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**United Nations Commission on  
 International Trade Law**  
**Working Group III (Investor-State  
 Dispute Settlement Reform)**  
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## Possible reform of investor-State dispute settlement (ISDS)

### Third-party funding – Possible solutions

Note by the Secretariat

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## I. Introduction

1. At its thirty-seventh session, the Working Group concluded that it would be desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third-party funding in investor-State dispute settlement (ISDS) (A/CN.9/970, para. 25). Accordingly, the Secretariat was requested to undertake preparatory work on third-party funding in investment disputes based on document A/CN.9/WG.III/WP.157 and to suggest possible solutions in light of the various policy questions (A/CN.9/970, para. 84).
2. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic and does not seek to express a view on the reform options described, which is a matter for the Working Group to consider.<sup>1</sup>

## II. Third-party funding

### A. Identified concerns and legal framework

#### 1. Identified concerns

3. At the thirty-seventh session of the Working Group, it was emphasized that the phenomenon of third-party funding was one of great concern and the necessity of developing reforms in that area was underlined, particularly in light of the current lack of transparency and of regulation of third-party funding (A/CN.9/970, para. 18).
4. A number of concerns were identified during the deliberations of the Working Group (A/CN.9/970, paras. 18–19). Certain concerns related to the impact of third-party funding on different aspects of ISDS procedure, including the lack or apparent lack of independence and impartiality of arbitrators and the costs of ISDS proceedings and security for costs. Other concerns related to the impact of third-party funding on the current system of investment protection and ISDS as such. In this regard, it was said that third-party funding introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it (A/CN.9/970, para. 19).
5. The following concerns were mentioned during the deliberations of the Working Group:

#### *Impact of third-party funding on the proceedings*

- Conflicts of interest of arbitrators arising out of third-party funding;
- Influence of third-party funding on decision on cost allocation (incurance of costs and potential shift of burden of proof);
- Relevance of third-party funding for decision on security for costs;

<sup>1</sup> This Note was prepared with reference to a broad range of published information on the topic, including the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (April 2018); the Handbook on Third-Party Funding in International Arbitration, Nikolaus Pitkowitz Editor (2018); Third-Party Funding in International Arbitration, Chapter 14 – Third-Party Funding in Investor-State Arbitration, Lisa Bench Nieuwveld and Victoria Shannon Sahani (2017); The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement, Brooke Guven and Lise Johnson, May 2019, Columbia Center on Sustainable Investment (CCSI) Working Paper 2019; See also see CCSI/IIED/IISD Joint Submission: Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement, 15 July 2019; publications from members of the Academic Forum, available at <https://www.cids.ch/academic-forum-concept-papers>, include Stavros Brekoulaki and Catherine Rogers, 'A Framework for Understanding Practice and Policy Regarding Third-Party Financing in ISDS', *Academic Forum on ISDS Working Paper*. Members of the Practitioners Group have also been consulted.

- Protection of privileged information disclosed to a third-party funder and extent to which the third-party funder is bound by confidentiality obligations;
- Control of third-party funders over the arbitration process and negative impact on amicable resolution of disputes.

*Impact of third-party funding on the ISDS system*

- Impact of third-party funding on the increase of the number of ISDS cases and frivolous claims;
- Impact of third-party funding on the promotion and protection of investments;
- Imbalance created by the practice of third-party funding as respondent States generally do not have access to it.

6. It was also said during the deliberations that there was a need for a clear scope of application and for balance in any solution to be developed, so that proposed solutions would not result in limiting access to justice particularly for small and medium-sized enterprises (A/CN.9/970, para. 22).

