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Master’s Thesis in Investment Treaty Arbitration
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“Tempering the Gambler’s Nirvana”
A Review into to the issues and regulation of Third Party Funding in Investment Treaty Arbitration

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# TABLE OF CONTENTS

TABLE OF ABREVIATIONS .................................................................................................................. 3
TABLE OF CASES ............................................................................................................................ 4
Introduction ........................................................................................................................................ 6
Objective and Methodology .............................................................................................................. 8
Definition of TPF in Investment Arbitration .................................................................................... 9
PART A .............................................................................................................................................. 11
1. Principle-Based issues with TPF .................................................................................................. 11
   1.1 Conflicts between TPF and Express Confidentiality .............................................................. 11
   1.2 Conflicts with TPF and Transparency ................................................................................... 15
   1.3 Enhancing the right to arbitration .......................................................................................... 18
   Conclusion on the principles ........................................................................................................ 20
2. Procedural-based issues with TPF ................................................................................................. 21
   2.1 Jurisdictional Issue - Does a funded claimant satisfy jurisdictional prerequisites?.............. 21
   2.2 The Enforcement Issue - Can TPF be a barrier to enforcement of an award? ................. 24
   2.3 The Impartiality Issues - Conflict of Interests and Disclosure ........................................... 26
   2.4 The Provisional Measures issue – Security for Costs ......................................................... 32
   Conclusion of the Procedural Aspects ......................................................................................... 38
PART B .............................................................................................................................................. 38
3. What form should potential Remedies take .............................................................................. 38
   3.1 How restrictive should the remedies be: Abolition vs. Restriction? ............................ 39
   3.2 Regulation through National Laws ..................................................................................... 41
   3.3 Regulation through Treaties ................................................................................................. 45
   3.4 Regulation through Arbitral Rules ...................................................................................... 47
   Conclusion on Regulatory Approaches ....................................................................................... 49
Overall Conclusion ........................................................................................................................ 49
Bibliography ..................................................................................................................................... 49
**TABLE OF ABREVIATIONS**

BIT: Bilateral Investment Treaty  
CAMC-CCB: Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada  
EU: European Union  
HKIAC: Hong Kong International Arbitration Centre  
IAR: Investment Arbitration Reporter  
IBA: International Bar Association  
ICC: International Chamber of Commerce  
ICCA: International Council for Commercial Arbitration  
ICSID: International Centre for Settlement of Investment Disputes  
IDLO: International Development Law Organisation  
IPL: International Public Law  
ITA: Investment Treaty Arbitration  
MIT: Multilateral Investment Treaty  
LCIA: London Court of International Arbitration  
TPF: Third Party Funding  
SIAC: Singapore International Arbitration Centre  
UNCITRAL: The United Nations Commission on International Trade Law
TABLE OF CASES

Domestic Cases

Canada (Ontario)


England & Wales

*Giles v Thompson* [1993] 3 All ER 321

*Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314

*Wintertthur Swiss Insurance Co & Or v AG (Manchester) Ltd (in Liquidation) & Ors*, [2006] EWHC 839 (Comm Ct)

*Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)

Ireland

*Personal Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27

Singapore

*Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another* [2007] 1 SLR 989

Sweden


United States of America (New York)


*Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484 (S.D.N.Y. 2011)

Investment Arbitration Cases

ICSID

*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28 1999

*Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No.3, 29 September 2006

*Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Formerly Aguas Provinciales)*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus curiae, 17 March 2006

*Abaclat and Others v The Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic)*, ICSID Case No ARB/07/05, Procedural Order No 3, Confidentiality Order, 27 January 2010
Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010

Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Government of Grenada, ICSID Case No. ARB/10/6, Tribunal’s Decision on Respondent’s Application for Security for Costs, 14 October 2010

Malicorp Ltd v Arab Republic of Egypt, ICSID Case No ARB/08/18, Award, 7 February 2011

Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures Requested by the Parties, 25 September 2011,


RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014

Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3, 12 June 2015

EuroGas Inc and Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 dated 23 June 2015

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11 (Occidental v. Ecuador), Decision on Annulment of the Award, 2 November 2015

Philip Morris v. Uruguay: Implications for Public Health Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016

**UNCITRAL**

Methanex Corporation v. United States of America, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Award, August 7, 2005

Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23

Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, UNCITRAL, Award, 17 December 2015

Introduction

Third party funding (TPF) is a method of financing legal proceedings, in which a party not directly connected to the proceedings funds one of the disputing parties, usually in return for a percentage of the final monetary settlement. The interests behind TPF are that the funded party will have the resources to pursue their claim, while the funder will be able to profit from a percentage of the final settlement. Traditionally, within common law-systems, TPF was excluded through application of the common law torts of “Champerty and Maintenance”. However, in the second half of the 20th century, many common law systems abolished the torts of “Champerty and Maintenance”. This effectively opened up TPF as a valid litigation option for many resource poor litigants and birthed a niche industry of litigation financiers. There is debate on TPF in general, with some believing that it allows legal recourse to include those that do not have the means to reasonably finance and confront legal wrongs imposed on them. Others state that there is a danger of letting the funder interests supersede the claimant’s, as exemplified by some retaliatory cases proceeding the Chevron v Ecuador arbitration, in which the funders had veto power over such aspects as the choice of attorneys and priority in the disbursement of a monetary award.

However, issues with the general system of TPF is not the focus of this thesis. Instead, focus will be on the issues it brings to the system of investment arbitration. While its operation is largely the same as within national jurisdictions, it does have the potential for damage of distinct principles and procedure of investment arbitration. At first look, TPF seems to complement the system of arbitration as a

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1 Steyn LJ, in Giles v Thompson [1993] 3 All ER 321 at 328, explained the doctrines thusly: “In modern idiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.”
2 In Civil law systems, unless TPF was not expressly excluded, was mostly allowed.
3 For example see s.14(2), Criminal Law Act 1967 (England and Wales) or Maintenance, Champerty and Barratry Abolition Act 1993 (NSW, Australia)
4 There is now several prominent litigation financing companies such as: Burford Capital Ltd., Harbour Litigation Funding, IMF Bentham and Longford Capital. For a more in-depth review of the industry in general see Hancock, B, ‘Who Rules the World of Litigation Funding?’ March 30, 2017, The American Lawyer.
6 Chevron Corp. v. Donziger, 800 F. Supp. 2d 484 (S.D.N.Y. 2011)
7 U.S. Chamber Institute for Legal Reform (2018), “Third Party Litigation Funding”
whole. If one considers that, at its core, arbitration is a user determined dispute settlement system, then questions of funding should be determined by the parties themselves. This may suggest that due to its emphasis on “Party Autonomy”, TPF is more aligned with arbitration than it is with court-based litigation, where the principles of justice and fairness take a more preferential role. Nevertheless, “Party Autonomy” is not the sole principle of arbitration and does not mean that TPF is harmonious with either general arbitration or in particular investment arbitration.

There is the general concern that a funder can actively change the process and end result of a dispute. This is seen through their influence over the funded party. As a funder will have a direct economic control over the funded party, they can dictate, as part of the funding agreement, outcomes such as early settlement, litigation strategies etc. The choice of approach, and it is submission to a third party, however, is squarely within party autonomy and does not raise any fundamental concerns. What is concerning is affected parts of process that are out with party autonomy. One can see below that TPF can affect general trends and principles of arbitration, i.e. transparency and confidentiality, while also conflicting with core aspects of procedure such as jurisdiction and impartiality.

This concern has given way to calls for regulation of TPF within the academic and global community. What was traditionally a “legal no mans land” for investment arbitration, with little regard given to regulation, has now had extensive academic commentary and State reactions to regulating TPF. Yet, comprehensive regulation of TPF remains rare and piecemeal within the arbitral world. The majority of jurisdictions and arbitral institutions, while aware of the issues, have made no serious effort to remedy through regulation. That being said, there has been some work done in three distinct areas of regulation: (i) National laws (ii) Trade/Investment Treaties and (iii) Arbitral Rules. Each area’s success however can be described as mixed. Therefore, the topic of this thesis is to first explore the potential issues of TPF and investment arbitration and then to examine and analysis the response to these issues through regulation.

8 Shaw G (2017), ‘Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit’, at 12
Objective and Methodology
This thesis’s objective is to provide answers to two questions: (A) “Should TPF be regulated within investment arbitration?”, and if so, (B) “What form and content should these regulations take?” The method to answer these questions, is an initial critical analysis into the issues posed by TPF in investment arbitration, Part A, with a latter comparative review of current regulation of TPF and into the possible forms of regulation potential remedies could take, Part B.

Within Part A, there shall be a distinction between principle-based issues and procedural-based issues. This is to allow the paper to distinguish from general hypothetical conflicts that TPF may cause in regards to the principles of investment arbitration, i.e. transparency or confidentiality, with actual conflicts that have arisen with TPF and the rules of procedure.

In the principle-based issues section, there will be three principles examined to assess the general threat of TPF to investment arbitration principles. They shall be: (1) Does TPF endanger Confidentiality? (2) Does TPF endanger Transparency? (3) Does TPF improve the right to arbitration? This will allow an initial assessment to be made regarding the threat, or benefit, TPF brings to investment arbitration overall. It will also allow initial conclusion to be made regarding the need and extent for regulation in this area, with some remedies suggested to cure these principle-based issues.

