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**United Nations Commission on  
 International Trade Law**  
**Working Group III (Investor-State  
 Dispute Settlement Reform)**  
**Thirty-seventh session**  
 New York, 1–5 April 2019

## Possible reform of investor-State dispute settlement (ISDS)

### Third-party funding

#### Note by the Secretariat

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## I. Introduction

1. At its thirty-fifth session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions, (ii) set out a possible framework for its future deliberations, and (iii) consider the provision of further information to assist States with respect to the scope of some concerns ([A/CN.9/935](#), paras. 99 and 100).
2. At its thirty-sixth session, the Working Group undertook its consideration of concerns about ISDS on the basis of document [A/CN.9/WG.III/WP.149](#), which addresses items (i) and (ii) at an overview level, as well as documents [A/CN.9/WG.III/WP.150](#) to [A/CN.9/WG.III/WP.153](#) which provide background information on the consistency of arbitral decisions by ISDS tribunals and related questions, the independence, impartiality and appointment mechanisms of arbitrators, as well as the cost and duration of ISDS.<sup>1</sup>
3. At that session, the Working Group also took note of observations made including concerns expressed on third-party funding and agreed to consider at its forthcoming session whether it would be desirable for UNCITRAL to undertake reform on third-party funding ([A/CN.9/964](#), paras. 134 and 136).
4. This Note aims at providing further information to assist States with respect to the scope of concerns about third-party funding. 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 desirability of reforms, which is a matter for the Working Group to consider.<sup>2</sup>

## II. Third-party funding

### A. Definition and legal framework

#### 1. Definition and scope of third-party funding

5. Third-party funding is generally defined as an agreement by an entity (the “third-party funder”) that is not a party to a dispute to provide funds or other material support to a disputing party (usually the claimant or a law firm representing the claimant), in return for a remuneration, which is dependent on the outcome of the dispute. The remuneration can take any form, though more common forms include a multiple of the funding, a percentage of the proceeds, a fixed amount, or a combination of the above.
6. Third-party funding usually covers all or part of the cost of the proceedings, such as legal fees (as well as fees of experts, arbitrators and arbitral institution) and the costs associated with subsequent enforcement actions or appeals. Third-party funding may be structured around a single claim, where funding applies to individual cases, or a portfolio of claims.<sup>3</sup>

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<sup>1</sup> The Working Group may wish to recall that document [A/CN.9/WG.III/WP.150](#) addresses the question of consistency and related matters, documents [A/CN.9/WG.III/WP.151](#) and [A/CN.9/WG.III/WP.152](#) address issues relating to arbitrators and decision makers in ISDS, and document [A/CN.9/WG.III/WP.153](#) deals with cost and duration of ISDS mechanisms.

<sup>2</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; and Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform, by Rachel Denae Thrasher (Boston College Law Review, Vol. 59, Issue 8, Reforming International Investment Law, 2018).

<sup>3</sup> There are two main types of portfolio funding arrangements: funding structured around a law firm, where the claim holders may be various clients of the firm; or funding structured around a corporate claim holder involved in multiple legal disputes (see Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 38).

7. At the thirty-fifth session of the Working Group, information was provided indicating that use of third-party funding was increasing in ISDS (A/CN.9/935, para. 89). In recent years, the third-party funding industry has developed, in terms of both the number of funds and funders operating and the amount of capital available.

8. At that session, it was also indicated that third-party funding was a complex area and that there were different forms or types of funding (A/CN.9/935, para. 90). Indeed, the scope of the definition of both third-party funders and third-party funding in the context of international arbitration varies across different sources including legislation, treaties, institutions and soft law instruments.<sup>4</sup> The definition continues to be subject to considerable debate as third-party funding may be provided through a variety of structures.<sup>5</sup> At stake are the questions of extent of disclosure and of regulation.

9. As an illustration of the different forms or types of funding, it may be noted that a wide range of mechanisms have been developed to support a disputing party, such as contingency fee arrangements, liability insurance, portfolio funding, law firm financing, before-the-event and after-the-event insurances, litigation loans and philanthropic arrangements. Some definitions of third-party funding include these types of financing<sup>6</sup> whereas others adopt a narrower approach, for instance by excluding non-commercial funders (such as individual persons), pro bono as well as before-the-event and after-the-event insurances. Those definitions that adopt the narrower approach exclude forms of financing that are generally regulated through other legal regimes.<sup>7</sup> 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.

