

# A 'GAMBLER'S NIRVANA'?

## DEBUNKING ARBITRATION FUNDING MYTHS

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When is an arbitral claim a frivolous or speculative arbitral claim? When it fails? And if the claim that failed was funded, does that mean that funded arbitral claims are frivolous and speculative as a matter of course? And in those funded arbitral claims that fail, is the funder nonetheless the winner?

These issues (and others) may appear worthy of a philosophical debate over a fine red wine. Yet they increasingly form the prism through which actors in the world of international arbitration - specifically in investor-state dispute settlement ('ISDS')<sup>1</sup> - and in the more mainstream media<sup>2</sup>, are questioning the legitimacy of third-party funding. Are there any logical bases for doing so?

**The short answer is no.**



In its submission to UNCITRAL Working Group III, commenting on the latter's proposed reforms to third-party funding in ISDS, the International Litigation Finance Association ('ILFA') formulated a compelling evidence-based thesis in support of third-party funding, whilst simultaneously debunking many

anti-funding tropes<sup>3</sup>. ILFA highlighted that there is no evidence to support the assertion that funding leads to the pursuit of meritless or speculative claims. In fact, empirical research

***'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'<sup>4</sup>***

<sup>1</sup> See the UNCITRAL Working Group III Third Party Funding Reform Proposals (2021).

<sup>2</sup> See The Guardian (online), March 2025: 'Revealed: how Wall Street is making millions betting against green laws'

<sup>3</sup> See ILFA's submission dated 31 July 2021 (61088589e63c5979a9f22599\_ILFA comments UNCITRAL WG III TPF Reform Proposals FINAL.pdf).

<sup>4</sup> Ibid, citing Ina Popova and Katherine Seifert's research (both of Debevoise & Plimpton LLP).

Nor did the evidence suggest that funding leads to an increase in the number of ISDS claims, results in claims where damages are inflated, or gives rise to unpaid costs where such claims fail.



Moreover, to suggest that a funded claim that fails is a frivolous claim is, respectfully, a non sequitur. In *ELA USA Inc vs. the Republic of Estonia*<sup>5</sup>, an unsuccessful case brought under the US – Estonia bilateral investment treaty, the tribunal determined that the claimant had acted in good faith in pursuing its claims by way of arbitration and that the case presented ‘serious and complex’ issues and ‘was not frivolous or vexatious.’

Significantly and relatedly, ILFA’s commentary illustrates how funding for ISDS positively promotes the UN Global Compact, which strives for accountability, stability, equality and access to justice, leading to respect for human rights and the environment<sup>6</sup>, and U.N. Sustainable Development Goal 16, which 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<sup>7</sup>.

There are numerous examples of successful funded ISDS claims, in which third-party funding has resulted in the rule of law being upheld and ensured state accountability: see for instance *Kardassopoulos & Fuchs vs. Republic of Georgia*; *Dominion Minerals Corp. vs. Republic of Panama*, and of course the claims against the Bolivarian Republic of Venezuela.



More recently, in *GreenX Mining vs Republic of Poland*, the claimant, a listed entity, utilised third-party funding in its successful claim against Poland over the obstruction of a coking-coal project<sup>8</sup>. Last year, a UK sustainable paper and packaging company filed a claim against Poland over a renewable energy project<sup>9</sup>, following a trend set over the last ten years by the large volume of solar renewable-related claims brought against certain European states<sup>10</sup>. These claims are instructive with reference to a developing view, espoused in some quarters, linking funding to the pursuit of anti-environmental claims<sup>11</sup>. There is little evidence to support that contention.

With respect to *GreenX Mining*, the European Commission’s 2008 Raw Materials Initiative classed coking-coal as a critical raw material within the EU and the environmental implications of the project had been stringently managed in the granting of *GreenX*’s priority mining right. The overarching environmental impact of a renewable energy project is self-evident.

Whilst it is correct that the EU is pursuing a ‘coordinated withdrawal’ of EU member states from the Energy Charter Treaty (‘ECT’), reportedly on grounds that its investment protections could hinder efforts to mitigate climate change, the 2022 modernised version of the treaty (which includes the option to exclude protections for fossil fuel investments) is not yet in force and proponents of the ECT argue that member states are withdrawing from the treaty to avoid their obligations to investors, rather than because of climate change goals<sup>12</sup>.



Third-party funding of arbitration is not therefore the spectre some would portray it as. ILFA’s submission highlights that in ISDS overall, c. 27 – 29% of claims prevail and in the ICSID<sup>13</sup> context, 60% of cases that are funded result in a successful outcome for claimants. Equally however, it is not a ‘gambler’s nirvana’, the colourful metaphor used over ten years ago by Gavan Griffith KC in *RSM Production Corporation vs Saint Lucia*; ISDS claims are not easy and where they fail, the funder generally loses its investment.

Within a tightening funding market, continued funder interest and deployment in ISDS claims which encompass the good-faith assertion of treaty rights, support the rule of law and encourage good governance and sustainability is anticipated. Such claims are not speculative; but neither are they ‘risk-free’ from the perspective of third-party funders.



5 PCA Case No. 2018-42.

6 <https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law>.

7 <https://www.un.org/sustainabledevelopment/peace-justice/>.

8 The UNCITRAL tribunal ordered Poland to pay *GreenX Mining* c. GBP252m.

9 *Mondi Investments vs. Republic of Poland* (ICSID Case No ARB(AF)/24/1). It is unclear whether this claim is funded.

10 The majority of which have resulted in awards against the state.

11 See *The Guardian*: ‘Revealed; how Wall Street is making millions betting against green laws’ (supra).

12 The Energy Charter Secretariat reports that of the 162 cases brought under the ECT as at December 2023, 58% concerned renewable power generation, with only 33% relating to fossil fuels.

13 The International Centre for Settlement of Investment Disputes, administered under the auspices of the World Bank.