

THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT
ROUND TABLE DISCUSSION OF THE
ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL
ARBITRATION
DRAFT REPORT FOR PUBLIC DISCUSSION¹

OCTOBER 17, 2017

INTRODUCTION

On October 17, 2017, the Columbia Center on Sustainable Investment (CCSI) and the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (Task Force) co-hosted a roundtable discussion at Columbia University in New York City to discuss the Draft Report for Public Discussion of The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, dated September 1, 2017 (Draft Report).

The roundtable was convened to specifically address the use, and public policy impacts, of third party funding in investor-State dispute settlement (ISDS). When third party funding is used in ISDS it raises myriad policy questions, some of which are debated in the context of third party funding generally, and some of which are unique to ISDS. For example, because of the involvement of a respondent-State, which has innumerable, and sometimes competing, obligations to its citizens, policy concerns arise that are not present when a dispute is between two private parties. Similarly, under nearly all existing treaties, treaty-based claims must be initiated by a claimant, and other than in the extremely limited number of circumstances in which a counterclaim may be possible, only the claimant, and not the respondent-State, has the potential to be awarded financial compensation. This reality means that the economics of third party funding will necessarily look different as between claimants and States.

Furthermore, the debate over third party funding cannot be decoupled from with the larger, ongoing debate over the propriety of investor protection provisions and the inclusion of ISDS mechanisms in international investment treaties. This roundtable took place at a time when ICSID, UNCITRAL, UNCTAD, the European Union as well as many States are reconsidering their approach to, and/or the rules surrounding, ISDS, focusing on how this system *should* work. In light of the present reality in which ISDS exists and third-party funding is being used, this roundtable sought to allow participants to better understand how third-party funding, and different approaches to governing it, impact issues including, for example: the use of ISDS, outcomes of cases for litigants and non-parties, development of the law, and ethical obligations of arbitral professionals.

This roundtable provided an opportunity engage various stakeholders with diverse perspectives and experiences to discuss the issues raised in the Draft Report regarding the use of third party funding in ISDS. This roundtable sought not only to ask what is happening, but to dig deeper by considering the impacts of third-party funding, whether the impacts are desirable or undesirable from a policy perspective, and what mechanisms are available, or should be available, to manage the impacts. It also sought to identify information gaps that prevented adequate analysis of third party funding and its policy implications.

¹ CCSI and the Task Force express their thanks to the rapporteurs for the roundtable whose contributions made this outcome document possible: Vladislav Djanic, Nathan Lobel, Neeraj R. S. and Charlotte Skerten.

The roundtable discussion proceeded under Chatham House Rules and this outcome document is therefore drafted on a basis of non-attribution. Present at the roundtable were representatives of the following: States, funders, lawyers who represent States, lawyers who represent claimants, academics, and members of civil society. A list of participants is included in Annex A to this outcome document.

ROUNDTABLE DISCUSSION

The discussion started with a general round of introductions and a brief overview of the Task Force, including a review of chapter topics for the forthcoming final report. The introduction also clarified the objective of the roundtable, which was to generate an informed dialogue about the public policy issues surrounding third party funding in ISDS.

SESSION 1: THIRD PARTY FUNDING AND PUBLIC POLICY

Recent years have seen significant increases in third party funding in ISDS. While it is understood that the number of funded cases is increasing, diverse opinions exist on how third party funding is impacting ISDS, whether third party funding is useful or desirable in this context, and what may be the short- and long-term public policy impacts of third party funding. The roundtable's first session considered questions about potential structural impacts of third party funding (for both claimants and respondents), including how of standards in the Task Force's draft report regarding disclosure, cost allocation and security for costs may affect these structural issues.

Specific questions that roundtable participants were asked to address included:

- Does third party funding promote “access to justice”? From the perspective of claimants? States? Third parties? What do we mean by “access to justice”? Is third party funding necessary for “access to justice”?
- Does the use of third party funding as a way to manage funds and a corporate balance sheet, as opposed to funding impecunious claimants, change the public policy issues surrounding third party funding? Why or why not?
- Does third-party funding impact the number of cases? The quality? Does third party funding increase or decrease frivolous cases? What is meant by a “frivolous” case?
- Does third party funding ameliorate or exacerbate systemic power imbalances? How?
- What are policy arguments for permitting, and for not permitting, third party funding in ISDS?
- How does third party funding ameliorate or exacerbate concerns about ISDS as a general matter?

To facilitate comprehensive deliberation over a wide range of issues the discussants split into four sub-groups for one hour and then reconvened into a plenary group.

Small Group Discussions:

Small Group I

In discussing whether third party funding increases access to justice, participants in this group began by asking what exactly is meant by the word “justice?”

One participant, conceiving of “justice” as ability to have one's day in court, asserted that third party funding undeniably increased access to justice. Some participants reasoned, however, that third party funding does not generally provide access to the ISDS system for all claimants. For example, even impecunious small claimants may have claims that are not financially large enough to entice a third party

funders, so these claimants still have no greater access to the ISDS system. Rather, third party funding seems to be more likely to lower the cost of entry for potential claimants that, without funding, may have been hesitant to bring a claim but are not impecunious. To support this position, participants pointed to the recipients of third party funding, who, based on anecdotal evidence and the Draft Report, as well as knowledge of the ISDS system generally, seem to be mostly large multinational corporations. While third party funding may be useful in managing their balance sheets and how these corporations choose to allocate resources or which opportunities may be foregone if they choose to finance an ISDS claim, to these participants, third party financing in this context does not seem to be about fundamentally achieving access to justice. Consequently, it was said that it is misplaced to assert that for these kinds of non-impecunious claimants third party funding is necessary for access to justice.

One participant felt that third party funding brings other benefits outside of “access to justice.” For example, this participant pointed out that in all legal systems, laws evolve and develop, and so ISDS, which is relatively transparent in comparison to commercial arbitration, exhibits the positive externality of creating public discussion about legal questions. Another participant added that many cases now involve corruption in some respect, and it is a good thing that third party funding can promote cases that shed light on these issues and hold governments accountable, both to other countries as well as their own citizens. Other participants, however, disagreed, noting that the arguments rely on the premise that ISDS is transparent, and stating that ISDS is strikingly opaque compared to other forms of public litigation, which thereby limits the magnitude of any positive externalities that could potentially arise from ISDS debates.

The participants then shifted the discussion to whether third party funders impact the nature of claims actually brought in ISDS. One participant noted that, because the recipients of funding are often well-resourced themselves, and can therefore fund their own cases, particularly if they are confident about the outcome, third party funding then can actually encourage riskier cases to be brought, because the funders can diversify against risk within a portfolio of cases. This participant likened ISDS to the wild west of arbitration, with unpredictable determinations of liability and damages because of the inherently vague nature of standards in treaties themselves and the inconsistent way in which damages are calculated, and went on to say that third party funding is like buying a lottery ticket; it has a relatively low entry cost for claimants with an opportunity to win a very large return. Because States cannot initiate claims there is very little downside for claimants, and if third party funding further eases this cost of entry, there is a large public policy concern about funders’ impact on this system. Further, it was said that, because of the inconsistent nature of damages assessments in particular, it appears that funders push claimants to seek damages that exceed restitution for harm done, or that claimants are inflating claims to make them more attractive to funders, so that more speculative claims such as those based on speculative lost profits, are encouraged and ever-larger damage claims may become more of a norm.

To continue this discussion on the nature of claims, another participant noted that “capital seeks returns, not justice.” This participant continued, setting forth the position that unlike other business investments outside of the legal field, third party funding of litigation has profound implications for the development of law and the legal system, rendering the profit-motive of third party funders particularly problematic when it is injected into a system that is intended to promote justice. Some group members challenged this position, asserting that profit-seeking was not the sole motive for all third party funders, using the example of NGOs or private investors who can, and have, funded legal efforts for respondents. For NGO funding, the ideological nature does not, for these participants, change the fact that the funder may have a different interest in the outcome than the claimant that could distort how a claim is managed.

Following on this vein of the conversation, another participant raised the possibility of another motive for third party funding of ISDS - what could happen if States inevitably begin funding investor claims against other States for geopolitical reasons? There was general agreement that these concerns raised the need for

some type of disclosure of funding in ISDS claims, but the participants could not agree on whether mandated disclosure would be appropriate. On the one hand, disclosure of the existence of a funding arrangement could bias the legal aspects of the dispute resolution system and distract from the core subject of the case (for example, whether the existence of a third party funder should be taken into account in damages calculation, including whether the funder's costs should be included). Furthermore, it was said that financing terms are proprietary corporate information, so disclosure, if made, would have to be made subject to various exceptions. However, on the other hand, participants also noted that ISDS inherently raises public policy concerns given the participation of a respondent State, and tribunals already operate with substantial discretion. Advocating for greater discretion (i.e. something less than some determined level of transparency) therefore exacerbates other problematic aspects of the system that is frequently criticized for its lack of transparency. Furthermore, since claimants are receiving *public* money if they win cases, and in particular cases that are funded by third parties, claimants should be required to disclose their funding sources.

To conclude the first small group discussion, this group was split between whether third party funding should be evaluated as a phenomenon in and of itself, or whether it is inherently intertwined with, and therefore must be evaluated in light of, the ISDS system as a whole. On the one hand, some participants noted that ISDS is a legal system that currently permits third party funding, and investors should not be punished for using it. On the other hand, some participants felt that the system has many fundamental problems (noted problems included the asymmetrical nature in the ability to initiate claims, potential negative impacts on third-parties, relatively unregulated arbitrator conflicts of interests, and a lack of transparency), and third party funding appears to further exacerbate many of these problems.

Small Group II

Small group II first discussed the role in the investor-state dispute settlement system that is played by insurers that provide litigation/arbitration insurance. In this respect, one participant raised the question of whether these kinds of insurers are able to accurately predict the outcome of a case. One participant noted that insurers do in essence possess the capacity to usefully evaluate the merit of claims, but that there was a need to develop it further as they are also not always accurate. It was underlined that there is going to be considerable growth in this area in the future and that there is considerable discussion currently on-going behind the scenes regarding possible new ways of approaching investment insurance, which could be considered an alternative to more traditional forms of third party funding, or generally as a growth in third party funding.

The discussion then turned to consider the reasons for which claimants turn to third party funding. Discussion focused on the two types of claimants that look for funding. The first group consists of investors that lack the resources to finance the claim on their own. Faced with choosing between not being able to bring a claim at all and bringing a claim but giving up a share of the potential recovery, they are unsurprisingly inclined to go with the latter. The second group consists of investors who, while having sufficient funds to finance the claim, prefer not to have the money tied up so that they can streamline funds into their usual business activities. Even though third party funding may have started as a practice that was primarily oriented towards impecunious claimants, it has over time shifted more towards this second group of non-impecunious third party funding beneficiaries. There was disagreement within the group with respect to whether this is problematic from a public policy perspective.

The small group then moved on to discuss whether third party funders could themselves be considered to be investors and whether they would be able to bring a claim in their own name. There was broad agreement within this group that funders should not have this ability – while, strictly speaking, third party funders do have a financial investment in the claim, the group was of the opinion that this was not a protected investment within the meaning typically attributed to the term within investment treaties and

ISDS, and as a matter of policy should not be considered so. Several participants pointed out that third party funders themselves do not generally seem to assert that they should be considered protected investors.

Next, this small group focused on aspects of third party funding that are unique to ISDS because they relate to States, as opposed to private parties, being the respondent. Noting the asymmetrical nature of how ISDS functions, where claimants sue States but States generally do not sue claimants, and claimants are also the parties who can benefit from third party funding, one participant raised the question of whether it would be possible for a State to get access to third party funding when it is defending a claim, as well as what the cost of doing so would be. It was noted that apart from cost awards for their legal defense (which are often not awarded at 100% of costs), States do not receive any remuneration in the event that they are successful in defending a claim so there would not be any upside for a third party funder, and the economics therefore make State funding difficult. One participant responded by explaining that the mechanism through which States can potentially receive funding is known as inverse contingency – the funder provides financing for the State’s legal costs during the arbitration and, in return, receives a certain level of compensation in the event that the State is successful in defending against the claim, or is found liable to pay damages that fall below a threshold agreed between the State and the funder. The group briefly considered whether there could be any room for funding States in the case of a counterclaim, but noted that counterclaims are relatively rare. It was then noted that some States have started inserting ICSID clauses in all of the investment contracts that they conclude, so States would have the possibility of initiating contractual claims, and that there is also a possibility of including provisions in future BITs that would allow States to bring claims. One participant questioned, however, whether an increase in State counterclaims is a good thing, and whether it also exacerbates problems with the ISDS system, specifically because counterclaims could have a negative impact on the rights of non-parties to an ISDS dispute but who may also have a claim (in another forum) against the claimant that the counterclaim purports to waive or resolve.

The group moved on to discuss the manner in which a respondent-State might be affected by the existence of a third party funder supporting a claimant. One participant thought that this might lead to more illegitimate claims simply because it allows more claims to be pursued and there is a built-in incentive for claimants to inflate the value of claims to ensure that they are attractive to funders. Another discussant pointed out that to the contrary, it is difficult to secure third party funding from the major funders because they only fund claims that have a strong basis, so it should not result in an increase in illegitimate claims. The first participant pointed out that new entrants or other funders may be less scrupulous.

In a related vein, the group moved on to discuss what may be the biggest concerns by governments regarding third party funding. In this respect, one participant noted that the primary concern was that the entire nature of ISDS, as envisioned by States as treaty parties, would change if third party funding becomes prevalent in investment arbitration because of funders’ singular focus on profit. This participant pointed out that no State could have anticipated the impacts that third party funders could have on ISDS at the time when BITs were negotiated. Another participant felt that the biggest concern to States should be the costs of the arbitration, as there is no mechanism in place that prevents claimants from bringing outrageous claims that States are nonetheless forced to defend against, and third party funders cannot be held liable for the costs of such arbitrations in case the claimant is impecunious. One participant highlighted Panama’s recent letter to ICSID in which it raised concern about Panama being unable to collect on several costs awards after prevailing in arbitrations.

Another related issue that was deemed to be of significant importance to this small group was the need for disclosure of third party funding. One participant noted that there was a need for respondent-States to know when third party funding was supporting a claim so that it would be easier to discern whether the

claimant was impecunious. This fact can have an impact on how the State approaches certain issues in its defense. Some participants pointed out that it was unrealistic to expect claimants to voluntarily disclose information about the presence of third party funding, but thought that disclosure would be possible if ordered by the tribunal. Participants acknowledged that there are several new international agreements that include provisions that regulate some level of transparency in third party funding, but that general practice nonetheless remains against disclosure, as in the absence of treaty provisions, tribunals seem not to be inclined to request parties to disclose the presence of third party funding. The group concluded that there are different degrees of disclosure that can be made regarding third party funding, spanning from merely revealing the fact that third party funding is supporting a claim, to disclosing who the funder is (either to the tribunal, to both the tribunal and to the opposing party, or generally as a matter of public transparency), to how and to what extent the claim is being funded and, finally, to revealing the entire funding agreement (again, either to the tribunal, to both the tribunal and to the opposing party, or generally as a matter of public transparency). There were differing opinions within the group as to the precise level of disclosure that would be warranted. One participant noted that one way to avoid many issues would be for claimants to purchase insurance for the costs of the arbitration.

Finally, this group noted that the ongoing debate about the impact of third party funding in ISDS is largely theoretical, and issues raised during this roundtable discussion difficult to answer, because due to a lack of transparency there remains a lack of reliable data on the percentage of cases that receive third party funding and on the success rate of those cases. It is therefore difficult to understand the impacts of third party funding. One participant stated that with respect to the proportion of cases that receive third party funding, this percentage was probably less than the ten percent of cases that are actually brought to third party funders (the number cited in the Draft Report) and that obtaining third party funding is extremely difficult. In this context, one participant felt that having a debate in such general terms runs the risk of losing sight of the diversity of individual claims, some of which are legitimate and others that may be inflated claims where the pressure exerted on a State may be exacerbated by a substantial financial commitment of a funder. It was highlighted that the key to a policy solution will be to find an appropriate balance between these two extremes in order to ensure that wronged claimants can access funding, but also to and prevent extortion of States through inflated claims.

Finally, this small group considered how the existence of third party funding in a claim could impact how the claim is generally perceived by the State, the public, and arbitrators, and how the existence of third party funding may impact how a respondent-State and arbitrators may approach the claim. The prevailing view within the group was that knowledge that there was funding behind a case would certainly influence how a case is perceived generally speaking, although there was uncertainty whether it would result in the case being viewed more favorably or whether it would be detrimental. As part of this discussion, one participant questioned whether it is possible that obtaining third party funding would ever be considered to be a de facto prerequisite to bringing a claim, such that if third party funding ever became the norm in investment arbitration, an unfunded claim may be perceived as less meritorious. Supporting this point, another participant pointed out that a prominent arbitrator had stated that he would look at a case that he knew was being funded as more likely to be meritorious because he knew how demanding the procedure for obtaining funding was. One participant expressed concern that this would compromise the role of arbitrators and distort the nature of the ISDS system by giving outsized power to a largely unregulated funder that is itself not a direct part of the arbitration. The general consensus within the group was that funding should never become or be viewed as a necessary or desirable prerequisite that would taint the merits of a claim.

Discussants also generally agreed that third party funding was likely to encourage settlements for two reasons: first, a funded claim is likely to be strong because it will have received careful scrutiny by the third party funder, so a State is more likely to want to settle than to continue with the time and expense of arbitration, and second, because the respondent-State would be aware that the claim was supported by

considerable resources and would therefore have confidence that the claim would continue through arbitration unless settled.

One participant pointed out at the conclusion of the discussion that one possible public interest benefit of third party funding could be the presence of more awards in the ISDS system, which could result in the law becoming clearer. Another participant noted that the ISDS system is frequently criticized for the lack of consistency in the awards, so more awards would be unlikely to remedy, and could in fact make worse, this underlying problem.

Small Group III

This small group started their discussion by considering the role of third party funding in promoting access to justice. Members of the group expressed differing opinions as to whether third party funding should be used to support ISDS claims only for the impecunious, or whether it has a broader role to play for financially sound claimants. Participants considered whether it is possible to determine the solvency of claimants in a practical and cost-efficient way, and whether a claimant's solvency should be the determinant of whether the claimant should be able to access third party funding. Participants agreed that this issue turned on one's view of ISDS – if one is philosophically opposed to ISDS, any mechanism likely to generate more cases might be undesirable, whereas those who are generally supportive of ISDS are also more likely to support third party funding, and its broader use, as a general matter.

Some participants expressed concern that an ISDS system featuring claims backed by third party funders is not what was envisaged or intended by States when concluding investment treaties. These participants felt that it only exacerbates the worst and most controversial aspects of ISDS. Others in this group felt that when monetary obstacles to bringing a claim exist, as they do in ISDS where bringing or defending a claim cost several million dollars, access to this system requires an ability to find funding mechanisms. Whether third party funding is a cause or a symptom of ISDS was an issue on which participants disagreed.

The group also discussed whether and how third party funding impacts the asymmetric nature of ISDS – States are always respondents and investors are always claimants. Further, one group member pointed out, investors are also able to access third party funding or forms of corporate finance whereas the defensive nature of a State's position changes the attractiveness of funding. Therefore, the group questioned whether third party funding can and should also be used by States, and whether its use by only investors gives them a preliminary advantage in a claim. Most participants felt that if investors access third party funding there should be some way for States to do so as well. Some participants argued that third party funding should not be limited to impecunious claimants, but should, as a matter of policy, be available to any claimant that wishes to access it. One participant floated the possibility that the World Bank or another institution could provide additional insurance for States, which would reduce the asymmetry issue.

This small group engaged in an animated debate over whether third party funders are able to identify meritorious claims. To start, one participant expressed the view that because of the economics of the investment, third party funders would only invest in claims that were meritorious and highly likely to prevail. Other participants countered this position and pointed out that all ISDS cases are essentially a “shot in the dark” given that no regime of *stare decisis* applies to ISDS and treaty standards are exceptionally vague. ICSID data shows that about one in three cases are dismissed on the basis of jurisdiction and then one half of the remainder win and the other half lose, indicating that claimants are themselves unable to identify when they have a strong claim. Other participants, however, noted that there are some cases (such as direct expropriation) that are likely to succeed, particularly where the investment and the expropriation was well documented. One participant continued to explain that

decisions to fund involve more criteria than just the perceived strength of the legal claim, and that the types of cases that would be unlikely to prevail and thus would be unattractive for funding would also include, for example, the respondent-State itself, such as cases against the United States or Sweden, and further noted that some funders also would not fund claims against deeply impoverished States because of enforcement concerns or otherwise. Relating to impact on outcomes of cases, it was noted that one funder's experience was that none of its funded cases had settled.

The group discussed the economics of third party funding, noting that it costs about \$5 million to finance an ISDS claim, so damages must be at least \$30-40 million in order to make the claim financially feasible for funders. In this light, some members of the group perceived a risk that claims would be inflated to receiving support from third party funders. Group members also noted a concern that when a claimant is impecunious but funded, States may not be able to collect costs awards even when a third party funder is financing the claim, and these members felt that this scenario must be addressed by tribunals or other rules.

This group agreed that there has not been much research on the relationship between third party funding and access to justice in ISDS. Some participants stated that it is impossible for States, in particular, to get a sense of how prevalent third party funding is generally, and even in specific cases when acting as a respondent. Some participants expressed the opinion that third party funding does not have a distortionary impact on the ISDS system as a whole because only a very small percentage of cases are funded. However, it was noted that there is a lack of public data to establish just how prevalent third party funding is; it was also noted that managing financial risk and third party funding to achieve this objective is a growing area, so one could expect third party funding to continue to grow and to back a larger number of cases.

With respect to concluding observations, this small group agreed that transparency steps would be relative easy to take, and could be mandated in the investment agreements. The group did not come to a consensus on whether third party funding changes access to justice.

Small Group IV

The discussion in this small group began with two questions: (1) Whether third party funding impacts the volume of cases brought under ISDS? If it does, is there an increase in number of "frivolous" cases financed through third party funding? (2) Does third party funding ameliorate or exacerbate systemic power imbalances? If so, how?

On the first issue of whether third party funding impacts the volume of cases brought under ISDS, some participants noted the lack of empirical evidence to establish a link between the established increase in ISDS cases and third party funding. Several participants agreed that the increase in the volume of ISDS cases is, in and of itself, not a worrying trend if the claims brought are not frivolous. Therefore, what is ultimately important is to study whether third party funding is increasing the number of speculative or frivolous claims, and the focus of this inquiry should be on the quality of claims and not on the quantity.

Participants could not agree on what is meant by a "frivolous case." Some participants noted that third party funders carry out an assessment of the merits of a claim before deciding to finance the claim. This rigorous process of assessment, it was said, acts as a buffer against frivolous claims being presented for investment arbitration. One participant also noted the rationalizing influence that an established third party funder has on buoyant claimants who often show a tendency to inflate the recovery amount sought. It was also noted that third party funding is sometimes provided to incentivize a settlement of a claim. A few respondents agreed that although third party funding may increase the number of cases brought under ISDS, if so these are likely to be mostly meritorious cases.

However, it was also noted that “frivolous” cases are hard to identify, and that novel or speculative claims may be used to push the boundaries of the law or for other non-monetary reasons. It was further noted that more novel or speculative claims could be bundled in a portfolio along with other claims that are likely to win and still present a financially viable package for funding. Third party funders could therefore invest in cases with the strategic interest aimed at their long-term business interests, which is problematic from a “justice” perspective. Other participants, however, felt that there is nothing inherently wrong in stretching the interpretative understanding of substantive law as long as it is within the reasonable permissible margins of the treaty interpretation. Attempts to stretch norms and standards occur in parallel forums such as international human rights courts, civil rights courts, amongst others. The person who originally set forth the concern noted that because States do not initiate claims in ISDS the boundaries of the law are likely to only be pushed in the direction that is favorable to claimants, which is different from other forums. This comment triggered a discussion on the possibility of collusion amongst third party funders in investment arbitration to challenge a test or standard, which was viewed as problematic and something that should be usefully regulated in a way that would be analogous to antitrust regulations.

Some participants were interested in how a claim that is funded by a third party influences the perception of the claim on the part of arbitrators and respondent States. Specifically, one participant observed that when a reputed third party funder, after conducting rigorous assessment of a claim, has decided to invest in a claim, the mere presence of the funding could influence an arbitrator’s decision making because they would be biased in favor of the merit of the claim. So, one participant asserted, in a situation in which claims are inflated because of the economics or influence of third party funding, this combination poses a threat to States in this system.

On the second broad issue tackled by this small group, whether third party funding ameliorates or exacerbates systemic power imbalances, discussants had divergent views. The discussion started with the question of whether there are actually power imbalances under the ISDS regime. Some participants felt strongly that there are systemic imbalances in the ISDS regime that are against States, a powerful illustration of the imbalance being that only investors can bring claims under ISDS. These participants felt that this particular issue is exacerbated by third party funding because it increases the number of claims brought against States. Other participants disagreed, saying that States have extraordinary power over investors, and it is investors who are frequently unable to access the ISDS system to hold States accountable. These participants believed that redressal of investors’ claims through ISDS needs to be juxtaposed to domestic redressal mechanisms where investors may not have a reasonable opportunity to challenge the State, or their investments may be expropriated without being given a fair hearing, such as when an investor may be imprisoned and has no ability to challenge an expropriation. Seen, in this light, these participants viewed ISDS as a forum that tries to correct the imbalances in the domestic grievance redressal mechanism in a host State. As such, one participant argued that it is difficult to conclude that there are systemic imbalances in favor of investors in the ISDS mechanism. According to that perspective, third party funding is only increasing the access to justice for investors who could not have otherwise raised their claims. One participant in this group noted that the examples pointed out are relatively rare, in that most cases do not involve investors who are imprisoned nor direct expropriations, so it is incorrect to use rare examples to make such a broad argument.

Some participants expressed concern that allowing third party funding at the international investment treaty level would “lock in” the policies permanently and make them difficult to amend if problems with third party funding were perceived in the future. These participants felt that that it makes better sense to unilaterally liberalize third party funding at the domestic level than at the bilateral or multilateral level. However, other participants pointed out that there are ways that States can prevent the “locking in” of policies surrounding third party funding, citing the fact that several countries have withdrawn from their international investment treaties.

Plenary Discussion:

The plenary session commenced with a report by each group on areas of convergence and divergence amongst the groups' discussants. Following this report, the plenary debated various public policy issues related to this session:

Viability of Third Party Funding of Respondent States; Portfolio Funding

One participant shared knowledge of third party funding that is being provided to respondent States. This participant noted that funding States in ISDS, from an investment perspective, is a rather complicated process, and that the economics crucially depend on the domestic regulations of States because the financial upside can also depend on claims by States against the investor. However, another participant, observing that funding for respondent States still requires that a State pay some amount to a funder, felt that this is a lose-lose situation from the State's budget perspective as money is invariably going from the public exchequer to the funder.

Another participant reflected on the absence of commercial upside supporting third party funding for respondent States. In almost all known cases of State funding, the funding arrangement for the States are either based on ideological agreement and advancing a common cause - such as financial support given to Uruguay by The Anti-Tobacco Trade Litigation Fund in *Philip Morris v Uruguay* - or, in at least one example, *RSM Production Corporation v. Saint Lucia*, based on a business interest to undercut the claim of a rival firm to a disputed investment. Ideological-focused funding arrangements were also said to be common in WTO cases.

The discussion continued to note the issue that even when an investor is benefitting from third party funding in bringing a claim, to the extent a State obtains a cost award, the State has no recourse against the funder if it cannot collect from the claimant. One participant said that under a corporate finance approach, recourse could be against the asset under consideration (although this depends on the particular asset and industry).

Definitional Issues

Participants agreed that difficulties in defining third party funding continue to persist because of the presence of a large variety of models that continue to evolve. Participants disagreed over classifications of various modes of funding. Several discussants took the position that the definition of "third party funding" should not include traditional financial instruments (such as bank loans) because in these latter forms of financing the third party funder does not exhibit a certain level of control over the dispute that is seen in other kinds of financing. However, one participant felt that there was no perceptible distinction between the level of control that funders in either of these structures would have over the final outcome and approach to a dispute. Another participant questioned whether pro bono legal services, or contracts that give firms contingency fees in exchange for cheaper up-front rates, could be considered third party funding, but this position was countered by at least one participant who said that pro bono legal services are, in fact, third party funding because of the in-kind nature of the service even though no payment is received.

Security for Costs

It was noted by one participant that in a number of cases in which tribunals have ordered claimants to cover States' legal costs, particularly when a claimant does not have the assets to cover this award or otherwise does not pay, tribunals are unable to hold third party funders accountable even though the

funder played a central role in the ability of the claimant to bring the case, thereby leaving States to foot the bill. This scenario is of particular concern in the event of cases that have little to no legal merit. One participant noted that seeing as how funders and others take the position that third party funding does not increase the number of marginal claims brought by investors, funders should have to “put their money with their mouths are” by providing security for costs up front to protect against non-payment of cost awards. Other possible alternatives suggested to address this situation included obtaining insurance for security for costs, and the ability to pierce the corporate veil to collect from higher up the corporate chain of the claimant. One participant raised concern as to whether the respondent would be liable to pay the third party funder’s success fee.

Assumption of Permanence of Third Party Funding in Investment Arbitration

Participants disagreed about whether it is possible to highly regulate or even prevent in many cases third party funding international investment arbitration. Some participants challenged the assumption that is made in the Draft Report that third party funding is here to stay. One participant noted that the assumption in the Draft Report, that third party funding is here to stay, was based on trends visible in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) which are trying to regulate third party funding rather than prohibit it (when it is mentioned at all). For example, the French BIT model and the EU-Canada Comprehensive Economic Trade Agreement both allow third party funding but regulate its operation. There was general agreement among participants that in order to better evaluate the policy need for third party funding there is a need for empirical information that will permit an understanding on how third party funding is increasing access to justice for investors who would not have otherwise been able to initiate a claim. Participants expressed agreement that there may be situations in which third party funding is valuable from a public policy perspective, but its overall value would depend on the manner in which it is being used in the ISDS system. Some participants felt that in considering its value, information about funding of meritorious claims must be distinguished from frivolous claims, and there was a need for information describing how third party funding may be contributing to or even participating in increasing non-meritorious claims. Participants generally agreed that greater transparency would aid in actually understand the role of third party funding.

To conclude this portion of the discussion, the conversation returned to focus on the interlinkages between third party funding and the ISDS system as a whole, and whether it is possible to reform only third party funding provisions to address public policy concerns, or whether the only way to address concerns about third party funding is through reform of the broader ISDS system. Some participants argued that the challenges arising from third party funding could be addressed through greater transparency, security for costs, or potentially even prohibitions on third party funding, thereby addressing public policy concerns without having to address concerns with the ISDS system. Another participant took issue with this approach, comparing these types of provisional fixes to “only third party funding” as more ways to “patch a leaking bucket” (with the bucket representing ISDS) without asking more fundamentally why the bucket keeps sprouting holes and questioning whether it is time to throw out the bucket. In other words, for this participant, third party funding is a symptom of a larger problem and the symptom cannot be addressed without broader ISDS reform.

Settlement

One participant raised the issue of whether the presence of a third party funder in a case would impact settlements, either to increase or decrease their likelihood, or to prevent non-monetary settlements. The speaker noted that from a public policy perspective, settlements can be useful to the parties, but can also be problematic to the extent that they impact rights of non-parties. One participant said that based on this participant’s experience, third party funding does not increase the likelihood of settlement, but another participant disagreed, also based on that participant’s experience. The participant who initially raised the

topic noted that there is a lack of data in this area and in order to draw policy conclusions it is necessary to have more information about what the impacts are.

Access to Justice

The plenary turned to the question of whether third-party funding promotes access to justice. One participant said that yes, third party funding does promote access to justice, and mentioned a case in which an investor was imprisoned and required funding to pursue a claim. Other participants, however, expressed the opposing view, noting that this example is an exception not the rule, and that it would be helpful to know more about these kinds of situations to empirically assess whether third party funding is indeed necessary for access to justice in some situations. The participant further stated that in other cases, that there are alternative forums for claimants to pursue justice, such as domestic courts for a start. It was also said that the term “access to justice” is used in different contexts to describe attempts to secure relief, after exhaustion of remedies, for harms to lives, livelihoods, and freedom, and that the claim that third party funding ensures “access to justice” for investors should not be used lightly. Another participant noted that third party funding fundamentally changes ISDS as a system of justice, because ‘capital looks for return, not for justice’.

SESSION 2: THIRD-PARTY FUNDERS IN A DISPUTE, INCLUDING AS “PARTIES” OR “INVESTORS”?

The second session considered the role of third-party funders in ISDS proceedings themselves, including arguments that funding is a form of investment. This session also considered issues surrounding transparency.

Specific questions that roundtable participants were asked to address included:

- What kind of claimants are using third party funding? What kinds of cases are third-party funders funding? What kinds of cases are not being funded?
- Does the presence of a third-party funder impact the outcome of a dispute? Does a funder impact case strategy or case management (i.e., selection of arbitrators, arbitral institutions)? Does it impact the substantive development of the law? If so, or if potentially so, what are the policy implications of this?
- Does having a third-party funder impact the likelihood of settlement? In either case, is this a good thing?
- What kinds of conflicts of interest arise with respect to funders and arbitrators, or funders and counsel/parties?
- Who benefits and who is harmed by transparency in third party funding? How much transparency is desirable? What are the implications of mandating disclosure of the funder? Of the funding agreement? When transparency is mandated with no tribunal discretion? With tribunal discretion?
- If challenges stemming from transparency/disclosure impact a proceeding, are there options to mitigate this cost?
- Are governments capable of being funded? In which ways? Are they interested in funding?

As with the first session, to facilitate comprehensive deliberation the discussants split into four sub-groups and then reconvened into a plenary group. Rapporteurs were only present in two of the four small groups for this session.

Small Group Discussions:

Small Group II

This small group started off this session by considering potential conflicts of interest that might arise due to third party funding. The group tried to flesh out the different types of conflicts that could come up and considered what might be an appropriate test for assessing whether a conflict of interest existed. It was noted by one participant that an increasing number of arbitrators were being asked to sit on the advisory boards for third party funders, which fact, if true, was deemed to be highly problematic by the group as a whole. There was agreement that this scenario would be likely to further perpetuate the impression that based on this kind of conflict of interest, the cases that were being funded were more likely to be successful. To continue this conversation, one participant highlighted that the potential conflicts that might arise with respect to arbitrators could concern both issue-based conflicts and firm-type conflicts. Examples that were deemed to be particularly problematic included instances where an arbitrator could have previously participated in evaluating the case for the third party funder, but also deemed problematic would be a situation in which a funder with whom the arbitrator had an institutional connection was funding a case before that arbitrator, even when the arbitrator did not participate personally in the evaluation of the specific case. Some participants believed that there would certainly be a conflict of interest on behalf of the arbitrator whenever there was an institutional connection between a funder and an arbitrator with respect to any given case. Some discussants did note that regulation may not be easy, because with the introduction of portfolio funding the entire nature of funding is more decentralized and the conflicts more attenuated thereby making it both more difficult to identify potential conflicts as well as to have clear rules as to what a relevant conflict of interest would be. Some participants felt that even though there may be complications in implementation, conflicts rules remain necessary to protect against abuses.

Remaining with the conflict of interest discussion, this small group considered on whom the duty to look into possible conflicts would fall – whether this would be a responsibility of the parties themselves or whether the arbitrators should also be expected to investigate their own conflicts. The group noted that when the existence of a third party funder being involved in a case is disclosed, there are a lot of additional questions that arise with respect to conflicts of interest and some of these questions could give rise to time-consuming challenges. Because of this, it was noted by one participant, some parties are hesitant to disclose the existence of a third party funder. Another participant raised the opinion that every instance of third party funding needed to be disclosed, but that the existence of a third party funder should not necessarily affect whether an order for the security of costs would be issued – that other factors should also determine security for costs. This group also discussed whether the existence of funding should be disclosed to both the opposing party and the tribunal, or whether it was sufficient to simply inform the tribunal. While some participants were of the opinion that disclosure to the tribunal would be a sufficient safeguard, others were concerned that failing to inform the other party might give rise to a problem with respect to procedural propriety and potentially endanger the eventual award. One participant also pointed out that, in any event, there was no need for the tribunal to know what the specific conditions of the funding agreement were as the conflicts questions and security for costs concerns could be addressed without the entire agreement being disclosed.

The group then moved on to discuss the role that third party funders should have in the arbitral proceeding itself. One participant discussed experiences in which third party funders were present at oral proceedings and also experiences in which a funder exerted influence with respect to the way in which the case was being presented. There was agreement within the group that it was not desirable for a third party funder to take active participation in the proceedings or even to be present during the oral phase. One participant felt that the presence of the third party funder was likely to negatively affect the conduct of the

arbitration because of the funder's focus on profit, and could also impact the perception that the tribunal may have of the funded party and the claim, depending on the arbitrators' view of third party funding generally.

Finally, this small group briefly addressed whether third party funders could have an impact on the development of the substantive law. One participant noted that funders choose certain kinds of cases and these cases may therefore be brought more frequently than other kinds of cases, and furthermore funders may have the financial ability, particularly through portfolios of claims, to fund some claims with marginal legal merit but that are intended to push the boundaries of the law and are in the long-term economic interest of the funder. This participant felt that in this way, the introduction of third party funders further distorts a system in which only claimants can initiate cases and are already incentivized to stretch the intent of the State-parties to the treaty. Other participants disagreed, feeling that it would be unlikely that funders would fund these kinds of cases noting that funding is an investment business and the economics must make sense.

Small Group IV

This small group began their second discussion by considering the process by which third parties decide to fund particular cases. The participants agreed that funders, of economic necessity and as a general matter, seek meritorious cases with claims large enough to merit the initial investment and ensure a reasonable return, which amount would generally translate to claims of at least US\$50 million. Such claims can provide for a 10:1 return on capital investment for the funder. One participant said that in order to determine which potential cases make for good investments, many funders pay outside law firms around \$40,000 to assess the merits of the case, based on due diligence of a week of research. One participant noted that anecdotally, funders may only achieve a return on investment of closer to 5:1, half of their intended return, which therefore raises questions about the quality of the legal advice that the funders are receiving as well as funders' claim that they only fund meritorious cases.

It was also noted that the need for a relatively high return on investment inevitably leaves a number of potentially meritorious cases that do not get funded, simply because the claims are not sufficiently large. For these smaller investors/claims, third party funding does not improve the ability for investors to bring even meritorious claims. One participant considered that perhaps a way to provide small investors access to the ISDS system would be to create a "fast track" tribunal process for small claims. One participant expressed concern that this would lead to a massive proliferation of cases and would create an entirely new industry model, leading many new boutique law firms to enter the market. Another participant wondered why claimants don't hire cheaper law firms, particularly for less complicated cases, thus lowering litigation costs. Several participants felt that all cases are complicated, and that damage awards are highly correlated with the quality of representation, so it pays off to hire expensive lawyers who are more likely to help the claimant prevail.

The discussants then moved to discuss the way in which the presence of a third party funder in a case can impact the case overall. While no participant questioned the presumption that third party funding impacts case outcomes, the group split about whether that impact would be positive or negative. Some argued that the normative impact is difficult to measure, but analysts should nevertheless be wary that often, normative assumptions are embedded within other arguments. For example, when investors bring self-funded claims, they often agree to contingency fees, aligning their law firm's interest in providing solid legal advice with its financial interest in a way that can also produce perverse incentives. It was said that third party funding removes complications surrounding contingency fees, thereby allowing the claimant's lawyers to consider only how to best represent their client and not about their financial upside. It was also put forward that third party funders can be valuable, neutral evaluators of a case's merits, thereby

increasing the quality of cases that get brought, and that they can act as a neutral manager of litigation costs by cutting off hours sunk into the case.

Another participant pointed out, however, that these counter arguments also rely on a number of normative and factual assumptions. Notably, it was said that one could wonder whether the constraint on cases being brought is access to capital or conservatism in the face of risk. This participant continued, if third party funders only fund large claims in the first place, one might assume that risk, and not raw capital, is the limiting factor that third party funding overcomes to allow for a proliferation of cases. If this is true, then it is unlikely that a week of legal research actually leads to more meritorious cases being brought, particularly because of the vague nature of treaty standards in the first place that makes cases difficult to assess with certainty so early on, but rather cases that have a higher ratio of potential damages magnitude to risk that the claimant will lose the case. In addition, another participant noted, it is incorrect to say that third party funders are neutral in these cases because funders also have ongoing business relationships and firms have vested interests in their relationships with funders. So, in reality, third party funding causes as many potential conflicts of interests as it solves. For example, whether a lawyer is in practice fully accountable to its client or whether there is some space where this duty would be limited because of an interest in an ongoing relationship with the funder, and the potential for intertwined relationships between funders, firms, and arbitrators. The participant also noted that even when lawyers take cases on a non-contingency basis the lawyer can still have a personal interest in how the case progresses and its outcome, but noted that fiduciary duties attempt to regulate this scenario.

SESSION III: THIRD PARTY FUNDING: LOOKING AHEAD

The third and final session considered future trajectories of third-party funders and funding.

Specific questions that roundtable participants were asked to address included:

- Are funders proliferating?
- What will be the impact of any increase in funded cases or changes in funding models (e.g. portfolio funding)? Are criteria for funded portfolio cases the same as for funded individual cases?
- Can funding contribute to effective case management or contribute to early case evaluation?
- What empirical data is needed to assess and monitor the effects of funding in ISDS?
- What can we learn from experiences in domestic courts?
- Can the existence of a third-party funder reduce the overall cost of ISDS? For whom?

Plenary Discussion: Session II and Session III:

Following the presentation to the plenary of small group reports on the topics from Session II, the participants continued their discussion in the plenary session.

Because the agenda was running behind schedule, in addition to discussing the points in Session II, this plenary also considered Session III.

The Funding of Unmeritorious Cases by New-Comers to Third Party Funding

The discussion was initiated by a participant who brought up a potentially problematic scenario in which a case, after being rejected by reputable funders because of a lack of legal merit, would then be picked up by less reputable funders who may be more inclined to take on unfounded, high-risk cases. Anecdotal examples were presented in which some participants discussed situations in which this has happened. One

participant noted that in a conversation with a well-established funder, the funder said that the funder had been approached by claimants with respect to two thirds of the cases that were registered at ICSID in one particular year. This funder had rejected all but one of these cases, but the rest nonetheless ended up on the case registry, which means that someone funded them, or the claimants found alternative means of financing. This participant noted that this anecdote demonstrated that less reputable funders are out there. While participants agreed for the sake of argument that the well-established funders may have well developed internal rules and codes of conduct and may not fund claims with questionable legal merit, less reputable funders might be a cause for concern, and that regulation may be necessary to prevent these kinds of abuses of the ISDS system.

One participant noted that there were indeed new entrants into the system, but that it was questionable how long they would last. And in response to the point made about one funder rejecting so many cases that were nonetheless brought, this participant noted that the value of the claim also needed to be taken into account and that one could not assume that the cases were rejected because lacked legal merit, as some meritorious cases may have been rejected just because they are not sufficiently large. These types of cases are not inherently problematic if taken on by less established funders after they are rejected by the well-established ones. The problem would only arise to the extent that some funders fund less meritorious cases, which is a cause for concern, but this participant felt that funders that would invest in such cases would be unlikely to last for a long time. Another participant rebutted that even if these “fringe” funders are likely to go out of business, a lot of damage can be done to a respondent State even if only one unmeritorious case is brought.

Another participant said that based on the nature of financial investors generally, one could expect to see entrance in this kind of market where there is an opportunity for high return on the basis of high risk. The participant argued that it was not inconceivable that someone could develop an algorithm that could successfully predict the outcome, or the probability of a given outcome, in certain cases or types of cases, which would then turn this high-risk option into a more attractive alternative. This kind of scenario would be problematic because particularly if portfolio funding were used, these high-risk cases present a systemic danger to respondent-States.

Third party funding and underlying concerns with ISDS

One participant noted that more information is needed on what kinds of cases are being funded. From a public policy perspective, certain kinds of cases are inherently problematic because of the issues that are raised and argued, and the implications of those disputes and arguments on governments’ willingness and ability to regulate, as well as the rights or interests of non-parties. In these kinds of inherently problematic situations, if third party funding were making these kinds of cases more likely to be brought, third party funding would be exacerbating the preexisting and underlying problems with ISDS. For example, this participant continued, in mining investments, the cases often arise when there is a conflict between, on the one hand, a economically, socially, or politically marginalized local community, and a relatively powerful foreign investor, and the government ultimately sides with the local community against the investor. When ISDS cases challenge government support of those domestic constituents (or when the ISDS cases challenge inadequate government support for the investor), those ISDS can exacerbate existing power imbalances between local communities and foreign investors, causing the government to favor the latter over the former. This participant felt that it would be easy to see how mining cases, as one example, would be attractive to funders given their generally higher claim amounts, and if funders were permitting more cases with underlying public policy concerns to be brought, funders would be exacerbating the pre-existing public policy problems with ISDS.

Other participants agreed that indeed, there are a lot of cases of the type described that are being funded by third parties, but pointed out that whether or not such cases received funding depended primarily on

the stage of the investment and the certainty of damages. One participant felt that the problem was actually with the investors who had invested, for example, US\$3 million of sunk costs, but were not able to get their cases funded due to the unlikelihood of a high return. Another participant asked whether these kinds of cases could not have used the domestic court system of the host-state to address the investor's grievance, and questioned why ISDS, let alone being funded by a third-party, was considered necessary for these claimants to seek a remedy.

Another participant, addressing the original question about mining claims, stated that, while such cases were indeed being funded, this participant did not agree with the depiction of such a practice as a negative thing. The participant noted that the situation needed to also be looked at from the perspective of the investor (in this particular case, mining companies) who had invested considerable resources and might, under the circumstances, deserve compensation. In response, the speaker who had posed the original question rebutted to note that mining exploration was an inherently risky business from a commercial perspective and that it was therefore problematic that an investor might be in a position to force a state into settlement or secure damages simply because, for example, a license to exploit – which had never been guaranteed under domestic law -- had ultimately been refused. It was further said that ISDS sees many cases in which investors seek to transfer commercial risk onto a host-State through an ISDS claim and if third party funders are exacerbating these kinds of claims and risk transfers it is problematic. The previous discussant responded that, even in such a situation, compensation might be justified if there was a legitimate expectation that the license would be granted, noting that this would be a very factual matter that depended on a cluster of circumstances and disagreed with the idea that, as a matter of general approach, mining companies should not have a right to be granted a license.

A separate participant interjected into this discussion to note that contracts are frequently used in extractive industries there should be no sympathy for a company that was sinking significant costs into an investment based on promises or insinuations that were not written into a contract.

At this point a participant tried to steer the discussion back to the public policy issues surrounding third party funding and not ISDS generally, while other participants noted that this discussion was an example of how intertwined the public policy aspects of ISDS per se, and third party funding are, and that there remained important questions about whether and how third party funding exacerbates these public policy issues. One participant noted the earlier analogy to a leaky bucket saying that we are indeed only patching holes and need to deal with the bucket. However, another participant took issue with these positions noting that to the extent investors are given rights under international investment agreements, then they should be able to pursue those rights, regardless of whether one thinks that they should have such rights in the first place. The discussant further noted that a very problematic issue was the small investors who cannot bring claims due to a lack of funding and end up not pursuing them.

On a related note, another speaker commented that it was indeed peculiar that that some participants believed that issues that were generally problematic within ISDS could be resolved through third party funding. For example, the fact that somehow investors require third parties to facilitate “access to justice,” indicate that the system itself cannot provide justice. It was submitted that, if the real issue pertained to whether the ISDS system was problematic as such, then it seemed that a discussion that skirted around the edges and only touched on third party funding was misplaced, and the debate should be aimed at whether the ISDS system should be shut down or completely reformed in its entirety. The problem seemed to be that there was a stalemate on the other issues in ISDS that needed reform and that, therefore, the momentum that existed with respect to third party funding was being channeled to address these issues. But it would be misplaced to expect that addressing issues with third party funding could in any meaningful way help to address the underlying problems with ISDS.

Do Funders have “skin in the game”?

One speaker noted that lawyers, and contingency fees, are generally not perceived as problematic to the same level as other kinds of third party funding because it is perceived that lawyers have “skin in the game” and are interested in integrity of the legal system and not just in making a profit. This participant raised the issue of whether third party funders could contribute to the system in ways that did not include the direct funding of claims. It was noted that funders do not take part in initiatives that, for example, facilitate education about the system, that they do not support report or research into how the system can be improved, nor do they contribute to, for example, providing third parties who may be impacted by an investment dispute with access to the system. The discussant asked whether investing in initiatives that have a positive public relations impact might, in the long run, end up being beneficial by increasing the good will surrounding third party funding and ISDS more generally. It was underlined that this could potentially change the perception of third party funding in the future, so that it is not only seen in a negative light, but also as a mechanism that makes a positive contribution.

One answer that was put forward emphasized that the ISDS system and the role of third party funders in it was inherently problematic from the perspective of States because it was not balanced - States need to be able to bring claims and there needs to be more equality between the parties.

Another speaker, referring to the initial comment about funders engaging in activities that would generate more goodwill, stated that from a human rights perspective, doing a positive thing in one respect does not necessarily justify and negate the negative impact in other areas. Human rights obligations, including of funders, are independent of whether they try to offset them with positive actions elsewhere. In this sense, the speaker continued, underlying aspects of ISDS that are inherently problematic from a human rights perspective remain problematic and funders still have obligations to not exacerbate these problems even if they engage in good will gestures on the side. As an example of an underlying human rights problem with ISDS, the speaker noted that third parties whose rights are often impacted by an ISDS dispute have no ability to join a dispute to defend those rights. The participant who had posed the original question responded to note that positive engagement by funders may nonetheless help to impact how the ISDS system is perceived.

Another participant noted the issue of small claims and the generally accepted US\$5 million ticket price to ISDS entry. If these types of investors with small claims are to have access, the ISDS system has to be changed and third party funding will not address this problem.

Another participant also pointed to the fact that the discussion had principally been aimed at the primary market for third party funding, but that the proper functioning of a financial market also requires the presence of a secondary market. The introduction of a secondary market could bring about an increased possibility for funding small cases, which could be a positive development as it would provide access to ISDS for a section of the investment community that otherwise would not have such access, such as the US\$3 million claims. Another positive consequence of the development of a secondary market for third party funding would be that investors would be in a position to diversify and therefore get access to better funding. The discussant noted that it was expected that the secondary market will develop in the next five year or so, which will be a game changer and have an impact on how the system is regulated.

At this point, the discussion concluded and the organizers thanked all in attendance for their fruitful debate.

ANNEX A

LIST OF PARTICIPANTS

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