

2020

Panel III: New Parties in Arbitration

American University Business Law Review

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Recommended Citation

American University Business Law Review "Panel III: New Parties in Arbitration," American University Business Law Review, Vol. 8, No. 3 (2020) .

Available at: <https://digitalcommons.wcl.american.edu/aubl/vol8/iss3/4>

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PANEL III: NEW PARTIES IN ARBITRATION

PANEL 3: NEW PARTIES IN ARBITRATION

M = Moderator

P = Panelist

A = Attendee

M: Welcome back. I hope everybody enjoyed their lunch. Our third and final panel of the day, New Parties in Arbitration, will be moderated by WCL professor **M3**. **M3** is the director of the Business Law Program here at WCL, and his teaching and research interests are primarily in contracts and commercial law, including their international and comparative aspects. He was chair of the Section on Contracts of the Association of the American Law Schools 2005–2006 and chair of the Washington Steering Committee for the 18th International Congress of Comparative Law in 2010. He is an elected member of the American Law Institute and a titular member of the International Academy on Comparative Law. He has served on the board of directors of the Washington Foreign Law Society, on the board of editors for the American Journal of Comparative Law. Unfortunately, we do not allow video or audio recording, third-party video or audio recording. I will give it away to **M3**.

M3: Thanks very much for the kind introduction and thanks for all of you for being here. I am pleased that we have such a distinguished panel to talk about new parties and arbitration in what, I dare say, is the capstone and highlight of what I am sure has been an excellent day. So, we have three panelists, I will keep the introductions brief. **P1** graduated from WCL in 2017, so those of you who are current students, look up here. In two or three years, that is what you turn into. He does international arbitration at [Redacted]. I have a particular soft spot for [Redacted], my old law firm. He also does international trade work.

P2 is the managing director at [Redacted], that is a third-party funder in arbitration. Really, the debate among the panelists early was whether [Redacted] is big or huge, so that will give you an idea. He is at the forefront of life on the ground and third-party funding. He practiced international arbitration at [Redacted] and was the chief investment treaty negotiator for

Colombia. In addition, he teaches international arbitration as an adjunct professor at [Redacted]. In addition to those two fine gentlemen, we have **P3** — a tenured associate professor¹ at [Redacted]. She literally wrote the book on third-party funding and international arbitration. In addition, [she] has over a decade of experience in international arbitration.

So, **P3** will go first. After each of the presentations, we will have some interaction from the panel, and we will proceed that way. At the end, we will have time for questions from all of you. **P3**.

P3: Thank you so much, **M3**. I am so excited to be here. Thank you so much to the *American University Business Law Review* for inviting me to speak with you today. I am going to start us off talking about a particular new party in arbitration that has been something I have been studying for a decade at this point, which is third-party funding. Third-party funding was introduced in one of the earlier panels. So, one of our previous panelists gave you a quick, brief definition of what third-party funding is. I will go a little bit further into that in my remarks.

Basically, what I would like to focus on, in the brief time that I have, are three controversial issues in third-party funding and three less controversial issues in third-party funding that still have not been fully addressed. So, starting with the three controversial issues: I would say one of them, the first one, of course, is the definition. While one of my fellow panelists in the earlier panel gave a simple definition of third-party funding, I am talking about three challenges in third-party funding. The first is definitional. So, whereas on the earlier panel we received a very excellent short definition of third-party funding, in reality, the third-party funding has morphed and changed over the past several years. There are actually many different types [This] is making it much more challenging to figure out what it is we are regulating or what it is we are studying. So, [a] traditional third-party fund[er] is thought of as an outsider to the disputes, so a non-party and also not a lawyer — so we are not talking about contingency fee arrangements here — a non-party to the dispute offering one of the parties funds, and traditionally it is in exchange for some portion of the proceeds that the party might receive if they win the case. That is the traditional garden-variety classic third-party funding, if you will.

Now, we have got other types that are questionable as to whether they even are third-party funding. So, we have corporate finance where we have funders that are offering money to companies to finance their operating expenses while they go through arbitration. We also have equity investment by third-party funders where they take an equity stake or an ownership

1. Since Promoted.

position within a party or ownership over some of the party's assets. For example, in patent cases, there are sometimes some rights to the intellectual property [or shares in the company] that are traded in exchange for the third-party funding, that sort of thing. We also have philanthropy. We also [have] non-profit funders, so funders that exist with another primary motivation besides profit. Those funders are actually investing in arbitration for ideological reasons — they want a certain result, or they want to support a certain policy goal. These are all things that go into this definitional problem. So, we can talk about that further as we continue our discussion. I just wanted to put that out there as one controversial issue.

A second controversial issue is awarding the cost of funding to the winning party. Something that is very common, generally, in arbitration is that — not all arbitration, but in some arbitration, particularly if it involves a UK party or UK arbitrators, or any other jurisdiction that follows the “loser pays” rule — if you win the arbitration, then you get awarded cost. So, the losing side has to pay the cost[s] of the winner. That is very common, and the cost[s] include things like attorney's fees, evidentiary costs, and other things that you would expect to be included in cost[s].

So, a question that has come up is whether the cost of funding, meaning if a party has to obtain third-party funding, of course the third-party funder is typically — most third-party funders are in it for profit. So, there is a cost, meaning the party has to pay a little more than purely reimbursing the funder for having paid the attorney's fees and evidentiary costs. The question is, is that cost something that is recoverable if the party wins? There has been at least one case, court case, in the United Kingdom — *Essar v. Norscot*.² In that case, the UK court — this is a domestic court case, so not an international arbitration — ruled that the cost was recoverable because, this is a narrowing of that rule, the court found that the losing party had created a situation that required the winning party to seek third-party funding in order to vindicate its rights. Meaning, the losing party had made the winning party impecunious, and, therefore, they had to get third-party funding. That is why the court said that the cost was recoverable. That has been a controversial decision: some say that it has far-reaching implications, others say that it is limited to its own facts. So, that is something that is controversial. It has not yet fully been addressed in third-party funding guidance or rules.

The last thing that I will mention, which was also discussed a little bit in one of the earlier panels, is investment arbitration. So, third-party funders do investment arbitration. The challenge is that investment arbitration, for those of you who do not know about how it is structured, in most situations,

2. *Essar Oilfield Serv. Ltd. v. Norscot Rig Mgmt. PVT Ltd.* [2016] EWHC-2361 (appeal taken from Eng. and Wales).

it is very one-sided in the sense that the investment treaties provide for rights for the investors and obligations for the states, which means, the investors — these are the corporations, sometimes individuals, but usually corporations — the claimants and the states are generally always the respondents. If the funders are trying to make money, they are going to invest in the claimants but may not necessarily invest in respondents. So, some states, many states, are outraged at this, and they do not want third-party funding involved in investment arbitration. So, there are some questions about whether or not third-party should either be treated differently, or some have argued it should not even be allowed. That is one of the debates that is out there. So, those are the three controversial issues.

I want to quickly mention three less controversial issues that nevertheless have not yet been addressed. There is a question mark there about how these issues will actually be addressed in future rules and guidelines, but, for now, they have not yet been addressed. One is privileges. As you know, evidentiary privileges are ways in which a party can block having to put information or give information to the opposing side. So, there is a question about whether or not information shared with a third-party funder can maintain a privilege. If you have an attorney-client privilege, or some other privilege over documents or information, if you share that with a third-party funder, that is technically not your attorney or not part of your attorney, have you waived your privilege? Most would agree. Most jurisdictions would agree, at least in principal, that the answer would be, “No, that is not an implicit or even an explicit waiver.” Yet, we do not have rules in the books to protect parties that are sharing information with third-party funders. Here, in the United States, we only have, as far as I know, three jurisdictions that have a statutory privilege, which would be Indiana, Nebraska, and Vermont.³ Other than that, you’re basically relying on case law. So, this is an issue that is not really controversial and yet has not yet been addressed, so I think more jurisdictions, not just in the United States, but worldwide, need to address it.

The second issue that is relatively uncontroversial is what I call a funder code of conduct or ethics. So, we have a few jurisdictions in the world in which funders have, themselves, come up with their own codes of conduct and codes of ethics. In the United Kingdom, we have the Association of Litigation Funders that has their own code of ethics.⁴ “Code of Conduct” is what they call it. We also, in the United States, have an American Legal

3. Ind. Code Ann. § 24-12-8-1; Neb. Rev. St. § 25-3301; Vt. Stat. tit. 8, § 2255.

4. *Code of Conduct for Litigation Funders*, ASSOCIATION OF LITIGATOR FUNDERS (Jan. 2018), <http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>.

Finance Association⁵ — they have a code of conduct. But, for the most part, those are not mandatory associations; those are voluntary, and they aren't widespread across the entire world. So, there is a question of, "How do we govern funder conduct and funder ethics?" I mean, in the attorney field you have to abide by the rules of professional conduct or whatever rules apply in your particular jurisdictions in which you are licensed. So, I think this is something that everybody agrees: funders should have ethics; they should have a code of conduct, or at least some sort of governing principles for their behavior. Yet, we do not have widespread adoption of written codes. That is something I think we should look at.

Tribunals have the power to order a party to disclose the existence of third-party funding and the name of the third-party funder. We do not really have any particular rules, as far as I am aware, in any particular arbitration institution yet that say that tribunals have to ask this question or that parties have to disclose. We do have guidelines; we have the IBA Guidelines on arbitration conflicts of interest.⁶ That does say that arbitrators should ask, but, again, those are guidelines, those aren't rules. But everyone agrees that tribunals have this power to ask the question. There is this gap between practice, which when tribunals feel they need to they do ask, and the guidelines and rules that do not necessarily make it explicit — that this is something that they have the power to do. That is something that is relatively uncontroversial, but still has not yet been addressed.

So, those are three controversial issues that are still being debated and three uncontroversial issues that I think need to be addressed formally. I look forward to the discussion. Thank you very much for listening.

M3: Thanks very much, **P3**. So, now there is a chance for the other panelists to give any comments or questions. Thoughts?

P1: Thanks, that was great, a wonderful overview. I have a couple of quick questions, particularly on your last point about the code of conduct for third-party funders. Namely, do you have a perspective on [who] should draft that document, who should administer it, and what type of institutions should administer it? If there are any particular substantive issues that you think should be tackled, primarily focused on such a code of conduct.

P3: Thank you very much, **P1**. That was a great question. So, who should administer it is a complex question. There are a few jurisdictions, off the top of my head, I am thinking of Singapore and Hong Kong, that by statute allow

5. *The ALFA Code of Conduct*, AMERICAN LEGAL FINANCE ASSOCIATION, <https://americanlegalfin.com/alfa-code-of-conduct/> (last visited Mar. 20, 2019).

6. *IBA Guidelines on Conflicts of Interest in International Arbitration*, INT'L BAR ASS'N (2014), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918>] (on file with speaker).

third-party funding in international arbitration. As part of their statutes, they require a code of conduct to be developed. Yet, those two jurisdictions have not yet developed that code of conduct. So, there is a code of conduct coming from the government of Singapore⁷ and the government of Hong Kong.⁸ We do not have it yet. So, that is one answer. You also have in the UK, I mentioned this, the Association of Litigation Funders. The government of the UK has said, “We are going to let you self-regulate third-party funders. So, as long as you can self-regulate successfully, we won’t interfere. We will let you do it yourself.”⁹ So far, that is what has been happening there. Then there are funders that actually have their own internal codes, they came up with a code, [and] that is their internal company policy. I know Bentham IMF has put theirs [sic] [code] out on their website. There are other funders that have them whether they may or not be public. So, I think right now it is sort of a hodgepodge of different possible regulators including self-regulation. I do not really have an ideal sense of who should regulate, but I do think that the biggest concern in my view is consumer protection, making sure that whoever is hiring the funder is sure that they are getting a funder that is reputable, that is well-capitalized, that is going to be supportive of their lawsuit, not interfere too drastically, or interfere at all, in their attorney-client relationship. I think those are important; and then legitimacy of the system. So, those are things that I think the funder code of conduct should address. Thanks.

M3: P2, do you want to make a comment, or do you just want to head straight into your presentation? I will leave it to you.

P2: I will do a little bit of both.

M3: Okay, great.

P2: Just a comment, because **P3** referenced to one of the more controversial points is a good segue into why we are discussing third-party funding here. Why is it now so controversial mainly in investor-state arbitration? As you explained, part of the reason is that a state is there, there is the perception that because of third-party funders, there are more cases or there will be cases in investor-state arbitrations. Some of them may be frivolous. I will leave it there because I want to sort of demystify that idea that because there is third-party funding in the world, there should be more cases. Quite to the contrary, in many respects.

Now, before explaining one of my points in the presentation, which is the

7. CIVIL LAW ACT OF 2017 [CIVIL LAW ACT] § 5B (Singapore).

8. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017) A143 O.H.K., § 98P.

9. See generally Code of Conduct for Litigation Funders, 2018, Ass’n of Litig. Funders.

procedure that we go through to determine whether we would fund a case or not, I would like to say that it is entirely true in investment-treaty arbitration [that] the most likely party that would be funded are claimants. Mainly because the treaties do not provide obligations for investors, and therefore the most a state can do in a case is not lose or get an award for cost in its favor. It cannot be given any damages awards if it is strictly an investment-treaty arbitration. If we are referring, however, to a commercial contract arbitration, and a state or a state-owned entity is involved, there is nothing preventing the state or the state-owned entity from being the claimant. That in itself puts you in a position where the state or the state-owned company can be funded. In fact, we are actually funding a state-owned company in the enforcement of an award currently. So, there is a concrete example. Also, states have been funding [sic] by non-for-profit funders, and that is a case that you may have already heard of. It is *Philip Morris v. Uruguay* case,¹⁰ but that was for a non-profit. So, all-in-all, it is true that [in] investor-treaty arbitration, most of the companies are being funded, not the state. If you put into the equation a contract, either investment-related or not, the possibility for the state-owned company or the state is there for getting funding. With that, let's talk about the process.

I won't go into the definition, I think that **P3** has done a marvelous job in terms of providing the more specific and wider definitions. I personally subscribe to the wider definition. I would only say that a third-party funder could be the lawyers if there is, in fact, a contingency fee. Who is funding the case [are] the lawyers in many respects because they're reducing their fees for a profit. The damages award is favorable. It could be the bank, or it could be your aunt. The thing here is, in many of those cases, nobody asks, "Why?" and, "Where is the third-party funding?" I think that third-party funding has become sort of the public eye with investors at arbitration and with questions on ethics.

Let's tackle three questions here. First, I will go beyond the definition, I do not want to define anything. I just want to say what happens — and I want this to be clear — if the case is lost, the claimant loses, then the third-party funder loses everything, the whole investment. If the claim is \$5 million in lawyer's fees, the funder loses \$5 million. But does the lawyer lose [it] or the claimant? They lose their case, of course, but they are not losing the investment — that is a clear element here. What happens if they win? If they win, then the funder gets, because of his investment, a percentage of the damages award or a multiple of the investment. It is for-profit or at least the institutional fund[ers] that I am referring to.

10. *Philip Morris v. Oriental Republic of Uruguay*, 56 ILM 1 (2017).

These are the issues, and I will not address all of them, but the presentation will be there for your reading later. As far as national requirements, what is the due diligence process? Who controls [it]? Which is the key question in this whole discussion. Let's look at this slide here. That is the whole financial process. The one that you cannot see, and I apologize for that, says, "due diligence process." This is what we go through. We are first approached by either a client or counsel; eighty percent of our portfolio includes cases that have been originated by counsel. So, counsel really becomes our target if we are speaking in terms of marketing processes. After being approached, we run a conflict check, just like a law firm would do, to make sure that we have no conflict with the parties, to make sure that we have no conflict with the counsel, to ask ourselves whether the experts that we may be consulting later on have any conflict [with] either party, et cetera. We run a conflict check, as any firm would do. Then, we enter into a non-disclosure agreement, basically, for everyone's protection — we will protect your information, you will protect our financial information, and the model that we work on. Then we go into the slide that you cannot see, and I apologize for that. The due diligence process — that is the most important part [of what] we do. After doing the due diligence process, we enter into a term sheet or offer terms — commercial terms, and that is a provisional offer. While we do that, we [go] outside of the third-party funding company, and we ask for a second opinion both on damages and on the substance of the case. If everything goes well, we then enter into a funding agreement. Then, the case begins being funded. While the funding happens, we receive reports from counsel as to what is going on in the case.

So, that brings me to one of the issues that **P3** raised about ethics [and] the code of conduct. One of our key elements, at least in many of the companies [where] I work, is [that] we are funders, and we are not counsel. We do not control the case. We do a very, some may think, annoying due diligence process, very in-depth, but once we launch the case, once we launch the funds, we step back, and counsel is counsel. We do not interfere with counsel's decisions. That, in part, is because we belong to the one of the associations that **P3** mentioned, which is the Association of Funders in the UK. Under their code of conduct, the lines between counsel and funders [are] very well determined.¹¹ In addition to that, in our business we are all licensed attorneys, and we understand very well that if we mess with the obligations that counsel has with its party, we may be disbarred. I love being licensed.

So, let's take one step and let me answer one of the main criticisms. Do

11. See generally Code of Conduct for Litigation Funders, 2017, Ass'n of Litig. Funders, ¶ 2.

we fund frivolous claims? You'll answer that question after I explain the process that we go through. So, what do we ask for? We ask for there to be a one-to-ten ratio between the cost of the arbitration, from point zero to the payment of the award; that is the cost of the whole arbitration, ten being the damages award. If that ratio is met, it becomes an interesting case financially. If that cost is not met, we simply say, "We are sorry that you have been mistreated, but we cannot have a funding conversation." It is refreshing because we are not abusing anybody's time, we are simply saying we would, or we would not be interested in it financially. If that is met, then we move forward, we look into the budget of the arbitration. Who provides a budget? The lawyers. We look into whether it could be enforced. There are jurisdictions, for instance, investment arbitration, where you know that it is more difficult to enforce an award. In Latin America, you may have some thoughts; in other countries, you may have some thoughts. If it is not enforceable, we may not go in. If it is enforceable, but it is difficult to enforce, that gets into our model. It may be difficult, so it may take not one year, but three years, so that needs to be taken into the financial model, so that at the end of the day we can think, "What kind of proposal will we make to the party and to counsel?" We look into the merits and into jurisdiction. All these elements are analyzed by people who have done ten or fifteen years of their legal career into international investment arbitration or international commercial arbitration. If that goes well, then we offer terms. The terms normally go as follows; these are examples. This is not the offer that we always [sic], but these are examples. In year two, we would expect about twenty-five percent of the damages award or two and a half times the investment. That increases every two years: thirty percent, thirty-five percent, up to forty percent. With the objective that the funded part[y] never gets less than fifty percent of the damages award that they receive. If it is earlier in time, then you will get more.

With that, I think that I have answered the question of whether we fund frivolous claims. There is no reason why we would do that because ultimately if we did it, we would be just wasting money, so, rationally, there is no way that we would do that. Is there a risk? Yes, there is a risk, but the idea is that through, what we call, the gold standard of the review, we get to a point where we can say to the party, "Your case is good," or, "Your case has these flaws."

Just to finalize that is the process, and we will be discussing a few issues that you may also be interested in learning about. Such as, disclosure and what should be disclosed off the third-party fund. Thank you.

M3: Thanks very much. So, maybe some reactions from the other panelists?

P3: Thank you so much, **P2**. I have a question about, after you do your

due diligence or at least you've started to look at the legal merits of a case; if you decide you're not going to fund it, how do you break that news to the party? Do you give them any information about how you came to that decision or do you just say, "We are not going to fund you. The end?"

P2: That is a great question. Yesterday I had a conversation with one of the counsels that we have received leads from. I knew that there might be a little bit of a thorny relationship because we rejected one of their cases. To my good surprise, it was completely the opposite. They were thankful because we take the time, or we try to break the news quickly enough, so that they won't lose time, and we try to walk with them through the reasons that they do not allow us to fund the case. If it is a financial reason, the conversation is very quick. I mean, I didn't use to like discussing money issues before, and I thought, "Well, am I going to be able to do this?" It is very quick because you say, "Listen, there is nothing that we can do." An ICSID case costs, at the very least, I would say at the low end — this is being very optimistic — \$3.5 million, around \$3 million; and that is really working with a very slim budget. It could go up to \$6 million, et cetera. If you do not have the multiple \$60 million for a \$6 million in cost claim, then there is no conversation there. But if there is, for instance, a good damages perspective, but you have severe flaws in jurisdiction or severe flaws on the merits, then you have to analyze that and tell that to counsel. In this particular case that I am referring to, counsel basically came back to me, after we had to know, and she asked me whether — she knew that we were not going to fund it. But then the question became whether she should encourage the client to self-fund it. She came back to me to say, "I do not see the right in the concession. I am having second thoughts about this. What do you think?" Yesterday she came back with another case. So, the idea is to become part of the conversation in legal terms.

M3: I am going to just interject something for **P3** and **P2**. You do not have to respond now because I think we will have [sic] after the conclusion. But when we were talking about setting up the panel, I thought maybe there would be some interesting areas of disagreement. It is interesting to hear you all talk about this. Just from the scholarly and judicious perspective, following my usual subtlety, let me just say, I think this whole situation is outrageous! When you said that there were these controversial issues about definitions and codes of ethics, to me the controversy is that it exists! We seem to have skipped over that.

We might ask ourselves, why did it get skipped over? The potential answer is that there is an enormous conflict of interest — the people working on this are the lawyers who make money out of international commercial arbitration. Then you say, "Oh, no, we have these prestigious jurisdictions — the UK, Singapore, all of whom are doing everything they can to promote

their arbitral markets.” I mean, Singapore’s whole business model. So, if we move away from the perspective of counsel, arbitrators, the bar associations, and the people who will write the codes of ethics and think about the question from the symposium: is this a friend or a foe of corporations? It seems to me what underlies [sic] — and now being a little more serious. The question people keep on talking about, “All right, well, it is the claimant, not respondent.” Is this a friend or a foe? A lot of depends on, are you going to be the claimant or respondent?

I am interested to hear how the process works, but it is hard to avoid the idea that the number of arbitrations will be greater than the number of arbitrations than there were without the availability of extra money. I do not know that there is any way, theoretically, logically, or empirically, to refute that unless you say, “Oh, this was going to get brought and was going to get self-funded, and we dissuaded them when there was a hint of that.” But that would have to be fairly large number of cases. So, I will put that out there, and then hand the microphone over to **P1** to talk about some other issues. Then, I think, maybe we will have more stuff to talk about.

P1: Thanks, **M3**, and thanks to the *BLR* for organizing this event and having all of us here. I look forward, very much, to the discussion afterwards, given **M3**’s points there. I will also like to add, just before moving into my presentation, that the ICSID rules committee has proposed some amendments to the rules. I do not know if either of you have had an opportunity to review amendments to Rule 21 suggesting a definition for a third-party funding.¹² Then, two obligations on parties that do engage in or have a third-party funder to both disclose the fact of third-party funding and the identity of the third-party funder. I think that goes to some of the disclosure issues that you didn’t get an opportunity to discuss, and then also some of the definitional issues that you discussed briefly. If you could both, maybe, talk about that more, I would love to hear your thoughts on the proposed rule.

The objective in including me in this panel is to round out the discussion of third parties involved in investment arbitration or in arbitration. I am not going to speak about third-party funding, but rather a third party being a state involved in arbitration.

Before diving into my discussion, I think it might be helpful to set up an example. If you imagine that there is state A and state B that have a bilateral investment treaty between them; and there is investor A and investor B, investor A being a national with a qualifying investment from state A, and investor B being the same of state B. The instance that I am talking about is

12. ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (Aug. 2018) (proposed amendment to rule 21).

where an investor, say investor A, decides to submit claims against state B. State A then becomes involved in the arbitration in some form. Usually, they are requested to partake in the interpretation of certain terms of the treaty or in some form of consultation with the state to see if there is a way to seek mutually agreeable solution to the dispute and find a settlement opportunity. The questions that I have contemplated in making this presentation are, “Why would my state want to become involved in a dispute between an investor and another state? When may a state participation [sic] under the law? What implication does a second state’s involvement in investment arbitration have for the investor-state dispute settlement system?” How this ties in with our discussion is primarily a question of conflicts of interest, but I do not think we really addressed it fully. Hopefully, it will get addressed in the questions and answers portion of the panel.

So, my first point, why states might want to participate in an investor-state dispute settlement? I think, in part, the answer is obvious — self-preservation is a big interest. When two states have a treaty with each other, and an investor of one state sues the other state, the two parties to that dispute are that investor and the opposing or contrary state. So, to take our example, investor A sues state B. State B is a party to that dispute and is able to submit its interpretation of the relevant treaty, but state A is left out in the cold where the interpretation of that treaty might eventually be used against state A. Of course, it is a member of that treaty or that investment instrument.

One of the perpetuating — not issues in investment arbitration, but something that makes this issue more prevalent — is we have this notion that there is no *stare decisis* in investment arbitration. So, there is no binding precedent, each case is *sui generis*, or is taken on its own merits, but that is not exactly true in practice. Tribunals regularly rely on other cases, and if you review a brief of investment arbitration submissions, it is rife with references to other interpretations of similar provisions. That is part of how the system functions; it is supposed to be a reliable and predictable system for investors. In fact, Carey Bourne and Gabrielle Carencro (ph), two very prominent arbitrators have suggested that this is the way of the future, that relying on precedent is how we build a predictable system. The problem is that that leaves the interpretation of the applicable treaty to the tribunal and the other state. So, again, taking the example: Investor A suing state B in [what is] a closed universe, where investor A gets to submit its interpretation of the treaty to the tribunal. The tribunal gets to interpret that. Potentially, state A doesn’t get any part of that interpretation; it doesn’t get to submit its own interpretation, despite having been party to the treaty negotiation and having built the treaty along with the other state party. As we see more multilateral agreements formed, this issue is compounded. If we take, again, the example and look at now state A, and let’s suggest that state A joins the

CPTPP — the TPP that went forward without the United States. If now, let's say, Japanese investors choose Australia, then state A — not to mention the other ten parties to that treaty — also has an interest in how the terms of that treaty are interpreted and applied, so the case had issue. So, this issue, then, is mediatizing, essentially, as these multilateral treaties are entered into more prevalently. There are some pretty clear manifestations of states' frustration with this approach. If you look at the more recently negotiated investment chapters of treaties, states have tried to define the protections that are afforded to investors more carefully —dropping any number of footnotes, for example, if you look at CPTPP trying to define what fair and equitable treatment is or what full protection and security is.

So, the states are taking into their own hands this interpretation. If you look at the USMCA, a similar example is provided where the state parties, the treaty, have tried to narrow the investment chapter by narrowing both the substantive investments that are protected by that chapter and the substantive protections afforded by that chapter. I know that WCL has a pretty big trade interest, so I think there is an interesting parallel in the WTO world where the United States has voiced its real frustration with the appellate body taking the same approach. Essentially taking former interpretations of these agreements, as opposed to taking the tech [sic] steps *sui generis*. Now the United States has refused to permit the election of an appellate body member, essentially frustrating that branch of the system.

So, it is clear that states have an interest in being party to these disputes in a way that lets them interpret the treaties that may be used against them at a later date. Time is going quickly. The second interest that a state might have in becoming involved in a dispute is the protection of an investor. Obviously, again, if an investor of state A sues state B, and the investor's claim is somewhat tenuous, state A might have an interest in interpreting the treaty and submitting its interpretation of the treaty to the tribunal in a way that is expansive but provides grounds for investor A to have a claim against state B. I will discuss some of the substantive and procedural interpretations that might be an issue that a state might take up in the second portion of this discussion.

So, secondly, when may states participate under the law? Without getting into too much detail, both the UNCITRAL rules and ICSID rules, as two of the most popular rules applicable to investment arbitration, provide for non-disputing party submissions to be submitted to the tribunal. But both sets of rules set up the tribunal as the gatekeeper of submissions, so the arbitral [sic] tribunal is endowed with significant discretion to decide whether it is going to accept these submissions or not. Treaty texts also sometimes provide avenues for interpretations of the treaty. In particular, I think an interesting example is [that] the NAFTA and the USMCA set up an

interpretive body that in 2001 rendered an interpretation of the NAFTA, while there were investments arbitrations ongoing under the NAFTA. This caused significant uproar. You can imagine an investor who has submitted a claim against the state, then, while that investment arbitration is going on, the state parties, including the state party that is the respondent in that investment arbitration, submits an interpretation of the treaty narrowing the scope of the protections provided to the claimants, investors, and potential claimants under that treaty. So, there is an inherent conflict of interest in that type of interpretation and that type of procedure.

There is another important type of provision that is included in a lot of treaties and has been ruled on recently in a number of cases, which is the denial of benefits. This type of provision, I think, is particularly interesting in this framework of the second state involvement in investor-state dispute settlements because of all of the procedural hurdles that can come up in the denial of benefits. If you think about this in practical terms, one state party's interpretation of all of the procedural hurdles involved in the denial of benefits could effectively either deny or provide access to the denial of benefits to another state. This is a huge, huge benefit or disadvantage, too, depending on how the state decides to interpret that provision. If you look at, again, [the] USMCA or the CPTPP, both of those treaties contained denial of benefits clauses that would be interpreted by one party; if another state is prevented to participate in the arbitration, up to eleven other parties.

So, to conclude: what implications does second state's participation have on the system? It has implications for the value of precedent — states being permitted to weigh in and particularize the meaning of texts may decrease the value of precedent. You can imagine that the state's interpretation of a particular term in a treaty would be valued greater than an alternative tribunal's interpretation of protections in a treaty. The alternative approach is to go further down this hole, or approach of *stare decisis* being essentially the practical approach to investment arbitration. It could frustrate states further, making them reluctant to continue with or sign up for more investment arbitration protection regimes. So, of course, there is a balance to be struck between the certainty for the investor and the certainty for the state. When the question is, "Who gets to interpret the treaty? Is it just the investor and just the opposing state? Is it the states that are also the party to the treaty and have a vested interest in the outcome and interpretation of the treaty at issue?"

Finally, just to conclude, so we can get back to our discussion on conflicts of interest, I think it is fairly clear from the first portion of this discussion that there are inherent conflicts of interest in a state's involvement in an investment arbitration. States have held out a consent to arbitration in a dispute settlement mechanism, and it is up to the investor to accept that

consent to arbitrate and go to the arbitration with that investor on the basis of the treaty. When the adverse states, or the state of the investor at issue, are then able to interpret the treaty, it has these other interests that are inherent in that issue. It can either benefit itself by narrowing the protections afforded by the treaty, so that later claims brought under that treaty have to be narrowed by the precedent that is caused by that disputed issue. It could potentially benefit the investor by broadening the definitions of the protections afforded under the treaty to let the investor have an effective claim against the state.

M3: Great. Thank you. So, I think it is now open to the panel for a bit of discussion. In that time, maybe the audience can be thinking about your questions. We have a few minutes left, we've managed our time reasonably well for plenty of interaction between the panelists and with you in the audience. Is there somebody that has a mic or something? Do people come up? Just shout. So, we will start with the panel because I may have floated a little question here or there in between.

P2: P1, thank you. I have some comments and reactions. Some may allow us to go back into third-party funding. I have a bit of a reaction to the idea of the investment treaty arbitration or investment arbitration system being informally ruled by the idea of *stare decisis*. I think that I understand what you meant, but I take a little bit of a different approach. I think that, technically, it is not *stare decisis*, but at the same time it is completely that, if you read any brief either from responder or claimant, you will see a plethora of decisions being cited. What I see in the system is both counsel for claimant and respondent looking and exploring into the lines of case jurisprudence that there are. Basically, taking into account those decisions to support their cases. That is what I see really happening. That being said, I think that the system, the investor-state arbitration system — we haven't discussed this, but I will put it out there — is one that has been unfairly treated because there is this perception that everything is inconsistent. But there is no consistency at all, and you can basically argue whatever you want in an investment treaty case, which I think is not true. The system has really about thirty years of real existence or forty years, fifty years, of real existence. The system has, indeed, decided a few topics, which I would call *jurisprudence constante*. Basically, these issues that have been decided, and no tribunal would ever try to modify it. I will give you a couple of examples.

The question of whether federal agencies create responsibility for the state, which is an easy public international law question. But in the investment treaty arbitration, the question was posed, and it was answered. I think it said a lot. Another one could be things such as whether minority shareholders or minority investors could bring a claim. The question was posed, and it has been settled. Nobody would think of bringing that question.

I mean, they might, but they may not have learned anything in thirty years. So, I think that all in all I would depart from the idea there is strong stare decisis, and I would embrace the idea that on some topics there is this idea of *jurisprudence constante*.

Now, on other issues, I think that your presentation was so good because it ultimately encapsulated the idea of these cases which [are] controversial because they involve public interest of the nation and, sometimes, of the world. Think about the projects that are involved: sometimes, healthcare issues are involved; sometimes, the environment is involved. So, that is why it is so true that the states, and sometimes the states that are not party to the controversy, may have a say. I could talk a little bit more, but I won't. Thank you.

P3: I do not know if **P1** wanted to respond, or I could jump in. I will just say I really thought your presentation was fascinating, and I am particularly fascinated by this idea states having a say in the interpretation of treaties to which they are party. So, just to be a little controversial along the lines of **M3**, here, I would like to say, what if the treaty is gigantic? So, the ICSID treaty, for example, has 158–159 parties or so. The New York Convention, which is the other treaty by which international arbitration awards are enforced, 150-some odd parties as well. So, if it is just a free trade agreement between state A and state B, it is a little easier to say, “Okay, if there is a claim against state B, let state A be in amicus.” But if it is a debate about the meaning of the New York Convention, or an issue of the meeting of the ICSID convention, can you have 150-some odd amici? Is there a limit? I do not know. What would you say to that?

P1: I think I can tie together a couple of points here and addressing [sic] both of your questions. The idea that I think states should be able to participate in these investment arbitrations in order to help to find terms, in particular, the protections that they have agreed to offer to investors under the treaty. So, when, again, it is investor A suing state B, state A has an interest in the outcome of how the treaty, and the protections in particular, are interpreted. So, I think, as opposed [to] the New York Convention on the enforcement and protection of awards or the ICSID convention, those aren't necessarily substantive protections that are being afforded to the investor. Rather, they are either jurisdictional hurdles that an investor has to overcome in order to gain access to arbitration or similar jurisdictional hurdles for the enforcement of an award, usually interpreted by the courts. I do not think that a state has as large of an interest in the interpretation of those types of provisions, as, essentially, the protections that it has offered already to afford to investors, but they are interpreted in a way that may be expanded following the negotiation of the treaty. So, not by their own terms. Not by the terms of how the state A and state B concluded this treaty, but by

state B's interpretation of the treaty and investor A's interpretation of the treaty.

Then, to address **P2**'s concern that *stare decisis* isn't exactly germane in investment arbitration — I totally agree. I would suggest that it is something like *stare decisis*-like because, as these protections are interpreted over and over again, there is consistency in the way that they are interpreted, but there are slight differences if you look at fair and equitable treatment and the inclusion of an investor's legitimate expectations, for example. That has been a contentious and controversial issue in a number of awards. Certainly, as you say, it is a young system, and as more awards are rendered on these issues, it is refined and whittled down to a point. But the point is that the whittling down is happening by virtue of an investor's interpretation and a state's interpretation, as opposed to a state-to-state agreement that was entered into by the terms of those two states as opposed to a private entity.

P2: I think that we agree, and I would only add that the beauty of the investment treaty arbitration system is that it gets that input from caselaw for its development. At the same time, this is the other part, there is a treaty-making power that also helps that development. It is kind of a symbiotic relationship because the jurisprudence is there, and then the drafters read the jurisprudence and sometimes adopt what has been there and qualified into new treaties. There are examples of that. So, for instance, one example of this is, for those of you that are aware of the use of the MFN to import procedural provisions from one treaty into the applicable treaty or dispute settlement provisions of one more favorable treaty into the applicable treaty. That is a doctrine called the Maffezzini Doctrine after the case that created it.¹³ After that was implemented in many, many, many cases, there was a backlash, and the United States proposed in the old Free Trade Agreement of the Americas in a little footnote. That agreement never came to life. The United States proposed a little footnote in which that Maffezzini Doctrine was prohibited, mainly. That in itself was adopted in many other treaties throughout the world. Now, new treaties have a rejection to that doctrine. So, ultimately there is this relationship between treaty-makers and cases, which makes this all more fun.

M3: Questions from the audience?

A4: [audience question]

13. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25. 2000); see Tribunale federale [TF] [Federal Tribunal] June 29, 2017, 4A_600/2016 (Switz.); see also *CAS Award in the Platini Case Upheld by the Swiss Supreme Court*, SWISS INT'L ARB. DECISIONS, <http://www.swissarbitrationdecisions.com/cas-award-platini-case-upheld-swiss-supreme-court> (last visited Aug. 28, 2019).

P3: Absolutely. Great question, thank you raising that. So, here is something to consider. If you look at the domestic court context, one of the things that judges are very embarrassed [by] is when they get reversed. So, if you can think about that in the arbitration context, similarly arbitrators do not like for their awards to be overturned for whatever reason, whether it is on the merits or otherwise. So, let's say the arbitrator could have willful ignorance about whether there is a funder, "I do not ask, I do not want to know. Do not tell me whether there is a funder. I am going to decide the case." Then, later on, the losing party, and it usually is the loser, is unhappy with the award for some reason and is looking for any possible reason to challenge it. Whether it is a legitimate reason or not, they are just looking for some reason to challenge the award. They find out that there was a funder; they find out that the arbitrator didn't disclose some connection to that funder because the arbitrator didn't know about it. They intentionally tried not to know about it, but they can still use that to challenge the award. The arbitrator wouldn't be able to argue, "Well, I didn't know. That is why I was not affected." That would not be an argument that would stand up in court. It would be an assumption made that by not disclosing this connection, or at least not asking about it, there must be some malicious intent on the part of the arbitrator to hide it. That would be the way the court would view it, and, therefore, the award would be potentially set aside, vacated, or whatever the court decides to do with it.

To avoid that on the back end because the parties have spent time, money, energy, frustration, all this to get through this arbitration, and to have an award, and then it be overturned, is frustrating for everybody. So, to avoid all of that, it is better for arbitrators to ask the question at the front end, get an answer, and then there is the key, they can disclose, "Actually, you're being funded by funder A. Well, five years ago I was at the council in a case funded by funder A." Disclose that to the parties. Often the parties will waive a conflict if it has specific parameters with respect to time and there is repetition, and also to things that you would have to look at. But the parties can say, "That is okay. We will let you still serve as our arbitrator. Thank you for disclosing that." Therefore, you then neutralize the possibility of the award being challenged on the back end. So, that is the reason.

P2: Just to supplement that. When I was still counsel to parties, I have been before tribunals, whereas counsel for the state, we didn't even raise any question as to the identity of the third-party funder. We didn't even ask the tribunal for anything. The minute the tribunal learned that there was third-party funding, they wanted to know who it was because the most valuable asset that an arbitrator has, it is his or her reputation. They want to know whether she or her law firm ever had a relationship with a funder to make sure that they have no conflict of interest. So, it is obvious that they want to

know.

I want to answer one question from **M3**, which is, “Why should this exist?” I mean, is it legitimate that third-party funding exists? The other question that you had is, “The numbers are not right. If there is party funding, there is going to be more cases overall.” I agree with that. Mathematically, that is true, but not with the premise that there will be more frivolous cases. So, where does that [take] us? That takes us to the first question. That takes us to — why is it legitimate to have it? Think about claimants that will not be able to bring their cases except for there being a funder. So, ultimately, it is related to an issue of access to justice. Is the issue [of] access to justice related to a profit? Yes, it is. Is the legal practice for profit? Yes, it is. So, the idea that you can actually do good for profit is not irrational and is not based on “la la land.” Ultimately, the basis is more access to justice — yes, for profit in some cases — and having all the actors follow a set of ethical and substantial controls, so that it can happen.

P3: May I be a little controversial? I will push back on that a little bit. So, yes, the legal industry is for profit and yes, we have allowed contingency fees — we allow attorneys to invest in their own cases. But we also have robust codes of ethics and conduct that are enforced by the bar with teeth: you can be disbarred; you can be suspended. You can be publicly reprimanded as an attorney if you engage in some practice that violates the rules regarding contingent fees. Pretty much every jurisdiction has some cap on contingent fees and things like that. So, we allow it, but we have all of these restrictions and rules. The third-party funding industry is not, at this point in time, governed by a similar set of rules, guidelines, and consequences. I am pushing back on that.

P2: No, that is a great question. Thank you, **P3**. I thought that we were not going to be able to disagree on something, but I am glad that we are.

M3: On that note, let me say that Karl Llewellyn, one of the great law professors of all time, said, “The job of the law professor is to stir up the students.” So, if we’ve achieved our goal, you go out and come to blows over third-party funding of arbitration over dessert and coffee outside. I think there are some concluding remarks.