REMEDYING INVESTOR MISCONDUCT IN INVESTOR-STATE ARBITRATION THROUGH THIRD PARTY FUNDING

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Abstract

Foreign investors are increasingly turning to third party funders to finance their arbitrations against host States. In the short time that third party funding has been employed in investor-state arbitration, it has created significant controversy over its role in the practice. Despite its practical benefits including elimination of investors' financial distress regarding the costs of arbitration proceedings, several concerns have been voiced against its use. One of these concerns relates to the control that the funders have on arbitral proceedings by way of the funding agreement signed between the funder and the investor. Although this control is of an indirect nature, one may contend that equipping a non-party with this kind of power could go against the fundamental characteristics of investor-state arbitration. Yet, what if this contentious power of funders actually has the potential to address a chronic problem of the investor-state dispute settlement system? What if the funding agreement that secures the third party funder's control over the proceedings could be employed as a tool to remediate investor misconduct? Adopting an argumentative approach, this article seeks to address these questions.

I. INTRODUCTION

In contemporary investor-state dispute settlement ["**ISDS**"] practice, foreign investors have adapted some of the procedural tactics similar to those frequently resorted to in domestic litigations, with a view to increase their chances of getting a favourable award.[1] In a vast number of cases, these tactics have amounted to misconduct, which threatens the reliability and the reputation of the international investment arbitration system.[2] Investor misconduct involves not only *prima facie* illegal conduct such as corruption and fraud but also conduct that manifests itself in the form of abuse of process, which technically cannot be deemed illegal. Abuse of process can be grouped into three categories: (1) devising plans to secure jurisdiction

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[1] Emmanuel Gaillard, *Abuse of Process in International Arbitration,* ICSID Review 1, 1 (2017).

[2] *Id.*

under an investment treaty; (2) initiating multiple arbitral proceedings to increase the likelihood of success; and (3) and bringing frivolous claims that have a low likelihood of success. In addition, procedural misconduct of investors, in other words, guerrilla tactics[3] appears as a distinct type of wrongful conduct of investors.

Third party funding is an agreement that allows a corporation or an individual, with no connection to the legal dispute, to fund or to provide other material support to a party, covering all or some of the expenses incurred from the legal proceedings.[4] In return, the third party funder receives an agreed remuneration.[5] This remuneration could be in multiple forms, such as a percentage of the amount recovered from the other party, a fixed amount, or a multiple of the funding.[6] In addition to fees of arbitral institutions, arbitrators, experts, and counsel, costs incurred from the appeal process or enforcement could also be covered by the third party funder.[7]

While civil law jurisdictions were not familiar with third party funding, common law considered it illegal until the end of the twentieth century, due to its violation of the doctrines of maintenance and champerty.[8] Thereafter, courts started to recognize the legality of third party funding, first in Australia and the United Kingdom, then in the United States and Europe.[9]

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[3] Hwang first used the term "arbitration guerrilla" in his article in 2005 where he stated that arbitration guerrillas were those whose aim was "*to exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective.*" Michael Hwang, *Why is There Still Resistance to Arbitration in Asia?* in Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner 401 (Gerald Aksen et al. eds., 2005); Sussman describes guerrilla tactics as "*different strategies, methods and tactics ranging from poor behavior to egregious and even criminal conduct*." Edna Sussman & Solomon Ebere, *All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration* 22 The American Review of International Arbitration 612 (2011); Horvath and Wilske noted, "Guerrilla tactics, while always unethical, may not in every instance amount to a violation of law or written procedural rules. Nonetheless, such behaviour always constitutes a hindrance to arbitral proceedings." The authors underlined that in identifying guerrilla tactics, the question was not whether the conducts follow the letter of the law, but rather whether they conform to the spirit of the relevant rules. Günther J. Horvath, Stephan Wilske, et al., *Chapter 1, §1.02: Categories of Guerrilla Tactics* in Guerrilla Tactics in International Arbitration, International Arbitration Law Library 3-4 (Günther J. Horvath & Stephan Wilske eds. 2013).

[4] Ridhima Sharma, *Third-party Funding in International Commercial Arbitration*, 12 NUALS L.J. 61, 63 (2018).