In the procedural-based issues, there will be four examples of to show that the TPF affects nearly all areas of procedure for the dispute resolution process from initiation to the final award. Through this analysis, it will be established that TPF is not isolated to a singular procedural question but constitutes a comprehensive threat to the system as a whole. The 4 procedural elements examined shall be: (1) Jurisdictional requirements- with a review on how TPF can change the claimant into a nominal owner and thus effect the prerequisites of claimant standing; (2) Enforcement requirements – analysing whether TPF is contrary to public policy, and if so, to the element where the award would be unenforceable; (3) Impartiality requirements – reviewing how TPF may constitute additional conflict of interests for the parties involved in the dispute and if this should be subject to voluntary or mandatory disclosure; (4) Provisional Measures requirements - exploring how
many investment tribunals have used security for costs as a provisional measure to mitigate the threat of TPF assisted claims being initiated but no assistance to provide for settlements of costs awards in the event of a loss. By the end of the examination of the procedural-based issues, there will be enough evidence to make a conclusion on the first question of the thesis whether there should be regulation on the basis of both procedural and principle issues.

Part B shall be focused on extracting the remedies from Part A and finding the most appropriate way to implement them. To do this, there will be examination of the three most practical routes of remedying TPF issues: (1) National Legal Systems (2) Investment Treaties (3) Arbitral Rules. In each section here, the benefits and restrictions of all systems will be examined with evidence from current and proposed reforms, to that particular system, throughout the arbitral world. On the balance of benefits and restrictions, an answer will be established on what shall be the most effective legal form at implementing the above remedies and thus at regulating TPF. This will allow a ultimate conclusion to be made on the second question of this thesis of what form TPF regulation should take.

For clarification, focus will be on the two most popular bodies of investment arbitration for jurisprudence of the issues, the United Nations Commission on International Trade Law Arbitral Rules and the International Centre for Settlement of Investment Disputes Convention. Additionally, national court jurisprudence will be used to give some guidance on novel issues. Academic commentary, governmental papers/legislation and general media commentary as resources to reach our conclusion.

**Definition of TPF in Investment Arbitration**

Before moving on to the critical analysis of the issues TPF cause, it is first useful to discuss the definition, or lack of, of TPF in investment arbitration. Despite much academic debate on the issues of TPF, there is no absolute definition of TPF in civil litigation never minding investment arbitration. The lack of definition is, as explained by W. Park and C. Rogers, being due to: “economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments…or as full transfers of the underlying claims. Some agreements permit or require active participation of the third party funder in key strategic
decisions in the case, while other agreements are limited to periodic updates.”.\textsuperscript{10} It is fair to assume that the recurring elements are the claimant receiving funding in favour for a percentage of the profits, yet even this does not hold true in all cases.

For example, in the ICSID case of Philip Morris v Uruguay, the government of Uruguay received funding from the Anti-Tobacco Trade Litigation Fund created by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, who wished to support the cause against tobacco companies under investment treaties.\textsuperscript{11} It can be established, contrary to Park and Rogers, the definition of TPF does not have to relate to an economic interest and does not have to be in favour of the claimant. There should be caution of over-exaggerating the breadth of potential disputes that a third party will be involved with. The practical reality is that in most cases the funders are concerned with profit. Since under ITA the respondent may be compensated for costs spent only, and not seek any damages or profits\textsuperscript{12}, the likelihood is that funding will mostly flow in favour of the claimant, in which the funder can take a percentage of the final award. Due to the current rarity of funding out with profit, this discussion may follow under the presumption that the issues discussed hereafter are focused for-profit claimant funding.

This leaves a further ambiguity within TPF, which is what type of funders can exist and whether there are any substantial difference between say a litigation funding company or an insurer. The approach from existing examples seem to make no distinction. If one is to look to at the relevant provisions under CETA\textsuperscript{13}, then they will find the following definition: “TPF means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome”. The focus here is not on who is providing the funding but the rationale for doing so. Any third party that gives donation, grant or promise of profit to an investment dispute will be classified as providing TPF. This broad definition is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{10} Park W and Rogers C, ‘Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force’, at 4
\item \textsuperscript{11} Sahani V.S, “Revealing Not-for-Profit Third-Party Funders in Investment Arbitration”
\item \textsuperscript{12} While one may be able to argue that they can receive damages under a counter-claim, this out with the scope of this discussion.
\item \textsuperscript{13} CETA, Art. 8.1, Section A, Chapter 8 (Investment)
\end{itemize}
\end{footnotesize}
useful. Regardless of purpose or identity, by providing funding the third party are aiming to influence the dispute through funding, a funder has the potential motive and resources to disproportionately influence the dispute. This influence should be identified and restricted regardless of purpose or identity. That being said, this paper will mostly be focused on for-profit funders, given their interest to influence being more direct, as it involves their business sustainability, and the fact that they fund the majority of the cases.

Given the unavailability and only broad approaches of a definition, we shall continue our discussion without further consideration of the legal definition of TPF. For practical reasons, when there is discussion of separate for profit-funders it will be the effect litigation companies within this thesis due to them constituting the backbone of TPF in investment arbitration and due to their propagation, are the most relevant actor in these emerging issues.

PART A

1. Principle-Based issues with TPF

As discussed above, there are numerous core principles of investment arbitration that may seem at odds, by introducing TPF to investment arbitration. In this section we will analyse these principles and conclude whether TPF is fundamentally incompatible with some of these principles. Additionally, however, there are some principles that may be enhanced through the increase of TPF.

1.1 Conflicts between TPF and Express Confidentiality

Traditionally, arbitration was essentially characterised as a private dispute resolution system, in which only the disputing parties, and no other third party, would have the ability to attend and present arguments at hearings and have access to the conclusions made by the tribunal.15 The former was known as the privacy of arbitration, i.e. the exclusion of third parties, while the latter could be seen as the confidentiality of the arbitration, i.e. the restriction of information. This has particular importance to investment arbitration, given the increased sensitivity of

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14 Petit S, Rogers J and Dowling C (2016), 'Third-party funding in arbitration – the funders’ perspective', at 3
disputing documents as disputes were regularly between large multinational companies as sovereign states, both parties whose information, due to their size, is traditionally cloaked in increased secrecy. The more acceptable view now is that if there is no express agreement on confidentiality, i.e. party agreed rules on confidentiality, then confidentiality will have a limited role.\textsuperscript{16} A default rule on confidentiality may be imported by including an applicable national law\textsuperscript{17} or direct inclusion within the treaty. This approach does not seem in line with the shift to transparency however. Additionally, neither UNCITRAL nor ICSID state an explicit rule of default confidentiality in their rules or conventions. Thus, this is less a question of TPF vs. general confidentiality, and more TPF vs. express party agreement on confidentiality. If the parties agree to a dispute being confidential, then the tribunal should strive to uphold this, not due to a principle of default confidentiality but due to the principle of party autonomy being expressed through express confidentiality. Privacy, on the other hand, is still upheld, apart from the exceptions brought by the move to transparency. Whereas the privacy of arbitration is not general infringed by funders, as they will rarely have physical access to the proceedings, the concerning effect is their indirect effect on express agreements of confidentiality.

The funder is likely, due to its funding agreement with the claimant, to have consistent access to documents throughout the dispute, considered confidential, similar to the level of access the claimant’s counsel will have. The issue with this is that if the parties agree express confidentiality to the proceedings. The tribunal have no jurisdiction to enforce such a provision on the funder due to them operating under a private contract between the funder and funded party. The tribunal have no authority to rule on this, and if did so, would be acting \textit{ultra petita}\textsuperscript{18}. This effectively means that the funder has access to the information and ability to use such confidential information without fear of tribunal oversight or rectification.

\textsuperscript{16} See Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, Procedural Order No. 3, at 121
\textsuperscript{18} Bench Nieuwveld LV Sahani, ‘Third-Party Funding In International Arbitration’ (Kluwer Law International 2017, 2nd Edn), at 12
Further to the point above, the argument may be made that the threat to confidentiality by funders is no different than that posed to it by inclusion of other third parties, such as *amicus curiae*, or the increased publication of arbitral information, both brought on by the shift to transparency.\(^\text{19}\) A key distinction here however is tribunal oversight.

In regards to the inclusion of *amicus curiae*, it is in no doubt the major arbitral institutions allow the participation and inclusion of this type of third party.\(^\text{20}\) Most tribunals will allow third party *amicus curiae* to participate in proceedings and allow them to assist the tribunal in matters of public interest and human rights law.\(^\text{21}\) Two aspects distinguish these *amicus curiae* from funders. Firstly, while the admission *amicus curiae* is completely with in the tribunal’s discretion, there is many prerequisites, both in arbitral rules and general investment law jurisprudence, for an *amicus* to meet in both their capacity as a petitioner and the quality of their submission. For example, a petitioner is required to show expertise in the subject they wish to submit in and sufficient financial and structural independence from the parties. Their submission must also not disrupt the proceedings, and must actually benefit the tribunal’s decision making while be applicable to the dispute at hand.\(^\text{22}\)

No such prerequisites or control exists for funders. Secondly, the tribunal can set limits to access the *amicus* can have to confidential documents or general access to the hearings. For example, one tribunal allowed an *amicus curiae* submission, but rejected their request to access for information that was not available to the public.\(^\text{23}\)

While tribunals have allowed third parties, they have by no doubt allowed the unrestricted access to the dispute, by putting prerequisites before submission and limitations on their access. Comparing this approach to the unrestricted access enjoyed by funders, then we can see that funders have considerably more effect on confidentiality than *amicus curiae*. The fundamental difference between the two

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\(^\text{19}\) Obadia E, *supra* note 13, at 349

\(^\text{20}\) For example see Art. 17(a),UNCITRAL Model Law, Art. 37(2),ICSID Arbitration Rules (2006), and generally UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)


\(^\text{22}\) Obadia E, *supra* note 13, at 369 -371

\(^\text{23}\) *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (Formerly Aguas Provinciales)*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus curiae, 17 March 2006, at para. 25.
third parties is that where a tribunal can put restrictions upon an amicus access, they cannot do so for a funder, due to funder’s access existing out with tribunal’s authority. Thus funders have more access to information that amicus and also the ability to misuse it.