## 2. Legal framework

7. The Working Group may wish to note that third-party funding in ISDS remains largely unregulated. Third-party funding has been historically prohibited in national legislation of many common law countries under the doctrines of champerty, maintenance, barratry or usury.<sup>2</sup> Certain civil law jurisdictions prohibit contingency fee agreements.<sup>3</sup> However, recently, a few jurisdictions including Singapore, Hong Kong and Nigeria have taken steps to liberalize the legal framework for third-party funding in commercial arbitration.<sup>4</sup>

8. Notably, several recent investment treaties include provisions addressing third-party funding. The definitions of third-party funding in these treaties are relatively broad and generally cover the financing of proceedings by a non-party with an economic interest in the outcome of the case, including agreements with legal counsel and insurance companies.<sup>5</sup> Certain treaties have banned third-party funding completely.<sup>6</sup> Several investment treaties have introduced disclosure requirements, mostly requiring the disclosure of the existence and address of the third-party funder

<sup>2</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 6.

<sup>3</sup> Handbook on Third-Party Funding in International Arbitration, Nikolaus Pitkowitz Editor, p. 7.

<sup>4</sup> On 10 January 2017 Singapore amended the Civil Law Act to establish a framework for third-party funding in international commercial arbitration (see <https://www.mlaw.gov.sg/content/minlaw/en/news/legal-industry-newsletters/note-by-senior-minister-of-state-for-law--indranee-rajah-s-c---o13.html>); The amended Hong Kong Arbitration and Mediation Legislation of 2017 states that third-party funding is not prohibited under the common law doctrines of maintenance and champerty (see <https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf>); See also the Nigerian Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017, <http://arbitrationblog.kluwerarbitration.com/2018/06/03/jumping-tpf-bandwagon-nigerias-new-arbitration-bill-embraces-third-party-funding/>.

<sup>5</sup> See Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Article 8.1; European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.28; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018), Article 3.1; Canada-Chile Free Trade Agreement (CCFTA) (in force since 5 February 2019): Article G-23 bis; Slovak Model BIT (as quoted in Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 62).

<sup>6</sup> See Argentina-United Arab Emirates Agreement for the Reciprocal Promotion and Protection of Investments (signed on 16 April 2018), Article 24: "Third party funding is not permitted".

to the other disputing party and the tribunal.<sup>7</sup> Another treaty provides that the tribunal shall take third-party funding into account when deciding on security for costs.<sup>8</sup>

9. Third-party funding in ISDS is also being addressed in the ongoing ICSID Rules and Regulation Amendment Process, with a focus on avoiding conflicts of interest between arbitrators and third-party funders.<sup>9</sup> The draft provision under consideration requires disclosure of the existence of third-party funding and the name of the funder. A provision on security for costs (Article 51) is also under consideration but currently does not mention third-party funding as a criterion.<sup>10</sup>

## B. Possible reform options

10. As requested by the Working Group, this section provides an overview of available reform options, in light of the suggestions made during the deliberations of the Working Group at its thirty-seventh session. The reform options discussed so far include: (i) prohibiting third-party funding entirely in ISDS; and (ii) regulating third-party funding by, for example, introducing mechanisms to ensure a level of transparency including through disclosures (which could also assist in ensuring the impartiality of the arbitrators), by imposing sanctions for failure to disclose, and by providing rules on third-party funders and on when they could provide funding (A/CN.9/970, para. 20). Suggestions for a reform in the area of third-party funding can also be found in Submissions by States.<sup>11</sup>

### 1. Definition of third-party funding

11. It was suggested that, for any reform to be effective, a clear definition of “third-party funding” (or “third-party funder”) would need to be developed (A/CN.9/970, para. 21).<sup>12</sup> The Working Group may wish to note that there are different types of third-party funding and their definition varies across different sources of law.<sup>13</sup>

<sup>7</sup> See Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Article 8.26; European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.37; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018), Article 3.8; Canada-Chile Free Trade Agreement (CCFTA) (in force since 5 February 2019): Article G-23 bis ; Slovak Model BIT (as quoted in Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 62); See also a French non-paper, *Vers un nouveau moyen de régler les différends entre Etats et investisseurs*, May 2015, accessible under [https://www.diplomatie.gouv.fr/IMG/pdf/20150530\\_isds\\_papier\\_fr\\_vf\\_cle432fca.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/20150530_isds_papier_fr_vf_cle432fca.pdf); See also Rwanda-United Arab Emirates Agreement on the Promotion and Reciprocal Protection of Investments (2017), Article 18.

<sup>8</sup> See European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), 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.”

<sup>9</sup> See List of Topics for Potential ICSID Rule Amendment, available under <https://icsid.worldbank.org/en/amendments>; ICSID Rules and Regulation Amendment Process, Working Paper 2, Vol. 1, para. 128.

<sup>10</sup> ICSID Rules and Regulation Amendment Process, amended ICSID Arbitration Rules, Working Paper 2, Vol. 1, Article 13.

<sup>11</sup> A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; ; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission by the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea.

<sup>12</sup> See also the Secretariat’s Note on third-party funding, document A/CN.9/WG.III/WP.157, paras. 5–10 and document A/CN.9/935, para. 90.

<sup>13</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 17.

12. The Working Group may wish to consider the following issues when developing the elements in a definition of third-party funding:

- Funding provided by the counsel of the disputing party under a pro bono, contingency fee or conditional fee arrangement;<sup>14</sup>
- Different forms of insurance policies, including after-the-event insurance;
- Equity investments by third-party funders.

13. The Working Group may also wish to consider the definitions of third-party funding that have been included in several recent investment treaties.<sup>15</sup>

14. In addition to these existing forms of financing, there is a wide range of other funding models that have been developed more recently and are rapidly evolving, with increasingly diverse and sophisticated options becoming available. Certain definitions focus on the risk assumption by third-party funders in accepting cases and the level of control a funder exercises over a case, rather than on the forms of financial arrangements.

## 2. Prohibition of third-party funding

15. One possible solution to address the concerns identified is to prohibit third-party funding in ISDS (A/CN.9/935, para. 92; A/CN.9/970, para. 20).<sup>16</sup> This reform option

<sup>14</sup> Counsel are generally subject to professional disclosure requirements and ethical rules.

<sup>15</sup> Definitions included in recently concluded investment treaties include the following: Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Article 8.1:

“third party funding means any funding provided by a natural or legal 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 either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.”;

European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.28:

“i. ‘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”;

European Union-Singapore Investment Protection Agreement (signed on 19 October 2018), Article 3.1 Scope and Definitions [...]:

“2. For the purposes of this Section, unless otherwise specified: [...] (f) ‘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 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.”;

Canada-Chile Free Trade Agreement (CCFTA) (in force since 5 February 2019):

Article G-23 bis:

“[...] 3. For the purpose of this Article, third party funding means any funding provided by a person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.”;

Slovak Model BIT (as quoted in Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 62):

“A request for consultations must contain identification of any government, person or organization that has provided or agreed to provide any financial or other assistance to the investor in connection with the claim, or has an interest in the outcome of the claim.”

See also Rule 7 (a) of the IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on Thursday 23 October 2014, requiring the disclosure of “any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.

<sup>16</sup> As an illustration, a prohibition of third-party funding can be found in the Argentina-United Arab Emirates Agreement for the Reciprocal Promotion and Protection of Investments (signed on

is also mentioned in Submissions.<sup>17</sup> Under this option, the potential limitation of the access to justice may need to be addressed through other mechanisms such as a legal aid mechanism.

*Prohibition of third-party funding*

16. The prohibition of third party-funding would require a clear definition of the prohibited forms of funding. Moreover, the consequences of non-compliance with the prohibition would need to be considered. These may include, for instance, suspension of the proceedings until compliance with the prohibition, discontinuance of the proceedings, shifting of the costs to the party that breached the prohibition or the inadmissibility of the funded claim.

*Legal aid mechanism*

17. The Working Group may wish to consider whether a prohibition of third-party funding would need to be accompanied by a legal aid mechanism, in order to address possible impact on access to justice, particularly for small and medium-sized enterprises (A/CN.9/970, para. 22).<sup>18</sup> This mechanism may be financed by States or the private sector through various means, including dedicated funds or proceeds from ISDS cases.