[5] Rachel D. Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. Rev. 2935, 2935 (2018).

[6] UNCITRAL Working Group III, Possible reform of investor-state dispute settlement (ISDS) Third-party funding UN Doc A/CN.9/WG.III/WP.157 2 (Jan. 24, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.157.

[7] *Id.*

[8] Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. Rev. 2911, 2912 (2018).

[9] *Id.*; As of today, Australia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America have regulations on legal dispute funding. The practice of funding legal disputes by third parties is also growing in Singapore, China (Hong Kong Special Administrative Region), as well as some countries in Latin America and in Europe.

In recent years, third party funding has been frequently witnessed in investor-state arbitration despite its concomitant problems concerning issues such as conflict of interest, disclosure requirements, and evidentiary privileges.

Except for very rare circumstances[10], in international investment arbitration practice, third party funding has been available to claimants only. This has strengthened foreign investors' hand even more in a system whose pro-investor bias has been at the core of the widespread criticisms voiced against it. One may argue that in addition to the multiple legal tools already granted to investors by the ISDS system, they can now employ third party funding as a procedural weapon against respondent States. Receiving external funding for their claims may encourage investors to bring frivolous claims, which usually aim at forcing the state to settle. Yet, the author believes that third party funding can be taken advantage of in countering investors' abuse of the ISDS system.

After briefly touching upon third party funding's position in the practice of investor-state arbitration, this article explores its potential as a tool to remedy frivolous claims. It then discusses how third party funding agreements can help curb other types of investor misconduct.

II. THIRD PARTY FUNDING IN INVESTOR-STATE ARBITRATION

In investor-state arbitration, third party funders have been increasingly enthusiastic about providing claimants with finances for arbitral proceedings. It is neither their philanthropic demeanour nor their commitment to the rule of law that sparks this enthusiasm. The reason for their increasing interest, in all likelihood, is the amount of claim at stake. The amount of claim usually extends to hundreds of millions, even billions of dollars. In its early days, third party funding in investor-state arbitration was oriented towards the claimants who lacked sufficient funds to cover the legal representation fees and other related expenses of an investment claim. Over time, it shifted towards providing funding for non-impecunious claimants who prefer streamlining the funds into their investments and business growth instead of tying up the same in a legal battle, the outcome of which is not certain. From the investors' viewpoint, taking the high costs of the proceedings into consideration, receiving funding from external players for

[10] This was the case in *Philip Morris v. Uruguay* (*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7) where the Bloomberg Foundation provided financial assistance to the Uruguayan Government for its legal defense. The president of the foundation Michael Bloomberg publicly announced his support for Uruguay's anti-tobacco laws, which engendered the investment dispute with Philip Morris; McKay B. *Bloomberg, Gates Launch Antitobacco Fund* WSJ (Mar. 18, 2015), https://www.wsj.com/articles/bloomberg-gates-launch-antitobacco-fund-1426703947.

arbitration is quite plausible as this practice poses no financial risk for them. The funder assumes the risk of obtaining a negative award. For investors with robust balance sheets, specifically large multinational corporations, third party funding is particularly attractive as it can be employed as a finance tool to pursue their arbitral claims, without having to channel a portion of their cash flow towards arbitration related expenses.[11]

Along with its investor-favoring nature, the structural deficits in the current ISDS system have the potential to create a fertile market for third party funders who can smoothly obtain high returns for their investments in proceedings without taking a high risk, especially when they perform portfolio funding.[12] The average cost for a party in an ISDS proceeding is around USD 5 million[13], while the average award is over USD 120 million.[14] The massive gap between these numbers whets third party funders' appetite to invest in investment arbitration cases more enthusiastically. In certain instances, third party funding leads to unusually high returns. To illustrate the same, a well-known arbitration/litigation funder, Burford Capital, managed to secure a 736% return (USD 94.2 million) on invested capital in only one year in an international investment arbitration case.[15]

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[11] International Council for Commercial Arbitration (ICCA), *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, The ICCA Reports No. 4 (April 2018) [hereinafter *ICCA-QM Report*].

[12] *Id.* at 38. The following remarks in the report about portfolio funding are quite elucidatory:

> "A portfolio arrangement can be structured in many ways, but there are two major types of arrangements: (1) finance structured around a law firm, or department within a law firm, where the claim holders may be various clients of the firm; or (2) finance structured around a corporate claim holder or other entity, which is likely to be involved in multiple legal disputes over a relatively short period of time. Structuring finance around multiple claims under either model usually involves some form of cross-collateralization, meaning that the funder's return is dependent upon the overall net financial performance of the portfolio as opposed to the outcome of each particular claim. This type of structure may enable the entity (e.g., the law firm or corporate client) to secure third party funding more quickly, on pre-arranged terms, and, depending on the structure, the ability to benefit from the overall success of the portfolio. Additionally, there may also be economic benefits to this approach – if the funder's risk is spread across multiple claims, this should in turn dictate a lower cost of capital for the funded party (although this does not always materialize in practice)."

[13] *Id.* Annex C at 244.

[14] Brooke Guven & Lisa Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, Columbia Center on Sustainable Investment, CCSI Working Paper 6 (2019).

[15] In *Teinver v. Argentina* (*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award (July 21, 2017)) the tribunal awarded USD 324 million in damages in favor of claimants due to unlawful expropriation and violation of the fair and equitable treatment obligation. Burford capital had invested in the proceedings as a third party funder in the amount of USD 12.8 million. Burford Capital's agreement with Teinver allowed it to take home roughly USD 140 million. Upon Respondent's initiation of the annulment procedure against the award, Burford Capital sold its entire entitlement in the case for USD 107 million in cash on the secondary market and made USD 94.2 million as profit. The company made following assessment in terms of annulment proceedings:

> "The Teinver award is the subject of ongoing annulment proceedings. Annulment (the cancellation of an award) is only available in very limited circumstances of serious error by the arbitration tribunal that we do not believe exist here, with only 6% of awards ever rendered by the World

Opponents of third party funding argue that it exacerbates the deficiencies and asymmetries in the ISDS system by taking advantage of its flaws. The ISDS system has distinctive structural characteristics according to which host States are deprived of substantial rights such as bringing counterclaims. In the same vein, it was asserted that third party funding strengthens investors' position even more by providing them with funding and expertise, which may drive up the number of unmeritorious claims that would not be brought otherwise. Opponents also reject the view that third party funding is a useful tool for facilitating impecunious or disadvantaged investors' access to justice. To them, funders are not necessarily enthusiastic about justice as their primary motivation is to reap a profit as is the case in any business. Apart from the motive of the funder, the opponents contend that the current ISDS system is far from being able to deliver justice due to its chronic problems.

As a relatively novel phenomenon devised to build wealth, third party funding is on the rise in investor-state arbitration practice. Today, entities such as investment banks, specialized litigation finance companies, and hedge funds dominate the arbitration funding market.[16] Risk assessment and management is at the core of this practice. After all, the funder would lose its investment in case the tribunal dismisses the claim. To determine whether an investment arbitration claim is worth investing in, a third party funder conducts extensive due diligence and considers various factors that involve, among others, the enforceability of the claim, merit of the claim, the amount of the damages sought, and costs.[17]

> Bank's arbitration institution having been annulled (and only 3% in the current decade). Were the award to be annulled, the sale transaction could be rescinded at the option of the buyers, although in that unlikely event Burford would retain a $7 million fee and would also have its original entitlement back and be free to pursue the claim again. Based on the historical speed of annulment proceedings a decision on annulment would be expected in the second half of 2019 although individual case timing is unpredictable."

[16] Frank Garcia, *supra* note 8, at 2915.

[17] Brooke Guven & Lisa Johnson, *supra* note 14 at 5-6. Citing the ICCA-QM Report, the paper provided a comprehensive list of the factors that have been taken into consideration by funders to figure out if the claim is worth to invest in:

> "When considering whether to invest in a claim, funders consider the following, the respective importance of which will vary by claim and by funder: (1) demonstration of healthy claim, (2) counsel that has been selected by the claimant and how counsel will be compensated, (3) the value of the claim, (4) anticipated margin of recovery relative to the budget for funding, (5) the amount required to be advanced, (6) jurisdictional obstacles, (7) available defenses, (8) the expected nature, length and type of the proceeding, (9) existence and implications of associated claims (e.g., by other investors in the same sector impacted by the measure), (10) the possibility of settlement, (11) the identity of the respondent, and (12) ease of, or particular hurdles to, enforcement."

