

ISDS Reform Conference - Mapping the Way Forward Discussion Paper for the Session on Third Party Funding in ISDS

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INTRODUCTION

1. Over the past several years, the discussion over investor-state dispute settlement ("ISDS") has been complicated with concerns about Third Party Funding ("TPF"), where parties to a dispute obtain funding from a third party ("Funder") in order to pay the various costs of the dispute, in return for the Funder receiving a portion of any award received by that party.
2. This discussion paper aims to cover the current issues surrounding third party funding in ISDS, including several common issues arising from recent investor-state arbitration jurisprudence. This paper will also go into various pros and cons of including third party funding as a complementary element in the investor-state dispute settlement system. This paper will also address current initiatives taking place to provide structure and regulation around third party funding, including initiatives being implemented at the administrative, state, and international levels. Finally, this paper will briefly address issues that may arise from third party funding of investment mediation.

BACKGROUND

3. Third party funding in common law jurisdictions was historically illegal due to the common law doctrines of champerty and maintenance. These doctrines arose from English common law and are centuries old. Maintenance is defined as a person assisting a party to an action even when that person had no interest in the action². Champerty is a specific form of maintenance where the person assisting the party to the action obtains a share of the judgment award as payment³.
4. Accordingly, under common law, third party funding was illegal as it would give rise to maintenance and champerty. However, given the antiquated nature of these offences, common law jurisdictions such as the UK and Australia have relaxed or abolished these offences⁴. The result of this is the creation of a new market for litigation and arbitration financing, where third party investors seek to finance prospective claimants in hope for a certain return⁵. The nature of this return can

² Law Reform Commission of Hong Kong, "Third Party Funding for Arbitration Sub-committee Consultation Paper" <https://www.hkreform.gov.hk/en/docs/tpf_e.pdf> accessed 22 December 2018, para. 1.18, citing *Massai Aviation Services v Attorney General* [2007] UKPC 12

³ *ibid* para. 1.19; *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 at para. 11

⁴ *Massai Aviation Services v Attorney General* [2007] UKPC 12

⁵ See Arbitration Ordinance (Cap 609), s.98J

either be in respect of a fixed sum, or in many cases, in the form of a contingency fee arrangement whereby the Funder will obtain a certain percentage or portion of any award rendered in favor of the claimant.

5. While tortious offences of maintenance and champerty still exist in several common law jurisdictions such as Hong Kong⁶, similar measures to relax the traditional offences in arbitration have taken place over the past several years in both Hong Kong and Singapore⁷.
6. The general liberalization of third party litigation and arbitration financing has also coincided with the advent of international investment arbitration. The structure of treaty-based arbitration poses several attractive features for potential Funders. Considering the nature of most treaty-based claims such as expropriation of major infrastructure or energy investments, the value of potential claims has the potential to be considerably higher than most commercial disputes. This translates into high potential returns for Funders who are willing to back investor claims, with some published figures stating returns of over 700%⁸.
7. The explosive growth of investor-state arbitration has not been without its growing pains. There exists a vocal and growing division of investor-state arbitration critics who see investment arbitration as favoring foreign investors, and as a negative force on efforts to drive sustainable development. The existence of third party funding and its use in investor-state arbitration has fueled these concerns, as critics rely on the profit-making objectives of third party funding to further decry the transfer of wealth from public purpose objectives to private profits.

CURRENT ISSUES IN RELATION TO THIRD PARTY FUNDING IN INVESTOR-STATE ARBITRATION

8. The presence of third party funding in relation to investment arbitration raises certain issues that for the most part are not present or are of lesser concern in commercial contract-based cases. The treaty-based nature of investment arbitration creates an asymmetrical environment that changes how some tools in arbitration will operate. These differences have attracted greater attention due to the nature of third party funding and

⁶ *Unruh v Seeberger* (2007) 10 HKCFAR 31; *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16; *Raafat Imam v Life (China) Co Ltd* [2018] 4 HKLRD 152

⁷ Arbitration Ordinance (Cap 609), Part 10A; Singapore Civil Law (Amendment) Act 2017

⁸ Burford Capital FY 2017 Report <<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>> accessed 22 December 2018

funding agreements. Several of the major issues that third party funding raises in investor-state arbitration are detailed below.

Security for Costs

9. Whereas security for costs is not uncommon in common law or in commercial arbitrations, the use of security in investor-state arbitration is much less clear. The power of the arbitral tribunal to order security is normally discussed in the context of Article 47 of the ICSID Convention which empowers the tribunal to recommend provisional measures to preserve the respective rights of either party as well as ICSID Arbitration Rule 39 which requires parties to establish the circumstances that require such provisional measures. However, particularly in the early days of investor-state arbitration, tribunals questioned whether these rules would allow for the order of security for costs, particularly in light of ICSID's unique role as a facilitative dispute resolution mechanism for investors in foreign states⁹. Whereas several investor-state arbitration tribunals would determine that they could order security for costs, these tribunals also agreed that exceptional circumstances would be required in order to do so¹⁰. It was therefore not until 2014 that the first investor-state arbitral tribunal ordered a claimant to pay security in the case of *RSM v Saint Lucia*¹¹.
10. The tribunal in *RSM v Saint Lucia* found that exceptional circumstances were present, primarily on the basis that the claimant had previously been involved in two separate ICSID arbitrations against Grenada, where the claimant had failed to comply with several costs orders¹². The tribunal also took note of the claimant's receipt of third party funding, and took that as further support that the claimant may not be able to comply with a costs award rendered against it, as it was questionable whether the Funder would assume responsibility for honoring any such award¹³. In a separate assenting opinion by Gavan Griffith QC, he noted that the presence of a Funder should in and of itself constitute exceptional

⁹ *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97.7, Procedural Order No. 2, 28 October 1999

¹⁰ See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/08, Decision on Preliminary Issues of June 23, 2008, para. 57; *Commerce Group Corp & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, Decision on El Salvador's Application for Security for Costs of September 20, 2012, at para. 45; *Victor Pey Casado, Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures of September 25, 2001, para. 88; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs of October 14, 2010, at para. 5.16

¹¹ *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs

¹² *ibid* para. 82

¹³ *ibid* para. 83

circumstances to justify an order for security for costs¹⁴. He would further propose that where a Funder was involved, that the funded claimant should be able to show that it would have independent capacity to meet any costs orders issued against it, essentially reversing the burden of proof¹⁵.

11. Gavan Griffith QC's opinion did not find much immediate support however. Securities for costs on the basis of the existence of a Funder were subsequently rejected in the cases of *Guaracachi v Bolivia*¹⁶ and *South American Silver v Bolivia*¹⁷. In the case of *Guaracachi v Bolivia*, the request for security was denied on the basis that the mere existence of a third party funder did not, in and of itself, demonstrate that a security for costs order would be justified, in particular when the claimant was shown to be a going concern with sufficient assets¹⁸. In *South American Silver v Bolivia*, the tribunal also rejected an application to order security based solely on the existence of a Funder, stating "[i]f the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims."¹⁹
12. Although the mere existence of a Funder would not normally constitute exceptional circumstances, one tribunal has determined that the details of the relationship between the Funder and claimant *may* constitute the exceptional circumstances required to ground an order for security. In *Manuel García Armas and others v Venezuela*²⁰ the Tribunal ordered the claimant to produce the funding agreement that it had entered into. After reviewing the funding agreement, which showed that the Funder would not provide funding for any award of costs, the Tribunal ordered the claimant to prove that it could in fact cover any award²¹. The Tribunal justified reversing the burden of proof on the basis that the Claimant would be in the best position to produce the evidence. Eventually, the Tribunal decided that the existence of the Funder and in particular, the

¹⁴ *ibid*, Assenting Reasons at para. 16

¹⁵ *ibid*

¹⁶ PCA Case No. 2011-17, Procedural Order No. 14

¹⁷ PCA Case No. 2013-15, Procedural Order No. 10

¹⁸ PCA Case No. 2011-17, Procedural Order No. 14, para. 7

¹⁹ PCA Case No. 2013-15, Procedural Order No. 10, para. 77

²⁰ PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018. For English summary of the case, see Alexander Levanthal, "Towards an Exceptio Fundati? Assessing a (Potentially) Emerging Exception for Third Party Funding in Investment Treaty Decisions on Security for Costs in the Wake of *Armas v Venezuela*" <<http://arbitrationblog.kluwerarbitration.com/2018/09/18/assessing-a-potentially-emerging-exception-for-third-party-funding-in-investment-treaty-decisions-on-security-for-costs-in-the-wake-of-arms-v-venezuela/>> accessed 22 December 2018

²¹ *ibid*, para. 246

fact that the funding agreement would not cover an award of costs, constituted exceptional circumstances and subsequently ordered security for costs²². The conclusion of this tribunal lines up with the proposition made by Gavan Griffith QC in *RSM v Saint Lucia*.

13. As will be noted below, the assumption that the existence of a Funder means that the claimant will be unable to satisfy any costs awards is a simplistic one at best. In many situations, even a financially stable claimant may opt for third party funding simply on the basis that leveraged financing of its claim will make for a more efficient use of its resources. In those situations, the existence of a Funder should make no difference as to the assessment of whether security for costs should be ordered. Even in the *Armas* case, where the details of the funding agreement were a key factor in establishing exceptional circumstances, there existed concerns regarding the solvency of the claimant, and such decision was not solely based on the existence of a Funder.
14. However, what has been left open to debate is whether the details of a funding arrangement should be disclosed to the Tribunal, and if such details are disclosed, to what extent should the Tribunal rely on those details to make its determination on whether to order security. The Queen Mary Task Force, for example, proposes in its report on third party funding in international arbitration that in the first instance, the decision on whether to order security should be made without regard to the existence of any funding arrangement. However, it then immediately states that the details of a funding arrangement may be relevant to show whether the claimant can satisfy any adverse costs award²³. The report remains silent as to how evidential issues in these sorts of applications should be balanced, including as to whether the burden of proof should be reversed.

Conflicts of Interest and Extent of Disclosure

15. The existence of third party funding may also give rise to issues regarding conflicts of interest. Where Funders have vested interests in certain arbitrators or in certain law firms, potential conflicts of interest may arise between arbitrators and Funders, even when no conflicts exist between the parties and the arbitrators. In an unregulated environment, the existence of third party funding could be confidential and therefore

²² *ibid*, para. 250

²³ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.16

remain undisclosed to the tribunal or to the other party, resulting in conflicts of interest that could persist throughout the course of a dispute.

16. Furthermore, even in regulated environments, questions arise as to what extent third party funding should be disclosed. While most current efforts are unanimous in requiring disclosure of the existence and source of third party funding, the authorities are much less clear as to whether details of a funding agreement should be automatically disclosed or whether such disclosure should be at the discretion of the arbitral tribunal.
17. The Queen Mary Task Force has noted that there has been increased interest in potential conflicts of interest caused by the presence of Funders due to several factors, including the fact that many leading arbitrators have also taken positions either within Funders or as *ad hoc* consultants to Funders, as well as increasing symbiosis between law firms and Funders²⁴.
18. Whether Funders should be disclosed in investor-state arbitration, and if so, to what extent, was recently addressed by two different tribunals. In *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti.v Turkmenistan*²⁵, the Tribunal was requested to order Claimant to disclose its funding arrangements in order to determine whether there were any conflicts of interest. The Tribunal eventually decided to order disclosure of the funding arrangements on the basis of several factors, such as the need to ensure the integrity of the proceedings and to determine whether any arbitrators were affected by the existence of the Funder²⁶. In particular, the Tribunal noted that previous orders for costs in other proceedings had not been paid, and that the Claimant had not denied the existence of a Funder. These two factors led the Tribunal to determine that the Claimant would be unable to meet any costs orders if the Respondent were successful, and that the Funder would be able to disappear, as it was not party to the arbitration²⁷.
19. A similar request was submitted by the respondent state in the case of *South American Silver v Bolivia*²⁸. However, while the tribunal in *South American Silver* ordered that the claimant disclose the identity of its Funder, it did not go as far as to order disclosure of the details of the

²⁴ *ibid* p.82

²⁵ ICSID Case No. ARB/12/6, Procedural Order No. 3

²⁶ *ibid* at paras. 9-10

²⁷ *ibid* at paras. 10-12

²⁸ PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016

actual funding agreement, on the basis that the mere existence of a Funder could not constitute an independent reason to justify disclosure²⁹.

20. The need to disclose third party funding so as to prevent conflicts of interest has also found its way into soft law instruments. The 2014 IBA Guidelines on Conflict of Interest General Standard 7 stipulates that a funded party shall:

"...inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity."³⁰

The 2014 amendments to the IBA Guidelines on Conflicts of Interest show that the duty of disclosure has thus been extended to the existence and identity of potential Funders, primarily to provide arbitrators with sufficient information to determine whether or not they may have any conflict of interest. However, the IBA Guidelines do not provide any guidance as to whether the details of a funding agreement should be disclosed.

Transparency

21. Issues regarding security for costs and conflicts of interest also serve as indicators of a greater issue, which is that many facets of ISDS remain confidential and non-transparent. While many investment arbitration awards and procedural decisions are published, in far greater quantities than commercial arbitration awards, such publications do not entirely solve issues of transparency. Many investment arbitration awards are still confidential, and even those that are public do not necessarily disclose whether third parties are in fact funding prospective claimants.
22. In investor-state arbitration, the issue of transparency is of even greater importance considering that the subject matter of many claims are relevant to a state's public policy, and in many cases touch upon issues regarding the exercise of governmental authority which significantly affects the citizens of a host state. One of the strongest criticisms against

²⁹ *ibid* para. 81

³⁰ IBA Guidelines on Conflicts of Interest (2014), General Standard 7

ISDS is the lack of transparency on issues that are highly relevant to the public interest.

23. The call for transparency in ISDS was strong enough to lead UNCITRAL to develop and publish the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which provides a set of rules that are designed to increase the transparency of both the submission and hearing of investor-state disputes³¹. However, the UNCITRAL Rules on Transparency do not provide any guidance on the disclosure of third party funding or the details of any funding arrangements that may be of interest to the public.
24. The need for transparency in, at the very least, disclosing the identity of any Funder, has been reflected in investor-state arbitration decisions such as *Sehil v Turkmenistan*³² and *South American Silver v Bolivia*³³ mentioned above. Notably, all efforts in relation to increasing transparency regarding third party funding have revolved around the need to prevent conflicts of interest and to preserve the integrity of proceedings. However, to date, there has been little discussion by arbitral tribunals as to whether the need for transparency around third party funding should be greater on the basis of the inherent nature of investor-state arbitration.
25. Transparency in relation to funding agreements carries both pros and cons. The forced transparency of providing funding agreements and details to the public may serve to better understand what effect, if any, third party funding has on the number of claims being brought in investor-state arbitration. Such concerns were raised during small group discussions within the Queen Mary Task Force³⁴. However, many funding agreements may contain confidential information that may not be necessary to disclose. Furthermore, the need to provide exact details of funding agreements may potentially deter potential Funders from taking on certain cases, which would negate the primary benefits of third party funding, such as enhanced access to justice.
26. While certain regulatory initiatives have explicitly granted arbitrators discretionary power to order disclosure of funding agreements and other

³¹ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

³² ICSID Case No. ARB/12/6, Procedural Order No. 3

³³ PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016

³⁴ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.239

details, such as Rule 24 of the SIAC Investment Arbitration Rules³⁵ and Article 27 of the CIETAC Investment Arbitration Rules³⁶, no current regulatory initiative provides for any mandatory disclosure greater than the existence and source of any third party funding. Without the mandatory disclosure of the various details of funding agreements, it is questionable whether enough information can be made publically available so as to determine the real effects of third party funding on ISDS, in particular in relation to key issues such as to what extent funding agreements cover adverse costs decisions or the rights of the respective parties to terminate the agreement.

PROS AND CONS OF USING THIRD PARTY FUNDING IN ISDS

27. The following section examines both the positive and negative effects of third party funding on the current investor-state arbitration regime. While these factors may not be exhaustive, they tend to be the most common arguments raised by both proponents and critics of third party funding in investor-state arbitration, and provide guidance as to what elements of third party funding are causing the greatest benefit or the most consternation.

Pros

TPF provides greater access to justice for aggrieved investors

28. One of the primary justifications for allowing third party funding is that it greatly increases the ability for aggrieved claimants to proceed with their claims, providing greater access to justice and allowing legitimately injured investors to have their grievances heard.
29. One of the greatest advantages of the current investment dispute settlement system is that, for the most part, it operates outside of the ambit and jurisdiction of the host state's domestic legal systems. Investment arbitration provides a rule-based form of dispute resolution that is, for the most part, neutral, and which gives aggrieved investors an avenue to have their claims heard without potentially unlawful interference of a foreign government. ISDS therefore provides unprecedented access to justice for private investors, opening up avenues of recourse that would traditionally have to be dealt with on an inter-state level.

³⁵ 2017 Singapore International Arbitration Centre Investment Arbitration Rules, Rule 24(1)

³⁶ CIETAC International Investment Arbitration Rules, 1 October 2017, Article 27

30. The need for such a system is particularly evident in cases where the aggrieved investor has been affected by a denial of justice, whereby the cause of action itself stems from the host state's domestic legal and judicial framework. In cases such as *Saipem v Bangladesh*³⁷ or *Loewen v United States*³⁸ for example, domestic judicial systems have not only failed to provide adequate recourse to aggrieved investors, but have outright refused access to justice. These situations form the primary cause of action for the breach of the host state's treaty obligations. It is therefore insufficient to maintain that such claims can be handled solely in a domestic context.
31. However, the ability of the investor to access investment arbitration does not come cheap. The costs of ISDS are ever increasing. The average cost of bringing a claim in investment arbitration today is approximately US\$ 8 million³⁹. For many smaller investors, the costs of attempting to recover the value of their investments are simply too high to bear. This is further exacerbated when considering that where investors are claiming for expropriation, the acts of the host state may have severely depleted the investor's economic resources. In other words, the very breaches that the investors are seeking compensation for may also make it impossible for these investors to bring their claims.
32. Funders are therefore a key contributor to ensuring that investors who have legitimate grievances against host states, and who have contributed capital and labor to contribute to a host state's economy, are not left without recourse in the event that their investments are either expropriated or otherwise diminished. Where the host state has entered into obligations under a bilateral or multilateral agreement to respect foreign investment, Funders help to lubricate the machinery required for the investor to obtain recourse.
33. Some of the delegations to the UNCITRAL Working Group as well as the Queen Mary Task Force have recognized the need for Funders in the current investment arbitration framework. It has been observed by some of the delegations to the UNCITRAL Working Group that many small to medium enterprises are currently unable to access the investment arbitration system due to the high costs of conducting a modern-day

³⁷ ICSID Case No. ARB/05/7

³⁸ ICSID Case No. ARB(AF)/98/3. Notably, the Tribunal in this case did not allow the investor to present its case due to a failure to exhaust domestic remedies. The factual situation however, shows how a domestic legal system can fail to provide effective recourse.

³⁹ UNCITRAL Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session", A/CN.9/930, 19 December 2017, para. 29

investment arbitration⁴⁰. These delegations further expressed that these investors are now turning to third party funding in order to finance the costs of having their dispute heard⁴¹. The Queen Mary Task Force also supports this contention, stating that investment arbitration is seen as an essential means of recourse for foreign investors in order to protect against expropriation and discrimination; and that to support this, "*third-party funding is regarded as a critical tool for facilitating access to investment arbitration in order to seek justice on such claims*"⁴²."

TPF helps mitigate the financial risks of investors that are faced with arbitration

34. For investors who have had their investments expropriated or who have otherwise faced severe repercussions due to breaches of a host state's treaty obligations, the prospect of a lengthy and costly arbitration against the host state may not be appealing, particularly when their own finances may have already been severely affected due to the host state's actions. Even when an investor may potentially have the resources to fund its own claim against a respondent state, the high costs of investment arbitration may prove to be an ineffective and inefficient use of the investor's resources, limiting economic growth, which in turn may have severe economic effects on the investor beyond the initial breach of treaty.
35. The presence of Funders in these situations allow for investors to leverage their claims, to use outside funding to help support the costs of arbitration so that their existing economic resources can best be allocated to their business proficiencies. Indeed, an increasing number of solvent companies are turning to Funders to help cover their legal costs so as to better utilize their resources⁴³. In the Queen Mary Task Force report, most funders in the Task Force suggested that larger solvent companies

⁴⁰ UNCITRAL Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session", A/CN.9/930, 19 December 2017, para. 34

⁴¹ *ibid* para. 57. The issue of third party funding is to be further considered in the 37th session of Working Group III in New York, to be held in April 2019. For the views that have been expressed by different delegations in the previous working sessions of Working Group III on third party funding, see summary by Prof. Anthea Roberts <<https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/>> accessed 27 January 2019

⁴² Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.202; citing D G Henriques, "Third Party Funding: a Protected Investment?", 30 *Spain Arbitration Review* (2017) pp. 122-127

⁴³ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.158

are increasingly using third party funding to share risk and maintain liquidity⁴⁴.

36. While there may be some criticism levied on the basis that third party funding may prop up unmeritorious claims, where the claim brought by an aggrieved investor is meritorious, the question of whether the investor is in fact impecunious and therefore qualified for third party funding should be of less importance. Where the claim is valid, the obligation of the respondent state to pay compensation should take place regardless of whether the investor is currently solvent. As such, when third party funding would allow an investor to better utilize its existing resources, the presence of such funding should not be objectionable to respondent states.

Review of potential claims by Funders may filter out hopeless or unmeritorious claims

37. The very nature of third party funding means that Funders will usually only support claims that have a high probability of returns, i.e. success on the merits of the claims. Just as with any other professional investor, the success of any individual funder will be dependent on their ability to determine which investments will succeed and which will fail. This subsequently gives rise to the assumption that in order to obtain third party funding, any prospective funded party must first convince the Funder that their claim is strong enough to provide a high probability of returns.
38. Based on those assumptions, it is arguable that the existence of third party funding in investment arbitration provides a *de facto* screening mechanism for claims. Only those claims that provide a high chance of success will proceed on to the arbitration stage, and unmeritorious claims will filter out due to lack of financing⁴⁵. This will subsequently reduce the costs that may be incurred by host states as claims that are hopeless will not take up the limited time and resources that many host states are faced with.
39. Published figures from major Funders indicate that such a filtering process is taking place. Burford Capital, for example, closed only 4% of all inquiries in 2017, funding 59 investments out of 1,561 inquiries⁴⁶.

⁴⁴ *ibid* p.180

⁴⁵ *ibid* p.208

⁴⁶ "Burford Annual Report 2017" <<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>> (accessed 22 December 2018), p.20

IMF Bentham, another major Funder represents a 90% success rate in jurisdictions outside of the USA between 2011-2018⁴⁷. These figures show that the due diligence process of Funders does filter out claims, although they do not demonstrate whether those claims would have proceeded without their support.

40. While there may still be questions as to how effective Funders may actually be at filtering out unmeritorious claims, as well as to what criteria Funders may attach in investment arbitration cases where the relative novelty of the field means that there is not a strong body of precedent to lend predictability to the outcome of a dispute, what can be shown is that given the attractiveness of third party funding to aggrieved investors, the due diligence process undertaken by Funders at least provides some form of pre-arbitration screening mechanism that may either drive away unmeritorious claims, or persuade borderline investors to pursue settlement.

Presence of third party funding may result in more efficient case management

41. The level of control that a Funder may exercise over the management of the case appears to differ from case to case and to date there do not appear to be any published studies that examine the effects of third party funding on the overall management and control of a case⁴⁸. Control over a case by a Funder may have both good and bad characteristics.
42. In certain cases, there are advantages to having oversight by a Funder that has done rigorous due diligence on the merits of a certain claim. The English Court of Appeal has stated that "*rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals*" was expected from responsible Funders⁴⁹. Active monitoring by a Funder in these situations may provide for more effective case management.
43. Furthermore, the presence of third party funding may act as a deterrent against strategic attempts to "bleed out" prospective claimants by delaying or otherwise imposing high burdens on claimants in attempts to deplete their cash reserves and force the investor to eventually abandon

⁴⁷ IMF Bentham, "FY2018 Full Year Results Investor Presentation" <<https://www.imf.com.au/docs/default-source/site-documents/investor-presentation-fy2018-full-year-results>>, Slide 12

⁴⁸ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> (accessed 22 December 2018), p.74

⁴⁹ *Excalibur Ventures v Texas Keystone and others* [2016] EWCA Civ 1144.

their claim. Knowledge that a claimant will have external financing to cover such costs may prevent forensic defensive posturing by a respondent state⁵⁰.

Cons

TPF prevents true access to justice by excluding non-investors

44. Access to justice, as described above, is one of the greater strengths and arguments for allowing third party funding in ISDS. However, critics of the investment arbitration system argue that the access that third party funding provides to investors is not true access to justice, as such access is limited to only the foreign investor, and excludes other potential interested parties.
45. Just as with commercial arbitration, investment arbitration is based on consent, which in the ISDS context is offered by the respondent state in the form of a dispute settlement article in a bilateral or multilateral agreement, and subsequently crystallized by the investor when it submits its request for arbitration. This consent-based jurisdiction necessarily means that, just as with commercial arbitration, only the parties to the dispute settlement clause may participate in that arbitration.
46. Normally this may not be objectionable in commercial arbitration as the subject matter of a commercial dispute rarely has public policy or public interest ramifications. However, in the ISDS context, where measures taken by a respondent state may have significant public interest or policy concerns, only the investor has the right to make claims against the respondent state. Furthermore, if the measures taken by the respondent state are in fact due to public interest, the public, in most cases, are powerless to prevent an investor from challenging those measures or being able to present their case before the arbitral tribunal.
47. Participation in investment arbitration is therefore difficult for those non-investors that may have been affected either by the investment or by the governmental measures that have affected the investment. Unlike in most domestic systems where these individuals may have been able to act as interpleaders, the closest substitute is the preparation and filing of *amicus curiae* submissions. Those who have attempted to file *amicus curiae* submissions, however, have complained that this system does not "*provide an effective or practical means of accessing justice for either*

⁵⁰ Law Reform Commission of Hong Kong, "Third Party Funding for Arbitration Sub-committee Consultation Paper" <https://www.hkreform.gov.hk/en/docs/tpf_e.pdf> accessed 22 December 2018, para. 5.15

*state violations or company abuses exacerbated or caused by international investments*⁵¹."

48. Third party funding advocates argue that the presence of third party funding enhances access to justice. However, third party funding may also be seen as enabling or prolonging a focus on economic returns rather than "justice" by fueling a system that only allows those with direct economic interests to access the investment arbitration system and excluding those who may have been directly or indirectly affected by the related investment or governmental measure.

TPF exacerbates what is a largely asymmetric dispute resolution method

49. Critics of the current investor-state arbitration system argue that the system is structurally biased towards prospective claimants⁵². Recent numbers from UNCTAD show that respondent states have been successful in over a third of all published investment disputes, mostly at the jurisdictional phase, slightly higher than the 28% of claimants that have succeeded overall. However, of those cases that have proceeded to the merits, 60% were decided in favor of claimants⁵³. These numbers indicate that while states may enjoy some advantage at the jurisdictional phase, these advantages are subsequently negated if a dispute manages to reach discussion of the merits. These statistics also may indicate a structural bias due to the asymmetrical nature of investor-state arbitration, primarily due to the fact that under the current system, it is practically impossible for respondents to successfully lodge counterclaims that would help set off or neutralize prospective claims. These structural imbalances may be further distorted by the introduction of third party funding.
50. In commercial arbitration, third party funding will usually fund both claimants and respondents. The benefits for the Funder in respect of prospective claimants are straightforward. For respondents, third party funding may also increase the availability of funds to respond to claims,

⁵¹ Columbia Center on Sustainable Investment, "Impacts of the International Investment Regime on Access to Justice", September 2018 <<http://ccsi.columbia.edu/files/2018/09/CCSI-and-UNWGBHR-International-Investment-Regime-and-Access-to-Justice-Outcome-Documents-Final.pdf>> accessed 26 December 2018, p.10

⁵² See Frank Garcia and Kirrin Hough, "Third Party Funding in International Investor-State Arbitration", American Society of International Law vol.22 issue 16 (1 November 2018) <<https://www.asil.org/insights/volume/22/issue/16/third-party-funding-international-investor-state-arbitration>> accessed 22 December 2018; See also *Teinver v Argentina* (ICSID Case ARB/09/1); Burford Capital FY 2017 Report <<http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf>> accessed 22 December 2018

⁵³ UNCTAD, *World Investment Report 2018* <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 27 January 2019 pp.94-95

in particular where the respondent may have a strong prospective counterclaim from which the Funder can obtain returns on its investment.

51. In most cases, however, investment arbitrations tend to be asymmetric. Whereas the Claimant will usually obtain monetary damages in respect of its claims, the host states, when successful, are in almost all cases limited to only costs awards. In particular, the specific nature of treaty arbitration in many cases serves to bar host states from being able to bring counterclaims that could potentially provide returns to any Funder.
52. Whether a respondent state may bring counterclaims in investment arbitration remains a topic of heated debate. These debates arise primarily from the unique elements that separate investment arbitration from normal commercial disputes. Whereas the majority of commercial arbitration disputes arise from contractual agreements that are, for the most part, symmetrical as to the respective rights and powers of the parties to bring claims against each other, there is no such guarantee of symmetry for investment disputes.
53. In particular, while it is a given that the bilateral or multilateral agreement that constitutes the standing offer to arbitrate on behalf of the host state is subsequently crystallized by the submission of a request for arbitration by the investor, the method of this crystallization raises questions as to whether the host state can subsequently bring counterclaims under that agreement. In various cases where the state has attempted to bring a counterclaim, the tribunal has had to determine whether the wording of the arbitration agreement in the relevant treaty was broad enough to encompass potential counterclaims, or whether the wording had been restricted so that only the investor had the power to bring substantive claims⁵⁴.
54. Even with more recent arbitral decisions deciding that the scope of modern treaty dispute resolution clauses will allow for states to bring counterclaims for issues such as environmental damages or human rights abuses, such decisions subsequently run into other issues in relation to whether the counterclaims of respective respondent states share factual or legal connections to the investor's claims, i.e. whether the counterclaims arise out of the same legal instrument as the investor⁵⁵. These tests

⁵⁴ *Saluka Investments BV v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004; *Sergei Paushok v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011

⁵⁵ *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *David Aven v Costa Rica*, UNCITRAL, Final Award, 18 September 2018

almost invariably result in the failure of the application for a counterclaim given that the claimant will rely primarily on breaches of treaty, and that exceedingly few of those treaties provide for any substantive rights that the respondent state could use as the legal basis for its counterclaims.

55. The result of this is that while the door may be slowly opening, the probability of a respondent state to successfully have their counterclaim admitted, much less succeed on the merits is vanishingly small. In fact, of all published investment arbitration decisions, only two cases considered a counterclaim from the respondent state to be admissible. Those two decisions were both related, in the cases of *Burlington Resources v Ecuador*⁵⁶ and *Perenco v Ecuador*⁵⁷. Even then, the only reasons the counterclaims in these cases were found admissible was because the claimants in both cases declined to contest the jurisdiction or admissibility of the counterclaims.
56. In the context of TPF, the consequences of the asymmetric dispute resolution methods most commonly found in investment arbitration through bilateral and multilateral agreements are that host states will almost never be able to access the avenues for funding that the investors will be able to access. Without the ability to have any potential counterclaims heard, respondent states simply cannot provide a workable business model that will allow a Funder to obtain a comparable rate of return.
57. There have been disparate cases where respondents have been able to obtain funding from third parties, but these sources of funding tended to be from non-profit entities rather than from professional financial investors. For example, in the *Philip Morris v Uruguay*⁵⁸ arbitration, the Uruguayan government received financial support from the Bloomberg Foundation and its "Campaign for Tobacco-Free Kids"⁵⁹. Such sources of non-profit funding will likely help to support respondent states in other cases that deal with significant issues of public interest, but it is arguable that the limited nature of such funding is far outweighed by the availability of funding for claimants, and therefore does not significantly alleviate what is an inherent structural imbalance.

⁵⁶ ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017

⁵⁷ ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015

⁵⁸ ICSID Case No. ARB/10/7

⁵⁹ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.48

TPF risks overburdening governmental resources

58. The rapid increase in investor-state claims over the past 20 years has proven that ISDS is an effective and popular option for aggrieved investors, despite the high costs of handling a claim. However, whereas a prospective claimant will only have to deal with one set of legal costs, respondent states face an ever-increasing burden of legal costs as more and more investors utilize the investor-state dispute resolution system.
59. One of the greatest criticisms against the investor-state dispute resolution system stems from physical or economic crises that have arisen in host states. In situations where states are forced to take certain measures, either to regulate or to safeguard its interests, the general measures taken can give rise to multiple claims, which then puts even more pressure on already strained governmental resources. One such example of this was Argentina, whose economic crisis between 1999-2001 gave rise to as many as 45 claims from 2001 – 2009⁶⁰. These claims included cases such as *Abaclat v Argentina*⁶¹, the world's first ISDS class-arbitration, whereby over 180,000 individual Italian bond holders brought claims against Argentina in respect of its debt-restructuring efforts during the 2001 economic crisis⁶².
60. Even when cases are discontinued or settled, handling of these cases may require the devotion of significant resources by respondent states. Costs in investment arbitration continue to rise, and as stated above, the estimated average cost for an investment dispute is now approximately US\$ 8 million⁶³. Furthermore, many investment arbitrations are being brought against developing nations, who may have limited resources to spend for defending against potential claims. For these nations, even at the best of times, the existing caseloads may already stretch governmental budgets and public resources to the breaking point. Considering that many cases may also be brought in times when the host state is still dealing with the after-effects of national crisis, the costs of defending such proceedings may eventually prove unbearable.
61. This burden may be further exacerbated by the presence of a Funder. The funding of claims potentially extends the survivability of a claim, meritorious or otherwise. Whereas certain claims may have fizzled out due to passage of time or exhaustion of resources, funding will prolong

⁶⁰ "Argentina – as Respondent State", Investment Policy Hub

<<https://investmentpolicyhub.unctad.org/ISDS/CountryCases/8?partyRole=2>> accessed 22 December 2018

⁶¹ ICSID Case No. ARB/07/5

⁶² *ibid*

⁶³ UNCITRAL Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session", A/CN.9/930, 19 December 2017, para. 29

these disputes and thereby continue to drive up costs for respondent states.

TPF may amplify regulatory chilling effects

62. Regulatory chill is the theory that outside forces may force a government to refrain from implementing regulations. Critics of the investment arbitration system have argued that the explosion of investment treaty arbitration cases may lead to governments hesitating or refraining from instituting regulatory measures out of fear of opening themselves up to liability and risk facing claims brought by affected foreign investors⁶⁴. The possibility of regulatory chill may be more significant when considering that many cases are against developing countries that may not necessarily have robust health, environmental, or human rights regulations.
63. Further, many of these developing nations may not have the governmental resources to negotiate or modernize their original treaties, leaving these nations with older generation treaties that possess limited safeguards to protect a state's inherent regulatory powers.
64. Such concerns are only amplified with third party funding, the presence of which can not only increase the quantity of claims that can be levied against a respondent state, but also prolong the life of such claims, even when they may not be meritorious.

TPF supports the transfer of wealth from the public sector to private actors

65. Where an investor has been successful in claiming against a respondent state for breaches of treaty, any award that will be rendered will necessarily have to be paid out of public funds. The issuance of an investment award, and its subsequent enforcement, therefore constitutes a *de facto* transfer of public resources to private entities.
66. In a non-funded investment dispute, the payment out of any award to the claimant constitutes compensation for breaches of the respondent state's

⁶⁴ K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, Cambridge 2009) 25 citing Mann, H. *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (IISD and World Wildlife Fund, Winnipeg 2001) 34; E. Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Earthscan, London 2001) 87; K. Gray, "Foreign Direct Investment and Environmental Impacts: Is the Debate Over?", *RECIEL* 11(3) 311; A. Cosbey, H. Mann, L. Peterson, K. von Moltke, *Investment and Sustainable Development* (IISD, Winnipeg 2004)

treaty obligations. In cases of expropriation or denial of justice this may be justified, but in situations where the state has exercised its inherent right to regulate for its health, environment, or other needs, the transfer of funds from the public sector to private actors may be seen as contradictory to the state's need to promote sustainable development⁶⁵.

67. The presence of a Funder only lends further support to this specific criticism of the investment disputes system, as the Funder will subsequently make a profit off of what was, up until the date of any award, public funds at the disposal of the respondent state. This may also lead to criticism that the presence of Funders will artificially prop up those investors whose purposes run counter to the principles of sustainable development⁶⁶, particularly when many claims of indirect expropriation due to environmental or safety regulations have arisen from mining and energy investments.
68. Furthermore, such transfers of wealth from public sectors to Funders can be seen as actively working against the original purposes of the funds. Whereas public funding would have normally been earmarked to help support environmental or health regulations, when such funds have been diverted to a Funder, there is no guarantee as to how those funds will subsequently be used. It is not impossible that the Funder, having received returns from a state's legitimate exercise of its regulatory rights, subsequently uses those funds to invest into other claimants who do not actively support sustainable development objectives. The public purpose of the funds is thus destroyed, and the transfer of wealth to private actors potentially causes measurable harm to health, environmental, and human rights objectives.

TPF increases the risk of creating more marginal, speculative, and frivolous claims

69. Just like any other professional investor, success is based on the diversification of a portfolio of investment. The assumption underlying third party funding is that the chance of success of a claim is the primary consideration of a Funder, as returns will generally be based on success of the claim. However, the probability of success may not always be the only consideration. It is not impossible to consider that a Funder, faced with a claim that may have only a very small chance of success, but

⁶⁵ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.201

⁶⁶ *ibid*

which could net a very high return, may take the chance of including that investment in its portfolio.

70. Current efforts to regulate third party funding revolve around requirements of disclosure and effective standards to protect funded parties entering into funding agreements. However, there is currently no regulatory initiative that attempts to control how Funders should manage their portfolios or provide criteria that must be established in order to accept an investment. Indeed, there does not appear to be any way to practically implement such regulation even if it was proposed. Each Funder exercises its own discretion and judgment when accepting an investment into its portfolio.
71. Furthermore, it is undeniable that the current state of ISDS, and one of its largest criticisms, is that an investor could possibly bring two identical cases before two different tribunals, and obtain two different results. There is no binding precedent in investment arbitration and what may be a weak case for one tribunal may convince a different one. Funders may therefore take a greater risk supporting a case that may be unmeritorious on its face in the hope of a different outcome before a different tribunal. Such risks are subsequently balanced through a portfolio of other safer investments. The Queen Mary Task Force has also pointed out that several critics have raised specific concerns regarding portfolio investment and its ability to hedge higher risk investments⁶⁷.

Cost allocation in funding agreements may give rise to "arbitral hit and runs"

72. The ability for a Funder to withdraw from a funding agreement may cause situations where, once it appears that a claimant may lose its case against a respondent state, the Funder will be able to withdraw from the case, leaving the claimant impecunious and unable to satisfy any subsequent costs award rendered in favor of the respondent state. The Funder, as a non-party to the disputes settlement clause, is able to walk away as it cannot be subject to any orders issued by the respective arbitral tribunal⁶⁸. This creates an "arbitral hit and run" scenario whereby success will result in a windfall for the claimant and Funder but failure will still leave the respondent state out of pocket.

⁶⁷ Queen Mary Task Force Report <https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 22 December 2018, p.203

⁶⁸ *ibid* pp.161, 177

73. Such concerns were the driving reasons why respondent states have been pushing for issuance of security for costs orders, such as those issued in *RSM v Saint Lucia*⁶⁹ and *Armas v Venezuela*⁷⁰. Without security for costs, respondent states find themselves in situations of unnecessary risks, where even success will still cause undue burden on governmental resources.
74. Hong Kong regulation in respect of the recently published Code of Practice has also recognized that the sudden withdrawal by a Funder may cause severe prejudice to a case. The Code attempts to mitigate this risk by restricting the ability of the Funder to withdraw or terminate a funding agreement except under certain prescribed situations⁷¹.

CURRENT INITIATIVES TO REGULATE THIRD PARTY FUNDING IN ISDS

75. Considering the great level of interest from both private investors and public bodies in how third party funding can affect the ISDS landscape, it is not surprising that there are multiple current initiatives to provide a structured framework around third party funding that will help preserve the advantages of funding while mitigating any potential pitfalls. These initiatives are taking place now and on multiple levels, including at the procedural or administrative level, domestic law level, and treaty level. Some of these initiatives are detailed below.

Procedural and administrative level – rules regarding third party funding

76. Arbitral institutions are at the forefront of third party funding regulation, with several institutions now including rules and regulations regarding the need to disclose third party funding relationships. Several of these modifications are also specific to investor-state arbitration.
77. The ICSID Rules have been amended with the aim of modernizing the ICSID arbitration rules and to take into account developments in the investment treaty arbitration field over the past 20 years. Among the

⁶⁹ *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs

⁷⁰ *Manuel García Armas and others v Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018

⁷¹ Code of Practice for Third Party Funding of Arbitration"

<http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf> accessed 22 December 2018, paras. 2.13 – 2.16

various amendments are rules relating specifically to the need for parties to disclose the existence of any third party funding and the sources of this funding, as well as separate codified powers for arbitrators to make orders for security for costs. New ICSID Arbitration Rule 21 imposes a new obligation on the parties to disclose whether they are being supported by third party funding and if so to disclose the source of the funding. The parties must also keep such details current throughout the proceedings. However, the new Rule 21 does not impose any obligations to disclose the funding agreement or its contents⁷².

78. ICSID is not the only administrative body to contemplate specific regulations in relation to TPF. While not specific to investment arbitration, the 2018 HKIAC Administered Arbitration Rules include specific rules in respect of TPF that imposes disclosure obligations when funding arrangements have been entered into. Specifically, Article 44 of the 2018 HKIAC Rules specifies that when a funding agreement has been made, the funded party must communicate the fact that a funding agreement has been concluded as well as the source of funding⁷³. The funded party must also notify the tribunal and other party when their situation has changed.
79. The Singapore International Arbitration Centre has also considered issues in relation to third party funding in its 2017 SIAC Investment Arbitration Rules. Rule 24 of the SIAC Investment Arbitration Rules provides for additional powers of the tribunal. Rule 24(1) explicitly empowers the tribunal to order disclosure of any funding arrangement, identity of any Funder, and where appropriate, details of the Funder's interests and whether the Funder has agreed to take on any adverse costs liability⁷⁴. Notably, unlike the ICSID amendments and the 2018 HKIAC Rules, the SIAC Investment Arbitration Rules do not provide for automatic disclosure of the existence of any funding arrangements. This is likely due to Singapore's decision to impose its disclosure obligations on counsel rather than the funded party via Singapore's professional conduct rules⁷⁵.
80. The China International Economic and Trade Arbitration Commission ("CIETAC") International Investment Arbitration Rules adopted in 2017 also provide for disclosure requirements when third party funding is

⁷² "Proposals for Amendment of the ICSID Rules – Synopsis"

<https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis_English.pdf> accessed 22 December 2018, para. 21

⁷³ 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules, Article 44

⁷⁴ 2017 Singapore International Arbitration Centre Investment Arbitration Rules, Rule 24(1)

⁷⁵ Legal Profession (Professional Conduct) Rules 2015, s.49A

present. Article 27 of the Investment Arbitration Rules provides for mandatory disclosure of the existence, nature, and identity of any funding, as well as empowering the arbitral tribunal to order disclosure of any relevant information in the respective funding agreement⁷⁶.

Regulation at the jurisdictional level

81. Whereas individual institutions such as ICSID and HKIAC are moving towards imposing regulations for Funders, such effort are also being replicated at the domestic law level, with individual jurisdictions now implementing provisions to regulate potential Funders. Hong Kong and Singapore have both recently implemented amendments to their domestic laws to both accommodate for and regulate third party funding.
82. Following the Hong Kong decision in *Unruh v Seeberger & Anor*⁷⁷ where it was left open whether maintenance and champerty would apply to arbitrations in Hong Kong, and subsequent to the Law Reform Commission's report in 2016, Hong Kong's amendments to the Arbitration Ordinance (Cap 609) in June 2017 now make express allowances for third party funding in arbitration⁷⁸. Adopting an approach similar to that taken by Australia, Hong Kong takes a "light-touch" approach to the regulation of third party funding, requiring all third party funders to adhere to a Code of Practice developed by the Hong Kong Department of Justice, but not requiring any further interventionist measures⁷⁹.
83. Hong Kong issued its Code of Practice for Third Party Funding of Arbitration ("Code") on 7 December 2018, fulfilling its obligations under Part 10A of the amended Arbitration Ordinance (Cap 609)⁸⁰. The Code imposes several obligations upon Funders, including obligations in relation to maintaining suitable standards and practices such as:
 - Promotional material standards and requirements⁸¹;

⁷⁶ CIETAC International Investment Arbitration Rules, 1 October 2017, Article 27

⁷⁷ [2007] 2 HKC 609

⁷⁸ <<https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf>> accessed 27 January 2019

⁷⁹ "Report on Third Party Funding for Arbitration" <https://www.hkreform.gov.hk/en/docs/rtpf_e.pdf> p.64

⁸⁰ "Code of Practice for Third Party Funding of Arbitration"

<http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf> accessed 22 December 2018

⁸¹ *ibid* para. 2.2

- Requirements as to the content of the funding agreement and the need to ensure that funded parties have obtained independent legal advice in relation to the funding agreement⁸²;
- Maintenance and disclosure of capital adequacy requirements⁸³;
- Required procedures to manage conflicts of interest⁸⁴;
- Standards and requirements for confidentiality⁸⁵;
- Requirements for the Funder to refrain from influencing the funded party or its legal representative to give control or conduct of the arbitration to the Funder, nor to cause the funded party's legal representative to act in breach of its professional duties, nor to influence the arbitral body or institution⁸⁶;
- Requirements for the Funder to remind the funded party of its obligation to disclose information under sections 98U and 98V of the Arbitration Ordinance (Cap 609)⁸⁷;
- Requirements to explicitly state in the funding agreement whether the Funder will meet any liability for adverse costs, insurance premiums, security for costs, or any other financial liability⁸⁸;
- Requirements for establishing grounds of termination, in particular that the Funder will not withdraw except under specific circumstances⁸⁹;
- Requirement to have an effective dispute resolution mechanism between Funders and funded parties⁹⁰;
- Requirements to have an effective procedure for addressing complaints against it⁹¹.

⁸² *ibid* paras. 2.3-2.4

⁸³ *ibid* para. 2.5

⁸⁴ *ibid* paras. 2.6-2.7

⁸⁵ *ibid* para. 2.8

⁸⁶ *ibid* para. 2.9

⁸⁷ *ibid* paras. 2.10-2.11

⁸⁸ *ibid* para. 2.12

⁸⁹ *ibid* paras. 2.13-2.16

⁹⁰ *ibid* para. 2.17

⁹¹ *ibid* para. 2.18

84. Singapore has also implemented amendments to its Civil Law Act (Chapter 43 of the 1999 Revised Edition) as well as its Legal Profession Act (Chapter 161 of the 2009 Revised Edition) to allow for third party funding in specific circumstances. Section 5A of the amended Act abolishes the torts of maintenance and champerty, while maintaining that contracts not allowed by section 5B will still be considered to be contrary to Singaporean public policy or otherwise illegal⁹². Section 5B of the amended Act then provides for the legalization of third party funding for certain classes of dispute resolution, such as arbitration. Section 5B is structured so that the Minister can later broaden the scope of the qualification to other classes of dispute resolution⁹³.
85. In respect of disclosure obligations, Singapore has taken the approach of imposing these obligations upon the legal representatives of funded parties rather than upon the parties themselves. Section 49A of the Singaporean Legal Profession (Professional Conduct) Rules 2015 stipulates that any Singaporean legal practitioner must disclose the existence and identity of any Funder⁹⁴. Moreover, section 49B of the same rules prohibits legal practitioners from having any ownership interest in a Funder that it has referred to a client or which has a contract with the law firm⁹⁵.

Treaty level regulation of TPF

86. In addition to regulation at the administrative and jurisdictional levels, third party funding in investment arbitration must also consider potential regulation at the treaty level, as more recent bilateral and multilateral agreements are considering the issue of third party funding.
87. For example, the Comprehensive Economic Trade Agreement ("CETA") signed between Canada and the EU now includes specific disclosure requirements when there is the presence of third party funding. Specifically, Article 8.26 CETA establishes that "*[w]here there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.*"⁹⁶ Similar provisions are also present in the EU-

⁹² Civil Law (Amendment) Act 2017, s.2

⁹³ *ibid*

⁹⁴ Legal Profession (Professional Conduct) Rules 2015, s.49A

⁹⁵ *ibid* s.49B

⁹⁶ Comprehensive Economic and Trade Agreement, Article 8.26

<http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 22 December 2018

Vietnam Investment Protection Agreement⁹⁷ and the EU-Singapore Investment Protection Agreement⁹⁸.

88. As third party funding in investment arbitration continues to grow and calls for regulation increase, it is likely that third party funding clauses will become more and more prevalent in bilateral and multilateral investment agreements, so as to provide safeguards for host states that may not wish to rely on institutional rules.

Is regulation of funding at multiple levels advisable?

89. As established above, there are multiple initiatives that have either taken place or which are underway in relation to ensuring that third party funding of arbitration or mediation issues is sufficiently regulated. Such initiatives are taking place at each level of the dispute resolution environment, including at the institutional, jurisdictional, and international level.
90. While regulation of Funders is generally recognized as a necessary element to ensure that funded parties are adequately protected and advised of their rights and obligations, as well as to ensure that the integrity of the arbitration process is maintained and that there are effective methods of disclosure and conflicts management, the various initiatives to attempt to regulate this process may lead to issues of conflict between the various regulatory requirements.
91. This potential conflict can be seen when comparing, for example, the method of regulation in Hong Kong and Singapore. Hong Kong's amended Arbitration Ordinance (Cap 609) regulates Funders operating in Hong Kong, including the imposition of disclosure obligations upon funded parties pursuant to sections 98U and 98V Arbitration Ordinance (Cap 609)⁹⁹. Singapore's disclosure requirements, however, are imposed on counsel by virtue of its Professional Conduct Rules¹⁰⁰. The 2018 HKIAC Arbitration Rules also impose disclosure obligations under Article 44¹⁰¹. Therefore, an arbitration that would be seated in Hong Kong under the 2018 HKIAC Rules that involves Singaporean counsel could potentially have three different rules governing disclosure of third

⁹⁷ EU-Vietnam Investment Protection Agreement, Chapter 3, Article 3.37

<http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf> accessed 22 December 2018

⁹⁸ EU-Singapore Investment Protection Agreement, Chapter 3, Article 3.8

<http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf> accessed 22 December 2018

⁹⁹ Arbitration Ordinance (Cap 609), ss.98U, 98V

¹⁰⁰ Legal Profession (Professional Conduct) Rules 2015, s.49A

¹⁰¹ 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules, Article 44

party funding. In the investment arbitration context, one also needs to consider regulation currently being included into bilateral and multilateral agreements, potentially adding a fourth source of regulation into the dispute.

92. At the moment, most regulations are unanimous in requiring the disclosure of the existence and identity of any Funder. However, as the field matures and regulations are amended or refined, there exists the possibility of eventual conflict between the disparate methods of funding regulation. Even where general concepts may be common between these sets of rules, different applications of those concepts may cause greater confusion and debate in the future.

THIRD PARTY FUNDING IN INVESTMENT MEDIATION

93. Much of the focus on third party funding and the structural imbalances inherent in ISDS have focused on one aspect of ISDS, investor-state arbitration. In reality, there exists a range of dispute settlement methods along the spectrum, including party-to-party negotiation as well as investment mediation.
94. That the investor may have multiple methods of resolving its dispute is readily reflected in most bilateral and multilateral agreements. Most treaties include as part of their dispute settlement provisions the requirement for consultations and negotiations, or a cooling off period¹⁰².
95. Several international bodies have considered the use of mediation to help reduce and alleviate the high costs of investor-state arbitration. The UNCITRAL Working Group, for example, has considered that the "*use of methods other than arbitration to resolve disputes, including mediation, were also considered as potential measures that could reduce time and cost in ISDS*"¹⁰³. ICSID also maintains an investment mediation program whereby ICSID will provide facilities and administrative services to assist parties in identifying mediators, organizing mediation sessions and managing the finances of the process¹⁰⁴. ICSID also provides a set of mediation rules under its Additional Facility (which no longer requires one party to be a Contracting State or a national of a

¹⁰² "Investor-State Mediation" <<https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>> accessed 28 December 2018

¹⁰³ UNCITRAL Working Group III, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session", A/CN.9/930, 19 December 2017, para. 67

¹⁰⁴ "Investor-State Mediation" <<https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>> accessed 28 December 2018

Contracting State)¹⁰⁵. The IBA has also issued Rules for Investor-State Mediation, which provide rules for, *inter alia*, appointment of mediators and the conduct of mediation¹⁰⁶.

96. While third party funding in arbitration has been relaxed, it is questionable whether third party funding of mediation may fall within the traditional doctrines of maintenance and champerty. As noted in *Neville v London Express Newspaper*¹⁰⁷ and adopted in *HKSAR v Winnie Lo*¹⁰⁸, maintenance and champerty are concerned with *litigation*, and therefore may not extend to non-contentious proceedings such as mediation. When considering third party funding in mediation generally, the Law Reform Commission of Hong Kong Third Party Funding in Arbitration Sub-committee considered that mediation and other forms of alternative dispute resolution, being non-contentious, would not attract liability under maintenance and champerty¹⁰⁹.
97. Notably, nothing in the ICSID (AF) Mediation Rules nor the IBA Rules for Investor-State Mediation contain any explicit references or rules governing third party funding. Considering that both ICSID and the IBA have explicitly included regulations on disclosure of third party funding in their amended ICSID Rules and IBA Guidelines on Conflicts of Interest respectively, the omission of such regulations in their Mediation Rules may serve to indicate that the use of third party funding in mediation is seen to be less of an issue¹¹⁰.
98. Despite this, when considering amendments to the Arbitration Ordinance (Cap 609) to accommodate third party funding, Hong Kong took the further step to clarify the applicability of third party funding to mediation as well, thereby reducing potential confusion as to whether maintenance and champerty may apply to mediation¹¹¹. The subsequent Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016

¹⁰⁵ ICSID Additional Facility Rules of Procedure for Mediation Proceedings ((Additional Facility) Mediation Rules) <https://icsid.worldbank.org/en/Documents/X.%20Amendments_Vol_Two-English_AF%20MR.pdf> accessed 28 December 2018

¹⁰⁶ "IBA Rules for Investor-State Mediation", 4 October 2012 <[https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf)> accessed 28 December 2018

¹⁰⁷ [1919] AC 368

¹⁰⁸ (2012) 15 HKCFAR 16

¹⁰⁹ Law Reform Commission of Hong Kong, "Third Party Funding for Arbitration Sub-committee Consultation Paper" <https://www.hkreform.gov.hk/en/docs/tpf_e.pdf> accessed 22 December 2018, para. 1.30

¹¹⁰ The amended ICSID Conciliation Rules even include an explicit rule providing for disclosure of third party funding.

¹¹¹ Law Reform Commission of Hong Kong, "Report: Third Party Funding for Arbitration" <https://www.hkreform.gov.hk/en/docs/rtpf_e.pdf> accessed 28 December 2018, para. 3.38-3.39

made changes to the Mediation Ordinance (Cap 620), adding a new section 7A that replicates the application of Part 10A to mediations as well as arbitration¹¹².

99. While some of the structural elements of investment arbitration that may be amplified or exacerbated by third party funding may not be present in investment mediation systems, such as the asymmetrical nature of compensation and the issues regarding regulatory chill or portfolio investment, there are still several issues that will not be dissipated by moving from an investment arbitration to an investment mediation system.
100. Primarily, issues regarding conflicts of interest may still arise between Funders and potential mediators. In particular, the ICSID (AF) Mediation Rules and the IBA Rules for Investor-State Mediation both impose obligations of impartiality and independence upon a mediator¹¹³, and yet without mandatory disclosure of the existence of a Funder, mediators may have inherent conflicts of interest that they will not be aware of. Further, issues of transparency may be further muddied due to the express obligations of confidentiality included in current mediation rules¹¹⁴. Such provisions have the potential to provide a step backwards in relation to efforts to improve and expand transparency in the investment disputes system.

CONCLUSION

101. The advent of the investment dispute settlement system was a sea change for how private actors could obtain relief for foreign governmental measures, allowing for the first time, a method by which private investors could obtain direct relief from host states. The meteoric rise of investor-state arbitration cases over the past 20 years shows both a need and demand for this sort of direct relief.
102. The creation of ISDS has also opened up a new lucrative market for Funders that many Funders have taken advantage of, allowing for greater gains and subsequently, greater access for smaller investors that may have sufficient resources on their own to be able to access the dispute settlement system.

¹¹² Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 <<https://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf>> accessed 28 December 2018

¹¹³ ICSID (AF) Mediation Rules, Rule 6; IBA Rules for Investor-State Mediation, Article 3

¹¹⁴ ICSID (AF) Mediation Rules, Rule 16; IBA Rules for Investor-State Mediation, Article 10

103. However, just as with any other burgeoning industry, there remain issues that need to be resolved in order to provide a balanced system that both allows access to justice for legitimately aggrieved investors while preventing undue burden on respondent states that could cause an eventual withdrawal from the dispute settlement system altogether.
104. The advantages of including third party funding into the current investment disputes system are clear, providing unprecedented access to investors to have their grievances heard, in a manner that promotes meritorious claims and possibly filters out unmeritorious ones.
105. Meanwhile, whereas there are certainly disadvantages to including third party funding, such as exacerbating or amplifying existing structural imbalances that tend to favor the investor over respondent states, it is questionable whether third party funding independently causes these issues; or rather that these weaknesses are inherent in the investment arbitration system itself.
106. Current efforts to regulate third party funding are unanimous on the need to disclose both the existence and sources of third party funding. Beyond that, however, regulations begin to diverge as to whether any further disclosure is required, on whom these obligations lie, and whether the presence of third party funding justifies any other measures such as security for costs. Considering regulation at the administrative, jurisdictional, and treaty levels, further work may be required to establish a common set of rules and regulations so that obligations and duties are clear to all parties.
107. Further, it is unclear at the moment what role third party funding may play in investment mediation, if any. Current rules governing investment mediation do not account for nor attempt to regulate for third party funding, which may cause issues with conflicts of interest and transparency.
108. In the end, the genie cannot be put back into the bottle. What is agreed by a vast majority is that the answer is not to eliminate ISDS altogether, but to reform it in a manner that provides effective safeguards against abuse while preserving and further enhancing the ability for individuals to obtain recourse and relief from legitimate grievances.