18. The Working Group may wish to note that a legal aid mechanism could be established as a stand-alone mechanism, or under the umbrella of an advisory centre on international investment law (see document A/CN.9/WG.III/WP.168).

19. The establishment of a legal aid mechanism would require the consideration of a number of elements, including the financing of the mechanism and the requirements for benefiting from the legal aid (for instance, prima facie evidence on impecuniosity or equivalent legitimate interest, i.a. those of small and medium-sized enterprises with limited financial capacities; prospects of the claim; and absence of bad faith).

### **3. Regulation of third-party funding**

20. The Working Group may wish to consider developing regulations for third-party funding in ISDS in order to address the identified concerns. Regulations might include the following elements, which will be further outlined below: (a) limiting access to third-party funding to cases of impecuniosity of the claimant or equivalent legitimate interests; (b) requiring the parties to disclose the existence and identity of the funder, or terms of the funding agreement to the other party and/or the tribunal; (c) clarifying instances where third-party funding should be considered in the decision on security for costs; and (d) clarifying whether the costs for securing third-party funding are costs of the arbitration and are therewith to be considered in a decision on costs by the tribunal. Further, the Working Group may wish to consider complementing a regulation with a legal aid mechanism (e) and/or a code of ethics for third-party funder (f). Regulation on these matters might also cover the legal consequences in case of non-compliance.

#### **(a) Limitation of third-party funding to cases of impecunious claimants**

21. The Working Group may wish to consider possible limitations on access to third-party funding. For instance, it may wish to consider whether third-party funding in ISDS could be limited to cases brought by claimants who could otherwise not afford to pursue their rights in ISDS proceedings. This may particularly apply to

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16 April 2018), Article 24, which provides that “Third party funding is not permitted”; See also The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement, Brooke Guven and Lise Johnson, May 2019, Columbia Center on Sustainable Investment (CCSI) Working Paper 2019, pp. 38 f.

<sup>17</sup> A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.

<sup>18</sup> Legal aid is also mentioned as an alternative funding model in Handbook on Third-Party Funding in International Arbitration, Nikolaus Pitkowicz Editor, p. 7, 117, 394 f.

impecunious claimants, or small and medium-sized enterprises with limited financial capacities. Such limitations might exclude third-party funding with the objectives of risk management, of reduction of legal budgets, and of taking the cost of pursuing arbitration off-balance sheet.<sup>19</sup> In that context, the Working Group may wish to consider the following questions.

- *How to demonstrate impecuniosity or equivalent legitimate interests*

22. The Working Group may wish to consider whether admissibility of third-party funding should be made subject to evidence that the claimant is either impecunious or has other legitimate reasons to apply for third-party funding.

23. Impecuniosity could be demonstrated by self-disclosure of documents proving the claimant's alleged financial distress. The admissibility might be extended to cases in which the claimant is not impecunious but has an equivalent legitimate financial reason to resort to third-party funding. This might cover situations where a small and medium-sized enterprise is confronted with an ISDS case and the legal costs would exceed its financial capacities. Questions for consideration include how the limitation would be enforced and who could be tasked with the decision if third-party funding is secured before the constitution of the tribunal.

- *Whether to take into consideration prospects of success of the case and how to demonstrate no abuse of rights*

24. Admissibility of third-party funding may further be made subject to the requirement that the claimant's case has sufficient prospects of success and is not brought in bad faith.<sup>20</sup> A question for consideration is how this pre-requisite would work in practice.

- *How the decision on admissibility of third-party funding would be made*

25. The Working Group may wish to consider the various options for deciding on the admissibility of third-party funding under this approach. For instance, the decision on the admissibility of third-party funding may be made by the ISDS tribunal, a permanent standing mechanism or a designated institution upon request by a party. Such request may have to include prima facie evidence of the impecuniosity or other legitimate reasons, the prospects of success of the claim, good faith intentions of the claimant as well as the name and address of the third-party funder and the terms of the funding agreement. Moreover, the timing of this request and its integration in ISDS procedure would have to be determined.