III. THE ROLE OF THIRD PARTY FUNDING IN ADDRESSING INVESTOR MISCONDUCT

The interrelation between third party funding and frivolous claims will be tackled in this section. A discussion on how third party funding affects other types of investor misconduct such as corruption, fraud, abuse of process, and procedural misconduct will follow.

A. Third party funding and frivolous claims

How third party funding affects frivolous ISDS claims has been a contentious issue.[18] Some commentators suggest that the examination of the case by a third party funder plays a filtering role, which eventually leads to the elimination of most of the frivolous cases.[19] This is because the funders do not want to lose their investment. In contrast, others suggest that through enabling investors to bring claims without having to allocate funds for legal representation in the case and risk diversification by way of portfolio funding, third party funding actually causes a rise in the number of frivolous cases.[20]

The absence of a clear definition of frivolous claims in the context of ISDS further complicates analyzing whether third party funding drives an increase in these claims. Various reasons make the identification of frivolous claims challenging. By way of illustration, receiving remuneration per case or hour might incentivize an arbitrator to allow a frivolous case to proceed. In a similar vein, arbitrators in an ISDS setting do not necessarily have to interpret the language of the investment treaties the same way the State parties do. Put differently, there may occur a gap between the State parties' interpretation of a treaty provision on frivolous claims and interpretation of the same text by arbitral tribunals.[21]

Advocating the view that third party funding could play a part in preventing frivolous claims warrants a business-oriented approach to the matter. One may argue that third party funders, to be able to make more profit, prefer to invest in meritorious claims that have a high likelihood

[18] Bernardo M. Cremades Román, *Third-party Litigation Funding: Investing in Arbitration*, 13 Spain Arbitration Review 155, 183 (2012); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 77 (2004); Douglas R. Richmond, *Other People's Money: The Ethics of the Litigation Funding,* 56 Mercer L. Rev. 660-661 (2005); Mariel Rodak, *It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, U. Pa. L. Rev. 518-519 (2006).
[19] *Id.* at 21.
[20] *Id.*
[21] *Id.*

of success. To identify if the claim is worth investing in, third party funders carry out extensive merits assessments of the claim or have a law firm do this job for them.[22] Thanks to this exhaustive assessment process, the funders can eliminate unmeritorious claims and invest only in claims with solid legal bases.

On the other hand, according to some commentators, third party funding exacerbates abusive litigation and frivolous claims. They argue that if the potential recovery is large enough, a funder would be willing to take the risk even if the claim has a low probability of success due to a thin legal basis.[23] In the same vein, an empirical research study looking at the cases examined by a third party funder found that the funder preferred investing in riskier claims with a relatively lower probability of success.[24] Moreover, large funders have been increasingly adopting portfolio funding, which helps them in spreading out the risks.[25] This model of funding incentivizes the investors to bring riskier or frivolous claims, as the cost of a possible loss would be spread over the portfolio.[26] Opponents of third party funding also compare contingency fee lawyers to third party funders to substantiate their argument that third party funding encourages frivolous claims. While a contingency fee lawyer does have an ethical duty to advise his or her client if the claim at stake is frivolous, they underline that there is no such a duty in a third party funding agreement, which enables third party funders to take the risk of funding frivolous claims with an expectation of unusually high returns.

The matter can also be evaluated from the point of view of the types of third party funders. Large investment firms providing financial services have dominated the litigation/arbitration funding market. They are repeat players and maintaining their reputation in the steadily expanding market is crucial for achieving their long-term financial goals. Considering this, in all likelihood, they would be hesitant about risking their reputation by contributing to abusive conduct, such as paving the way for frivolous claims. They usually prefer portfolio funding to manage the risk and ensure a relatively steady profit.

Then again, medium or small-sized new entrant companies in the third party funding market may be more enthusiastic about engaging in risky and frivolous claims that might yield

[22] ICCA-QM Report, *supra* note 11, Annex C at 243.
[23] Bernardo M. Cremades Román, *supra* note 18.
[24] Brooke Guven & Lisa Johnson, *supra* note 14, at 24. [citing Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims* 46 RAND J. of Economics 23, 25, 33 (2015)].
[25] ICCA-QM Report, *supra* note 11, at 38.
[26] Frank Garcia, *supra* note 8, at 2921.

exceptionally high returns that would help them take root in the market and establish a reputation. It would be fair to expect an augmentation in the number of new entrant companies as the third party funding market is continuously expanding. This surge would make the competition among the funders even fiercer, which could create an atmosphere in which even unmeritorious claims would be in high demand.

The lack of empirical evidence with respect to whether third party funding drives up the number of frivolous cases in ISDS makes producing a comprehensive analysis exceptionally difficult.[27] It is partly due to the fact that third party funding is an unregulated area of practice. The need for regulating third party funding in investment arbitration was brought before the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III within the ambit of the ISDS reform process. The continuous expansion of third party funding would produce more data on the effects of the practice in ISDS. Along with prospective regulation of the practice through ISDS reform, this data would help produce a comprehensive analysis of how third party funding affects frivolous cases.

B. Remedying the other types of investor misconduct

Investors' misconduct has proven to have destructive effects on ISDS claims. While certain types of misconduct would deprive a tribunal of its jurisdiction, others could conduce to the inadmissibility of the claim. Moreover, misconduct may lead a tribunal to cut the amount of compensation to the detriment of the claimant. Tribunals also pay regard to misconduct while allocating the costs. So, how can a third party funder protect itself from the risks posed by investor misconduct? More importantly, can third party funding play a role in deterring investors from engaging in misconduct?

In addition to conducting extensive research and assessment activities before deciding to finance a claim, a third party funder may impose certain obligations and limitations on the investor through a funding agreement as a means of risk management. These obligations and limitations enable the funder to establish partial control over the investor's engagement in the proceedings. This control matters for the funder, as he would want to make sure his interest in the case is protected. In this context, funders' control over both the investor and the case could be construed as a deterrent to investor misconduct.

[27] ICCA-QM Report, *supra* note 11, at 204.

Incorporation of representations and warranties attesting that no misconduct had occurred into the funding agreement could be a viable option for a third party funder to deter an investor from engaging in misconduct. These kinds of provisions also oblige an investor to let the funder know about its past claim-related actions that may influence the outcome of the proceedings. In other words, a provision can cover the past behaviour of the investor, whereby the investor would attest to the third party funder that there was no misconduct. Another provision can contain the investor's promise to the third party funder that no misconduct will be committed in the arbitration or otherwise while the third party funding agreement is concluded.

The model litigation-financing contract proposed by Steinitz and Field provides guidance on this matter.[28] Some articles within the section on representations and warranties in this contract could be adapted and incorporated into the provisions of an arbitration financing contract aimed at deterring investor misconduct.[29] The article on full disclosure of the model contract reads:

> "The Plaintiff represents that, as of the date of this Agreement, the Plaintiff has provided the Funder all material information relating to the Claim, excluding information protected solely by the attorney-client privilege."[30]

Investor misconduct committed before concluding the funding agreement would fall under "all material information relating to the claim" as it would have a determinative effect on the fate of the claim. Similarly, the model contract has another article in the section on impairment that would cover investors' past misconduct:

> "Other than as already disclosed to the Funder, the Plaintiff has not taken any action (including executing documents) or failed to take any action, which would materially and adversely affect the Claim"[31]

Inclusion of adapted versions of the abovementioned provisions, which are in the form of representations, in funding agreements between investors and funders may play a role in deterring investors from engaging in misconduct. An investor's past misconduct concerning the case would most certainly be a deal-breaker for the third party funder as it increases the risk of failure of the claim dramatically.

Special attention needs to be paid to the time of signing the third party funding agreement. The

[28] Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711 (2014).
[29] *Id.* at 757.
[30] *Id.*
[31] *Id.*

agreement can be signed either before the initiation of the arbitration proceedings or during the proceedings. In some cases, investors are impecunious and need funding from third parties to be able to initiate the arbitration. Even if they have sufficient funds to cover the arbitration-related expenses, they may still seek external funding to avoid directing their cash flow to arbitration instead of using it for business growth. Some investors may prefer to resort to external funding in the middle of the proceedings, due to, for example, unexpected expenses. The abovementioned provisions in the form of representations in the third party funding agreement would be able to cover investor misconduct committed before the time of signing the agreement. To make it more concrete, if the funding agreement was signed prior to the initiation of the proceedings, representations in the agreement would cover corruption, fraud, and abuse of process. They would not cover guerrilla tactics as these tactics can only be employed in the course of the proceedings. Therefore, addressing guerrilla tactics through representations would not be a viable option unless the funding agreement is signed after the initiation of the proceedings. A provision in the form of a warranty would offer a solution to this problem. In that context, the said model contract contains an article covering the plaintiff's prospective conduct that might impair the claim:

> "The Plaintiff agrees and undertakes that it will not take any step reasonably likely to have a materially adverse impact on the Claim or the Funder's share of any Proceeds"[32]

If a third party funding agreement has provisions in the form of both representations and warranties aimed at addressing investor misconduct, the time of signing the agreement would not matter much as the said representations and warranties would cover both past and future misconduct.

It is apposite to touch upon here the motivation that third party funders have. Some commentators argue that "capital seeks returns, not justice"[33] and injecting a profit-motivated external actor into a system that aims at promoting justice is quite problematic.[34] Approaching the issue from this viewpoint, one can assert that third party funders may turn a blind eye to investor misconduct if they believe that the misconduct can help them win the case without being detected. In other words, third party funders may not care much about investor

[32] Maya Steinitz & Abigail C. Field, *supra* note 28, at 757, 758.
[33] ICCA-QM Report, *supra* note 11, Annex C, at 238.
[34] *Id.*; In line with the concerns expressed on the ISDS system, many governments and commentators argue that the current version of the system is far from delivering justice due to structural deficiencies and asymmetries that deprives the respondent states of making claims or counterclaims.

misconduct unless the risk of it being detected by the arbitral tribunal is relatively high. Therefore, it is the likelihood of getting caught that matters for the funder, not the misconduct itself. For instance, its bilateral nature and collusion between parties make bribery extremely difficult to be detected by arbitral tribunals. Taking advantage of this in an unregulated practice, a profit-motivated funder may ignore the misconduct and opt for funding the claim tainted by bribery. In extreme circumstances, an unscrupulous funder may even encourage the investor to resort to misconduct to increase the likelihood of success in the case. However, it would be highly unlikely for institutionalized large funding companies with well-established reputations to condescend to these sorts of illicit actions. The dynamics of less reputable small-scale third party funders, though, could point to different possibilities.

IV. CONCLUSION

Despite the widespread use of third party funding in investor-state arbitration practice, it is still a relatively new phenomenon, with problems. There has been considerable debate as to whether its benefits outweigh its costs. Yet, it is fair to say that third party funding is here to stay and will play a cardinal role in the future of the practice. Indeed, the UNCITRAL included the matter in its agenda. In its discussions on ISDS reform, the Working Group III of the UNCITRAL tackled the concerns associated with third party funding in investor-state arbitration. One of the issues brought forward was how funding agreements are supposed to be structured.[35] The Working Group decided to continue its discussions on the matter in its next sessions. In light of the determinations and concerns explained above, UNCITRAL's reform discussions provide an opportunity for ISDS stakeholders to bring forward the necessity of deterring investor misconduct via third party funding agreements.

[35] UNCITRAL Working Group III, *supra* note 6, at 6. The paper noted:

> "An issue that has also given rise to debate is the potential influence of the third party funder on the proceedings, including in settlement negotiations, particularly when a funder's compensation depends on the outcome of the proceedings. The main element for consideration on this matter is the manner in which the funding agreements are structured, and the extent to which third party funders have control over the management of the case proceedings."