

# **Third-Party Funding: CCSI/IISD/IIED Observer Submission**

**Presented by:**

**Brooke Guven, Columbia Center on Sustainable Investment**

**UNCITRAL Working Group III 38<sup>th</sup> Session Preparatory Meeting**

**October 12, 2019**



**Columbia Center  
on Sustainable Investment**

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



# Outline

- ◆ **Third-Party Funding (TPF) in UNCITRAL WGIII**
- ◆ Defining Third-Party Funding
- ◆ How is TPF used in ISDS?
- ◆ What is the concern about third-party funding?
- ◆ What policy responses are available to address these concerns?
- ◆ CCSI/IISD/IIED Observer Submission

# Third-Party Funding in UNCITRAL WGIII

“At the outset [of the 37<sup>th</sup> Session], it was emphasized that the phenomenon of third-party funding was one of great concern and the necessity of developing reforms in that area was underlined, particularly in light of the current lack of transparency and of regulation of third-party funding.”

“The Working Group concluded that it was desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third-party funding in ISDS”\*

\*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), paras 17, 25.

# Outline

- ◆ Third-Party Funding (TPF) in UNCITRAL WGIII
- ◆ **Defining Third-Party Funding**
- ◆ How is TPF used in ISDS?
- ◆ What is the concern about third-party funding?
- ◆ What policy responses are available to address these concerns?
- ◆ CCSI/IISD/IIED Observer Submission

# Defining Third-Party Funding

“The Working Group noted that there were many different types of third-party funding. It was also said that the definition of third-party funding varied across different sources including legislation and treaties. It was, therefore, suggested that a clear definition of third-party funding would need to be developed for any reform to be effective.”\*

\*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), para 21.

# Defining Third-Party Funding

- ◆ Definitions can be broader or narrower
- ◆ “Third-party funding” can compete with, resemble, or complement other forms of arbitration financing, including:
  - ◆ Contingency fee arrangements
  - ◆ Pro bono legal services
  - ◆ Philanthropic grants
  - ◆ Financing without a financial interest in the outcome of a dispute (i.e. corporate finance)
  - ◆ Litigation insurance
  - ◆ After-the-event insurance

# Defining Third-Party Funding

- ◆ “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.*”\*

\*UNCITRAL Secretariat Note WP. 157 ¶ 5

# Defining Third-Party Funding

- ◆ 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*.\*

**\*ICCA Queen Mary Task Force on Third Party Funding in International Arbitration**



# ICSID Rule Reform

- ◆ Defined in the context of transparency requirements

“(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.”

# CCSI/IISD/IIED Submission

“Third-party funding” is the provision of funds or equivalent support by a third-party funder to a party, its affiliate, or its representative, for the pursuit or defense of a proceeding.\*

Other than as provided in (b) [funding from contingency arrangements] and (c) [funding from affiliates] below, a disputing party shall not accept or receive third-party funding provided to it on a non-recourse basis in exchange for a success fee or other form of monetary remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding, or a portfolio of proceedings when such portfolio includes the proceeding.

\*subject to ongoing transparency to tribunal and each other party to proceeding

# Outline

- ◆ Third-Party Funding (TPF) in UNCITRAL WGIII
- ◆ Defining Third-Party Funding
- ◆ **How is TPF used in ISDS?**
- ◆ What is the concern about third-party funding?
- ◆ What policy responses are available to address these concerns?
- ◆ CCSI/IISD/IIED Observer Submission

# How is TPF Used in ISDS?

## Who are Funders

Third-party funders are investment funds. ISDS claims are assets. Funders invest in the asset to generate a financial return.

- ◆ Some funders are public, some are private, but all have profit-focused fiduciary obligations to their shareholders
- ◆ Some investors look to litigation funding as a way to diversify their investment portfolio away from other investable assets (e.g. stock market)

# How is TPF Used in ISDS?

## Who is benefitting from Funding?

- ◆ “Access to justice” is usually not the reason for seeking funding
- ◆ Access to ISDS may be the reason in some cases.
- ◆ Beneficiaries are often not impecunious. Well-resourced and sophisticated claimants seek to:
  - ◆ Manage risk
  - ◆ Move legal risk off-balance sheet
  - ◆ Reduce legal budgets or “turn legal departments into profit centers”
  - ◆ Take advantage of financing that may be on more attractive terms than elsewhere
  - ◆ Take advantage of funders “management consultancy” role

# How is TPF used in ISDS?

- ◆ Claimant funding
  - ◆ Money placed into a “special-purpose vehicle”
  - ◆ Funding Agreement between funder and claimant
  - ◆ Secured interest in portion of outcome of claim
  - ◆ Termination rights
  - ◆ Sometimes rights to:
    - ◆ Information
    - ◆ management of claim

