

Submission on Third-Party Funding Initial Draft

10 September 2021

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

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

I General comments

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

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

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

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

II Specific comments

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

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

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

III Detailed comments in annex

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

Annex

This is an initial draft for comments until 30 July. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject “Comments on TPF initial draft”.
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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on third-party funding

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I. Background

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

II. Draft provisions on third-party funding

A. Definitions

DRAFT PROVISION 1 (Definitions)

1. “*Proceeding*” means any procedure to resolve a dispute between an investor of a Party and another Party.
2. “*Third-party funder*” is any natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides Third-party funding for the Proceeding.
3. “*Funded party*” is a party to a dispute that benefits from third-party funding by entering into a funding agreement on its own or through its affiliate or its representative.
4. “*Third-party funding*” is any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the Proceeding.

4. Draft provision 1 provides definitions of some key terminology, as the effectiveness of any regulation on third-party funding would depend on a clear definition thereof ([A/CN.9/1004](#), para. 86). The definitions would need to be adjusted depending on the

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

Commented [A1]: As drafted these definitions overlap, which could create confusion. We have made some comments to them to address this.

Commented [A2]: If TPF to affiliates is going to be addressed, also consider a definition of affiliate here

Commented [A3]: The portion mentioning “funding agreement” is inconsistent with the definition of “Third-party funder” stating “...enters into an agreement to provide, or otherwise provides...” as this appears to NOT be limited to a funding agreement.

Commented [A4]: Consider whether “representative” should be defined or restricted to legal representative?

Commented [A5]: This definition overlaps with/duplicates other definitions above. Consider changing that provision to “the provision of direct or indirect funds or equivalent support by a Third-party funder to a Funded party in a Proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the Proceeding.”

Commented [A6]: Proceeding is the suggested defined term, not dispute

intended model and scope of regulation.² Alternatively, there could be a broad definition of third-party funding, and narrower definitions of certain types of funding (such as contingency fee arrangements, or pro bono support) that would be treated differently under the regulation, depending on the aims to be achieved. The Working Group may wish to consider whether any additional terminology would need to be defined.

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

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

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

8. Paragraph 4 clarifies that the purpose of third-party funding is to provide financing for the costs of the proceeding.⁷ The phrase “direct or indirect” is meant to cover circumstances where the disputing party might not be a party to the funding agreement but still a beneficiary of the funding arrangement (see para. 7 above). The words “or equivalent support” are meant to cover non-financial support.⁸ The phrase “in return for remuneration dependent on the outcome of the proceedings” refers to commercial financing,⁹ whereas the phrase “a donation or grant” refers to forms of non-profit funding ([A/CN.9/1004](#), para. 87).¹⁰ The inclusion of the latter would largely depend on the regulation models outlined

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

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

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

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

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

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

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

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

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

below, particularly as non-profit funding and funding by development organizations such as the [African Legal Support Facility \(ALSF\)](#), the [International Development Law Organization \(IDLO\)](#) and a multilateral advisory centre, should one be established, would not present the same concerns as commercial funding.

9. The Working Group may wish to consider whether certain funding arrangements should be excluded from the definition, such as funding by legal counsel or parties' representatives.¹¹ Or, as noted above, these forms of third-party funding could be subsumed within the definition, and covered by provisions aiming to address transparency and conflicts of interest, but excluded from provisions restricting the use of such specific forms of funding. In conjunction, it may wish to consider whether the definition should expressly cover (i) equity financing (for example, where the funder purchases shares in a disputing party or creates a special purpose vehicle jointly with that party) and (ii) instances where the third-party funder owns or invests in a law firm representing a disputing party.¹²

B. Regulation models

10. This section sets forth the various models for restricting use of all or some forms of third-party funding, in all or some cases, and by all or some parties. In considering the different models, the Working Group may wish to take into account a number of factors, including but not limited to the need to ensure the integrity of the proceedings by preventing any abuse and the benefit that third-party funding could have for claimants with insufficient financial resources, particularly small and medium-sized businesses, to raise claims ([A/CN.9/1004](#), para. 85). This section first outlines approaches for restricting third-party funding based on the type of funding provided. It then outlines approaches for restricting third-party funding based on the type of case or user. These two options could be combined. The third section then addresses legal consequences for breach of these restrictions.

