument. The reference to a “Party” in the draft provisions refers to a contracting Party of an investment treaty (such as a State or a regional economic integration organization).

II. Draft provisions on third-party funding

A. Definitions

DRAFT PROVISION 1 (Definitions)

1. “*Proceeding*” means any procedure to resolve a dispute between an investor of a Party and another Party pursuant to a treaty providing for the protection of investments or investors.

¹ This Note was prepared with reference to a broad range of published information on the topic, including: [Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration \(2018\)](#) (“ICCA Report”); [Handbook on Third-Party Funding in International Arbitration](#) edited by Nikolaus Pitkowitz (2018) (“Pitkowitz”); [Third-Party Funding in International Arbitration](#) by Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017) (“Nieuwveld & Sahani”); [The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement](#) by Brooke Guven and Lise Johnson (2019) (“Guven & Johnson”); [Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement](#) submitted by CCSI/IIED/IISD (2019) (“CCSI/IIED/IISD Joint Submission”); [A Framework for Understanding Practice and Policy Regarding Third-Party Financing in ISDS](#) by Stavros Brekoulaki and Catherine Rogers (2019) (“Brekoulaki & Rogers”) and other publications by the Academic Forum (available [here](#)). Reference was also made to the ICSID Rules and Regulations Amendment - [Working Paper #4, Proposals for Amendment of the ICSID Rules](#) (“ICSID Working Paper #4”).

2. “Third-party funder” is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides third-party funding for the proceeding, but does not include a representative of a party.

3. “Funded party” is a party to a proceeding dispute that benefits from third-party funding by entering into a funding agreement on its own or through its affiliate or its representative.

4. “Third-party funding” is any provision of direct or indirect funding or equivalent support to a party to a dispute provided by a natural or legal person who is not a party to the proceeding dispute where such person enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings through a donation or grant, or in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled remuneration dependent on the outcome of the proceeding, or where such person provides such funding in the form of a donation or grant.

Singapore: On paragraph (1), this document should, as a general rule, only apply to investor-state disputes arising out of a treaty, and not those arising out of a contract. We further support applying this document to ISDS generally, *ie* not only investor-state arbitration, but also investor-state mediation or other ADR mechanism. If this document applies to investor-State mediation or ADR, the draft provisions would need to be amended to achieve this (e.g. to use “tribunal or mediator (as the case may be)” instead of just “tribunal”).

On paragraphs (2) to (4), we have suggested edits to ensure that the definitions are not repetitive of each other. For paragraph (2), Singapore prefers to exclude contingency fee arrangements from the definition of third party funding. Singapore is concerned that subjecting contingency fee arrangements to the provisions in this document (such as disclosure requirements, codes of conduct and regulation models (if adopted)) may be overly intrusive to a private arrangement between a party and its counsel. We would not wish to inadvertently create an undue chilling effect on the fledgling third party funding industry.

For paragraph (4), the inclusion of the phrase “*part or all of the costs of the proceedings*” may be useful as it conveys that funding may not always be for *all* costs of the proceeding. We have replaced “*in return for remuneration dependent on the outcome of the proceeding*” with “*in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled*” as the latter specifies the exact interest which a third party funder has in the proceeding. For clarity, we have listed commercial funding (“finance”) and non-profit funding (“donation or grant”) as two separate limbs of third party funding. These drafting suggestions are drawn from the the definition of “third party funding” in the EU-Singapore Investment Protection Agreement.

4. Draft provision 1 provides definitions of some key terminology, as the effectiveness of any regulation on third-party funding would depend on a clear definition thereof (A/CN.9/1004, para. 86). The definitions would need to be adjusted depending on the intended model and scope of regulation.² The Working Group may wish to consider whether any additional terminology would need to be defined.

5. In relation to paragraph 1, the Working Group may wish to consider whether it would be necessary to indicate the dispute resolution method and the legal basis of the proceedings. It should, however, be noted that a regulation could apply to ISDS generally,

² For example, the CCSI/IIED/IISD Joint Submission provides a broad definition, based on which disclosure requirements apply to all third-party funding. The prohibition clause is then limited to non-recourse, outcome-contingent third-party funding.

including arbitration, mediation³ and any other ADR mechanism, and regardless of whether the dispute is based on a treaty or a contract.

6. In relation to paragraph 2, the Working Group may wish to note that the phrase “enters into an agreement to provide funding” intends to capture instances where the funder has yet to provide the funding to the disputing party.⁴

7. While recently adopted investment treaties usually do not define the term “funded party” separately,⁵ paragraph 3 attempts to address “indirect funding”,⁶ where a funding agreement is entered into by an affiliate or a representative of the disputing party for the benefit of the disputing party. The Working Group may wish to consider whether the term “funded party” should be limited to claimant investors or also encompass States, though this would largely depend on the regulation model.

8. Paragraph 4 clarifies that the purpose of third-party funding is to provide financing for the costs of the proceeding.⁷ The phrase “direct or indirect” is meant to cover circumstances where the disputing party might not be a party to the funding agreement but still a beneficiary of the funding arrangement (see para. 7 above). The words “or equivalent support” are meant to cover non-financial support.⁸ The phrase “in return for remuneration dependent on the outcome of the proceedings” refers to commercial financing,⁹ whereas the phrase “a donation or grant” refers to forms of non-profit funding (A/CN.9/1004, para. 87).¹⁰ The inclusion of the latter would largely depend on the regulation models outlined below, particularly as non-profit funding and funding by development organizations such as the [African Legal Support Facility \(ALSF\)](#), the [International Development Law Organization \(IDLO\)](#) and a multilateral advisory centre, should one be established, would not present the same concerns as commercial funding.

9. The Working Group may wish to consider whether certain funding arrangements should be excluded from the definition, such as funding by legal counsel or parties’ representatives.¹¹ In conjunction, it may wish to consider whether the definition should expressly cover (i) equity financing (for example, where the funder purchases shares in a disputing party or creates a special purpose vehicle jointly with that party) and (ii) instances where the third-party funder owns or invests in a law firm representing a disputing party.¹²

B. Regulation models

³ See Draft Rule 12 of the amended ICSID Conciliation Rules in ICSID Working Paper #4, p. 88.

⁴ See ICCA Report, p. 50. See also Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) (provisionally in force since 21 September 2017), Article 8.1; and Canada-Chile Free Trade Agreement (“CCFTA”) (in force since 5 February 2019), Article G-23 bis (3).

⁵ See, for example, European Union-Singapore Investment Protection Agreement (“EU-Singapore”) (signed on 19 October 2018), Article 3.1.; EU-Vietnam Investment Protection Agreement (“EU-Vietnam”), Article 3.37.

⁶ Regarding a definition of the “beneficial owner”, see CCSI/IIED/IISD Joint Submission, p. 5, footnote 7.

⁷ See Draft Rule 14 of the amended ICSID Arbitration Rules; EU-Singapore, Article 3.1 (2)(f); and IBA Guidelines on Conflicts of Interest (“IBA Guidelines”), Explanation to General Standard 6(b): “contributing [...] to the prosecution or defence of the case”.

⁸ See, for example, ICCA Report, p. 50; Another approach would be to add a phrase such as “and other equivalent funding mechanisms” as a catch-all phrase to prevent the undermining of the definition and guarantee the efficient implementation of any regulation; The IBA Guidelines defines funding as “contributing funds, or other material support”.

⁹ For EU-Singapore, Article 3.1 – “in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled, or in the form of a donation or grant”; CCFTA, Article G-23 bis – “either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute”; draft Rule 14 of the amended ICSID Arbitration Rules – “in return for remuneration dependent on the outcome of the proceeding”.

¹⁰ For a broad definition, see CCSI/IIED/IISD Joint Submission. For an example of non-profit funding, see *Philip Morris v. Uruguay*, where the Bloomberg Foundation and its ‘Campaign for Tobacco-Free Kids’ provided funding for the Uruguayan government. See also ICCA report, p. 96 and Nieuwveld & Sahani, pp. 4, 5.

¹¹ Draft Rule 14(2) of the amended ICSID Arbitration Rules provides that “[a] non-party referred to in paragraph (1) does not include a representative of a party”. See also ICCA Report, p. 50; and draft provision 3 (b) in the CCSI/IIED/IISD Joint Submission.

¹² See ICCA Report, p. 35 and 36.

Singapore: Singapore expresses our deepest appreciation to the Secretariat for the comprehensive work in preparing the various options for the WG’s consideration. As set out in our intervention at the 38th session, Singapore takes the view that third party funding can promote access to justice, especially for individuals, as well as micro, small and medium-sized enterprises, with their more limited resources. We would also note that even States have – on a couple of occasions – been able to benefit from third party funding in ISDS cases, a view that was also expressed by Bahrain and Ghana at the 38th Session. These views were reflected in paragraph 81 of the WG’s report for the 38th session (A/CN.9/1004*), which states:

“While some support was expressed for prohibiting third-party funding, *it was generally felt that flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources, particularly SMEs and, in limited instances, to States*. In that context, it was suggested that further research might need to be conducted on the extent to which SMEs had used third-party funding. It was further said that prohibition of third-party funding could lead to the development of other forms of funding which might not be subject to regulation.”

Singapore further recalls that in paragraph 85 of the WG’s report for the 38th session (A/CN.9/1004*), the WG had “*the view that over-regulation of [third party funding] should be avoided.*”

Consequently, Singapore’s view is that that the right balance on third party funding can be struck by developing a set of disclosure obligations in draft provision 7 (disclosure), and does not support the prohibition or regulation of third-party funding in draft provisions 2 to 6.

10. This section sets forth the various models for regulating third-party funding. In considering the different models, the Working Group may wish to take into account a number of factors, including but not limited to the need to ensure the integrity of the proceedings by preventing any abuse and the benefit that third-party funding could have for claimants with insufficient financial resources, particularly small and medium-sized businesses, to raise claims (A/CN.9/1004, para. 85).

1. Prohibition models

General

11. One regulation model is to prohibit third-party funding in ISDS (A/CN.9/1004, para. 81).¹³ Such prohibition could address the concern that third-party funding aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed.

DRAFT PROVISION 2 (Prohibition model)

Option A – A general provision prohibiting third-party funding

A claimant shall not enter into an agreement on, or receive, third-party funding.

Option B – Condition for the submission of a claim

A claim may be submitted only if the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option C – Requirement for the consent

¹³ See Submissions from the Government of South Africa (A/CN.9/WG.III/WP.176) and the Government of Morocco (A/CN.9/WG.III/WP.161,). See also A/CN.9/WG.III/WP.172 - [Third-party funding](#), paras. 15-19.

The consent of the respondent requires that the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option D – Denial of benefits

A Party may deny the benefits of this investment treaty to an investor of another Party that raises a claim if the investor has entered into an agreement on or received third-party funding.

12. The table above provides different options to implement the prohibition model. Option A would include a general provision prohibiting third-party funding.¹⁴ Such a provision would oblige the disputing parties to refrain from seeking third-party funding in an ISDS proceeding. The Working Group may wish to consider whether all “disputing parties” should be subject to the prohibition in option A.

13. Option B would require the non-existence of third-party funding as a condition for submitting a claim. The text of option B can also be incorporated into a general provision addressing procedural and other requirements for submissions of a claim.¹⁵ Option C would indicate that the consent of the respondent State is subject to the requirement that the claimant has not received and will not seek to receive third-party funding. Such language could be incorporated into a provision addressing consent found in recent investment treaties.¹⁶ Failure to comply with the requirements in option B and C would likely result in the claim being dismissed or the tribunal deciding that it lacked jurisdiction.

14. Option D is modelled on denial of benefit clauses found in investment treaties. Through such clauses, States have denied the benefits under investment treaties to certain categories of investors that the investment treaties did not intend to protect, for example, claimants that are “controlled by nationals of a third State”¹⁷ and/or “do not have a real economic connection with the home State”¹⁸. A denial of benefit clause has been used by States to “counteract strategies that seek the protection of particular treaties by acquiring a favourable nationality”,¹⁹ in other words, to prevent forum shopping and freeriding of the benefits under the investment treaty. Similarly, denying the benefits of a claimant with third-party funding could prevent the abuse of rights and safeguard the economic development objectives States pursue in investment treaties.²⁰ The application of option D could either take effect at the level of jurisdiction of the tribunal or the admissibility of the claim.²¹

15. Draft provision 2 would need to be accompanied by a provision on sanctions if third-party funding is obtained despite the general prohibition (see draft provision 6 below).

16. Should any of the above-mentioned approaches be taken, the Working Group may wish to exclude from the scope of the regulation non-profit funding and funding provided to respondent States (see paras. 8-9 above). The Working Group may also wish to consider excluding contingency arrangements and funding provided by an affiliate of the disputing party.²² Concerns that the prohibition of third-party funding could limit small and medium-

¹⁴ See Argentina - United Arab Emirates BIT (2018), Article 24 - “Third party funding is not permitted”.

¹⁵ See EU-Vietnam, Article 3.35, Australia-Hong Kong Investment Agreement (“Australia-HK”), Article 26-27; Free Trade Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”), Article 14.D.3.

¹⁶ See EU-Vietnam, Article 3.36; Australia-HK, Article 24; and USMCA, Article 14.D.5.

¹⁷ Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award (5 June 2012), para. 354.

¹⁸ ‘Denial of Benefits’ Clause in Investment Treaty Arbitration by Loukas Mistelis and Crina Baltag, Queen Mary University of London, School of Law Legal Studies Research Paper No. 293/2018 (“Mistelis & Baltag”), p. 1.

¹⁹ Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edition, 2012), p. 55.

²⁰ See Mistelis & Baltag, p. 2; See also Guven & Johnson, p. 42, 43.

²¹ See Mistelis & Baltag, p. 2, 18. “Distinguishing between jurisdiction and merits has relevant practical consequences. When arbitral tribunal considers a matter to pertain to its jurisdiction, that decision may be challenged under the appropriate available mechanism. As such, erroneously considering an issue pertaining to jurisdiction, could ‘result in an unjustified extension of the scope for challenging the awards.’”

²² For a drafting example, see CCSI/IIED/IISD Joint Submission.

sized enterprises and impecunious claimants from raising claims under investment treaties could be addressed through legal aid mechanisms.

2. Restriction models

17. Another regulation model would be to permit or restrict certain types of third-party funding (A/CN.9/1004, paras. 82 and 83). Such a model could provide for more flexibility than the prohibition model, while addressing the concerns mentioned above (see para. 11 above). While there could be a number of variants, the Working Group may wish to consider the following models:

- Third-party funding is allowed only when it is necessary for the claimant to bring its claim (draft provision 3 - access to justice model) (A/CN.9/1004, paras. 82 and 83)
- Third-party funding is allowed only when the investment is in compliance with sustainable development requirements (draft provision 4 - sustainable development model)
- Third-party funding is generally allowed unless specified (draft provision 5 restriction list model)

(a) Access to justice model

18. Under the access to justice model, third-party funding would be permitted if the funding is necessary for the claimant to bring its claim, particularly, micro, small and medium-sized enterprises (MSMEs).

DRAFT PROVISION 3 (Access to justice model)

1. Third-party funding is permitted if the claimant can demonstrate that it is pursuing the claim in good faith and is not in a position to pursue its claim without third-party funding.

2. The tribunal shall grant the permission in paragraph 1 upon receiving the request from the claimant, which shall be submitted with the notice of arbitration and prior to entering into an agreement on or receiving third-party funding.

19. Under draft provision 3, the claimant is required to demonstrate that it is pursuing the claim in good faith and that, without third-party funding, it is not possible to afford to bring its claim. Accordingly, if the third-party funding was obtained merely for business purposes (for example, to manage risks or to deduct the cost of the proceedings from its balance sheet), it would not be able to obtain a permission. The Working Group may wish to note that it may be difficult to demonstrate the impecuniosity of the claimant (A/CN.9/1004, para. 83).²³ and more generally that third-party funding is “necessary” to pursue the claim. As to the drafting, paragraph 1 can also be rephrased along the following lines: “Draft provision 2 does not apply if the claimant ...” The Working Group may also wish to consider adding “prospects of success” as another criterion, often found in legal aid schemes.²⁴

20. Under the access to justice model, procedural rules for granting permission may need to be prepared. Paragraph 2 stipulates that the tribunal would grant permission upon a request by the party seeking to obtain third-party funding. The Working Group may wish to consider whether other authorities should be involved, particularly if the request is made prior to the constitution of the tribunal. Paragraph 2 also requires the claimant to make the request in its notice of arbitration and prior to entering into an agreement on or receiving funding. In so doing, the claimant would need to disclose information as required in draft provision 7.

²³ See ICCA Report, p. 20.

²⁴ [Global Study on Legal Aid - Global Report](#) (2016), United Nations Development Programme (UNDP), United Nations Office on Drugs and Crime (UNODC).

21. Draft provision 3 may need to include additional procedural rules to address: (i) circumstances where there is a change in the funding arrangement after the permission is granted; (ii) the consequences of the tribunal not granting the permission; and (iii) the consequences if the claimant proceeds to obtain third-party funding despite the tribunal not granting the permission (see draft provision 6 on possible sanctions).

(b) Sustainable development model

22. Under the sustainable development model, a claimant would be allowed to seek third-party funding, if its investment meets pre-defined sustainable development requirements of the respondent State. This reflects the trend that States, in particular developing countries, are seeking to balance in their investment treaties the protection of investors on the one hand and the sustainable development agenda on the other. By allowing only investors that contribute to sustainable development to obtain third-party funding, this model would allow States to prioritize and promote such investments, for example, those with the purposes of protecting the environment or mitigating climate change.

DRAFT PROVISION 4 (Sustainable development model)

Third-party funding is permitted if the claimant can demonstrate that its investment is in compliance with [applicable sustainable development provisions].

23. Under draft provision 4, the claimant will be permitted to obtain third-party funding by demonstrating that its investment is or was made in compliance with the applicable sustainable development provisions. In taking this approach, it may be necessary to include procedural rules similar to draft provision 3(2) (see para. 21 above).

24. As to the drafting, draft provision 4 can also be phrased to provide that draft provision 2 on general prohibition does not apply when the claimant demonstrates that its investment is in compliance with sustainable development requirements.

25. Furthermore, it would be possible to combine draft provisions 3 and 4.

(c) Restriction list model

26. Under the restricted list model, third-party funding would generally be allowed whereas certain types would be prohibited. A list of the types of third-party funding that are not allowed would be provided in the regulation. Compared to the access to justice model and the sustainable development model, this approach could provide more flexibility to the parties in obtaining third-party funding for a number of different purposes.

DRAFT PROVISION 5 (Restriction list model)

1. Third-party funding is permitted unless:

- (a) the funding is provided on a non-recourse basis in exchange for a success fee and other forms of monetary remuneration or reimbursement wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings;*
- (b) the expected return to be paid to the third-party funder exceeds a reasonable amount;*
- (c) the number of cases that the third-party funder funds against the respondent State with regard to the same measure exceeds a reasonable number;*
- (d) ...*

2. Upon disclosure of the information required in draft provision 7, the tribunal, upon request of a party or on its own initiative, shall determine whether the third-party funding is not permissible in accordance with paragraph 1.

27. Draft provision 5, paragraph 1 provides the types of third-party funding that would not be permitted. Paragraph 1(a) intends to cover speculative funding (A/CN.9/1004, para. 82). The Working Group may wish to note that paragraph 1(a), as drafted, could restrict most commercial funding, in which case, the following subparagraphs might not be necessary.

28. Paragraph 1(b) aims to cover third-party funding where the amount of the expected return is excessive or above a certain threshold. An alternative approach would be to provide a rule limiting the amount or percentage of return, instead of prohibiting third-party funding entirely.²⁵ Paragraph 1(c) aims to cover third-party funding, where the funder has already provided funding for a number of claims against the same respondent State with regard to the same measure. This would limit the number of cases that a third-party funder can fund against a particular State, which was viewed as a concern as it could increase the existing imbalance to the detriment of those States, as the funder could have an influence on the outcome of those cases.

29. Paragraph 1 only provides some examples and the Working Group may wish to consider which other types of funding should be included in the list, for instance, claims that are frivolous or without legal merit, in bad faith or with political purposes (A/CN.9/1004, para. 82). If a separate provision is developed to dismiss frivolous claims, the existence of third-party funding could be an element to be considered in determining whether the claim was frivolous or not.

30. Regardless of whether the third-party funding falls within the category of those listed in paragraph 1, it would be subject to the same disclosure requirements in draft provision 7. Similar to other restriction models, additional procedural rules would need to be developed. For example, draft provision 5(2) stipulates that the tribunal shall determine whether the third-party funding is not permissible under paragraph 1. The Working Group may wish to consider the following issues:

- Whether such determination should be mandatory upon disclosure;
- How the tribunal could obtain information not subject to disclosure that would allow the tribunal to make the determination (for example, information on the funder's return and involvement in other cases involving the respondent State – see draft provision 7(2));
- Whether the determination should be upon the request of a party or on the initiative of the tribunal and, if so, the time frame for making the request;
- Whether any other authority shall make the determination prior to the constitution of the tribunal; and
- The consequences if the third-party funding is found to fall under the category in paragraph 1 (see draft provision 6).

3. Legal consequences and possible sanctions

31. The legal consequences of a party entering into or being provided with third-party funding that is not permitted would differ depending on the regulation model. For example, the claim may be inadmissible or the tribunal might lack jurisdiction to consider the case (see para. 13 above).

DRAFT PROVISION 6 (Sanctions)

If a claimant enters into an agreement on or receives third-party funding, which is not permissible under these provisions, the tribunal may:

- (a) order the claimant to terminate the third-party funding agreement and/or return funding received;*
- (b) suspend or terminate the proceeding;*

²⁵ Submission by the Government of Turkey (A/CN.9/WG.III/WP.174), p. 3 - "... [T]he amount of the return that would be taken by the funder should be limited to a reasonable portion of compensation".

- (c) *consider the non-compliance in allocating the costs of the proceeding;*
- (d) ...

32. Draft provision 6 provides examples of measures that a tribunal (or any other authority) could take, should it determine that the third-party funding was not permissible under the draft provisions. It would need to be adjusted in accordance with the different regulation models and options therein.

33. The Working Group may wish to consider whether the measures outlined in draft provision 6 are appropriate and whether any other measures should be added.²⁶ It would be possible for the tribunal to take one or more measures on the list to rectify the situation. The Working Group may wish to confirm that such measures by the tribunal would not require a request by the respondent party and can be taken on its own initiative.

34. The Working Group may wish to further consider whether attempts by the claimant with the intent or effect of circumventing the regulation on third-party funding (for example, by structuring the funding arrangements, whether through debt, equity, or otherwise) should also be subject to the same sanction measures.²⁷

35. While draft provision 6 focuses on measures that can be taken by the tribunal, it could be anticipated that an award or a decision rendered by the tribunal, despite the existence of third-party funding that was not permissible under the regulation, could be set aside or annulled.

C. Disclosure of third-party funding

36. Disclosure is required generally for addressing the risk of conflicts of interest or the lack of transparency and a number of existing investment treaties and arbitration rules include rules on disclosure of third-party funding. ICSID is also considering requiring disclosure of third-party funding in its Rules and Regulations Amendment Process to address the potential risk of conflicts of interest.²⁸

37. Requiring disclosure could be a stand-alone regulation model. However, the implementation of other regulation models mentioned in sections A and B would need to be based on the disclosure of certain information. This is because without the information disclosed, it would not be possible to determine whether the third-party funding is permissible or not. Depending on the approach to be taken, disclosure may be a pre-requisite for obtaining approval from the tribunal to seek third-party funding. It is in this context that the Working Group may wish to consider disclosure requirement as outlined below (A/CN.9/1004, para. 89).

DRAFT PROVISION 7 (Disclosure)

1. The funded party shall disclose to the tribunal and the other disputing parties the following information:

- (a) *the name and address of the third-party funder; and*
- ~~(b)~~ *the name ~~and~~ address and corporate structure of the ultimate beneficial owner of the third-party funder [and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the Proceeding];*
~~and~~
- ~~(c) the funding agreement or the terms thereof.~~

²⁶ See for example Indonesia-Australia Comprehensive Economic Partnership Agreement (2020) ("Indonesia-Australia"), Article 14.32 (3).

²⁷ See CCSI/IIED/IISD Joint Submission.

²⁸ See ICSID Working Paper #4, pp. 294-296.

2. In addition to those set forth in paragraph 1, the tribunal may require the funded party to disclose the following information:

- (a) whether the third-party funder agreed to cover the costs of an adverse cost award;
- (b) the expected return amount or share of the third-party funder;
- (c) any rights of the third-party funder to control or influence the management of the claim, the proceedings and to terminate the funding arrangement;
- (d) number of cases that the third-party funder has provided funding for claims against the respondent State;
- (e) any agreement between the third-party funder and the legal counsel or firm representing the funded party;
- (f) [specific terms of the funding agreement, in so far as such information is necessary to reveal the nature of the third-party funder's involvement]; and
- (g) any other information deemed necessary by the tribunal.

3. The funded party shall disclose the information listed in paragraph 1 when submitting its statement of claim, or if the funding ~~agreement~~ is agreed, donated or granted entered into after the submission of the statement of claim, as promptly as possible after the ~~agreement is entered into~~ funding is agreed, donated or granted, as applicable. The funded party shall disclose the information requested by the tribunal in accordance with paragraph 2 as promptly as possible after such request.

4. If there is any change in the information disclosed in accordance with this provision, the funded party shall immediately notify the tribunal and the other disputing parties.

5. If the funded party fails to comply with the obligations in this provision, the tribunal may:

- (a) suspend or terminate the proceedings;
- (b) take the fact into account when making decision on the costs of the proceeding;
or
- (c) take any other appropriate measure.

Singapore: Singapore strongly supports a disclosure obligation to regulate third party funding, in line with our general comments. We further support the continuing disclosure obligation in provision 7(4).

For the draft provision 7(1)(b), the phrase “any natural or legal person with decision-making authority for or on behalf of the third-party funder” is currently too broad. It potentially includes a director who has the authority to make decisions on day-to-day affairs on behalf of the third-party funder. If the WG is inclined to retain this phrase, Singapore suggests that it be limited to “any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the Proceeding”.

In relation to the draft provision 7(1)(c), Singapore does not support a blanket disclosure of the funding arrangement, as it might stymie the use of third-party funding. It should be left up to each State to regulate the landscape on third-party funding. Further, it is possible that States that obtain third party funding may not wish to disclose all the details of their funding arrangements for political or policy considerations. In any case, the Tribunal has the discretion to require disclosure of the key terms of the agreement in draft provision 7(2). Singapore is of the view that this tiered approach strikes the right balance between competing interests of confidentiality and transparency. Further, it always remains open for Parties to include a more robust disclosure obligation in their investment treaties. Corresponding edits would need to be made to the explanatory notes, to delete the paragraph on draft provision 7(1)(c) and include a new paragraph on the proposed draft provision 7(2)(f).

In this regard, we recall paragraph 90 of the WG’s report for the 38th session (A/CN.9/1004*), where “it was said that the terms of the funding agreement should also be disclosed to reveal the nature of the third-party funder’s involvement.” If the WG is minded to provide for disclosure of the funding agreement, this could be included as an additional limb in provision 7(2), to the extent that disclosure of specific terms (but not the whole agreement) is necessary to reveal the extent of the funder’s involvement.

Parties involved

38. Paragraph 1 requires the funded party to disclose certain information. The Working Group may wish to consider whether both claimants and respondent States should be subject to the same requirement (see para. 7 above), as respondent States may already be subject to disclosure requirements under domestic law (A/CN.9/1004, para. 84).

39. Paragraph 1 further reflects the view that disclosure should be made to the arbitral tribunal and the other disputing parties (A/CN.9/1004, para. 91),²⁹ which is in line with provisions in recently adopted investment treaties.³⁰ The Working Group may wish to consider whether rules need to be prepared for disclosing the information prior to the constitution of the tribunal, for example, in the notice of arbitration to an administering institution, appointing or other authority. In that case, that entity that received the information from the funded party would need to transmit the information to potential candidates and the tribunal once it is constituted.

Scope of disclosure

40. There was general agreement in the Working Group that the existence of third-party funding and the identity of the third-party funder should be disclosed (A/CN.9/1004, para. 89). Accordingly, paragraph 1(a) requires the disclosure of the name and the address of the third-party funder, in line with recently adopted investment treaties.³¹ The proposed ICSID rules provides for the disclosure of the name and address of the funder to the parties and arbitrators.

41. Paragraph 1(b) requires the disclosure of the name and address of the beneficial owner of the third-party funder as well as the name and address of any person with decision-making authority for or on behalf of the third-party funder (for example, an investment manager or advisor). This could assist in identifying potential conflicts of interest, particularly when the funding is channelled through a special purpose vehicle (A/CN.9/1004, para. 89).³² The Working Group may further wish to consider the extent to which such kind of information should be subject to disclosure requirements.

