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Third-Party Funding: A Protected Investment?

Duarte G. Henriques

Resumen: *Entre tantos escritos dedicados al fenómeno de financiación de litigios por terceros, muy pocos detallan una característica específica de este modelo de negocio. Mucho más que una faceta oculta, es una característica general que constituye un principio fundamental del derecho: el derecho de acceso a la justicia. Este aspecto puede tener un impacto potencial en el arbitraje de inversión: sirviendo como una cápsula para nuevas perspectivas en el ámbito de financiación de litigios por terceros, puede llevarnos a considerar que una inversión de financiación de un tercero es una inversión protegida según los tratados internacionales de protección de inversiones.*

Por otro lado, la consideración de los desarrollos recientes y la experiencia de los productos financieros en el entorno del arbitraje de inversiones también puede proporcionar motivos adicionales para postular dicha protección.

Este artículo intenta evaluar si esta protección puede otorgarse a modelos de financiación de litigios por terceros.

Palabras clave: *third-party funding; sistema de solución de diferencias entre inversores y Estados; derecho de acceso a la justicia*

I. Introduction

1. The modern business model of third-party funding in arbitration (both commercial and investment arbitration) is undoubtedly one of the hot-topics amongst scholars and commentators. Not without propriety, the phenomenon has even warranted the close attention of investment tribunals.

Indeed, as we will see below, the appearance of external funders may raise issues related to the integrity of the arbitral tribunal, and of the proceedings themselves, because their presence may cause conflicts of interests that could lead to a subsequent annulment of the award. Further, investment tribunals have dealt not only with issues of disclosure of the existence of third-party funders, but also with the impact that these new players may produce in arbitration as far as costs and security for costs are concerned.

It can also be suggested that third-party funding may contribute to an increase in claims against host States, particularly unmeritorious ones, which raises intricate questions related to the legitimacy of the mechanisms currently available to solve disputes between foreign investors and host states.

These are obviously sentiments that conjure up pejorative connotations regarding third-party funding and third-party funders.[1]

2. As a matter of fact, under the guise of "implications" or more emphatically "concerns" that third-party funding may raise in the arena of investment arbitration, some flag a "suspicion" levelled against these players when referring to them

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1 In his dissenting opinion of July 13, 2017, in Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic (ICSID Case No. ARB/09/1), Kamal Hossain refers to third-party funding as a form of "champerty in its most odious form" (see dissenting opinion, para 73, p. 30, award of July 21, 2017).

as "loan sharks"[2] and "vulture investors".[3] The metaphor contained in the now famous words of Gavan Griffith on *RSM v Santa Lucia*, where he described third-party funding as a 'business venture' led by 'mercantile adventurers' that embrace the 'gambler's Nirvana: Heads I win, and Tails I do not lose', is not therefore unsurprising.[4] If those words are not exactly described as an accusation, they are not far from it, and certainly will prompt in most readers' minds the notion that third-party funding poses serious risks to the integrity of the adjudicatory function of arbitral tribunals.

3. On the other hand, one of the most intricate and delicate issues in the investment arbitration realm is to ascertain whether an investment is included in the scope of a relevant international instrument for protection of foreign investments and, more specifically, whether such an investment is afforded the protection of the mechanism for the settlement of disputes arising therefrom. In order to obtain such protection, a set of criteria must be met (for instance, requisites related to the nationality of the investor, and the location of the investment, to name a few).

4. The combination of these two arenas of discussion prompts us to take a step further and ask whether an investment made by a third-party funder in a claim brought by an investor against a host State may qualify as a relevant investment and, therefore, if it may obtain protection of its own.

By way of illustration, let us imagine that a claimant was funded by a third party to pursue its claim and that this claimant was awarded damages as a result of the arbitration proceedings brought against the host State. The funding agreement contemplated a share of the proceeds to be paid to the funder. If this share of the proceeds is somehow subject to a State measure—for instance, a ban on expatriation of funds or the enactment of a new tax imposed on that share—could the third-party funder initiate a separate arbitration against that State, or could it even be granted standing of its own in the pending arbitration?

5. Most international instruments for the protection of foreign investments contain a "catch-all" provision to the effect of considering that an investment is *"every kind of asset"*. This general clause will in principle be followed by an illustrative list of "assets" considered to be "investment", such as "movable and immovable property" or "loans, claims to money or to any performance under contract having a financial value."[5]

As long as one does not take the view that this list, rather than being merely "illustrative", is "exhaustive" regarding possible investments, it would be relatively easy to draw the conclusion that a funding arrangement made by a third-party funder may be considered a separate "investment".

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2 Douglas R. Richmond, 'Litigation Funding: Investing, Lending, or Loan Sharking' (2005) 17 Prof. Law. Symp. Issues and Daniel Brook, 'Litigation by Loan Shark', Legal Aff. (Sept. – Oct. 2004), accessible at http://www.legalaffairs.org/issues/September-October-2004/feature_brook_sepoct04.msp, last accessed on 25 January 2017.

3 Mark Kantor, 'Third-Party Funding in International Arbitration: An Essay About New Developments'(2009) 24(1) ICSID Rev. 65, 66.

4 *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Assenting Reasons of Gavan Griffith (12 August 2014) paras 12–14.

5 This formulation may be found in the bilateral investment treaty between Slovakia and Greece, to point out just a single case.

However, if the investment arbitration is brought within the ICSID setting, intricate questions may arise as to whether its additional jurisdictional requisites have been met. Further, some investment treaties require a nexus between the investment and the territory of the host contracting state. For instance, Art. 26(1) of the Energy Charter Treaty refers to investments made in the "Area" of the host state, and Art. 1101(1)(b) of the North American Free Trade Agreement speaks of 'investments of investors of another Party in the territory of the Party'.

6. At first glance, it seems that the criteria laid down by ICSID tribunals do not allow us to consider that an investment made by a third party meets the requirements regarding the protection of an "investment". Indeed, can we consider that such an "investment" made a "special contribution to the economy of the host State"[6]? Can we consider that there is a territorial link to the host State?

7. Notwithstanding, there is one specific feature of the third-party funding business model which is worthy of a closer look. Rather than a hidden facet, it is a real overarching characteristic, amounting to a fundamental principle of law: the right of access to justice. This aspect may have a potential impact in investment arbitration: serving as a capsule for new perspectives on the third-party funding realm, it may lead us to consider that a third-party funding investment could be considered a protected investment.

8. Moreover, as we will see below, third-party funding structures have been protected at unexpected levels, and have produced effects that we may consider to be "external" to the initial underlying legal relationship (consider the *Essar v Norscot* case referred to below). Hence, considering third-party funding investments to be included in the notion of "protected investments" for the purposes of a relevant international instrument might be just a matter of adding a further layer of protection to foreign investments.

9. Lastly, investment tribunals have accorded protection to financial instruments, such as negotiable instruments, working capital, derivatives and sovereign bonds acquired in the secondary market, where the nexus with the economy and territory of the host state can cause anxiety. Therefore, one may question whether third-party funding ought not to be equated to such financial products and, consequently, whether they deserve a similar level of protection.

10. The goal of this article is precisely to ascertain whether the current state of affairs in investment arbitration allows protection to be accorded to investments made by third-party funders, and whether the new developments in third-party funding, coupled with the consideration of experiences in the financial sector and the right of access to justice, support such a notion.

In doing so, we will focus on the jurisdictional requirements related to the definition of an "investment" and also on the requisite territory, leaving aside considerations on the issues related to jurisdiction *"ratione personae"* and *"ratione temporis"*, and also issues related to consent. Indeed, despite being fundamental in assessing the tribunals' jurisdiction, these issues have already been addressed thoroughly in

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6 See, for instance, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID* Case No. ARB/05/10, Award on Jurisdiction (17 May 2007).

the context of the generic framework applicable to investment disputes.[7] Moreover, considering that third-party funding assumes many shapes and forms and, accordingly, that it may be conducted through special purpose-vehicles, this analysis must be done on a case-by-case and fact-dependent basis.

11. In this endeavour, we will first look briefly at the landscape of the protection that tribunals have accorded to foreign investments, and more specifically the issues related to the jurisdictional criteria (*"ratione materiae"* and *"ratione loci"*) applied in the context of investment arbitrations. We will see that these tribunals have not always held consistent views, which would leave the door open to broaden the scope of protection (II). In order to assess whether the recent developments in third-party funding may hold any weight regarding the protection accorded by investment treaties, we need to provide a broad overview of the traditional concerns related to this industry (III). This will be followed by an analysis of recent developments in third-party funding, and then discussion of the possible impact that these developments may have in considering its protection as investments (IV). We will then address the role of the finance industry in investment arbitration, and assess whether a parallel may be drawn in respect of third-party funding (V). After, we will consider the principle of access to justice (VI) and then discuss third-party funding as a promoter of this access (VII). We will then consider its possible impact of third-party funding as a protected investment (VIII), address how and when can a separate claim by a third-party funder be put forward (IX) before concluding.

II. Generic Considerations Related to the Definition of an Investment

12. In order to benefit from the protection afforded to foreign investments, an investment must be classified as … an "investment". Tautological as it may appear, the postulation of such an assertion may prove a difficult task.

In the words of Rudolf Dolzer and Christoph Schreuer,

> [T]he complexity of the current debate on the term 'investment' arises out of its simple, non-defined use in the jurisdictional clause of the ICSID Convention (Art 25). One approach to the interpretation of 'investment' in Article 25 will orient itself to the definitions in investment treaties, the other to its understanding in the economic literature. In effect, the latter approach requires two separate examinations ('a double keyhole approach'): one under the BIT, the other under Article 25.[8]

This complexity may also be reflected in two possible approaches to the definition of a relevant "investment". The first one, of a legal kind and subjective by nature, will look at the specific language used in the bilateral or multilateral treaty for protection of investments. The second, more objective and tied to the "economic parlance", leaves the 'interpretation and application to the practice of states and tribunals.'[9]

Be it as it may, a certain "investment" must have been made by a physical or legal entity that is a national of a contracting State in the territory of another State party to that international instrument.

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7 See inter alia Zachary Douglas, *The International Law of Investment Claims* (4th edn, Cambridge University Press 2012) paras 151-161, 284-325 and 328-342.

8 Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, (2nd edn, Oxford University Press 2012) 61.

9 ibid.

13. As said, the first approach will lead us to consider the specific language of the relevant treaty. Usually, those international instruments provide for a broad catch-all clause. The language of those clauses is of course of a legal character, and as such is capable of encompassing numerous different "assets". However, some treaties provide for language with an economic significance attached.[10] In any event, the term "investment" is referred to in an 'open-ended way that ensures a high degree of flexibility in application.'[11]

14. If the arbitration is brought under the UNCITRAL rules, there are no additional jurisdictional requirements, and the investment tribunal will have jurisdiction to hear any claim that satisfies the requirements of the investment treaty.[12] An illustration of international instruments providing for additional jurisdictional requisites may be found in the ECT (Art. 26(1)) and NAFTA (Art. 1101(1)(b)), which require a territorial link.

15. In addition to these definitional requirements, if the investor resorts to arbitration under the ICSID framework, some criteria must also be met. Indeed, Art. 25(1) of the ICSID Convention—which stands at the forefront of a heated debate surrounding the meaning of investment—provides that

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

This provision has been read as requiring the following elements for an investment dispute to be 'eligible for ICSID arbitration: (a) a dispute must be a legal dispute and arise out of an investment; (b) the dispute must involve, on the one hand, either a Contracting State or one of its subdivisions or agencies specifically designated to ICSID and, on the other hand, a national of another Contracting State; and (c) all parties to the dispute must consent in writing to have the investment dispute submitted to ICSID.'[13]

16. The conundrum here lies in defining what an investment must be in order to benefit from the protection of the ICSID's jurisdiction. Because there is no other provision in the ICSID Convention defining what an "investment" should be for the purposes of assessing this jurisdiction threshold, there are several understandings related to the concept, not all of them following the "ordinary meaning" criterion of Art. 31 of the Vienna Convention on the Law of Treaties. Accordingly, one has to look specifically at the case law and assess whether tribunals have followed an understanding that could lead us to consider that a third-party funding investment fulfils the jurisdictional requisites.

17. In general terms, investment tribunals do not find it difficult to require an economic notion of "investment" as a set of 'several interrelated economic activities

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10 See examples Dolzer and Schreuer (n 7) 63-64.

11 Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration,* (2nd edn, Wolters Kluwer) 65.

12 Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (New York, Oxford University Press 2010) 95.

13 Reed, Paulsson and Nigel Blackaby (n 10) 24.

each of which should not be viewed in isolation'.[14] This is a formulation that can be found in *CSOB v Slovakia,* where the Tribunal considered that a loan qualified as an investment.[15] However, not every "interrelated economic activity" amounts to an investment in the sense of Art. 25(1) of the ICSID Convention, as the Award made in 1997 in the *Fedax v Venezuela* case shows.[16]

18. Indeed, after considering that a broad meaning should be given to the notion of investment, the Tribunal went on to assess whether a particular operation was an "ordinary commercial transaction" not deserving protection. In doing so, the Tribunal resorted to a list of five criteria that should be met: duration, regularity of profit and return, assumption of risk, substantial commitment and a significance to the host State's development. Looking at the fact-specifics of the case, the Tribunal concluded that six "promissory notes" issued by the Government of Venezuela amounted to an "investment".[17]

19. The objective approach taken in Fedax was subsequently followed in *Salini v Morocco,* thus giving birth to the now famous "Salini test".[18]

In assessing whether the investment made by "Salini" was protected (and was not an ordinary commercial transaction), the Tribunal considered that such investment should be analysed according to the definition of the relevant "BIT" (in that case, the "BIT" between Italy and Morocco), but also according to a set of typical characteristics of an "investment". In *Salini* the Tribunal considered the following elements: contribution, duration, risk of the transaction, and contribution to the economic development of the host State. The dispute in *Salini* related to a contract for the construction of a highway in Morocco, which was thus recognised as an "investment".

20. In later cases, arbitral tribunals adopted similar objective approaches, and held that supremacy must be given to the Washington Convention over any particular provision in a contract or "BIT".

Applying the "Salini test" in *Joy Mining v Egypt,* the Tribunal considered that a bank guarantee would be 'simply a contingent liability', therefore lacking the characteristics of an "investment".[19]

In *Mitchell v Congo*, the ad hoc Committee annulled the Award that had been made on 9 February 2004, thus excluding Mr. Patrick Mitchell's law offices and legal practice from the definition of "investment". On that occasion, the Committee

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14 Dolzer and Schreuer (n 7) 61.

15 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) para 72.

16 *Fedax N.V. v The Republic of Venezuela,* Case No. ARB/96/03, Decision of the Arbitral Tribunal on Objections to Jurisdiction (11 July 1997) paras 21-33.

17 See Dolzer and Schreuer (n 7) 66.

18 See *Salini Costruttori SpA and Italstrade SpA v Morocco,* Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

19 See *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) para 44.

considered that the '[a]rbitral Tribunal forced the concept of investment in the case at hand in order to affirm its jurisdiction.'[20]

Similar application of this approach was taken in *SGS v Pakistan,*[21] *Bayindir v Pakistan,*[22] *Jan de Nul v Egypt,*[23] *Saipem v Bangladesh,*[24] *and AES v Argentina,* the latter containing a formulation of the "Salini test" which is as concise as it is comprehensive and clear:

> [t]hey realize contribution in capital over a reasonably lengthy period of time for the economic development of the host State, an operation AES has accepted to share the inherent risks which it presents.[25]

21. The objective and rather narrow interpretations of the concept of investment adopted in the cases noted above were not taken as constituting a binding precedent, and the understanding underpinning them is far from undisputed. Indeed, in subsequent cases, this approach was questioned for being inconsistent with the broad understanding of the definition of investment contained in bilateral investment treaties and also in Art. 25(1) of the ICSID Convention, which does not refer to any criteria similar to the "Salini test", or any others. Consideration as to the right to access the jurisdiction of ICSID was also put on the table.

22. As a result, in *Biwater Gauff v Tanzania* the Tribunal considered that a '(…) more flexible and pragmatic approach to the meaning of "investment" is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.'[26] [27]

23. Subsequently, in the decision on the annulment application in the *Malaysian Historical Salvors v Malaysia* case, the ad hoc Committee considered that if the meaning of investment were left only to Art. 25(1) of the ICSID Convention and no regard was paid to the BIT at stake, that would produce a result that was difficult to 'reconcile with the intentions of the Governments of Malaysia and the United Kingdom in concluding their Agreement'.[28]

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20 See *Mr. Patrick Mitchell v. Democratic Republic of the Congo,* ICSID Case No. ARB/99/7, Annulment Decision (1 November 2006) para 46.

21 SGS *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) para 133, footnote 153.

22 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 130–138.

23 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) paras 90–96.

24 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) paras 98–106.

25 *AES Corporation v The Argentine Republic,* ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) para 88.

26 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award (24 July 2008) para 316.

27 For a brief commentary on the Biwater case, see Emmanuel Gaillard, ''Biwater,' Classic Investment Bases: Input, Risk, Duration' (2008) 240 (126) New York Law Journal, <www.nylj.com> accessed on 31 January 2017.

28 *Malaysian Historical Salvors,* SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Annulment Application (16 April 2009) para 62.

24. In subsequent cases, tribunals followed this approach. For instance, in the *Fraport v Philippines*[29] or in the case of M.C.I. Power v Ecuador, where the Tribunal went as far as to postulate that,

> (…) the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.[30]

25. As an alternative to the consideration of a rigid set of criteria, such as the test deployed in *Salini*, some tribunals have adopted a mitigated view, dispensing with the requisite "contribution to the host State's development". This was the case of *SGS v Dominican Republic*, where the Tribunal held that a transfer of ownership over a company for a price of USD 2 was still an investment relevant for the purposes of the BIT at stake.[31] One could hardly regard the consideration of USD two as a "contribution" to the economy or development of the host State, the Dominican Republic.

26. Another example is given in Sabes Fakes v Turkey, where the Tribunal considered that '(…) the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention.'[32]

In the same vein, the tribunal in *Alpha v Ukraine* considered that,

> [t]he contribution-to-development criterion (…) brings little independent content to the inquiry' and '(…) invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities. It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis.[33]

27. The overview of the case law shows us that there is little agreement as to the definition of "investment", and particularly as to the characteristics that an investment must display in order to obtain the jurisdictional protection under the ICSID Convention and applicable international instruments.[34] In any event, it seems that the understanding that is taking hold consists of a combination of the subjective,

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29 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007) para 305.

30 *M.C.I. Power Group, L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) para 165. See also *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania,* ICSID Case No. ARB/07/21, Award (30 July 2009), *RSM Production Corporation v Grenada,* ICSID Case No. ARB/05/14, Award (13 March 2009), and *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine,* ICSID Case No. ARB/08/8, Decision (8 March 2010).

31 Société Générale in respect of *DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* UNCITRAL, LCIA Case No. UN 792, Award on Preliminary Objections to Jurisdiction (19 September 2008) paras 32-35.

32 *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award (14 July 2010) para 110.

33 *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16, Award (8 November 2010) paras 313-314.

34 A recent formulation for *investment,* is proposed by Achim-Rüdiger Börner: '(..) investment is the allocation of capital and/or assets by private parties for employment in a gainful, profitable enterprise. The notion of "enterprise" already caries the element of assumption of risks, be it production risk, market risk or similar risk associated with the entrepreneurial endeavor. This definition excludes the allocation of merchandise or services in fulfillment of a sale or service contract (…).'Achim-Rüdiger Börner, 'Simple Truths on the Right to Regulate and the Duty to Pay' (2017) 15 SchiedsVZ 6.

party-consent based approach that looks at the wording of the relevant instrument for the protection of foreign investments, on the one hand, and the objective, self-contained approach that takes into account the specific jurisdictional requirements of the ICSID Convention, on the other.[35] At the same time, when resorting to the objective elements of an "investment", a flexible approach should be adopted, and no restrictions should be introduced other than requiring the three criteria of "contribution, risk and duration".

It remains to be seen to what extent this combined approach is suitable to address the question of whether third-party funding can be considered a relevant investment. Nonetheless, an additional layer of difficulty arises in this assessment.

28. In fact, some international instruments require that the investment must have been made in the territory of the host State (Art. 26(1) of the ECT, and Art. 1101(1)(b) of the NAFTA cited above)

29. The requisite territory is fairly easy to set out: 'there must be a territorial connection to the respondent host State so that the investment is within the domestic jurisdiction of the host state.'[36] Moreover,

> [t]he territorial connection between the claimant's contribution of capital and an investment enterprise in the host state must be direct rather than indirect or consequential.[37]

30. In line with this, respondent states often contend that the "investment" at hand did not meet the requisites set forth in the applicable treaty because the investment had not been made in that State's "territory". In *Alpha v Ukraine,* the respondent alleged that the Claimant 'did not engage in "economic activity" in the "territory" of Ukraine but instead made payments directly to Pakova in Cyprus.'[38]

However, the tribunal "elevated substance over form" and agreed with the Claimant that,

> [f]or purposes of the UABIT, it is the "activity" that must take place "in the territory" of Ukraine and not necessarily the flow of funds that allows that "activity" to take place.[39]

Accordingly, although the funds had travelled to the distant shores of Cyprus, the Tribunal decided that '(…) Alpha's payments related to Pakova's work on floors 8-12 of the Hotel were "in connection with the economic activity of [Claimant] in the territory of" Ukraine.' [40]

31. This understanding had been adopted in *SGS v Pakistan* and *SGS v Philippines*,[41] where the tribunals considered that the "pre-shipment inspection" services of

35 Dolzer and Schreuer (n 7) 76.

36 ibid.

37 ibid 191.

38 *Alpha Projektholding GmbH v. Ukraine* (n 32) para 261.

39 ibid para 279.

40 ibid para 285.

41 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (n 20) and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* Decision of the Tribunal on Objections to Jurisdiction (29 January 2004).

the goods to be exported to the respondent States met the requisite territorial connection, notwithstanding they had been delivered outside the territory of those States.

32. The complexity of the requisite territory is exacerbated in cases involving dematerialised negotiable financial instruments, working capital, derivatives and sovereign bonds acquired in the secondary market. Cases such as *Fedax v Venezuela, Abaclat v Argentina, Deutsche Bank v Sri Lanka,* and *Ambiente Ufficio v Argentina,*[42] show that the tribunals have considered as investments a category of "assets" which possess a feeble territorial link with the host State, and which only questionably can be classified as "investments" under the definition provided for in the applicable treaty.

33. Precisely because the third-party funding phenomenon poses questions regarding the requisite territorial connection and the classification under the definitional provision of the relevant treaty, the cases related to finance products may bring a different perspective as regards the protection of investments made by third-party funders.

34. Further, there are cases where the third-party funding itself was connected to financial products. In this respect, two examples provided by Jonas von Goeler are noteworthy.[43]

The first interesting example is the attempted issue of securities made by Crystallex in 2011: after initiating an ICSID arbitration against Venezuela, it announced that it was selling securities worth US$120 million linked to the proceeds of a future favourable award.[44]

The second is the securitisation operation whereby EuroGas, Inc. had purchased an option to buy shares in Belmont Resources, Inc. against a share of the proceeds of an arbitration claim that it subsequently brought under the ICSID framework against the Slovak Republic.[45]

These examples show that the funding of claims can even be the subject of securitisation structures and other kinds of financial operations, giving rise, in turn, to other potential relevant investments.

35. Potentially, these experiences may be used as an analogy when assessing whether third-party funding falls within the definition of "investment".

For this reason, we shall dedicate the next section to look more closely to the cases involving financial products.

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42 The case *Giovanni Alemanni and Others v. The Argentine Republic* (ICSID Case No. Arb/07/8), could have been another example. Indeed, in its 'Decision on Jurisdiction and Admissibility (17 November 2014)' the tribunal remitted the assessment of the territorial link to the merits of the case, but the proceedings were eventually dismissed in 2015 for lack of payment of the required advances.

43 See Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (The Netherlands, Kluwer Law 2016) 112.

44 ibid. See also

http://www.fulbrookmanagement.com/claimant-sells-securities-linked-to-icsid-awards/. The press release published by Crystallex is no longer available online.

45 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic,* ICSID Case No. ARB/14/14.

III. The Parallel with Arbitration in Finance and Banking

36. A different host of considerations may be found in the context of the intersection between investment arbitration, and financial and banking institutions.[46]

As said above, the current landscape of investment arbitration in financial and banking matters demonstrates that arbitral tribunals are open to considering broad notions of investment under a relevant international instrument, thus including in that notion different products such as negotiable instruments, working capital, derivatives and sovereign bonds, to name just a few.

37. As mentioned above, in *Fedax v Venezuela* the Tribunal considered that '(…) loans qualify as an investment within ICSID's jurisdiction, as does, in given circumstances, the purchase of bonds.'[47]

Addressing the requisite territorial link to the host State, the Tribunal concluded that, although it is usual that the transfer of funds is made into the territory of the host State,

> [i]t is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. The same is true of many important offshore financial operations relating to exports and other kinds of business. [48]

The critical point was, however, the fact that those funds were made available by the beneficiary of the credit—in this case the Government of Venezuela—as a means of meeting its budgetary needs.[49] The Tribunal agreed upon the verification of such a requisite.

38. Regarding a subsequent case (Abaclat v Argentina[50]), it was noted that the "decision signals the availability of ICSID arbitral tribunals to holders of security entitlements dissatisfied with the manner in which a State has accomplished its sovereign debt restructuring."[51]

In fact, the Tribunal in that case held that,

> with regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. [They] should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is where the invested funds

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46 For further research and considerations, see the recent Report of the ICC Task Force on Financial Institutions and International Arbitration, available at http://www.iccwbo.org/Data/Policies/2016/Financial-Institutions-and-International-Arbitration-Report/, last accessed on 18 December 2016.

47 *Fedax N.V. v. Venezuela* (n 15) para 29.

48 ibid para 41.

49 ibid.

50 *Abaclat and Others v. The Argentine Republic,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

51 Giuseppe Bianco, 'The Bitter End of Sovereign Debt Restructurings: The Abaclat v. Argentina Arbitration and the Eurozone Crisis' (2013) 40/4 Legal Issues of Economic Integration 331.

> ultimately made available to the Host State and did they support the latter's economic development.[52]

The Tribunal was obviously building upon the considerations left in *Fedax* regarding the requisite territorial nexus.

39. Likewise, in *Deutsche Bank AG v Sri Lanka*, the Tribunal took a similar view as regards a commodity hedging agreement entered into with the German bank, and considered that,

> the Hedging Agreement is an asset. It is a legal property with an economic value for Deutsche Bank. It is a claim to money which has been used to create an economic value.[53]

As regards the requisite territorial connection with the host State, the Tribunal drew completely from *Abaclat* to reach the conclusion that the hedge agreement at stake met the "territorial nexus condition".[54]

40. In Ambiente *Ufficio v Argentina*, the Tribunal had to deal with a dispute that arose in connection with a series of bonds issued by the Argentine Republic. In this case, Argentina contended, *inter alia*, that the Centre was in want of jurisdiction to hear the case because the bond issuance could not be understood as a qualified investment for the purposes of the Argentina – Italy BIT.[55] When considering this issue, the Tribunal entertained no doubt that '(…) bonds / security entitlements such as those at stake in the present proceedings fall under the term *investment*.'[56]

By adopting an approach based on the analysis of the 'general unity of an investment operation' and looking at the 'economic substance of the operation in question in a holistic manner'[57], the Tribunal was,

> [c]onvinced that the process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind "aris[e] directly out of an investment" and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT.[58]

Furthermore, the Tribunal considered that, even if the jurisdiction threshold ought to resort to the "Salini criteria"[59]—the appropriateness of which might nevertheless be criticisable—the business at stake would still meet the five elements test: '(a) the existence of a substantial contribution, (b) the project should have a certain duration, (c) participation in the risks of the transaction beyond the mere risk arising from a commercial transaction, (d) regularity of profit and

52 See *Abaclat and Others v. The Argentine Republic* (n 49) para 374.

53 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/02, Award (31 October 2012).

54 *Abaclat and Others v. The Argentine Republic* (n 49) paras 288, 291.

55 "Agreement between the Argentine Republic and the Republic of Italy for the Encouragement and Protection of Investments of 22 May 1990".

56 *Ambiente Ufficio S.p.A. and others v. Argentine Republic,* ICSID Case No. ARB/08/9 *(formerly Giordano Alpi and others v. Argentine Republic),* Decision on Jurisdiction and Admissibility (8 February 2013) para. 471.

57 ibid para 428.

58 ibid para 429.

59 See *Salini Costruttori S.p.A. and Italstrate S.p.A. v. Morocco* (n 17).

return for the investors as well as (e) significance of the operation for the host State's development.'[60]

41. Regarding the question of how to '(…) assess where an investment was made, the criterion must be to whose economic development an investment contributed.'[61] In such a circumstance, the Tribunal found that the respondent State had been the beneficiary of the investment in hand, and as such, concluded for the existence of the necessary territorial connection.

42. This illustration of cases related to financial products could not end without mentioning the 2015 *Poštová banka v. Greece* case,[62] precisely because it signals a shift in the understanding of investment tribunals towards sovereign bond issuances.

The central issue considered was whether provisions such as the one interpreted and applied on this occasion contain a mere illustrative list of cases where the investment is deemed to be protected or whether there is an additional meaning to be given to such list.

43. The *thema decidendum* in this case relates to an issuance of Greek government bonds, governed by Greek Law. These bonds were dematerialised, and were restricted to the participants in the system administered by the Greek Central Bank, but could nevertheless be assigned to non-participant investors. Poštová banka did not intervene as a participant but had purchased five series of Greek bonds. The Poštová banka and its Cypriot major shareholder brought an ICSID arbitration against Greece under the Slovakian – Greece BIT.

The arbitral tribunal was confronted with the challenge of determining if these series of sovereign bonds would qualify under the definition of "investment" of the said "BIT".

44. The Tribunal considered that, while the definition of "investment" contained in the "BIT" would be broad enough to include a sovereign bond, a meaning was to be given to the list contained in the definitional provision. When interpreting such provision, the Tribunal took the Vienna Convention into account, which requires a treaty provision to be interpreted "...in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[63]

In doing so, the Tribunal considered that if the broad definition would suffice to include investments not expressly provided for in that list, then the examples of that list would be redundant. This rationale would mean that to classify an investment as protected, the treaty would have to set forth an express provision to that effect or at least contain a provision similar to this kind of "investment".

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60 ibid paras 482-487.

61 *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (n 55) para 499.

62 *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic,* ICSID Case No. ARB/13/8, Award (9 April 2015). For further considerations on *Poštová banka,* see Georges Affaki, The Greek Sovereign Debt Rescheduling, EU Bail-in and Investment Arbitration, September 2015, available at http://www.affaki.fr/wp-content/uploads/2016/11/Issue5_2015_September.pdf, last accessed on 4 December 2016.

63 Vienna Convention on the Law of Treaties (1969) art 31(4).

45. Subsequently, the Tribunal relied on that list to determine whether the Greek Government Bonds fitted into any of the categories contained therein, and concluded that those sovereign bonds could not equate to any "company debenture" (for the purposes of Art. 1(1)(b) of the relevant BIT) nor to "claims of money" (Art. 1(1)(c)). The underlying consideration was that there existed no privity, as Poštová banka was in no way party to any agreement entered into with Greece because it had acquired the bonds in question from an intermediary in the secondary market.

46. In the words of the Tribunal,

> [U]nlike creditors in a loan, the creditors of bonds may change several times in a matter of days or even hours, as bonds are traded. The tradability of loans or syndicated loans is generally limited, and precisely because loans are generally not tradable, they are not subject to the restrictions or regulations that apply to securities.[64]
>
> (...) loans involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity.[65]

Considering these aspects, the Tribunal decided it was in want of jurisdiction to hear the case.

47. Although the decision of the Tribunal in *Poštová banka* rested almost exclusively on the analysis of the definition of investment provided for in the treaty at hand, it nevertheless contained interesting elements: the Tribunal found that the investment could not fit into any of the categories listed in the treaty because Greece had not entered into a contract with the "investor"; further, the Tribunal seems to have given a great deal of relevance to the fact that the bonds at stake were "tradable", that is, freely negotiable.

Can we draw the conclusion that, at least for financial products, we need to look at investments that are "non-tradable" and are a result of the bargain between the host State and the investor? Arguably, the privity character would be of considerable relevance. However, to consider that the investment must have been entered into with the host State would be a step too far that would leave numerous investments beyond the scope of protection provided for in virtually every treaty for the protection of investments.

48. Be it as it may, the current landscape of banking and financial matters in investment arbitration elicits the conclusion that arbitral tribunals have generally recognised financial instruments as "protected investments". The relevance of this is that often these financial products do not relate to any specific asset or enterprise situated in the territory of the host State, and the funds deriving therefrom are not always channelled to the territory of that host State. As we will see, this feature is crucial in third-party funding because, in some cases, it is very unlikely that any funds will be channelled to the territory of the respondent host State.

Moreover, when the Tribunal in *Poštová banka* considered that the Greek Government Bonds were not considered a protected investment, it nevertheless opened the door to a different outcome, if the investment had the character of privity and non-tradability.

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64 Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic (n 61) para 337.

65 ibid para 338.

Another trend that seems to be followed by arbitral tribunals when assessing the existence of an investment in finance and banking matters, is the adoption of a liberal or, at least, a flexible and pragmatic approach. To be sure, a rigid and strict cumulative test approach, such as the one adopted in *Salini,* would hardly allow the financial instruments that are the subject-matter of some of the cases mentioned above to qualify within the scope of the investment for jurisdictional purposes.

49. This background prompts the question of whether the same reasoning could be replicated in the case of an investment made by a third-party funder. In order to discuss this possible scenario, one needs to look into the third-party funding phenomenon, its current status and the latest developments in its arena.

IV. The Issues Commonly Raised Regarding the Third-party Funding Industry

50. Broadly speaking, and without any concern for definitional precision, third-party funding typically exists when a natural or legal entity, external to the underlying legal relationship in dispute, provides financial support to one of the parties,[66] according the funder the right to perceive an advantage linked to the award.

One feature of this business model that is commonly observed is that if the claim fails, the funded party is not obliged to compensate or repay the funder's investment: it is "risk-free" funding for the funded party. As a result, the funder will typically exert some control over the dispute to a greater or lesser degree.

51. As a consequence of the existence of these typical features, especially the control exerted over the dispute, concerns about the independence and impartiality of the tribunal, and about the integrity of the proceedings, may arise.[67]

Indeed, third-party funding may create conflicts of interests between the members of the tribunal and the funder.

For those reasons, the duty to disclose any tie to a third-party funder is gaining general acceptance in soft law (see the 2014 version of the "IBA Guidelines on Conflicts of Interests"), in institutional rules,[68] and also in orders made by arbitral tribunals, to name but a few examples.[69] Anecdotal evidence also shows that the funders themselves are prone to disclose the existence of the funding arrangement and the identity of the funder. While concurring with this high-level disclosure, they also

66 Usually, third-party funders channel funds to a claimant. However, the funding of a respondent is not unconceivable, as is shown in the case of the Bloomberg Foundation and its 'Campaign for Tobacco-Free Kids' providing funds to the respondent state Uruguay in the investment arbitration brought by Phillip Morris.

67 von Goeler (n 42) 253-291; Catherine A. Rogers, Ethics in International Arbitration (Oxford University Press 2014) 199; Valentina Frignati, 'Ethical implications of Third-party Funding in International Arbitration' (2016) 32/3 Arbitration International 505-522.

68 See the Guidelines for third-party funding of the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, available at https://hkarbitration.files.wordpress.com/2016/05/cietac-draft-guidelines-17-may-16.pdf, last accessed on 17 December 2016. See also the Administrative Resolution No. 18/2016 of the Arbitration and Mediation Centre of the Brazilian CCBC, available at http://www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016, last accessed on 16 December 2016.

69 See *Muhammet Çap & Sehil Inºaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015) accessible at

note that there is no record of any award being annulled on account of lack of disclosure of the existence of a third-party funding structure.[70]

52. Other questions are intertwined, such as the preservation of confidentiality inherent to the arbitration proceedings,[71] questions as to the assessment and decisions on applications for security for costs, and questions related to the allocation of the costs of arbitration.[72]/[73]

53. Furthermore, we may well say that investment arbitration carries with it some prejudices deriving from the lack of transparency, the handling of public interests in private chambers, and the outcomes often favourable to investors to the detriment of host States—to name but a few criticisms that can be levelled against investment arbitration. To add insult to injury, the emergence of third party funders in the investment arbitration setting may raise suspicions as to the increase in unmeritorious claims brought against the States, and an increase in the litigation against the State altogether, and it may also be seen as a potential source of abuse of process. Arguably, these criticisms weigh against opening the concept of "investment" to third-party funding structures.

V. New Developments and a New Mindset Regarding Third-party Funding

54. As an immediate reflex to these criticisms, the recent Comprehensive Economic Trade Agreement (CETA) entered into between Canada, the European Union, and its Member States sets forth a few provisions related to third-party funding[74] in the investor-State-dispute settlement mechanism: 'where 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', and the 'disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made' (Art. 8.26 CETA). Other international investment instruments set forth specific provisions related to third-party funding.[75]

55. These provisions, although they are a clear form of regulation (which is met with severe opposition from some sectors of the third-party funding industry), are

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www.italaw.com/cases/documents/3173, last accessed on 16 December 2016.

70 Christopher P. Bogart, 'Third-party financing of international arbitration', The European Arbitration Review 2017 (Global Arbitration Review), accessible at http://www.burfordcapital.com/blog/third-party-financing-international-arbitration/, last accessed on 25 January 2017.

71 von Goeler (n 42) 293-329.

72 See von Goeler (n 42) 333-366, 369-423. See also the 'ICCA-QMUL Task Force on Third-Party Funding in International Arbitration Subcommittee on Security for Costs and Costs', 2015, available at http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf, last accessed on 25 January 2017.

73 On a panorama of third-party funding in investment arbitration and the issues arising therefrom, see Jean-Christophe Honlet, 'Recent decisions on third-party funding in investment arbitration', ICSID Review, Vol. 30, No. 30 (2015), paras 699-712.

74 Third-party funding is defined as 'any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.' (Art. 8.1 CETA).

75 For instance, EU-Vietnam Free Trade Agreement [January 2016] ch 8, art 2.

still at a minimal level because they are limited to the obligation to disclose a minimum of details pertaining to the funding arrangements. The scope is therefore very narrow, and it is obviously aimed at safeguarding the integrity of the arbitration proceedings by limiting the chances of conflicts of interests between the funders and the appointed arbitrators. Further aspects of the intervention of third-party funders could and should be addressed, more particularly where issues of costs, and security for costs, are at stake. Other issues should follow as well.

56. All these concerns or implications have led to a considerable amount of discussion among third-party funders, as well as among scholars and practitioners.[76] A "school of thought" that seems to have emerged is pointing to the need for regulation of this business model.[77] Such regulation has already surfaced in some important instruments, as we have seen above.

57. As a result of this backdrop, we may suggest that some sort of regulation in the new generation of international instruments is to be expected, including not only provisions to impose disclosure of external funding, but also a definitional provision of "protected investment" to address specifically the third-party funding structures.

58. To date, the existence and evolution of the third-party funding industry in the dispute resolution setting has traditionally been divided between those jurisdictions where it was regulated to the extent of being prohibited under the doctrine of "champerty and maintenance",[78] and those jurisdictions where it was simply unregulated.

Traditionally, the common law jurisdictions considered third-party funding a structure akin to a champertous business and would therefore consider the funding agreements made by third parties null, and would criminally prosecute those who carried out such business.

59. That was the landscape in countries such as Australia some decades back, and also Singapore and Hong Kong.[79] On the other end of the spectrum, civil law jurisdictions, such as Germany, Switzerland and France, did not provide for a legal framework applicable to the third-party funding industry.[80]

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76 Mick Smith, 'Mechanics of Third-Party Funding Agreements: a Funder's Perspective', in Lisa Bench Nieuwveld & Victoria Shannon (eds), *Third-Party Funding in International Arbitration* (Kluwer Law International 2012) 19, 37. See also William W. Park & Catherine A. Rogers, 'Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force', THE PENNSYLVANIA STATE UNIVERSITY THE DICKINSON SCHOOL OF LAW, Legal Studies Research Paper No. 42-2014, available at http:ssrn.com/abstract=2507461, last accessed on 25 January 2017.

77 Rogers (n 66) 182.

78 Nick Rowles-Davies, *Third-Party Litigation Funding* (Oxford University Press 2014) 23, 76. For a historical overview, see Max Radin, 'Maintenance by Champerty'(1935) 24 Cal. L. Rev. 48, available at: http://scholarship.law.berkeley.edu/californialawreview/vol24/iss1/6, last accessed on 26 January 2017. See also Jason Lyon, 'Revolution in Progress: Third-Party Funding of American Litigation' (2010) 58 U.C.L.A. Law Review 571, 579.

79 For in-depth analysis on the legal status of third party funding, see the Consultation Paper released in 19 October 2015 by the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong, available at http://www.hkreform.gov.hk/en/publications/tpf.htm, last accessed on 3 December 2016.

80 von Goeler (n 42) 111; Rowles-Davies (n 77) 83.

60. Currently, whilst the status is basically the same in civil law jurisdictions, the scenario is rapidly changing in some common law jurisdictions.[81]

Australia has been very permissive regarding third-party funding since the Campbells' case in 2006, which eventually led to express legislation from the Australian government exempting third-party funding from regulation, subject to requirements of properly handling possible conflicts of interest.

In Canada, in July 2013, the Ontario Superior Court of Justice considered the use of third-party funding acceptable, subject to disclosure and approval by the courts of the funding agreement, which in any event must not accord the funder the right to interfere with the control of the case and with the client / attorney relationship.[82]

In the UK, the crime of champerty and maintenance has been abandoned since the Criminal Law Act 1967. The industry in the UK basically remains self-regulated by the Code of Conduct of the Association of Litigation Funders of England and Wales, and the English courts have consistently accepted the use of third-party funding in both the litigation and arbitration settings. In the US, the third-party funding in litigation is permitted in a number of States. [83]

61. More importantly, the jurisdictions of Hong Kong[84] and Singapore[85] have recently introduced legislative initiatives aimed at banning the prohibition of champerty and maintenance in the case of a third-party funding arrangement and avoiding the nullity of the contracts entered into with third-party funders for the purposes of funding claims. These caveats, however, seem to apply to arbitration only.[86]

In this respect, the Singaporean Government expressly considered that 'introducing third-party funding in Singapore for international arbitration will allow international businesses to use the funding tools available to them in other centres,

81 For in-depth analysis on the legal status of third party funding, see the Consultation Paper released in 19 October 2015 by the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong, available at http://www.hkreform.gov.hk/en/publications/tpf.htm, last accessed on 3 December 2016.

82 See *Bayens v Kinross Gold Corporation,* 2013 ONSC 4974.

83 See Rowles-Davies (n 77) 76-86.

84 On 30 December 2016, the Legislative Council of Hong Kong gazetted a New Bill to Amend the Arbitration Ordinance and the Mediation Ordinance to "ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards." The New Bill is available at http://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf, last accessed on 26 January 2017. See also Final Report of the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong (Final Report), accessible at http://www.hkreform.gov.hk/en/publications/rtpf.htm, last accessed on 3 December 2016.

85 See Civil Law (Amendment) Bill No. 38/2016, (07-11-2016), available at https://www.parliament.gov.sg/sites/default/files/Civil%20Law%20(Amendment)%20Bill%2038-2016.pdf, last accessed on 26 January 2017. See also Consultation Paper available at https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law—amendment—bill-2016.html, last accessed on 3 December 2016.

86 In the case of Hong Kong the Bill also applies to mediation proceedings.

and promote Singapore's growth as a leading venue for international arbitration.'[87]/[88]

62. As said, those initiatives take into account the fact that third-party funders help develop the arbitration, and that competing jurisdictions which do not bar third-party funding are taking the lead.[89]

As a result of the perception of this "race", one might suggest that there is also a new mindset of the players in international and investment arbitration when approaching the implications brought about (and the "concerns" raised) by this business model. When speaking about a new "mindset" we are thinking more precisely that the third-party funding industry is building its own legitimacy in the international and investment arbitration settings. This phenomenon is of course linked to a sort of "liberalisation" of the use of third-party funding at different levels of the dispute resolution framework. The recent legislative initiatives of Singapore and Hong Kong reported above evidence this "liberalisation".

However, this new mindset stems not only from the progress illustrated above but also from other areas where new developments have occurred.

63. We might look at these developments as a reflection of a trend towards an open environment. In other words, these new developments show that third-party funding structures are starting to leave an area that was considered to be restricted to "club members". Indeed, one of the characteristics of third-party funding has been that a significant volume of information related to third-party funding operations has been kept secret. Although the existence of third-party funding can lead to the idea that the claimant has put a meritorious claim forward (on account of the rigorous and thorough assessment of the case that third-party funders carry out, and of the fact that these funders will only fund claims with high chances of success), traditionally parties and funders prefer to keep the confidentiality of the bargain. Not only is the existence of the funding to be kept out of the public eye, but also the identity of the funder, and the details of the funding arrangement.

64. As a result, many of the details that abound in works dedicated to the subject make reference to "anecdotal evidence".[90] This environment, however, is changing. A few recent examples illustrate this idea.

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87 See Consultation Paper available at https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law—amendment—bill-2016.html, last accessed on 3 December 2016.

88 See Civil Law (Third Party Funding) Regulations 2016, at 'Prescribed dispute resolution proceedings', available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/TPF%20-%20Annex%20B.pdf, last accessed on 3 December 2016.

89 Notwithstanding, the Irish Supreme Court decided in Persona Digital Telephony Ltd & ors v The Minister for Public Enterprise & ors ([2017] IESC 27) that third-party funding was still unlawful and to be in violation of the ancient concept of "maintenance and champerty".

90 As a matter of illustration, showing references to anecdotal evidence, see also Park and Rogers, (n 75), 3, 5, 8-9.

65. Under English Law, a court judge may make third party cost orders,[91] which was the case of the decision in *Arkin v Borchard Lines Ltd.* (2005), where the court considered that,

> (…) where (…) the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs.[92]

66. In 2014, the court judge ordered a third-party funder to pay the costs of the proceedings in the now famous *Excalibur* case.[93] The *Excalibur* decision was upheld on 18 November 2016 by the Court of Appeal, with Lord Justice Tomlinson saying that,

> A litigant may find himself liable to pay indemnity costs on account of the conduct of those whom he has chosen to engage – e.g. lawyers, or experts [who] may themselves have been chosen by the lawyers, or witnesses… The position of the funder is directly analogous.[94]

In the US, a court judge had also decided in the same direction.[95]

67. If these examples show some negative outcomes for the funders, the very recent case of *Essar v Norscot* points in a different direction, but in any event demonstrating some side effects of a funding arrangement. In this case, J. Waksman QC confirmed an award made by Sir Philip Otto in an ICC arbitration seated in London, where the arbitrator considered the financing arrangement that Norscot had entered into with a third-party funder to be "costs" incurred by the claimant to pursue its claim. The arbitrator further considered that the whole amount payable to the third-party funder (i.e. 300% of the funding or 35% of the damages recovered, whichever was greater) should also be included in those costs. Therefore, the third-party funder was awarded its "uplift", via a costs order.[96]

68. It is worth noting, as we have written elsewhere, that this case is disturbing in many ways, and leaves the arbitration system in distress, for several reasons.[97] On the one hand, the arbitrator awarded the claimant the third-party funder's "uplift" or "windfall" and in our view this could convey a notion of unjust enrichment or a double (or triple or more) recovery. On the other hand, there is no limit, other than what might be considered "reasonable" by each arbitrator, to this "uplift" being included in a "party's cost" term sheet, and therefore it opens the door to consider any amount payable on such account.

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91 See Senior Courts Act 1981 (UK) and Rule 45.2 of the Civil Procedure Rules 1998 of the UK commenced on 26 April 1999.

92 *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055 (CA).

93 See Excalibur Ventures LLC v Texas Keystone Inc. [2014] EWHC 3436 (Comm).

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

95 See A*bu-Ghazaleh v. Chaul, Florida* 3.º District Court of Appeal, decision of 2 December 2002, n. 3D07–3128, 3D07–3130, 36 So. 3d 691.

96 See *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited* [2016] EWHC 2361 (Comm). Full transcript of the decision available at http://www.bailii.org/ew/cases/EWHC/Comm/2016/2361.html, last accessed on 3 December 2016.

97 See this author's post on Kluwer Arbitration Blog: http://kluwerarbitrationblog.com/2016/10/15/the-essar-v-norscot-case-a-final-argument-for-the-full-disclosure-wingers-of-tpf-in-international-arbitration/.

In a nutshell, this decision 'produces an unjust outcome, it is a strong deterrent to arbitration, and is potentially damaging to the third-party funding industry.'[98]

69. One could now add that this decision seems to have shaken Lord Jackson's views on third-party funding: ''the use of third-party funding (unlike the use of conditional fee agreements (CFAs)) does not impose additional financial burdens upon opposing parties.'[99]

70. More importantly, this decision may produce even worse results in the context of investment disputes. Indeed, it should be noted that the main factor that drove Sir Philip Otto to award the funder's "uplift" seems to have been the respondent's conduct prior to the initiation of the arbitration (and during the proceedings), which was characterised as "exploitative". According to the allegations in the records, 'Essar had set out to cripple Norscot financially by resolutely refusing to make payment', thus intending to exert, and in fact exerting, commercial pressure on Norscot 'before and throughout the arbitral process and it was a David and Goliath battle, and such conduct forced Norscot's managing director to re-mortgage his home for the best part of $1 million.'[100]

71. We do not believe that much elaboration and substantiation will be needed to show that numerous cases of disputes brought by investors against host States arise precisely on similar grounds to those described in *Essar*. How would the conduct of a State such as the expropriation of "Las Cristinas" in *Crystallex*[101] be characterised in this context?

This consideration should even be underscored as we know that Sir Philip Otto's award was made in an ICC arbitration and, accordingly, was subject to the scrutiny of the ICC Court.

72. More to the point, if we look at the rules of the SCC (Art. 44 of the 2010 Rules)[102], the UNCITRAL Rules (Art. 40)[103], and the ICSID rules (Art. 61)[104], one can easily concede that arbitral tribunals constituted under those frameworks are accorded a substantial degree of discretionary powers to award costs on an indemnity basis, such as was the *Essar* case.

Applying the rationale in *Essar* is but a small step forward, and a matter of assessing its "reasonableness" and "appropriateness", and the causal link with the need to fund the claim.

Hence, it is not beyond any reasonable standard to think that the *Essar* outcome may well be replicated in the context of investment disputes.

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98 ibid.

99 See Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (2009) 117.

100 *See Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited* (n 94).

101 See *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2.

102 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce of 2010.

103 The UNCITRAL Rules of Arbitration as revised in 2013.

104 Rules of Arbitration of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

73. The *Essar v Norscot* case may well be an explosive combination for the investment arbitration setting, and may well pave the way for new claims under many international investment agreements.

Be it as it may, this decision at least holds the benefit of rendering almost undisputable any request and subsequent order for disclosure of third-party funding in any arbitration, lest to allow "surprises" at the very end of the proceedings. Be it as it may, this decision shows that third-party funding structures are "coming out of the darkness" and building their own legitimacy.

74. As suggested, this new environment helps build a new legitimacy for the third-party funding industry. Yet, we must add another element to this perspective: that of the right of access to justice, and the role third-party funding plays in it, especially in the context of investment arbitration.

VI. The Relevance of the Right of Access to Justice

75. The notion of access to justice is one of the most fundamental features in dispute resolution, and the funding of claims by third parties often warrants an effective enjoyment of such right.

Indeed, as we will see below, the situation is particular stringent in the context of investment arbitration: not only can the costs of initiating and maintaining an investment case be "prohibitive" to some parties, but more importantly virtually every set of arbitration rules applies severe consequences for the lack of payment in advance of costs, namely the dismissal or refusal to administrate the case.

The questions that arise in this context can be set out simply: what happens when one of the parties does not pay his or her share on the costs of the investment arbitration? Should (or can) the case be dismissed? Or, conversely, should the principle of access to justice and of the prohibition of denial of justice override any specific provision to the effect of dismissing or not accepting the claim?

We will address these questions below.

76. The right of access to justice is one of those cases where common sense ideas provide a better explanation than elaborate reasoning: *everyone is entitled to his or her day in court and a right without remedy is no right at all.* As the U.S. Supreme Court has put it, the 'right to sue and defend in the courts' is a 'fundamental principle' in organised societies, one that is 'conservative of all other rights' and 'lies at the foundation of orderly government.[105]

Of course, the right of access to justice is not (and must not be) restricted to this simple notion. In order to effectively and completely enjoy such right, everyone has a right to resort to a dispute resolution body, to effective remedy, to timely adjudication of his / her dispute, to a fair and equitable trial, and to an efficient and effective delivery of Justice. Thus, the access to justice does not only require the actual access to a court, but also demands that this access provides a resolution of a dispute in an efficient and timely fashion, and that all the parties are treated fairly and equitably.

105 *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

77. Not surprisingly, the notion of the right of access to justice (and prohibition of denial of justice) is recognised in several international legal instruments, such as the Energy Charter Treaty (for instance, Art. 13 relating to the standard applicable to expropriations).

Most notably, the right to an effective remedy and to a fair trial has been recognised as a fundamental human right in the EU Charter of Fundamental Rights (Art. 47 of the EU Charter).

In European human rights law, the right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR). Further international instruments recognise and protect this right: Articles 2 (3) and 14 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR). More prominently, the United Nations Universal Declaration of Human Rights, of 10 December 1948, provides that:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. (Art. 8),

And

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Art. 10).

78. In municipal law, access to justice is recognised as one of the principles underpinning the constitutional instrument of numerous jurisdictions. It has been reported that the number of constitutions expressly recognising access to courts as a fundamental feature rose from 63 constitutions in 1946 to the figure of 188 in 2006.[106]

79. International (including investment) tribunals have addressed the principle and corollaries deriving from this fundamental human right, although not always in the same fashion, but almost always with respect to issues of state immunity and requirements of exhaustion of local remedies. The *Loewen* and *Mondev* cases are prominent in this respect.[107]

80. Indeed, in the first case, the Loewen Group had lost a case where the jury awarded $ 500 million in damages and punitive damages to the plaintiff. An appeal against that verdict was available but the losing party had to post a security of 125% of that amount in order to suspend the award during the appeal. In light of such costs, Loewen eventually settled the case with the plaintiff but nevertheless it subsequently started an investment arbitration against the United States alleging

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106 See Christopher A. Whytock, 'Foreign State Immunity and the Right to Access to Justice' (2013) 93 Boston University Law Review 2033-2093.

107 See *Loewen Group Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, 26, Award (26 June 2003). Accessible at www.icsid.org, last accessed on 13 November 2016. See *Mondev International Ltd v. United States of America,* ICSID (Additional Facility) Case No. ARB(AF)/99/2, Award (11 Oct. 2002), 42 ILM (2003) 85. Another example of disregard of the right of access to justice may be found in Barcelona Traction (Case concerning the Barcelona Traction, Light and Power Company, brought by Belgium against Spain – 1970 ICJ Report 4, accessible at http://www.icj-cij.org/docket/files/50/5387.pdf, accessed 15 November 2016). See, discussing access to justice as a principle of law, Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20/3 European Journal of International Law 729-747.

discriminatory treatment, expropriation, and breach of fair and equitable standards under the NAFTA. The Tribunal dismissed the case on the grounds of lack of exhaustion of the local remedies.

81. In the second case, Mondev had secured a favourable jury verdict against the City of Boston (and a municipal state entity), but in the appeal the U.S. Supreme Court reversed that verdict on grounds of domestic sovereignty of local regulatory authorities. The ICSID tribunal before whom the case was brought considered that the right of access to justice was not denied by the application of the sovereignty immunity exception.

82. The right of access to justice has been identified as a customary international law concept and its counter-face—denial of justice—has been defined as a state's "administration of justice to aliens in a fundamentally unfair manner."[108]

Access to justice is thus recognised as a general principle of law in the sense of Art. 38(1) of the Statute of the International Court of Justice (a principle of law recognised by 'civilized nations'), and is applicable by international investment tribunals.[109]

Hence, literature, case law and international instruments clearly point to the conclusion that the right of access to justice is of a fundamental character, innate and inseparable from human nature.

83. In cases such as *Mondev* and *Loewen*, the right of access to justice has appeared as the subject-matter of disputes that have mainly arisen in the context of decisions of states (or state-related entities) affecting the private entities' right of access to justice. In those cases, denial of justice has generally been questioned as a violation by host states of the standards of protection of international investments agreements.

But how has this issue been dealt with by international tribunals when the right of access to justice arises in the context of an impecunious party before the commencement of (or during) am investment dispute?

84. First of all, it should be noted that the amounts at stake in arbitration generally, and in investment arbitration more particularly, are not negligible. On the contrary, the advance on costs is well beyond the amount of any advance that a party must make in litigation before state courts in virtually every jurisdiction.

Indeed, when engaged in a dispute with a foreign State, the parties tend to retain high profile legal teams. The arbitrators' fees and the costs of the institution chosen to administrate the case are high.

To make it clear, investment arbitration is very expensive, especially for a party that has been deprived of its investments or assets.

85. As David Gaukrodger and Kathryn Gordon pointed out, 'ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some ca-

108 See Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 62, n 91.

109 See Dolzer and Schreuer (n 7) 17, citing *Fraport v Philippines,* Decision on Annulment (23 December 2010) paras 197-208, 218-47 on the "right to be heard".

ses'.[110]/[111] These authors gave *Abaclat*[112] as an example, in which the Claimants spent around USD 27 million, while the expenditure of Argentina was about USD 12 million. In the meantime, the figures of the Yukos case have surfaced, reporting that the Claimants spent some USD 79 million, plus GBP 1 million, while Russia spent some USD 27 million in costs.[113]

86. Recent surveys, such as those conducted by the Chartered Institute of Arbitrators[114] and the ICC[115], point out that a percentage of around 80% of the total costs of a case are allocated to parties' costs (legal fees, experts fees, other evidentiary expenses, and ancillary expenditures), while only 20% are costs with the arbitration itself (arbitrators' fees and administrative expenses).[116]

87. To make things worse, in investment arbitration claimants often face a situation where they have become deprived of assets that could have served as collateral in common financing structures, and have been dispossessed of the disposition of funds that was available to them.

Further, the financial support available to impecunious parties as part of legal aid programmes in State courts and / or the financial mechanisms similar to those existing in the Court of Arbitration for Sport[117] are not replicated in investment arbitration.

It is thus no surprise that a wealthy investor, the owner of a gold mining company in the host State, who is suddenly expropriated of his assets in that country, becomes impecunious and incapable of pursuing his claim for restitution or compensation, even before the host State's courts. Actually, this was what happened in the case of Crystallex,[118] which is paradigmatic in many respects, including in that it illustrates a situation where the investor would have been prevented from pursuing the case if no external financial support had been given to it. We may dispense with the details of that case, but it is worth noting that the funding structure

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110 See Gaukrodger, D. and K. Gordon 'Investor-State Dispute Settlement: A Scoping Paper for the Invesment Policy Community' (2012) OECD Working Papers on International Investment 2012/03, 19 http://dx.doi.org/10.1787/5k46b1r85j6f-em. These authors indicate also that the costs of ISDS arbitration are not a deterrent for small and medium investors, although "smaller claims—worth less than several million dollars—could not be pursued effectively in such a high cost system"—see op. cit. at 23.

111 Survey of 143 available ISDS arbitral awards listed on the www.italaw.com website, as of August 2011.

112 Gaukrodger and Gordon (n 108).

113 See Yukos Universal Limited (Isle of Man) v. the Russian Federation, PCA Case No. AA 227, Award (18 July 2014) para 1847, available at http://www.italaw.com/cases/1175, last accessed on 27 January 2017.

114 See 'CIArb Costs Of International Arbitration Survey 2011' *(International Arbitration Attorney Network, 2011)* 2 <https://international-arbitration-attorney.com/cost-of-international-arbitration/> last accessed on 27 January 2017.

115 See the 'ICC Commission Report - Decisions on Costs in International Arbitration' (ICC Dispute Resolution Bulletin 2015 - Issue 2, 2015) 3 http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/Decisions-on-Costs-in-International-Arbitration—-ICC-Arbitration-and-ADR-Commission-Report/ last accessed on 27 January 2017.

116 Gaukrodger and Gordon (n 108).19.

117 See CAS Legal Aid guidelines, available at http://www.tas-cas.org/en/arbitration/legal-aid.html, last accessed on 27 January 2017.

118 See *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (n 99).

provided by Tenor Capital proved successful in that Crystallex was awarded compensation of around USD 1.3 billion.[119]

The impecuniosity of a claimant has a direct and crucial impact on the investor's right of access to justice and to an effective means of remedy.[120]

88. As a matter of principle, virtually every set of institutional rules applicable to arbitration sets forth that the parties are bound to pay an advance on costs and that, should a party fail to do so, the other is invited to pay the entire amount of the advance on costs. If such payment is not made within the designated time, the tribunal or the institution may suspend or even terminate the case. This is true in relation to international commercial arbitration, but also in the framework applicable to investment disputes.[121]

89. Specifically, in the context of investment disputes, a party may face financial distress or even become impecunious not only before initiating a dispute, but also during the proceedings. In such event, the case may be suspended or terminated.

90. Accordingly, in *Quadrant Pacific v Costa Rica,* the Tribunal dismissed the claim after the investors failed to pay the costs of the arbitration.[122] The same occurred in *Commerce Group v El Salvador* and *RSM v Grenada*, where the Tribunal ordered that these cases be discontinued.[123]

91. In the context of international commercial arbitration, the trend seemingly points to considering that other principles of the arbitration law override the right of access to justice.

It has been reported that the French Court of Appeals annulled a decision of the President of the *Tribunal de Grande Instance* of Paris, acting as *jui d'appui,* that had considered that the decision of the ICC withdrawing the claim on account of a lack

119 ibid, Award (4 April 2016), available at http://www.italaw.com/cases/1530, last accessed on 27 January 2017.

120 Discussing the issue of impecuniosity in several jurisdictions, see 'Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?', Schriftenreihe Der August-Maria-Berges-Stiftung Fur Arbitrales Recht 16 (Frankfurt and Main: Peter Lang 2004), in particular Gerhard Wagner ('Poor Parties and German Forums: Placing Arbitration under the Sword of Domocles?'), Andreas Reiner ('Impecuniosity of the Parties and its Effect on Arbitration – From the Perspective of Austrian Law'), and Emmanuel Gaillar ('Impecuniosity of the Parties and its Effect on Arbitration – A French View'). See also Patricia Zivkovic, 'Impecunious Party in International Arbitration Proceedings and its Rights under Art. 6(1) of the European Convention on Human Rights' (2015) Journal of Constitutionalism & Human Rights 1-2(7), ISSN 2351-6283 online, Klaus Sachs, 'Insolvency Proceedings and International Arbitration' (2013) 1 Collected Courses of the International Academy for Arbitration Law 1 and Detlev Kuhner, 'The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany' (2014) 31/6 Journal of International Arbitration, paras 807-818.

121 See ICC (Art. 36(5) ICC Arbitration Rules 2012), SCC (Art. 45(4) SCC Arbitration Rules 2010), UNCITRAL (Art. 43(4) UNCITRAL Rules 2010), and ICSID (Arbitration Rule 45 and, more particularly, Regulation 14-Direct Costs of Individual Proceedings, of the Administrative and Financial Regulations), to name but a few provisions.

122 See *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v Republic of Costa Rica*, ICSID Case No. ARB (AF)/08/1, Order (27 October 2010) accessible at <http://www.italaw.com/sites/default/files/case-documents/ita0696.pdf>.

123 See *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Order (28 August 2013) available at http://www.italaw.com/cases/documents/2217 and *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order (28 April 2011) available at http://www.italaw.com/cases/documents/941.

of payment of the advance on costs following a notification to do so amounted to a denial of justice. The Claimant in that ICC arbitration had alleged before the *jui d'appui* that he had become incapable of paying that advance on costs and, not without subsequent substantial criticism, the judge ordered the ICC to proceed with the arbitration notwithstanding that failure to pay the advance on costs.[124] The Court of Appeals resorted to procedural arguments and did not address the fundamental issue of one party (or both parties) being incapable of paying the advance on costs, seemingly rendering the latter principle overridable by procedural considerations. In the same vein, in *SARL Lola Fleurs v. Société Monceau Fleurs*, the Paris Court of Appeals considered that the right of access to justice would not suffice to render inoperable an arbitration clause where one of the parties had become impecunious.[125]

92. Conversely, in *LP v. Pirelli* the French Supreme Court affirmed that the decision of an arbitral tribunal to refuse to hear the counterclaims of a party that failed to pay the advance on costs may amount to a violation of the right of access to a judge and to the principle of fair and equal treatment.[126]

93. The scenario where the claim collapses if the advance on costs is not made in due time may be found across the globe—except perhaps in Germany. Likewise, in the context of investment arbitration, there are no known decisions to the effect of ordering the continuance of the proceedings even though one of the parties had refused to pay or was not capable of paying its share of the advance on costs.

VII. Third-party Funding as a Promoter of Access to Justice

94. In terms of financial resources allocated to a dispute resolution mechanism, the parties may play on a levelled field, or exactly the opposite may be the case, where the bargaining and financial power of one of the parties by far outweighs the financial status of the other party. Often, a party may have wanted to retain "top-flight" hourly counsel to deal with its case, but was unable to do so due to a sudden expropriation of its assets or to another venture that exhausted all its financial resources. Likewise, a financially resourceful party resisting a meritorious claim might well be willing to spend any amount of money to pursue a strategy aimed at derailing the case and thus dragging out the service of justice.

As a result, the weaker party will most likely be forced to settle the case to his detriment, or will simply be unable to start arbitration.

95. For this reason, Lord Jackson's remarks in his Final Report on the Review of Civil Litigation Costs are pertinent and acute:

> access to justice entails that those with meritorious claims (whether or not ultimately successful) are able to bring those claims before the courts for judicial resolution

124 See *ICC v. S.A.R.L. Projet Pilote Garoubé,* Paris Court of Appeal, 24 May 2016, no. 15/23553, commented in http://kluwerarbitrationblog.com/2016/11/15/impecuniosity-and-denial-of-justice-walking-on-eggshells/ .

125 See decision of the Paris Court of Appeal, 26 February 2013, no. 12/12953, cited in Gabrielle Kaufman-Kholer and Antonio Rogozzi, *International Arbitration Law And Practice in Switzerland* (Oxford 2015) 16, n 63.

126 See, decision of the "Cour de Cassation", Civ. 1re, in LP v. Pirelli, of 28 Mar. 2013, no. 11-27.770, reversing the decision of the Paris Court of Appeal, 17 Nov. 2011—accessible at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251564&fastReqId=230507661&fastPos=1

> or post-issue settlement, as the case may be. It also entails that those with meritorious defences (whether or not ultimately successful) are able to put those defences before the courts for judicial resolution or, alternatively, settlement based upon the merits of the case.[127]

96. At the same time, Lord Jackson asserts not only that 'access to justice is only possible if both parties have adequate funding', but more importantly that,

> it is now recognised that many claimants cannot afford to pursue valid claims without third-party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third-party funding has a part to play in promoting access to justice.[128]

97. Indeed, the funding structures provided by third parties allow immediate access to a channelling of financial facilities. Moreover, the typical structures used by third-party funders make this business model quite attractive to funded parties: the funding arrangement does not provide for any reimbursement of the amounts spent by the funder. It is pure non-recourse funding.

98. It is true that some hesitations of the parties may surface when the remuneration of the third-party funder is considered: typically, the funder will be remunerated in a certain percentage calculated over the proceeds (usually between 30% and 50% of the proceeds) or according to a multiple calculated upon the amounts spent by the funder (usually, for each USD put in as "investment" the funder will receive USD three). This may lead the parties to think that, when entering into this kind of structure, they are forfeiting a substantial portion of their claims. In turn, these hesitations will be compensated by the circumstance that the funder will not be paid if the claim fails.

99. Thus, most impecunious parties, who would not otherwise be able to pay the costs of bringing a dispute against a host State, will prefer to give away a part of their expected proceeds against the supply of a financing stream. The funder will then assume and pay every cost connected with bringing such a claim.

100. The benefits of third-party funding in terms of access to justice now seem clear.[129]

For obvious reasons, the appearance of a third-party funder allows an impecunious party to overcome its financial distress and pursue its claim. The examples already given demonstrate that third-party funding is a powerful tool in guaranteeing access to justice. Often, it is the only means that a party may resort to in order to seek a remedy.

101. As a result, the investment arbitration setting may experience the impact of considering the role that a third-party funder plays when facilitating the right of access to justice. When a financially distressed party is prevented from pursuing its claim against a host State if it is not helped by a third-party funder, then the right of access to justice is at stake, and relevance must be given to the helping financial structure, as a consequence.

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127 See Lord Justice Jackson (n 97) 41.

128 See Lord Justice Jackson, Review of Civil Litigation Costs: Preliminary Report (2009) 160, 15.1.1.

129 On a slightly different perspective, see John P. Rossos, 'Access to Justice: Using Third Party Financing to Fulfil the Promise of Class Action Litigation' (December 2008) 5/1 The Canadian Class Action Review 100-120.

The fact that third-party funding promotes the right of access to justice, in addition to its crucial role in guaranteeing such right, leads to the emergence of a fundamental cover for each and every right: the cloak of legal-ethical and social-economic relevance. Indeed, every right must be exercised in accordance with its legal-ethical and social-economic significance, and the right of access to justice provides such relevance to the investments made by third-party funders.

102. Conversely, there are cases where third-party funding is sought by disputants for reasons other than those related to the right of access to justice. Parties may resort to an external funder not because they would not otherwise be able to pay the costs of the case, but because there are other kinds of financial needs that may occur along the way during the normal course of their business. For instance, they may use this mechanism for reasons related to cash flow management or because they wish to use their financial resources in other areas of their business, such as day-to-day financial needs, or to channel funds to other investments.

In these cases, the image of access to justice becomes blurred and its contribution to classifying third-party funding as a relevant foreign investment is highly disputable.

103. In sum, when third-party funding is resorted to because the right of access to justice is at stake, relevance must be given to this financing structure.

Because investment arbitration costs can often be prohibitive, the lack of external financial support may amount to a denial of justice — if, in a given case, that particular mechanism for solving disputes is the only one available to the investor.

For this reason, and because the third-party funding phenomenon is not only becoming more open to the public but also being recognised in jurisdictions that once banned it, one may argue that there is a new legitimacy built around this business model. This legitimacy could be the necessary cloak for business models entered into by third-party funders to be considered included in the definition of "investment" for the purposes of the relevant treaty.

104. More to the point, as we have seen above, the third-party funding industry is producing examples of investments that may well be qualified as "assets" or "tradable values", thus prompting a notion of a certain "commoditisation" of claims. In financial, economic and commercial terms, investments made by third party funders have an independent and proper value. Also, a third-party funding investment may even be recognised as a separate portion of damages to be awarded (*Essar* case).

Again, third-party funding might well be a "protected investment" under certain circumstances.

105. The extent to which this business model may be considered a "bundle of rights in property"[130] acquired by the funder, thus being a protected investment, is the question that now follows.

130 We borrow the words of Douglas (n 6) 161, "Rule 22".

VIII. Third-party Funding as a Protected Investment

106. Third-party funding, like any other business, can be subject to the very same mishaps as any other investment that has been submitted to the investment arbitration dispute resolution mechanisms. Consider the *Essar* case in the context of an investment dispute: had the investment made in that claim, by a foreign third-party funder, been subjected to a host State's measure entailing the violation of a standard of protection of foreign investments (for example, unfair measures imposing sanctions or otherwise forbidding repatriation of funds), we would easily concede that there was a protected investment worth compensating.

Therefore, the ultimate question arises: can a third-party funding structure avail itself of the protection accorded to foreign investments under international instruments?

107. There is a caveat to make to this inquiry. Often, third-party funders "acquire" a claim related to an investment. Either by entering into an agreement with the original investor prior to the initiation of the case, or by making such a deal after the proceedings are commenced, the funder will acquire a standing of its own by way of subrogation, assignment or transfer of title over the claim.

108. These cases are not of great concern to our analysis. In any event, it is worth noting that, generally, investment tribunals have held that the assignment of a claim subsequent to the initiation of the proceedings does not have any impact, and therefore the funder will not lose any entitlement to the original claim.[131]

109. Investment tribunals have held that such a transfer was irrelevant even if the assignment took place before the commencement of the proceedings.[132]

110. Coming back to our question—is third-party funding a separate protected investment?—it has been affirmed that this would be a "rather imaginative interpretation", partially because the 'funder's lack of involvement in the subject matter of the investment dispute prevents its inclusion as a party in the arbitral proceedings.'[133]

111. In line with this view, in *GEA v Ukraine* the Tribunal held that an ICC Award would not qualify as "investment". It can be said to the detriment of a pos-

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131 See *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (n 14), *Compania de Aguas del Aconquija S.A. And Compagnie Generale des Eaux v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000), and *Teinver S.A., Transportes de Cercanias S.A. And Autobuses Urbanos del Sur, S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012). In El Paso v Argentina, the assignment of the claim took place ten days after the commencement of the proceedings, with no relevant impact on the Tribunal's jurisdiction (see *El Paso Energy International Company v. The Argentine Republic, ICSID* case No. ARB/03/15, Decision on Jurisdiction (27 April 2006).

132 See *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 September 2010); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award (17 March 2006); *Quasar de Valores SICAV S.A. et al. v. The Russian Federation*, SCC Arbitration No. 24/2007, Award (20 July 2012). To the contrary understanding, see *Consorzio Groupement L.E.S.I. - Dipenta v. Republique Algerienne Democratique Populaire,* ICSID Case No. ARB/03/08, Award (10 January 2005) and *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009).

133 See von Goeler (n 42) 420.

sible parallel to be drawn from this case that the ICC Award was related to settlement and repayment agreements.

112. However, the issue might not be settled yet. Indeed, on a previous occasion, the arbitral Tribunal in *Saipem v Bangladesh* seemed to have left the door open to consider that an arbitral award rendered in commercial arbitration could amount to an investment as "credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income" for the purposes of the Italy / Bangladesh BIT.[134] Undoubtedly, the tribunal was prepared to consider it as an "indirect investment".

113. Conversely, in a very recent dissenting opinion in Teinver & Autobuses v Argentina, Kamal Hossain rejected the notion of a third-party investment being considered protected under the BIT in question:

> 'Burford may have "invested" in the present arbitration proceedings by agreeing to fund the legal expenses but such an "investment" based on speculating on the prospect of obtaining a substantial portion the proceeds of any award resulting from a pending arbitration cannot be treated as protected "investment" under the BIT. The BIT guarantees the rights of "investors" who have made an "investment" in the territory of the host state. The BIT is not intended to enable payment of awards to third party funders who are not "investors" and who have no protected "investment", and who only come into the situation in the circumstances described above to advance funds in order to speculate on the outcome of a pending arbitration.'[135]

114. In any event, the considerations elaborated on above —in particular, third-party funding as a guarantor of the right of access to justice—might shed another kind of light when assessing the requisites of eligibility as a protected investment.

Let us then frame the inquiry, starting with the usual wording provided for in investment treaties.

115. As said, the vast majority of the available IIAs contain a catch-all definition: '"investment" means every kind of asset' is the most common wording of the general clause) followed by an illustrative list of "assets" considered to be "investment"'.

116. This simple formulation would allow us to include an investment made by a third-party funder as a protected "investment", if not for other reasons, because it is indeed a "claim to money" or a claim "to any performance under contract having a financial value" (and in some cases, such as the one we will address below, it would even fall into the category of "movable property"). This, however, does not suffice and would be too simplistic a notion. Indeed, as we have seen above, there is also a requisite territory involved—most international instruments require that the investment must have been made "in the territory" of the other contracting state. Further, in the context of ICSID arbitration, additional jurisdictional requisites have to be met.

117. In the abstract, there are a few groups of cases where the consideration of a "protected investment" will not raise any considerable doubt in light of the set of

134 *Saipem S.p.A. v. The People's Republic of Bangladesh* (n 23) paras 113-114.

135 See dissenting opinion of July 13, 2017, in Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic (ICSID Case No. ARB/09/1), para 72, p. 30, award of July 21, 2017).

criteria that is currently applied by investment tribunals and advocated by scholars and commentators.

The considerations that will follow below will be drawn out of the conclusions of the cases illustrated above, and therefore we will assume that a 'combination of the flexible versions of the two approaches' [objective and party-based] might 'best serve as the proper framework' for such a definitional task.[136] We just have to couple the verification of the requisite territory with that combination.

118. Hence, assuming a flexible and practical approach based on the three-fold test (contribution, duration and risk), one may not deny that third-party funding involves an intrinsic risk: the outcome of the dispute is uncertain by nature. Third-party funding also entails a contribution: the funder will pay the costs of the arbitration (legal fees, arbitrators' fees, administrative costs, taking of evidence costs, and so forth). This contribution is considerable, taking into account that arbitration costs are not negligible. Further, the fund channelling is also long-lasting, usually surviving several fiscal years.

119. On the other hand, an investment made by a third-party funder can be considered "immovable property", "shares in and stock and debentures of a company", or even a "claim to money".

120. Based on these assumptions, let us turn back to the core question of whether a third-party funding investment may be classified as a relevant "investment" under both the jurisdictional ICSID criteria, and the definitional provision of a given relevant treaty.

Let us look also into some hypothetical cases.

121. Indeed, consider the case of a third-party funder settled in a given State, operating overseas via a local company. If the State hosting this company expropriates the premises and shuts down the operation unlawfully and / or without equitable compensation, or otherwise produces similar measures as regards the shares owned by the third-party funder in the local company, one cannot reasonably deny the causation of damage to an "investment". The same holds true in the case where the State in question passes tax legislation to the effect of aggravating the income tax regime for foreign citizens.

In the abstract, this investment is capable of meeting the criteria that has been applied in virtually every case that has been recognised as a protected investment (duration, contribution, and risk), and it further is capable of meeting the territorial nexus requirement. Clearly, this situation would not differ much from the expropriation of "Las Cristina's" made by the Government of Venezuela, where the investor was deprived of all its assets that were located in the host State.

More to the point, a state measure such as the ones here raised would undoubtedly amount to a violation of the standards of protection accorded by clauses such as prohibition of expropriation without equitable compensation, the right to fair and equitable treatment, and others that the particulars of the case might show.

122. Consider also the case where a foreign funder—who is not resorting to a local affiliate or the like (and therefore, has not established a local physical operation)—is providing financing to local companies to pursue their claims in litigation

136 Dolzer and Schreuer (n 7) 76.

before State courts and / or in arbitration (either international or domestic) proceedings taking place "in situ" or located elsewhere. It may even do that through "portfolio financing" (that is, the funder provides funds to a pool of cases, rather than just to a particular one or a few of them). The funds were channelled into the territory of the State where those procedures are taking place, and the parties were assisted through this in-bound financial structure that provided them with funding for their cases: for instance, the funder made wire transfers into the lawyers' bank accounts, and wire transfers to the local institution administering the arbitration. The funder made those payments during a considerable amount of time—the time that those proceedings took place in arbitration and / or litigation in the State in question.

According to the funding structure, the funder was entitled to a share of the proceeds (in this case this would be the "asset" of the investor).

Let us now imagine that the host State, after all these investments were made, passes legislation to the effect of banning from its territory third-party funding activities undertaken by foreign entities.

Wouldn't this measure amount to a violation of the fair and equitable treatment standard (or similar)? Hadn't there been a contribution to the funder's business, with a certain degree of duration and risk? Wasn't the channeling of funds made into the territory of that host State? Wasn't the funder entitled to a "claim to money" before that measure was taken?

One can hardly deny it.

123. This example might well be replicated in the context of the financing of foreign States in disputes brought by them against other States or against private entities. The same would hold true if a given State was funded by external funders in defending claims brought against it by other States or private entities. This is a possibility that may well occur with developing countries. In a comparable situation, isn't the funder entitled to claim its agreed share of the proceeds?

124. We can also take into account the case where the third-party funder has funded an investment claim and afterwards proceeds to a "commoditisation" or otherwise a "securitisation" operation out of that "investment" (see cases cited above *EuroGas,* Inc. and *Crystallex).*

A State's measure affecting this claim, and therefore, the securitisation of this claim (for instance, through legislation or administrative resolution to the effect of banning repatriation of funds, or even banning the sale and distribution of this financial product on the market) will likely amount to a protected investment harmed by such state's measure.

125. Arguably, these last cases are no different from regular investments. The conundrum, however, lies at the very heart of the investment arbitration claims: can funding of an investment arbitration claim be classified as a separate investment?

Just by way of illustration, the *Crystallex* case shows that the third-party funder providing financial resources to pursue that claim is entitled by agreement entered

into with the investor to receive 35% of the proceeds of that claim.[137] Is that share a protected investment, and will it provide the funder with proper standing in the case or in a separate arbitration?

At first sight, this case seems similar to the ones illustrated above. Arguably, it would meet the three-fold test, generally accepted according to the current state of affairs (risk, contribution, and duration), and would fit into the definitional provision of the relevant treaty as, at least, a "claim to money".

Yet, there are noticeable differences that leave us at pains to answer our core question.

126. Indeed, the Claimant in this case is a Canadian corporation, the investor's funder is a US company (Tenor Capital), and the Respondent is the Republic of Venezuela. However, the claim was brought before the ICSID, in Washington, and not in the courts of Venezuela. Moreover, counsel to Claimant are not based in Venezuela, and if some of the team's members reside in this country, it is unlikely the payments are made in or through the Venezuelan banks. Accordingly, where or what is the territorial link in this case?

127. On the other hand, how could this "investment" possibly be harmed by a measure taken by the Government of Venezuela? Which standard of protection could possibly have been violated by Venezuela?

128. One of the core issues is the consideration of the nexus between the investment and the territory of the host State. In a case such as the one illustrated above it will be extremely difficult to detect such connection.

However, as we have seen before, investment tribunals have already considered that an investment does not lose its character if the funds are not channelled into the territory of the host State. Cases such as *Fedax* and *Abaclat* illustrate this notion.[138]

Nonetheless, those cases referred to a situation where the money had not entered the territory of the respondent State but nevertheless was made available to it for the pursuit of the State's needs. On the other hand, the case of Poštová banka showed that the crucial element that was missing in that situation was the privity of contract between the investor and (in that case) the host State—which is a link that undoubtedly is missing in virtually every funding structure.

129. This, however, might not be a sufficiently convincing deterrent. Firstly, the rational adopted by the Tribunal in *Poštová* has completely forgotten that international financial products such as the sovereign bonds of Greece may be—and actually are—offered in the secondary market, where the brokers and intermediaries play a crucial role in disseminating those products. Further, the funds were ultimately made available to the host State because someone had paid for the bonds, and those funds had arrived one way or the other to the state's accounts. Without placement of those issuances in overseas markets, through intermediaries and brokers, the operation might have not been successful, or even possible. Purchase of finan-

137 See the decision of the Superior Court of Justice of Ontario, of 16-04-2012 authorising the funding agreement with Tenor Capital (Re Crystallex International Corporation, 2012 ONSC 2125 (CanLII), <http://canlii.ca/t/fr167>, retrieved on 2017-01-26).

138 *Fedax N.V. v. Venezuela* (n 15) para 29; *Abaclat and Others v. The Argentine Republic* (n 49).

cial instruments such as the one in *Poštová* occur in the way the international financial market works.

130. Secondly, more often than not, foreign investors make investments in host States without entering into any kind of bargain with the host state. Hence, the privity element of the investment, and the purported contractual connection with a host State, is a misplaced and misleading requisite.

131. As a matter of principle, the experiences in finance products can serve to build the notion that the funds need not be channelled directly to the host State in question. Why should a contractual relationship with the host State be required?

132. Besides that, as we noted above, at least one tribunal was prepared to accept an arbitral award as an "indirect investment".[139] This means that if the relevant instrument of protection of foreign investments does not expressly require that an investment must have been made "directly" in the territory of the contracting parties, then a notion where an investment in a claim would be considered as a separate "indirect" investment is conceivable.

For instance, the 2003 BIT between Germany and China sets forth that the '[t]erm "investment" means every kind of asset invested directly or indirectly by investors of one Party in the territory of the other Party (…)' – Art. 1(1). It further provides that an "investment" includes, not exclusively, '[c]laims to money or to any other performance having an economic value associated with an investment' (Art. 1(1)(c) of the Germany – China BIT). This wording may be found in many other international investment treaties.

133. Further, the consideration of the right of access to justice and the fundamental role third-party funders may play in a given situation may allow the extension of the scope of protection beyond the strict terms of the territorial requisite.

Indeed, a State's measure is capable of producing a situation where the investor will be completely deprived of its assets and of any means to seek redress, even before the local courts.

More to the point, due to the lack of securities or collateral to be provided in a "traditional" financing structure, the investor may be forced to resort to third-party funders, as they are apt to run the risk of funding a case in a non-recourse fashion. The Crystallex and the Essar cases show how an investor or claimant may be forced to resort to financing arrangements with entities willing to take the risk of funding a case without the respective obligation to repay such provision of funds.

One may therefore suggest that in these cases, and where the third-party funding provides the access to justice to the investor, this investment could be relieved from the requisites related to the territorial link because, most evidently, the financing will not be provided within the territory of the host State but, nevertheless, is inextricably linked to the protection of the investment at stake.

134. The second kind of issue raised above relates to the question of how the investment made in a claim by a funder could be subjected to a State's measure affecting its value or depriving the funder of it. This question, however, needs to be addressed on a case-by-case basis, as it may vary tremendously from one situation to another.

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139 See *Saipem S.p.A. v. The People's Republic of Bangladesh* (n 23).

In any event, we may think that measures such as imposing extra requirements for developing the industry of third-party funding in the host State, or even prohibiting it for foreign investors, and also the host State adding barriers to the repatriation of funds earned by the funder, may amount to measures to the detriment of the funder.

For instance, if a given foreign investor is awarded damages by an ICSID tribunal and the amounts awarded are made available to the investor in a local bank institution—therefore allowing the investor the enjoyment of such sums—but nevertheless that host State passes legislation or any other kind of administrative resolution to the effect of prohibiting the third-party funder from receiving its share of the proceeds, arguably this may amount to a measure affecting the right of the funder, in spite of the funded investor having been fully compensated.

135. Again, the standards of protection violated by the host State may vary from one case to another. The situations illustrated above may constitute a violation of 'fair and equitable treatment' or even of the 'prohibition of expropriation without due compensation'. These standards and also the promotion and protection of foreign investments obligations—the illustration of which may be found in the Germany-China 2003 BIT—may also be put on the table:

> [N]either Contracting Party shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.[140]
>
> [I]nvestments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. [141]

136. Another standard of protection—to which reference has been made in the previous sections—may be found, for instance, in Art. 6 of the 1989 BIT between Egypt and Italy:

> Repatriation of Capital and Returns:
>
> (1) Each Contracting State shall guarantee, without undue delay and after the performance of all fiscal obligations the transfer in any convertible currency of: (a) the net profits, dividends, royalties, technical assistance and technical service fees, interests and other income, accruing from any investment by an investor of the other Contracting State; (b) the proceeds accruing from the total or partial sale or total or partial liquidation of any investment made by an investor of the Contracting State; (c) funds in repayment of borrowings; (d) the earnings of nationals of the other Contracting State deriving from their work and service in connection with an investment in its territory and maritime zones, in accordance with its national laws and regulations.(…)

Arguably, an "investment" made by a third-party funder may fit into one of these categories, at least as a "net profit (…) accruing from any investment (…).'

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140 See Germany-China Bilateral Investment Treaty (2003) art 2(3).

141 ibid art 4(2).

IX. How and When to Claim the Third-party Funding Investment

137. Besides the generic requirements noted above, it is worth considering two additional aspects. The first is to assess how a third-party funding investment may be recovered (and if a funder can exercise its right on its own). The second issue is to determine the procedural moment when this right must or can be exercised.

These two issues seem to be intertwined: if the funder is allowed to claim protection for its investment, it must do so in a manner consistent with a regular procedural unfolding. Indeed, considering the link between the funder's claim and the investor's claim, the funder may only exercise its right in a manner consistent with the pending procedure or with the outcome of the funded claim. Put differently, it is unthinkable that a funder would be allowed to bring its own claim before the funded party has done so.

138. Thus, the first possible option is for the claimant (investor) and the funder to start joint proceedings, each of them putting forward their own claim.

A second option would be for the claimant-investor to bring an ancillary claim either on behalf of the funder or as a matter of its own damage or costs, on account of its obligation to share the proceeds or otherwise to compensate the funder for the investment it has made to pursue the claim. This latter situation is shown by the Essar case, although in this case the funder's share was considered under the issue of costs determination and more specifically under the doctrine of costs on an indemnity basis.

139. The second possible situation may arise out of the framework applicable to ancillary claims in investment arbitration. This is generally admissible.

Indeed, Art. 46 of the ICSID Convention sets forth that,

> except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

In the same line, Rule 40 of the ICSID Arbitration Rules states that,

> Rule 40 Ancillary Claims
>
> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

The ICSID Secretariat's Explanatory Notes to the Arbitration Rules provide that for Arbitration Rule 40, in order to ascertain whether a claim meets the test that claims must arise "directly" out of "the subject-matter of the dispute", one must be able to affirm that the "factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the fi-

nal settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter".

140. For illustrative purposes, one could point to the *Klöckner* v. *Cameroon* case, where the Tribunal considered it to be a crucial requirement to hear an ancillary claim that a "close connection factor" was present, and that the "reciprocal obligations had a common origin, identical sources and an operational unity", so that they 'were assumed for the accomplishment of a single goal and are thus interdependent.'[142]

As other examples where tribunals have ruled upon ancillary claims applications, the *CMS Gas*, the LG&E, and the *Enron* cases, all against *Argentina,* come to mind.[143]

141. In the case of a third-party funding structure set up for the purposes of bringing an investment claim, one cannot deny that there is a "close connection factor" with the original claim. Whether this investment meets the remaining requirements (common origin of reciprocal obligations, accomplishment of a single goal, interdependency, and others that might be devised) is a matter of interpretation—or of perspective of interpretation—of the particular funding arrangement at stake.

In any event, the consideration of the right of access to justice and the role a third-party funder may play in that respect potentially elicits such "close connection factor".

142. A third possible way for funders to bring their own claim against a host State would be to accord them a proper standing in the case, not *ab initio* as initially suggested, but rather after the proceedings are commenced. This would only be possible where the applicable framework allowed for a joinder of third parties.

143. However, it seems to be clear that the joinder of third parties in ICSID arbitration has not been permitted yet, and it certainly may not be conjured without the express consent of all the parties in dispute.

Indeed, notwithstanding the broad powers conferred under Art. 44 of the ICSID to arbitral tribunals to conduct the proceedings, there is no express provision with such effect, which contrasts with other institutional regulation applicable to arbitration. Therefore, arbitral tribunals have exercised their powers to conduct the proceedings in a restrictive manner, and have not allowed the joinder of third parties.

In *Churchill v. Indonesia,* the Tribunal denied the application of a third party (the Government of the Regency of East Kutai) to join the claim, noting precisely the

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142 See *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2, Award (21 October 1983) in 2 ICSID Reports 65.

143 See *CMS Gas Transmission Co. v. the Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. the Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction (30 April 2004); *Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004). See also *Itera International Energy LLC & Itera Group NV v. Georgia* (ICSID Case No. ARB/08/7), Decision on Admissibility of Ancillary Claims (4 December 2009).

want of consent (in that case, of the Claimant) and the lack of express provision in the ICSID Convention to admit such joinder.[144]

144. Under the 2012 Arbitration Rules of the Permanent Court of Arbitration, 'the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.'[145] Other institutional rules set forth similar provisions.[146]

145. Therefore, in the current state of affairs an application made by a third-party funder to join a pending case is hardly admissible, which is not to say that arbitral tribunals might not start broadening their powers in this respect so as to accommodate new needs arising out of the budding of the third-party funding industry.

146. A final possible way is for third-party funders to start their own "post award" claim. This means that a new arbitration by funders would be initiated against the host State. This route raises concerns, however, about the *res judicata* effects of the award made in the arbitration between the funded party and the host State. The funder was not a party to the initial funded arbitration case and, therefore, the threefold identity test would fail, and the funder would not be covered by the *res judicata* effects.

147. The purpose of this article is not to address the effects of *lis pendens* and of *res judicata* in investment arbitration, but one cannot avoid noting that the situation of third-party funders in this respect may be assimilated to that of the group of companies. The answer can be no different, as Zachary Douglas has put it:

> A host State cannot be expected to defend a barrage of concurrent or consecutive claims relating to precisely the same prejudice to a single investment. Nor can it be right for a host State to defend consecutive claims in relation to the same investment by different members of the group of claimant companies until an award favourable to the group is procured.[147]

Indeed, the claim of the third-party funder is so tightly linked with the investor's initial claim, almost as if they were merged one into the other, that the funder should be obliged to accept the external effects of the *"force de la chose jugée"*. Therefore, in principle revising the entire case must not be admitted and the final award must be accepted "as is".

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144 See *Churchill Mining PLC v. Republic of Indonesia,* ICSID Case No. ARB/12/14, Procedural Order No. 2 (5 February 2013). See also See G. Kaufmann-Kohler et al., 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?' Final Report on the Geneva Colloquium held on 22 April 2006, 21 ICSID Review-Foreign Investment Law Journal 59 (2006) (Annex AL RA7).

145 PCA Rules (2012) art 17(5).

146 For instance, ICC Rules (2012) art 7 and SIAC Rules (2013) art 24(1).

147 See Douglas (n 6) 309.

X. Conclusions

153. Looking at the current setting in international commercial arbitration and investment arbitration, it is fair to conclude that third-party funding is gaining a growing relevance, so as to be considered capable of producing effects beyond the circle of the legal relationship between the funder and the funded party (such as the securitisation of a funding and the Essar case). Moreover, procedural effects may also affect third party funders in other ways (such as in the *Excalibur* case). Further, third-party funding may play a fundamental role in the right of access to justice, thus highlighting an inextricable link between the necessity of the funding and the funded claim.

At the same time, the facilitation of the right of access to justice provides the necessary cloak of legal-ethical, and social-economic relevance which the exercise of any right must be covered with.

Last but not the least, the parallel with the experiences of investment arbitration in finance and banking matters elicits the notion that investment tribunals are open to recognise numerous shapes and forms of financial instruments as "protected investments". Take the example of sovereign dematerialised bond issuances, even when purchased on the secondary market. The experience in this field also shows that arbitral tribunals often adopt a more liberal or, at least, a more flexible and pragmatic approach.

Thus, it seems that all these factors are contributing to pave the way to consider third-party funding to be protected investments.

In any event, the consideration of a third-party funding investment as "protected" requires a flexible and practical approach in the qualification assessment, but one can arguably posit that, on grounds of principles, these funding business models may amount to a disbursement of financial resources (contribution), with a reasonable durability (duration) and a considerable degree of uncertainty (risk). Hence, in theory, it is possible to ascertain the requirements for jurisdiction under the ICSID Convention. The requisite territory link may also be broadened on account of the principle of access to justice.

Further, when assessing the consent for arbitration requirements and the notion of investment itself under the relevant international investment agreement, it is also theoretically admissible to consider that a third-party funding falls under the specific provisions defining protected investments, in the very same fashion as investment tribunals have done regarding financial instruments.

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