<sup>4</sup> The Working Group may wish to note the definitions of third-party funding found in works by certain organizations, or specialized code of conducts for litigation funders; for instance, the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration provides that the term “third-party funding” refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party, or a law firm representing that party, (a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and (b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment. See also the General Standard 6(b) in the IBA Guidelines on Conflicts of Interest in International Arbitration; as a further illustration, see the England and Wales Voluntary Code of Conduct for Litigation Funders, published by the Association of Litigation funders, which provides that: “Litigation funding is where a third-party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant.”

<sup>5</sup> For instance, approaches also diverge on whether the definition should extend beyond direct economic interest funding to also include not-for-profit funders; see Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 46; see also “Third-Party Funding in International Arbitration in Europe: Part 1 – Funders’ Perspectives”, by M. Scherer, A. Goldsmith and C. Flechet, available on the Internet at <https://www.transnational-dispute-management.com/news/20120312.pdf>.

<sup>6</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, Chapter 3 (Definitions), and the IBA Guidelines on Conflicts of Interest in International Arbitration.

<sup>7</sup> See Section 2 of the Civil Law (Amendment) Act 2017, Singapore, qualifying a third-party funder as an entity that “carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the Third-Party Funder is not a party” and “has a paid-up share capital of not less than S\$ 5 million or the equivalent amount in foreign currency in managed assets”.

10. Beneficiaries of third-party funding include small- and medium-sized enterprises as well as large companies. Noteworthy is the fact that third-party funding in ISDS offers a specific context, as States are always in the role of respondents and private investors in the role of claimants. Third-party funding appears as a one-sided funding, provided to investors, which creates unbalance.

## 2. Legal framework

11. Definitions found in various sources of law provide an illustration of the varied approaches mentioned above and of the developments that have occurred in the field of international arbitration.

### *National legislation*

12. Third-party funding began in the context of domestic litigation and arbitration before being used in international commercial and investment arbitration. While a few jurisdictions are known to date to have established a legal dispute funding framework,<sup>8</sup> the practice continues to emerge and grow in certain jurisdictions.<sup>9</sup> However, in many of them, third-party funding in international litigation and arbitration is left unregulated and debate is ongoing about whether and to what extent third-party funding should be permitted or regulated.

### *Investment treaties*

13. Recent investment treaties have sought to develop definitions of third-party funding, generally adopting a broad approach,<sup>10</sup> with the aim of providing a basis for considering potential conflicts of interest.

### *Arbitration rules*

14. Most arbitral institutions do not include any provisions explicitly defining or addressing third-party funding, with only a few exceptions.<sup>11</sup>

15. Notable developments concern the Rules and Regulations of the International Centre for Settlement of Investment Dispute (ICSID). In October 2016, the ICSID

<sup>8</sup> Those jurisdictions include the following: Australia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

<sup>9</sup> For instance, Singapore, China (Hong Kong Special Administrative Region), jurisdictions in Latin America and in Europe.

<sup>10</sup> For instance, the EU-Vietnam Trade and Investment Agreements provide in article 2 as follows: “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 in the form of a donation or grant”. See also EU-Canada Comprehensive Economic and Trade Agreement (CETA), 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”.

<sup>11</sup> See the Brazilian CAM-CCBC Administrative Resolution No. 18 of 20 July 2016, which defines third-party funding as being a situation “when a natural or legal person who is not party to the arbitration proceedings provides full or partial resources to one party so as to enable or assist the payment of the arbitration costs, receiving in return a portion or percentage of any profits earned from the award or from the agreement.” See also the Singapore International Arbitration Centre which defines “external funding” and “direct economic interest” in a Practice Note of 31 March 2017 as being “an interest in the arbitration proceedings resulting from the provision by a non-Disputant Party to a Disputant Party of funding for or indemnity against the award to be rendered in the arbitration proceedings.” See also the “Guidelines for Third-Party Funding in Arbitration” (23 May 2016) of the China International Economic and Trade Arbitration Commission Hong Kong Centre (CIETAC) which refers in para. 1.2 to third-party funding as follows: “third-party funding arises when a professional third person or entity contributes funds, or other material support to a party in arbitration and has a direct economic interest in the award to be rendered in the arbitration”.

Secretariat launched a process to amend such rules and regulations.<sup>12</sup> In its proposal for amendments, the ICSID Secretariat included a definition of third-party funding,<sup>13</sup> as well as a continuing obligation to disclose the name of any third-party funder to the Secretariat.<sup>14</sup> The proposal also addresses the question of the effect of third-party funding on security for costs (see below, para. 33).

## B. Main issues

16. At the thirty-fifth session of the Working Group, it was said that the practice of third-party funding raised ethical issues, and might have negative impacts on ISDS proceedings. It was further pointed out that third-party funders might gain excessive control or influence over the arbitration process, which could lead to frivolous claims and discouragement of settlements (A/CN.9/935, para. 89). Issues raised in relation to third-party funding include potential conflicts of interest, third-party control and influence on the ISDS proceedings, impact on confidentiality, on costs and security for costs, as well as on speculative, marginal and/or frivolous claims.

### 1. Conflicts of interest and disclosure

#### *Examples of conflicts of interest*

17. The question of conflicts of interest between arbitrators and third-party funders was one of the first issues that attracted attention in light of its potential impact on the enforceability of arbitral awards and, more generally, on the integrity of the arbitral process and the legitimacy of international arbitration.

18. Situations that may give rise to conflicts of interest include where arbitrators act as advisors to funders, and where an arbitrator or an arbitrator's law firm has a recurring relationship with a third-party funder, which is involved in arbitration before the arbitrator, and the arbitrator or the firm receives income from this relationship.

19. At the thirty-fifth session of the Working Group, it was noted that the question of conflicts of interest between an arbitrator and a third-party funder was closely linked to the lack of disclosure and transparency regarding third-party funding. The question was considered as important as the issue of conflicts of interest between an arbitrator and a party (A/CN.9/935, para. 90).

#### *Disclosure requirements and extent of disclosure*

20. Questions at stake relate to whether, how, to what extent and by whom disclosure of third-party funding should be made in order to allow arbitrators, parties and institutions to assess potential or actual conflicts of interest involving funders.<sup>15</sup> A

<sup>12</sup> The ICSID Rules Amendment Process, available at <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>.

<sup>13</sup> Third-party funding is defined as follows: "The provision of funds or other material support for the pursuit or defence of a proceeding, by a natural or juridical person that is not a party to the dispute ("third-party funder"), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided: (a) through a donation or grant; or (b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding." See the "Proposals for Amendment of the ICSID Rules" prepared by the ICSID Secretariat, dated 2 August 2018, available at [https://icsid.worldbank.org/en/Documents/Synopsis\\_English.pdf](https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf) and [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_Two.pdf](https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf).

<sup>14</sup> The "Proposals for Amendment of the ICSID Rules" prepared by the ICSID Secretariat, dated 2 August 2018, available at [https://icsid.worldbank.org/en/Documents/Synopsis\\_English.pdf](https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf) and [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_Two.pdf](https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf).

<sup>15</sup> See the "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (Queen Mary, University of London and White & Case): 76 per cent of respondents to the survey agreed that disclosure of the existence of third-party funding should be mandatory, 63 per cent believed disclosure of the identity of the funders should be mandatory and 71 per cent that the full terms of the funding agreement should not be disclosed.

further question is whether an arbitrator who has a relationship with a third-party funder involved in the arbitration should continue to adjudicate the arbitration. This last question is closely connected to the issues of arbitrators' impartiality.

21. The question of whether disclosure should be limited to the existence and identity of the funder or whether it should also extend to the terms of the funding agreement remains controversial.

22. There is a trend in regulation that requires disclosure of the existence of funding and the identity of funders so that arbitrators can make appropriate decisions regarding conflicts of interest. Newly enacted legislations on third-party funding mandates such disclosure.<sup>16</sup> In the same vein, recent investment treaties contain an obligation to disclose the name and address of the third-party funder.<sup>17</sup> Arbitration rules that address the matter also provide for disclosure of such information, with varying formulations, either authorizing the arbitral tribunal to order disclosure of the existence and identity of the third-party funder,<sup>18</sup> or putting an obligation on the parties receiving funding to provide information on the existence and nature of the arrangement.<sup>19</sup> The existence of funding and the identity of a third-party funder is usually not considered as subject to any legal privilege; however, how and when such disclosure should occur, and whether it should be systematic, remain controversial.

23. Disclosing the terms of the agreement between a party and a third-party funder would, on one hand, reveal the nature of third-party funders' involvement, which may be a factor in evaluating a relationship between an arbitrator and a funder; on the other, such disclosure may give rise to issues of contractual confidentiality and give the opposing party leverage in settlement negotiations by revealing economic terms. Most national arbitration laws and arbitral rules largely leave such issues to the arbitrators' discretion who usually enjoy broad control over the proceedings before them, including the determination of whether any privileges apply to requested documents and whether such privileges may have been waived.<sup>20</sup>

## 2. Third-party control and influence

24. 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.

## 3. Confidentiality and legal privilege<sup>21</sup>

25. Obtaining third-party funding generally requires disclosure of information that would otherwise be required to be disclosed to courts or other authorities because the

<sup>16</sup> Arbitration and Mediation Legislation (Third-Party funding) (Amendment) Ordinance 2017, Hong Kong Special Administrative Region, Section 98T (1)(a)-(b); Civil Law (Amendment) Act 2017, Singapore, Section 5(b)(2).

<sup>17</sup> See, for instance, the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA).

<sup>18</sup> See the Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC), articles 24(10) and 33.1. See also the International Chamber of Commerce (ICC) Guidance Note on ICC Rules of Arbitration, 2017, which provides that arbitrators should consider, for purposes of disclosure, "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award."

<sup>19</sup> See the China International Economic and Trade Arbitration Commission (CIETAC) Rules on Investment Arbitration, Article 27.

<sup>20</sup> Available decisions show that arbitral tribunals have requested parties to disclose the existence and identity of a third-party funder (*EuroGas Inc. and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14; *South American Silver v. Plurinational State of Bolivia*, PCA Case No. 2013-15), as well as in certain cases the details of the financial arrangements (*Muhammet Cap & Sehil Insaat Endustri ve Tivaret Ltd. Sti v. Turkmenistan*, ICSID Case No. ARB/12/6).

<sup>21</sup> The notion of "legal privileges" includes professional duties of confidentiality and professional secrecy.

party seeking funds may share with the funder confidential communications or analysis of the case. This is a concern because third-party funders are not necessarily bound by confidentiality obligations and they are not prohibited from using such information in another funded dispute, regardless of any potential conflict.

26. A related question is whether information disclosed to a third-party funder may result in a waiver of confidentiality making that information susceptible to disclosure requests in arbitration proceedings or other related national court proceedings. Divergent views have been expressed regarding whether the applicable legal standards on confidentiality in international arbitration should be domestic laws, or whether international rules could be identified and applied. In most jurisdictions there is no clear answer to the question of whether information provided to a third-party funder would be protected.<sup>22</sup> Indeed, most arbitration laws and arbitration rules are silent about issues of protection of confidential and privileged information and generally leave the issues to the arbitrators' discretion. In addition, solutions to these questions would vary depending on the legal traditions.

#### 4. Costs and security for costs

##### *Costs issues*

27. Third-party funding may also have an impact on costs<sup>23</sup> and security for costs.

28. Regarding costs, the existence of third-party funding may have an impact on the determination of recoverable costs, in particular on whether the costs of legal representation and other legal costs that have been paid by a third-party funder are recoverable. Arbitral tribunals usually enjoy broad discretion in the decision on the determination of recoverable costs and their allocation, so the outcomes on this matter vary.<sup>24</sup>

29. Another question on which diverging views have been expressed is whether a third-party funder should be ordered by an arbitral tribunal to pay adverse costs should the funded claim fail. As the third-party funder is normally not party to the arbitration agreement and has no formal participation in the underlying arbitration proceedings between the two parties, it could be argued that arbitral tribunals may lack jurisdiction to issue a cost order against a third-party funder. In this light, some have argued in support of the opposite view.<sup>25</sup>

30. A number of further questions are disputed, such as whether an arbitral tribunal can and should allocate the costs of securing third-party funding.

##### *Security for costs*

31. Regarding security for costs, the main issue is whether third-party funding should affect the ordering of security for costs. The use of third-party funding by a claimant may be an indication of its impecuniosity. However, it may be noted that third-party funding is also frequently used as a risk management tool by adequately

<sup>22</sup> Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 123.

<sup>23</sup> The causality between the rising costs of international arbitration and the presence of third-party financing remains unknown.

<sup>24</sup> See *Supplier v. First distributor, Second distributor* (ICC Case No. 7006), Final Award (1992), 4 ICC Bulletin (May 1993), where an ICC tribunal noted that the legal costs of a respondent that had been paid by a third-party (insurer) would have been recoverable had the respondent succeeded; *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, Queen's Bench Division (Commercial Court) 15 September 2016, [2016] EWHC 2361 (Comm), where an English High Court stated that it was within the arbitrator's discretion to construe the phrase "other costs" in s.59(1)(c) of the Arbitration Act 1996 and "costs of the arbitration" in s.63(3) as including costs of funding; *Kardassopoulos and Fuchs v. The Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (3 March 2010), where the arbitral tribunal provided that "[it] knows of no principle why any such third-party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs."

<sup>25</sup> See Hong Kong Law Reform Commission's Final Consultation Paper, (2015).

resourced parties who could use their own resources to pursue a claim but choose to use external funding, for example to minimize their risks, and use their funds for their core and business priorities.

32. Arbitral tribunals have the power to order security for costs, either pursuant to arbitration laws and/or rules explicitly providing for such power, or general provisions on interim measures (see [A/CN.9/WG.III/WP.153](#), paras. 33–37). When an arbitral tribunal is faced with a security for costs application, it usually balances the claimant’s interest in having access to arbitral justice and the respondent’s interest in recovering its costs if it wins. Commentators have noted that tribunals tend to require sufficient evidence to conclude that the current financial circumstances of the claimant are such that it will not be able to pay the respondent’s costs at the end of the proceedings.<sup>26</sup>

33. Notably, the Working Paper on the Proposed Amendments prepared by the ICSID Secretariat on the reform of the ICSID Rules provides as follows: “Proposed AR 51 on security for costs is a new Rule and does not address the effect of [third-party funding]. Instead, proposed AR 51 requires the Tribunal to consider the responding party’s ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. As a result, the mere fact of [third-party funding], without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51. On the other hand, the existence of [third-party funding] coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case.”<sup>27</sup>

#### 5. Impact on frivolous claims

34. A question often raised is the potential impact of third-party funding on the number of investment arbitration claims brought against States including speculative, marginal and/or frivolous claims. A study concluded that third-party funding leads to an overall increase in the number of ISDS claims. It also concluded that third-party funders have funded cases that raise novel issues and involve riskier, more uncertain claims.<sup>28</sup> However, another study suggests that the greater availability of funding does not lead to an increase in the overall number of claims.<sup>29</sup>

### III. Questions for consideration

35. This note outlines some aspects as well as concerns expressed regarding third-party funding. Based on available information, the Working Group may wish to consider whether development of reforms by UNCITRAL would be desirable to address those concerns, in particular in light of the balance to be found between the perceived need for funding on one hand, and the protection of the integrity of the arbitral process as well as the enforceability of the outcome of decisions by ISDS tribunals on the other.

<sup>26</sup> See Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p. 180.

<sup>27</sup> The “Proposals for Amendment of the ICSID Rules” prepared by the ICSID Secretariat, dated 2 August 2018, see paragraphs 267 and 530; available at [https://icsid.worldbank.org/en/Documents/Synopsis\\_English.pdf](https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf) and [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_Two.pdf](https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf).

<sup>28</sup> See D. L. Chen, “Can Markets Stimulate Rights?”, 46 *RAND Journal of Economics* (2015, No. 1), p. 23 and p. 42.

<sup>29</sup> M. G. Faure, T. Hartlief and N. J. Philipsen, “Funding of Personal Injury Litigation and Claims Culture: Evidence from the Netherlands”, 2 *Utrecht L. Rev.* 1 (2006) (finding that Between 1999 and 2003, the number of policies for legal expenses insurance increased by over 30 per cent, but the number of personal injury claims remained stable).



36. By way of background information, during the deliberation of the Working Group at its previous sessions, while it was acknowledged that third-party funding could be a useful tool to ensure access to justice, particularly for small- and medium-sized enterprises, concerns were expressed regarding its impact on the cost and duration of ISDS proceedings, and on questions of the lack or apparent lack of independence and impartiality of arbitrators. It was stated that third-party funding had an impact on different aspects of ISDS, aspects on which the Working Group had already decided that reforms would be desirable ([A/CN.9/964](#), para. 120). It was also said that third-party funding introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it. In that context, measures being introduced by States and institutions (including ICSID) to address concerns expressed about third-party funding were mentioned ([A/CN.9/935](#), paras. 44 and 91; and [A/CN.9/964](#), paras. 80 and 120).

37. The following possible solutions were suggested for further consideration: (i) prohibiting third-party funding entirely in ISDS cases; (ii) regulating third-party funding, for example, by introducing mechanisms to ensure transparency in the arrangements (which could also assist in ensuring the impartiality of the arbitrators). There was general agreement to include the matter of third-party funding and the questions of lack of transparency and of disclosure as well as security for costs on the list of concerns for consideration ([A/CN.9/935](#), para. 92).

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