1. Restrictions based on the nature of the funding

General

11. One regulation model is to prohibit all or some forms of third-party funding in ISDS ([A/CN.9/1004](#), para. 81).¹³ Such prohibition could be used to address the concern that third-party funding aggravates the structural imbalance in the ISDS regime and increases the number of ISDS cases, frivolous claims as well as the amount of damages claimed. It could also be tailored to enable funding arrangements that do not raise similar concerns, such as funding for respondent states, funding on a pro-bono basis, or contingency fee arrangements that permit recovery of fees for legal services rendered.

DRAFT PROVISION 2 (Prohibition model)

Option A – A general provision prohibiting third-party funding

A claimant shall not enter into an agreement on, or receive, [the form[s] of] Third-party funding [listed below].

...

Option B – Condition for the submission of a claim

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

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

¹² See ICCA Report, p. 35 and 36.

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

Commented [A7]: This is an important consideration since there may be other reforms (e.g. reflective loss and shareholder claims, and damages) that may also address some concerns around equity-based third-party funding.

Commented [A8]: As suggested in paragraph 16 below, and noted in our general comment, it would be useful to more clearly signpost that regulation/prohibition need not be all or nothing – ie, encompassing all forms of TPF or none. It can be more targeted so as to address specific concerns, since not all forms of TPF raise the same issues. Relatedly, a combination of models (regulation (based on the type of funding) and restriction (based on the particularities of the case/potential user) is possible, and perhaps desirable to achieve certain objectives.

More specifically, the option could be to prohibit/restrict certain forms of third-party funding, such as speculative funding where remuneration is dependent on the outcome of the proceeding and not in exchange for legal services rendered, but allow other types of funding, such as grants and contingency fee arrangements, while requiring transparency regarding such funding.

While that is suggested in paragraph 16, we think it would be clearer if the paper signposted that possibility earlier. Edits are suggested in the text of Draft Provision 2 to reflect that point. An approach could also be adopted that looks more like the “Restriction list” approach in 2(c) below.

Option C – Requirement for the consent

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

Option D – Denial of benefits

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

Commented [A9]: It is unclear whether this works in practice if the funding is received, or discovered, after “consent” has been established. Consider in relation to sanctions and what is the appropriate penalty?

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

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

Commented [A10]: What would be the sanction if the breach were discovered late? Would the funding agreement be deemed to bring the award outside of the agreement to arbitrate, and require annulment or set aside? The penalties/sanctions would need to address this.

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

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

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

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

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

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

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

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

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

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

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

2. Restriction models based on the nature of the claimant

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

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

(a) Access to justice model

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

DRAFT PROVISION 3 (Access to justice model)

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

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

Commented [A11]: There are solutions beyond legal aid mechanisms that could be included here: (1) reform options aimed at reducing costs of proceedings (2) the ability to states to exempt SMEs and/or impecunious claimants from the restriction (3) the ability of states to consent to permit funding to such entities on a case-by-case basis, etc.

Commented [A12]: It seems like it would be clearer to address “c” (the Restriction List model) as an option under “Regulation models”. Then, this section 2 can be focused instead on approaches that might modify the “Regulation” based on the specifics of the case – e.g., the size of the claimant, and the circumstances of the case.

In order to effect this change, we’d also suggest moving paras 26-30, and Draft Provision 5, up to after para. 16.

Commented [A13]: Establishing whether it is “necessary” may be complex. States may wish to define this term, and as noted below, clarify how and under what circumstances impecuniosity/necessity is established (e.g. where burden lies, whether shedding assets is not permitted in x months prior to claim, whether “cheapest” funding qualifies as “necessary”).

Commented [A14]: There are several conceptual and practical problems with this approach. As a general matter, concerns about TPF relate to the distortionary impacts that a TPF industry has on ISDS cases and investment law. Those impacts are a risk irrespective of whether the underlying investment is or is not consistent with sustainable development.

Additionally, an implication of this approach is that investments that are inconsistent with and undermine sustainable development are entitled to bring ISDS claims, just not benefit from TPF.

Commented [A15]: Only if? Or is this one of several possible grounds? This could also be combined with a partial restriction such as suggested in our amended version of Draft Provision 2 and in the “restriction list” approach below — e.g., it can use contingency fee arrangements, those are not prohibited under the “restriction list” approach below.

Commented [A16]: What is meant by “pursuing the claim in good faith”?

Commented [A17]: Based on what standard? Financing, and where money comes from, is always a cost-based choice.

An important consideration would also be the burden of proof. Given that the investor/claimant would have information relevant to its finances, it should have the burden of proving impecuniosity and demonstrating that it has not stripped assets/structured its holdings so as to artificially establish impecuniosity.

It would also be important to establish this as an “access to justice” issue. Is ISDS the only form of relief available? What about other, less costly, dispute settlement avenues? Access to ISDS to secure a preferred monetary remedy is not the same as access to justice. If the claimant can bring another claim elsewhere should it have to?

Commented [A18]: There are also other possibilities. For example, a state-state filter, where states, not the tribunal, can make this decision.

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

²³ See ICCA Report, p. 20.

provision 2 does not apply if the claimant ...” The Working Group may also wish to consider adding “prospects of success” as another criterion, often found in legal aid schemes.²⁴

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

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

(b) Sustainable development model

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

DRAFT PROVISION 4 (Sustainable development model)

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

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

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

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

(c) Restriction list model

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

DRAFT PROVISION 5 (Restriction list model)

1. Third-party funding is permitted unless:

Commented [A19]: How would this work in practice? What pre-defined criteria would act as any kind of actual guidance?

Commented [A20]: Accepting that this qualifies this with “for example”, sustainability is much broader and more nuanced than this and it would seem rather challenging for a tribunal to assess this absent substantial input on this question.

Commented [A21]: In addition to the comments above, there is the general issue that TPF in ISDS itself may undermine sustainable development. There are risks that it (1) increases the number of actors and industries with an incentive to have broad approaches to jurisdiction, broad standards of liability, and large damage awards; (2) drives up claims and damages, which may broaden the nature and type of ISDS claims that are broad, place added strain on government/public resources, and increase the flow of money from host state budgets to legal and financial services firms located in home states or tax havens. Even if a business is operating in an SDG-relevant sector like provision of water services, TPF funding of its ISDS claims can distort the law and its use in ways that are inconsistent with sustainable development.

Commented [A22]: Unless carefully designed, there is a significant risk that this limitation will be meaningless in practice.

Commented [A23]: As noted above, we’d suggest moving paras. 26-30 up so that they follow para. 16.

Commented [A24]: Many states’ interventions on the topic of TPF narrow in on the funding that this referred to in Draft Provision 5(1)(a). It may be appropriate to explain in a paragraph that this paragraph is intended to address those many comments.

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

- (a) the funding is provided on a non-recourse basis in exchange for a success fee and other forms of monetary remuneration or reimbursement wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings;
- (b) the expected return to be paid to the Third-party funder exceeds a reasonable amount;
- (c) the number of cases that the Third-party funder funds against the respondent State with regard to the same measure exceeds a reasonable number;
- (d) ...
2. Upon disclosure of the information required in draft provision 7, the tribunal, upon request of a party or on its own initiative, shall determine whether the Third-party funding is not permissible in accordance with paragraph 1.

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

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

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

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

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

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

Commented [A25]: This word should NOT be "and" but rather "or".

Commented [A26]: This should be "any other form" to ensure that one and not multiple forms will meet the criteria here.

Commented [A27]: "expected return" is not clear. Consider rewording this provision to state an objective measurement, such as referring to a specific percentage of award etc.

Commented [A28]: Is "amount" sufficient to capture percentages?

Commented [A29]: In order for this to be workable in practice it would be critically important to link to the beneficial owner of the funder, and not the special purpose vehicle.

Commented [A30]: Comment throughout (including but not limited to provisions 6, 7, and 10.) that "tribunal" is too specific to arbitration?

Commented [A31]: "party to the dispute" or "Party"?

Commented [A32]: If the requirement on the tribunal is mandatory, is the clause "upon request of a party or on its own initiative" necessary? The word "shall" suggests that this evaluation should be done in any event, so a request from a party would presumably not be necessary.

Commented [A33]: Permitted? Not permissible? Also it would be more clear to express this positively – i.e. "shall determine whether the Third-party funding is permitted in accordance with paragraph 1"?

Commented [A34]: While it is useful to clarify that 1(a) would restrict commercial funding, per our more general comment in our accompanying submission, there are many other combinations of regulation/restriction that states could use – e.g. combine with the exceptions from the "prohibition" to permit TPF in certain circumstances

Commented [A35]: There are other workable ways to limit E.g. "bad faith", "political purposes" and that aren't included in this "restriction" list, or may even be better dealt with in other ways. It may be useful to evaluate the following: if there was a determination that these claims were frivolous and meritless and did not justify TPF, should those claims be allowed to proceed absent TPF? Is the suggestion here that the standard/test of "frivolity" used to determine whether TPF is permissible would be different than the standard/test used to evaluate a preliminary objection?

Commented [A36]: In what way? If it is funded it is presumed not frivolous? This seems a challenge. Also it gives weight to the merits of the claim itself based on the assessment of a profit-driven funder, which may make evaluations based on criteria other than legal merit alone. (e.g., counsel used, the respondent's experience with ISDS and ability to fund a strong defense).

- The consequences if the third-party funding is found to fall under the category in paragraph 1 (see draft provision 6).

3. Legal consequences and possible sanctions

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

DRAFT PROVISION 6 (Sanctions)

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

- order the claimant to terminate the Third-party funding agreement and/or return funding received;*
- suspend or terminate the Proceeding;*
- consider the non-compliance in allocating the costs of the Proceeding;*
- ...*

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

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

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

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

C. Disclosure of third-party funding

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

37. Requiring disclosure could be a stand-alone regulation model. However, the implementation of other regulation models mentioned in sections A and B would need to be based on the disclosure of certain information. This is because without the information

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

²⁷ See CCSI/IIED/IIISD Joint Submission.

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

Commented [A37]: Is “may” adequate in all cases? Should more nuance be brought in here? E.g. “may” for some violations, “shall” for others?

Commented [A38]: It is unclear what is being suggested here. Is the suggestion that the claimant would return funding received (or paid to the attorneys) to the funder? That seems unworkable and ineffective as a sanction. Is what is meant instead that the claimant is to pay the respondent amounts recovered by the funder, if any, or repay the award, if any, to the respondent?

Other sanctions, such as penalties on claimant’s counsel, and cost orders, are outlined in Art. 4 of our submission, https://ccsi.columbia.edu/sites/default/files/content/pics/our_focus/uncitral-submission-third-party-funding-en.pdf

Commented [A39]: (c) is an incredibly light-handed sanction as it would merely be a consideration in the funder’s cost/benefit analysis and not a real sanction or deterrent. To the extent such light sanctions are included here, we also suggest including more strict ones as we have highlighted in our cover note. They should include requirements on tribunals (e.g. “shall” not “may”) and also certifications by claimants board of directors and legal counsel as to the non-existence of funding.

Commented [A40]: This is really key and should be included directly in the Draft Provision above. If anything, we know that funding takes many forms and that if rules are put into place, financial incentives to avoid them are high. Capturing intent or effect to circumvent will be critical to raising the risk in doing so and thus deterring funding.

Commented [A41]: This should be included in the Draft Provision itself. Given the difficulty of discovering arrangements designed to circumvent the rules, strong penalties are essential to discourage/increase the risk of such arrangements.

Commented [A42]: Another option not included here but which was included in our draft is disclosure through written certification.

We included a requirement that the party sign this, and also the party’s representative sign it. For the lawyer, we also had a list of legal and ethics societies listed.

We made these obligations continuous, so disclosure upon any change in the relevant information.

See Art 2 of this submission: https://ccsi.columbia.edu/sites/default/files/content/pics/our_focus/uncitral-submission-third-party-funding-en.pdf

disclosed, it would not be possible to determine whether the third-party funding is permissible or not. Depending on the approach to be taken, disclosure may be a prerequisite for obtaining approval from the tribunal to seek third-party funding. It is in this context that the Working Group may wish to consider disclosure requirement as outlined below ([A/CN.9/1004](#), para. 89).

DRAFT PROVISION 7 (Disclosure)

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

(a) the name and address of the Third-party funder;

(b) the name and address of the beneficial owner of the Third-party funder and any natural or legal person with decision-making authority for or on behalf of the Third-party funder; and

(c) the funding agreement(s) or the terms thereof;

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

(a) whether the Third-party funder agreed to cover the costs of an adverse cost award;

(b) the expected return amount of the Third-party funder;

(c) any rights of the Third-party funder to control or influence the management of the claim, the Proceeding and to terminate the funding arrangement;

(d) number of cases that the Third-party funder has provided funding for claims against the respondent State;

(e) any agreement between the Third-party funder and the legal counsel or firm representing the Funded party; and

(f) any other information deemed necessary by the tribunal.

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

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

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

(a) suspend or terminate the proceedings;

(b) take the fact into account when making decision on the costs of the Proceeding; or

(c) take any other appropriate measure.

Parties involved

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

Commented [A43]: This should be "ultimate beneficial owner"

Commented [A44]: Does this introduce unnecessary confusion?

Commented [A45]: Consider also adding a requirement for the funder to disclose other arbitration in which it has provided funding, and counsel and arbitrators involved in those cases. This would enable easier detection of conflicts of interests.

Commented [A46]: Consider replacing "of" by "in case of". In addition, would this information not be covered by "1 (c)"?

Commented [A47]: This should say "agreement" for consistency.

Commented [A48]: Why not already require this information when submitting the Request for Arbitration? How can a respondent State rule out that arbitrators have no link with a possible Third-party funder, if it isn't aware of such a funder before the constitution of the tribunal?

Commented [A49]: Terminology: disputing parties or parties to the dispute should be used consistently.

Commented [A50]: Per above comments on sanctions, these are very much on the lighter ends of the possibilities.

Commented [A51]: Per the CCSI/IISD/IIED submission, should there be a length of time it is suspended before termination? E.g. 90 days? If the party fails to remedy it is discontinued?

Commented [A52]: Consider:

- (1) Automatic termination if a party e.g. intentionally evades disclosure or lies? If a party misrepresents TPF?
- (2) Reasons for termination to be made public
- (3) Legal counsel – if counsel has to certify that to its knowledge there is no third party funding this would certainly require counsel to consider that.

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

Scope of disclosure

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

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

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

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

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

Timing and means of disclosure

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

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

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

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

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

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

Commented [A53]: Ultimate beneficial owner.

Commented [A54]: It also would be required for other restrictions – like same funder financing multiple claims against a government

Commented [A55]: Ultimately disclosure should be aligned with the purposes of the regulation and what is necessary so this should follow from that

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

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

Non-compliance and possible sanctions

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

Linkage with disclosure requirements of the tribunal

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

Public disclosure

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

Commented [A56]: Per our general comment, the WGIII has identified myriad concerns about TPF that seem to go well beyond those identified by and incorporated into existing treaties (generally limited to conflicts of interest) so it would then only be appropriate that sanctions may be better tailored to these more robust concerns and not be limited to, or even based on, what is in existing treaties. We humbly suggest visiting Section 4 of the CCSI/IISD/IIED submission.

Commented [A57]: This is critically important. We suggest addressing this directly in the Draft Provision. It could also be clarified that information submitted to the tribunal in accordance with Draft Provision 7 is "any further written statements or written submissions by any disputing party" in Art. 3 of the UNCITRAL transparency rules.

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

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

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

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

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

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

D. Other provisions

1. Scope of covered investor and investment

DRAFT PROVISION 8 (Investment and investor of a Party)

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

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

2. Security for costs

DRAFT PROVISION 9 (Security for costs)

Option A

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

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

Option B

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

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

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

53. If a general provision on security for costs is to be prepared,⁴² draft provision 9 could possibly be merged with that provision, similar to those found in recent investment treaties

Commented [A58]: Again: "Party" or "party to a dispute"?

Commented [A59]: It may make sense to adopt different approaches based on the type of TPF permitted. If only pro bono and contingency-type arrangements were permitted, then Option B may be adequate; however, if a lighter regulatory approach were adopted, then states might want the additional comfort of Option A.

Commented [A60]: These two factors seem irrelevant to the motives behind security for costs – in particular the concern that the respondent state will not be able to recover costs from funded parties. With respect to Option A(b), for instance, a funder may still fund the claim with a requirement to post security for costs. The cost order protecting the respondent state would not preclude the investor from securing funding. Additionally, Option A(a), with its language on "responsibility", seems to require an examination of the merits, which would be unworkable at an early stage.

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

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

stating that the tribunals shall take third-party funding into consideration when deciding to order security for costs.⁴³

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

3. Allocation of costs

DRAFT PROVISION 10 (Allocation of costs)

Option A

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

Option B

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

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

Commented [A61]: i.e., the "respondent State"?

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

D. Principles on Security for Costs

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

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

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

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

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

C. Principles on Final Award (Allocation) of Costs

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

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

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

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

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

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

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

4. Code of conduct for third-party funders

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

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

E. Collection of data

Note: The Secretariat was requested to collect relevant data on third-party funding, including on the frequency of its use particularly by SMEs (A/CN.9/1004, paras. 81 and 98), the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons for using third-

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

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

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

⁴⁷ See ICCA Report, p. 161.

⁴⁸ See Hong Kong Code of Practice for Third Party Funding of Arbitration issued December 7, available

at https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf; See Code of Conduct for Litigation Funders by the Association of Litigation Funders, available at <https://associationoflitigationfunders.com/code-of-conduct/>.

party funding. Considering the difficulty that the Secretariat is facing in compiling relevant data, it would be appreciated if any such information could be provided to the Secretariat.

Initial draft