

# **National Security Harms: Third Party Litigation Funding Corrodes the Integrity of Rules-Based Trade, the Rule of Law, the Justice Sector, and Open Markets**

David M. Luna

Chair, Business at OECD (BIAC) Anti-Illicit Trade Expert Group (AITEG)

CEO, Luna Global Networks & Convergence Strategies

International Coalition Against Illicit Economies (ICAIE)

13 June 2024

Paris, France (Virtual Online)

## **Remarks and Statement**

Good morning, and good afternoon to our good friends in Europe.

Piotr Stryszowski, Head of Unit, Working Party on Countering Illicit Trade (WP-CIT), Mr. David Lowe, Intellectual Property Office, United Kingdom (UK IPO), and OECD and Business at OECD colleagues, and partners, thank you for the opportunity to participate in today's OECD-BIAC webinar on the "*Exploitation of IP Frameworks and Rules-Based Trade: Investor Funded Litigation Contributes to Illicit Economies and Damages Innovation and Market Integrity*".

First, as the Chair of Business at OECD's AITEG, let me commend the OECD and Business at OECD for putting this important transnational illicit threat on our radar, and inclusion as a policy discussion stream of the WP-CIT work program.

The reality today in a more complex, dangerous world, is that we are losing market share to criminals, terrorists, illicit threat networks, and their enablers who use the profits from illicit trade to finance greater chaos, corruption, insecurity, and instability.

But of course, it is not only an economic impact, illicit trade also has tremendous human, societal and security costs and consequences.

Today's bad actors and illicit threat networks co-opt states, infiltrate legitimate industries for diversification, export violence against our societies, and finance conflicts.

Similar to how intellectual property (IP) crime and cross-border financial crime help fuel greater illicit trade, money laundering, sanctions evasion, and foreign corrupt influence, Third Party Litigation Funding (TPLF) also harms the innovative spirit and economic and reputational interests of leading business and industrial firms around the world including the mining of critical minerals, development of medications, and including energy, defense, high-technology, and other sensitive sectors.

The secrecy surrounding TPLF and funding arrangements including through anonymous shell companies makes it impossible to know the precise source of much of the billions of dollars that are flowing into U.S. litigation pursuant to this practice.

However, some public reports estimate that the transnational third-party litigation finance industry attracted more than \$15 billion in capital in the United States and is expected to continue to grow steadily at over \$40+ billion globally in five (5) years, as some hedge funds, sovereign wealth funds, private equity firms, and other financiers invest in lawsuits in exchange for a percentage of any settlement or judgment.

TPLF is not benign. It is a growing risk to the national security of OECD member states and should be viewed properly as a lucrative illicit enterprise, and in some cases, state sponsored and commercial judicial criminality and terrorism that impacts the integrity of litigation and the justice system.

This is especially true as large foreign-sourced investments and sovereign wealth funds from China, Russia, and the United Arab Emirates (UAE), for example, are pouring into U.S. courts and those in some OECD member jurisdictions via TPLF and related lawfare cases, raise significant national, judicial, and economic security risks that imperil the rule of law and other important policy areas.

In the United States, malign forces including foreign actors, agents, and governments (or their proxies) continue to target and undermine U.S. national economic and security interests through the infiltration of the American litigation system.

In fact, both the national security and intelligence communities in the United States have stated that U.S. adversaries such as China and Russia continue to leverage the full scope of their political, economic, and military power to pursue their own disruptive national security goals as part of today's Great Power Competition.

The National Counterintelligence and Security Center has warned that "Russia and China operate globally, use all instruments of national power to target the United States, and have a broad range of sophisticated intelligence capabilities."

In their recent annual threat assessments, the Office of the Director of National Intelligence (ODNI) has echoed the concerns of the U.S. intelligence community, noting that China uses "whole-of-government efforts to spread [its] influence, undercut that of the United States, drive wedges between Washington and its allies and partners, and foster new international norms that favor the authoritarian Chinese system". Similarly, ODNI has underscored that "Russia presents one of the most serious foreign influence threats to the United States, using its intelligence services, proxies, and wide-ranging influence tools to try to divide Western alliances, and increase its sway around the world, while attempting to undermine U.S. global standing, amplify discord inside the United States, and influence U.S. voters and decision[-]making."

Given the concerted effort and enormous resources expended by foreign adversaries to pursue their national security goals, there is no reason to believe that exploiting litigation financing would be excluded from their hybrid warfare toolbox. These governments, either directly or indirectly, may seek to exert control over the strategy and outcome of a case, or a portfolio of cases through anonymity, third-party proxies, through the use of strategic corruption, and through covert malign influence operations.

Accessing and exploiting the judicial process, such foreign adversaries can instigate such specious and non-meritorious litigation, influence strategy, and encourage and capitalize from commercial disputes involving American companies to obtain proprietary information regarding sensitive technologies in defense-military, technology, and other highly sensitive industries to provide advantage to their home industries.

They are able to gain intellectual property (IP), confidential documents, and trade secrets of U.S. and OECD member state institutions and companies, as well as, operational market strategies and innovations.

In the past year, there have been numerous public reports indicating, for example, how sovereign wealth funds and non-U.S. citizens are investing in U.S. litigation. A recent Bloomberg Law report highlighted how Russian billionaires tied to President Putin were secretly pouring money into U.S. courts through TPLF. More specifically, the report informed how A1, a subsidiary of Russian financial giant Alfa Group, had funded lawsuits in New York and London, and at least a dozen cases in other parts of the world, using the TPLF judicial-business model as a way to avoid international sanctions.

Other reports have also informed how some Chinese-related investment firms and sovereign wealth funds have leveraged third-party litigation through many IP lawsuits in U.S. courts against some corporations to either profit financially, or to be sensitive trade information.

These newer market threats are among the reasons that the United States Congress have made it a priority to examine TPLF and related harms more closely including at yesterday's hearing by the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet with respect to intellectual property (IP) litigation financed by third party investors and foreign entities, including the impact of those developments on the U.S. IP system and our national security.

As I underscored at our recent plenary meeting of the OECD Working Party on Countering Illicit Trade (CP-CIT), the harms and impacts posed by TPLF to the rules-based international trading system, the rule of law, and market integrity, will only increase and imperil our trade and economic security agenda in the coming years.

Frankly, no industry sector is immune and all points in the global trade supply chain are vulnerable.

On one side of this litigation are the makers and innovators and legitimate traders – businesses across all industry sectors that develop new products, create jobs, drive trade, and help drive our economies forward.

On the other side are anonymous shell companies, often supported by non-transparent financial actors that, at best, free-ride on the global trading system or, at worst, allow transnational organized crime or malign state influencers to operate under a cloak of apparent legitimacy.

### **So what do we do about countering TPLF through our dynamic PPPs at the OECD?**

Business at OECD supports public-private partnerships to internationalize awareness of the TPLF and other cross-border illicit trade threats.

The OECD WP-CIT has been successfully enhancing evidence on IP crime in the context of global illicit trade and crime-based illicit financial flows. This includes, for example, a set of joint reports with the European Union Intellectual Property Office (EUIPO) on the scale and magnitude of illicit trade in counterfeit goods that has become a universally-accepted point of reference in OECD Member efforts to combat this form of illicit trade.

We should expand on our good work within the WP-CIT in recent years to advance this important policy work stream.

Business at OECD supports further evidence-based research by the OECD that helps to enhance information on the scale, magnitude, and damaging effects of misuse of legal IP frameworks through abusive litigation, especially by hedge funds, sovereign wealth funds and anonymous

shell companies, and highlights the role of these entities in global illicit trade and illicit financial flows.

Such a report could augment the Working Party's understanding on the nexus of transnational organized or state-sponsored financial networks in these illegal practices and their activities to grow illicit trade through illicit or unregulated finance, corruption, and organized crime.

Such a report would also build on two equally valid policy concerns.

The first is the role of these shadowy, non-transparent players and how these practices contribute to increasingly destructive illicit trade and illicit financial flows and disrupt the rule of law through global crime convergence and illicit activities.

The second is the urgent need to spotlight existing gaps in international trade and related systems that support the misuse of legal IP frameworks, facilitating damage to innovation, competitiveness, employment, and long-term economic growth.

We need to continue to level the playing field with a rules-based trading system in good working order across sectors, while upholding the principles of justice, fairness, and ethical conduct in our legal systems.

To succeed against this threat, companies and governments must join together. We have a chance to get out in front of TPLF abuse and structure global partnerships against it, before it is too late as the BIAC AITEG Vice-Chair underscored at the opening of this webinar.

It is only by leveraging our collaborative energies, expertise, shared-market intelligence, and unified dynamic networks, that we can more effectively mitigate some of these TPLF harmful impacts of illicit trade across borders, sectors, and communities.

In closing, the illicit threats and national security risks that the international community confronts each day are very real, growing in complexity, and accelerating particularly in the digital world as criminal entrepreneurs have leveraged the lack of disclosure of litigation funding mechanisms to steal wealth from OECD governments and industries alike, and to skirt sanctions if not our laws for greedy profits.

BIAC is committed to work through these common judicial security and market challenges across sectors to navigate these cross-border litigation abuses in our trade, commerce, and rule of law systems.

Thank you