# How is TPF used in ISDS?

- ◆ What and when does funding occur?
  - ◆ Some funders fund only a portion of costs, some all
  - ◆ Funding can come in early or later in the process
- ◆ Role of funder varies:
  - ◆ Some will require influence or decision-making over the management of the claim (e.g. decisions to settle)
  - ◆ Some will take a hands-off approach

# How is TPF used in ISDS?

- ◆ Factors considered by funders:
  - ◆ demonstration of healthy claim
  - ◆ margin of recovery somewhere higher than budget for funding
  - ◆ the value of the claim
  - ◆ the amount required to be advanced
  - ◆ jurisdictional obstacles
  - ◆ available defenses
  - ◆ the nature, length and type of the proceeding
  - ◆ the possibility of settlement
  - ◆ the creditworthiness of the client
  - ◆ the creditworthiness of the Respondent (collectability of award)
  - ◆ counsel that has been selected and how counsel will be compensated
  - ◆ any other obstacles to recovery of an award



# How is TPF used in ISDS?

- ◆ Respondent funding
  - ◆ Very different from claimant funding because there is no financial upside
  - ◆ Can be similar to after the event insurance
    - ◆ Requires agreement on foreseeable outcome/liability (i.e. how will tribunal apply law to facts and what will award be?)
    - ◆ Permits risk limitation but not elimination
    - ◆ Respondent will pay a deductible for agreed amount, and higher amounts will be compensated by funder (and may be shared in some combination between funder and respondent)
  - ◆ May also be collateralized by other claims
- ◆ But: Under what circumstances can (or will) governments enter into arrangements that grant control of claim to funder?

# How is TPF used in ISDS?

- ◆ Portfolio funding = financial interest in a basket of claims
  - ◆ Around a single claimant
  - ◆ Around a law firm
- ◆ Permits risk diversification for funder
- ◆ Can result in lower cost of funding for claimants
- ◆ Permits secondary market for institutional investors
  - ◆ Not robust right now, but starting to exist

# Outline

- ◆ Third-Party Funding (TPF) in UNCITRAL WGIII
- ◆ Defining Third-Party Funding
- ◆ How is TPF used in ISDS?
- ◆ **What is the concern about third-party funding?**
- ◆ What policy responses are available to address these concerns?
- ◆ CCSI/IISD/IIED Observer Submission

# What is the concern about TPF?

- ◆ **Concerns must relate to an objective – What is the objective of Investment Treaties?**
- ◆ **Does TPF advance the object and purpose of investment treaties?**
  - ◆ Purpose: [Sustainable] Economic Development
    - ◆ US – Argentina (1994): Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the parties
    - ◆ Switzerland – Egypt (2012): Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity and sustainable development of both States
- ◆ **What are the costs vs. benefits of TPF?**
- ◆ **What are desirable and appropriate policy responses?**

# What is the concern about TPF?

- ◆ **Concerns about the structural imbalance exacerbated by TPF**
- ◆ **Concerns about the impact of TPF on:**
  - ◆ Conflicts of Interest
  - ◆ Costs and Security for Costs
  - ◆ Confidentiality and Legal Privilege
  - ◆ Speculative, frivolous and marginal claims
  - ◆ The outcome of disputes and decisions to settle claims
  - ◆ The retention of foreign direct investment
  - ◆ Valuation of claims
  - ◆ The number of cases against select respondent states
- ◆ The number and kind of ISDS cases
- ◆ The substantive development of investment law
- ◆ State conduct: regulatory chill

# Outline

- ◆ Third-Party Funding (TPF) in UNCITRAL WGIII
- ◆ Defining Third-Party Funding
- ◆ How is TPF used in ISDS?
- ◆ What is the concern about third-party funding?
- ◆ **What policy responses are available to address these concerns?**
- ◆ CCSI/IISD/IIED Observer Submission

# What policy responses are available?

UNCITRAL Secretariat Note: Third-party funding – Possible Solutions (A/CN.9/WG.III/WP.172)

- ◆ Definition of Third-Party Funding
- ◆ Prohibition of Third-Party Funding
- ◆ Regulation of Third-Party Funding

# What policy responses are available?

## Questions that should guide policy-making:

- ◆ How and under what circumstances is TPF being used?
- ◆ Absent information, what assumptions should be made? Should a precautionary approach be used?
- ◆ Evaluated in light of treaty objectives, what is the concern about TPF?
- ◆ Under what circumstances, if any, should TPF be permitted?
- ◆ What regulations should be in place to reduce costs and advance benefits?