**(b) Requiring the disclosure of third-party funding**

26. The Working Group may wish to consider a requirement to disclose third-party funding in order to address the concerns with regard to potential conflicts of interest

<sup>19</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 20.

<sup>20</sup> The request would have to be based on prima facie evidence, which may prove difficult in practice.



of arbitrators.<sup>21</sup> This reform option is also mentioned in Submissions.<sup>22</sup> The Working Group may wish to consider the following questions regarding a requirement for disclosure of third-party funding.

- *Disclosure of existence and identity of third-party funder and terms of the funding agreement*

27. A disclosure requirement may cover the existence of third-party funding and the identity of the third-party funder.<sup>23</sup> It would need to ensure that the identity of the ultimate funder is revealed. It may be noted that as funders routinely resell their investments, the requirement might need to be ongoing.

28. Questions for consideration include whether (i) a disclosure requirement should extend to the terms of the funding agreement, and if so, whether regulations would

<sup>21</sup> By way of illustration, the Working Group may wish to note the following investment treaties that address the matter:

Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Article 8.26:

“1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder. 2. The disclosure shall be made at the time of the submission of a claim, or, if 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.”;

European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.37:

“1. In case of third-party funding, the disputing party benefiting from it shall notify the other disputing party and the division of the Tribunal, or where the division of the Tribunal is not established, the President of the Tribunal 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.”;

European Union-Singapore Investment Protection Agreement (signed on 19 October 2018), Article 3.8 Third Party Funding:

“1. Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third party funder. 2. Such notification shall be made at the time of submission of a claim, or without delay as soon as the third party funding is agreed, donated or granted, as applicable.”;

Canada-Chile Free Trade Agreement (CCFTA) (in force since 5 February 2019):

Article G-23 bis: Third Party Funding:

“1. If there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder. 2. The disclosure shall be made at the time of the submission of a claim or, if 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”;

Slovak Model BIT (as quoted in Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 62),

“A request for consultations must contain identification of any government, person or organization that has provided or agreed to provide any financial or other assistance to the investor in connection with the claim, or has an interest in the outcome of the claim.”

<sup>22</sup> [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco; [A/CN.9/WG.III/WP.162](#), Submission from the Government of Thailand; [A/CN.9/WG.III/WP.163](#), Submission from the Governments of Chile, Israel and Japan; [A/CN.9/WG.III/WP.164](#), Submission from the Government of Costa Rica; [A/CN.9/WG.III/WP.174](#), Submission by the Government of Turkey; [A/CN.9/WG.III/WP.176](#), Submission from the Government of South Africa; [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

<sup>23</sup> Regarding exiting disclosure requirements in investment treaties see above **para. 7**; Also, the systematic disclosure of the existence and identity of the third-party funder is discussed in the ICSID rules amendment process. It may be noted that the SIAC rules – which only provide for an affirmation of the tribunal’s power to order disclosure of third-party funding, extended this power to “where appropriate, details of the third-party funder’s interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability”.



also need to include provisions to protect confidentiality;<sup>24</sup> and (ii) the scope of disclosure of the funding arrangement should be pre-determined or ordered by the tribunal on a case-by-case basis.<sup>25</sup> The requirement of disclosure of the terms of the funding agreement is suggested in Submissions.<sup>26</sup>

- *Systematic disclosure or only affirmation of power of tribunal to order disclosure*

29. The Working Group may wish to consider whether disclosure of third-party funder should be systematic and mandatory or if the affirmation of the tribunal's power to order the disclosure of third-party funding at any time would be sufficient.<sup>27</sup> A disclosure requirement may also be designed as a phased model, with a systematic disclosure of the existence and identity of the funder and an affirmation of the tribunal's power to order disclosure with regard to the terms of the funding agreement on a case-by-case basis.

- *Disclosure to the tribunal only or also the other disputing party*

30. The Working Group may wish to consider, whether third-party funding would have to be disclosed to the tribunal only or also to the other disputing party. While disclosure to the other disputing party may not be necessary in order for the tribunal to identify potential conflicts of interest, the other party may claim the right to comment on a potential conflict of interest. Further, the Working Group may wish to consider if a broad disclosure requirement is desirable against the background of the transparency sought in third-party funding. Recent investment treaties contain disclosure of third-party funding "to the other disputing party and the tribunal".<sup>28</sup>

- *Consequences of failure to disclose*

31. The Working Group may wish to consider the consequences of the failure to disclose, which may include, for instance, the suspension of the proceedings to order compliance or a cost shifting rule burdening the party in violation of the disclosure obligation.

- *Requirement to communicate funding agreement to a Transparency Registry*

32. At the thirty-seventh session, a suggestion was made that a regulation should ensure a level of transparency (A/CN.9/970, para. 20). Against this background, the Working Group may wish to consider fostering transparency beyond a mere disclosure requirement, for instance by making necessary information on third-party funding in ISDS available through the transparency standards developed by

<sup>24</sup> See also The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement, Brooke Guven and Lise Johnson, May 2019, Columbia Center on Sustainable Investment (CCSI) Working Paper 2019, p. 40; This option might be particularly relevant, if a regulation limits the admissibility of third-party funding to cases of impecunious claimants or claimants with equivalent legitimate interests (See under **II.B.3.a.**).

<sup>25</sup> See for instance EuroGas Inc. and Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14 and South American Silver v. Plurinational State of Bolivia, PCA Case No. 2013-15; Regarding disclosure of the details of the financial arrangements see Muhammet Cap & Sehil Insaat Endustri ve Tivaret Ltd. Sti v. Turkmenistan, ICSID Case No. ARB/12/6.

<sup>26</sup> A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.164, Submission from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission by the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China.

<sup>27</sup> See, for instance, Investment Arbitration Rulers of the Singapore International Arbitration Centre, SIAC Investment Arbitration Rules (2017), Rule 24.

<sup>28</sup> See for example Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Article 8.26; EU-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.37; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018), Article 3.8.

UNCITRAL, including the Transparency Registry created under the Rules on Transparency in Treaty-based Investor-State Arbitration.<sup>29</sup>

**(c) Recoverability of costs of third-party funding**

33. The Working Group may wish to consider a regulation clarifying the extent to which costs incurred for securing third-party funding could be ordered by the tribunal to be reimbursed by the losing party. The following questions arise in this regard: (i) whether costs for securing third-party funding can be considered as “costs of the arbitration”; (ii) whether costs for securing third-party funding would be reimbursable when incurred reasonably; and (iii) whether funding costs are incurred reasonably, if the funding was secured by an impecunious claimant, who could otherwise not have pursued its rights in ISDS (e.g. under a regulation as outlined above, **II.B.3.a.**).

**(d) Influence of third-party funding on decision on security for costs**

34. The Working Group may also wish to consider the extent to which third-party funding should be considered in the decision on security for costs and who would bear the burden of proof. Currently, the legal basis and requirements of orders for security for costs in ISDS are disputed, including the extent to which third-party funding may be considered.<sup>30</sup> Where accepted, the burden of proof generally lies with the party requesting that security be ordered.<sup>31</sup>

35. In case of impecunious claimants, funding might be considered a strong indicator that the funded party is unlikely to pay an adverse cost award. Therefore, if the admissibility of third-party funding were to be limited to cases of impecunious claimants (see above under **II.B.3.a.**), the Working Group may wish to consider whether it would be appropriate to shift the burden of proof to the effect that the funded party must prove that security for costs should not be ordered.

36. If a regulation of third-party funding in ISDS were to consist of a mere disclosure requirement (see above under **II.B.3.b.**), the scope of potentially funded parties would remain large and the existence of funding might not serve as an indicator of the financial situation of the funded party. In this case, the Working Group may wish to consider allocating the burden of proof with the requesting party.