42. Paragraph 1(c) requires the disclosure of the funding agreement or the terms thereof. The Working Group may wish to consider whether there should be any exceptions to the disclosure requirement, in particular agreements that may be subject to other disclosure requirements. Some examples may be pro bono assistance arrangements, contingency arrangements, or inter-corporate financing agreements (A/CN.9/1004, para. 87).³³

43. Paragraph 2 reflects the view that the tribunal should have the discretion to determine the extent of disclosure beyond the existence and identity of the third-party funder based on the circumstances of the case (see A/CN.9/1004, para. 90). It also reflects the fact that depending on the regulation model, the information required by the tribunal may differ (for example, subparagraph (d) in relation to draft provision 5(1)(c)). The proposed ICSID rules

²⁹ The ICCA Report suggests disclosure only to the tribunal, the arbitral institution and appointing authority (if any). See ICCA Report p. 14.

³⁰ CETA, Article 8.26; EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8.

³¹ EU-Singapore, Article 3.8; CCFTA, Article G-23 bis; Argentina-Chile Free Trade Agreement (2017) Article 8.27; Indonesia-Australia, Article 14.32; CETA, Article 8.26; EU-Vietnam, Article 3.37.

³² See Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388 (2016).

³³ See ICCA Report, p. 96, referring to the example of General Standard 7(a) of the IBA Guidelines, which provides that disclosure for the purpose of assessing conflicts applies not only to a party, but also to “another company of the same group of companies [as the party], or an individual having a controlling influence on the party in the arbitration”; See also draft provision 3(c) in the CCSI/IIED/IISD Joint Submission.

on disclosure also provides the tribunal with the power to order the disclosure of further information if deemed necessary.³⁴

44. The Working Group may wish to consider whether any of the information listed in paragraph 2 should be moved to paragraph 1, yet taking into account that in the regulation models, the funded party would be incentivized to provide relevant information to the tribunal to ensure that it will be permitted to obtain third-party funding.

Timing and means of disclosure

45. Paragraph 3 reflects the view that disclosure should be made at an early stage of the proceedings or as soon as the funding agreement is concluded (A/CN.9/1004, para. 89). While paragraph 3 requires disclosure to be made in the statement of claim to cater for ad hoc arbitration, if there were to be an administering institution, disclosure could be made earlier possibly in the notice of arbitration (see para. 39 above). Provisions in recently adopted IIAs generally require that disclosure is made at the time of the submission of the claim or immediately after the funding is received or a funding agreement is concluded.³⁵ Paragraph 3 also requires the funded party to disclose the information requested by the tribunal as promptly as possible after the request.

46. Paragraph 4 reflects the view that the disclosure requirement should continue throughout the proceedings (A/CN.9/1004, para. 89) and requires the funded party to notify the tribunal and the other parties of any changes.

Non-compliance and possible sanctions

47. In light of views that clearly defined and strictly applied sanctions for non-compliance of the disclosure requirement would ensure an effective enforcement of those requirements (A/CN.9/1004, para. 92), paragraph 5 lists the possible sanctions that the tribunal could impose (see also draft provision 6). Recent investment treaties have provided that the tribunal could suspend or terminate the proceedings,³⁶ take into account the non-compliance in its decision on costs,³⁷ or take any measure to be determined by it.³⁸

Linkage with disclosure requirements of the tribunal

48. It may be necessary to consider the relationship between the disclosure requirements in draft provision 7 and disclosure requirements of tribunal members (A/CN.9/1004, para. 91).³⁹ For example, article 10(2)(a)(iv) of the proposed draft Code of Conduct for Adjudicators in International Investment Disputes (version two) requires adjudicators to disclose any financial, business, professional, or personal relationship within [the past five years] with any third-party funder with a financial interest in the outcome of the proceeding and identified by a party. Furthermore, they are required to make the disclosure prior to or upon accepting appointment (article 10(3) of the draft Code of Conduct). In order to do so, the proposed adjudicator would need to be aware of the identity of the third-party funder. The Working Group may wish to consider whether any rule would need to be developed to address this interplay.

Public disclosure

49. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration do not address the publication of information or documents about third-party funding. The Working Group may wish to consider whether any of the information disclosed in

³⁴ “[...] The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding.” See ICSID Working Paper #4, p. 295:

³⁵ See for example EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8; Indonesia-Australia, Article 14.32 (2); draft Rule 14(3) of the amended ICSID Arbitration Rules.

³⁶ See Indonesia-Australia, article 14.32 (3).

³⁷ See EU-Vietnam, Article 3.37 (3); CIETAC International Investment Arbitration Rules (2017), Art. 27 (3).

³⁸ See Argentina-Chile Free Trade Agreement (2017), Article 8.27(2).

³⁹ See, for example, Indonesia-Australia, Annex 14-A: Code of Conduct of Arbitrators, Disclosure Obligations. See the proposed arbitrator declaration in accordance with draft rule 19(3)(b) of the amended ICSID Arbitration Rules.

accordance with draft provision 7 should also be made available to the public similar to the procedural information under the Transparency Rules.⁴⁰

D. Other provisions

1. Scope of covered investor and investment

DRAFT PROVISION 8 (Investment and investor of a Party)

For the avoidance of doubt, third-party funding shall not be considered as covered investment under this [Agreement] and a third-party funder shall not be considered an investor of a Party.

Singapore: Singapore proposes to delete draft provision 8. Whilst we understand the intent of the paragraph, in our view, this provision is not appropriate for inclusion in this document. Singapore is of the view that whether third-party funding falls under the definition of an investment is a substantive issue to be interpreted under the provisions of the relevant international investment agreement.

50. Draft provision 8 clarifies that third-party funding shall not be construed as an investment protected under investment treaties and furthermore that a third-party funder would not be considered as an investor. The provision aims to preclude third-party funders from raising claims against a State on the basis of any loss or damage suffered by funding another claimant.

2. Security for costs

DRAFT PROVISION 9 (Security for costs)

Option A

When a party has entered into an agreement on or been provided third-party funding, the tribunal shall order the funded party to provide security for costs, unless the funded party demonstrates that:

- a) the respondent State was responsible for its impecuniosity; or*
- b) it is not able to pursue its claim without the third-party funding; and/or*
- c) the third-party funder would cover any adverse cost decision against the funded party.*

Option B

When a party has been provided third-party funding, the tribunal may order the funded party to provide security for costs.

Singapore: We recall that this issue was the subject of extensive discussions during the ICSID Rules Amendment Process. We suggest that the WP take reference from Rule 53(3) and (4) (Security for Costs) in Working Paper #4 of the ICSID Amended Arbitration Rules, which represents a reasonable compromise across the spectrum of differing views that were expressed during the ICSID Rules Amendment Process. We reproduce Rule 53(3) and (4) below for ease of reference:

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

- (a) that party's ability to comply with an adverse decision on costs;
- (b) that party's willingness to comply with an adverse decision on costs;

⁴⁰ See CCSI/IIED/IISD Joint Submission, p. 5.

(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and

(d) the conduct of the parties.

(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3). The existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs.

51. Draft provision 9 addresses the ordering of security for costs where a party has received third-party funding. One of the objectives is to address concerns regarding the respondent States' inability to recover their costs, particularly when an impecunious claimant had brought the claim with the support of third-party funding (A/CN.9/1004, para. 94). The options reflect the different views expressed during the Working Group.

52. Option A reflects the view that security for costs should be mandatory when there is third-party funding,⁴¹ unless the funded party could justify that the ordering of the security for costs would be inappropriate. The Working Group may wish to consider whether such justifications should be provided (without which, the existence of third-party funding would make security for costs mandatory) and whether the list of justification in option A are adequate. Option B reflects the view that mere existence of third-party funding would not be sufficient to justify ordering security for costs (A/CN.9/1004, para. 94) and provides flexibility to the tribunal. Option B could be supplemented by a rule that the existence of third-party funding is not by itself sufficient to justify an order for security for costs.

53. If a general provision on security for costs is to be prepared,⁴² draft provision 9 could possibly be merged with that provision, similar to those found in recent investment treaties stating that the tribunals shall take third-party funding into consideration when deciding to order security for costs.⁴³

54. The Working Group may wish to consider whether further guidance should be provided with regard to the amount of security to be ordered, including staggered or flexible mechanisms.

3. Allocation of costs

DRAFT PROVISION 10 (Allocation of costs)

Option A

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall not be included in the costs of the proceedings, unless determined otherwise by the tribunal.

⁴¹ See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10 - Security for costs should be a mandatory requirement in cases funded by third parties.

⁴² See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10; Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179), p. 5; Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182), p. 6.

⁴³ EU-Vietnam, Article 3.37 – “When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected”. For a different approach, see ICCA Report, p. 16:

D. Principles on Security for Costs

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including “after-the-event” (ATE) insurance, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

Option B

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall be borne by the funded party and cannot be allocated to the other party, unless determined otherwise by the tribunal.

55. Draft provision 10 reflects the view that costs related to third-party funding (including the return paid to the third-party funder) should not be recoverable (A/CN.9/1004, para. 93).⁴⁴ The costs of the ISDS proceedings that can be allocated among the parties vary depending on the applicable rules, which also provide for a range of ways to allocate such costs. However, they generally do not address whether third-party funding expenses can be recovered.⁴⁵

56. For example, article 40(2) of the UNCITRAL Arbitration Rules only mentions that legal or “other costs” incurred by the party in relation to the proceedings are to be included in the costs of arbitration as long as the arbitral tribunal determines that the amount of such costs is reasonable.⁴⁶ Article 42 of the UNCITRAL Arbitration Rules provides that the costs of the arbitration shall in principle be borne by the unsuccessful party or parties, while the arbitral tribunal may apportion each of such costs between the parties if deemed reasonable.

57. There can be a number of ways to ensure that expenses relating to third-party funding cannot be recovered. One would be to exclude such expenses from the definition of the costs of the proceedings as provided for in option A. Another would be to provide a rule that such expenses are to be borne by the funded party and thus not recoverable, as stipulated in option B. Both options provide discretion to the tribunal to determine otherwise, for example, when it considers reasonable to include the expenses as the costs of the proceedings or to allocate such expenses.

58. If general provisions on costs and allocation thereof are to be prepared, draft provision 10 could possibly be merged with those provisions.

59. The Working Group may wish to consider whether a separate provision should be prepared allowing the tribunal to allocate the costs of the proceedings to a third-party funder, particularly where the respondent State is not able to recover costs from the funded party (A/CN.9/1004, para. 93). Without such a provision, a tribunal would generally lack the authority to allocate costs to the third-party funder, as it is not a party to the dispute.⁴⁷

⁴⁴ The funded party is typically obliged to pay the funder a return under the funding agreement, if successful, and might seek to recover these funding costs from the unsuccessful party. The question of the recoverability arises when tribunals determine the scope of the costs incurred by a party to be shifted to the other party.

⁴⁵ See USMCA, Section 14.D.13 (4); Australia-HK, Article 35. With a broader provision see SIAC Investment Arbitration Rules (2017), according to which third-party funding shall be considered in the decision on costs allocation; See also ICCA Report, p. 15:

C. Principles on Final Award (Allocation) of Costs

C.1. Generally, at the end of an arbitration, recovery of costs should not be denied on the basis that a party seeking costs is funded by a third-party funder.

C.2. When recovery of costs is limited to costs which have been “incurred” or “directly incurred”, the obligation of a party to reimburse the funder in the event of a successful outcome is generally sufficient for a tribunal to find that the costs of a funded party come within that limitation.

C.3. The question of whether any of the cost of funding, including a third-party funder’s return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure.

C.4. In the absence of an express power, in applicable national legislation or procedural rules, a tribunal would lack jurisdiction to issue a costs order against a third-party funder.

⁴⁶ See for example UNCITRAL Arbitration Rules, Article 40 – “2. The term “costs” includes only: [...]

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; [...]

⁴⁷ See ICCA Report, p. 161.

4. Code of conduct for third-party funders

60. The Working Group may wish to consider whether a code of conduct for third-party funders should be prepared, which could be based on existing initiatives.⁴⁸ Some issues that could be addressed in such a code are:

- Disclosure, particularly of any conflict of interest;
- Transparency requirements with regard to the conduct of their business;
- Limitation on the return to be paid to the funder (for example, a maximum percentage of the amount awarded or claimed);
- Limitation on the control that the funder could have over the proceedings;
- Limitation on the number of claims that a funder could provide to support claims against a single State; and
- Due diligence on claims to prevent the funding of frivolous claims.

E. Collection of data

Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.

⁴⁸ See Hong Kong Code of Practice for Third Party Funding of Arbitration issued December 7, available at https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf; See Code of Conduct for Litigation Funders by the Association of Litigation Funders, available at <https://associationoflitigationfunders.com/code-of-conduct/>.



Comments submitted by Switzerland on the Initial Draft on Third Party Funding – UNCITRAL WGIII

Date: 8 July 2021

For: UNCITRAL Secretariat

File reference: SECO-D-BA633401/516

1 I. GENERAL COMMENTS

Switzerland would like to thank the UNCITRAL Secretariat for this very good initial draft on Third Party Funding (hereafter: TPF). It provides a clear basis on which to continue to build.

Before commenting specific issues linked to the draft provisions, we would like to make a general comment. The draft provisions have been prepared for inclusion in investment treaties, which will allow States to include such provisions in future treaties. While this will allow treaty practice to evolve and a better regulation of TPF in future treaties, it does not appear sufficient. In the case of States with a large network of existing investment treaties – among which Switzerland – a way to apply the provisions on TPF to these existing treaties would be needed. Hence we suggest to draft in parallel another set of provisions to be incorporated into a multilateral convention on ISDS reform. The draft provisions currently discussed could serve as a basis and be adjusted to be part of a multilateral instrument.

2 II. COMMENTS ON SPECIFIC DRAFT PROVISIONS

Definitions

In Switzerland's view, draft provision 1 is broad enough to cover different types of TPF. It notably captures not only direct but also indirect funding, which is an important element.

With respect to para. 9, we believe that no funding arrangements should be excluded, be it non-profit funding or funding by legal counsel or parties' representatives. Furthermore we suggest to include language to cover specifically equity financing and instances where the third-party funder owns or invests in a law firm representing a disputing party.

Regulation models

TPF should be regulated. However, Switzerland is of the view that access to TPF should neither be prohibited nor limited.

Therefore Switzerland sees draft provision 2 as problematic: a complete ban on TPF will only displace the issue, as other means of financing will be found to circumvent this. Furthermore it is a matter of access to justice for certain types of investors, e.g. MSMEs.



This being said, Switzerland does not believe that the access to justice model as foreseen in draft provision 3 is a good way forward. TPF is a business decision of the investor and States should not interfere into freedom of business. Moreover, it would in many cases be difficult to draw a line between impecunious and other investors.

As regards draft provision 4, Switzerland recognizes the importance of strengthening the coherence between investment and sustainable development. Nevertheless access to TPF should not be limited and States should not interfere with such business decisions. The same applies to draft provision 5 and, in view of the above, draft provision 6 on sanctions does not appear necessary.

Disclosure of TPF

Regarding disclosure, Switzerland is of the opinion that the existence of TPF and the identity of the funder or the beneficial owner of the funder should be disclosed, as foreseen in para. 1 letters (a) and (b) of draft provision 7. We do not think that general disclosure of the terms of the funding agreement or the funding agreement itself should be requested; a certain balance should be sought and such disclosure should only be made on request of the tribunal. In this respect, Switzerland suggests to move letter (c) of para. 1 of draft provision 7 to para. 2.

As regards timing of disclosure, we suggest that disclosure be made in the notice of arbitration when there is an administering institution. In this respect para. 1 should be amended to allow disclosure to the tribunal, the administering institution where applicable, and the other disputing parties.

For what concerns possible sanctions, the consequences of non-disclosure should be clearly stated. Hence the list in para. 5 seems appropriate.

Scope of covered investor and investment

It should be clarified that TPF should not be construed as an investment protected under investment treaties and furthermore that a third-party funder should not be considered as an investor, as foreseen in draft provision 8.

Security for costs

In Switzerland's view there should not be a direct link between TPF and the ordering of security for costs. It should be left to the tribunal to decide on concrete circumstances if TPF might have an impact. We would therefore favour option B of draft provision 9 and suggest to supplement it by a rule that the existence of TPF is not by itself sufficient to justify an order for security for costs.

Allocation of costs

Switzerland agrees that that costs related to TPF, including the return paid to the third-party funder, should not be recoverable. Switzerland has a preference for option B of draft provision 10 as it makes clear that such costs should be borne by the funded party.

* * *

POSSIBLE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Draft provisions on Third-Party Funding

Sri Lanka welcomes reforms proposed to the UNCITRAL Rules on Arbitration on third-party funding, as such reform no longer leave open the issue of third-party funding unaddressed.

Sri Lanka notes that the reform proposals present multiple options for State Parties to adopt in their Investment Treaties and welcomes the mixed options presented therein.

Having considered all options presented as reform proposals, Sri Lanka is concerned of the following:

- All reform proposals leave third party funded arbitration claims as a matter to be determined by the Arbitral Tribunal, once constituted.
- In fact, this would mean that, where third party funding is not allowed, it would be a matter of jurisdiction and not of admission.
- Sri Lanka is of the view that where third party funding is not permitted (i.e. prohibition model) or restricted (i.e. restriction model) it is a decision at the outset that needs to be made, and one that determines the admissibility of the request for Arbitration.

In these comments 'admissibility' means the very step of registration of a Notice/Reference of arbitration by a potential Claimant to an arbitration Centre for registration and in any event prior to registering the arbitration and issuing notice of arbitration to the Respondent."

- Therefore, Sri Lanka is of the view that reform proposals should consider requiring the respective arbitration centre or where no centre is mentioned, any other mechanism constituted to consider the admissibility of the arbitral reference prior to registering the same and communicating with the Respondent.
- The underlying concern for Sri Lanka is that the State should not have to incur arbitral costs in challenging the third-party funding as permitted before an Arbitral Tribunal, when such permission is outright denied in the Treaty.
- Therefore, Sri Lanka considers it of utmost concern that the Working Group III should take these points into consideration and deliberate further as to the best modality to incorporate reform to address these concerns.

Subject to the above considerations, Sri Lanka agrees in principle with the reform proposals and is open for future discussions.

Proposal on the Establishment of the Advisory Centre

In principle, Sri Lanka views the establishment of an Advisory Centre to assist developing and least developed countries, positively. Sri Lanka's perspectives on the different aspects of the proposal are varied and are briefly set out below:

- Sri Lanka fully supports the proposal to provide 'pre-dispute' and 'dispute avoidance' services, as such measures are likely be beneficial from an overall cost and time efficacy perspective. In this context, it would be important to formulate a core methodology and build awareness among all stakeholders.
- Sri Lanka's response to the establishment of a facility to offer alternative dispute resolution (ADR) services, is more nuanced. Whilst Sri Lanka welcomes the idea of a platform for exchange of experience and expertise in the field, Sri Lanka is concerned with some of the options identified as services to be offered by the Centre.
- Sri Lanka's views on each option are set out below:
 - **Option 1:** (*serving as a mediation Centre*): Given the wide availability of mediation services across all regions, there is no pressing need to incur the cost of establishing a centralised physical facility for ADR in the ISDS context. Instead, rules of procedure and best practices may be developed by the Advisory Centre, which could create a platform for the identification of mediators, for ISDS related mediation.

Sri Lanka highly recommends that mediation proceedings be held in the host State. It is important to ensure that this does not merely create yet another platform for perpetuating the systemic imbalances currently apparent in international 'mediation' and arbitration. The panel of mediators should reflect the varying levels of the development spectrum, as well as regional diversity. A well-defined criteria as to costs should also be developed, if the system is to be truly viable and relevant. Moving towards limiting legal representation in mediation proceedings should also be considered.

- **Option 2:** (*providing advice*): Assistance in respect of assessment of the strengths and weaknesses of a case, identification of strategy, deciding whether or not to resort to mediation, identifying a suitable team of lawyers, selection of arbitrators if necessary etc., would be invaluable to a developing country faced with a ISDS. Therefore, Sri Lanka favours this proposal. The organisation of seminars, workshops and conferences to provide continuing legal education and building awareness, should also be considered.
 - **Option 3:** (*representing or assisting the State in mediation*): This would be a useful corollary to option 2. However, to eliminate the perception of imbalance in representation, a move towards, limiting legal representation in mediation, for all parties, should be seriously considered.
- In Sri Lanka's view, the proposed scheme for representation and assistance services, require closer review:

- Providing ‘assistance services’ in the preparation of the case, whilst still leaving open the necessity to retain private counsels, in respect of an arbitration, would lead to a duplication of costs. Often, the lead counsel in ISDS cases demand high fees and also insist upon one or more juniors to assist. Therefore, spending on additional counsel, by the advisory Centre, merely to assist in the process, is not a significant value addition to justify the incurring of further costs.
- A full ‘Representation’ of a State, in an arbitration, would in principle, be a valid ground to justify a commitment of funds for the creation and maintenance of an Advisory Centre, provided the Centre can provide ‘effective’ representation.

Presently, international arbitration is undeniably the domain of select counsel and a close-knit circle of arbitrators. Therefore, unless counsel of the Centre command similar recognition by arbitrators, the State party to an arbitration could well be the underdog. Therefore, if the Centre’s representation is to be a force to be reckoned with, a critical mass of States should commit to being represented by the Centre. In the absence of such a common will, in order to overcome the imbalance, the Developing States who contribute to Centre, will also be compelled to retain a team of outside Counsel, when actually faced with a high value claim.

Furthermore, in this respect, a suitable cost benefit analysis on whether, in the long term, a developing State would spend less by retaining counsel on an ad hoc basis in comparison to standing commitment to fund counsel in the Centre, would become necessary.

Draft provisions on third-party funding – Comments by the United Kingdom

UK position on Third Party Funding

1. The United Kingdom welcomes the work of the UNCITRAL Secretariat on the draft provisions on Third Party Funding (TPF), which sets out options for addressing the legal framework pertaining to TPF in ISDS. The UK would like to express its continued support of this work and thanks the Secretariat for the paper it has provided for consideration. The UK looks forward to discussing TPF further in upcoming meetings of Working Group III.
2. The UK's principal focus in our ISDS reform negotiations is on ensuring efficiency, cost effectiveness and timeliness of the ISDS procedure, and the delivery of robust and transparent outcomes. Our position on the regulation of TPF reflects these principles.
3. The UK considers TPF to be a useful option for claimants who would otherwise be unable to pursue a claim due to lack of funds. This includes SMEs, individuals and those who may have suffered a loss through a breach of investment protection obligations by host states.
4. However, TPF should not give rise to conflicts of interest which could call into doubt the integrity of the ISDS process or give rise to challenges to arbitral awards. The UK believes that these concerns can be addressed by increasing transparency around TPF through requiring disclosure of its existence and the name and address of the funder.
5. Avoidance of conflicts of interest on TPF should be pursued without overregulation, as this could lead to decline in TPF availability, limiting access to justice, should claimants, such as those mentioned above, be unable to pursue claims due lack of funds. In this regard, the UK believes that focusing our discussions around how we address potential conflicts of interest through transparency and disclosure should be a priority for the work of the Secretariat and Working Group.
6. Set out below are UK comments on wider issues raised by the Secretariat in its paper.

UK comments on the Secretariat's paper

Defining the scope of issues

7. In our discussions on this topic to date, members of the WG have expressed a range of concerns with regard to the availability of TPF for the pursuit of ISDS claims. In order to make progress, the set of issues to be considered by the group now need to be defined and evidenced. More specifically, one concern frequently raised is that TPF may support growth in frivolous ISDS claims brought against States. The UK proposes the WG explores the evidence behind this concern to better understand the correlation (or lack thereof) between TPF and frivolous claims.
8. We note that the UNCITRAL Academic Forum has prepared a concept paper on TPF in ISDS, which may provide a useful starting point for these discussions.

Defining Third-Party Funding

**USG COMMENTS ON UNCITRAL SECRETARIAT DRAFT NOTE
ON THIRD PARTY FUNDING
September 15, 2021**

General

The United States thanks the UNCITRAL Secretariat for the preparation of the draft Note on “Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding.” Third party funding (TPF) has received considerable attention within the international arbitration community, such as the ICCA-Queen Mary report,¹ as well as during the ICSID rules amendment process. While UNCITRAL Working Group III has identified this topic as one that is ripe for consideration of reform options, it is important to keep in mind this existing work when considering options.

As the United States has observed previously, the concept of TPF can be quite broad and seeking to regulate its use raises a host of potential challenges that may limit the ability to find a common solution beyond requiring disclosure of certain aspects of TPF. Such challenges include (i) finding a workable definition of TPF that would not be either overinclusive or underinclusive for purposes of any type of prohibition or restriction on its use; (ii) identifying appropriate sanctions when any such requirements are not followed; and (iii) providing sufficient clarity regarding the use of TPF that would not in turn invite more litigation about whether the potential prohibitions or restrictions applied, which may in turn add to the cost and duration of any proceedings.

Instead, building upon the consensus for disclosure of at least the existence and identity of third-party funders and developing clear and specific requirements in this respect will address the need to avoid conflicts of interest and promote greater transparency about the providers of TPF as well as its users. Focusing on disclosure, including potentially expanded disclosure options, as the common default rule will minimize the risk of potential forum-shopping with respect to the choice of arbitral rules, given the disclosure-based approach that ICSID, SIAC, and HKIAC, among others, have pursued.² Of course, States are free to take measures domestically or in their individual treaties to address the availability or use of TPF, but given the diversity of views on whether TPF is appropriate or not, finding common ground on regulation, either by prohibition or restriction, may be difficult.

Related concerns, such as whether TPF promotes the pursuit of frivolous claims or should be subject to a requirement of security for costs, might be more effectively addressed in the context of reform options for those specific topics. A presumption that claims funded by TPF are frivolous is inappropriate; TPF may be appropriate to ensure that claimants who would otherwise be unable to pay the costs of an arbitration proceeding, such as those with investments that have been rendered without value or claimants that are small and medium-size enterprises, have access to justice. It is also unclear why TPF should be restricted in other circumstances where

¹ See generally International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, The ICCA Reports No. 4 (April 2018).

² Disclosure could also contribute to the identification of the prevalence of this practice and types of parties that rely on its availability and may help inform the need for any further reforms over time.

the claim is meritorious. Likewise, requiring security for costs based solely on the particular type of funding provided in a case, rather than on general criteria that may already account for TPF where appropriate, may raise additional access to justice barriers for claimants.

Specific Draft Provisions

The United States offers the following comments on the individual draft provisions:

A. Definitions:

With regard to Draft Provision 1, given the mandate of the Working Group, any definitions should be focused on binding dispute resolution mechanisms between investors and States, rather than on mediation or other alternative dispute resolution mechanisms. While a broad definition may be desirable for disclosure requirements, any prohibitions or restrictions will require more precise definitions. For further clarity, the term “dispute settlement proceeding” should be used instead of “dispute,” given that a dispute may exist regardless of whether a proceeding has been instituted.

B. Regulation models

As a general matter, the United States is skeptical that either a prohibition model or a restriction model will be workable. Such approaches can pose real concerns about access to justice for claimants that are harmed by a State’s breach of its obligations but who cannot pay the costs of an arbitration proceeding. Such models may also spur litigation over whether a particular type of TPF qualifies for the prohibition or otherwise satisfies the criteria set out under the various restrictions, which in turn will run the risk of increasing the cost and possibly duration of proceedings where a claimant uses TPF. Any discussion of these two approaches should include these risks more expressly so that the Working Group can better assess them. In addition, we offer some observations below on specific elements of both approaches.

1. Prohibition: Options A through C of Draft Provision 2 provide a range of approaches for considering the prohibition of TPF as a threshold matter for access to ISDS. A broad TPF prohibition, however, could have significant implications for access to justice by claimants and could inadvertently disrupt existing means for facilitating claims, such as law firms offering pro bono or contingency fee-based services or intra-corporate financing of claims. Although TPF does not seem to be as common a funding source for a respondent’s defense as it is for a claimant’s claim, there is no inherent reason that, were a ban to be imposed, it should not apply to both claimants and respondents. In this case, States would be prevented, at a minimum, from seeking TPF for any counter-claims that they might seek to pursue.

Thus, were TPF to be prohibited, TPF will either need to be defined very precisely or allow for exemptions, and both approaches are likely to give rise to disputes over whether a particular type of funding qualifies as TPF or not. Tribunals will presumably need to decide these issues as questions of jurisdiction or admissibility, which will introduce a new stage to an arbitral proceeding (which would, in turn, likely increase the costs and duration of the proceeding). These consequences should be included more clearly in the discussion of the implications of adopting a prohibition.

Option D, the so-called “denial of benefits” provision, should be deleted because, to the extent that it results in denying a claimant access to ISDS, it merely duplicates Options A through C but in a way that creates confusion as to what benefits of the investment treaty are to be denied and when. For example, it could deny any recourse for a breach of an international investment agreement (IIA) to claimants that otherwise satisfy the definition of an investor under the treaty but are not seeking to benefit from obtaining nationality through a shell company, simply because they relied on TPF to bring their claims.

2. Restriction: Although the restriction models permit the use of TPF in certain circumstances, each of these model approaches is likely to add to the cost and duration of ISDS claims because disputes over whether a claim satisfies the criteria for permissible TPF funding would be inevitable.

(a) access to justice model: As drafted, this Draft Provision 3 presumes that a claimant using TPF is not acting in good faith or that it is somehow otherwise able to fund a claim, and it is unclear that this presumption is borne out in practice. Regarding whether a claim is brought “in good faith,” that criterion seems irrelevant to the source of funding and is better suited to an assessment of whether there is an abuse of process. Such a requirement also introduces an additional asymmetry in treatment because there is no similar requirement that States make defenses “in good faith.” Similarly, requiring a tribunal to assess the business judgment of a claimant as to whether it can only pursue a claim with TPF could be very fact-specific and result in a “mini-arbitration” on this issue. It is also unclear whether it would be readily apparent to a tribunal whether the “business purposes” factors set out in paragraph 19 are present or, alternatively, that is appropriate to treat TPF as distinct as a matter of principle from other alternative funding arrangements, such as contingency fee arrangements, which may be pursued for similar reasons. Further, if a respondent may object to a request for TPF, this opportunity could create the perverse situation where a claimant cannot defend a request for TPF without TPF. In short, trying to define the circumstances in which TPF promotes access to justice could result in a narrow or unduly complex framework, either of which could disadvantage what might otherwise be a legitimate meritorious claim. Again, these considerations should be incorporated more clearly in the paper for the Working Group to consider.

(b) sustainable development model: Although the objective of Draft Provision 4 is laudable, finding agreement on what types of investments would qualify as sustainable development seems difficult at best, and would again likely result in disputes over whether an investment satisfied that requirement, thus increasing cost and duration of any proceedings without a clear benefit. States already have the discretion to define what types of investment qualify for protection and adding an additional layer of screening after an investment is made would make protection under the IIA unpredictable. Further, the draft note does not identify any correlation between investments that are not sustainable and claims that are likely to be supported by TPF. Using limitations on TPF to give effect to otherwise laudable “sustainable development” goals that are substantively unrelated to funding would be a mismatch of means to ends.

(c) restriction list model: This provision focuses on a particular business model for funding and again would likely spur disputes over whether a particular funding arrangement falls within the

restriction. It also raises questions about whether it is practical to preclude particular business practices that may depend on the circumstances of a particular case, such as the determination of a reasonable return in Draft Provision 5(b). With respect to Draft Provision 5(c), it would be useful to identify data, if any, to support a concern about a single funder inappropriately supporting multiple claims against a particular state.

3. Legal consequences and possible sanctions: As drafted, the sanctions suggested in Draft Provision 6(a) and 6(b) effectively amount to a prohibition of TPF, and thus may be excessive to correct a potential violation. Regardless of the sanction itself, it may be useful to consider whether sanctions should be assessed at the Respondent's request, to allow for an evaluation of whether there is prejudice to the Respondent if the claimant relies on TPF.

C. Disclosure:

Requiring disclosure of the existence of TPF and the identity of the third-party funder for both disputing parties is crucial for purposes of transparency and protecting against conflicts of interest. The United States fully supports disclosure requirements and appropriate sanctions to promote compliance with any such requirements. In our view, the focus of the Working Group's discussion should be on the overall scope of the disclosure requirements and whether they should go beyond the existence of TPF and the identity of the third-party funder and, if so, whether any additional information for disclosure should be mandatory or at the tribunal's discretion. The proposed ICSID Arbitration Rule 14, which requires disclosure of TPF, sets out a reasonable baseline framework for the requirements for disclosure. We think that it would also be useful, for determining conflicts and other purposes, to require the information in Draft Provision 7(1)(b) regarding the ultimate beneficial owner of a third-party funder, or any other individual or entity exercising control on decision-making for the third-party funder. It is less clear that disclosure of the funding agreement or its terms in their entirety should be required as a matter of course given likely issues of business confidentiality. The Working Group may consider, however, whether it would be useful also to require information related to a third-party funder's agreement to cover an adverse costs award, rather than leave disclosure of that information to the tribunal's discretion.

Regarding a tribunal's authority to request information at its discretion, the Working Group should consider whether to include an illustrative list of potentially relevant information. Having such a list could provide further guidance on the types of issues that might implicate a potential conflict of interest or any arrangements for paying costs if the claimant is ordered to do so. Draft Provisions 7(2)(a), (c) and (e) relate to these concerns. The need to list the other items is less clear and warrants further discussion by the Working Group.

To the extent that there are sanctions for failure to disclose, the sanctions should take into account that, while potential termination of the dispute settlement proceeding may incentivize the claimant to disclose, such a sanction would have the opposite effect were the respondent to receive TPF. In this vein, Draft Provisions 7(5)(b) and (c) may be sufficient.

D. Other provisions:

1. Scope of investor and investment: The need for Draft Provision 8 is unclear because TPF would not be present unless there was an investment initially and almost all IIAs require not only a nationality link but also a territorial link with a Party.

2. Security for costs: To the extent that TPF might require specific rules or be a factor in determining whether a tribunal should award security for costs, this issue should be considered in the general discussion of reforms related to security for costs, rather than as a specific rule for TPF. Were Draft Provision 9 to be included in the Working Paper on TPF, Option A essentially requires either a determination of the merits of the case (paragraph a), a needs-based determination that could be time-consuming to resolve and thus add to the cost and duration of ISDS (paragraph b), or scrutiny of the business details of the TPF arrangement (paragraph c). Option B may be simpler, but it is unclear why this particular type of claims funding should be subject to a blanket requirement for costs.

3. Allocation of Costs: The options in Draft Provision 10 warrant further discussion by the Working Group and it would be useful to have more data about the trends on recoverability of expenses related to or arising from TPF so that the Working Group can better analyze the issue.

4. Code of conduct for TPF: This issue may warrant further discussion by the Working Group on the possible contours of such a code, given that TPF is used to fund participation in a variety of dispute settlement proceedings beyond ISDS.

9. Following on from the above, the UK considers that work will need to be done to refine the definition of TPF as the Group works towards agreement on the concerns we are seeking to address through any regulation of TPF and/or the regulation models that we might adopt, to ensure the definition is directly applicable to these.
10. The UK notes that it is difficult to define TPF, given the diversity of funding models in existence and the speed at which the industry is developing and that subsequently a definition of TPF should be flexible enough to capture new developments but not so broad that it may have unintended consequences.
11. Specifically, the UK believes that the definition of TPF should not extend to cover contingency fees or other financial arrangements between law firms and claimants, as this may have a chilling effect on legal representation arrangement, which raises a fundamental question of access to justice.

Disclosure

12. The UK is of the view that disclosure should be limited only to that necessary to prevent conflicts of interest. We are supportive of requiring disclosure of the name and address of the TPF who is funding the claim. We believe that this information should give sufficient grounds for arbitrators to make appropriate disclosures and decisions regarding potential conflicts of interest.
13. The UK does not in principle agree that disclosure requirements should extend to the details of the financial arrangement. Disclosure of further details of the funding should be at the discretion of the tribunal to order, to the extent that there are concerns about conflicts of interest and subsequently the integrity of the proceedings.
14. In this regard, we note the need to assess whether it is necessary to include the expansive list of disclosure requirements set out in draft provision 7. We also note the need to revisit questions concerning disclosure as negotiations progress and decisions are taken by the group about which regulation model to adopt, as this may have implications on what information is necessary to be disclosed.

Regulation Models

15. The UK does not think that the draft prohibition and restriction models presented by the Secretariat for consideration are appropriate for addressing our concern that TPF should not give rise to conflicts of interest. However, we would like to present the following critiques of the models for consideration.
16. Firstly, the UK sees risks particularly relating to the Access to Justice and Sustainable Development models, which place the burden of proof on investors as to whether they have met the requirements to be eligible for TPF as described by the regulation model.
17. Fundamentally, the UK believes that investors should not have to seek approval from tribunals for TPF, rather it should be the responsibility of the respondent State to argue that the TPF may present a conflict of interest or may be in breach of a regulation model, such as the Access to Justice or Sustainable Development models, once the investor has disclosed the relevant information.

18. Furthermore, unless the criteria for bringing a claim with TPF under these models is succinctly defined, it could be very difficult for investors to prove whether or not they would be eligible to bring a claim with TPF.
19. Succinctly defining the requirements may itself be difficult. In the case of the Access to Justice model, an enterprise's ability to bring a claim without TPF is likely to be unique to that enterprise. Similarly in the Sustainable Development model, individual states sustainable development objectives may differ, perhaps substantially if we consider how this would apply to both developed and developing countries. This could lead to inconsistency and uncertainty in the system, which could represent its own barrier to justice for investors.
20. Finally, though the aim of the Restriction List model is not to prohibit TPF in its entirety, the UK would question whether the impact of prohibiting most commercial financing would be much different from the impact of a prohibition model. We believe that this is overly-restrictive and again gives rise to concerns about limiting access to justice.

Security for Costs

21. The UK considers that security for costs should only be ordered by a tribunal when there is a clear and obvious justification that there is a significant risk of a party not paying an award made against it. A tribunal may wish to consider the existence of TPF in determining whether there is a risk of non-payment, however the mere presence of third-party funding is not by itself sufficient grounds for a tribunal to order security for costs.
22. Given this, the UK is not supportive of either option as presented in the paper under draft provision 9, as we consider that both would allow for a tribunal to order security for costs solely because of the existence of TPF.

Sanctions

23. The UK believes that the question of sanctions should be revisited as the WG agrees a regulation model to ensure the sanctions are relative and proportionate to the model.
24. However, in regards to addressing conflicts of interest resulting from the existence of TPF, the UK believes that an appropriate sanction would be disqualification and removal of the arbitrator and/or the third-party funder to who the conflict relates, in line with the sanctions proposed in the draft Code of Conduct for Adjudicators in ISDS proceedings.

Draft Provision 8 - Investment and Investor of a Party

25. The UK supports this clarificatory Paragraph that third-party funding should not be construed as an investment, and that a third-party funder is not considered as an investor.

Written comments of Viet Nam on (A) the Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two; (B) the Draft Note on the Implementation and Enforcement of the Code of Conduct and (C) the Initial draft on the regulation of third-party funding

Based on (A) the Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two; (B) the Draft Note on the Implementation and Enforcement of the Code of Conduct and (C) the Initial draft on the regulation of third-party funding published by the Secretariat, Viet Nam would like to provide comments on the options set out in such current drafts. Any views and suggestions presented herewith are preliminary in nature and are without prejudice to Viet Nam's future position on these topics. Viet Nam reserves the right to submit additional comments on the above-mentioned issues.

Viet Nam also takes this opportunity to express its continued support of the ongoing ISDS reform process at Working Group III and thank the Secretariat for their tremendous work.

A. Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two

1. Article 2(4) of the Draft Code regulated the obligations of former Adjudicators. However, such obligations are limited to ex-parte contacts and disclosure requirements. An additional obligation on former Adjudicators similar to provision 15 of Annex 8 EVIPA (*All former arbitrators shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or rulings of the arbitration panel*) should be considered.

2. Article 2(5) of this Draft Code is extremely necessary to addresses the interplay of this Code with any treaty-specific Code of Conduct, especially CPTPP and EVIPA.

3. With the aim to improve transparency, Article 7(2) of the Draft Code is necessary.

4. Article 10(1) of the Draft Code requires disclosure of matters that may give rise to doubts "in the eyes of the parties". However, "in the eyes of the parties" may not be an appropriate criterion due to its subjective nature. Such criterion can be abused by disputing parties to reject the appointment of Adjudicators to delay the proceeding. The Secretariat and the Working Group may consider the Provision 3(c) of the Code of Conduct of CPTPP in which the appearance of impropriety or an apprehension of bias is based on a judgment of "**a reasonable person**":

"Each candidate or arbitrator shall disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or arbitrator's

independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created when a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or arbitrator's ability to carry out the duties with integrity, impartiality and competence is impaired".

B. Draft Note on the Implementation and Enforcement of the Code of Conduct

5. Viet Nam supports the following means of implementation of the Code of Conduct (the reasons are stated respectively):

(i) Incorporation through a multilateral instrument to guarantee the legal bases and to achieve harmonized application.

(ii) Incorporation in the applicable procedural rules (ICSID and UNCITRAL) to utilize the available sanctions provisions of such rules and ensure the immediate application of the Code of Conduct.

(iii) Incorporation in the arbitrators' declaration, as an annex to the declaration to simplify the legal procedure and improve the use of the Code of Conduct.

C. Initial draft on the regulation of third-party funding

C.1. Definition

6. In general, Viet Nam, is of the view that the regulation of third-party funding is an extremely important reform. Viet Nam strongly supports methods of administering and restricting third-party funding.

7. Regarding Paragraph 5 of the Working Paper, the current definition given by the Secretariat is adequate and covers all possible cases. Such general definition without specifying the type of proceedings and the legal basis of the investment disputes will ensure the cover of all related cases. Similarly, in regard to Paragraph 7 of the Working Paper, "funded party" should not be limited to claimant investors.

8. Concerning Paragraph 9 of the Working Paper, funding by legal counsel or parties' representatives should not be excluded from the definition. In contrast, funding by legal counsel or parties' representatives besides equity financing, and instances where the third-party funder owns or invests in a law firm representing a disputing party should be expressly covered by the definition.

9. Regarding Draft Provision 1(4), more clarification is needed in the term "equivalent support" to avoid confusion. For example, whether the participation of civil society organizations or environmental protection organizations in the form of amicus curiae to protect public interest in an investment dispute is considered "equivalent support" to the States, and therefore is prohibited or restricted by this regulation.

C.2. Models

10. In reality, claimant investors usually do not disclose third-party funding and the burden of proof rests on the States. Therefore, in regard to the four options of Prohibition models, further research is needed to find out methods allowing the States to detect investors receive third-party funding.

11. Concerning Restriction models, Viet Nam share the following comments:

(i) Viet Nam strongly opposes the restricted list model at Paragraph 26 of the Working Paper. Because the restricted list model could potentially omit a lot of methods of third-party funding and is based on the general principle of allowing third-party funding. Moreover, the information provided by the investors may be inaccurate or fraudulent, leading to a false assessment of the tribunal as to whether the funding is subject to the restricted list or not.

(ii) Limited access to justice is a major concern of the States opposing the ban on third-party funding. Therefore, this model with the improvement in the criteria and procedures for receiving third-party funding may be a good compromise. In particular, Viet Nam believes it is necessary to clarify the concept of “pursuing the claim in good faith”, such as adding criterion for determining or illustrating by examples. Besides, Viet Nam concerns about the criterion “prospects of success”. The addition of such criterion relating to the merit of the case is likely to complicate the arbitral proceedings, making it difficult for both the investor (in receiving funding) and the State (in opposing third-party funding).

In short, regarding the Restriction models, the criteria for receiving third-party funding should be clearly determined and can be examined at the early stages of the proceedings to save time and costs for the parties and not to complicate the matters.

12. Viet Nam supports the Draft provision 6 of the Initial draft. Moreover, Viet Nam suggested that the sanctions can be determined or added based on the seriousness of the violation, especially further sanctions for acts of circumventing regulations (abusing funding agreements, lending forms, etc.). In fact, there were cases only after the issuance of the award (the arbitration panel was also dissolved), did the State has information about the investor's third-party funding. Therefore, the violation of the disclose of third-party funding should not be considered a minor breach. Instead, such violation should be considered a material breach affecting the legality of the award, and as a result, the States can apply for setting aside or annulling the award.

C.3. Disclosure

13. Regarding Paragraph 38 of the Working Paper, the respondent States should not be subject to the same requirement of disclosure as claimant investors, as respondent States are subject to disclosure requirements under domestic laws.

14. Concerning Paragraph 39 of the Working Paper, the rules need to be prepared for disclosing the information *prior to* the constitution of the tribunal and any of the information disclosed in accordance with draft provision 7 should also be made available to the public similar to the procedural information under the Transparency Rules.

15. The Draft Provision 7(1)(c) should be amended as follow: “the funding agreement **and** the terms thereof” to ensure the full disclosure of the funding’s provision.

16. Concerning Draft Provision 7(2), an additional disclosure requirement about the financial status of the funded party and its ability to exercise award in the event that the party is required to indemnify should be considered.

C.3. Other provisions

17. The clarification at Draft Provision 8 is necessary to preclude third-party funders from raising claims against a State on the basis of any loss or damage suffered by funding another claimant.

18. Regarding Draft Provision 9, in case the Prohibition models are not selected, Option A would be a good compromise with the following suggestion:

(i) Removing “or” at the end of section b), keeping only the “and”¹ to improve the rigour when the parties receive funding. This is a core issue to protect the interests of the respondent state, when in fact the investors often fail to fulfill their financial obligations after losing the dispute

(ii) Adjusting the text of section c) in the following direction: “The third-party funder **reach an agreement with the Respondent** that they would cover any adverse costs decision against the funded part” to ensure the implementation of the funder.

19. Regarding Draft Provision 10, Option B together with the deletion of “*unless determined otherwise by the tribunal*” would ensure the funded party bears full responsibility for the costs of third-party funding. Finally, Viet Nam supports the drafting of an additional provision allowing the tribunal to allocate the costs of the proceedings to a third-party funder (in case the funded party fails to fulfill its financial obligations – very common in practice) referred to in Paragraph 59 of the Working Paper.

¹ “b) it is not able to pursue its claim without the third-party funding; **and**”

**COMMENTS OF THE
AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION
ON THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW ("UNCITRAL") WORKING GROUP III
INITIAL DRAFT PROVISIONS ON THIRD-PARTY FUNDING
IN INVESTOR-STATE DISPUTE SETTLEMENT**

July 29, 2021

The views stated in this submission are presented on behalf of the International Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

In May 2021, the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III released for comments initial "Draft provisions on third-party funding" (the "Draft Provisions").

The stated purpose of the Draft Provisions is to carry out part of Working Group III's mandate to consider possible reform of investor-State dispute settlement ("ISDS"). Specifically, the UNCITRAL Secretariat was requested to prepare draft provisions on third-party funding¹ "reflecting the deliberations [of Working Group III's thirty-eighth session], which would contain options for consideration"² in future sessions. The result is a series of Draft Provisions for inclusion in investment treaties that would prohibit or restrict the use of third-party funding in ISDS proceedings. In addition or as an alternative, the Secretariat proposes to require extensive disclosures and to require the imposition of security for costs.

The International Law Section of the American Bar Association ("the Section") submits these comments because it is concerned that the background discussion and options presented in the Draft Provisions are based on information that the Secretariat acknowledges is incomplete and possibly fundamental misunderstandings, about third-party funding. We are concerned that, if adopted, these options would reduce access to justice as well as respect for, and enforcement of, the rule of law.

The Section submits these comments in light of the American Bar Association's commitment to the pursuit of four goals that serve as the pillars of its mission, one of which is to "Advance the Rule of Law". The American Bar Association has determined that the objectives of this goal include "[h]old[ing] governments accountable under law", working for "fair legal process", and assuring "meaningful access to justice for all persons."³

The American Bar Association has also long supported independent and impartial dispute resolution for investment treaty disputes in multilateral agreements such as the North American Free Trade Agreement.⁴

¹ Draft Provisions, para. 1 (citing United Nation General Assembly, UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019)", A/CN.9/1004, October 23, 2019 ("Report of Working Group III's 38th Session, A/CN.9/1004"), paras. 80-94 and 97, as well as United Nation General Assembly, UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019)", A/CN.9/970, April 9, 2019 ("Report of Working Group III's 37th Session, A/CN.9/970"), paras. 17-25).

² Report of Working Group III's 38th Session, A/CN.9/1004, para. 97.

³ American Bar Association Policy and Procedures Handbook (2020), p. 1 ("GOAL IV").

⁴ For example, the American Bar Association recommended the adoption of the dispute resolution provisions included in NAFTA. "Dispute Settlement under A North American Free Trade Agreement", Recommendation of the

The American Bar Association strongly supports bilateral and multilateral dispute resolution mechanisms providing for transparent, impartial, and effective resolution of such disputes.

We appreciate the opportunity to submit these comments on the Draft Provisions. In the interest of furthering access to justice, the rule of law, and the benefits that flow from international trade and investment, the Section urges the Secretariat to consider the following comments.

A. Lack of Foundation for the Draft Provisions

The Draft Provisions end with a remark that is telling and troublesome:

“Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.”⁵

We are concerned that the Draft Provisions advance far-reaching policy proposals in the absence of “relevant data on third-party funding.”

It appears that the Draft Provisions rest on fundamental misunderstandings about third-party funding. This is evident, for example, in the proposal of a “prohibition model” that would “prohibit third-party funding in ISDS”, which the Secretariat states “could address the concern that third-party funding aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed.”⁶

We are not aware of data supporting the assertion that there is a “structural imbalance in the ISDS regime” that is made worse by the availability of third-party funding for claimants. It has been the experience of members of our Section that claimants in ISDS cases are often at a significant disadvantage compared to State defendants: a State may have far greater resources at its disposal than an individual claimant, may be in possession of relevant information that it may be refusing to disclose, and may be able to exert pressure on the claimant and potential witnesses via numerous means outside of the proceedings.

Further, in cases where the State’s actions that are the subject of the ISDS claim have destroyed the investment, the claimant may require third-party funding in order to address the allegedly internationally wrongful conduct of the State under the relevant treaty or investment contract. The ability to actually pursue a claim for violation of an obligation set out in a treaty or contract is fundamental to the rule of law.

Joint Working Group of the American Bar Association, The American Bar Association and Barra Mexicana, approved February 1992, 22 Int’l Law. 855 (1992). See also ABA Section on International Law R&R 2-93 on NAFTA (Trade Customs and Sanctions) and R&R 8/96 on the Multilateral Accord on Agreement (Policy on International Business Transactions – Investment and Private International Law).

⁵ Draft Provisions, p. 14.

⁶ Draft Provisions, para. 11. See also *id.*, p. 7 and para. 28 (proposing to “limit the number of cases that a third-party funder can fund against a particular State, which was viewed as a concern as it could increase the existing imbalance to the detriment of those States”).

The entire premise of ISDS is that, where a treaty provides a right for investors to pursue claims against the State, independent arbitral tribunals will decide such claims on their merits in a fair adjudicative process, in light of the other obligations to which the State has voluntarily consented. Independent arbitral tribunals are in the best position to be able to determine the merits of a specific case. Preventing such independent review of cases supported by funding is inconsistent with these obligations and the rule of law.

The Draft Provisions assert that “[c]oncerns that the prohibition of third-party funding could limit small and medium-sized enterprises and impecunious claimants from raising claims under investment treaties could be addressed through legal aid mechanisms.”⁷ However, the Secretariat does not expand on this statement or provide any citation to any such legal aid mechanisms. We are not aware of the existence of any operational legal aid mechanisms for pursuing ISDS claims other than third-party funding.

We are also not aware of data supporting the assertion that third-party funding has resulted in the assertion of frivolous claims. It has rather been the experience of members of our Section that it is very difficult to obtain third-party funding for ISDS cases. Funders – which will lose the funds they invest if the claimant does not prevail – are typically skeptical of claims and conduct due diligence prior to agreeing to fund a case. Typically, only claims with a high probability of success are able to obtain third-party funding. Not all such claims may ultimately prevail, but they cannot accurately be described as having been frivolous.

Finally, even if any frivolous claims are able to obtain third-party funding, the Working Group has recognized that “frivolous claims could be addressed through early dismissal mechanisms regardless of whether a third-party funder was involved.”⁸ For example, ICSID Arbitration Rule 41(5) provides for an expedited procedure to dispose of unmeritorious claims at a preliminary stage of a proceeding.

B. The Draft Provisions Propose Inappropriate Hurdles

The Draft Provisions propose, as an alternative to prohibition of third-party funding, that a tribunal could permit third-party funding if the claimant “can demonstrate that it is pursuing the claim in good faith and is not in a position to pursue its claim without third-party funding”.⁹ Here, the claimant would be required to seek to obtain the tribunal’s permission via a request “submitted with the notice of arbitration and prior to entering into an agreement on or receiving third-party funding.”¹⁰

The proposal to require claimants to obtain approval for funding prior to obtaining any funding would prevent impecunious claimants from having access to the funding that may be necessary to prepare their claims in the first place. It also ignores that substantial time and effort is often required from the time a notice of arbitration is filed until a tribunal is appointed, confirmed and in a position to issue any orders. We are also concerned that a tribunal would not be in a position to determine that a claimant “is pursuing the claim in good faith” without extensive briefing requiring funding. Further, demanding such a determination early in the proceedings would put a tribunal in the position of prejudging the merits of the case.

⁷ Draft Provisions, para. 16.

⁸ Report of Working Group III’s 37th Session, A/CN.9/970, para. 23.

⁹ Draft Provisions, p. 6 and para. 19.

¹⁰ Draft Provisions, p. 6 and para. 19.

The Draft Provisions would also require a tribunal to prejudge the merits of the case to the extent they propose to allow third-party funding “if the claimant can demonstrate that its investment is in compliance with [applicable sustainable development provisions]” established by the State.¹¹

C. The Definition of Third-Party Funding

The Draft Provisions define “Third-party funder” as “**any natural or legal person who is not a party to the proceeding**”¹² and define “Third-party funding” as including “**any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute** through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding”.¹³

We are concerned that these definitions appear to extend to parent or sister companies of investors that wish to bring ISDS claims. However, States often require that investments be made through operating companies that are registered or incorporated within the State’s territory. In the event of a dispute that rises to the level of an ISDS claim, the local company will often be dependent on financing provided by its mother company or another affiliated entity in order to pursue the claim. We are not aware that the Working Group intended to include provision of such funding within the scope of any restriction or regulation of third-party funding.

We also are concerned that this definition of third-party funding extends to traditional and widespread access to justice arrangements such as traditional lawyer contingency arrangements. In such cases, there are no bona fide concerns about disclosure because the identity of counsel is a matter of record. Further, because of the close connection of attorney-client or legal secrecy privileges to such arrangements, the existence and content of such arrangements should be excluded from the definition of third-party funding.

On a more technical level, the four defined terms are imprecisely drafted and may result in confusion. For example, it would be logical to define a third-party funder as a party that provides third-party funding (as defined). But different language is used in paragraph 2 (“any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides[,] funding for the proceeding”) and paragraph 4 (“a natural or legal person who is not a party to the dispute [and who provides funding] through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding”).

Similarly, whereas paragraph 2 suggests that a third-party funder need not necessarily have entered into an agreement to provide third-party funding (but, rather, may “otherwise provide[d] funding for the proceeding”), paragraph 3 defines a “funded party” as one that “entered into a funding agreement on its own or through its affiliate or its representative”.

In addition, “funded party” is defined as “a party to a dispute” rather than a party to a “proceeding”, as defined in paragraph 1. Each of the four definitions are so broad they risk being interpreted imprecisely and more broadly than intended.

Finally, Draft Provision 5 purports to allow third-party funding **unless** “the funding is provided on a non-recourse basis in exchange for a success fee and other forms of monetary remuneration or reimbursement

¹¹ Draft Provisions, pp. 6-7 and para. 22.

¹² Draft Provisions, p. 2 (emphasis added).

¹³ Draft Provisions, p. 2 (emphasis added).

wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings”.¹⁴ But the provision of non-recourse funding in exchange for remuneration if the claim is successful is the very essence of third-party funding. Indeed, the Secretariat notes that this provision, “as drafted, could restrict most commercial funding.”¹⁵

D. Disclosure of Third-Party Funding

Draft Provision 7 proposes to require extensive disclosure to the tribunal and the other disputing parties of the existence of, and details about, any third-party funding. Such disclosure would extend not only to the name and address of the funder but also the name and address of the beneficial owner of the funder “and any natural or legal person with decision-making authority for or on behalf of the third-party funder” as well as “the funding agreement or the terms thereof.”¹⁶ The Draft Provision also suggests that the tribunal may require disclosure of additional information, including “the expected return amount of the third-party funder”, “the number of cases that the third-party funder has provided funding for claims against the respondent State” and “any other information deemed necessary by the tribunal.”¹⁷

To our knowledge, such proposed disclosure goes well beyond disclosure requirements that have been established by courts or arbitration institutions.

For example, the ICC imposed a disclosure rule regarding third-party funding in its January 1, 2021 amendments to the ICC Arbitration Rules which is limited to the purpose of allowing prospective arbitrators and arbitrators to comply with their duties to disclose potential conflicts of interest. Article 11(7) of the ICC Arbitration Rules now provides only that “each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.” There is no requirement that the details of the funding arrangement be disclosed.

Likewise, after extensive consideration of issues related to disclosure of third-party funding,¹⁸ the ICSID Secretariat rejected the suggestion that the ICSID Arbitration Rules should be amended to require disclosure of a third-party funder’s corporate structure or ultimate beneficial owner. The Secretariat explained:

“(i) the potential risk identified by States has not been a concern in practice, and non-party funders have provided ample information for arbitrators to assess whether they have a conflict; (ii) adding these terms could create significant confusion for users of the rules, making the provision unclear and difficult to comply with; (iii) no other institutional rules or recent treaties addressing this matter include these terms; and (iv) if further information is required to assess a conflict, it can be requested pursuant to AR 14(4).”¹⁹

¹⁴ Draft Provisions, p. 7.

¹⁵ Draft Provisions, para. 27.

¹⁶ Draft Provision 7.1.

¹⁷ Draft Provision 7.2.

¹⁸ Proposed ICSID Arbitration Rule 14, ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, pp. 277-279.

¹⁹ ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, p. 278, para. 39.

The ICSID Secretariat also recognized that information regarding the third-party funding arrangement could include confidential business information, attorney-client privileged materials, or be subject to other confidentiality protections, and it “would be inappropriate to bar parties from invoking relevant and applicable privileges.”²⁰ We agree that the potentially privileged nature of information beyond the identity of the funder is a serious matter. Parties should not be required to disclose privileged information to a tribunal or opposing party as a condition of being able to pursue their claims.

E. Security for Costs

Draft Provision 9 proposes two options regarding security for costs.

Option A would remove the discretion of international tribunals and would **require** a tribunal to order a funded party to provide security for costs **unless** the funded party can demonstrate that:

- “a) the respondent State was responsible for the impecuniosity; or
- b) it is not able to pursue its claim without the third-party funding; and/or
- c) the third-party funder would cover any adverse cost decision against the funded party.”²¹

Under Option B, the tribunal would have the discretion to order a funded party to provide security for costs.

We are concerned that Option A has the potential to impair access to justice and to treat the disputing parties in an unequal and unfair manner. It would also interfere with the functioning and discretion of the independent arbitral tribunals that have been tasked with presiding over ISDS cases under the investment treaties to which States have voluntarily consented.

In commercial arbitrations, security for costs is typically not required unless there is evidence that a claimant has engaged in bad-faith efforts to hide or transfer assets to make itself judgment proof in the event it loses the case. After extensive consideration of this issue, the ICSID Secretariat recently recommended to States that ICSID tribunals should have the authority to order security for costs, but only after considering

“all relevant circumstances, including:

- (a) that party’s ability to comply with an adverse decision on costs;
- (b) that party’s willingness to comply with an adverse decision on costs;
- (c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and
- (d) the conduct of the parties.”²²

²⁰ ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, p. 278-279.

²¹ Draft Provisions, p. 12.

²² Proposed ICSID Arbitration Rule 53(3), ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, p. 306 and para. 101.

The proposed ICSID rule would provide that the existence of third-party funding is a circumstance to be considered by the tribunal, but is not a sufficient reason in itself to order security for costs.²³ As explained by the ICSID Secretariat:

“If a party raises third-party funding as evidence of a circumstance in [AR 53] paragraph (3), the Tribunal must consider such evidence as it would any other evidence adduced in favour of or against providing security for costs. The Tribunal has discretion to determine the weight to be given to such evidence pursuant to AR 36(1). However, the existence of third-party funding is not by itself sufficient to justify an order for security for costs as there must also be circumstances in favour of providing security pursuant to paragraph (3) (e.g. inability or unwillingness to pay an adverse decision on costs).”²⁴

We are of the opinion that Option B would better ensure the fairness of the proceedings and equality of the disputing parties. Tribunals should remain free to consider whether imposing security for costs is warranted in the case before them, taking into account factors traditionally considered in making this determination.

In addition, the text accompanying the Draft Provisions discusses whether certain types of funders/funding arrangements should be included or excluded. But the Secretariat does not discuss the possibility that, if different types are included, different rules should apply. Different considerations may apply, for example, to a professional funder that funds individual claims, a law firm that enters into a Contingency Fee Agreement with many potential claimants, and an NGO that covers the costs of legal representation of a developing respondent State.

CONCLUSION

Thank you once again for the opportunity to provide comments on the Draft Provisions. As the document is at a preliminary stage, this letter addresses only a few issues. We would welcome the opportunity to provide further comments in the future, as the Working Group continues its exploration of potential reforms to ISDS.

²³ Proposed ICSID Arbitration Rule 53(4), ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, p. 306 and paras. 102-103.

²⁴ ICSID Working Paper #5 on Proposals for Amendment of the ICSID Rules, June 2021, para. 103.

David Nikolaus Probst

From: christian.campbell@cils.org
Sent: Mittwoch, 23. Juni 2021 08:15
To: David Nikolaus Probst
Cc: Jae Sung Lee; Corinne Montineri
Subject: RE: Comments on TPF initial draft

Dear David, Please feel free to publish the comments (perhaps with my typo as **corrected below** 😊). Best, Chris

Christian Campbell

LLB (Edin), LL.M (McGeorge), New York State Bar (1992)

CENTER FOR INTERNATIONAL LEGAL STUDIES

An Austrian Registered (ZVR No. 208672816) Non-Profit Society

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Please know that I don't expect a reply on your weekend or evenings!

From: David Nikolaus Probst <david.probst@un.org>
Sent: Dienstag, 22. Juni 2021 15:55
To: christian.campbell@cils.org
Cc: Jae Sung Lee <jaesung.lee@un.org>; Corinne Montineri <corinne.montineri@un.org>
Subject: RE: Comments on TPF initial draft

Dear Chris,

We acknowledge receipt, with thanks, of the comments on the initial draft on the regulation of third-party funding. May we kindly ask whether it is agreeable to publish the comments as the comments of CILS on the website of UNCITRAL together with comments of other delegations, or if you prefer that we do not publish them?

Kind regards,

David

David Probst

Associate Expert in International Trade Law

Office of Legal Affairs

International Trade Law Division / UNCITRAL Secretariat

United Nations

Tel: +43126060 8126 // Email: david.probst@un.org

Website: <https://uncitral.un.org>



From: christian.campbell@cils.org <christian.campbell@cils.org>
Sent: Samstag, 19. Juni 2021 13:19
To: Jae Sung Lee <jaesung.lee@un.org>; David Nikolaus Probst <david.probst@un.org>
Subject: Comments on TPF initial draft

Dear Jaesung, dear David,

I suggest the inclusion of “specifically”.

*“2. “Third-party funder” is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides funding **specifically** for the proceeding.”*

“Funding” could be replaced by “third-party funding” to align better with No. 4

*“2. “Third-party funder” is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides **third-party** funding **specifically** for the proceeding.”*

“4. “Third-party funding” is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.”

A No. 5 should be added

“5.. “Third-party funding” does not include lending the repayment of which is not contingent on the outcome of the proceeding.”

Reason: Parties and law firms frequently use credit to fund litigation. I do not see the utility of making lender’s the subject of this regulation if they are not providing fund specifically for a particular proceeding.

I also wonder whether No. 4’s coverage of “...indirect... or equivalent support ... through a donation or grant, or ...” goes too far and might, for example, capture/prevent the submission of amicus briefs by NGOs, etc.

Best wishes, Chris

Christian Campbell

LLB (Edin), LLM (McGeorge), New York State Bar (1992)

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Please know that I don’t expect a reply on your weekend or evenings!

Submission on Third-Party Funding Initial Draft

10 September 2021

Submission to UNCITRAL Working Group III on ISDS Reform, contributed by the Columbia Center on Sustainable Investment (CCSI), the International Institute for Sustainable Development (IISD), and the International Institute for Environment and Development (IIED).

.....

We thank the Secretariat for producing the text, “Possible Reform of Investor-State Dispute Settlement (ISDS): Draft provisions on third party funding,” and affording stakeholders an opportunity to provide input. Our general comments are outlined below, and more specific comments included in the annex. We look forward to opportunities to further engage on these issues.¹

I General comments

1. As a key element of the “financial engine” of ISDS, third-party funding is a particularly important reform issue. Several delegations have voiced significant concerns about third-party funding, which highlights the need for deep reform in this area. We commend the Secretariat for the research and work that has gone into the Draft Provisions and encourage the Working Group to continue exploring bold and crucial reform options.
2. Third-party funding links closely to other reform issues identified by the Working Group. There may be a relation between the rise of third-party funding, actual and perceived conflicts of interests, the significant costs of arbitration, and the high amounts of damages claimed or awarded.² Additionally, the number and nature of claims, and large damages sought and ordered, relate to other key issues of concern the Working Group has committed to address, such as regulatory chill. Any reforms of third-party funding should thus take a holistic approach that addresses the diverse financial dimensions of ISDS, and the incentives created by third-party funding, in an integrated way. This will help ensure reform of third-party funding mitigates, and does not entrench or exacerbate, other identified concerns about ISDS.
3. In order to ensure that regulation of third-party funding is tailored to effectively address concerns, it would be important to, at the outset of discussion, further articulate the policy aims to be achieved. This can, in turn, more effectively enable the Working Group to distinguish between different types of funding, identify the concerns different types of funding raise, evaluate different regulatory approaches that may be desirable based on the relevant type of funding at issue, and craft clear and workable provisions.

¹ The submission was prepared by Nathalie Bernasconi-Osterwalder (IISD), Lorenzo Cotula (IIED), Brooke Güven (CCSI), Lise Johnson (CCSI), and Suzy Nikiéma (IISD).

² Third-party funders have incentives to ask for large damage awards. A recent study found that as the amount in dispute increases, so do the costs incurred by the disputing parties. See, e.g., Matthew Hodgson, Yarik Kryvoi, and Daniel Hrcaka, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration (BIICL and Allen & Overy, 2021) 26.

4. Relatedly, in order to achieve identified aims, delegates may wish to consider ways that the Draft Provisions and “models” could be combined. For example, states could conceivably combine a broad transparency provision (e.g. **Draft Provision 7**) with a more narrow restriction (e.g. **Draft Provision 5**), and then additionally decide to permit some kinds of funding that would be restricted by adding to these an additional carve-in (e.g. **Draft Provisions 3 and/or 4**). In order to craft a “package” of provisions best suited to address articulated concerns, it would be helpful to further elaborate in the beginning of the paper on the possible components of a regulation, and how those components can be tailored and combined to address different issues raised by different types of funding.

II Specific comments

5. As organisations committed to advancing sustainable development, we commend the Secretariat for considering how issues such as access to justice and sustainable development can be integrated in ISDS reform. However, we have both conceptual and practical concerns about the ways in which the Draft Provisions address these issues. We also have concerns about the possible sanctions outlined in the Draft Provisions. These issues are discussed briefly below, and further addressed in our specific comments to the text.
6. **Sustainable Development.** **Draft Provision 4** suggests permitting TPF for investors that can establish compliance with certain, as yet unidentified, sustainable development provisions. We are uncertain of the rationale for such an approach permitting TPF for these claimants. More specifically, concerns about third-party funding are that it introduces dysfunctionalities that can distort dispute settlement processes and outcomes. Such dysfunctionalities and distortions in the dispute settlement process and law will exist irrespective of whether the investment itself complies with sustainable development objectives. Therefore, it is unclear why such dysfunctionalities and distortions should be permitted simply because the investment seeking such funding complies with certain sustainable development norms. Additionally, this seems to imply that investments that do not comply with sustainable development objectives are and should be entitled to invoke ISDS privileges (though not third-party funding).
7. **Access to Justice.** **Draft Provision 3** suggests that claimants should be permitted to use third-party funding if such funding is necessary to bring the ISDS claim. It is labeled as an “access to justice” model. We would, however, question whether third-party funding can be framed in, and justified based on, “access to justice” terms. For one, there is inconclusive evidence that third-party funding does facilitate access to ISDS for genuinely small and medium-scale enterprises (SMEs), as the amount of SMEs’ claims may not be large enough to attract third-party funding. Additionally, it is important to distinguish between access to ISDS and access to justice. Access to justice can be secured and, for most stakeholders, must be secured, without recourse to ISDS. Investors often turn to ISDS without pursuing other avenues, for example under domestic law, and without demonstrating that pursuing relief through domestic processes would be futile. But that does not mean that those other avenues are unavailable, or that investors would be without

justice if they were unable to pursue ISDS proceedings. The concept of “access to justice” should not have a separate meaning for covered investors (i.e., access to justice equals access to ISDS) than it has for other stakeholders.

8. **Implementation.** Several proposed approaches in the Draft Provisions seem likely to face implementation difficulties. For example, the reference in *Draft Provision 3* to the claimant not being “in a position to pursue its claim without third-party funding” begs questions about how this condition would be assessed (e.g. burden of proof, availability of alternative but more costly financing options, existence of alternative dispute settlement fora). Further, the reference to “investment in compliance with sustainable development requirements” will be difficult to meaningfully implement in practice. Indeed, sustainable development is a broad concept; any references to sustainable development would need to be accompanied by explicit links to international instruments that are formulated in clear, specific language. Additionally, whether an investment advances sustainable development objectives can involve significant argumentation, and there are questions about the financing of costs related to the tribunal’s decision on these issues.
9. **Sanctions.** We note that Sanctions (*Draft Provision 6*) are a critical component of any regulation. We are concerned that some of the current list of proposed sanctions in the draft text (*Draft Provisions 6 and 7*), and the discretion given to tribunals to choose from among the options, may not effectively deter funders and claimants from breaching or seeking to circumvent the rules. The WGIII has identified myriad concerns about TPF that seem to go well beyond those identified by and incorporated into existing treaties (generally limited to conflicts of interest). It would then be appropriate to have sanctions better tailored to this broader set of concerns and not limited to, or even based on, what is in existing treaties. Therefore, we suggest stricter sanctions for violation of regulations intended to address the serious concerns identified by the Working Group III, and requirements on tribunals (e.g. “shall” not “may”). In that regard, we humbly suggest visiting the Section 4 of the CCSI/IISD/IIED 2019 joint submission on [Third Party Rights in Investor-State Dispute Settlement: Options for Reform](#).

III Detailed comments in annex

10. For ease of reference, we have also included comments that are specific to a particular section of the Draft Provisions in track-changes in the annex.

*F.A.O.
The UNCITRAL Secretariat*

*By email only
Jaesung.lee@un.org
David.probst@un.org
cc: uncitral@un.org*

30 July 2021

Dear Sirs,

UNCITRAL Working Group III: Possible reform of investor-State dispute settlement (ISDS); draft provisions on third-party funding ('UNCITRAL WG III TPF Reform Proposals')

The International Legal Finance Association ('ILFA') was founded in September 2020. ILFA is the only global association of commercial legal finance companies. ILFA has 14 members, including all the leading third-party funders. ILFA is a not-for-profit trade association. It promotes the highest standards of operation and service within the commercial legal finance sector, including avoiding conflicts of interest and preserving confidentiality and legal privilege, and is committed to ensuring that the rule of law is maintained¹

ILFA welcomes the opportunity to comment on the UNCITRAL WG III TPF Reform Proposals (the 'Proposals') and thereby to assist the Secretariat and the Working Group in their considerations with respect to possible ISDS reform. In that regard, ILFA notes that:

- in preparing the Proposals, the Secretariat has not meaningfully engaged with the funding market generally or ILFA in particular.
- the Proposals appear to be heavily influenced by papers published by certain academics with the support of various NGOs who cast doubt on the legitimacy of third-party funding in the ISDS context².
- the Secretariat confirms that in the preparation of the Proposals, it encountered difficulties in obtaining empirical data relevant to the relationship between third-party funding and ISDS claims; indeed, there is no data cited in support of the various assumptions underpinning the draft provisions³.

As part of ILFA's comments on the Proposals below, ILFA therefore provides data showing that many of the concerns underlying the Secretariat's draft proposals are misplaced. ILFA invites the Secretariat to engage with ILFA as part of its future deliberations; ILFA stands ready to assist the Secretariat and, to that end, will shortly seek permission to become an Observer to the UNCITRAL WG III.

¹ Ilfa.com.

² See Brooke Guven and Lise Johnson: 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', The Columbia Centre on Sustainable Investment ('CCSI'), May 2019; and 'Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement', CCSI, 15 July 2019.

³ UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS): Draft provisions on third-party funding' (*UNCITRAL WG III TPF Note*), 25 May 2021, section E ('Collection of data').

Before commenting on the concerns that the suggested proposals are intended to address and the specific draft provisions themselves, ILFA considers that it is important to make reference to a number of overarching principles promoted by the United Nations which are relevant to ISDS; ILFA submits that it is incumbent on the Secretariat and UNCITRAL WG III to consider these principles when addressing ‘the legal framework pertaining to third-party funding in ISDS’⁴.

1. The U.N. Global Compact and Sustainable Development Goals

The rule of law is at the heart of the U.N. Global Compact:

‘Governments need to have good laws, institutions and processes in place to ensure accountability, stability, equality and access to justice for all. This ultimately leads to respect for human rights and the environment. It also helps lower levels of corruption and instances of violent conflict.’⁵

Where the rule of law is weak, it is more difficult for responsible businesses to function and to meet their legal obligations, including their commitments to universal sustainability standards. U.N. Sustainable Development Goal 16 (‘SDG 16’) seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels. SDG 16 recognises that ‘conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.’⁶ According to the U.N., ‘Institutions that do not function according to legitimate laws are prone to arbitrariness and abuse of power and less capable of delivering public services to everyone.’⁷

The express purpose of UNCITRAL is to ‘further the progressive harmonization and modernization of the law of international trade as the core legal body of the United Nations system in the field of international trade law’.⁸ The UNCITRAL Arbitration Rules (1976, revised in 2010) are internationally recognised rules under which disputes, including those under bilateral investment treaties, can be resolved. The focus of investment treaty disputes are alleged violations of such treaties through the actions of a State against foreign investors who are citizens of another State-party to the treaty.

Treaty violations often include expropriations or complete destruction by the host State of the property or business of the foreign investor, leaving the foreign investor without the means to support legal proceedings against a State, whose litigation budgets are often, effectively, unlimited. An early example of this can be found in the case of *Kardassopoulos & Fuchs v. the Republic of Georgia*⁹, where the claimants had the benefit of legal finance. A substantial award was made in their favour as part of the arbitral tribunal’s determination that the State had *inter alia* expropriated the claimants’ property; without funding, access to justice would have been denied.

Legal finance also supports the rule of law. *Kardassopoulos & Fuchs* exemplifies that. Any restriction on the availability of legal finance to wronged investors would prevent some of them from taking legal action to hold the offending State accountable and recover compensation for their losses; this would have the effect of allowing States to ignore their treaty obligations with impunity and would undermine the rule

⁴ *Ibid.*, at para. 1.

⁵ <https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law>.

⁶ <https://www.un.org/sustainabledevelopment/peace-justice/>.

⁷ *Ibid.*

⁸ <https://uncitral.un.org/>.

⁹ ICSID Case No. ARB/05/18.

of law, including in territories where the rule of law is most needed to encourage responsible, sustainable investments.

Many investors are now required to make investment decisions based on Environmental and Sustainable Development standards, of which adherence to the rule of law is central. A lack of available sources of funding to pay for the costs of enforcing treaty obligations against host States will increase the risk to foreign investors, causing them to divert capital away from those least developed countries ('LDCs'), deterring foreign direct investment where the values enshrined in the U.N. charter, including access to justice and accountability, are in short supply.

Of particular note here is the absence of realistic alternatives to legal finance for would-be ISDS claimants. Commercial banks are reticent to assist in an area where they have limited experience and expertise. Even where a claimant has the means to fund an ISDS claim, legal finance provides fiscal and accounting benefits to the recipient. Increasingly, large corporations with strong balance sheets are employing legal finance as a corporate finance tool¹⁰. Use of legal finance to fund ISDS claims in such cases is no less supportive of the rule of law than its use to fund claims by impecunious claimants and denying corporations the use of legal finance would be draconian in the extreme, unjustifiably denying them access to a legitimate capital source.

Any reform of the ISDS system should be cognisant of the views of those investors, big or small, who engage in ISDS processes. Regrettably, it appears to date that UNCITRAL WG III has not considered the views of such stakeholders. In May 2020, against the background of '*an alleged legitimacy crisis of ISDS*' and with reference to *inter alia* UNCITRAL WG III's considerations of ISDS reforms, the Queen Mary – CCIAG Survey was published, seeking to '*fill this gap and fulfil the critical need for this important stakeholders' representation*' in respect of ISDS reform¹¹. Of the 86 responses from corporate counsel or representatives of corporations, 74% of respondents confirmed that third-party funding of ISDS cases should be permitted, with 74% confirming that third-party funding should be available to investors as a commercial decision, irrespective of the '*depth of the investor's pockets*'¹².

Accordingly, prohibition or restriction of legal finance would weaken the rule of law, create a significant gap between the express goals of the U.N. and UNCITRAL and the achievement of those goals, and fly in the face of strong support for third-party funding by the corporations that are in a position to build the infrastructure and make the other direct investments needed by many States. The Organisation for Economic Co-operation and Development ('OECD') has stated recently that the Covid-19 pandemic has made conditions ripe for corruption and there is an expectation that there will be an increase in disputes arising from *inter alia* fraud. In the light of this, defending investor protections to preserve investor interest in LDCs should be a priority during this period of severe economic disruption¹³.

¹⁰ Report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration (2018).

¹¹ Survey of the Queen Mary University – Corporate Counsel International Arbitration Group: 'Investors' perceptions of ISDS' (May 2020).

¹² *Ibid* (18).

¹³ '*The OECD Working Group on Bribery reaffirms its collective commitment to fight foreign bribery under the Anti-Bribery Convention. The coronavirus (COVID-19) pandemic is bringing unprecedented challenges, human suffering, uncertainty and major economic disruption on a global scale, which in turn can create environments that are ripe for corruption..*' <https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm>.

2. The Current State of Third-Party Funding in International Investment Arbitrations

Third-party funding has, in quite short order, become part of the landscape of international arbitration. In 2021 alone, the use of third-party funding has been recognised expressly in the rules of at least five international arbitral institutions. This is in addition to the five others that issued rule revisions or policy statements accommodating the growing practice in previous years, and many others that permit its use without an express rule. Taken together, the list of arbitral institutions permitting and endorsing the use of third-party funding in arbitration includes not only all five of the most preferred arbitral institutions globally, but all of the institutions ranked as preferred by arbitration users.¹⁴ And to this must be added the many jurisdictions in which the use of third-party funding in arbitration is permitted and/or expressly encouraged through recently enacted laws and regulations. This is all not surprising in light of the widespread acceptance and use of funding in international arbitration by users, with 249 funded arbitrations reported by law firms in the latest Global Arbitration Review 100 survey (14th edition) released in July 2021,¹⁵ and increasing numbers reported by arbitral institutions.¹⁶ This is particularly the case in international investment arbitration, owing at least in part to the significant cost and duration of an original proceeding – approximately US\$6.4 million and 4.4 years¹⁷ – as well as the increasing frequency of post-award proceedings and significant challenges enforcing awards against sovereigns. As a result of the transparency inherent in investor-State arbitrations, it is decisions and awards rendered by ICSID and UNCITRAL tribunals in the last 10 years that have informed and motivated discussions among stakeholders about the use of third-party funding.

ICSID, the world's leading institution devoted to international investment dispute settlement, is now reaching the conclusion of its effort to modernise rules for resolving disputes between foreign investors and States. As the facility of choice for investor-State arbitration – having administered approximately 70% of all known investment arbitrations – ICSID's significant work and engagement with investors and States since 2017 on various rule amendment issues, including the issue of third-party funding, is instructive. ICSID has proposed two main rule amendments that address the issue of third-party funding: Arbitrator Declarations (Schedules) and Rule 14 (Notice of Third-Party Funding). The issue of third-party funding has also featured in discussions about Rule 53 (Security for Costs), but ICSID has made clear that the two issues are distinct and '*third-party funding on its own is not sufficient to justify an order for security for costs*', which is '*consistent with ICSID case law on security for costs*'.¹⁸ As explained most recently in its 15 June 2021 Working Paper No. 5, Rule 14 contemplates disclosure of the fact of funding (and identity of the funder) in a notice upon the earlier of registration of any request for arbitration, or upon concluding a third-party funding arrangement after registration.¹⁹ ICSID has been clear about the rationale for disclosure in funded arbitrations: to avoid conflicts of interest with a potential arbitrator, something which all funders are acutely aware of and sensitive to (although it is worth noting that the threat of such conflicts is more theoretical than real – with not one known investor-State arbitration in which an arbitrator has been so disqualified and no known award challenged on that basis).

¹⁴ White & Case/Queen Mary, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC).

¹⁵ Global Arbitration Review, GAR 100 (14th edition), 15 July 2021.

¹⁶ ICSID, Working Paper No. 1, 2 August 2018, 135-136 ('In fact, in at least 20 recent cases in which the existence of TPF was at issue before an ICSID Tribunal ...'); HKIAC, HKIAC Releases Statistics for 2020, 9 February 2021 ('Parties disclosed third-party funding arrangements in three cases under the new requirements of the 2018 Rules').

¹⁷ BIICL/Allen & Overy, 'Costs, damages and duration in investor-State arbitration' (2 June 2021).

¹⁸ ICSID, Working Paper No. 4, February 2020, 325.

¹⁹ ICSID, Working Paper No. 5, 15 June 2021, 277-279.

The other leading institutions responsible for administering investor-State arbitrations – the SCC and ICC – have introduced similar disclosure requirements, albeit in different forms. In September 2019, the SCC introduced a policy to encourage the disclosure of third parties with an interest in the outcomes of SCC-administered disputes.²⁰ And in January 2021, Art. 11(7) of the 2021 ICC Rules came into force, requiring that parties disclose the existence and identity of ‘*any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*’.²¹ These rules are consistent with the disclosure requirements that have been adopted by States in recent treaty practice (CETA, EU-Vietnam FTA, EU-Singapore FTA, Australia-Indonesia FTA, Canada’s 2021 model FIPA), as well as the decisions and orders of various tribunals that have required the disclosure of the fact of funding and identity of the funder to avoid potential conflicts of interest.²²

This background context regarding initiatives undertaken by the leading arbitral institutions responsible for administering investor-State arbitrations (ICSID, ICC, and SCC) to address third-party funding, recent treaty-making practice by State parties, and decisions and procedural orders of tribunals in funded cases, is informative in examining and assessing the work of UNCITRAL WG III.

3. The Concerns Underlying the Proposals

In the Proposals, the Secretariat explains it developed the proposed options ‘*in order to address concerns pertaining to third-party funding in investor-State dispute settlement*’, asserting that funding ‘*aggravates the structural imbalance in the ISDS regime*’.²³ Before commenting on those specific proposals and the challenges associated with them – which are many – the veracity of the concerns that the reforms were meant to address should be tested. Specifically, the Secretariat explains it has devised proposals to address alleged increases in (a) the number of frivolous claims; (b) the number of investor-state arbitration cases, and (c) the number of cases in which respondent States have been unable to recover their costs.²⁴

As explained below, none of these stated concerns have any support in fact, nor in the practice and decisions of tribunals in international investment law. This is surprising, since the data to which ILFA refers below is publicly available and sits uneasily with the Secretariat’s comment that it is facing difficulty in ‘*compiling relevant data*’.²⁵ For that reason, ILFA refers below – in some detail – to the latest data on claims and outcomes in investor-State arbitrations released this year by UNCTAD²⁶ and ICSID,²⁷ the first empirical

²⁰ SCC, SCC Policy – Disclosure of Third Parties with an Interest in the Outcome of the Dispute, 11 September 2019.

²¹ ICC, 2021 Arbitration Rules, Article 11(7). To these ICSID, ICC, and SCC initiatives must also be added the newly introduced investment arbitration rules by the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the China International Economic and Trade Arbitration Commission (CIETAC), which have each introduced provisions addressing the disclosure of arbitration finance (see 98U and 98V of the Hong Kong Arbitration Ordinance (Cap. 609) and the HKIAC 2018 Administered Arbitration Rules; SIAC Investment Arbitration Rules, Rules 24, 33.1, 35; and CIETAC Investment Arbitration Rules, Art. 27), although none figure prominently in investment arbitrations.

²² See, e.g., *Bacilio Amorrotu v. The Republic of Peru*, PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020; *Tennant Energy LLC v. Canada*, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020; *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10, 11 January 2016.

²³ UNCITRAL WG III TPF Note, at para. 11.

²⁴ UNCITRAL WG III TPF Note, at para. 11.

²⁵ UNCITRAL WG III TPF Note, at para. 60.

²⁶ UNCTAD, World Investment Report 2021 (21 June 2021).

²⁷ ICSID, The ICSID Caseload – Statistics, 2021-1 Edition (28 January 2021).

study of funded claims in investor-state arbitration (also released this year),²⁸ and appendices of investor-state tribunal decisions on certain procedural applications implicated by the UNCITRAL WG III TPF Note.²⁹

A. The Number of Claims That Are Frivolous or Without Legal Merit

First, the Secretariat explains that there is a concern that the use of funding has increased the number of ‘claims that are frivolous or without legal merit’.³⁰ There is no citation in support of this concern, and as explained in more detail below, the data that exists contradicts the Secretariat’s suggestion.

Indeed, owing to the nature of non-recourse funding, it would make no economic sense for a funder to invest in a claim it knew to be frivolous and without legal merit. Funders perform significant due diligence prior to agreeing to fund a case precisely in order to avoid funding claims that are frivolous or without legal merit. ICSID, in its First Working Paper, acknowledged this economic reality, explaining that ‘[t]he receipt of TPF does not, in itself, mean a claim is frivolous, and some argue that TPF enables the pursuit of meritorious claims or defenses, including those that otherwise might not be pursued’.³¹ Likewise, the UNCITRAL tribunal in the *Bacilio Amorrtu v. The Republic of Peru* case observed that a claimant may even seek third-party funding in order to obtain ‘validation by a more objective third party of the merits of the claim.’³²

Consistent with this, in one of the first empirical analyses to examine outcomes of at least 20 publicly reported, concluded, and funded, investor-State cases, the authors – both respected practitioners from Debevoise & Plimpton – posit that third-party funding may actually incentivise meritorious claims:

‘All else being equal, therefore, the involvement of a funder may indicate that the case had more compelling merits than other, more traditional sources of funding, because a sophisticated party with experience in investment claims (and often a broader statistical perspective than the party or its counsel) thinks it is likely to succeed.’³³

‘An empirical assessment of these cases reveals that the statistics do not support the idea that funded claimants are more likely to bring frivolous claims, and instead provides some indication that funded claims are at least as successful on their merits as claims in a broader sample of investment arbitration cases.’³⁴

²⁸ Ina Popova and Katherine Seifert, ‘Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration’ in *PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW* (K. Fach Gomez, ed., Springer, 2021).

²⁹ Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021); Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021).

³⁰ UNCITRAL WG III TPF Note, at para. 29.

³¹ ICSID, Working Paper No. 1, 2 August 2018, 131.

³² *Bacilio Amorrtu v. The Republic of Peru*, PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020.

³³ Ina Popova and Katherine Seifert, ‘Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration’ in *PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW* (K. Fach Gomez, ed., Springer, 2021).

³⁴ *Ibid.*

Others have confirmed the valuable case assessment service performed by funders, acknowledging the significant time, money, and effort required to perform a thorough legal and financial analysis of any case during due diligence:

‘While the funder’s reasons are certainly colored by its business objectives, the funder has no reason to exaggerate or lie to a party when explaining the reasons for declining to fund that party’s case. In addition, parties often consult more than one funder while seeking funding, so the party will likely hear multiple perspectives regarding why their case has not received funding. All of these conversations provide valuable information to the party, even if they do not result in a funding arrangement.’³⁵

‘Establishing the right balance of risk and reward therefore requires funders to engage in a ‘multi-disciplinary and rigorous’ due diligence exercise. To date, there is no evidence that this process has led to an increase in meritless claims backed by third-party funders. Indeed, studies suggest that third-party funders ultimately finance only a small proportion of the claims presented to them.’³⁶

‘Because of the link between the profit of the funder and the positive outcome of the arbitral proceeding, it seems rather unlikely that third-party funders would be willing to engage their resources in manifestly unmeritorious claims.’³⁷

In addition, there are effective mechanisms already in place – both in institutional rules and in treaties – to address concerns that a claim may be frivolous or without legal merit. Simply put, ‘[w]hen it comes to investment treaty arbitrations, there are other incentives not to fund weak or meritless claims’.³⁸ For instance, as discussed below, the ICSID Convention and Rules include such mechanisms prior to registration, shortly after tribunal constitution, as well as throughout an arbitration proceeding in the form of bifurcated preliminary rulings and costs awards. These are not the only mechanisms within a tribunal’s toolkit to address frivolous claims, as States have agreed to expedited proceeding³⁹ and summary dismissal procedures in the text of certain treaties as well.⁴⁰

³⁵ Victoria Shannon Sahani, ‘The Impact of Third-Party Funders on the Parties They Decline to Finance’, Kluwer Arbitration Blog, 6 July 2015.

³⁶ Nigel Blackaby and Alex Wilbraham, ‘Third-Party Funding in Investment Treaty Arbitration’ in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2d ed, OUP, 2018), at 26.12.

³⁷ Eric De Brabandere and Julia Lepeltak, ‘Third-Party Funding in International Investment Arbitration’ *ICSID Review*, Vol. 27, No. 2, (2012) 379, 384.

³⁸ Nigel Blackaby and Alex Wilbraham, ‘Third-Party Funding in Investment Treaty Arbitration’ in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2d ed, OUP, 2018), at 26.13.

³⁹ On 9 July 2021, UNCITRAL adopted the 2021 Expedited Arbitration Rules (EAR), modifying certain aspects of the UNCITRAL Arbitration Rules.

⁴⁰ A review of decisions rendered under those mechanisms – under DR– CAFTA (Articles 10.20.4 and 10.20.5), the US– Peru FTA (Article 10.20.4) and the US– Panama FTA (Article 10.20.4) – likewise does not reveal an increase in the filing of claims that are frivolous or manifestly without legal merit. See Jeffery Commission and Rahim Moloo, *PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION* (OUP, 2018) at 9.22.

So, for instance, Article 36(3) of the ICSID Convention confers a screening power on the Secretary-General, allowing the Secretary-General to register a request or refuse its registration on the ground that it is ‘*manifestly outside the jurisdiction of the Centre*’.⁴¹ The purpose of the Article 36(3) screening power has been described as ‘*to avoid a requesting party’s misuse of the Centre’s facility*’.⁴² With that in mind, in practice respondents are involved in the process and receive the Request for Arbitration and have a brief period of time to reply and bring up any relevant point that goes to whether the claim is manifestly outside ICSID’s jurisdiction. According to ICSID’s Secretary-General, ‘*about one or two cases a year are rejected on this basis*’.⁴³ Registration has been refused for a variety of reasons, including a pathological ICSID clause, a claimant with the same nationality as the State party to the arbitration, a State agency not designated to ICSID, and manifest lack of an investment.⁴⁴ Despite the increasing numbers of ICSID cases, including cases supported by third-party funding, a review of the number of requests for arbitration refused registration by ICSID reveals no percentage increase in refusals as compared to the number of registered cases; indeed the percentage has fallen over time: In 1985, ICSID refused to register 5.5% of requests⁴⁵, in 2011 it was 3.7% of requests⁴⁶, in 2014 3.8% of requests⁴⁷, and in 2020 ICSID refused to register 2.9% of requests⁴⁸.

⁴¹ ICSID Convention, Article 36(3).

⁴² Martina Polasek, ‘The Threshold for Registration of a Request for Arbitration under the ICSID Convention’, *Dispute Resolution International*, Vol. 5, No. 2 (2011).

⁴³ Claire Lipman, ‘An Interview with Meg Kinnear, Secretary General of ICSID: part 3/4 – Changes to ICSID Arbitration Procedure’, *Practical Law Arbitration Blog*, 9 February 2016.

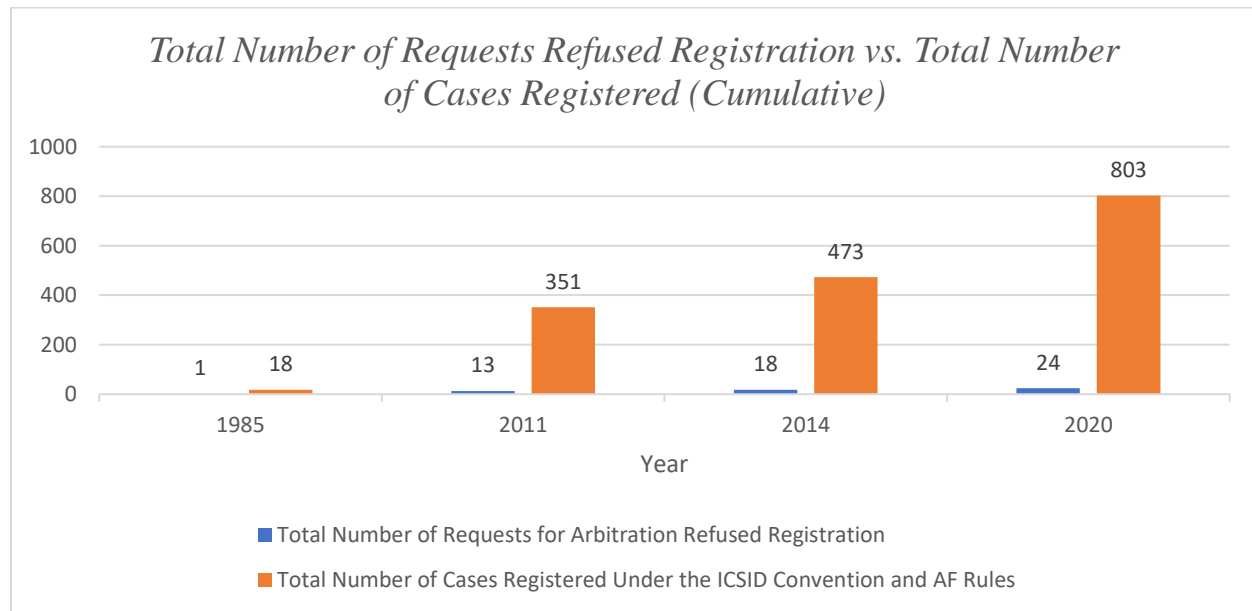
⁴⁴ Martina Polasek, ‘The Threshold for Registration of a Request for Arbitration under the ICSID Convention’, *Dispute Resolution International*, Vol. 5, No. 2 (2011).

⁴⁵ Antonio Parra, ‘The Screening Power of the ICSID Secretary-General’, *News from ICSID*, Vol. 2, No. 2 (1985); Georges Delaume, ‘ICSID Arbitration Proceedings’, *International Tax & Business Lawyer*, Vol. 4, 218 (1986).

⁴⁶ Martina Polasek, ‘The Threshold for Registration of a Request for Arbitration under the ICSID Convention’, *Dispute Resolution International*, Vol. 5, No. 2 (2011); Sergio Puig and Chester Brown, ‘The Secretary-General’s Power to Refuse to Register a Request for Arbitration Under the ICSID Convention’, *ICSID Review*, Vol. 27, No. 1 (2012); ICSID, *The ICSID Caseload – Statistics*, 2012-2 Edition.

⁴⁷ Eloïse Obadia and Frauke Nitschke, ‘Institutional Arbitration and the Role of the Secretariat’ in *LITIGATING INTERNATIONAL INVESTMENT DISPUTES, A PRACTITIONER’S GUIDE* 80 (C. Giorgetti ed., Brill, 2014); ICSID, *The ICSID Caseload – Statistics*, 2015-2 Edition.

⁴⁸ Interview with ICSID Secretariat, 13 July 2021 (on file with Burford Capital/ILFA); ICSID, *The ICSID Caseload – Statistics*, 2021-1 Edition.

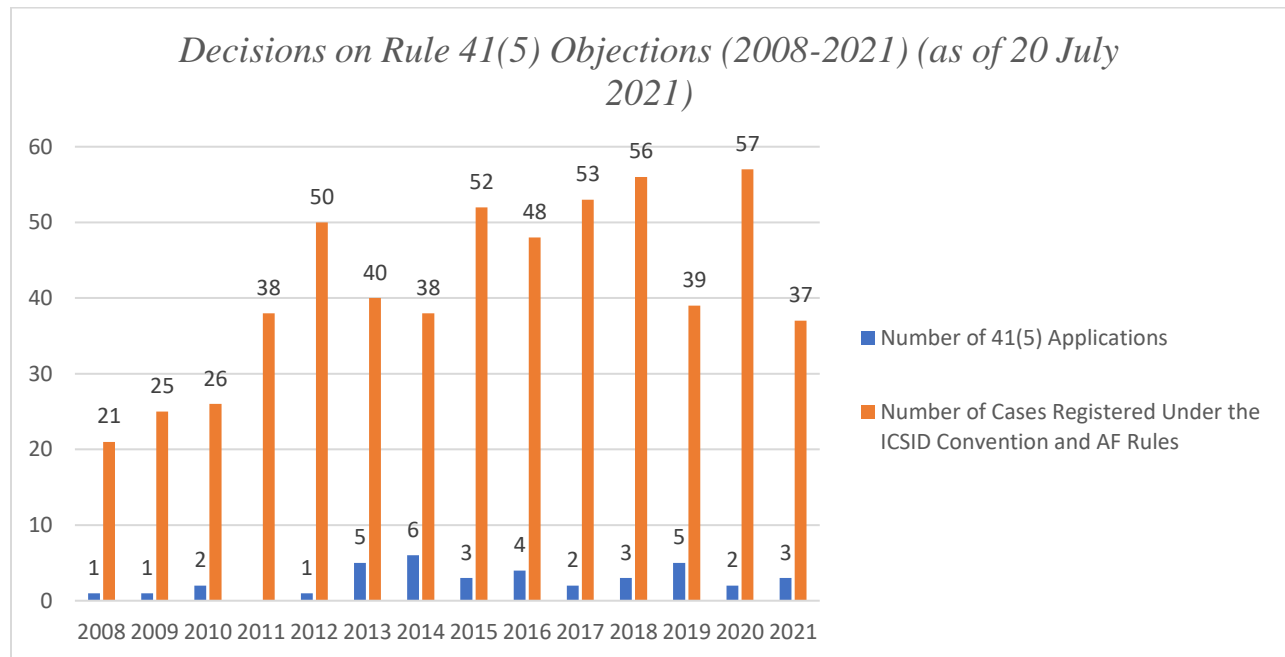


Furthermore and to take another example, Rule 41(5), introduced as part of the 2006 amendments to the ICSID Arbitration Rules, provides for the dismissal by tribunals of ‘*patently unmeritorious claims*’ at a preliminary stage of the proceeding.⁴⁹ The rationale is straightforward: to allow claims that manifestly lack legal merit to be dismissed early on before they unnecessarily consume the parties’ resources.⁵⁰ A review of the 38 decisions on Rule 41(5) applications rendered since 2008 shows no significant increase in the number of such applications filed in recent years, with only seven cases dismissed in their entirety since the rule’s introduction in 2006.⁵¹

⁴⁹ Antonio Parra, ‘The Development of the Regulations and Rules of the International Center for Settlement of Investment Disputes’, ICSID Review, Vol. 22, No. 1 (2007).

⁵⁰ See generally, Katia Yannaca Small and David Earnest, ‘The Fate of Frivolous and Unmeritorious Claims’ in ARBITRATION UNDER INTERNATIONAL INVESTMENT TREATIES: A GUIDE TO THE KEY ISSUES (2d ed, OUP, 2018) at 7.01-7.31; Jeffery Commission and Rahim Moloo, PROCEDURAL ISSUES UNDER INTERNATIONAL INVESTMENT ARBITRATION (OUP, 2018) at 9.20-9.32, Appendix 8B.

⁵¹ Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021). See also, ICSID, Decisions on Manifest Lack of Legal Merit; ICSID, ‘In Focus: Objections that a Claim Manifestly Lacks Legal Merit’, March 2021.



Against this background, the facts do not support the allegation that there has been an increase in the number of claims that are frivolous or without legal merit filed in investor-State arbitration, much less due to the availability of third-party funding.

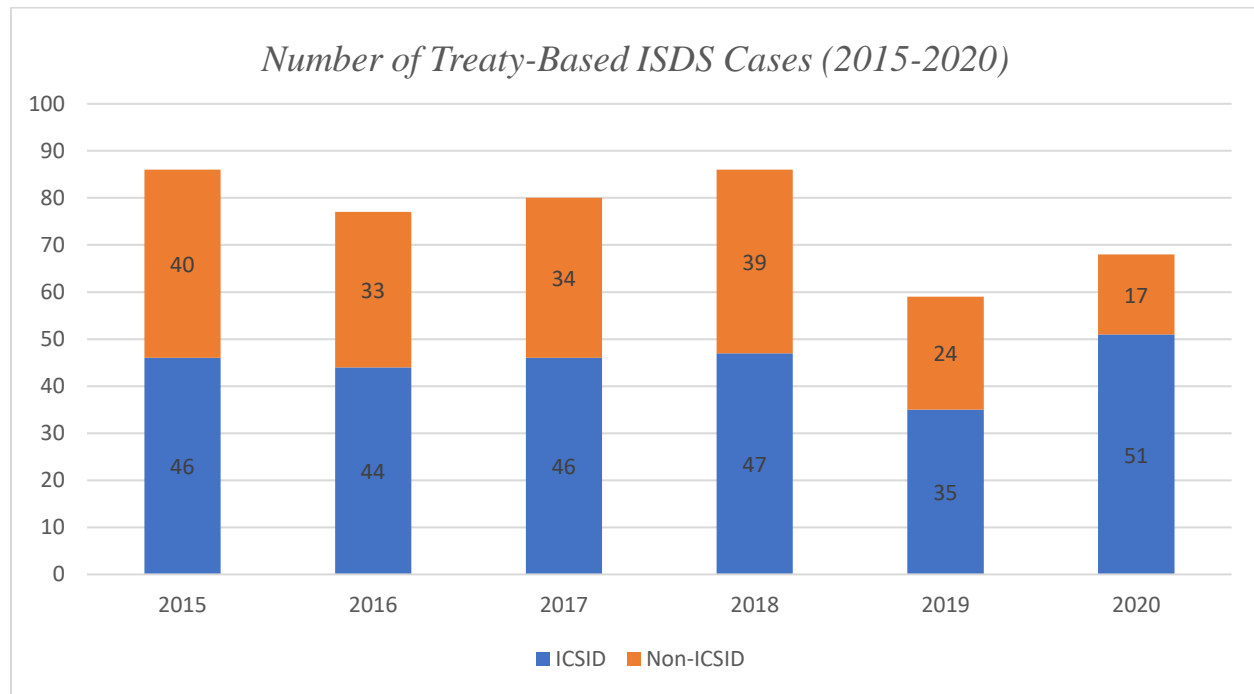
B. The Number of ISDS Cases and Outcomes of ISDS Cases

Second, the Secretariat maintains that there is a concern that the use of third-party funding has increased the number of ISDS cases filed.⁵² There is, again, no authority or data cited for this concern. As at July 2021, there were 1,104 publicly known ISDS claims, the majority filed under the ICSID Convention and Additional Facility Rules (59.2%) and the remainder filed under a number of other arbitration rules (UNCITRAL Arbitration Rules (31.7%), the SCC Arbitration Rules (4.4%), and the ICC Arbitration Rules (1.7%)). Considering the number of investor-state arbitrations filed since 2015 – the year UNCITRAL WG III first noted that the ‘*current circumstances in relation to investor-state arbitration posed challenges*’⁵³ – the number of ISDS cases filed per year has actually decreased.⁵⁴

⁵² UNCITRAL WG III TPF Note, at para. 11.

⁵³ Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1 (19 December 2017).

⁵⁴ UNCTAD, World Investment Report 2021 (21 June 2021), at 129.

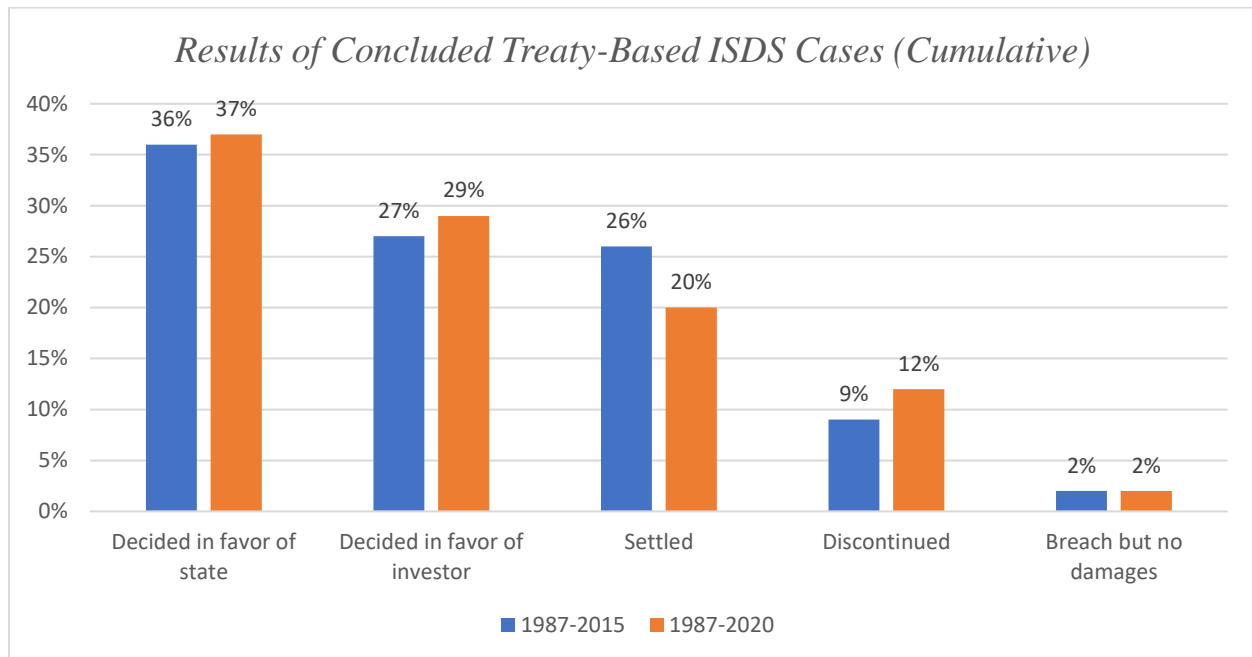


In any event, even if the number of cases had increased as result of funding, if the cases were based on good-faith assertion of treaty rights, and particularly if they resulted in decisions in favor of investors, the increased numbers of cases should not be a concern.⁵⁵ And there are numerous examples of publicly-known funded cases which have resulted in tribunals finding that respondent States breached their treaty obligations.⁵⁶

Of equal importance, not only has there not been an increase in the number of ISDS claims filed since 2015, but also the outcomes in decided cases have remained steady, with 27-29% of cases decided in favor of claimant investors and 36-37% in favor of respondent States.

⁵⁵ Eric De Brabandere and Julia Lepeltak, ‘Third-Party Funding in International Investment Arbitration’ ICSID Review, Vol. 27, No. 2, (2012) 379, 386 (*‘However, it may be argued that if the claim has merit and the host State is eventually found in violation of its international treaty obligations, the fact that the proceedings were financed by a third party has little relevance’*).

⁵⁶ *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15), Award, 3 March 2010; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL (PCA Case No. 2011-17), Award, 31 January 2014; *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Award, 12 August 2014; *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Award, 21 July 2017; *South American Silver Limited v. Bolivia*, UNCITRAL (PCA Case No. 2013-15), Award, 22 November 2018; *Trinh Vinh Binh and Binh Chau JSC v. Viet Nam*, UNCITRAL (PCA Case No. 2015-23), Award, 10 April 2019; *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic*, UNCITRAL (PCA Case No. 2015-32), Award, 20 August 2019; *Mohamed Abdel Raouf Bahgat v. Egypt*, UNCITRAL (PCA Case No. 2012-07), Award, 23 December 2019; *Dominion Minerals Corp. v. Republic of Panama* (ICSID Case No. ARB/16/13), Award, 5 November 2020; *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021.



If only cases in the ICSID context are considered – ICSID administering the majority of investor-State arbitrations – third-party funded claims have proven to be more successful on jurisdiction and the merits than the average of all cases, as confirmed in an empirical study earlier this year.⁵⁷ Specifically, the authors concluded that ‘[f]unded claimants prevailed on at least some, if not all, of their claims in the majority of cases: 12/20 funded cases, or 60%’ but that ‘[i]n comparison, only 47% of all ICSID cases led to an award upholding claims in part or in full’.⁵⁸ Similarly, it was found that ‘[t]ribunals issued an award dismissing all claims in only 3/20 funded cases, or 15%’ but ‘[i]n ICSID cases, this figure is 27%’.⁵⁹

What is more, the suggestion by the Secretariat that third-party funding somehow leads to an increase in the amount of damages claimed⁶⁰ is belied by practice. Tribunals tend to award only a fraction of the amount of damages claimed (37%, on average)⁶¹, and the evidence and credibility of competing party-appointed quantum experts is tested on cross-examination, as well as through tribunal questioning. And this suggestion, wholly unsupported by any citation, makes little sense since funders are tasked with assessing the commercial viability of any particular arbitration as an investment:

‘Funders often provide a “reality check” for parties that have unrealistically high expectations regarding the amount of damages they should claim. Funders may also tell the party that its case is too expensive relative to the potential recovery amount, that the likelihood of winning is low, or that the likelihood of recovering money from the respondent is

⁵⁷ Ina Popova and Katherine Seifert, ‘Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration’ in *PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW* (K. Fach Gomez, ed., Springer, 2021).

⁵⁸ *Ibid* (139).

⁵⁹ *Ibid*.

⁶⁰ UNCITRAL WG III TPF Note, at para. 11.

⁶¹ BIICL/Allen & Overy, ‘Costs, damages and duration in investor-state arbitration’ (2 June 2021).

*remote. Funders may also share other reasons and valuable information with the party, if the party is receptive.*⁶²

*‘A decision to claim an inflated value for an asset is more likely to be the result of poor expert or legal advice. Third-party funders of international investment treaty claims are usually sophisticated actors whose in-house teams include experts in both the law and financial matters. They are well placed to provide a claimant with a second opinion as to the probable value of a claim. They understand that the credibility of a claim in the eyes of a tribunal can suffer if the value of the claim is inflated.’*⁶³

*‘Second, as a practical matter, claims and awards almost invariably undergo rigorous due diligence before they receive funding. As any client or practitioner who has participated in such a process will appreciate, it can be labour-intensive and time-consuming. Funders claim that they apply stringent criteria, such as whether ‘the legal theory is tested and has good support’ in case law, the ‘damages theory can be reasonably extrapolated from past performance’ and ‘the economics of the investment do not depend on the case settling early’.*⁶⁴

Simply put, the evidence does not support the contention that third-party funding increases the number of ISDS claims or increases the damages claimed. Indeed, the existing empirical evidence suggests otherwise: funders serve a gatekeeping function in the field of investment arbitration by filtering out – as opposed to facilitating – the filing of frivolous claims. In this regard, the following statistic emanates from the investment adviser to a funder with significant experience in investment treaty arbitrations, often under the UNCITRAL Rules: of circa 300 potential investment treaty claims considered over an eight-year period (2010 – 2018), the funder agreed to fund only circa 3% of them. The experience of ILFA funder members is very similar. This is further evidence disproving the notion that third-party funding is fueling an increase in ISDS cases (or that funders are investing in cases regardless of their merits).

Moreover, to the extent that funded claims in the ICSID context are more successful on jurisdiction and the merits than the average of all cases (*supra*), then legal finance supports the rule of law and acts as a deterrent to recalcitrant States, furthering the aims of the U.N. Global Compact⁶⁵.

C. Applications for Security for Costs and Compliance with Awards

Third, the Secretariat states that there is a concern about security for costs applications and the ability of respondent States to recover costs in funded arbitrations.⁶⁶ This concern is misguided. In practice, ICSID and UNCITRAL investment tribunals have consistently held that the mere existence of arbitration finance, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security

⁶² Victoria Shannon Sahani, ‘The Impact of Third-Party Funders on the Parties They Decline to Finance’, Kluwer Arbitration Blog, 6 July 2015.

⁶³ Nigel Blackaby and Alex Wilbraham, ‘Third-Party Funding in Investment Treaty Arbitration’ in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2d ed, OUP, 2018), at 26.14.

⁶⁴ Ina Popova and Katherine Seifert, ‘Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration’ in *PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW* (K. Fach Gomez, ed., Springer, 2021).

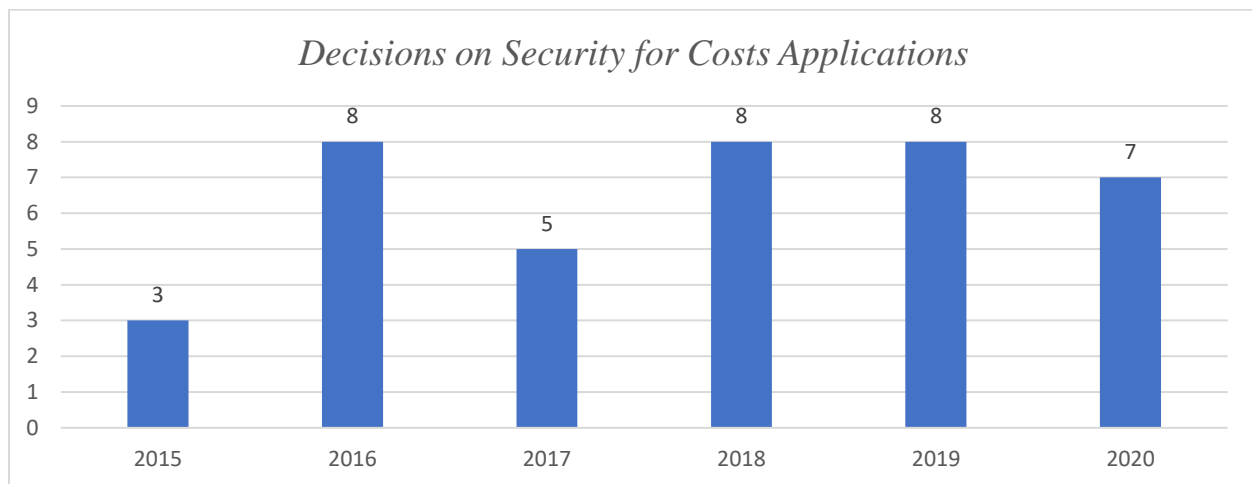
⁶⁵ <https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law>.

⁶⁶ UNCITRAL WG III TPF Note, at para. 51.

for costs.⁶⁷ In what has become a frequent occurrence in investor-state arbitrations, however, upon learning of the existence of an arbitration finance arrangement, respondents proceed to file applications seeking security for costs. They do so either as a stand-alone application or as part of a sequence of strategic procedural requests. As explained by Judge Charles Bower in his comments during the ICSID rule amendment process:

‘There is nothing per se “evil” about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the “evil” possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding.’⁶⁸

One form of that harassment is the filing of spurious security for costs applications, which are rarely, if ever, successful, but have been increasing in frequency, with 39 filed in just the last five years.



And the results are unambiguous: only a 7.6% success rate for security for costs applications (as of 16 July 2021), among the lowest for any procedural application advanced in ICSID and UNCITRAL arbitrations. In the 39 cases in which a security for costs application has been filed since 2015, only three have been successful. In 28 arbitrations, tribunals have denied security for costs applications because the exceptional circumstances required were absent, with 8 decisions not yet publicly available.⁶⁹

What is more, although UNCITRAL suggests that States share a central concern – the risk that claimants will fail to comply with costs awards⁷⁰ – in practice, very few costs awards in favor of States go unpaid. And this is not just anecdotal. As part of its rule amendment process, ICSID conducted a survey concerning

⁶⁷ See, e.g., *EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties’ Request for Provisional Measures (23 June 2015); *RSM v. St. Lucia* (ARB/12/10), Decision on St. Lucia’s Request for Security for Costs (13 Aug. 2014); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (11 Jan. 2016) 59, 77-78, 83; *Guaracachi & Rurelec v. Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013) 6-7).

⁶⁸ Judge Charles N. Brower, ‘Comments on ICSID’s proposed amendments to its chapter on the Constitution of the Tribunal’, 16 December 2018, p. 3. Gustaf Möller, also an ICSID arbitrator, and former Judge of the Supreme Court of Finland, fully concurs with the comments of Judge Brower. Gustaf Möller, ‘Comments on ICSID Rule Amendments – AR Rules 20-22’, 27 December 2018.

⁶⁹ Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021).

⁷⁰ UNCITRAL WG III TPF Note, at para. 51.

compliance with awards of costs, based on all ICSID Convention and Additional Facility awards and post-award decisions issued between October 14, 1966 and April 1, 2017. The results are striking: ‘*most awards in favor of States are paid*’ and for those few that are not paid, ‘*States do not always seek to enforce awards in their favor that have not been complied with*’.⁷¹ In contrast, there are now more unpaid ICSID and UNICTRAL awards in favor of investors, as the instances of noncompliance and delayed payment have increased significantly: ‘[s]ince the 2000s, instances of non-compliance have increased and, by all accounts, are likely to continue to do so, especially where disputes are burgeoning, intra-EU or political’.⁷²

4. Specific Comments on the Proposals

In addition to the general comments above, ILFA makes the following specific comments set out below. Please note, however, that the absence of comment in respect of a provision or part of a provision does not indicate that ILFA agrees with or accepts the provision.

Part A (definitions)

Draft provision 1

ILFA notes that much work has been done previously in the ISDS context with respect to a proposed definition of ‘funding’ and derivative nomenclature. For instance, the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration published its report in 2018 (the ‘ICCA-QM Report’) and adopted a wide definition of ‘funding’ given its broad remit and stated purpose, but suitably narrowed where the context required it⁷³. Irrespective of the merit of so doing, ILFA sees no reason to deviate from that working definition for the purpose of Draft provision 1 to ensure consistency of discussion within the ISDS community.

Part B (regulation models)

Draft provision 2 (prohibition model)

Regrettably, in ILFA’s view, this provision betrays the real objective of the discussions underpinning the UNCITRAL WG III TPF Note, which is to remove legal finance from the potential armoury of claimants in ISDS. Adoption of any of the suggestions would seriously undermine access to justice and the rule of law, as developed in more detail above.

Draft provision 3 (restriction model; access to justice)

- a) ILFA submits that the distinction between indigent claimants, who cannot afford to pursue a claim without legal finance, and claimants who can afford to do so, but wish to de-risk the arbitral process via legal finance, is not an appropriate one for the purpose of creating an ISDS funding gateway. But access to justice and the rule of law dictate that there is no reason to discriminate against the use of legal finance as a corporate finance tool. As stated by one tribunal, the suggestion that additional hurdles be imposed on a claimant raises ‘*a potentially important “access to justice” issue. If the Claimant can meet the jurisdictional prerequisites to have his*

⁷¹ ICSID Secretariat, ‘Survey for ICSID Member States on Compliance with ICSID Awards’, 2018, p. 5.

⁷² Emmanuel Gaillard and Ilija Mitrev Penusliski, ‘State Compliance with ICSID Awards’, ICSID Review (15 February 2021).

⁷³ Chapter 3, Part III, p. 50.

*claim arbitrated ... 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.*⁷⁴

- b) In addition, a rule requiring an indigent claimant to prove that they are unable to progress a claim without legal finance would be wrong in principle and practically unworkable. It would:
 - i. impose an unjustified and costly burden on that party at the beginning of the arbitral process, which may dissuade funders from supporting them at that stage.
 - ii. place the tribunal in the invidious position of having to hear argument which may well involve consideration of the merits of the claim, including whether the claimant has been financially harmed by the alleged wrong by the State; tribunals are – rightly – loath to do that at the beginning of the process at the risk of pre-judging the dispute; and
 - iii. result in costly and lengthy ‘satellite’ disputes; the average length of ISDS arbitral proceedings (including annulment but excluding enforcement) is almost 4.5 years⁷⁵; preliminary skirmishes of this nature would substantially elongate the process and increase costs.

Draft provision 4 (restriction model; sustainable development)

While on the face of it this provision may appear laudable in its aim, reflecting the U.N.’s initiative encouraging sustainable development, its application as a gateway principle for the use of legal finance in ISDS is at best inappropriate, and at worst misconceived.

First, as noted above, Sustainable Development Goal 16 confirms the importance of access to justice (and implicitly the rule of law) for effective, accountable, and inclusive government. There is no legitimate basis for subordinating that goal to any other.

Secondly and in any event, reputable funders are committed to upholding Environmental and Sustainable Development standards in terms of the cases that they finance.

Thirdly, placing a burden on the claimant to prove that its investment complied with a particular Sustainable Development Goal would lead to costly and lengthy ‘satellite’ disputes at the commencement of a proceeding that would require the tribunal to prematurely consider the merits of the case (cf. comments on the access to justice model above).

Draft provision 5 (restriction list model)

This provision is a prohibition model in all but name.

The authors expressly recognise that by noting that paragraph 1 (a) (the exclusion of funding on a non-recourse basis in exchange for a success fee) ‘*could restrict most commercial funding, in which case, the following subparagraphs might not be necessary.*’ The authors refer to ‘*speculative funding*’ and suggest that the Working Group ‘*may wish to consider which other types of funding should be included in the list, for instance, claims that are frivolous or without legal merit, in bad faith or with political purposes.*’

ILFA repeats its comments at 1 – 3 above.

⁷⁴ *Bacilio Amorrtu v. The Republic of Peru*, PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020.

⁷⁵ BICCL/Allen & Overy, ‘Costs, damages and duration in investor State arbitration’ (2 June 2021).

In any event, the provision:

- a) does not make it clear whether the suggested sub-paragraphs are to be construed conjunctively or disjunctively; in other words, if a tribunal were satisfied that the funding arrangement did not fall foul of sub-paragraph (b) – i.e., the funding return was reasonable – might funding be disallowed because the funder was funding more than a reasonable number of cases against the State in question?
- b) is practically unworkable:
 - i. who bears the burden of proof? There is a presumption that funding is permitted in the draft, so presumably the State would have the burden to show that the presumption does not apply.
 - ii. as to sub-paragraph (b), this would lead, yet again, to lengthy and costly ‘satellite’ disputes which may require a tribunal to consider the substantive merits of the case at an early stage, potentially including the submission of expert testimony dealing with market pricing; and
 - iii. as to sub-paragraph (c), what is a ‘reasonable number’ of cases in the context of egregious State conduct in breach of U.N. Sustainable Development Goal 16, for example?

Draft provision 6 (sanctions)

ILFA does not consider that any form of prohibition or restriction of legal finance of ISDS is appropriate, for the reasons set out in these comments. Be that as it may, this proposed provision would mark a paradigm shift away from the accepted principle of arbitration as a bilateral consensual process affecting only the parties subject to the arbitration agreement. One might expect any such shift to work both ways. For example, if a tribunal were able to order the termination of a legal finance agreement between the claimant and its financier or compel the claimant to return the funding received to the financier (6 (a)), why should the claimant and/or financier not seek an order against the State for the recovery of the costs of the funding where a claim is successful? There appears to be little basis in principle for altering the jurisdiction of the tribunal with respect to relations between third parties only in the way proposed in the draft.

Part C (disclosure)

The issue of the disclosure of legal finance arrangements is a relatively well-trodden discursive path in respect of ISDS. It is dealt with exhaustively in chapter 4 of the ICCA-QM Report and in the Appendix thereto, where suggested principles regarding disclosure and conflicts of interest are proposed. As set out above (‘The Current State of Third-Party Funding in International Investment Arbitration’), disclosure obligations already have been developing under the rules (and proposed amendments to those rules) of the major international arbitral institutions, in treaties, and in tribunal rulings.

Any rule requiring disclosure should focus on the proper purpose of such a rule: for example, to identify potential conflicts of interest between those sitting on a tribunal and a funder, not to provide a respondent State with the means to engage in ‘fishing’ exercises as part of a ‘long-game’ strategy of wearing a claimant down or to seek to discover privileged information regarding the claimant’s strategy or assessment of a case.

In that regard, the draft provision obliging the claimant to disclose the funding agreement (apparently unredacted) and its terms (paragraph 1 (c)) and empowering the tribunal to request details of the funding return (paragraph 2 (b)) are completely irrelevant to the issue of conflicts and would enable a State to plot a procedural strategy in an attempt to exhaust the funding.

ILFA also notes the broad application of the draft provision. Draft provision 1 is such that a contingency arrangement between a claimant and its legal representatives would, under draft provision 7, be disclosable. ILFA repeats the comments above in respect of the definition of ‘funding’.

Part D (Costs)

Draft provision 9 (security for costs)

The decision of the tribunal in *RSM Production Corporation v. St. Lucia*⁷⁶ set a number of hares running in the context of the jurisdiction of a tribunal to compel a funded claimant to provide security for the respondent State’s costs.

The ICCA-QM Report addressed this issue in some detail⁷⁷ and proposed evenly balanced principles in part D of its Appendix:

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including ATE, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.’

Principles D1 and D2 are broadly reflected in the recent jurisprudence where tribunals have been asked to rule on States’ motions seeking security for costs⁷⁸. Those principles are as follows:

- Tribunals seem to agree that security for costs orders raise access to justice issues, which is why provision of security should be ordered only in exceptional circumstances.
- the mere involvement of a third-party funder does not warrant a security for costs order. Third-party funding has become a common practice and requiring security for costs whenever a third-party funder is involved risks blocking potentially legitimate claims.

⁷⁶ (ARB/12/10) *supra*.

⁷⁷ Chapter 6.

⁷⁸ See, e.g., *EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties’ Request for Provisional Measures (23 June 2015); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013 – 15), Procedural Order No. 10 (11 Jan. 2016) 59, 77 – 78, 83; *Guaracachi & Rurelec v. Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013) 6 – 7); *Tennant Energy LLC v. Canada*, PCA Case No. 2018-54).

- the mere fact that a third-party funder supports an otherwise impecunious claimant is an insufficient reason to order security for costs. **For impecunious parties, the help of a third-party funder will often be the only way to seek redress under investment treaties.**
- Exceptional circumstances that may justify a security for costs order include: (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) other evidence of a claimant's bad faith or improper behaviour⁷⁹.

The passage in bold sits very comfortably with ILFA's opening comments above.

ILFA sees no justifiable reason to adopt draft provision 9 (A) given the established jurisprudence, which strikes a fair balance between access to justice and protecting States against a claimant's improper behaviour. Provision 9 option B is relatively benign, save that it is unnecessary given the existing jurisprudence setting out the relevant principles that are in part reflective of the approach advocated in the ICCA-QM Report.

Draft provision 10 (allocation of costs)

Option A in draft provision 10 seeks to sidestep jurisprudence on a claimant's ability to recover from the losing party its costs where those costs are funded. That principle was established by the tribunal in *Kardassopoulos & Fuchs*⁸⁰. ILFA submits that there is no compelling reason to impinge on that principle which has been applied for over ten years.

Option B is an attempt to shut-down an incipient jurisprudence heralded by the decision in *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Ltd*⁸¹, where the arbitrator permitted recovery of the claimant's funding costs (including the return payable to the funder) of pursuing the respondent Essar Oilfield. In that case, the arbitrator found that Essar had set out to cripple the claimant financially, whose impecuniosity had been caused by Essar and for whom legal finance was the only alternative open to it.

The ICCA-QM Report proposed principles addressing costs⁸². They concurred with the approach in *Kardassopoulos & Fuchs*. As to recoverability of funders' returns, they suggested that:

'The question of whether any of the cost of funding, including a third-party funder's return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure.'

ILFA considers that this strikes a fair balance between claimant investors and States and, to this extent, accepts that the standard approach to disclosure of funding arrangements would need to be slightly varied. ILFA members are aware of claims in which they are currently involved where claimants have pleaded

⁷⁹ *Tennant Energy LLC v. Canada*, PCA Case No. 2018-54.

⁸⁰ *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15), Award, 3 March 2010

⁸¹ [2016] EWHC 2361 (Comm).

⁸² Chapter 6 and Appendix C.

the recovery of their funding costs in the light of the egregious behaviour of respondent States underpinning their alleged Treaty breaches.

ILFA notes the Secretariat's suggestion that the UNCITRAL WG III may wish to consider whether funders should be liable to meet successful respondent State's unpaid costs ordered in their favour. ILFA repeats its comments in respect of draft provision 6 above. If such a shift in the bi-lateral consensus to arbitration is contemplated, then it would seem equitable for funders to be able to recover funding costs against recalcitrant States, including where a funder is obliged to provide security for a State's costs, something recognised in the ICCA-QM Report⁸³.

ILFA also notes the Secretariat's suggestion that the UNCITRAL WG III considers promulgating a Code of Conduct for funders. Without addressing the issues recommended for consideration within such a Code, ILFA submits that suitable voluntary regulation exists in the form of *inter alia* the UK's Association of Litigation Funders' Code of Conduct⁸⁴.

5. Concluding remarks

ILFA hopes that the Secretariat and the participants in UNCITRAL's WG III find these comments helpful.

ILFA reiterates that it stands ready to assist and work with the Secretariat and UNCITRAL WG III with respect to the Proposals. ILFA considers that it is well placed to provide such assistance, given its mandate and global reach, and would be delighted to engage with and provide additional data relevant to the issues being considered by UNCITRAL WG III.

Yours faithfully,



Leslie Perrin
Chairman, ILFA

⁸³ Appendix D3.

⁸⁴ See also HKIAC's 'Code of Practice for the Third-Party Funding of Arbitration', Arbitration Ordinance (Chapter 609).

Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021)

| Case name | Date of Decision or Award | Finding that Claim is Manifestly Without Legal Merit |
|---|----------------------------------|---|
| Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25) | 12 May 2008 | Partial |
| Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/3) | 2 February 2009 | No |
| Global Trading Resource Corp. and Globex International, Inc. v. Ukraine (ICSID Case No. ARB/09/11) | 1 December 2010 | Yes |
| RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6) | 10 December 2010 | Yes |
| Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13) | 4 April 2012 | No |
| Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary (ICSID Case No. ARB/12/3) | 16 January 2013 | Partial |
| Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary (ICSID Case No. ARB/12/2) | 11 March 2013 | Partial |
| Pan American Energy LLC v. Plurinational State of Bolivia (ICSID Case No. ARB/10/8) | 26 April 2013 | No |
| Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12) | 2 July 2013 | No |
| Mobile TeleSystems OJSC v. Republic of Uzbekistan (ICSID Case No. ARB(AF)/12/7) | 14 November 2013 | No |
| Lundin Tunisia B. V. v. Republic of Tunisia (ICSID Case No. ARB/12/30) | 6 January 2014 | No |
| Elsamex, S.A. v. Republic of Honduras (ICSID Case No. ARB/09/4) [Annulment] | 7 January 2014 | No |
| Edenred SA v. Hungary (ICSID Case No. ARB/13/21) | 6 June 2014 | No |

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|---|------------------|-----|
| Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20) [Annulment] | 25 June 2014 | No |
| PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea (ICSID Case No. ARB/13/33) | 28 October 2014 | No |
| MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (ICSID Case No. ARB/13/32) | 2 December 2014 | No |
| CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8) | 27 January 2015 | No |
| Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. ARB/13/28) | 17 March 2015 | No |
| Elektrogospodarstvo Slovenije - razvoj in inženiring d.o.o. v. Bosnia and Herzegovina (ICSID Case No. ARB/14/13) | 3 November 2015 | No |
| Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/22) [Annulment] | 8 March 2016 | No |
| Mathias Kruck and others v. Kingdom of Spain (ICSID Case No. ARB/15/23) | 14 March 2016 | No |
| Álvarez y Marín Corporación S.A. and others v. Republic of Panama (ICSID Case No. ARB/15/14) | 4 April 2016 | No |
| Lion Mexico Consolidated L.P. v. United Mexican States (ICSID Case No. ARB(AF)/15/2) | 12 December 2016 | No |
| Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25) | 9 March 2017 | Yes |
| Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50) | 20 March 2017 | No |
| Mabco Constructions SA v. Republic of Kosovo (ICSID Case No. ARB/17/25) | 7 February 2018 | No |
| Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15) | 31 May 2018 | No |
| African Petroleum Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia (ICSID Case No. ARB/17/38) | 31 December 2018 | No |
| Edenred SA v. Hungary (ICSID Case No. ARB/13/21) [Revision] | 7 February 2019 | Yes |

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| Alverley Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30) | 1 August 2019 | No |
| Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait (ICSID Case No. ARB/18/2) | 1 November 2019 | Yes |
| Red Eagle Exploration Limited v. Republic of Colombia (ICSID Case No. ARB/18/12) | 16 December 2019 | No |
| Galway Gold Inc. v. Republic of Colombia (ICSID Case No. ARB/18/13) | 20 December 2019 | No |
| Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30) | 6 April 2020 | Yes |
| Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany (ICSID Case No. ARB/19/29) | 24 July 2020 | No |
| InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12) [Revision] | 8 March 2021 | Yes |
| Glencore International A.G. and others v. Republic of Colombia (ICSID Case No. ARB/19/22) | 8 March 2021 | No |
| Fengzhen Min v. Republic of Korea (ICSID Case No. ARB/20/26) | 18 June 2021 | Partial |

Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021)

| Case name | Date of Decision or Order | Outcome |
|--|---------------------------|------------|
| EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14) | 23 June 2015 | Rejected |
| Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10) | 24 September 2015 | Not public |
| BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ICSID Case No. ARB/14/22) | 25 November 2015 | Rejected |
| South American Silver Limited v. Bolivia (PCA Case No. 2013-15) | 11 January 2016 | Rejected |
| Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. ARB/13/28) | 21 January 2016 | Rejected |
| Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/18) | 25 January 2016 | Rejected |
| Muhammet Çap & Bankrupt Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6) | 09 February 2016 | Not public |
| Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste (ICSID Case No. ARB/15/2) | 13 February 2016 | Rejected |
| Tamagot Bumi S.A. and Bumi Mauritania S.A. v. Islamic Republic of Mauritania (ICSID Case No. ARB/14/23) | 19 September 2016 | Not public |
| Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/18) | 21 September 2016 | Rejected |

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| Lao Holdings N.V. v. The Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) | 20 October 2016 | Rejected |
| Dawood Rawat v. The Republic of Mauritius (PCA Case No. 2016-20) | 11 January 2017 | Rejected |
| Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria (ICSID Case No. ARB/13/20) | 01 February 2017 | Rejected |
| Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50) | 12 April 2017 | Rejected |
| Sergei Viktorovich Pugachev v. The Russian Federation (UNCITRAL) | 07 July 2017 | Rejected |
| Dominion Minerals Corp. v. Republic of Panama (ICSID Case No. ARB/16/13) | 21 February 2018 | Not public |
| WalAm Energy LLC v. Republic of Kenya (ICSID Case No. ARB/15/7) | 31 May 2018 | Not public |
| Anglo-Adriatic Group Limited v. Republic of Albania (ICSID Case No. ARB/17/6) | 05 June 2018 | Rejected |
| Luis García Armas v. Republic of Venezuela (ICSID Case No. ARB(AF)/16/1) Manuel García Armas et al. v. Republic of Venezuela (PCA Case No. 2016-08) | 20 June 2018 | Granted |
| Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/16/2; ICSID Case No. ADHOC/17/1) | 26 July 2018 | Rejected |
| Abed El Jaouni v. Lebanese Republic (ICSID Case No. ARB/15/3) | 11 October 2018 | Rejected |

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|---|------------------|--|
| Consutel Group S.p.A. in liquidazione v. Algeria (PCA No. 2017-33) (UNCITRAL) | 11 December 2018 | Rejected |
| Muhammet Çap & Bankrupt Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6) | 13 December 2018 | Not public |
| Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina (ICSID Case No. ARB/16/36) | 18 June 2019 | Rejected |
| Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia (PCA Case No. 2018-39) | 09 July 2019 | Rejected |
| Consutel Group S.p.A. in liquidazione v. Algeria (PCA No. 2017-33) (UNCITRAL) | 10 July 2019 | Rejected |
| Alverley Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30) | 01 August 2019 | Rejected |
| (1) Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v. The Russian Federation (PCA Case No. 2015-20) (UNCITRAL) | 30 August 2019 | Rejected |
| Ipek Investment Limited v. Republic of Turkey (ICSID Case No. ARB/18/18) | 14 October 2019 | Rejected |
| Cunico Resources N.V. v. Republic of North Macedonia (ICSID Case No. ARB/17/46) | 17 October 2019 | Not public |
| Jochem Bernard Buse v. Republic of Panama (ICSID Case No. ARB/17/12) | 05 November 2019 | Rejected |
| Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35) | 27 January 2020 | Rejected |
| Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35) | 27 January 2020 | Granted* (later rescinded on 9 June 2020 in Decision and PO No. 5) |

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|---|-------------------|----------|
| Tennant Energy, LLC. v. Government of Canada (PCA Case No. 2018-54) | 27 February 2020 | Rejected |
| Eugene Kazmin v. Republic of Latvia (ICSID Case No. ARB/17/5) | 13 April 2020 | Granted |
| Theodoros Adamakopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49) | 08 June 2020 | Granted |
| Theodoros Adamakopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49) | 08 June 2020 | Rejected |
| Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21) | 28 September 2020 | Rejected |
| Hope Services LLC v. Republic of Cameroon (ICSID Case No. ARB/20/2) | 12 May 2021 | Rejected |

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This is an initial draft for comments until 30 July. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject “Comments on TPF initial draft”.

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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on third-party funding

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I. Background

1. At its thirty-seventh and thirty eighth sessions, the Working Group considered that it would be desirable to address the legal framework pertaining to third-party funding in ISDS in light of the impact of third-party funding on both the proceedings and the ISDS regime. Possible options for reform were discussed, and the Secretariat was requested to prepare draft provisions on third-party funding (A/CN.9/1004, paras. 80-94 and 97; see also A/CN.9/970, paras. 17-25).¹
2. Accordingly, this note contains draft provisions on third-party funding for the consideration by the Working Group.
3. Regulations on third-party funding may be implemented through various means, such as through inclusion in investment treaties, in arbitration rules, in domestic legislation or in a multilateral treaty on ISDS reform (A/CN.9/1004, paras. 95 and 97; see also A/CN.9/WG.III/WP.194). The draft provisions in this note have been prepared for inclusion in investment treaties and would need to be adjusted if they were to be part of a different type of instrument. The reference to a "Party" in the draft provisions refers to a contracting Party of an investment treaty (such as a State or a regional economic integration organization).

II. Draft provisions on third-party funding

A. Definitions

DRAFT PROVISION 1 (Definitions)

1. "Proceeding" means any procedure to resolve a dispute between an investor of a Party and another Party.
2. "Third-party funder" is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides funding for the proceeding.
3. "Funded party" is a party to a dispute that benefits from third-party funding by entering into a funding agreement on its own or through its affiliate or its representative.
4. "Third-party funding" is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

Commented [at1]: I suggest drafting consistency with para 2, whereby funding may be provided according to terms other than by agreement, by simply adding "..., or otherwise".

4. Draft provision 1 provides definitions of some key terminology, as the effectiveness of any regulation on third-party funding would depend on a clear definition thereof (A/CN.9/1004, para. 86). The definitions would need to be adjusted depending on the

¹ This Note was prepared with reference to a broad range of published information on the topic, including: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018) ("ICCA Report"); Handbook on Third-Party Funding in International Arbitration edited by Nikolaus Pitkowitz (2018) ("Pitkowitz"); Third-Party Funding in International Arbitration by Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017) ("Nieuwveld & Sahani"); The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement by Brooke Guven and Lise Johnson (2019) ("Guven & Johnson"); Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement submitted by CCSI/IIED/IIISD (2019) ("CCSI/IIED/IIISD Joint Submission"); A Framework for Understanding Practice and Policy Regarding Third-Party Financing in ISDS by Stavros Brekoulaki and Catherine Rogers (2019) ("Brekoulaki & Rogers") and other publications by the Academic Forum (available [here](#)). Reference was also made to the ICSID Rules and Regulations Amendment - Working Paper #4, Proposals for Amendment of the ICSID Rules ("ICSID Working Paper #4").

intended model and scope of regulation.² The Working Group may wish to consider whether any additional terminology would need to be defined.

5. In relation to paragraph 1, the Working Group may wish to consider whether it would be necessary to indicate the dispute resolution method and the legal basis of the proceedings. It should, however, be noted that a regulation could apply to ISDS generally, including arbitration, mediation³ and any other ADR mechanism, and regardless of whether the dispute is based on a treaty or a contract.

Commented [at2]: If sentence 2 is true, as I believe, then sentence 1 may be unnecessary.

6. In relation to paragraph 2, the Working Group may wish to note that the phrase “enters into an agreement to provide funding” intends to capture instances where the funder has yet to provide the funding to the disputing party.⁴

7. While recently adopted investment treaties usually do not define the term “funded party” separately,⁵ paragraph 3 attempts to address “indirect funding”,⁶ where a funding agreement is entered into by an affiliate or a representative of the disputing party for the benefit of the disputing party. The Working Group may wish to consider whether the term “funded party” should be limited to claimant investors or also encompass States, though this would largely depend on the regulation model.

Commented [at3]: The issue may be solved by referring to “claimant”, which would cover counterclaims by States.

8. Paragraph 4 clarifies that the purpose of third-party funding is to provide financing for the costs of the proceeding.⁷ The phrase “direct or indirect” is meant to cover circumstances where the disputing party might not be a party to the funding agreement but still a beneficiary of the funding arrangement (see para. 7 above). The words “or equivalent support” are meant to cover non-financial support.⁸ The phrase “in return for remuneration dependent on the outcome of the proceedings” refers to commercial financing,⁹ whereas the phrase “a donation or grant” refers to forms of non-profit funding (A/CN.9/1004, para. 87).¹⁰ The inclusion of the latter would largely depend on the regulation models outlined below, particularly as non-profit funding and funding by development organizations such as the African Legal Support Facility (ALSF), the International Development Law Organization (IDLO) and a multilateral advisory centre, should one be established, would not present the same concerns as commercial funding.

9. The Working Group may wish to consider whether certain funding arrangements should be excluded from the definition, such as funding by legal counsel or parties’ representatives.¹¹ In conjunction, it may wish to consider whether the definition should

² For example, the CCSI/IIED/ISD Joint Submission provides a broad definition, based on which disclosure requirements apply to all third-party funding. The prohibition clause is then limited to non-recourse, outcome-contingent third-party funding.

³ See Draft Rule 12 of the amended ICSID Conciliation Rules in ICSID Working Paper #4, p. 88.

⁴ See ICCA Report, p. 50. See also Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) (provisionally in force since 21 September 2017), Article 8.1; and Canada-Chile Free Trade Agreement (“CCFTA”) (in force since 5 February 2019), Article G-23 bis (3).

⁵ See, for example, European Union-Singapore Investment Protection Agreement (“EU-Singapore”) (signed on 19 October 2018), Article 3.1.; EU-Vietnam Investment Protection Agreement (“EU-Vietnam”), Article 3.37.

⁶ Regarding a definition of the “beneficial owner”, see CCSI/IIED/ISD Joint Submission, p. 5, footnote 7.

⁷ See Draft Rule 14 of the amended ICSID Arbitration Rules; EU-Singapore, Article 3.1 (2)(f); and IBA Guidelines on Conflicts of Interest (“IBA Guidelines”), Explanation to General Standard 6(b): “contributing [...] to the prosecution or defence of the case”.

⁸ See, for example, ICCA Report, p. 50; Another approach would be to add a phrase such as “and other equivalent funding mechanisms” as a catch-all phrase to prevent the undermining of the definition and guarantee the efficient implementation of any regulation; The IBA Guidelines defines funding as “contributing funds, or other material support”.

⁹ For EU-Singapore, Article 3.1 – “in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled, or in the form of a donation or grant”; CCFTA, Article G-23 bis – “either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute”; draft Rule 14 of the amended ICSID Arbitration Rules – “in return for remuneration dependent on the outcome of the proceeding”.

¹⁰ For a broad definition, see CCSI/IIED/ISD Joint Submission. For an example of non-profit funding, see Philip Morris v. Uruguay, where the Bloomberg Foundation and its ‘Campaign for Tobacco-Free Kids’ provided funding for the Uruguayan government. See also ICCA report, p. 96 and Nieuwveld & Sahani, pp. 4, 5.

¹¹ Draft Rule 14(2) of the amended ICSID Arbitration Rules provides that “[a] non-party referred to in

expressly cover (i) equity financing (for example, where the funder purchases shares in a disputing party or creates a special purpose vehicle jointly with that party) and (ii) instances where the third-party funder owns or invests in a law firm representing a disputing party.¹²

B. Regulation models

10. This section sets forth the various models for regulating third-party funding. In considering the different models, the Working Group may wish to take into account a number of factors, including but not limited to the need to ensure the integrity of the proceedings by preventing any abuse and the benefit that third-party funding could have for claimants with insufficient financial resources, particularly small and medium-sized businesses, to raise claims (A/CN.9/1004, para. 85).

1. Prohibition models

General

11. One regulation model is to prohibit third-party funding in ISDS (A/CN.9/1004, para. 81).¹³ Such prohibition could address the concern that third-party funding aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed.

DRAFT PROVISION 2 (Prohibition model)

Option A – A general provision prohibiting third-party funding

A claimant shall not enter into an agreement on, or receive, third-party funding.

Option B – Condition for the submission of a claim

A claim may be submitted only if the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option C – Requirement for the consent

The consent of the respondent requires that the claimant has not entered into an agreement on, or received, third-party funding and refrains from doing so.

Option D – Denial of benefits

A Party may deny the benefits of this investment treaty to an investor of another Party that raises a claim if the investor has entered into an agreement on or received third-party funding.

12. The table above provides different options to implement the prohibition model. Option A would include a general provision prohibiting third-party funding.¹⁴ Such a provision would oblige the disputing parties to refrain from seeking third-party funding in an ISDS proceeding. The Working Group may wish to consider whether all “disputing parties” should be subject to the prohibition in option A.

13. Option B would require the non-existence of third-party funding as a condition for submitting a claim. The text of option B can also be incorporated into a general provision addressing procedural and other requirements for submissions of a claim.¹⁵ Option C would indicate that the consent of the respondent State is subject to the requirement that the claimant has not received and will not seek to receive third-party funding. Such language

Commented [at4]: I am not fully sure about the added value in referring to specific funding agreements/arrangements, given the wide approach to funding in Draft provision 1 (“enters into an agreement to provide, or otherwise provides funding for the proceeding”). I believe this is a good case in which less is more.

Commented [at5]: I favour the “Restriction model” over the “Prohibition model”. Still, if the Prohibition model were to be retained, my preference would go to Option D, perhaps adding reference to dispute settlement provisions.

paragraph (1) does not include a representative of a party”. See also ICCA Report, p. 50; and draft provision 3 (b) in the CCSI/IIED/ISD Joint Submission.

¹² See ICCA Report, p. 35 and 36.

¹³ See Submissions from the Government of South Africa (A/CN.9/WG.III/WP.176) and the Government of Morocco (A/CN.9/WG.III/WP.161.). See also A/CN.9/WG.III/WP.172 - Third-party funding, paras. 15-19.

¹⁴ See Argentina - United Arab Emirates BIT (2018), Article 24 - “Third party funding is not permitted”.

¹⁵ See EU-Vietnam, Article 3.35, Australia-Hong Kong Investment Agreement (“Australia-HK”), Article 26-27; Free Trade Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”), Article 14.D.3.

could be incorporated into a provision addressing consent found in recent investment treaties.¹⁶ Failure to comply with the requirements in option B and C would likely result in the claim being dismissed or the tribunal deciding that it lacked jurisdiction.

14. Option D is modelled on denial of benefit clauses found in investment treaties. Through such clauses, States have denied the benefits under investment treaties to certain categories of investors that the investment treaties did not intend to protect, for example, claimants that are “controlled by nationals of a third State”¹⁷ and/or “do not have a real economic connection with the home State”¹⁸. A denial of benefit clause has been used by States to “counteract strategies that seek the protection of particular treaties by acquiring a favourable nationality”,¹⁹ in other words, to prevent forum shopping and freeriding of the benefits under the investment treaty. Similarly, denying the benefits of a claimant with third-party funding could prevent the abuse of rights and safeguard the economic development objectives States pursue in investment treaties.²⁰ The application of option D could either take effect at the level of jurisdiction of the tribunal or the admissibility of the claim.²¹

15. Draft provision 2 would need to be accompanied by a provision on sanctions if third-party funding is obtained despite the general prohibition (see draft provision 6 below).

16. Should any of the above-mentioned approaches be taken, the Working Group may wish to exclude from the scope of the regulation non-profit funding and funding provided to respondent States (see paras. 8-9 above). The Working Group may also wish to consider excluding contingency arrangements and funding provided by an affiliate of the disputing party.²² Concerns that the prohibition of third-party funding could limit small and medium-sized enterprises and impecunious claimants from raising claims under investment treaties could be addressed through legal aid mechanisms.

2. Restriction models

17. Another regulation model would be to permit or restrict certain types of third-party funding (A/CN.9/1004, paras. 82 and 83). Such a model could provide for more flexibility than the prohibition model, while addressing the concerns mentioned above (see para. 11 above). While there could be a number of variants, the Working Group may wish to consider the following models:

- Third-party funding is allowed only when it is necessary for the claimant to bring its claim (draft provision 3 - access to justice model) (A/CN.9/1004, paras. 82 and 83)
- Third-party funding is allowed only when the investment is in compliance with sustainable development requirements (draft provision 4 - sustainable development model)
- Third-party funding is generally allowed unless specified (draft provision 5 restriction list model)

(a) Access to justice model

¹⁶ See EU-Vietnam, Article 3.36; Australia-HK, Article 24; and USMCA, Article 14.D.5.

¹⁷ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), para. 354.

¹⁸ ‘Denial of Benefits’ Clause in Investment Treaty Arbitration by Loukas Mistelis and Crina Baltag, Queen Mary University of London, School of Law Legal Studies Research Paper No. 293/2018 (“Mistelis & Baltag”), p. 1.

¹⁹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edition, 2012), p. 55.

²⁰ See Mistelis & Baltag, p. 2; See also Guven & Johnson, p. 42, 43.

²¹ See Mistelis & Baltag, p. 2, 18. “Distinguishing between jurisdiction and merits has relevant practical consequences. When arbitral tribunal considers a matter to pertain to its jurisdiction, that decision may be challenged under the appropriate available mechanism. As such, erroneously considering an issue pertaining to jurisdiction, could ‘result in an unjustified extension of the scope for challenging the awards.’”

²² For a drafting example, see CCSI/IIED/IISD Joint Submission.

Commented [at6]: I am in favor of a Restriction model, under Option B (Sustainable development model).

18. Under the access to justice model, third-party funding would be permitted if the funding is necessary for the claimant to bring its claim, particularly, micro, small and medium-sized enterprises (MSMEs).

DRAFT PROVISION 3 (Access to justice model)

1. *Third-party funding is permitted if the claimant can demonstrate that it is pursuing the claim in good faith and is not in a position to pursue its claim without third-party funding.*
2. *The tribunal shall grant the permission in paragraph 1 upon receiving the request from the claimant, which shall be submitted with the notice of arbitration and prior to entering into an agreement on or receiving third-party funding.*

19. Under draft provision 3, the claimant is required to demonstrate that it is pursuing the claim in good faith and that, without third-party funding, it is not possible to afford to bring its claim. Accordingly, if the third-party funding was obtained merely for business purposes (for example, to manage risks or to deduct the cost of the proceedings from its balance sheet), it would not be able to obtain a permission. The Working Group may wish to note that it may be difficult to demonstrate the impecuniosity of the claimant (A/CN.9/1004, para. 83).²³ and more generally that third-party funding is “necessary” to pursue the claim. As to the drafting, paragraph 1 can also be rephrased along the following lines: “Draft provision 2 does not apply if the claimant ...” [The Working Group may also wish to consider adding “prospects of success” as another criterion, often found in legal aid schemes].²⁴

20. Under the access to justice model, procedural rules for granting permission may need to be prepared. Paragraph 2 stipulates that the tribunal would grant permission upon a request by the party seeking to obtain third-party funding. The Working Group may wish to consider whether other authorities should be involved, particularly if the request is made prior to the constitution of the tribunal. Paragraph 2 also requires the claimant to make the request in its notice of arbitration and prior to entering into an agreement on or receiving funding. In so doing, the claimant would need to disclose information as required in draft provision 7.

21. Draft provision 3 may need to include additional procedural rules to address: (i) circumstances where there is a change in the funding arrangement after the permission is granted; (ii) the consequences of the tribunal not granting the permission; and (iii) the consequences if the claimant proceeds to obtain third-party funding despite the tribunal not granting the permission (see draft provision 6 on possible sanctions).

(b) Sustainable development model

22. Under the sustainable development model, a claimant would be allowed to seek third-party funding, if its investment meets pre-defined sustainable development requirements of the respondent State. This reflects the trend that States, in particular developing countries, are seeking to balance in their investment treaties the protection of investors on the one hand and the sustainable development agenda on the other. By allowing only investors that contribute to sustainable development to obtain third-party funding, this model would allow States to prioritize and promote such investments, for example, those with the purposes of protecting the environment or mitigating climate change.

DRAFT PROVISION 4 (Sustainable development model)

Third-party funding is permitted if the claimant can demonstrate that its investment is in compliance with [applicable sustainable development provisions].

Commented [at7]: I find this requirement dangerous as it would put the Tribunal in a position that would predicate its decision on the jurisdiction/admissibility/merits of the case. A negative formulation - eg “without manifest prospect of failure” - could serve the same purpose, without putting arbitrators in a difficult position.

Commented [at8]: Having expressed my favor for this model, I see however here again the possibility that assessment by the Panel of this requirement may predicate proceedings - here with regard to possible counterclaims by the Respondent - unless we would make reference to *prima facie* assessment that the claimant is in compliance with sustainable development requirements. Reference to Responsible Business Conduct Standards may be added.

²³ See ICCA Report, p. 20.

²⁴ *Global Study on Legal Aid - Global Report* (2016), United Nations Development Programme (UNDP), United Nations Office on Drugs and Crime (UNODC).

23. Under draft provision 4, the claimant will be permitted to obtain third-party funding by demonstrating that its investment is or was made in compliance with the applicable sustainable development provisions. In taking this approach, it may be necessary to include procedural rules similar to draft provision 3(2) (see para. 21 above).

24. As to the drafting, draft provision 4 can also be phrased to provide that draft provision 2 on general prohibition does not apply when the claimant demonstrates that its investment is in compliance with sustainable development requirements.

25. Furthermore, it would be possible to combine draft provisions 3 and 4.

(c) Restriction list model

26. Under the restricted list model, third-party funding would generally be allowed whereas certain types would be prohibited. A list of the types of third-party funding that are not allowed would be provided in the regulation. Compared to the access to justice model and the sustainable development model, this approach could provide more flexibility to the parties in obtaining third-party funding for a number of different purposes.

DRAFT PROVISION 5 (Restriction list model)

1. Third-party funding is permitted unless:

- (a) the funding is provided on a non-recourse basis in exchange for a success fee and other forms of monetary remuneration or reimbursement wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings;*
- (b) the expected return to be paid to the third-party funder exceeds a reasonable amount;*
- (c) the number of cases that the third-party funder funds against the respondent State with regard to the same measure exceeds a reasonable number;*
- (d) ...*

2. Upon disclosure of the information required in draft provision 7, the tribunal, upon request of a party or on its own initiative, shall determine whether the third-party funding is not permissible in accordance with paragraph 1.

27. Draft provision 5, paragraph 1 provides the types of third-party funding that would not be permitted. Paragraph 1(a) intends to cover speculative funding (A/CN.9/1004, para. 82). The Working Group may wish to note that paragraph 1(a), as drafted, could restrict most commercial funding, in which case, the following subparagraphs might not be necessary.

28. Paragraph 1(b) aims to cover third-party funding where the amount of the expected return is excessive or above a certain threshold. An alternative approach would be to provide a rule limiting the amount or percentage of return, instead of prohibiting third-party funding entirely.²⁵ Paragraph 1(c) aims to cover third-party funding, where the funder has already provided funding for a number of claims against the same respondent State with regard to the same measure. This would limit the number of cases that a third-party funder can fund against a particular State, which was viewed as a concern as it could increase the existing imbalance to the detriment of those States, as the funder could have an influence on the outcome of those cases.

29. Paragraph 1 only provides some examples and the Working Group may wish to consider which other types of funding should be included in the list, for instance, claims that are frivolous or without legal merit, in bad faith or with political purposes (A/CN.9/1004, para. 82). If a separate provision is developed to dismiss frivolous claims, the existence of third-

²⁵ Submission by the Government of Turkey (A/CN.9/WG.III/WP.174), p. 3 - "... [T]he amount of the return that would be taken by the funder should be limited to a reasonable portion of compensation".

party funding could be an element to be considered in determining whether the claim was frivolous or not.

30. Regardless of whether the third-party funding falls within the category of those listed in paragraph 1, it would be subject to the same disclosure requirements in draft provision 7. Similar to other restriction models, additional procedural rules would need to be developed. For example, draft provision 5(2) stipulates that the tribunal shall determine whether the third-party funding is not permissible under paragraph 1. The Working Group may wish to consider the following issues:

- Whether such determination should be mandatory upon disclosure;
- How the tribunal could obtain information not subject to disclosure that would allow the tribunal to make the determination (for example, information on the funder's return and involvement in other cases involving the respondent State – see draft provision 7(2));
- Whether the determination should be upon the request of a party or on the initiative of the tribunal and, if so, the time frame for making the request;
- Whether any other authority shall make the determination prior to the constitution of the tribunal; and
- The consequences if the third-party funding is found to fall under the category in paragraph 1 (see draft provision 6).

3. Legal consequences and possible sanctions

31. The legal consequences of a party entering into or being provided with third-party funding that is not permitted would differ depending on the regulation model. For example, the claim may be inadmissible or the tribunal might lack jurisdiction to consider the case (see para. 13 above).

DRAFT PROVISION 6 (Sanctions)

If a claimant enters into an agreement on or receives third-party funding, which is not permissible under these provisions, the tribunal may:

- (a) *order the claimant to terminate the third-party funding agreement and/or return funding received;*
- (b) *suspend or terminate the proceeding;*
- (c) *consider the non-compliance in allocating the costs of the proceeding;*
- (d) ...

Commented [at9]: Reference to this possibility - which would surely be the most effective sanction - should be made in draft provision 6.

32. Draft provision 6 provides examples of measures that a tribunal (or any other authority) could take, should it determine that the third-party funding was not permissible under the draft provisions. It would need to be adjusted in accordance with the different regulation models and options therein.

33. The Working Group may wish to consider whether the measures outlined in draft provision 6 are appropriate and whether any other measures should be added.²⁶ It would be possible for the tribunal to take one or more measures on the list to rectify the situation. The Working Group may wish to confirm that such measures by the tribunal would not require a request by the respondent party and can be taken on its own initiative.

34. The Working Group may wish to further consider whether attempts by the claimant with the intent or effect of circumventing the regulation on third-party funding (for

²⁶ See for example Indonesia-Australia Comprehensive Economic Partnership Agreement (2020) ("Indonesia-Australia"), Article 14.32 (3).

example, by structuring the funding arrangements, whether through debt, equity, or otherwise) should also be subject to the same sanction measures.²⁷

35. While draft provision 6 focuses on measures that can be taken by the tribunal, it could be anticipated that an award or a decision rendered by the tribunal, despite the existence of third-party funding that was not permissible under the regulation, could be set aside or annulled.

C. Disclosure of third-party funding

36. Disclosure is required generally for addressing the risk of conflicts of interest or the lack of transparency and a number of existing investment treaties and arbitration rules include rules on disclosure of third-party funding. ICSID is also considering requiring disclosure of third-party funding in its Rules and Regulations Amendment Process to address the potential risk of conflicts of interest.²⁸

37. Requiring disclosure could be a stand-alone regulation model. However, the implementation of other regulation models mentioned in sections A and B would need to be based on the disclosure of certain information. This is because without the information disclosed, it would not be possible to determine whether the third-party funding is permissible or not. Depending on the approach to be taken, disclosure may be a pre-requisite for obtaining approval from the tribunal to seek third-party funding. It is in this context that the Working Group may wish to consider disclosure requirement as outlined below (A/CN.9/1004, para. 89).

DRAFT PROVISION 7 (Disclosure)

1. The funded party shall disclose to the tribunal and the other disputing parties the following information:

- (a) the name and address of the third-party funder;*
- (b) the name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder; and*
- (c) the funding agreement or the terms thereof.*

2. In addition to those set forth in paragraph 1, the tribunal may require the funded party to disclose the following information:

- (a) whether the third-party funder agreed to cover the costs of an adverse cost award;*
- (b) the expected return amount of the third-party funder;*
- (c) any rights of the third-party funder to control or influence the management of the claim, the proceedings and to terminate the funding arrangement;*
- (d) number of cases that the third-party funder has provided funding for claims against the respondent State;*
- (e) any agreement between the third-party funder and the legal counsel or firm representing the funded party; and*
- (f) any other information deemed necessary by the tribunal.*

3. The funded party shall disclose the information listed in paragraph 1 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement claim, as promptly as possible after the agreement is entered into. The funded party shall disclose the information requested by the tribunal in accordance with paragraph 2 as promptly as possible after such request.

Commented [at10]: The expression "or the terms thereof" appears to be vague and uncertain. disclosure appears extremely broad. I would rather go for language along the lines of Article 11(7) of ICC Rules.

²⁷ See CCSI/IIED/IISD Joint Submission.

²⁸ See ICSID Working Paper #4, pp. 294-296.

4. If there is any change in the information disclosed in accordance with this provision, the funded party shall immediately notify the tribunal and the other disputing parties.

5. If the funded party fails to comply with the obligations in this provision, the tribunal may:

(a) suspend or terminate the proceedings;

(b) take the fact into account when making decision on the costs of the proceeding;
or

(c) take any other appropriate measure.

Parties involved

38. Paragraph 1 requires the funded party to disclose certain information. The Working Group may wish to consider whether both claimants and respondent States should be subject to the same requirement (see para. 7 above), as respondent States may already be subject to disclosure requirements under domestic law (A/CN.9/1004, para. 84).

39. Paragraph 1 further reflects the view that disclosure should be made to the arbitral tribunal and the other disputing parties (A/CN.9/1004, para. 91),²⁹ which is in line with provisions in recently adopted investment treaties.³⁰ The Working Group may wish to consider whether rules need to be prepared for disclosing the information prior to the constitution of the tribunal, for example, in the notice of arbitration to an administering institution, appointing or other authority. In that case, that entity that received the information from the funded party would need to transmit the information to potential candidates and the tribunal once it is constituted.

Scope of disclosure

40. There was general agreement in the Working Group that the existence of third-party funding and the identity of the third-party funder should be disclosed (A/CN.9/1004, para. 89). Accordingly, paragraph 1(a) requires the disclosure of the name and the address of the third-party funder, in line with recently adopted investment treaties.³¹ The proposed ICSID rules provides for the disclosure of the name and address of the funder to the parties and arbitrators.

41. Paragraph 1(b) requires the disclosure of the name and address of the beneficial owner of the third-party funder as well as the name and address of any person with decision-making authority for or on behalf of the third-party funder (for example, an investment manager or advisor). This could assist in identifying potential conflicts of interest, particularly when the funding is channelled through a special purpose vehicle (A/CN.9/1004, para. 89).³² The Working Group may further wish to consider the extent to which such kind of information should be subject to disclosure requirements.

42. Paragraph 1(c) requires the disclosure of the funding agreement or the terms thereof. The Working Group may wish to consider whether there should be any exceptions to the disclosure requirement, in particular agreements that may be subject to other disclosure requirements. Some examples may be pro bono assistance arrangements, contingency arrangements, or inter-corporate financing agreements (A/CN.9/1004, para. 87).³³

²⁹ The ICCA Report suggests disclosure only to the tribunal, the arbitral institution and appointing authority (if any). See ICCA Report p. 14.

³⁰ CETA, Article 8.26; EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8.

³¹ EU-Singapore, Article 3.8; CCFTA, Article G-23 bis; Argentina-Chile Free Trade Agreement (2017) Article 8.27; Indonesia-Australia, Article 14.32; CETA, Article 8.26; EU-Vietnam, Article 3.37.

³² See Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388 (2016).

³³ See ICCA Report, p. 96, referring to the example of General Standard 7(a) of the IBA Guidelines, which provides that disclosure for the purpose of assessing conflicts applies not only to a party, but also to "another company of the same group of companies [as the party], or an individual having a controlling influence on the party in the arbitration"; See also draft provision 3(c) in the CCSI/IIED/IISD Joint Submission.

43. Paragraph 2 reflects the view that the tribunal should have the discretion to determine the extent of disclosure beyond the existence and identity of the third-party funder based on the circumstances of the case (see [A/CN.9/1004](#), para. 90). It also reflects the fact that depending on the regulation model, the information required by the tribunal may differ (for example, subparagraph (d) in relation to draft provision 5(1)(c)). The proposed ICSID rules on disclosure also provides the tribunal with the power to order the disclosure of further information if deemed necessary.³⁴

44. The Working Group may wish to consider whether any of the information listed in paragraph 2 should be moved to paragraph 1, yet taking into account that in the regulation models, the funded party would be incentivized to provide relevant information to the tribunal to ensure that it will be permitted to obtain third-party funding.

Timing and means of disclosure

45. Paragraph 3 reflects the view that disclosure should be made at an early stage of the proceedings or as soon as the funding agreement is concluded ([A/CN.9/1004](#), para. 89). While paragraph 3 requires disclosure to be made in the statement of claim to cater for ad hoc arbitration, if there were to be an administering institution, disclosure could be made earlier possibly in the notice of arbitration (see para. 39 above). Provisions in recently adopted IIAs generally require that disclosure is made at the time of the submission of the claim or immediately after the funding is received or a funding agreement is concluded.³⁵ Paragraph 3 also requires the funded party to disclose the information requested by the tribunal as promptly as possible after the request.

46. Paragraph 4 reflects the view that the disclosure requirement should continue throughout the proceedings ([A/CN.9/1004](#), para. 89) and requires the funded party to notify the tribunal and the other parties of any changes.

Non-compliance and possible sanctions

47. In light of views that clearly defined and strictly applied sanctions for non-compliance of the disclosure requirement would ensure an effective enforcement of those requirements ([A/CN.9/1004](#), para. 92), paragraph 5 lists the possible sanctions that the tribunal could impose (see also draft provision 6). Recent investment treaties have provided that the tribunal could suspend or terminate the proceedings,³⁶ take into account the non-compliance in its decision on costs,³⁷ or take any measure to be determined by it.³⁸

Linkage with disclosure requirements of the tribunal

48. It may be necessary to consider the relationship between the disclosure requirements in draft provision 7 and disclosure requirements of tribunal members ([A/CN.9/1004](#), para. 91).³⁹ For example, article 10(2)(a)(iv) of the proposed draft Code of Conduct for Adjudicators in International Investment Disputes (version two) requires adjudicators to disclose any financial, business, professional, or personal relationship within [the past five years] with any third-party funder with a financial interest in the outcome of the proceeding and identified by a party. Furthermore, they are required to make the disclosure prior to or upon accepting appointment (article 10(3) of the draft Code of Conduct). In order to do so, the proposed adjudicator would need to be aware of the identity of the third-party funder. The Working Group may wish to consider whether any rule would need to be developed to address this interplay.

³⁴ “[...] The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding.” See ICSID Working Paper #4, p. 295.

³⁵ See for example EU-Vietnam, Article 3.37; EU-Singapore, Article 3.8; Indonesia-Australia, Article 14.32 (2); draft Rule 14(3) of the amended ICSID Arbitration Rules.

³⁶ See Indonesia-Australia, article 14.32 (3).

³⁷ See EU-Vietnam, Article 3.37 (3); CIETAC International Investment Arbitration Rules (2017), Art. 27 (3).

³⁸ See Argentina-Chile Free Trade Agreement (2017), Article 8.27(2).

³⁹ See, for example, Indonesia-Australia, Annex 14-A: Code of Conduct of Arbitrators, Disclosure Obligations. See the proposed arbitrator declaration in accordance with draft rule 19(3)(b) of the amended ICSID Arbitration Rules.

Public disclosure

49. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration do not address the publication of information or documents about third-party funding. The Working Group may wish to consider whether any of the information disclosed in accordance with draft provision 7 should also be made available to the public similar to the procedural information under the Transparency Rules.⁴⁰

D. Other provisions

1. Scope of covered investor and investment

DRAFT PROVISION 8 (Investment and investor of a Party)

For the avoidance of doubt, third-party funding shall not be considered as covered investment under this [Agreement] and a third-party funder shall not be considered an investor of a Party.

50. Draft provision 8 clarifies that third-party funding shall not be construed as an investment protected under investment treaties and furthermore that a third-party funder would not be considered as an investor. The provision aims to preclude third-party funders from raising claims against a State on the basis of any loss or damage suffered by funding another claimant.

2. Security for costs

DRAFT PROVISION 9 (Security for costs)

Option A

When a party has entered into an agreement on or been provided third-party funding, the tribunal shall order the funded party to provide security for costs, unless the funded party demonstrates that:

- a) the respondent State was responsible for its impecuniosity; or*
- b) it is not able to pursue its claim without the third-party funding; and/or*
- c) the third-party funder would cover any adverse cost decision against the funded party.*

Option B

When a party has been provided third-party funding, the tribunal may order the funded party to provide security for costs.

51. Draft provision 9 addresses the ordering of security for costs where a party has received third-party funding. One of the objectives is to address concerns regarding the respondent States' inability to recover their costs, particularly when an impecunious claimant had brought the claim with the support of third-party funding (A/CN.9/1004, para. 94). The options reflect the different views expressed during the Working Group.

52. Option A reflects the view that security for costs should be mandatory when there is third-party funding,⁴¹ unless the funded party could justify that the ordering of the security for costs would be inappropriate. The Working Group may wish to consider whether such justifications should be provided (without which, the existence of third-party funding would make security for costs mandatory) and whether the list of justification in option A are adequate. Option B reflects the view that mere existence of third-party funding would not be sufficient to justify ordering security for costs (A/CN.9/1004, para. 94) and provides

⁴⁰ See CCSI/IIED/IISD Joint Submission, p. 5.

⁴¹ See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10 - Security for costs should be a mandatory requirement in cases funded by third parties.

flexibility to the tribunal. Option B could be supplemented by a rule that the existence of third-party funding is not by itself sufficient to justify an order for security for costs.

53. If a general provision on security for costs is to be prepared,⁴² draft provision 9 could possibly be merged with that provision, similar to those found in recent investment treaties stating that the tribunals shall take third-party funding into consideration when deciding to order security for costs.⁴³

54. The Working Group may wish to consider whether further guidance should be provided with regard to the amount of security to be ordered, including staggered or flexible mechanisms.

3. Allocation of costs

DRAFT PROVISION 10 (Allocation of costs)

Option A

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall not be included in the costs of the proceedings, unless determined otherwise by the tribunal.

Option B

Expenses related to or arising from third-party funding (including the return paid to the third-party funder) shall be borne by the funded party and cannot be allocated to the other party, unless determined otherwise by the tribunal.

55. Draft provision 10 reflects the view that costs related to third-party funding (including the return paid to the third-party funder) should not be recoverable (A/CN.9/1004, para. 93).⁴⁴ The costs of the ISDS proceedings that can be allocated among the parties vary depending on the applicable rules, which also provide for a range of ways to allocate such costs. However, they generally do not address whether third-party funding expenses can be recovered.⁴⁵

⁴² See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10; Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179), p. 5; Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182), p. 6.

⁴³ EU-Vietnam, Article 3.37 – “When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected”. For a different approach, see ICCA Report, p. 16:

D. Principles on Security for Costs

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including “after-the-event” (ATE) insurance, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder’s termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

⁴⁴ The funded party is typically obliged to pay the funder a return under the funding agreement, if successful, and might seek to recover these funding costs from the unsuccessful party. The question of the recoverability arises when tribunals determine the scope of the costs incurred by a party to be shifted to the other party.

⁴⁵ See USMCA, Section 14.D.13 (4); Australia-HK, Article 35. With a broader provision see SIAC Investment Arbitration Rules (2017), according to which third-party funding shall be considered in the decision on costs allocation; See also ICCA Report, p. 15:

C. Principles on Final Award (Allocation) of Costs

C.1. Generally, at the end of an arbitration, recovery of costs should not be denied on the basis that a party seeking costs is funded by a third-party funder.

C.2. When recovery of costs is limited to costs which have been “incurred” or “directly incurred”, the obligation of a party to reimburse the funder in the event of a successful outcome is generally sufficient for a tribunal to find that the costs of a funded party come within that limitation.

C.3. The question of whether any of the cost of funding, including a third-party funder’s return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of

56. For example, article 40(2) of the UNCITRAL Arbitration Rules only mentions that legal or “other costs” incurred by the party in relation to the proceedings are to be included in the costs of arbitration as long as the arbitral tribunal determines that the amount of such costs is reasonable.⁴⁶ Article 42 of the UNCITRAL Arbitration Rules provides that the costs of the arbitration shall in principle be borne by the unsuccessful party or parties, while the arbitral tribunal may apportion each of such costs between the parties if deemed reasonable.

57. There can be a number of ways to ensure that expenses relating to third-party funding cannot be recovered. One would be to exclude such expenses from the definition of the costs of the proceedings as provided for in option A. Another would be to provide a rule that such expenses are to be borne by the funded party and thus not recoverable, as stipulated in option B. Both options provide discretion to the tribunal to determine otherwise, for example, when it considers reasonable to include the expenses as the costs of the proceedings or to allocate such expenses.

58. If general provisions on costs and allocation thereof are to be prepared, draft provision 10 could possibly be merged with those provisions.

59. The Working Group may wish to consider whether a separate provision should be prepared allowing the tribunal to allocate the costs of the proceedings to a third-party funder, particularly where the respondent State is not able to recover costs from the funded party (A/CN.9/1004, para. 93). Without such a provision, a tribunal would generally lack the authority to allocate costs to the third-party funder, as it is not a party to the dispute.⁴⁷

4. Code of conduct for third-party funders

60. The Working Group may wish to consider whether a code of conduct for third-party funders should be prepared, which could be based on existing initiatives.⁴⁸ Some issues that could be addressed in such a code are:

- Disclosure, particularly of any conflict of interest;
- Transparency requirements with regard to the conduct of their business;
- Limitation on the return to be paid to the funder (for example, a maximum percentage of the amount awarded or claimed);
- Limitation on the control that the funder could have over the proceedings;
- Limitation on the number of claims that a funder could provide to support claims against a single State; and
- Due diligence on claims to prevent the funding of frivolous claims.

E. Collection of data

Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.

details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure.

C.4. In the absence of an express power, in applicable national legislation or procedural rules, a tribunal would lack jurisdiction to issue a costs order against a third-party funder.

⁴⁶ See for example UNCITRAL Arbitration Rules, Article 40 – “2. The term “costs” includes only: [...]”

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; [...]”

⁴⁷ See ICCA Report, p. 161.

⁴⁸ See Hong Kong Code of Practice for Third Party Funding of Arbitration issued December 7, available at https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf; See Code of Conduct for Litigation Funders by the Association of Litigation Funders, available at <https://associationoflitigationfunders.com/code-of-conduct/>.

David Nikolaus Probst

From: Mick Smith <mick.smith@calunius.com>
Sent: Donnerstag, 29. Juli 2021 13:21
To: David Nikolaus Probst; UNCITRAL
Cc: Anna Joubin-Bret; Corinne Montineri; Jae Sung Lee; Judith Knieper; Nikola KOVACIKOVA; Partners
Subject: RE: UNCITRAL WG III on ISDS reform: Initial draft on the regulation of third-party funding
Importance: High

Dear David,

We note the comment on the absence of any empirical data in the document and the following caveat from the Secretariat:

Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.

To assist the Secretariat in its gathering of data we would like to make the following submission on behalf of Calunius Capital LLP:

Of the approximately 300 actual or potential investment treaty claims considered for funding by Calunius over an eight-year period (December 2010 – November 2018), Calunius reached an agreement to fund 10 of them, i.e. less than 4%. Of these 10 cases, 7 have already won on liability and 3 are ongoing pre-merits hearing.

With kind regards,
Mick

Mick Smith | Partner & Co-Founder
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Calunius is authorised and regulated by the Financial Conduct Authority in the UK.

Calunius Capital LLP ("Calunius") is registered in England (No. OC324721), with its registered address at 10 Queen Street Place, London, EC4R 1AG.

From: David Nikolaus Probst <david.probst@un.org>

Sent: 01 July 2021 10:41

To: UNCITRAL <uncitral@un.org>

Cc: Anna Joubin-Bret <anna.joubin-bret@un.org>; Corinne Montineri <corinne.montineri@un.org>; Jae Sung Lee <jaesung.lee@un.org>; Judith Knieper <judith.knieper@un.org>; Nikola KOVACIKOVA <nikola.kovacikova@un.org>

Subject: UNCITRAL WG III on ISDS reform: Initial draft on the regulation of third-party funding

Dear all,

Following up on the expert group meeting in November last year, we are sending you attached the initial draft on the regulation of third-party funding for your information. This initial draft has been posted on the [UNCITRAL webpage](#) for comments by delegates to Working Group III until 30 July 2021.

Thank you again for your valuable input and we look forward to being in touch regarding further work on this topic.

Kind regards,

UNCITRAL Secretariat

David Probst

Associate Expert in International Trade Law

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FAO: UNCITRAL Secretariat

Date

30 July 2021

Comments on “Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding”

Further to the publication of the draft working paper on third-party funding (*TPF*) by the UNCITRAL Working Group III (*WGIII*) in May 2021, practitioners from the international arbitration practice at Freshfields Bruckhaus Deringer wish to provide the following high-level comments on the proposals outlined in the draft working paper. These represent the views of individual practitioners with experience working on funded investor-State arbitration cases.

We have not transposed the entirety of the draft provisions relating to our comments, except where this is required for clarity. Our comments are intended to be read alongside the draft working paper.

We thank the members of WGIII for their continued efforts to improve existing dispute resolution frameworks, and for the opportunity to provide comments on these proposed reforms. Should you have any queries in relation to these comments, please contact Ashley Jones (ashley.jones@freshfields.com).

1. Overall comments

- 1.1 We welcome the consideration given by WGIII to the increasingly important role played by TPF in ISDS proceedings. However, we note that the proposals contained in the draft working paper are very broad. If implemented, we are concerned that these proposals may have significant negative effects on the existing ISDS system, particularly with respect to access to justice. We are concerned that these proposals rest on an assumed but unexplained link between safeguarding the integrity of ISDS proceedings and limiting TPF. We would welcome WGIII’s further attention to this assumption, which we consider to be inconsistent with our experience of TPF in the ISDS system.
- 1.2 We consider that the key policy considerations raised by increased use of TPF in ISDS proceedings – namely (i) the ability of a tribunal to assess and address potential conflicts of interest, and (ii) protecting a respondent’s ability to recover its costs in the event it obtains a costs award in its favour – can be (and indeed are) managed under existing arbitral rules.
- 1.3 We also consider that these proposals may fail to give adequate weight to the significant benefits of TPF in respect of access to justice and may misconstrue the diverse reasons underpinning a claimant’s decision to use external funding in the pursuit of a claim.

2. Definitions

- 2.1 We consider that the definitions in draft provision 1 (*definitions*) are very broadly drawn – e.g. draft provision 1.4 which expressly covers both ‘direct’ and ‘indirect’ funding. We consider that these definitions may bring into scope a wide range of funding mechanisms outside of traditional specialised dispute resolution funders, including for instance mechanisms such as shareholder loans or intra-group lending.

3. Regulation models

(a) The Prohibition Model

- 3.2 We consider that all proposals contained in draft provision 2 (*prohibition model*) are unjustified. Moreover, we consider that any form of prohibition model would seem to ignore the significant benefits provided by a well-regulated system of TPF and would significantly disadvantage legitimate claimants.
- 3.3 We do not consider that the stated concern that TPF “*aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed*” to be supported by either empirical or anecdotal evidence. Claimants with weak claims will typically struggle to secure TPF because commercial lenders are naturally unlikely to invest in claims where the prospect of recovery of damages is low. In our experience, specialised litigation and arbitration funders typically mandate a rigorous due diligence phase, and apply high thresholds to assess the viability of any potential investment.
- 3.4 We consider that the proposal in paragraph 16 regarding a potential legal aid mechanism for small and medium-sized enterprises or impecunious claimants is impractical. Even if support was obtained for such a system among states (which we respectfully consider to be unlikely), it would appear to place an unnecessary and significant burden on the ISDS system. We consider that a legal aid system would not adequately prevent the stifling of legitimate claims consequent on a prohibition of TPF.
- 3.5 Moreover, we consider that any proposed prohibition model may reveal a failure to recognise the diverse reasons why ISDS claimants might obtain TPF. In our experience, a claimant may choose to obtain external funding in order to finance a claim for a number of commercial or strategic reasons, in circumstances where it has sufficient funds to finance the claim itself. It is not clear what policy considerations impugn this use of external lending in the context of an investment claim, as distinct from any other legitimate corporate activity.
- 3.6 We note that the prohibition model, in conjunction with the broad definitions proposed in draft provision 1, may lead to significant uncertainty. For instance, it is not clear whether these provisions would prohibit shareholder loans, where the funds were ultimately used to prosecute a claim, given that shareholders will ultimately benefit from damages obtained if a claim is successful.
- 3.7 We do not express an opinion on the proposed exclusion of non-profit grants from the remit of these proposals.

- 3.8 We do not consider that there is any policy justification for a separate regime to apply to funding provided to respondent states versus that which would apply to claimants, as is suggested in paragraph 16.

(b) The Restriction Model

- 3.9 We consider that all three types of restrictions proposed under the “Restriction model” may be unnecessarily and unjustifiably broad. We make the following high-level comments on these proposals:

- (i) Draft provision 3 (*Access to justice model*): we do not consider that limiting TPF to a claimant who can demonstrate that it would otherwise not be able to bring its claim serves a legitimate policy objective. We do not consider that a claimant which (via its directors or shareholders) chooses to use TPF for legitimate commercial reasons, but which does not require TPF to bring its claim, should be prevented from using TPF for that reason.
- (ii) Draft provision 4 (*Sustainable development model*): it is unclear to us why a link should be drawn between access to TPF and sustainable development, and the proposal does not seek to justify such a link. In our view, imposing such a pre-condition on accessing TPF would unnecessarily restrict access to TPF and would be difficult to assess in practice, which would lead to uncertainty and would be burdensome for parties and tribunals.
- (iii) Draft provision 5 (*Restriction list model*): as above, we consider this list to be very broadly drawn. As acknowledged in the draft working paper, draft provision 5.1(a) would have the effect of prohibiting the vast majority of TPF provided by specialised arbitration and litigation funders. Furthermore, we consider that there may be significant ambiguity in the references to ‘reasonableness’ in respect of a funder’s return or number of cases, which will lead to uncertainty and would be burdensome for parties and tribunals.

- 3.10 We do not consider that further restrictions on TPF suggested in paragraph 29, to include “*claims that are frivolous or without legal merit, in bad faith or with political purposes*”, is a necessary addition. The progress of bad faith, frivolous or abusive claims is already regulated by existing arbitral rules and practice. We strongly disagree with the suggestion that the use of TPF should be an element to be considered in determining whether a claim is frivolous or not. To the contrary, in our experience, unmeritorious claims are highly unlikely to receive funding, for the reasons explained above, and there are myriad reasons why a claimant may choose to avail itself of external funding for its claim.

4. Legal consequences and possible sanctions

- 4.1 In light of the comments made above in respect of draft provisions 1-5, we consider draft provision 6 (*Sanctions*) to be unjustified.

5. Disclosure of third-party funding

- 5.1 We consider that existing arbitral rules and practice in relation to disclosure and conflicts of interest are adequate and fit for purpose.
- 5.2 We do not consider that it is necessary for the purpose of assessing potential conflicts of interest to require that either the terms of the funding agreement or the funding agreement itself be mandatorily disclosed.
- 5.3 We do not consider that the additional categories of information in draft provision 7.2 are necessary. In particular, we do not consider it is in the interests of justice for a tribunal to require disclosure of any agreement between counsel and an external funder.

6. Other provisions

- 6.1 We express no view on draft provisions 8 or 10, or the proposed Code of Conduct suggested in paragraph 60.
- 6.2 In respect of draft provision 9 (*Security for costs*), we do not consider either Option A or B to be necessary additions.
- 6.3 Option A represents a significant departure from established practice among investment tribunals, which have largely been reluctant to order security for costs unless the applicant can demonstrate that “exceptional circumstances” exist to support the granting of security. Recent research undertaken by our team suggests that there are approximately 5 published examples of tribunals granting security for costs in ICSID or UNCITRAL proceedings, on a survey of approximately 60 applications.
- 6.4 Option A has the effect of removing the burden of proof from the party applying for security and shifting it to the funded party. Similarly, Option A assumes that the unfunded party would be entitled to recover some or all of its costs from the funded party, should the unfunded party succeed. However, depending on the applicable treaty, arbitral rules and / or law of the seat, this may not be the case. In any event, as noted above, Option A may fail to recognise the diverse reasons why a claimant may elect to use TPF – a claimant may have sufficient funds to meet any adverse costs award, and still choose to use external funding for other commercial reasons. We see no justification for the exception provided in draft provision 9(b). Finally, we consider that the exception provided in draft provision 9(a) may present the funded party (and indeed any tribunal) with some practical difficulties, in that it appears to require the funded party to prove, and the tribunal to adjudicate upon, a key element of its merits case at a preliminary stage. We do not consider it is appropriate to impose such an obligation.
- 6.5 We do not consider that Option B is a necessary addition. Under existing arbitral rules and practice, it is open to a tribunal that is empowered to award security for costs to do so where one party is funded.
- 6.6 We consider that the proposal in paragraph 52 that Option B could be supplemented by an express rule that the existence of TPF is not by itself sufficient to justify an order for security is appropriate and reflects the existing practice of investment tribunals.

F.A.O.
The UNCITRAL Secretariat

By email only
jaesung.lee@un.org
David.probst@un.org
cc: uncitral@un.org

30 July 2021

Dear Sirs,

UNCITRAL Working Group III: Possible reform of investor-State dispute settlement (ISDS); draft provisions on third-party funding ('UNCITRAL WG III TPF Reform Proposals')

Omni Bridgeway is the oldest Litigation Funder in the world, currently the largest by headcount operating since 1986 with 185 professionals working from 18 offices worldwide. Its client base includes a wide variety of claimants including exporters, multinationals, banks, insurance companies, investors and multilateral institutions, but also western governments, mostly through their Export Credit Agency's. In addition, Omni Bridgeway is a joint venture partner of the World Bank's International Finance Corporation under the Distressed Assets Recovery Program (DARP) to help financial institutions in the EMENA region with the funding and recovery of larger ticket Non-Performing Loans. Omni Bridgeway has supported for over 2 decades and continues to support claimants in investor-state disputes. Omni Bridgeway is listed on the Australian stock exchange since 2001, serving appropriate transparency and upholds the highest compliance and ESG standards¹.

Omni Bridgeway welcomes the opportunity to comment on the UNCITRAL WG III TPF Reform Proposals (the 'TPF Proposals') and thereby to assist the Secretariat and the Working Group in their considerations with respect to possible ISDS reform.

Omni Bridgeway comments and ILFA comments

Omni Bridgeway is a founding member of the International Legal Finance Association ('ILFA'). ILFA has submitted its comments also today and Omni Bridgeway refers to its content and confirms to the extent necessary its agreement and support. The ILFA submission makes unequivocally clear that *not one* of the three assumed concerns regarding the alleged adverse influence of third party funding on ISDS have any merit, nor the proposed amendments based upon them. Any comments provided in this separate submission are to be read as an extra suggestion that do not in any way derogate on the comments made by ILFA.

The rationale for this separate and additional submission lies in the necessity for Omni Bridgeway of a specific focus on two important issues it comes often across in its long experience as a funder of investment treaty claims through to and including the end, i.e. including the enforcement process in matters where an award debtor refuses to comply with an award.

¹ Its ESG commitment can be found at <https://omnibridgeway.com/docs/default-source/investors/corporate-governance/esg-statement.pdf?sfvrsn=287a01f6>

Omni Bridgeway has assisted with funding and its specialist enforcement expertise hundreds of clients, many of which had invested substantial sums in emerging economies, welcomed by FDI inviting measures and under the reassurance of treaty cover and ISDS mechanisms in case of adverse illegal, unfair and/or corrupt state behaviour. There are ample data available of these types of cases including those cited in the ILFA submission².

Omni Bridgeway has experienced first-hand that without the availability of legal finance to wronged investors, a significant subset of them would be forced to refrain from taking legal action to hold the offending State accountable and recover compensation for their losses; There can be no doubt that this would have the effect of allowing States to ignore their treaty obligations with impunity and would undermine the rule of law the UN seeks to promote as per for instance U.N. Sustainable Development Goal 16 ('SDG 16') and the UNCITRAL Arbitration Rules (1976, revised in 2010).

Two important issues not addressed: Additional suggestions for inclusion in the UNCITRAL WG III proposals

In a context where the UNCITRAL WG III clearly seeks to improve and innovate towards its goals as stated above under inter alia SDG16, such that ISDS redress mechanisms are fair, providing ample access to justice and equality of arms to make sure the much needed FDI is facilitated in those countries for which this is specifically relevant,³ the following issues need to be addressed:

1. There are now more unpaid ICSID and UNICTRAL awards in favour of investors, as the instances of noncompliance and delayed payment have increased significantly:
'[s]ince the 2000s, instances of non-compliance have increased and, by all accounts, are likely to continue to do so, especially where disputes are burgeoning, intra-EU or political' ⁴.

Omni Bridgeway experiences this in its daily practice first-hand. The list of cases cited in the article referenced in the footnote 4 is long.

2. Defendants increasingly refuse to pay their upfront share of the arbitration yet seek full procedural protections under the rules in the arbitrations. This means the wronged claimant needs to use its scarce hopefully remaining resources or seek additional funding to advance those fees to enjoy the protection against exactly the behavior that underlies that refusal to pay the arbitration contribution. Defendants refusing to contribute upfront their share of the arbitration fees have an incentive to do so because it increases the hurdle for a claimant to seek redress, yet it does not have any adverse consequences for the defendant, inviting this practice becoming a standard operating procedure for many.

Omni Bridgeway suggests to the UNCITRAL WG III to urgently seek a solution for the above returning issues in ISDS and is prepared to assist herewith as further stipulated below. The following may serve as a first guide towards improvement of relevant rules:

² See for instance footnote 56.

³ For the avoidance of any doubt on the important influence ISDS has on FDI see https://icsid.worldbank.org/sites/default/files/publications/ICSID_Benefits_English.23.2020.pdf

⁴ Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with ICSID Awards', ICSID Review (15 February 2021). <https://academic.oup.com/icsidreview/advance-article/doi/10.1093/icsidreview/siaa034/6135471>

- Public Default lists such as in use with certain specialized arbitration centers (for instance the International Cotton Association) should be mandatory, i.e. publicly listing defendants which are in default on a full and final award. Such a list should come from and be published on behalf of UNCITRAL to drive the point home that it supports the effectiveness of its ISDS mechanisms.
- Multilateral (finance) institutions should take such default lists into account in the context of further lending as intended originally in most multilateral finance treaties but not consistently upheld. A drive towards this from UNCITRAL is on point to confirm its support of the effectiveness of its ISDS mechanisms.
- Pre and post award interest should apply adequate market conform risk premiums in new arbitrations involving such default listed defendant.
- Defendants refusing to comply with full and final awards should forego on full procedural protections under the rules in new arbitrations.
- No entitlement to adverse costs orders should apply if the contribution to the arbitration fees has not been made, or if the defendant is on the default list in relation to prior arbitrations.

Omni Bridgeway will not cease to bring forward these concerns in the public debate. These are valid concerns based on actual data as provided here, in the ILFA submission and publicly available.

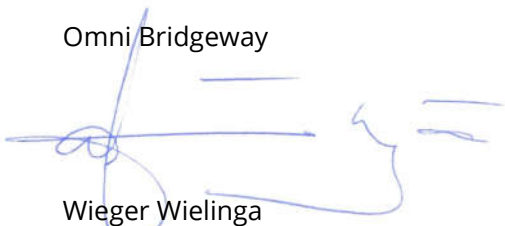
By contrast, as demonstrated, *not one* of the concerns in the underlying UNCITRAL WG III TPF Reform Proposals, have any basis in the facts, as the data highlighted in the ILFA submission show.

The elephant in the room for many readers in the relevant legal industry of the UNCITRAL TPF Proposals is the *why* of a reform proposal that seeks to for all practical purposes ban TPF from the ISDS landscape on such a suboptimal factual basis. Be this as it may, it is in our view dangerous to take a one-sided view whatever the motives of the moment may have been. What the risks are in the end, is exemplified by David Soley in the introduction of his article "*ICSID, an Effective Alternative to International Conflict*".⁵ It serves as a reminder why we should cherish and nourish and improve our ISDS mechanisms, for better or worse of either constituency, both claimants and defendants, but based on empirical, correct data.

Concluding remarks

Omni Bridgeway hopes that the Secretariat and the participants in UNCITRAL's WG III find these comments helpful and is ready to constructively assist and work with the Secretariat and UNCITRAL WG III with respect to the TPF Proposals or other proposals that would make for a more effective ISDS mechanism.

Omni Bridgeway



Wieger Wielinga

Managing Director Enforcement and EMEA

⁵ David Soley, *ICSID, an Effective Alternative to International Conflict*, *The International Lawyer*, 1985 VOL 19, No2, P 521. <https://scholar.smu.edu/cgi/viewcontent.cgi?article=3779&context=til>



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30 July 2021

Dear Sirs,

UNCITRAL Working Group III: Possible reform of investor-State dispute settlement (ISDS); draft provisions on third-party funding ('UNCITRAL WG III TPF Reform Proposals')

Therium Capital Management Limited is a UK based company and litigation sub-advisor to Therium Group Holdings, a Jersey company, and its affiliates. Therium Group Holdings is investment adviser to Therium funds that provide disputes funding for large-scale litigation and arbitration in the UK and globally (hereinafter, 'Therium').

Since 2009, Therium has raised in excess of USD1bn for deployment into the global funding market, including in support of ISDS claims. Therium is a founder member of the International Litigation Finance Association ('ILFA') on whose management committee Neil Purslow, Co-Founder and Chief Investment Officer of Therium, sits. Therium's Timothy Mayer was a member of the ICCA - Queen Mary Task Force on Third Party Funding which published its report in 2018 (the 'ICCA-QM Report') and is a member of the ILFA Working Group tasked with considering and commenting on the UNCITRAL WG III TPF Reform Proposals (the 'Proposals').

Therium welcomes the opportunity to provide comments on the Proposals. Therium has seen ILFA's comments on the Proposals (the 'ILFA Comments'). Therium fully endorses the ILFA Comments. Consequently, Therium does not propose here to address every matter raised or suggestion made in the Proposals; rather, Therium will aim to provide general comments and examples of ISDS claims in which Therium (or its members) has been involved to illustrate *inter alia* the important role that third-party funding plays in providing access to justice and support of the rule of law, principles which underpin the U.N. Global Compact and Sustainable Development Goals.

Where Therium does not specifically address a matter or suggestion set out in the Proposals, it does not indicate that Therium agrees with or accepts it.

General remarks

Regrettably, the Draft Provisions belie their true purpose, which is not to address legitimate concerns that arise from the use of third-party funding in ISDS based on empirical data, but to support an agenda, driven by States, academics and NGOs, whose goal is to prevent claimant investors using third-party funding at all in the ISDS context. This is perfectly illustrated in the Proposal by section B of part II, entitled 'Regulatory models'; the first regulatory 'model' suggested is not regulation at all, but the prohibition of third-party funding.

This approach is wholly out of step with the trend world-wide towards embracing disputes funding on grounds of public policy given the benefits it has in promoting access to justice; it is an open attack on claimant investors' access to justice against States. Moreover:

- it sits uncomfortably with the U.N.'s own Sustainable Development Goal 16 which recognises that *'conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.'*
- it threatens effective access to justice in ISDS, removing State accountability and thereby discouraging foreign direct investment into countries where it is needed most.

As one leading funder has remarked, the Proposals are *'a solution in search of a problem'* (Burford). Therium agrees with that. To the extent that they address issues such as the definition of third-party funding, disclosure, security for costs and costs generally, they proceed along a road well-travelled in the ICCA-QM Report, they offer nothing new (or in need of fixing), they ignore recent developments in arbitral jurisprudence and they offer not one scintilla of evidential data to justify their position, in fact expressly recognising that the Secretariat has encountered difficulty in obtaining such data (part II, 'E', 'Collection of data'), which is itself surprising for the reasons set out in the ILFA Comments.

In the circumstances, the Proposals should be treated with extreme caution.

Access to justice and the rule of law

The importance of third-party funding in this regard should not be underestimated. Timothy Mayer was involved in the funding of the claimants' case in *Kardassopoulos & Fuchs vs. Republic of Georgia* (ICSID Case No. ARB/07/15, Award 3 March 2010), where the tribunal found that

the State had breached its treaty obligations owed to Mr. Kardassopoulos and Mr. Fuchs in respect of their investment into an energy project. The Award is replete with findings against the State and its alleged justification for the events that transpired:

'Viewed in its totality, the process by which the Respondent took GTI's rights, and thereby expropriated Mr. Kardassopoulos' investment, cannot by any definition be considered to have been carried out under due process of law. Moreover, the Respondent's failure to grant Mr. Kardassopoulos a reasonable chance within a reasonable time to have his claims heard following the expropriation of his investment unquestionably, in the eyes of the Tribunal, falls short of what is required by this criterion. Accordingly, the Tribunal determines that the expropriation of Mr. Kardassopoulos' investment was carried out in breach of Article 13(1) of the ECT.' [404]

'Based on the foregoing, the Tribunal determines that the Respondent expropriated Mr. Kardassopoulos' rights by Decree No. 178 and that such expropriation was unlawful by virtue of the Respondent's failure to carry out the expropriation in accordance with due process of law. The Tribunal also finds that the Respondent breached the ECT by reason of its continuing failure to pay prompt, adequate and effective compensation, as required by the terms of Article 13(1) of the ECT.' [408]

And with respect to Mr. Fuchs:

'The process which ultimately unfolded following constitution of the compensation commission in 1997 can only be described as non-transparent, arbitrary and unfair. The relevant question is not whether the Georgian Government had an obligation to include the Claimants in their deliberations. Rather, the record shows that the Claimants did substantially participate in the compensation process, both formally when the 1997 Commission was established and informally after Mr. Fuchs was removed from its roster. Georgia was, however, obligated to act reasonably, transparently and in a non-arbitrary manner towards the Claimants. The evidence on the record demonstrates that this is not, in fact, what transpired.' [446]

The State's conduct in *Kardassopoulos & Fuchs* exemplifies that which the U.N. Global Compact strives against. Mr. Kardassopoulos and Mr. Fuchs invested into Georgia at a time when the State was actively seeking foreign investments as a means of *inter alia* developing its national energy infrastructure. The investors needed good laws, institutions and processes but found none of them. Their only option was to seek redress through ISDS. The cost of so doing amounted to circa USD8m. Without third-party

funding, Mr. Kardassopoulos and Mr. Fuchs would have been left without a remedy and the State's unlawful conduct would have enjoyed impunity.

Therium has supported a significant number of ISDS claims which would not have been viable without the assistance of third-party funding. Some of those cases are publicly reported.

In October 2018 the government of Malaysia settled a claim by the estate of the late *Boonsom Boonyanit*, a Thai national who, in 1988, had been fraudulently deprived of her Malaysian development property. The estate had invoked the 1987 ASEAN agreement and accused Malaysia of breaching it as a result of the failure of its domestic courts - including the highest Malaysian appellate court - to provide relief from the fraud. In 2010, in an unrelated domestic dispute, Malaysia's highest court overturned its previous decision on the law, describing it as '*highly regrettable*'. Boonayanit's estate, having secured funding from Therium, alleged that the court's admissions proved that it had acted '*wrongfully and egregiously*' and denied Boonyanit the right to enjoyment of her investment, in breach of the ASEAN agreement. After receipt of a notice of dispute, but prior to formal commencement of proceedings, Malaysia settled.

The Boonyanit estate had no means of financing a claim against the Malaysian government. Malaysia's wrongful acts would have gone unremedied but for Therium's funding; justice would have been denied. While Mrs. Boonyanit's interest was not in energy or infrastructure, the resolution of her estate's claim via ISDS strengthened the rule of law in the absence of domestic relief, encouraging foreign direct investment.

Other non-public ISDS claims successfully funded by Therium include a claim involving the expropriation of a mining concession by a Central American State, leading to a damages award in favour of the claimant corporation. The 'taking' had rendered the claimant financially incapable of pursuing the claim.

Other non-public ISDS claims currently ongoing and funded by Therium commonly feature scenarios where the very State conduct complained of by the investor is the cause of their impecuniosity. We have seen State conduct which irreparably damages individual livelihoods, threatens personal safety, and causes mental health issues. Without the backing of a funder, this conduct would be at risk of slipping under the radar and undermining the very goals that the U.N. is committed to achieve.

State compliance

In the 2020 Queen Mary University – Corporate Counsel International Arbitration Group (CCIAG) survey (*‘Investors’ perceptions of ISDS*), the authors cite *‘an alleged legitimacy crisis of ISDS’* permeating the ISDS community. The principal orators for that are *‘civil society and NGOs as well as...a good number of academics’*. From Therium’s experience of funding ISDS claims, any crisis there is lies in the questionable attitude of many States towards their treaty obligations and in particular, compliance with arbitral awards. As to the latter, *Crystallex International Corporation vs. Venezuela* (ICSID Case No. ARB(AF)/11/2, Award 4 April 2016) is the obvious example, but there are many more and the data shows an increasing tendency on the part of States to fail to comply with awards or delay payment. Such reprehensible conduct rides a coach and horses through the U.N. Global Compact, jeopardises continued foreign direct investment with the benefits that brings to local communities and the broader economy, frustrates sustainable development goals and increases the risk of corruption. It would seem sensible for the ISDS community to address this worrying trend, rather than focussing on attempts to frustrate the good-faith assertion of treaty rights.

Concluding remarks

Therium stands ready to assist UNCITRAL WG III with respect to the Proposals and looks forward to doing so in the near future.

Yours sincerely,

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