ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

F.A.O.
The UNCITRAL Secretariat

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30 July 2021

Dear Sirs,

UNCITRAL Working Group III: Possible reform of investor-State dispute settlement (ISDS); draft provisions on third-party funding ('UNCITRAL WG III TPF Reform Proposals')

The International Legal Finance Association ('ILFA') was founded in September 2020. ILFA is the only global association of commercial legal finance companies. ILFA has 14 members, including all the leading third-party funders. ILFA is a not-for-profit trade association. It promotes the highest standards of operation and service within the commercial legal finance sector, including avoiding conflicts of interest and preserving confidentiality and legal privilege, and is committed to ensuring that the rule of law is maintained[1]

ILFA welcomes the opportunity to comment on the UNCITRAL WG III TPF Reform Proposals (the 'Proposals') and thereby to assist the Secretariat and the Working Group in their considerations with respect to possible ISDS reform. In that regard, ILFA notes that:

- in preparing the Proposals, the Secretariat has not meaningfully engaged with the funding market generally or ILFA in particular.
- the Proposals appear to be heavily influenced by papers published by certain academics with the support of various NGOs who cast doubt on the legitimacy of third-party funding in the ISDS context[2].
- the Secretariat confirms that in the preparation of the Proposals, it encountered difficulties in obtaining empirical data relevant to the relationship between third-party funding and ISDS claims; indeed, there is no data cited in support of the various assumptions underpinning the draft provisions[3].

As part of ILFA's comments on the Proposals below, ILFA therefore provides data showing that many of the concerns underlying the Secretariat's draft proposals are misplaced. ILFA invites the Secretariat to engage with ILFA as part of its future deliberations; ILFA stands ready to assist the Secretariat and, to that end, will shortly seek permission to become an Observer to the UNCITRAL WG III.

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[1] Ilfa.com.
[2] *See* Brooke Guven and Lise Johnson: 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', The Columbia Centre on Sustainable Investment ('CCSI'), May 2019; and 'Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement', CCSI, 15 July 2019.
[3] UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS): Draft provisions on third-party funding' (***UNCITRAL WG III TPF Note***), 25 May 2021, section E ('Collection of data').

Before commenting on the concerns that the suggested proposals are intended to address and the specific draft provisions themselves, ILFA considers that it is important to make reference to a number of overarching principles promoted by the United Nations which are relevant to ISDS; ILFA submits that it is incumbent on the Secretariat and UNCITRAL WG III to consider these principles when addressing '*the legal framework pertaining to third-party funding in ISDS*'[4].

1. The U.N. Global Compact and Sustainable Development Goals

The rule of law is at the heart of the U.N. Global Compact:

> '*Governments need to have good laws, institutions and processes in place to ensure accountability, stability, equality and access to justice for all. This ultimately leads to respect for human rights and the environment. It also helps lower levels of corruption and instances of violent conflict*.'[5]

Where the rule of law is weak, it is more difficult for responsible businesses to function and to meet their legal obligations, including their commitments to universal sustainability standards. U.N. Sustainable Development Goal 16 ('SDG 16') seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels. SDG 16 recognises that '*conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development*.'[6] According to the U.N., '*Institutions that do not function according to legitimate laws are prone to arbitrariness and abuse of power and less capable of delivering public services to everyone*.'[7]

The express purpose of UNCITRAL is to '*further the progressive harmonization and modernization of the law of international trade as the core legal body of the United Nations system in the field of international trade law*'.[8] The UNCITRAL Arbitration Rules (1976, revised in 2010) are internationally recognised rules under which disputes, including those under bilateral investment treaties, can be resolved. The focus of investment treaty disputes are alleged violations of such treaties through the actions of a State against foreign investors who are citizens of another State-party to the treaty.

Treaty violations often include expropriations or complete destruction by the host State of the property or business of the foreign investor, leaving the foreign investor without the means to support legal proceedings against a State, whose litigation budgets are often, effectively, unlimited. An early example of this can be found in the case of *Kardassopoulos & Fuchs v. the Republic of Georgia*[9], where the claimants had the benefit of legal finance. A substantial award was made in their favour as part of the arbitral tribunal's determination that the State had *inter alia* expropriated the claimants' property; without funding, access to justice would have been denied.

Legal finance also supports the rule of law. *Kardassopoulos & Fuchs* exemplifies that. Any restriction on the availability of legal finance to wronged investors would prevent some of them from taking legal action to hold the offending State accountable and recover compensation for their losses; this would have the effect of allowing States to ignore their treaty obligations with impunity and would undermine the rule

[4] *Ibid*, at para. 1.
[5] https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law.
[6] https://www.un.org/sustainabledevelopment/peace-justice/.
[7] *Ibid*.
[8] https://uncitral.un.org/.
[9] ICSID Case No. ARB/05/18.

of law, including in territories where the rule of law is most needed to encourage responsible, sustainable investments.

Many investors are now required to make investment decisions based on Environmental and Sustainable Development standards, of which adherence to the rule of law is central. A lack of available sources of funding to pay for the costs of enforcing treaty obligations against host States will increase the risk to foreign investors, causing them to divert capital away from those least developed countries ('LDCs'), deterring foreign direct investment where the values enshrined in the U.N. charter, including access to justice and accountability, are in short supply.

Of particular note here is the absence of realistic alternatives to legal finance for would-be ISDS claimants. Commercial banks are reticent to assist in an area where they have limited experience and expertise. Even where a claimant has the means to fund an ISDS claim, legal finance provides fiscal and accounting benefits to the recipient. Increasingly, large corporations with strong balance sheets are employing legal finance as a corporate finance tool[10]. Use of legal finance to fund ISDS claims in such cases is no less supportive of the rule of law than its use to fund claims by impecunious claimants and denying corporations the use of legal finance would be draconian in the extreme, unjustifiably denying them access to a legitimate capital source.

Any reform of the ISDS system should be cognisant of the views of those investors, big or small, who engage in ISDS processes. Regrettably, it appears to date that UNCITRAL WG III has not considered the views of such stakeholders. In May 2020, against the background of '*an alleged legitimacy crisis of ISDS*' and with reference to *inter alia* UNCITRAL WG III's considerations of ISDS reforms, the Queen Mary – CCIAG Survey was published, seeking to '*fill this gap and fulfil the critical need for this important stakeholders' representation*' in respect of ISDS reform[11]. Of the 86 responses from corporate counsel or representatives of corporations, 74% of respondents confirmed that third-party funding of ISDS cases should be permitted, with 74% confirming that third-party funding should be available to investors as a commercial decision, irrespective of the '*depth of the investor's pockets*'[12].

Accordingly, prohibition or restriction of legal finance would weaken the rule of law, create a significant gap between the express goals of the U.N. and UNCITRAL and the achievement of those goals, and fly in the face of strong support for third-party funding by the corporations that are in a position to build the infrastructure and make the other direct investments needed by many States. The Organisation for Economic Co-operation and Development ('OECD') has stated recently that the Covid-19 pandemic has made conditions ripe for corruption and there is an expectation that there will be an increase in disputes arising from *inter alia* fraud. In the light of this, defending investor protections to preserve investor interest in LDCs should be a priority during this period of severe economic disruption[13].

[10] Report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration (2018).
[11] Survey of the Queen Mary University – Corporate Counsel International Arbitration Group: 'Investors' perceptions of ISDS' (May 2020).
[12] *Ibid* (18).
[13] '*The OECD Working Group on Bribery reaffirms its collective commitment to fight foreign bribery under the Anti-Bribery Convention. The coronavirus (COVID-19) pandemic is bringing unprecedented challenges, human suffering, uncertainty and major economic disruption on a global scale, which in turn can create environments that are ripe for corruption.*.' https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm.

2. The Current State of Third-Party Funding in International Investment Arbitrations

Third-party funding has, in quite short order, become part of the landscape of international arbitration. In 2021 alone, the use of third-party funding has been recognised expressly in the rules of at least five international arbitral institutions. This is in addition to the five others that issued rule revisions or policy statements accommodating the growing practice in previous years, and many others that permit its use without an express rule. Taken together, the list of arbitral institutions permitting and endorsing the use of third-party funding in arbitration includes not only all five of the most preferred arbitral institutions globally, but all of the institutions ranked as preferred by arbitration users.[14] And to this must be added the many jurisdictions in which the use of third-party funding in arbitration is permitted and/or expressly encouraged through recently enacted laws and regulations. This is all not surprising in light of the widespread acceptance and use of funding in international arbitration by users, with 249 funded arbitrations reported by law firms in the latest Global Arbitration Review 100 survey (14th edition) released in July 2021,[15] and increasing numbers reported by arbitral institutions.[16] This is particularly the case in international investment arbitration, owing at least in part to the significant cost and duration of an original proceeding – approximately US$6.4 million and 4.4 years[17] – as well as the increasing frequency of post-award proceedings and significant challenges enforcing awards against sovereigns. As a result of the transparency inherent in investor-State arbitrations, it is decisions and awards rendered by ICSID and UNCITRAL tribunals in the last 10 years that have informed and motivated discussions among stakeholders about the use of third-party funding.

ICSID, the world's leading institution devoted to international investment dispute settlement, is now reaching the conclusion of its effort to modernise rules for resolving disputes between foreign investors and States. As the facility of choice for investor-State arbitration – having administered approximately 70% of all known investment arbitrations – ICSID's significant work and engagement with investors and States since 2017 on various rule amendment issues, including the issue of third-party funding, is instructive. ICSID has proposed two main rule amendments that address the issue of third-party funding: Arbitrator Declarations (Schedules) and Rule 14 (Notice of Third-Party Funding). The issue of third-party funding has also featured in discussions about Rule 53 (Security for Costs), but ICSID has made clear that the two issues are distinct and '*third-party funding on its own is not sufficient to justify an order for security for costs*', which is '*consistent with ICSID case law on security for costs'*.[18] As explained most recently in its 15 June 2021 Working Paper No. 5, Rule 14 contemplates disclosure of the fact of funding (and identity of the funder) in a notice upon the earlier of registration of any request for arbitration, or upon concluding a third-party funding arrangement after registration.[19] ICSID has been clear about the rationale for disclosure in funded arbitrations: to avoid conflicts of interest with a potential arbitrator, something which all funders are acutely aware of and sensitive to (although it is worth noting that the threat of such conflicts is more theoretical than real – with not one known investor-State arbitration in which an arbitrator has been so disqualified and no known award challenged on that basis).

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[14] White & Case/Queen Mary, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (The five most preferred arbitral institutions are the ICC, SIAC, HKIAC, LCIA and CIETAC).
[15] Global Arbitration Review, GAR 100 (14th edition), 15 July 2021.
[16] ICSID, Working Paper No. 1, 2 August 2018, 135-136 ('In fact, in at least 20 recent cases in which the existence of TPF was at issue before an ICSID Tribunal …'); HKIAC, HKIAC Releases Statistics for 2020, 9 February 2021 ('Parties disclosed third-party funding arrangements in three cases under the new requirements of the 2018 Rules').
[17] BIICL/Allen & Overy, 'Costs, damages and duration in investor-State arbitration' (2 June 2021).
[18] ICSID, Working Paper No. 4, February 2020, 325.
[19] ICSID, Working Paper No. 5, 15 June 2021, 277-279.

The other leading institutions responsible for administering investor-State arbitrations – the SCC and ICC – have introduced similar disclosure requirements, albeit in different forms. In September 2019, the SCC introduced a policy to encourage the disclosure of third parties with an interest in the outcomes of SCC-administered disputes.[20] And in January 2021, Art. 11(7) of the 2021 ICC Rules came into force, requiring that parties disclose the existence and identity of '*any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*'.[21] These rules are consistent with the disclosure requirements that have been adopted by States in recent treaty practice (CETA, EU-Vietnam FTA, EU-Singapore FTA, Australia-Indonesia FTA, Canada's 2021 model FIPA), as well as the decisions and orders of various tribunals that have required the disclosure of the fact of funding and identity of the funder to avoid potential conflicts of interest.[22]

This background context regarding initiatives undertaken by the leading arbitral institutions responsible for administering investor-State arbitrations (ICSID, ICC, and SCC) to address third-party funding, recent treaty-making practice by State parties, and decisions and procedural orders of tribunals in funded cases, is informative in examining and assessing the work of UNCITRAL WG III.

3. The Concerns Underlying the Proposals

In the Proposals, the Secretariat explains it developed the proposed options '*in order to address concerns pertaining to third-party funding in investor-State dispute settlement*', asserting that funding '*aggravates the structural imbalance in the ISDS regime*'.[23] Before commenting on those specific proposals and the challenges associated with them – which are many – the veracity of the concerns that the reforms were meant to address should be tested. Specifically, the Secretariat explains it has devised proposals to address alleged increases in (*a*) the number of frivolous claims; (*b*) the number of investor-state arbitration cases, and (*c*) the number of cases in which respondent States have been unable to recover their costs.[24]

As explained below, none of these stated concerns have any support in fact, nor in the practice and decisions of tribunals in international investment law. This is surprising, since the data to which ILFA refers below is publicly available and sits uneasily with the Secretariat's comment that it is facing difficulty in '*compiling relevant data*'.[25] For that reason, ILFA refers below – in some detail – to the latest data on claims and outcomes in investor-State arbitrations released this year by UNCTAD[26] and ICSID,[27] the first empirical

[20] SCC, SCC Policy – Disclosure of Third Parties with an Interest in the Outcome of the Dispute, 11 September 2019.
[21] ICC, 2021 Arbitration Rules, Article 11(7). To these ICSID, ICC, and SCC initiatives must also be added the newly introduced investment arbitration rules by the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the China International Economic and Trade Arbitration Commission (CIETAC), which have each introduced provisions addressing the disclosure of arbitration finance (*see* 98U and 98V of the Hong Kong Arbitration Ordinance (Cap. 609) and the HKIAC 2018 Administered Arbitration Rules; SIAC Investment Arbitration Rules, Rules 24, 33.1, 35; and CIETAC Investment Arbitration Rules, Art. 27), although none figure prominently in investment arbitrations.
[22] *See, e.g., Bacilio Amorrortu v. The Republic of Peru,* PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020; *Tennant Energy LLC v. Canada*, PCA Case No. 2018-54, Procedural Order No. 4, 27 February 2020; *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10, 11 January 2016.
[23] UNCITRAL WG III TPF Note, at para. 11.
[24] UNCITRAL WG III TPF Note, at para. 11.
[25] UNCITRAL WG III TPF Note, at para. 60.
[26] UNCTAD, World Investment Report 2021 (21 June 2021).
[27] ICSID, The ICSID Caseload – Statistics, 2021-1 Edition (28 January 2021).

study of funded claims in investor-state arbitration (also released this year),[28] and appendices of investor-state tribunal decisions on certain procedural applications implicated by the UNCITRAL WG III TPF Note.[29]

A. The Number of Claims That Are Frivolous or Without Legal Merit

First, the Secretariat explains that there is a concern that the use of funding has increased the number of '*claims that are frivolous or without legal merit'*.[30] There is no citation in support of this concern, and as explained in more detail below, the data that exists contradicts the Secretariat's suggestion.

Indeed, owing to the nature of non-recourse funding, it would make no economic sense for a funder to invest in a claim it knew to be frivolous and without legal merit. Funders perform significant due diligence prior to agreeing to fund a case precisely in order to avoid funding claims that are frivolous or without legal merit. ICSID, in its First Working Paper, acknowledged this economic reality, explaining that '[t]*he receipt of TPF does not, in itself, mean a claim is frivolous, and some argue that TPF enables the pursuit of meritorious claims or defenses, including those that otherwise might not be pursued*'.[31] Likewise, the UNCITRAL tribunal in the *Bacilio Amorrortu v. The Republic of Peru* case observed that a claimant may even seek third-party funding in order to obtain '*validation by a more objective third party of the merits of the claim.*'[32]

Consistent with this, in one of the first empirical analyses to examine outcomes of at least 20 publicly reported, concluded, and funded, investor-State cases, the authors – both respected practitioners from Debevoise & Plimpton – posit that third-party funding may actually incentivise meritorious claims:

> *'All else being equal, therefore, the involvement of a funder may indicate that the case had more compelling merits than other, more traditional sources of funding, because a sophisticated party with experience in investment claims (and often a broader statistical perspective than the party or its counsel) thinks it is likely to succeed.'*[33]
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> *'An empirical assessment of these cases reveals that the statistics do not support the idea that funded claimants are more likely to bring frivolous claims, and instead provides some indication that funded claims are at least as successful on their merits as claims in a broader sample of investment arbitration cases.'*[34]

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[28] Ina Popova and Katherine Seifert, 'Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration' in PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW (K. Fach Gomez, ed., Springer, 2021).
[29] Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021); Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021).
[30] UNCITRAL WG III TPF Note, at para. 29.
[31] ICSID, Working Paper No. 1, 2 August 2018, 131.
[32] *Bacilio Amorrortu v. The Republic of Peru,* PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020.
[33] Ina Popova and Katherine Seifert, 'Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration' in PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW (K. Fach Gomez, ed., Springer, 2021).
[34] *Ibid.*

Others have confirmed the valuable case assessment service performed by funders, acknowledging the significant time, money, and effort required to perform a thorough legal and financial analysis of any case during due diligence:

> *'While the funder's reasons are certainly colored by its business objectives, the funder has no reason to exaggerate or lie to a party when explaining the reasons for declining to fund that party's case. In addition, parties often consult more than one funder while seeking funding, so the party will likely hear multiple perspectives regarding why their case has not received funding. All of these conversations provide valuable information to the party, even if they do not result in a funding arrangement.'*[35]
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> *'Establishing the right balance of risk and reward therefore requires funders to engage in a 'multi-disciplinary and rigorous' due diligence exercise. To date, there is no evidence that this process has led to an increase in meritless claims backed by third-party funders. Indeed, studies suggest that third-party funders ultimately finance only a small proportion of the claims presented to them.'*[36]
>
> *'Because of the link between the profit of the funder and the positive outcome of the arbitral proceeding, it seems rather unlikely that third-party funders would be willing to engage their resources in manifestly unmeritorious claims.'*[37]

In addition, there are effective mechanisms already in place – both in institutional rules and in treaties – to address concerns that a claim may be frivolous or without legal merit. Simply put, '[w]*hen it comes to investment treaty arbitrations, there are other incentives not to fund weak or meritless claims'*.[38] For instance, as discussed below, the ICSID Convention and Rules include such mechanisms prior to registration, shortly after tribunal constitution, as well as throughout an arbitration proceeding in the form of bifurcated preliminary rulings and costs awards. These are not the only mechanisms within a tribunal's toolkit to address frivolous claims, as States have agreed to expedited proceeding[39] and summary dismissal procedures in the text of certain treaties as well.[40]

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[35] Victoria Shannon Sahani, 'The Impact of Third-Party Funders on the Parties They Decline to Finance', Kluwer Arbitration Blog, 6 July 2015.

[36] Nigel Blackaby and Alex Wilbraham, 'Third-Party Funding in Investment Treaty Arbitration' in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2d ed, OUP, 2018), at 26.12.

[37] Eric De Brabandere and Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' ICSID Review, Vol. 27, No. 2, (2012) 379, 384.

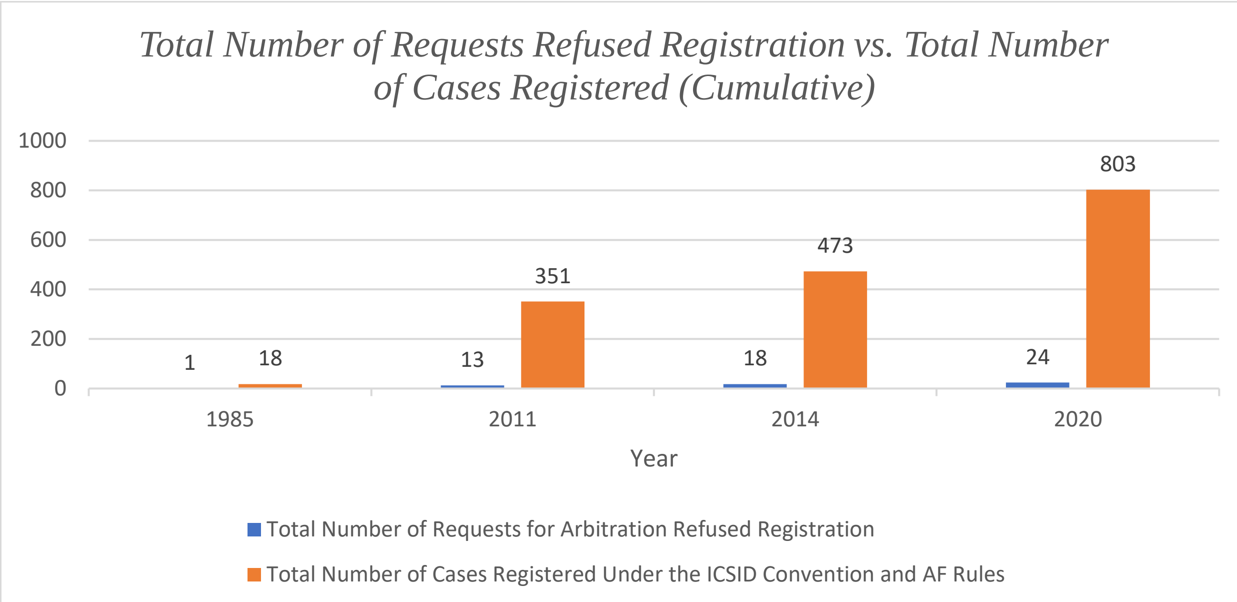
[38] Nigel Blackaby and Alex Wilbraham, 'Third-Party Funding in Investment Treaty Arbitration' in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2d ed, OUP, 2018), at 26.13.

[39] On 9 July 2021, UNCITRAL adopted the 2021 Expedited Arbitration Rules (EAR), modifying certain aspects of the UNCITRAL Arbitration Rules.

[40] A review of decisions rendered under those mechanisms – under DR– CAFTA (Articles 10.20.4 and 10.20.5), the US– Peru FTA (Article 10.20.4) and the US– Panama FTA (Article 10.20.4) – likewise does not reveal an increase in the filing of claims that are frivolous or manifestly without legal merit. *See* Jeffery Commission and Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION (OUP, 2018) at 9.22.

So, for instance, Article 36(3) of the ICSID Convention confers a screening power on the Secretary-General, allowing the Secretary-General to register a request or refuse its registration on the ground that it is '*manifestly outside the jurisdiction of the Centre'*.[41] The purpose of the Article 36(3) screening power has been described as '*to avoid a requesting party's misuse of the Centre's facility'*.[42] With that in mind, in practice respondents are involved in the process and receive the Request for Arbitration and have a brief period of time to reply and bring up any relevant point that goes to whether the claim is manifestly outside ICSID's jurisdiction. According to ICSID's Secretary-General, '*about one or two cases a year are rejected on this basis*'.[43] Registration has been refused for a variety of reasons, including a pathological ICSID clause, a claimant with the same nationality as the State party to the arbitration, a State agency not designated to ICSID, and manifest lack of an investment.[44] Despite the increasing numbers of ICSID cases, including cases supported by third-party funding, a review of the number of requests for arbitration refused registration by ICSID reveals no percentage increase in refusals as compared to the number of registered cases; indeed the percentage has fallen over time: In 1985, ICSID refused to register 5.5% of requests[45], in 2011 it was 3.7% of requests[46], in 2014 3.8% of requests[47], and in 2020 ICSID refused to register 2.9% of requests[48].

[41] ICSID Convention, Article 36(3).
[42] Martina Polasek, 'The Threshold for Registration of a Request for Arbitration under the ICSID Convention', Dispute Resolution International, Vol. 5, No. 2 (2011).
[43] Claire Lipman, 'An Interview with Meg Kinnear, Secretary General of ICSID: part 3/4 – Changes to ICSID Arbitration Procedure', Practical Law Arbitration Blog, 9 February 2016.
[44] Martina Polasek, 'The Threshold for Registration of a Request for Arbitration under the ICSID Convention', Dispute Resolution International, Vol. 5, No. 2 (2011).
[45] Antonio Parra, 'The Screening Power of the ICSID Secretary-General', News from ICSID, Vol. 2, No. 2 (1985); Georges Delaume, 'ICSID Arbitration Proceedings', International Tax & Business Lawyer, Vol. 4, 218 (1986).
[46] Martina Polasek, 'The Threshold for Registration of a Request for Arbitration under the ICSID Convention', Dispute Resolution International, Vol. 5, No. 2 (2011); Sergio Puig and Chester Brown, 'The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention', ICSID Review, Vol. 27, No. 1 (2012); ICSID, The ICSID Caseload – Statistics, 2012-2 Edition.
[47] Eloïse Obadia and Frauke Nitschke, 'Institutional Arbitration and the Role of the Secretariat' in LITIGATING INTERNATIONAL INVESTMENT DISPUTES, A PRACTITIONER'S GUIDE 80 (C. Giorgetti ed., Brill, 2014); ICSID, The ICSID Caseload – Statistics, 2015-2 Edition.
[48] Interview with ICSID Secretariat, 13 July 2021 (on file with Burford Capital/ILFA); ICSID, The ICSID Caseload – Statistics, 2021-1 Edition.

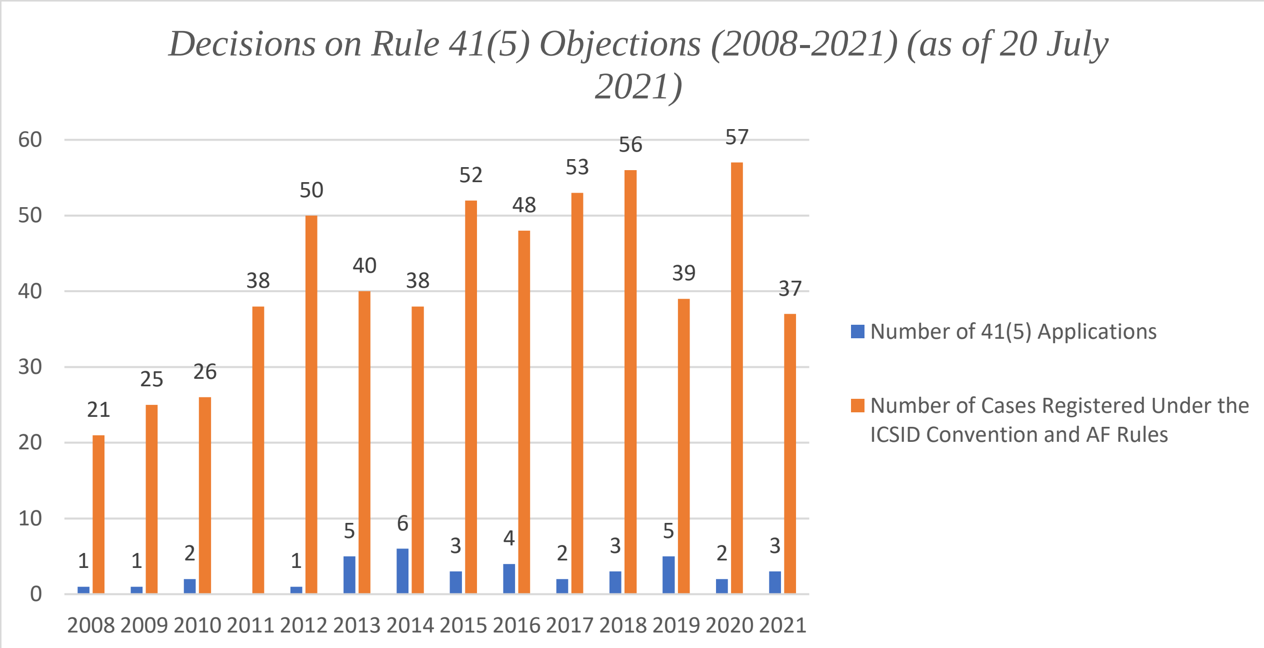


Furthermore and to take another example, Rule 41(5), introduced as part of the 2006 amendments to the ICSID Arbitration Rules, provides for the dismissal by tribunals of '*patently unmeritorious claims'* at a preliminary stage of the proceeding.[49] The rationale is straightforward: to allow claims that manifestly lack legal merit to be dismissed early on before they unnecessarily consume the parties' resources.[50] A review of the 38 decisions on Rule 41(5) applications rendered since 2008 shows no significant increase in the number of such applications filed in recent years, with only seven cases dismissed in their entirety since the rule's introduction in 2006.[51]

[49] Antonio Parra, 'The Development of the Regulations and Rules of the International Center for Settlement of Investment Disputes', ICSID Review, Vol. 22, No. 1 (2007).

[50] *See generally*, Katia Yannaca Small and David Earnest, 'The Fate of Frivolous and Unmeritorious Claims' in ARBITRATION UNDER INTERNATIONAL INVESTMENT TREATIES: A GUIDE TO THE KEY ISSUES (2d ed, OUP, 2018) at 7.01-7.31; Jeffery Commission and Rahim Moloo, PROCEDURAL ISSUES UNDER INTERNATIONAL INVESTMENT ARBITRATION (OUP, 2018) at 9.20-9.32, Appendix 8B.

[51] Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021). *See also*, ICSID, Decisions on Manifest Lack of Legal Merit; ICSID, 'In Focus: Objections that a Claim Manifestly Lacks Legal Merit', March 2021.

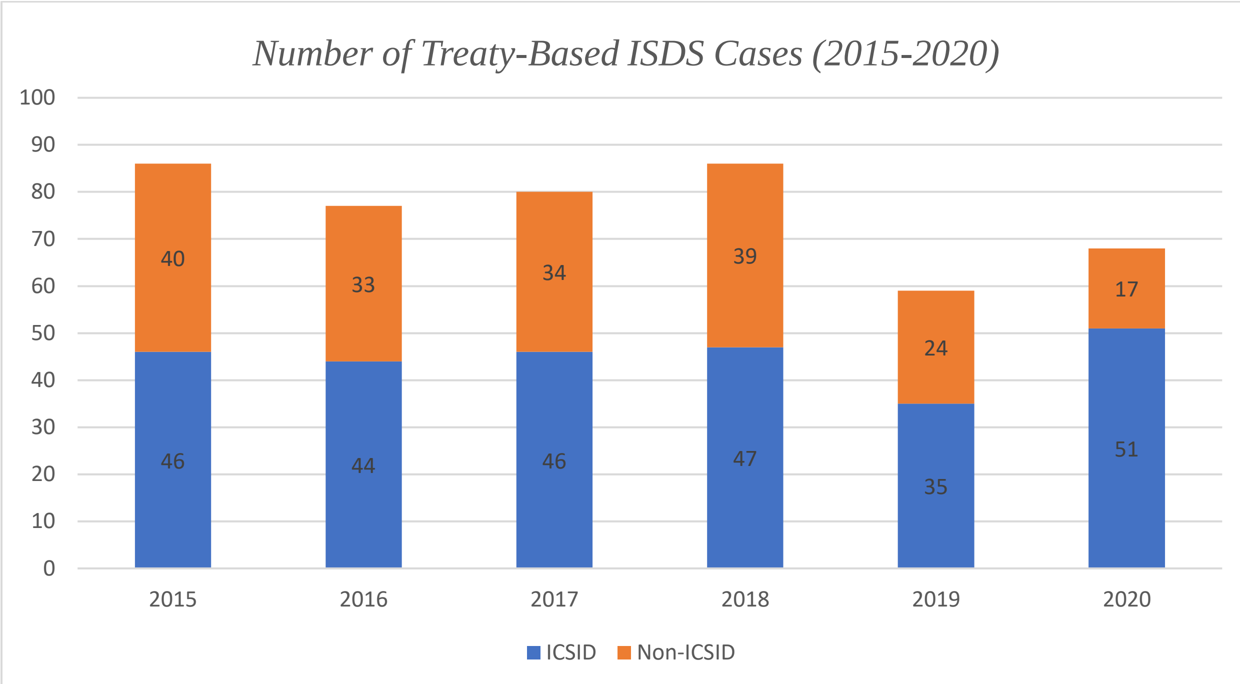


Against this background, the facts do not support the allegation that there has been an increase in the number of claims that are frivolous or without legal merit filed in investor-State arbitration, much less due to the availability of third-party funding.

B. The Number of ISDS Cases and Outcomes of ISDS Cases

Second, the Secretariat maintains that there is a concern that the use of third-party funding has increased the number of ISDS cases filed.[52] There is, again, no authority or data cited for this concern. As at July 2021, there were 1,104 publicly known ISDS claims, the majority filed under the ICSID Convention and Additional Facility Rules (59.2%) and the remainder filed under a number of other arbitration rules (UNCITRAL Arbitration Rules (31.7%), the SCC Arbitration Rules (4.4%), and the ICC Arbitration Rules (1.7%)). Considering the number of investor-state arbitrations filed since 2015 – the year UNCITRAL WG III first noted that the '*current circumstances in relation to investor-state arbitration posed challenges*'[53] – the number of ISDS cases filed per year has actually decreased.[54]

[52] UNCITRAL WG III TPF Note, at para. 11.
[53] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), A/CN.9/930/Rev.1 (19 December 2017).
[54] UNCTAD, World Investment Report 2021 (21 June 2021), at 129.

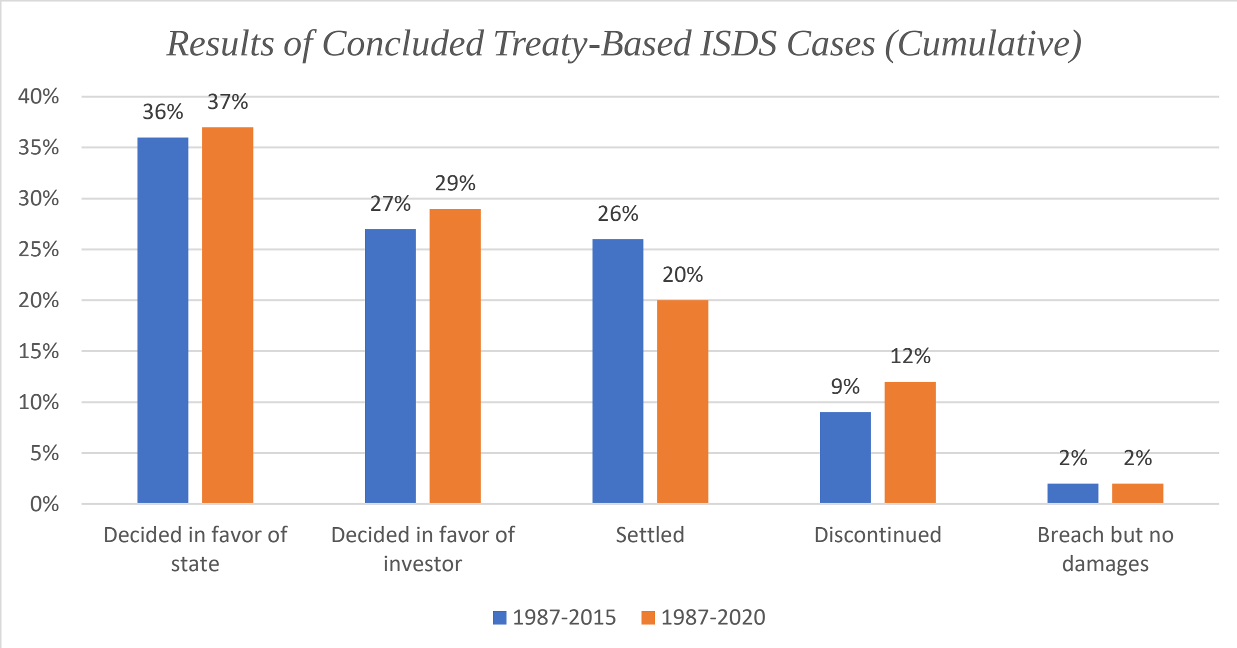


In any event, even if the number of cases had increased as result of funding, if the cases were based on good-faith assertion of treaty rights, and particularly if they resulted in decisions in favor of investors, the increased numbers of cases should not be a concern.[55] And there are numerous examples of publicly-known funded cases which have resulted in tribunals finding that respondent States breached their treaty obligations.[56]

Of equal importance, not only has there not been an increase in the number of ISDS claims filed since 2015, but also the outcomes in decided cases have remained steady, with 27-29% of cases decided in favor of claimant investors and 36-37% in favor of respondent States.

[55] Eric De Brabandere and Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' ICSID Review, Vol. 27, No. 2, (2012) 379, 386 ('*However, it may be argued that if the claim has merit and the host State is eventually found in violation of its international treaty obligations, the fact that the proceedings were financed by a third party has little relevance*').

[56] *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15), Award, 3 March 2010; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL (PCA Case No. 2011-17), Award, 31 January 2014; *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Award, 12 August 2014; *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Award, 21 July 2017; *South American Silver Limited v. Bolivia*, UNCITRAL (PCA Case No. 2013-15), Award, 22 November 2018; *Trinh Vinh Binh and Binh Chau JSC v. Viet Nam*, UNCITRAL (PCA Case No. 2015-23), Award, 10 April 2019; *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic*, UNCITRAL (PCA Case No. 2015-32), Award, 20 August 2019; *Mohamed Abdel Raouf Bahgat v. Egypt*, UNCITRAL (PCA Case No. 2012-07), Award, 23 December 2019; *Dominion Minerals Corp. v. Republic of Panama* (ICSID Case No. ARB/16/13), Award, 5 November 2020; *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021.



If only cases in the ICSID context are considered – ICSID administering the majority of investor-State arbitrations – third-party funded claims have proven to be more successful on jurisdiction and the merits than the average of all cases, as confirmed in an empirical study earlier this year.[57] Specifically, the authors concluded that '[f]*unded claimants prevailed on at least some, if not all, of their claims in the majority of cases: 12/20 funded cases, or 60%'* but that *'[i]n comparison, only 47% of all ICSID cases led to an award upholding claims in part or in full*'.[58] Similarly, it was found that '[t]*ribunals issued an award dismissing all claims in only 3/20 funded cases, or 15%*' but '[i]*n ICSID cases, this figure is 27%*'.[59]

What is more, the suggestion by the Secretariat that third-party funding somehow leads to an increase in the amount of damages claimed[60] is belied by practice. Tribunals tend to award only a fraction of the amount of damages claimed (37%, on average)[61], and the evidence and credibility of competing party-appointed quantum experts is tested on cross-examination, as well as through tribunal questioning. And this suggestion, wholly unsupported by any citation, makes little sense since funders are tasked with assessing the commercial viability of any particular arbitration as an investment:

> *'Funders often provide a "reality check" for parties that have unrealistically high expectations regarding the amount of damages they should claim. Funders may also tell the party that its case is too expensive relative to the potential recovery amount, that the likelihood of winning is low, or that the likelihood of recovering money from the respondent is*

[57] Ina Popova and Katherine Seifert, 'Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration' in PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW (K. Fach Gomez, ed., Springer, 2021).
[58] *Ibid* (139).
[59] *Ibid*.
[60] UNCITRAL WG III TPF Note, at para. 11.
[61] BIICL/Allen & Overy, 'Costs, damages and duration in investor-state arbitration' (2 June 2021).

> *remote. Funders may also share other reasons and valuable information with the party, if the party is receptive.'*[62]

> *'A decision to claim an inflated value for an asset is more likely to be the result of poor expert or legal advice. Third-party funders of international investment treaty claims are usually sophisticated actors whose in-house teams include experts in both the law and financial matters. They are well placed to provide a claimant with a second opinion as to the probable value of a claim. They understand that the credibility of a claim in the eyes of a tribunal can suffer if the value of the claim is inflated.'*[63]

> *'Second, as a practical matter, claims and awards almost invariably undergo rigorous due diligence before they receive funding. As any client or practitioner who has participated in such a process will appreciate, it can be labour-intensive and time-consuming. Funders claim that they apply stringent criteria, such as whether 'the legal theory is tested and has good support' in case law, the 'damages theory can be reasonably extrapolated from past performance' and 'the economics of the investment do not depend on the case settling early'.*[64]

Simply put, the evidence does not support the contention that third-party funding increases the number of ISDS claims or increases the damages claimed. Indeed, the existing empirical evidence suggests otherwise: funders serve a gatekeeping function in the field of investment arbitration by filtering out – as opposed to facilitating – the filing of frivolous claims. In this regard, the following statistic emanates from the investment adviser to a funder with significant experience in investment treaty arbitrations, often under the UNCITRAL Rules: of circa 300 potential investment treaty claims considered over an eight-year period (2010 – 2018), the funder agreed to fund only circa 3% of them. The experience of ILFA funder members is very similar. This is further evidence disproving the notion that third-party funding is fueling an increase in ISDS cases (or that funders are investing in cases regardless of their merits).

Moreover, to the extent that funded claims in the ICSID context are more successful on jurisdiction and the merits than the average of all cases (*supra*), then legal finance supports the rule of law and acts as a deterrent to recalcitrant States, furthering the aims of the U.N. Global Compact[65].

C. <u>Applications for Security for Costs and Compliance with Awards</u>

Third, the Secretariat states that there is a concern about security for costs applications and the ability of respondent States to recover costs in funded arbitrations.[66] This concern is misguided. In practice, ICSID and UNCITRAL investment tribunals have consistently held that the mere existence of arbitration finance, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security

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[62] Victoria Shannon Sahani, 'The Impact of Third-Party Funders on the Parties They Decline to Finance', Kluwer Arbitration Blog, 6 July 2015.

[63] Nigel Blackaby and Alex Wilbraham, 'Third-Party Funding in Investment Treaty Arbitration' in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (2d ed, OUP, 2018), at 26.14.

[64] Ina Popova and Katherine Seifert, 'Gatekeeping, Lawmaking and Rulemaking: Lessons from Third-Party Funding in Investment Arbitration' in PRIVATE ACTORS IN INTERNATIONAL INVESTMENT LAW (K. Fach Gomez, ed., Springer, 2021).

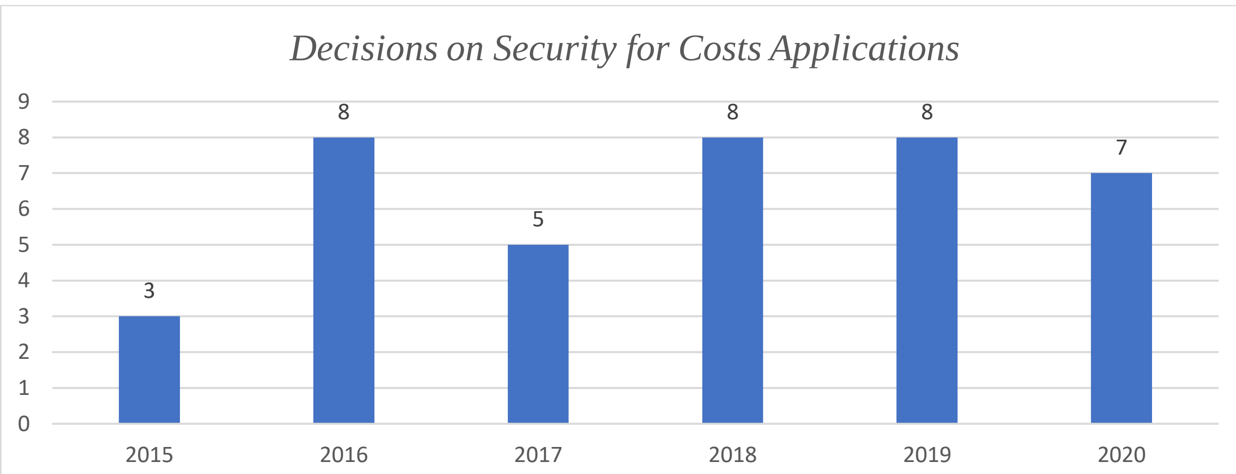
[65] https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law.

[66] UNCITRAL WG III TPF Note, at para. 51.

for costs.[67] In what has become a frequent occurrence in investor-state arbitrations, however, upon learning of the existence of an arbitration finance arrangement, respondents proceed to file applications seeking security for costs. They do so either as a stand-alone application or as part of a sequence of strategic procedural requests. As explained by Judge Charles Bower in his comments during the ICSID rule amendment process:

> *'There is nothing per se "evil" about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the "evil" possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding.'*[68]

One form of that harassment is the filing of spurious security for costs applications, which are rarely, if ever, successful, but have been increasing in frequency, with 39 filed in just the last five years.



And the results are unambiguous: only a 7.6% success rate for security for costs applications (as of 16 July 2021), among the lowest for any procedural application advanced in ICSID and UNCITRAL arbitrations. In the 39 cases in which a security for costs application has been filed since 2015, only three have been successful. In 28 arbitrations, tribunals have denied security for costs applications because the exceptional circumstances required were absent, with 8 decisions not yet publicly available.[69]

What is more, although UNCITRAL suggests that States share a central concern – the risk that claimants will fail to comply with costs awards[70] – in practice, very few costs awards in favor of States go unpaid. And this is not just anecdotal. As part of its rule amendment process, ICSID conducted a survey concerning

[67] *See, e.g.*, *EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (23 June 2015); *RSM v. St. Lucia* (ARB/12/10), Decision on St. Lucia's Request for Security for Costs (13 Aug. 2014); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (11 Jan. 2016) 59, 77-78, 83; *Guaracachi & Rurelec v. Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013) 6-7).
[68] Judge Charles N. Brower, 'Comments on ICSID's proposed amendments to its chapter on the Constitution of the Tribunal', 16 December 2018, p. 3. Gustaf Möller, also an ICSID arbitrator, and former Judge of the Supreme Court of Finland, fully concurs with the comments of Judge Brower. Gustaf Möller, 'Comments on ICSID Rule Amendments – AR Rules 20-22', 27 December 2018.
[69] Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021).
[70] UNCITRAL WG III TPF Note, at para. 51.

compliance with awards of costs, based on all ICSID Convention and Additional Facility awards and post-award decisions issued between October 14, 1966 and April 1, 2017. The results are striking: '*most awards in favor of States are paid'* and for those few that are not paid, '*States do not always seek to enforce awards in their favor that have not been complied with'*.[71] In contrast, there are now more unpaid ICSID and UNICTRAL awards in favor of investors, as the instances of noncompliance and delayed payment have increased significantly: '[s]*ince the 2000s, instances of non-compliance have increased and, by all accounts, are likely to continue to do so, especially where disputes are burgeoning, intra-EU or political*'.[72]

4. Specific Comments on the Proposals

In addition to the general comments above, ILFA makes the following specific comments set out below. Please note, however, that the absence of comment in respect of a provision or part of a provision does not indicate that ILFA agrees with or accepts the provision.

Part A (definitions)

Draft provision 1

ILFA notes that much work has been done previously in the ISDS context with respect to a proposed definition of 'funding' and derivative nomenclature. For instance, the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration published its report in 2018 (the 'ICCA-QM Report') and adopted a wide definition of 'funding' given its broad remit and stated purpose, but suitably narrowed where the context required it[73]. Irrespective of the merit of so doing, ILFA sees no reason to deviate from that working definition for the purpose of Draft provision 1 to ensure consistency of discussion within the ISDS community.

Part B (regulation models)

Draft provision 2 (prohibition model)

Regrettably, in ILFA's view, this provision betrays the real objective of the discussions underpinning the UNCITRAL WG III TPF Note, which is to remove legal finance from the potential armoury of claimants in ISDS. Adoption of any of the suggestions would seriously undermine access to justice and the rule of law, as developed in more detail above.

Draft provision 3 (restriction model; access to justice)

a) ILFA submits that the distinction between indigent claimants, who cannot afford to pursue a claim without legal finance, and claimants who can afford to do so, but wish to de-risk the arbitral process via legal finance, is not an appropriate one for the purpose of creating an ISDS funding gateway. But access to justice and the rule of law dictate that there is no reason to discriminate against the use of legal finance as a corporate finance tool. As stated by one tribunal, the suggestion that additional hurdles be imposed on a claimant raises *'a potentially important "access to justice" issue. If the Claimant can meet the jurisdictional prerequisites to have his*

[71] ICSID Secretariat, 'Survey for ICSID Member States on Compliance with ICSID Awards', 2018, p. 5.
[72] Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with ICSID Awards', ICSID Review (15 February 2021).
[73] Chapter 3, Part III, p. 50.

claim arbitrated … there is no additional requirement that he prove financial capacity to meet any potential adverse costs award or that he is the master of his own litigation.'[74]

b) In addition, a rule requiring an indigent claimant to prove that they are unable to progress a claim without legal finance would be wrong in principle and practically unworkable. It would:

i. impose an unjustified and costly burden on that party at the beginning of the arbitral process, which may dissuade funders from supporting them at that stage.

ii. place the tribunal in the invidious position of having to hear argument which may well involve consideration of the merits of the claim, including whether the claimant has been financially harmed by the alleged wrong by the State; tribunals are – rightly – loath to do that at the beginning of the process at the risk of pre-judging the dispute; and

iii. result in costly and lengthy 'satellite' disputes; the average length of ISDS arbitral proceedings (including annulment but excluding enforcement) is almost 4.5 years[75]; preliminary skirmishes of this nature would substantially elongate the process and increase costs.

Draft provision 4 (restriction model; sustainable development)

While on the face of it this provision may appear laudable in its aim, reflecting the U.N.'s initiative encouraging sustainable development, its application as a gateway principle for the use of legal finance in ISDS is at best inappropriate, and at worst misconceived.

First, as noted above, Sustainable Development Goal 16 confirms the importance of access to justice (and implicitly the rule of law) for effective, accountable, and inclusive government. There is no legitimate basis for subordinating that goal to any other.

Secondly and in any event, reputable funders are committed to upholding Environmental and Sustainable Development standards in terms of the cases that they finance.

Thirdly, placing a burden on the claimant to prove that its investment complied with a particular Sustainable Development Goal would lead to costly and lengthy 'satellite' disputes at the commencement of a proceeding that would require the tribunal to prematurely consider the merits of the case (cf. comments on the access to justice model above).

Draft provision 5 (restriction list model)

This provision is a prohibition model in all but name.

The authors expressly recognise that by noting that paragraph 1 (a) (the exclusion of funding on a non-recourse basis in exchange for a success fee) '*could restrict most commercial funding, in which case, the following subparagraphs might not be necessary*.' The authors refer to '*speculative funding*' and suggest that the Working Group '*may wish to consider which other types of funding should be included in the list, for instance, claims that are frivolous or without legal merit, in bad faith or with political purposes*.'

ILFA repeats its comments at 1 – 3 above.

[74] *Bacilio Amorrortu v. The Republic of Peru,* PCA Case No. 2020-11, Procedural Order No. 2, 19 October 2020.
[75] BICCL/Allen & Overy, 'Costs, damages and duration in investor State arbitration' (2 June 2021).

In any event, the provision:

a) does not make it clear whether the suggested sub-paragraphs are to be construed conjunctively or disjunctively; in other words, if a tribunal were satisfied that the funding arrangement did not fall foul of sub-paragraph (b) – i.e., the funding return was reasonable – might funding be disallowed because the funder was funding more than a reasonable number of cases against the State in question?

b) is practically unworkable:

   i. who bears the burden of proof? There is a presumption that funding is permitted in the draft, so presumably the State would have the burden to show that the presumption does not apply.

   ii. as to sub-paragraph (b), this would lead, yet again, to lengthy and costly 'satellite' disputes which may require a tribunal to consider the substantive merits of the case at an early stage, potentially including the submission of expert testimony dealing with market pricing; and

   iii. as to sub-paragraph (c), what is a 'reasonable number' of cases in the context of egregious State conduct in breach of U.N. Sustainable Development Goal 16, for example?

<u>Draft provision 6 (sanctions)</u>

ILFA does not consider that any form of prohibition or restriction of legal finance of ISDS is appropriate, for the reasons set out in these comments. Be that as it may, this proposed provision would mark a paradigm shift away from the accepted principle of arbitration as a bilateral consensual process affecting only the parties subject to the arbitration agreement. One might expect any such shift to work both ways. For example, if a tribunal were able to order the termination of a legal finance agreement between the claimant and its financier or compel the claimant to return the funding received to the financier (6 (a)), why should the claimant and/or financier not seek an order against the State for the recovery of the costs of the funding where a claim is successful? There appears to be little basis in principle for altering the jurisdiction of the tribunal with respect to relations between third parties only in the way proposed in the draft.

<u>Part C (disclosure)</u>

The issue of the disclosure of legal finance arrangements is a relatively well-trodden discursive path in respect of ISDS. It is dealt with exhaustively in chapter 4 of the ICCA-QM Report and in the Appendix thereto, where suggested principles regarding disclosure and conflicts of interest are proposed. As set out above ('The Current State of Third-Party Funding in International Investment Arbitration'), disclosure obligations already have been developing under the rules (and proposed amendments to those rules) of the major international arbitral institutions, in treaties, and in tribunal rulings.

Any rule requiring disclosure should focus on the proper purpose of such a rule: for example, to identify potential conflicts of interest between those sitting on a tribunal and a funder, not to provide a respondent State with the means to engage in 'fishing' exercises as part of a 'long-game' strategy of wearing a claimant down or to seek to discover privileged information regarding the claimant's strategy or assessment of a case.

In that regard, the draft provision obliging the claimant to disclose the funding agreement (apparently unredacted) and its terms (paragraph 1 (c)) and empowering the tribunal to request details of the funding return (paragraph 2 (b)) are completely irrelevant to the issue of conflicts and would enable a State to plot a procedural strategy in an attempt to exhaust the funding.

ILFA also notes the broad application of the draft provision. Draft provision 1 is such that a contingency arrangement between a claimant and its legal representatives would, under draft provision 7, be disclosable. ILFA repeats the comments above in respect of the definition of 'funding'.

Part D (Costs)

Draft provision 9 (security for costs)

The decision of the tribunal in *RSM Production Corporation v. St. Lucia*[76] set a number of hares running in the context of the jurisdiction of a tribunal to compel a funded claimant to provide security for the respondent State's costs.

The ICCA-QM Report addressed this issue in some detail[77] and proposed evenly balanced principles in part D of its Appendix:

> *'D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.*
>
> *D.2. The terms of any funding arrangement, including ATE, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).*
>
> *D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.'*

Principles D1 and D2 are broadly reflected in the recent jurisprudence where tribunals have been asked to rule on States' motions seeking security for costs[78]. Those principles are as follows:

- Tribunals seem to agree that security for costs orders raise access to justice issues, which is why provision of security should be ordered only in exceptional circumstances.
- the mere involvement of a third-party funder does not warrant a security for costs order. Third-party funding has become a common practice and requiring security for costs whenever a third-party funder is involved risks blocking potentially legitimate claims.

[76] (ARB/12/10) *supra*.
[77] Chapter 6.
[78] *See, e.g., EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (23 June 2015); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013 – 15), Procedural Order No. 10 (11 Jan. 2016) 59, 77 – 78, 83; *Guaracachi & Rurelec v. Bolivia* (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013) 6 – 7); *Tennant Energy LLC v. Canada,* PCA Case No. 2018-54).

- the mere fact that a third-party funder supports an otherwise impecunious claimant is an insufficient reason to order security for costs. **For impecunious parties, the help of a third-party funder will often be the only way to seek redress under investment treaties**.
- Exceptional circumstances that may justify a security for costs order include: (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) other evidence of a claimant's bad faith or improper behaviour[79].

The passage in bold sits very comfortably with ILFA's opening comments above.

ILFA sees no justifiable reason to adopt draft provision 9 (A) given the established jurisprudence, which strikes a fair balance between access to justice and protecting States against a claimant's improper behaviour. Provision 9 option B is relatively benign, save that it is unnecessary given the existing jurisprudence setting out the relevant principles that are in part reflective of the approach advocated in the ICCA-QM Report.

<u>Draft provision 10 (allocation of costs)</u>

Option A in draft provision 10 seeks to sidestep jurisprudence on a claimant's ability to recover from the losing party its costs where those costs are funded. That principle was established by the tribunal in *Kardassopoulos & Fuchs*[80]. ILFA submits that there is no compelling reason to impinge on that principle which has been applied for over ten years.

Option B is an attempt to shut-down an incipient jurisprudence heralded by the decision in *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Ltd*[81], where the arbitrator permitted recovery of the claimant's funding costs (including the return payable to the funder) of pursuing the respondent Essar Oilfield. In that case, the arbitrator found that Essar had set out to cripple the claimant financially, whose impecuniosity had been caused by Essar and for whom legal finance was the only alternative open to it.

The ICCA-QM Report proposed principles addressing costs[82]. They concurred with the approach in *Kardassopoulos & Fuchs*. As to recoverability of funders' returns, they suggested that:

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

ILFA considers that this strikes a fair balance between claimant investors and States and, to this extent, accepts that the standard approach to disclosure of funding arrangements would need to be slightly varied. ILFA members are aware of claims in which they are currently involved where claimants have pleaded

[79] *Tennant Energy LLC v. Canada*, PCA Case No. 2018-54.
[80] *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15), Award, 3 March 2010
[81] [2016] EWHC 2361 (Comm).
[82] Chapter 6 and Appendix C.

the recovery of their funding costs in the light of the egregious behaviour of respondent States underpinning their alleged Treaty breaches.

ILFA notes the Secretariat's suggestion that the UNCITRAL WG III may wish to consider whether funders should be liable to meet successful respondent State's unpaid costs ordered in their favour. ILFA repeats its comments in respect of draft provision 6 above. If such a shift in the bi-lateral consensus to arbitration is contemplated, then it would seem equitable for funders to be able to recover funding costs against recalcitrant States, including where a funder is obliged to provide security for a State's costs, something recognised in the ICCA-QM Report[83].

ILFA also notes the Secretariat's suggestion that the UNICTRAL WG III considers promulgating a Code of Conduct for funders. Without addressing the issues recommended for consideration within such a Code, ILFA submits that suitable voluntary regulation exists in the form of *inter alia* the UK's Association of Litigation Funders' Code of Conduct[84].

5. Concluding remarks

ILFA hopes that the Secretariat and the participants in UNCITRAL's WG III find these comments helpful.

ILFA reiterates that it stands ready to assist and work with the Secretariat and UNCITRAL WG III with respect to the Proposals. ILFA considers that it is well placed to provide such assistance, given its mandate and global reach, and would be delighted to engage with and provide additional data relevant to the issues being considered by UNCITRAL WG III.

Yours faithfully,

Leslie Perrin
Chairman, ILFA

[83] Appendix D3.
[84] *See also* HKIAC's 'Code of Practice for the Third-Party Funding of Arbitration', Arbitration Ordnance (Chapter 609).

Appendix 1 – Decisions on Rule 41(5) Manifest Lack of Legal Merit Applications (2008 – 2021)

Case name	Date of Decision or Award	Finding that Claim is Manifestly Without Legal Merit
Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25)	12 May 2008	Partial
Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/3)	2 February 2009	No
Global Trading Resource Corp. and Globex International, Inc. v. Ukraine (ICSID Case No. ARB/09/11)	1 December 2010	Yes
RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6)	10 December 2010	Yes
Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13)	4 April 2012	No
Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary (ICSID Case No. ARB/12/3)	16 January 2013	Partial
Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary (ICSID Case No. ARB/12/2)	11 March 2013	Partial
Pan American Energy LLC v. Plurinational State of Bolivia (ICSID Case No. ARB/10/8)	26 April 2013	No
Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12)	2 July 2013	No
Mobile TeleSystems OJSC v. Republic of Uzbekistan (ICSID Case No. ARB(AF)/12/7)	14 November 2013	No
Lundin Tunisia B. V. v. Republic of Tunisia (ICSID Case No. ARB/12/30)	6 January 2014	No
Elsamex, S.A. v. Republic of Honduras (ICSID Case No. ARB/09/4) [Annulment]	7 January 2014	No
Edenred SA v. Hungary (ICSID Case No. ARB/13/21)	6 June 2014	No

Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20) [Annulment]	25 June 2014	No
PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea (ICSID Case No. ARB/13/33)	28 October 2014	No
MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (ICSID Case No. ARB/13/32)	2 December 2014	No
CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)	27 January 2015	No
Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. ARB/13/28)	17 March 2015	No
Elektrogospodarstvo Slovenije - razvoj in inzeniring d.o.o. v. Bosnia and Herzegovina (ICSID Case No. ARB/14/13)	3 November 2015	No
Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/22) [Annulment]	8 March 2016	No
Mathias Kruck and others v. Kingdom of Spain (ICSID Case No. ARB/15/23)	14 March 2016	No
Álvarez y Marín Corporación S.A. and others v. Republic of Panama (ICSID Case No. ARB/15/14)	4 April 2016	No
Lion Mexico Consolidated L.P. v. United Mexican States (ICSID Case No. ARB(AF)/15/2)	12 December 2016	No
Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)	9 March 2017	Yes
Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)	20 March 2017	No
Mabco Constructions SA v. Republic of Kosovo (ICSID Case No. ARB/17/25)	7 February 2018	No
Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15)	31 May 2018	No
African Petroleum Gambia Limited and APCL Gambia B.V. v. Republic of The Gambia (ICSID Case No. ARB/17/38)	31 December 2018	No
Edenred SA v. Hungary (ICSID Case No. ARB/13/21) [Revision]	7 February 2019	Yes

Alverley Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30)	1 August 2019	No
Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait (ICSID Case No. ARB/18/2)	1 November 2019	Yes
Red Eagle Exploration Limited v. Republic of Colombia (ICSID Case No. ARB/18/12)	16 December 2019	No
Galway Gold Inc. v. Republic of Colombia (ICSID Case No. ARB/18/13)	20 December 2019	No
Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30	6 April 2020	Yes
Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany (ICSID Case No. ARB/19/29)	24 July 2020	No
InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12) [Revision]	8 March 2021	Yes
Glencore International A.G. and others v. Republic of Colombia (ICSID Case No. ARB/19/22)	8 March 2021	No
Fengzhen Min v. Republic of Korea (ICSID Case No. ARB/20/26)	18 June 2021	Partial

Appendix 2 – Decisions on Security for Costs Applications (2015 – 2021)

Case name	Date of Decision or Order	Outcome
EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14)	23 June 2015	Rejected
Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10)	24 September 2015	Not public
BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ICSID Case No. ARB/14/22)	25 November 2015	Rejected
South American Silver Limited v. Bolivia (PCA Case No. 2013-15)	11 January 2016	Rejected
Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. ARB/13/28)	21 January 2016	Rejected
Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/18)	25 January 2016	Rejected
Muhammet Çap & Bankrupt Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)	09 February 2016	Not public
Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste (ICSID Case No. ARB/15/2)	13 February 2016	Rejected
Tamagot Bumi S.A. and Bumi Mauritania S.A. v. Islamic Republic of Mauritania (ICSID Case No. ARB/14/23)	19 September 2016	Not public
Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/18)	21 September 2016	Rejected

Lao Holdings N.V. v. The Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6)	20 October 2016	Rejected
Dawood Rawat v. The Republic of Mauritius (PCA Case No. 2016-20)	11 January 2017	Rejected
Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria (ICSID Case No. ARB/13/20)	01 February 2017	Rejected
Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)	12 April 2017	Rejected
Sergei Viktorovich Pugachev v. The Russian Federation (UNCITRAL)	07 July 2017	Rejected
Dominion Minerals Corp. v. Republic of Panama (ICSID Case No. ARB/16/13)	21 February 2018	Not public
WalAm Energy LLC v. Republic of Kenya (ICSID Case No. ARB/15/7)	31 May 2018	Not public
Anglo-Adriatic Group Limited v. Republic of Albania (ICSID Case No. ARB/17/6)	05 June 2018	Rejected
Luis García Armas v. Republic of Venezuela (ICSID Case No. ARB(AF)/16/1) | Manuel Garcia Armas et al. v. Republic of Venezuela (PCA Case No. 2016-08)	20 June 2018	Granted
Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/16/2; ICSID Case No. ADHOC/17/1)	26 July 2018	Rejected
Abed El Jaouni v. Lebanese Republic (ICSID Case No. ARB/15/3)	11 October 2018	Rejected

Consutel Group S.p.A. in liquidazione v. Algeria (PCA No. 2017-33) (UNCITRAL)	11 December 2018	Rejected
Muhammet Çap & Bankrupt Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)	13 December 2018	Not public
Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina (ICSID Case No. ARB/16/36)	18 June 2019	Rejected
Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia (PCA Case No. 2018-39)	09 July 2019	Rejected
Consutel Group S.p.A. in liquidazione v. Algeria (PCA No. 2017-33) (UNCITRAL)	10 July 2019	Rejected
Alverley Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30)	01 August 2019	Rejected
(1) Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v. The Russian Federation (PCA Case No. 2015-20) (UNCITRAL)	30 August 2019	Rejected
Ipek Investment Limited v. Republic of Turkey (ICSID Case No. ARB/18/18)	14 October 2019	Rejected
Cunico Resources N.V. v. Republic of North Macedonia (ICSID Case No. ARB/17/46)	17 October 2019	Not public
Jochem Bernard Buse v. Republic of Panama (ICSID Case No. ARB/17/12)	05 November 2019	Rejected
Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35)	27 January 2020	Rejected
Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35)	27 January 2020	Granted* (later rescinded on 9 June 2020 in Decision and PO No. 5)

Tennant Energy, LLC. v. Government of Canada (PCA Case No. 2018-54)	27 February 2020	Rejected
Eugene Kazmin v. Republic of Latvia (ICSID Case No. ARB/17/5)	13 April 2020	Granted
Theodoros Adamakopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49)	08 June 2020	Granted
Theodoros Adamakopoulos and others v. Republic of Cyprus (ICSID Case No. ARB/15/49)	08 June 2020	Rejected
Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)	28 September 2020	Rejected
Hope Services LLC v. Republic of Cameroon (ICSID Case No. ARB/20/2)	12 May 2021	Rejected