37. The Working Group may wish to consider whether a regulation would need to explicitly provide that third-party funding may be considered in the decision on security for costs as one factor among other relevant circumstances.<sup>32</sup> Alternatively, the decision on the relevance of third-party funding could be left to the tribunal.<sup>33</sup>

38. Moreover, security for costs could be ordered as a rule in case of third-party funding, as suggested in a Submission.<sup>34</sup>

<sup>29</sup> The function of the Transparency Registry is undertaken by the Secretary-General of the United Nations through the UNCITRAL secretariat, see Articles 2, 3 and 8 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration; <http://www.uncitral.org/transparency-registry/en/introduction.html>, accessed 27 June 2019.

<sup>30</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 172 f.

<sup>31</sup> See in particular Manuel García Armas et al. v. Bolivarian Republic of Venezuela, PCA Case No. 2016-08.

<sup>32</sup> See, for instance European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.37 2018, which provides that the tribunal shall consider third-party funding in its decision on security for costs (Article 3.37 Third-Party Funding [...]: 3. 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).

<sup>33</sup> This is the approach currently discussed in the ICSID Rules and Regulations Amendment Process, see Working Paper 2 Vol. 1, para. 363.

<sup>34</sup> See A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

**(e) Legal aid mechanism**

39. A limitation of third-party funding through regulation could be complemented by a legal aid mechanism in order to compensate for a limitation of the access to justice for impecunious claimants or small and medium-sized enterprises (see also above under **II.B.2.**).

**(f) Code of ethics for third-party funders**

40. Moreover, the Working Group may wish to consider the development of a set of rules governing the profession of third-party funders in ISDS, for instance in form of a code of ethics.<sup>35</sup> These could provide for a minimum standard of professional qualification, transparency and confidentiality.

41. The Working Group may wish to consider whether such code should also include rules limiting the influence of third-party funders on the arbitration procedure, in particular with regard to sensitive issues such as the selection of arbitrators and settlement negotiations,<sup>36</sup> as well as potentially establish a limit for the remuneration of the funders, as suggested in a Submission.<sup>37</sup>

**C. Implementation of a reform on third party funding**

42. The Working Group may wish to consider the various means of implementation of a reform related to third-party funding in investment disputes.<sup>38</sup> A prohibition or regulation of third-party funding could be developed so as to be included in arbitration rules, as model clauses with variants for investment treaties or through an opt-in convention that could be modelled after the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.<sup>39</sup> The Working Group may further wish to consider whether the development of model legislative provisions on the matter would be required.

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<sup>35</sup> See for example non-paper by the Government of France, *Vers un nouveau moyen de régler les différends entre Etats et investisseurs*, May 2015, available at [https://www.diplomatie.gouv.fr/IMG/pdf/20150530\\_isds\\_papier\\_fr\\_vf\\_cle432fca.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/20150530_isds_papier_fr_vf_cle432fca.pdf).

<sup>36</sup> Third-party funders exert influence on the arbitral proceedings not only on the basis of contractual rights but also on the basis of the monitoring configuration and through case budgeting and termination rights, see Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 74 f.; See also non-paper by the Government of France, *Vers un nouveau moyen de régler les différends entre Etats et investisseurs*, May 2015, accessible under [https://www.diplomatie.gouv.fr/IMG/pdf/20150530\\_isds\\_papier\\_fr\\_vf\\_cle432fca.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/20150530_isds_papier_fr_vf_cle432fca.pdf).

<sup>37</sup> A limitation of the return of third-party funders “to a reasonable portion of compensation” was suggested by A/CN.9/WG.III/WP.174, Submission by the Government of Turkey.

<sup>38</sup> See also Note of the Secretariat on Possible reform of investor-State dispute settlement (ISDS), (A/CN.9/WG.III/WP.166).

<sup>39</sup> See also A/CN.9/WG.III/WP.174, Submission from the Government of Colombia; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador.