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Possible reform of investor-State dispute settlement (ISDS)

Submission from the Government of Kazakhstan

Note by the Secretariat

The present note transmits a submission received on 14 October 2019 from the Government of Kazakhstan in preparation for the thirty-eighth session of Working Group III. The submission is reproduced as an annex in the form in which it was received.



Annex

Third-party funding

Third-party funding is a rapidly expanding industry in international arbitration. This mechanism has already drawn the attention of States, scholars and arbitral institutions. However, despite the increased attention and number of recommendations regarding the procedures, ethics and related policy issues, many questions remain open.

The Republic of Kazakhstan also expresses its concerns about using third-party funding in practice without having any scientific and theoretical assessment. There are different approaches to using third-party funding mechanism and addressing it in treaties. Some jurisdictions have simply banned using third-party funding while others require the funded party to promptly disclose the funder's name and address. Some treaties go further and provide that the funded party must notify the tribunal of the nature of the funds.

Considering the nature of third-party funding mechanism and the principle of access to justice, the Republic of Kazakhstan believes that third-party funding must be regulated and considered by tribunal during the arbitration proceedings. In this regard, we propose the third-party funding clause below, which could be incorporated into existing rules of international arbitration institutions and bilateral investment treaties.

Third-party funding clause:

1. In case of Third-Party Funding, the disputing party benefiting from it shall notify the other disputing party and the Tribunal of the existence and nature of the funding arrangement, and the name and address of the third-party funder.
2. Such notification shall be made at the time of submission of a claim, or, when the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded, or the donation or grant is made.
3. "Third-Party funding" means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute, or any funding provided by a natural or juridical person who is not a party to the dispute in the form of a donation or grant.