# Outline

- ◆ Third-Party Funding (TPF) in UNCITRAL WGIII
- ◆ Defining Third-Party Funding
- ◆ How is TPF used in ISDS?
- ◆ What is the concern about third-party funding?
- ◆ What policy responses are available to address these concerns?
- ◆ **CCSI/IISD/IIED Observer Submission**

# CCSI/IISD/IIED Observer Submission

- ◆ **Two prongs:**

- ◆ Transparency of a broader set of third-party funding
- ◆ Prohibition of commercial, profit-driven funding

- ◆ **Transparency:**

- ◆ For uniformity, align transparency definition and requirements with ICSID's ongoing work on this issue

# CCSI/IISD/IIED Observer Submission

- ◆ Prohibition:

Other than as provided in (b) [contingency arrangements] and (c) [affiliates] below, a disputing party shall not accept or receive third-party funding provided to it on a **non-recourse basis** in exchange for a **success fee or other form of monetary remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding**, or a **portfolio of proceedings** when such portfolio includes the proceeding.

- ◆ Philanthropic and not-for-profit funding would be transparent but permitted.

- ◆ Equity investments are not covered by this text

# CCSI/IISD/IIED Observer Submission

## **Short of a full prohibition:**

- ◆ Are there certain situations in which TPF should be permitted? E.g. impecunious claimants? Certain kinds of claims?
- ◆ Who should bear the burden of demonstrating criteria for TPF?

# CCSI/IISD/IIED Observer Submission

## **Enforcement:**

- ◆ Failure to comply with transparency requirements
  - ◆ Suspension of the proceeding for 90 days
  - ◆ After 90 days proceeding is discontinued
- ◆ Failure to comply with prohibition requirements
  - ◆ Proceeding automatically discontinued
- ◆ “Catch all” – if funding is structured with intent or effect of avoiding transparency or prohibition provisions, the tribunal shall discontinue the proceeding.

# CCSI/IISD/IIED Observer Submission

## **Enforcement:**

- ◆ **Legal counsel:** referred to ethics or bar committee
- ◆ **Costs:** violating party shall bear costs and expenses
- ◆ **Annulment or set-aside:** if prohibited funding is discovered after an award has been rendered and/or damages paid – deemed to establish that the award was issued in manifest contravention of a fundamental rule of procedure agreed by the parties

## Working Group III: Investor-State Dispute Settlement Reform

### 38<sup>th</sup> session 14-18 October 2019, Vienna

- [A/CN.9/WG.III/WP.165 - Annotated provisional agenda](#)
- [A/CN.9/WG.III/WP.166 - Reform options](#)
- [A/CN.9/WG.III/WP.166/Add.1 - Reform options \(Tabular presentation\)](#)
- [A/CN.9/WG.III/WP.167 - Background information on a code of conduct](#)
- [A/CN.9/WG.III/WP.168 - Advisory Centre](#)
- [A/CN.9/WG.III/WP.169 - Selection and appointment of ISDS tribunal members](#)
- [A/CN.9/WG.III/WP.170 - Shareholder claims and reflective loss](#)
- [A/CN.9/WG.III/WP.172 - Third-party funding](#)

#### Submission from Governments

- [A/CN.9/WG.III/WP.156 - Submission from the Government of Indonesia](#)
- [A/CN.9/WG.III/WP.159 - Submission from the European Union and its Member States](#)
- [A/CN.9/WG.III/WP.159/Add.1 - Submission from the European Union and its Member States](#)
- [A/CN.9/WG.III/WP.161 - Submission from the Government of Morocco](#)
- [A/CN.9/WG.III/WP.162 - Submission from the Government of Thailand](#)
- [A/CN.9/WG.III/WP.163 - Submission from the Governments of Chile, Israel and Japan](#)
- [A/CN.9/WG.III/WP.164 - Submission from the Government of Costa Rica](#)
- [A/CN.9/WG.III/WP.171 - Submission from the Government of Brazil](#)
- [A/CN.9/WG.III/WP.173 - Submission from the Government of Colombia](#)

### Next Meeting

---

- 14-18 October 2019, Vienna
- 20-24 January 2020, Vienna
- 30 March to 3 April 2020, New York
- [Side events during the 38th session](#)

### Inter-sessional Regional Meetings

---

- [First Inter-sessional Regional Meeting](#)
- [Second Inter-sessional Regional Meeting](#)
- [Third Inter-sessional Regional Meeting](#)

### Additional Resources

---

- [Audio recordings of meetings](#)
- [ISDS Reform: On-line Resources](#)
- [Bibliography of recent writings related to investor-State dispute settlement](#)
- [Colloquia](#)
- [Portal for States](#)

# Thank you

Brooke Güven ([brooke.guven@law.columbia.edu](mailto:brooke.guven@law.columbia.edu))



**Columbia Center**  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY