

### **Third Party Funding, Investment Arbitration and Climate Change: Are You Kidding Me?**

(CJH Notes for presentation of ICCA/Queen Mary draft report, Lisbon, 9 Oct 17)

Good morning to all. It is a pleasure to be here with you.

Many thanks to the organizers, Duarte in particular, for the opportunity to spend a long weekend in Lisbon.

Unlike Sabine and Anne, I am not a member of the Task Force. But I have followed its work with interest.

Unlike José Miguel, I am not a leading player on the stage of investment arbitration. But I'm not unacquainted with the field.

And I am almost entirely ignorant regarding climate change.

Allow me to rewind a bit:

My interest in TPF dates back some 7½ years.

In May 2010, I attended one of the LCIA's delightful symposia at Tylney Hall [IMAGE 1], in the English countryside. There I happened to strike up a conversation with a lawyer who – from his base in suburban New York – had set up a company to work in a sector that I had no idea even existed. But that seemed truly fascinating, and truly promising, to me.

The fellow that I spoke with (whom I have gotten to know fairly well over the intervening years) was the CEO of Burford Capital, far and away the largest player in the TPF space today, with a share price evolution reminiscent of that of other “first-starters” in new industries like Google, Amazon or Facebook [IMAGE 2].

After the conference, I did some reading on this nascent industry. Intrigued by what I found, I decided to write a short piece (a kind of “TPF for Dummies”) to fill what seemed to be a void in the literature at that time. This put me in touch with a handful of the movers-and-shakers of the market, and led to the publication of an article [IMAGE 3] which – while quite basic – was indeed one of the first published pieces on the topic.

In Spain, where I practice, the topic was quite unknown. The market was opaque. The likely participants (lawyers in large firms, principally) seemed to be quite in the dark about TPF. At the time, I wondered if some might know a lot more than they were willing to acknowledge. But since we lawyers find it hard to conceal or downplay out knowledge and experience, I believed (and still believe) that at that time (7½ years ago), TPF in my portion of the world at least, was either non-existent or in its infancy.

My interest in investment arbitration dates back some 10 years, when I became active in the areas of commercial and sports arbitration. But other than representing for a short time one of the most notorious serial claimants in the sector (many of you will be familiar with the Libananco case) [IMAGE 4], my direct, personal involvement in investor-state claims has been non-existent.

Still, the boom in investment arbitration over the past generation, in particular the past 15 years or so, is well-known to all [IMAGE 5].

And now to fast-forward a bit:

Today Spain is front-and-center for TPF in Europe, particularly in the area of investment arbitration. There have been two principal areas of focus.

The first – in which, by sheer coincidence, I have had substantial professional involvement over the past few years – involves the financing of claims (coincidentally, by Burford), against a historically-intransigent Latin American sovereign by insolvent Spanish entities involved in the energy and travel sectors subject to Spanish insolvency proceedings [IMAGE 6].

The second -in which I have not had any direct professional role -involves the nearly three dozen claims brought by international investors against Spain alleging violations of international treaty law (concretely, the Energy Charter Treaty) for the recent series of regulatory rollbacks to Spain's over-generous renewable energy subsidy regime [IMAGE 7]. Of the three cases decided to date, one – the most recent, the only one decided unanimously, the only one administered by ICSID and (perhaps) the one that is most relevant for future cases – was decided in favor of the investor. Several new claims are likely to follow, and funders are flocking to the potential claimants and their law firms to offer their services.

Fine, you are thinking, but what is the connection with climate change? Is TPF responsible for the increase in Atlantic Ocean water temperatures that seems to have contributed to this year's tragic hurricane season?

Well, no. The connection that I want to draw, in truth, is not so much an actual causal connection or linkage between TPF, investment arbitration and climate change; it is instead a kind of analogy between the understanding, acceptance and approach to dealing with these concepts that I wanted to draw.

A generation ago, say the early 1980's, climate change existed. But we didn't know it existed. It may have been a truth, but it was an uncomfortable or inconvenient truth [IMAGE 8]. It was easier to put our heads in the sand. Not to change our lifestyles. Climate change was the elephant in the room. It was there, but we didn't see it. And didn't really want to see it.

Little by little, this changed. The sheer weight of scientific evidence, the general consensus of the scientific community, has the world convinced that climate change is real, and is a real problem [IMAGE 9]. Well, not all the world; there remain a few "creationists" -the types who have trouble getting their arms around the concept of evolution -who take a more head-in-the-sand approach. [IMAGE 10]

And this consensus (or near-consensus) has led to global regulatory initiatives to address an issue which a generation ago was unknown, unaddressed and unregulated.

A half-generation ago, say the early/mid/1990's, investment arbitration existed. Its golden age was approaching. It was there, but few really saw it.

This has changed. Today, investment arbitration is on everyone's radar screen-lawyers, states, politicians, journalists, etc. But more than just being on the radar screen, investment arbitration is under intense scrutiny and even attack: not only by "outliers" and populist/anti-establishment types like Donald Trump, but by a much broader range of groups and institutions, including the august EU Commission itself.

A decade ago, TPF existed. But very few of us knew that (I certainly didn't). And it was uncomfortable. As a commentator that Catherine so delightfully cited in her book [\[IMAGE 11\]](#) put it, there was something “*fishy*” to TPF, an “*ick factor*” which made the topic uncomfortable. It was easier to ignore than to address. It too was an elephant in the room.

But today, TPF is a global phenomenon; as Catherine notes, it has become a permanent fixture in international arbitration. And one especially prevalent, and especially controversial, in the realm of investment arbitration. Where issues of policy abound and the impression of imbalance between the parties, their resources and experience is always strong and often well-founded. Private disputes do not often reach the public. Litigants in private disputes (and their advisors and financiers) are rarely referred to in the press as “vultures” or “sharks”. But investment claims are inherently of public interest. TPF investment claims can give these “vultures” or “sharks” new wings, or fins (as the case may be). If TPF promotes frivolous claims by impecunious parties, and at the same time can be used to insulate such parties from adverse costs awards, these concerns are of particular relevance in the world of investment arbitration.

So, as with climate change, we can no longer ignore TPF. It is here to stay. Consensus as to the specifics of possible regulation or soft law guidance will be elusive. The Task Force, from what I can see, deals deftly with the inescapable existence of differing underlying value/policy judgments on the issue. But the Draft Report frames the issues and includes useful suggestions for further study and possible soft law regulation.

Having lived in New York in the late 80's, I remember the influence of the Columbia University Professor and head of NASA's Goddard Institute for Space Studies James Hansen, whose work and voice can be said to have been a tipping point in respect of the scientific community's views, and the public's awareness, of climate change. [\[IMAGE 12\]](#)

I expect the future will show that the ICCA/Queen Mary Task Force and its work [\[IMAGE 13\]](#) will prove to be a similar tipping point in respect of the legal community's views and awareness of the existence, complexities and challenges of TPF in the area of international arbitration and its possible regulation.

So chapeau to the Task Force, and thanks again for the opportunity to be here with you today.