With respect to increased publication, one example is the fact the Secretary-General of ICSID is now obligated in the publication of information regarding the existence/progress of cases within ICSID. Additionally, the centre must publish excerpts of the legal reasoning of each award. In other institutions, the level of publication varies between parties’ agreement and arbitral rules. With respect to documents used in proceedings, parties are not prohibited from publishing pleadings used in the proceedings, but there can be agreement to restrict them.

The same party based agreement is required for full disclosure of an award. Therefore, while ICSID itself has duties to some degree of publication, the majority of institutions recognise that disclosure must be party agreed. The issue with this in TPF, is that the tribunal have no authority to hold the funder to these agreements, as it would be out with their scope. It may be argued that a breach or publication by the funder may be remedied through national laws regarding confidentiality.

Nevertheless, this does not capture all issues. For example, if the funder was a large financing body engaged in financing a series of investment claims against a single measure by a country, then the funder would gain access to the respondent’s strategy and repeated arguments. It would then be able to share between the different claimants, regardless of any party agreement and likely in such discretion to avoid confidentiality laws, to increases its chances of success and thus profit.

24 ICSID, Administrative and Financial Regulations, 22 and 23
25 ICSID Arbitration Rules, 48(4)
26 Dolzer R and Christoph S (2012), Principles of international investment law, at 287
27 As seen in Abacałat and Others v The Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic), ICSID Case No ARB/07/05, Procedural Order No 3, Confidentiality Order, 27 January 2010
28 For example of this type of remedy against TPF disclosure in commercial arbitration see the English case of Winterthur Swiss Insurance Co & Or v AG (Manchester) Ltd (in Liquidation) & Ors, [2006] EWHC 839 (Comm Ct)
29 E.g., the Spain Solar cases or the Argentina Pessification cases
Consequently, we can establish that TPF endangers principles of express confidentiality in investment arbitration. While investment arbitration itself has engaged in an effort to introduce more transparency, one should not equate this with allowing third parties in general to join disputes. As we have seen above, TPF goes further in questions of confidentiality than the new shift to transparency allow from *amicus curiae* or publication. Even if they arose within the same temporal sphere and overlap in their move for reduced rules on confidentiality, the shift seeks to reform the rules on privacy in arbitration while TPF seeks to circumvent it altogether. TPF therefore endangers the principle of express confidentiality within investment treaty arbitration. Perhaps for this reason, some jurisdictions with more recent arbitration legislation have chosen to give tribunals explicit powers in holding funders, and any other relevant third parties, to express agreements of confidentiality. This puts funders under the same obligations to explicit agreements of confidentiality as the parties to the dispute. This should be the approach of any potential regulators.

### 1.2 Conflicts with TPF and Transparency

While it may seem rather paradoxical, TPF also has the ability to weaken this recent shift to transparency. Once again, the TPF is not under the control of the tribunal, and thus orders in favour of transparency are not applicable to funders. The shift to transparency has called for greater information regarding both the parties and the general procedure of arbitration. It has been particular focused on investment arbitration since there is an undisputable “public character” to this particular form of dispute resolution. While investment arbitration is at its heart a private law mechanism, the fact that many investment disputes call for decisions on public law matters (i.e. environmental, social and national economic systems) has required the whole system to become less opaque. Two major reforms have been the modification of the 2006 ICSID rules and the introduction of the July 2013 rules on ‘Transparency in treaty-based investor-State arbitration’ by UNCITRAL. If one is to take the ICSID rules then we can establish that as a default the existence of the dispute and the legal rationale underpinning the decision are now openly published. Looking to the UNCITRAL rules on transparency, one can find a multitude of rules,

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31 For example see Scottish Arbitration Act 2010, Rule 26(1)(d)
albeit party-opted rules, on access to documents relied on the hearing, to third-party participation and the holding of hearings in public.

In practice, what can now be achieved is that the general public can have documented access to a dispute. This allows them to establish the rationale and purpose behind the dispute and the degree that these decisions affect the public as a whole. This turns investment arbitration into a more open system, which affords it the legitimacy required when dealing with such controversial public dimension issues. The system of TPF however both circumvents the push for transparency and hinders it.

Circumvention can be seen as the effect of the structural differences between the funder and the disputing parties. There is no need for the funder to disclose their identity or their relationship to the dispute. For example, when the ICSID general secretary publishes the existence of the dispute, they will not publish the fact that one of the parties are subject to a funding agreement. 32 This is not down to any fault of the secretary, but instead the mere fact that the knowledge is not known or is not appropriate to include due to it being an overstep of the duty to only confirm the existence of a dispute. A similar result is likely if one is to look at the final award. There will be no mention of a third party funder here. Once again, this may be down to the fact that even if the tribunal had knowledge this particular piece of information was not pertinent to the dispute, it would still be inappropriate for the tribunal to discuss such a matter. 33

From this, we can see the hindrance to transparency. A dispute may have been indirectly influenced by TPF, and thus its final rationale, but the public will be left unaware that the effect that such funding may have had on a pivotal matter of public law and interest due to anonymity of the funder. Additionally, it is difficult for the general legal community to gauge the effect that TPF has on investment disputes and their outcome of their involvement, which in turn can paint a degree of unpredictability of decisions rendered. These two impacts seem to effect one of the reasons behind the move to transparency. By improving transparency through

32ICSID, Art. 48
33 Aside from perhaps a question of a security for costs, or a request to protect the integrity of the proceedings which is discussed below.
publication of cases, it was to make the system appear more open by making the decision-making process and its rationales clear and coherent, thus allowing individuals to understand how the decisions with impact on public law are made.\(^\text{34}\) It is counterintuitive because a funder is having an effect on the decisions of the dispute while remaining anonymous, rendering any clarity or coherence useless.

The solution is obviously default disclosure of the existence of TPF. Disclosure by the third party of their existence may actually benefit them. It will show their dedication to the dispute and may encourage the respondent to settle earlier due to the dedication showing it to be a claim with merit.\(^\text{35}\) For this reason, cases of voluntary disclosure of the funder’s identity are not unheard of in investment arbitration\(^\text{36}\). Regardless of ad-hoc voluntary disclosure, the lack of a default rule of disclosure will always cast doubt on whether there is a TPF influence over a case. This will hold all arbitral rationales suspect of TPF influence. This inherently harms any move for transparency within investment arbitration, which can only be remedied by a default rule for mandatory disclosure of a third party funder.

There has been some progress by the EU with its trade agreements of third countries in recognising the threat of non-disclosure by TPF. If one is to look at the recently agreed EU-Vietnam free trade agreement, then one can see a mandatory obligation to disclose the existence of TPF by the benefited disputing party.\(^\text{37}\) Given the proclivity for disclosure in this treaty, and within CETA, it may be argued this could become a standard provision for the EU. However, one may argue that in the interests of transparency, disclosure of only existence is not enough. To truly determine the effect of TPF, there must further disclosure the terms of the funding agreement to show the degree of the control the funder maintains on the party, and thus the dispute.\(^\text{38}\) No current regulation, be it national or through an investment

\(^{34}\) Van Boom WH, \textit{supra} note 7, at 14

\(^{35}\) Lowe, R, ‘Investment arbitration claims could be ‘traded like derivatives’’ (International Bar Association, Tuesday 12 March 2013)


\(^{37}\) EU-Viet Nam FTA, Art. 11. Also CETA, Art. 8.26

\(^{38}\) i.e. a higher funding or return of costs will undoubtedly presume a higher level of influence over the claimant and incentitive to disrupt the dispute.
agreement, exists requiring mandatory disclosure of the identity and the terms of
the agreement for protection of transparency.

Until then, allowing a third party to fund and indirectly participate without any
disclosure, is at odds with the principle of transparency within investment
arbitration.

1.3 Enhancing the right to arbitration

The discussion above has pertained to the fact that, due to the structural separation
of TPF, funders may harm important principles of investment arbitration. It is
however important to remember that not all aspects of TPF damage investment
arbitration. One particular beneficial aspect is that of providing greater access to
investment arbitration and, in general, justice.

A core principle under investment arbitration is that the investor, in their request
for arbitration, accepts an “offer” to arbitrate, usually the dispute resolution clause
under the investment instrument. If all required preconditions of the arbitral
institute and the legal instrument granting arbitration are met, this will then grant
the investor a so-called “right to arbitrate”. This right extends only to initiatio
and fair participation in the dispute, as it does entail any rights on supporting the
claimant in use of this right. One thing that may effectively eliminate this right is
the average cost of investment arbitration proceedings. The average figures in 2017
for tribunal costs to pursue investment claim is USD 933,000, with the average cost
of the respondent party being USD 4,855,000. There is no rules on the final
allocation of costs in either the ICSID convention or the UNCITRAL rules, so it is
usually within the tribunals discretion to decide. Research has found that it is
usually the approach is “loser pays” or “cost follows the event allocation”, in which
the losing party must pay both the proceedings costs and the costs of the successful
party. This may mean that a losing investor could end of paying USD 5 million

39 See Malicorp Ltd v Arab Republic of Egypt, ICSID Case No ARB/08/18, Award (7 February 2011) at 119
41 It should be noted that within ICSID proceedings, the cost for use of facilities which is dictated by the ICSID administrative council (ICSID, Art. 51)
for a lost ICSID claim. While this may not be an issue for the multinational corporations that pursue these claims, it has a different effect on smaller businesses consider investment arbitration to pursue their claim. Since a prudent claimant will base the decision of use of its right to arbitrate on potential monetary award of winning a claim vs. the potential cost of losing one, then due to the high cost in the event of failure, many claimants may simply chose to abandon the idea of investment arbitration. Therefore, while a claimant may have a right to arbitrate legally, they do not have the practical means to enforce this right realistically. This threatens to turn investment arbitration into a privileged form of dispute resolution available only to large corporations. A funder can therefore assist in at least initiation of this right.

Even if the investor can afford the basic proceeding costs, one must also consider the lack to fund additional aspects and its effect on proceedings. Enclosed in the “right to arbitration” are fundamental rules of procedure that are key to guaranteeing this right is an effective and fair one. For example, at a minimum, there must be equality of arms between, an opportunity to present one’s case and an opportunity for one to defend its claim against an opposing witnesses and evidence. One thing that can drastically alter these fundamental rules of procedure is the level of funding available to each party. If one considers the defence rule, then an effective rebuttal of an expert’s evidence usually requires an equally qualified but also equally expensive expert. A party may not be able to afford this expert and then will indirectly lose their right to have an effective defence of their claim. In investment arbitration, the funding balance is usually in favour of the respondent, i.e. the State, since a nation will usually have considerably more assets than an individual or a company. What is achieved by TPF is a fair guarantee of these fundamental rules of procedure, since the funder can support the purchase of at least equal experts, counsel and other additional costs and balance the rights more equally.

43 Lamm C, ‘Fundamental Rules of Procedure: Whose Due Process is it?’, at 2
44 It should however be noted that developing countries do not have unlimited assets to guarantee their own rights also. For that reason, TPF may present issues of increasing cases and thus potential drain on their resources. There is discussion, out with this one’s scope, of creation of funding programs for these states. See IDLO, ‘Investment Support Program for Least Developed Countries’, Conference Report, September 2017
TPF therefore can open up investment arbitration to these types of businesses as a way for them to dispute international wrongs. With additional funding from a third party to cover these potential costs, smaller businesses may now have the practical means to pursue claims with investment arbitration. It should of course be noted, that many TPF agreements only extend to the funding of the proceedings rather than a guarantee to pay costs in the event of a lost dispute, however we will discuss this more in relation to security for costs. At this point, it is fair to say that TPF may actually enhance the principle of right to arbitration within the ISDS system. It not only provides higher protection for the fundamental rules of procedure, but could also potentially open up the system to more users, making it more inclusive.

Conclusion on the principles

TPF may fit in uneasily next to the principles of express confidentiality and transparency within investment arbitration. Because tribunals have no effective power over the funder, it means that any efforts by the tribunal to enforce the principles of privacy or transparency will not extend to the funder. Since funders are different from over third parties, in the essence that they can influence and disrupt the proceedings, it makes their potential disregard of these principles even more threatening. For this reason, regulators should consider making explicit rule to allow for both instances requiring of confidentiality on the funder and their disclosure for transparency.

An argument for partial limitation of funder’s access and abilities is more reasonable than support for total exclusion of TPF. Even in the relation to principles, we can find that TPF brings benefit to the investment arbitration system. Funders may have the ability to make investment arbitration a fairer system as a whole, by allowing more claimants to have effective access to pursue international wrongs. An analysis of the principle-based issues that TPF brings to investment arbitration finds that while there is some principles TPF endangers, they can be remedied from the examples discussed above. It also brings overall benefit to the system weakening calls for is abolition. This should be kept in mind for any potential regulation of TPF.
2. Procedural-based issues with TPF

The procedural-based issues section focuses more on barriers that arise within the arbitral proceedings due TPF. Within academic discussion, there has been controversy with the following four procedural-based issues that will be the subject of review for this section: (1) Jurisdictional Issues; (2) Enforcement Issues; (3) Due Process Issues; (4) Provisional Measures Issues.

2.1 Jurisdictional Issue - Does a funded claimant satisfy jurisdictional prerequisites?

The first question for a tribunal in determining their jurisdictional, is whether the “investor” satisfies certain requirements of being the type of investor able to initiate a dispute, set by both the institutional governing rules and the investment agreement instrument? This is distinct from commercial arbitration, in which the parties have already agreement through their contract, whereas in investment arbitration the offer by the State is more akin to an “open offer” to arbitration. For the institutional rules, these usually set out the basic formula for who can initiate disputes under that institution. For example, the ICSID convention Art. 25 states: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State”. This shows that the jurisdiction of an ICSID tribunal is between disputes arising out an investment between a Contracting state and a national of another Contracting State. What the investment agreement, usually a BIT/MIT, completes is the definitions of key terms such as what foreign nationals can be determined an investor, what can be qualified as an investment, etc.

The issue with a funded claimant is that while they may satisfy these requirements individually, but by receiving extensive funding by the third party, can they still be the party that is effectively initiating the dispute? Harwood (et al.)45 describes this an issue of de facto or de jure assignment of the claim. De jure assignment, is when the funder pays for the direct interest of the claim and then the claimant can only lodge the claim after prior authorisation and direction from the funder.46

46 Bench Nieuwveld and LV Sahani, supra note 16, at 166
dissimilar to the issue of shell companies in treaty shopping. *De facto assignment* is instead when “a funder has been granted full control over the conduct of the claim or a disproportionate economic interest in the claim, the funder while not owner of the claim... has replaced the nominal claimant as the real party in interest behind the claim.” Harwood (*et al*) identifies two distinct issues to the tribunal’s jurisdiction by funding assignment in terms of both of rights of standing between nominal and beneficial owners of a claim and investors being of a certain nationality.

On the first point, there is a principle under international law that only the beneficial owner of the claim is able to dispute that claim under an international tribunal. This principle was upheld by the *ad hoc* committee in *Occidental v. Ecuador*. The committee held here that the original tribunal had exceeded its jurisdiction by granting an award for 100% compensation to a claimant that only owned 40% of the investment. They agreed that international law grants standing to the beneficial owner of the claim not the nominal owner. For this reason, claimants are only able to submit claims they hold in benefit and not those held in behalf of a third party. The committee noted, *obiter dicta*, that: “tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument.” While there judgment was regarding company control and compensation, one can still see the parallel issue with TPF. If a funding agreement was to amount to a *de facto* or *de jure* assignment then under international law the claimant would no longer be able to pursue his claim in investment arbitration. However, the funder would also not be able to pursue the claim either as it would not satisfy the definition of investor under the BIT/MIT. Therefore, an excessive funding agreement, that transfers total or disproportionate control interest in a claim, may result in the tribunal losing jurisdiction and a particular claim losing its ability to be arbitrated. At the very least, the final award

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47 Goldsmith A and Melchionda L 2012, ‘Third Party Funding in International Arbitration: Everything You Ever Wanted To Know (But Were Afraid To Ask): Part 2, at 228
48 Harwood (*et al*), supra note 43, at 110-112
49 James Crawford, ‘Principles of Public International Law’, at 704
50 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11 (Occidental v. Ecuador), Decision on Annulment of the Award dated 2 November 2015, Paragraphs 262-268
51 Ibid
should exclude compensation in proportion to the amount of the claim that was assigned.

The second issue has a similar result to the first, but from the perspective of nationality. A tribunal can only arbitrate on the issue that has an investor who is one of the nationalities under the BIT/MIT. If a claim is assigned to a funder who is not one of the nationalities then the tribunal will lose their jurisdiction under this claim. Interestingly, this issue has arisen before an investment tribunal. The tribunal in *Teinver v. Argentina*\(^{52}\) found that an alleged transfer of interest to a funder, who did not hold the prerequisite nationality requirements, would affect nationality requirements. It however did not affect this case in question, as the transfer had happened after the case had been initiated. The rationale here seems to focus on the timing on the transfer, however for funding agreements this may not be as large as the previous issue. This is because it is common for many funding agreements for disputes to be completed after the dispute has been initiated, as otherwise, a funder will not get a true assessment of success until a dispute is ongoing. Regardless of the practical effect, the tribunal seem to accept that a funding agreement may affect their jurisdiction due to nationality requirements, and thus shows the jurisdictional threat of TPF.

It is clear that extensive TPF can cause the tribunal to lose their jurisdiction over a dispute. In terms of regulation, this is difficult to restrict due to two issues. The first is determining what constitutes a *de facto assignment* between the investor and the funding. Looking to corporate or property law, there are many difficulties at defining a *de facto assignment* since it varies between jurisdiction and different entities. While a State may draft what they think is an appropriate limit to transfer of interest within their definition of investor in a BIT, to others it may look arbitrary and will be unpopular at incentivising future foreign investment. The other problem is the recurring issue of lack of disclosure. Many tribunals will not have access to the funding agreement, or be aware of the existence of TPF, and will therefore not be able determine if a *de facto assignment* has occurred. This effectively means that

\(^{52}\) Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction dated 21 December 2012, Paragraph 256
disputes may have been decided when the tribunal unknowingly lacked jurisdiction due to an assignment. This does not pose any practical problems, as tribunals cannot react to issues they have no awareness of. However, unlike the old idiom of “what you don’t know can’t hurt you”, it seems principally unacceptable that tribunals can no longer be aware of their own jurisdictional limits due to TPF. For this reason, this jurisdictional issue gives another limb to the argument that there should be mandatory disclosure. Disclosure here should not only be the existence of TPF but also the terms of the funding agreement in instances of extensive funding, or at a minimum, the degree of control held by the funder.

2.2 The Enforcement Issue - Can TPF be a barrier to enforcement of an award?

Aside from extensive TPF funding, even minimum funding can result in rendering a valid award unenforceable.

The issue lies in the rules of enforceability of an award and public policy considerations of TPF. A distinction lies between awards rendered in the auspices of ICISID compared to that of UNCITRAL and other institutions. Under ICSID, a pecuniary award is “automatically enforceable”,53 due to the operation of Art. 54(1), in which the enforcing contracting party must enforce the award as if it was a binding court award rendered by its own judiciary. An ICSID contracting party must enforce a valid ICSID award regardless of its own mandatory rules or public policy on TPF. Thus, under ICSID, TPF challenges may arise during dispute or annulment proceedings, perhaps under one of the other procedural conflicts discussed, but it cannot be a barrier to enforcement.54 There may remain issues regarding execution of the award but this matter is related to sovereign immunity from execution rather than any issues related to TPF.

Under other institutions however, enforcement proceedings are based on the New York Convention. Here, there are grounds under Art. V of the convention that allow an enforcing State to refuse to recognise and enforce the award. The most relevant ground is Art. V(2)(b), which allows denial of enforcement if recognition and enforcement of the award would prove contrary to the public policy of the enforcing

54 Aside from the potential annulment proceedings based on the points discussed in 2.1 or 2.3
State. This may be contrary to public policy if that particular State has restrictions or exclusions of TPF in legal disputes.

In practice, for TPF to go against public policy, it is most likely that they still have the tort of “Champerty and Maintenance”, if a common law country, or have an explicit rule restricting the TPF of legal or arbitral claims, if a civil law country. As discussed in the introduction, those countries that still maintain these types of rules are in the minority. However, these minority of jurisdictions, such as Ireland and until recently Singapore, have reaffirmed that existence of TPF will cause the particular legal decision within a dispute, and by extension arbitral award, to become unlawful.

The other question is that if a State does recognise TPF to be unlawful, does this mean that it is unlawful to being the point contrary to public policy. While there is ongoing debate about what constitutes a national, or even international, public policy, there is support that an award having some aspect of illegality in the enforcing State does not automatically render the award unenforceable there. Instead, some view a violation to public policy, under the New York Convention being: “only justified where the nonconformity with basic principles of morality and justice ... is evident.” This seems to be the view in many cases of enforcement regarding the public policy. The question remains whether TPF would contravene an enforcing State’s basic principles of morality and justice?

The difficulty with answering this confidently is that there is no current case law regarding an investment arbitration award being challenged based on Art. V(2)(b) due to TPF. There is however, limited case law within commercial arbitration that can prove as a useful parallel for this point. For example, in the Ontario case of Banglar Progoti Ltd v Ranka Enterprises Inc. the court found that even if the plaintiff could furnish proof of TPF, there was no overwhelming support that this

55 Kirby PJ, ‘Third party funding: access to justice or access to profits?’ (Hardwicke, 17 Jul 2017)
56 See Ireland, Digital Telephony Ltd v Minister for Public Enterprise [2017], and Singapore, Ootech Pakistan Pty Ltd v Clough Engineering Ltd and Another [2007],
58 Many courts have endorsed the legal standard being against “fundamental morality” stated from Parsons & Whittemore Overseas Co. v. Societe Generale d L'Industrie du Papier (RAKTA), 508 F.2d 969 (1974)
59 (2009) CanLII 16292 (ON SC)
would be contrary to the public policy of Ontario to the point of satisfying Art V (2)(b). However, looking to Singapore case law then one can find differing views. One such view was by the court in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* who explicitly stated: “Public policy is offended by such an agreement [a funding agreement] because of its tendency to pervert the due course of justice”

One should be careful about assigning too much weight to this decision however, since it occurred in purely domestic arbitration, in which the New York Convention does not apply, and the Singapore legislature has recent softened toward TPF, as seen within its recent legislation.  

Altogether, in theory, it is possible that TPF within a non-ICSID award may contravene an Enforcing State’s public policy, and thus limit the international applicability of awards rendered with funder’s assistance. In practice however, it is not likely funding will be a fundamental issue as many jurisdictions are softening their views to TPF generally. As stated by PJ Kirby QC: “…no jurisdiction which is seeking to hold itself out as a centre for dispute resolution could hope to capture a significant market share unless it permitted the TPF of claims.”  

For jurisdictions such as Ireland however, the remedy should less be specifically aimed at TPF within arbitration and more at the general legislative relationship with TPF as a whole. There is no practical sense in upholding outdated torts which disrupt the whole arbitral process near completion. Instead, there should be a general acceptance of TPF, following the global approach and a recognition of its benefits. This will then allow them to remedy issues specifically, while maintaining its benefits.

### 2.3 The Impartiality Issues- Conflict of Interests and Disclosure.

One of the most controversial aspects of TPF is undoubtedly the effect it has on the impartiality of parties in a proceeding. It is a cornerstone of investment arbitration that the arbitrators have independence and impartiality, to allow them to render an award that is fair and unbiased. Awards tainted by conflicts of interest remain open to challenge or annulment, under the basis of gross procedural irregularities.  

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60 See point 3.4  
61 See Note 53  
62 See UNCITRAL Model Law, Art. 34 and ICSID, Art. 51
While this is a continuous issue tribunals must remain vigilant about, the introduction of TPF has added another layer of potential conflict that is less apparent than conflict of interests between the parties and arbitrators. There are two individual aspects that make TPF particular insidious, their relationship within the legal world and the limited power of the tribunal to require disclosure.

The first point can be highlighted by the structure of two particular litigation funding bodies. Looking to the prominent Woodford litigation funding\(^\text{63}\), one of their selling points is the claim of maintaining an “Investment Advisory Panel” which contains currently acting arbitrators. Additionally, if one is to look to the largest UK litigation funder, Harbour Litigation Funding, then their “Investment Committee Panel” constitutes not only acting arbitrators but also very active arbitral counsel.\(^\text{64}\) From this, it seems many litigation funders maintain a multitude of well-known actors in the arbitral world. This presents many new areas of conflict of interest for the arbitral process at least in protecting the required apparent independence of the process. For example, not only does the tribunal have to consider the parties’ relationship with law firms but with litigation funding companies also. However, what is the distinction between this and the well-known fact that many arbitrators are usually partners at law firms? The distinguishing element is that law firms have recognised the danger to the arbitral process for many years. Many law firms ring-fence their arbitral teams from each other and their general practice. Additionally, while the information showing law firm’s legal counsel/arbitrators previous appointments is usually easy to obtain,\(^\text{65}\) such information is not so readably available in regards to TPF due to them not being a party to the dispute. Finally, international standards have been released for impartiality, with law firm conflict of interests provide a large focal point. One notable example being the International Bar Association Guidelines on “Conflicts of Interest in International Arbitration” (2014).

No such practices or standards have individually been prepared for funders. Even efforts to do so are ineffective at protecting impartiality in investment arbitration.

\(^{63}\) Harwood (et al), supra note 43, at 103-104
\(^{64}\) Harbour Litigation Funding, “About Us: The Investment Committee”, (Harbour Litigation Website)
\(^{65}\) With such appointment information being in awards, notice to arbitrate etc.
A cursory glance of the UK’s *Code of Conduct for Litigation Funders* mentions merely on this matter that a funder shall not “*take any steps that cause... the Funded Party’s solicitor or barrister to act in breach of their professional duties* [emphasis added]”.

The extent of this rule seems to be that a funder cannot make the benefitted party’s counsel breach any conflict of interests, as it would be in contravention of their national professional body’s standards. It fails to mention any restrictions any conflict of interest that may occur between the funder and the arbitrator, or the other parties’ counsel for that matter. The lack of preparation in the funding world supports the warning given by the ICCA-Queen Mary Task Force. Their report “*Third-Party Funding in International Arbitration*” notes the propagation of conflict of interests within TPF without regulation “…can undermine the integrity and legitimacy of international arbitration generally.”

This inevitably leads us to the question of disclosure of TPF within investment arbitration. The above task force suggested two alternatives for disclosure, albeit in relation to commercial arbitration but the rationale can apply to investment arbitration. (1) *Voluntary Disclosure:* The party receiving the funding should voluntary disclose the funder’s identity and funding agreement to the tribunal, as part of its first submission, if the funding was in place at the beginning of the dispute, or as soon as practicable once it receives funding, if later in the dispute; (2) *Mandatory Disclosure:* Arbitrators and Arbitral institutions expressly request disclosure from the parties whether they are receiving TPF and if so the identity of the funder.

In reference to the voluntary disclosure, the above-mentioned IBA guidelines should stand out as particularly instructive. Without guidelines, the above recommendation of voluntary disclosure could be misconstrued by their funded parties’ subjective conception of what constitutes a “conflict of interest”. It is useful that the most updated version of the guidelines explicitly note that a third party funder is to be considered the equivalent of a party. This shifts it from being a

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66 Code of Conduct for Litigation Funders UK (2018), Association of Litigation Funders (UK)
67 Ibid, at 9.2
68 Ibid, 74
69 ICCA-Queen Mary Projects (2017), ‘Third-Party Funding’, At Chapter 4
70 IBA Guidelines on Conflicts of Interest in International Arbitration, (2014)
71 Ibid, Explanation to General Standard 6(b), at 14–15
matter of discretion for the funded party or arbitrator to disclose their connection to a funder, to an objective review. If such a connection exists then the conflicted party must disclose similar to if they had a familial or professional relationship with the other party or arbitrator. Furthermore, by considering the funder to be “equivalent to a party” it also means that the traffic light system of disclosure used by the IBA guidelines is also directly applicable to situations with TPF. The situation of a sitting member of the tribunal also acting in capacity as part of a litigation funding company’s “investment advisory panel” will likely constitute a non-waivable red list conflict under the IBA guidelines. Thus, the IBA guidelines including TPF as part of potential conflicts is key to providing a funded parties clarity in whether there is need for a voluntary disclosure of their funding. The extent here is not only actual conflict of interests that are required to be disclosed, but also situations that give rise to the ambiguous “justifiable doubts” regarding the impartiality of the parties or arbitrators.72 The clarity provided by the guidelines become essential for parties in a legal environment where the conflict of interests caused by TPF in arbitration have only been a point of concern. Since allowing a conflict of interest to prevail could amount to an unenforceable or annulled award, it is important to promote voluntary disclosure as the first line of defence against conflict of interests with TPF in arbitration. This preliminary defence is achieved by arming parties, with such tools as the guidelines, so they shall at least be prepared to know when and what situations are appropriate to disclose.

Moving on to mandatory disclosure, while voluntary disclosure may provide an effective remedy at highlighting conflict of interests caused by TPF, there is the simple fact that many parties will simply decide not to disclose their funding situation. This may be perhaps due to ignorance of conflicts caused by funding or a fear that it may interfere with their funding. For situations like these, there must be an ability by the tribunal to order mandatory disclosure to avoid a potential conflict of interest. However, if one considers that the if the party chooses not to disclose their funding voluntarily, then there is no possible way a tribunal will have prior knowledge of the TPF, due to it being a separate agreement between the party and funder out with the arbitration. If a lack of knowledge regarding of TPF exists in a

72 Ibid, at General Standard (2)(d)
particular case, mandatory TPF disclosure questions will have to apply across the board in most arbitral cases, as sort of a compliance check, to guarantee that if there is TPF then it is properly disclosed.

This method has been debated with some controversy within the arbitral world. One critic believes that having such an extensive checks in all cases will only increase the costs of an arbitral proceeding, something that would be counter to the rationale of TPF making proceedings more accessible. He also believes that aside from nullifying the benefit of cost, allowing mandatory disclosure will permit further “guerrilla tactics” by the respondent. One of these “guerrilla tactics” is that disclosure can act as a delay tactic, in which the respondent aims to use the disclosure to establish as much information about the investor as possible or simply to delay the proceedings. At worst, it may increase challenges or annulments to awards, as losing parties will use the mere existence of funding to argue conflict of interest. If there exists a general duty for disclosure of TPF then non-compliance, regardless of there was a conflict, can amount to a presumption that “…the Party and the investor are presumed to be tainted by some irregularity”.

On the other hand, there seem to be more support overall for mandatory disclosure. This has been seen in both academic and arbitral practice. For example, the costs criticism above is easily rebutted by the fact that the disclosure could be in the form of having a simple yes/no question to whether there is TPF and the name of the funder. Through this method, the tribunal need no further disclosure of the agreement, as they may do in the other issues, as if they can establish the identity of the funder, then they can analysis if potential conflict connections of the funder and parties to the dispute exist. This limited mandatory disclosure also allows the tribunal to effectively avoid or remedy conflict of interests, and due to its limited reach, avoiding the use of “guerrilla tactics”. Also, releasing only the identity of the funder is non-expensive and unlikely to cause delays or release any sensitive confidential information.

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74 Ibid
The disclosure of only the identity is the approach taken by recent tribunals. The tribunal in the ICSID case *Sehil v. Turkmenistan*,\textsuperscript{76} found that they had the inherent power to require disclosure in favour of avoiding conflict of interests.\textsuperscript{77} It was necessary to disclose to avoid allowing any of the arbitrators to have a conflict of interest and also for the general benefit of transparency. In their view, mere disclosure of the identity of the funder alone satisfied impartiality. They did later require disclosure of the terms of the agreement, but this was likely done in regards to security for costs,\textsuperscript{78} rather than to avoid conflict of interests. This distinction is made clear in the following in the UNCITRAL case of *South American Silver v. Bolivia*, in which the name of the funder was ordered to be disclosed in favour of securing impartiality, but not the terms of the agreement, as the respondent did not have a convincing argument regarding security for costs.\textsuperscript{79} What we can establish from this is that arbitral practice will permit mandatory disclosure from a party receiving funding, but only to the extent of the identity of the party and nothing further. It is important to note that in situations where the identity has been discovered through voluntary disclosure, or other means, then the tribunal is likely only to confirm that there is no conflict of interests rather than require official disclosure of the identity or the agreement.\textsuperscript{80} Therefore, mandatory disclosure is a necessary tool for arbitral investment tribunals faced with TPF, in preventing a conflict of interest. While disclosure of TPF should apply in all cases, it should be limited to only the identity, except in cases requiring a potential security.

Conflict of interests is an unavoidable danger of any legal proceeding. It cannot be totally excluded, as all arbitrators have deep seated personal/business connections in the legal community to an extent, but can be subject to disclosure and disqualification, to alleviate the risks. TPF negates this by introducing more actors

\textsuperscript{76} Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 (Sehil v. Turkmenistan), paragraphs 1 and 9.

\textsuperscript{77} Under Art. 47, which grants the tribunal the authority to give provisional measures for preserving the rights of the parties or the integrity of the process. Conflict of interests is likely to effect both of these rights.

\textsuperscript{78} See point 2.4


into the equation, while having no internal system of disclosure. As for remedying this issue, the current approach of disclosure in the arbitral community, both voluntary and mandatory, is quite effective at preventing these conflict of interests contaminating arbitral awards. Supporting this is the fact that there has been little to no disqualified arbitrators in reference to conflict of interest due to TPF. The main issue with the current approach is that it is very much of either the discretion of the parties or the discretion of the arbitrators to order disclosure, with too few binding rules setting the standards of impartiality with TPF or the process required for disclosure. The IBA guidelines set good guidance for voluntary disclosure, as is the arbitral jurisprudence on tribunals mandated disclosure good for mandatory disclosure. However, both still require a subjective analysis on whether impartiality or independence is threatened and thus leave a grey area in which TPF may amount to a conflict of interest, but due to improper analysis of the party or the tribunal, it is not disclosed. What would remedy this is the application of explicit, and binding rules, on disclosure for parties that are funded. This in practice would minimise the risk of conflict of interests arising, as it takes the discretionary element and transforms it into a unified approach, in which there is an objective answer on when a TPF constitutes a conflict of interest and if this should be disclosed, to be applied in all cases. What is suggested is then a codification of the current approaches of voluntary and mandatory disclosure in legislation or arbitral rules. To summarise, while conflict of interests of TPF have be managed to an extent by the current arbitral system, it is better to have an objective set of rules and legislation citing what constitutes a conflict of interest and the what situations a party is required to disclose.

2.4 The Provisional Measures issue – Security for Costs

One writer has compared TPF to a arbitral “gambler’s nirvana”, and to some extent this is true. There is few gaming systems in which the better receives the winnings in success, yet has to pay nothing for a loss. But this is exactly the odds for TPF in arbitration, for their “initial bet”, i.e. their funding of the party, they

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81 For one example, under the ICC rules, see Carlevaris C and Digón R (2016), ‘Arbitrator Challenges under the ICC Rules and Practice’

82 See note 73

receive a guaranteed percentage of any monetary compensation but do not have to pay the any of the costs of losing an arbitral award, i.e. administrative fees and the other parties legal costs. This is likely what has made TPF within arbitration such a lucrative market, but it also why the element of costs has received so much attention by tribunals and academics alike. Reward without threat of loss inherently encourages risk taking behaviour which, in terms of investment arbitration, amounts to the financing of claims that do not aim to settle international wrongs, but are frivolous and seek to make profit rather than restitution.84

For this reason, the mechanism of cautio judicatum solvi (hereafter referred to as “Security for Costs”) has received significant attention. While not an absolute rule, it was established above that most tribunals operate a loser-pays cost model. This can cause issues for funded parties, as they are usually only funded for cost of proceedings and not for a potential costs award to the winning party. It can then mean that a party will not be able to satisfy a costs award in the event of a loss. Security then works as requiring the party receiving funding to post security for the winning party’s costs as a precondition to continuation of the proceedings. While not a direct action against the funder, the restriction to proceed on the funded party will require the funder to subside the security or abandon the case. There can be a dual benefit to this, firstly the respondent will not suffer unpaid legal costs due to the claimant not being able to pay this in absence of the funder and secondly, it introduces some risk for the funder and thus should pose as a disincentive for them funding frivolous claims which damages the whole investment arbitration system. It must be noted however, that there are questions regarding the application of a security by a tribunal, such as whether they have the power to so, in what situations they do so and if it acts as a barrier to justice.

Before discussing this procedural issue, it is important to discuss the relationship funders have to the merits of the claim. Most funding companies seemingly are quite stringent on what claims they are willing to fund, with one study showing that only 1 in 10 applications for funding get accepted.85 One should not equate this fact with the fact that

85 Veljanovski C (2011), ‘Third Party Litigation Funding in Europe’, at 10
leading to the conclusion that funders themselves do not fund “frivolous claims”. Simply having internal procedure does not mean that a frivolous claim will not get funded, if there is still the chance of profit. For example, some funders have been quoted as stating: “The perception that you need strong merits is wrong – there’s a price for everything”\(^{86}\) or as the Burford Group stated “If we shy away from risk for fear of loss, as some litigation investors do, we will not maximise the potential performance of this portfolio”.\(^{87}\) It is clear with this type of attitude that some funders have no qualms about financing claims that have the potential to fail. This is important to highlight, as it is clear funders can contribute to the environment of propping up frivolous claims that have a high chance of failing. The effect of this is the increase of cases in which the respondent wins but cannot practically enforce the costs order against the claimant.

Moving on to the actual procedural issue, the first major question is whether arbitral tribunals have the authority to ask for the claimant to provide security for costs. Some institutions explicit state that tribunals have the power to order security, such as LCIA\(^{88}\) and SIAC\(^{89}\). However, for those institutions that do not explicitly mention such authority, it is accepted that the power to do this is under a tribunal’s authority to order provisional/interim measures\(^{90}\) to protect parties’ rights or the integrity of the proceedings.\(^{91}\)

One difficulty using provisional measures in gaining security for costs, noted by Harwood (\textit{et al})\(^{92}\), is if one can really equate the securing of a potential costs award to the jurisdictional threshold question of a “right to be preserved”? This has proved difficult for ICSID tribunals, in which the preservation of rights is a precondition to granting a provisional measure. Some tribunals have refused to grant such a measure in the belief that a costs award is more of a “mere expectation”

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87 Harwood (\textit{et al}), \textit{supra} note 43, at 108

88 LCIA Rules 2014, Art. 25.2

89 Arbitration Rules of SIAC(2013), Art. 24(k)

90 See ICSID, Art. 47. Also see UNCITRAL Rules (2010), Art. 26

91 Ulmer N (2011), ‘The Cost Conundrum’, at 230 (‘IT is widely accepted that the ordering of security for costs is within the power of arbitrators to order interim measures’)

92 Harwood (\textit{et al}), \textit{supra} note 43, at 109
rather than an “existing right”.\footnote{Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010, at 9} This seems to be on following the \textit{Maffenzi} approach, in which many subsequent tribunals to the case have confirmed, in which an provisional measure must be based on an existing right at the time of the dispute and not one that is a hypothetical future right.\footnote{Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28 1999, at 12-13} However, later tribunals have adopted a less restrictive approach regarding security for costs provisional measures, on the basis that reimbursement of costs qualify as a “right to be preserved”.\footnote{For example see \textit{RSM Production Corporation v. Saint Lucia}, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014 (“RSM v St.Lucia”); \textit{Victor Pey Casado and President Allende Foundation v. Republic of Chile}, ICSID Case No. ARB/98/2, Decision on Provisional Measures Requested by the Parties, 25 September 2011 (“Victor Pey v Chile”); \textit{Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Government of Grenada}, ICSID Case No. ARB/10/6, Tribunal’s Decision on Respondent’s Application for Security for Costs, 14 October 2010, (“RSM v Grenada”)} As reimbursement of costs is part of eventual compliance of costs, which is the core rationale of provisional measures, it makes sense that any security contributing to eventual compliance should be protected under provisional measures.\footnote{See RSM v St. Lucia, at 72. Additionally, the tribunals mentioned in point 91 have all noted that due to the nature of provisional measures being jurisdictional, they must order them \textit{prima facie} and thus cannot engage in discussion on whether the right exists or not. For this reason conditional rights are allowed as part of their restriction on considering the merits at this stage.} Thus, security for costs are at least theoretically within the power of an ICSID tribunal as part of their authority to grant provisional measures.

Aside from jurisdiction, the other key requirement for a tribunal ordering security is the question of necessity. All tribunals ordering such a measure have noted, to some extent, that they will only be ordered in “\textit{exceptional circumstances}”\footnote{The use of this term seems to encompass the traditional requirements of both urgency and necessity that are usually preconditions for the ordering of provisional measures in general.}. This requirement is crucial in security for costs, as if ordered lightly the can amount to a barrier of access for justice for the claimant. For ordering security, tribunal have considered factors such as a claimant’s history of non-compliance with of awards,\footnote{As in RSM v St.Lucia,} stripping itself of assets in order to avoid compliance with an award\footnote{As in RSM v Grenanda}, or is insolvency\footnote{\textit{Pey Casado v Chile}, at para 46} as exceptional enough of a circumstance to justify a security for costs.
However, for TPF, does the fact that a claimant receive funding, with no guarantee of payment of costs in the event of loss, amount to an “exceptional circumstances”? Tribunal jurisprudence seems to indicate it does have importance but it is not the only consideration. The tribunal in ICSID case of Eurogas v Slovakia found that “…financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances”\(^\text{101}\). Meanwhile, the UNCITRAL tribunals in Guaracachi v. Bolivia\(^\text{102}\) and SAS v. Bolivia\(^\text{103}\), both found TPF to be a factor in deciding whether to order a security for costs, but not decisive enough to be considered the sole factor in such an order. The cases where such a request was successful also seem to be hesitant in assigning TPF decisive importance. The ICSID tribunal in RSM v St.Lucia granted a security for costs against a funded claimant, on the basis that it was “…doubtful whether the third party will assume responsibility for honoring such an [costs] award”.\(^\text{104}\) The tribunal then concluded that it was unjustified to burden the respondent with such risk, and on this basis, ordered the security for costs by the claimant. It should be noted, that even within this case, another essential factor was the fact that the claimant had a history of non-compliance with previous awards.

It is therefore established that TPF by itself will not justify a security for costs order. Instead there has to be additional evidence of financial instability or impropriety of the claimant. It also seems that the burden on proof on proving this instability rests on the respondent.\(^\text{105}\) This does not make a lot of practical sense. The mere fact that a claimant is receiving funding for a claim, seems to support the presumption that they themselves do not have the assets to pay for the potential costs order, since they lack the resources to even fund the proceeding. Additionally, as stated above, some funders do not seem to have qualms about funding a case that has a high eventuality of loss. On the basis of this, it seems that the party receives funding should in fact play the determinative factor rather than the subsidiary one. On the other hand, having this as the sole factor is that forcing a party that requires funding

\(^{101}\) EuroGas Inc and Belmont Resources Inc v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 dated 23 June 2015, para 123

\(^{102}\) Guaracachi v. Bolivia, at 6-7

\(^{103}\) SAS v Bolivia, at 75–77

\(^{104}\) RSM v St. Lucia, At 83

\(^{105}\) Harwood (et al), supra note 43, at 112
another financial barrier seems to be counterintuitive to the whole beneficial aspect of TPF, which is providing access to justice for those that cannot afford it. There is however, a balanced solution provided by the arbitrator Gavan Griffith in the St. Lucia case.\textsuperscript{106} He suggests that TPF should be a determinative factor in the form of a rebuttable presumption against the claimant. TPF should form the base for a security for costs order, unless the claimant can effectively show that it can comply with the potential costs order. This approach has been cited by approval by academics such as Gary Born.\textsuperscript{107} It may still be seen as restricting justice poorer claimants, however it also seems unfair that a Respondent must provide extraordinary evidence to prove the simple logic that if a Claimant cannot finance the proceedings it is unlikely to be able to pay a cost order, as it is their duty to do so. Additionally, it has a more moderate effect on TPF in general. If one was to adopt an automatic security for all claimants that receive funding, then this will not be fair to claimants who perhaps receive limited funding to enhance their claim rather than extensive funding to furnish it in its entirety.

The other issue with requiring the respondent to provide support for the security is the issue of disclosure. If it is required to disclose TPF for the reason of avoiding conflict of interests, this will only disclose the identity and existence of TPF, rather than the terms of the funding agreement, and thus the extent of the funding. This will then leave the respondent with the situation in which it knows of the threat of non-compliance of a costs award but not enough evidence to support a provisional measure ordering security. This issue has been dealt with adequately by recent tribunals however. For example, the tribunal in Sehil v. Turkmenistan\textsuperscript{108} ordered disclosure of the funding agreement as part of the respondent’s request for security. The Respondent will then get sufficient information to at least initiate its request for provisional measure. This should be another instance to justify further disclosure of the not just identity but the terms of the funding agreement.

On conclusion of this point regarding security of costs, the fact that TPF allows for claimants to initiate claims but not adequately settle the potential costs from a loss

\textsuperscript{106} RSM v. St Lucia, Assenting Reasons of Gavan Griffith, dated 12 August 2014,  
\textsuperscript{108} Sehil v. Turkmenistan, at 12
is a unfair and unjustifiable situation for the respondent and paints investment arbitration akin to gambling. Since the tribunal cannot order the funder to provide any guarantee, the mechanism of security for costs on the claimant remains the most effective way of protecting the system from frivolous claims. This will avoid the respondent bearing all financial risk of TPF supported claims, while also importing some responsibility for funders, which may distance the more reckless funders from investment arbitration. To crystallise this benefit, regulators should go further and required that in proving the security the burden is shifted from the Respondent to the Claimant as a rebuttable presumption, as it makes logical sense and is inherently fairer. This recommendation is likely the one that will cause most disruption to the TPF market. It will introduce, albeit indirectly, the aspect of risk to the funding of claims in that sense that they will have to likely provide further funding for the security or drop the claim, it will perhaps change it into less of a “gambler nirvana” and more of a moderate and responsible market.

Conclusion of the Procedural Aspects
As with the principles, TPF can affect procedural aspects of the proceedings from the jurisdiction within the initiation, conflict of interests and requirement of provisional measures throughout the proceedings and finally the enforceability of the award due to public policy. It is clear that throughout this critique that TPF within investment arbitration does need further regulation to prevent the risk it causes to these aspects do not disrupt the whole investment arbitration system. Throughout this section, there has potential remedies suggested to solve each procedural issue which may minimise or even eradicate such risks.

PART B
3. What form should potential Remedies take
Throughout all the issues discussed above, one consistent remedy should be considered essential move to any future regulation, that being disclosure of at least the existence of the funding. This gives the tribunal at least the knowledge that TPF exists and therefore a basis to take action on the particular issues it causes to arbitration. The other additional remedies are for the tribunal to have binding authority to order confidentiality orders on the funder, to rework provisional measures related to ordering security as a rebuttable presumption on the claimant
to prove they can pay a costs order and to have increased disclosure of terms of the agreement in cases of extensive funding or the inability to pay costs. This leaves the final question on what these remedies should look like and who should enforce them in their regulatory form. While there has been only a limited regulatory response to TPF by nations, arbitral institutions and multinational bodies, there still exists a divergence in approaches on how to regulate the question of TPF. To this end, the next section will be a comparative analysis on the existing approaches to regulation. This will provide a review of the positives and negatives of each approach and allow a recommendation of the best regulatory approach for those who have yet to regulate on TPF. Initially, however, there must be a review of the consideration of an outright ban on TPF in investment arbitration.

3.1 How restrictive should the remedies be: Abolition vs. Restriction?

In the face of all the issues that TPF causes to the investment arbitration regime, it is not impossible to consider the argument that there should be regulation that altogether it abolishes or bans it from the arbitral system. This however has not been the approach of any ruling body, for good reason. In a practical sense, TPF does bring benefits, such as improved access to justice and is attractive to investors; to then ban it outright would then do more harm than good. By eliminating positive aspects from the arbitral system, it will devalue it and reduce popularity. In a legal sense, it is unlikely that a total ban will come from either investment treaties or national legal systems. Regarding investment treaties, it seems out with an investment treaty’s scope and jurisdiction to begin banning third parties’ contracts directly. Since an investment treaty’s scope and authority relate to foreign investment, then the authority to ban a separate funding agreement, which involves validity at a national level, will most definitely not come under the powers allowed by IPL.109 Theoretically, this could be achieved by requiring a potential claimant to be financially capable to finance a claim independently. Nevertheless, this seems unrealistic in practice. Not only would this affect the ability of claimants to lodge a claim, funded or not funded alike, it would also presuppose the tribunals knowledge of the funding agreement. Since a ban would also likely absolve the duty to disclose, the tribunal would have no power to distinguish between claimants who can

109 Van Boom WH, supra note 7, at 52
independently finance a claim and those receiving illegal funding to do so. Additionally, it would only succeed in making this a very unattractive investment treaty to invest under. Many investors may chose not to invest in that country if there investment protection regime requires them to be financial solvent at all times to pursue a claim. As for national laws, unlike an investment treaty there is no direct legal limitations on them introducing a ban of TPF in their arbitration law regime. However, they should also consider that it would be difficult for them to maintain their place as an attractive place for arbitration if they ban a major source of funding, and effectively access, for many potential claimants. Because of this, it makes sense that no countries through their national law or their investment agreements, have introduced a ban on TPF in investment arbitration. The only countries that maintain any sort of ban, such as Ireland, do so as a remnant of the tort of “Champetry and Maintenance”, which itself, as seen above, is ineffective at restricting TPF, rather than an effective way to combat the issues of TPF.

The unavailability and non-existence in the international arbitral world of a ban does not presuppose support for a Laissez-faire approach to TPF. Left unregulated, TPF could damage both principles and core procedural aspects of investment treaty arbitration. Instead, the goal of any potential regulator should be to recognise the existence and propagation of TPF in investment arbitration, due to its fundamental benefits i.e. allowing the increased access to the system and overall fairness to between claimants, while aiming to restrict and thus minimise the issues that TPF cause. Our above analysis identified three issues that could potentially be minimised by regulation: (1) Holding funders to orders of confidentiality; (2) Requiring the funded party to disclose the identity/existence at a minimum, while requiring them to disclose further the funding agreement if issues of tribunal impartiality, jurisdiction or losing costs are at issue; (3) Establishing a rebuttable presumption for security of costs against the claimant in instances where TPF is known. These restrictions and requirements on the funded party balance the benefits brought by TPF with its detrimental effects, more effectively that an outright ban would achieve. Therefore, what remains to be discussed is the most effective way of implementing these measures. Since ITA requires the application of multiple sources of law at different points of a dispute, i.e. the national law to give validity to the investment contract, IPL to define a State wrong, arbitral rules for procedural
standards etc., then there are multiple areas in which regulation of TPF can be implemented. Looking to the general commentary, there seems to be at least three distinct forms of regulation that deserves to be discussed: (1) Regulation of TPF through national laws (2) Regulation of TPF through Investment treaties (3) Regulation through Arbitral Rules.

3.2 Regulation through National Laws

National laws can be incorporated into investment treaty disputes in two ways: expressly cited as a source of law within the Treaty that the tribunal must base its decision on, or as a requirement to examine questions out with the treaty’s mandate, such as whether a contract was valid or a company was properly incorporated. Concerning TPF, the prior is of the most interest. If a national law has set requirements regarding disclosure or privilege for funders, and if this law is cited as one of the applicable laws, then the tribunal will most likely be bound to apply these criteria to the dispute at hand, presuming that these provisions conflict with any treaty provisions.110 Thus, a singular jurisdiction does have the ability to import regulation on TPF this method. How then have states implemented TPF regulation through national law?

The two most commonly cited examples are that of Hong Kong and Singapore. Traditionally prohibited in both countries, they are now seen to be “setting the trend” of regulation of TPF, as being the first jurisdictions to establish formal rules of TPF in investment arbitration.111 In Hong Kong the Arbitration and Mediation (Third Party Funding) (Amendment) Bill (2016) stipulates that if a funding agreement is in place then there is mandatory duty of disclosure on the funded party to give notice of the existence of the agreement and the identity of the funder.112 This then alleviates both the issues of conflict of interests and transparency issues discussed above. Meanwhile Singapore has went further. The Civil Law (TPF) Regulations 2016 (Cap. 43, No. S 000) allows funding only by “qualified Third party funders”.113 To qualify, a funder must meet and continue to satisfy such

110 Dolzer R and Christoph S (2012), supra note 24, at 293
111 Suh J.H, “Disclosure of third party funding: Hong Kong and Singapore setting the trend?” (Thomas Reuters Practical Law, October 2 2017)
112 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016), Part 2, Clause 3, 98T
113 Civil Law (TPF) Regulations 2016 (Cap. 43, No. S 000), Regulation 4
criteria as maintaining consistent access to funds to fund the dispute resolution proceedings and must invest in the funded party to meet the cost of dispute resolution proceedings. Providing criteria for funders to both be able and required to subside the cost of proceedings is an effective alternative to the costs issue. Similar to Hong Kong, Singapore has also introduced regulation to disclosure of TPF in arbitration. Through amendment to the Legal Profession (Professional Conduct) Rules 2015, it requires the legal counsel, who are subject to the rules, of a funded party to disclose existence and identity of a funder to all relevant parties within in the arbitration. It is interesting to note that even with the two leading jurisdictions of regulation of TPF, there is a significant difference in the duty to disclose, with Hong Kong putting the duty on the funded party while Singapore instead puts the duty on representing counsel. The latter approach effectively means that international law firms representing a funded party to an investment arbitration in Singapore may not have the duty to disclose. Regarding the question of confidentiality orders, while those states that have opted for a duty of confidentiality in arbitration usually address this issue within legislation, very few discuss it’s applicability to TPF, or even third parties in general. What we can see is that those States with newer arbitral legislation, adopted within the past 10 years, are aware of not only the issue of TPF but also confidentiality issues with amicus curiae, and have regulated respectively. Thus, legislation such as the Scottish Arbitration Act, expressly addresses and remedies the potential threat of breach of confidentiality by giving the tribunal direct powers to the third party to uphold the requested confidentiality. How would this regulate TPF in practice? If confidentiality is ordered within the arbitral proceedings, and a funder is in threat of breaching this, then an interested party or tribunal can request a local court to uphold the award in a more legally binding manner. If the national legislation permits such powers, then the local court will be likely persuaded to also uphold the order. Without such duties or powers within the national legislation it is unlikely that a court will uphold such

114 Ibid, Regulation 4(a)
115 Made possible by the Civil Law (Amendment) Bill (No. 38/2016) which also brought the above regulations
116 i.e. a lawyer that is qualified in Singapore
117 See Note 106
confidentiality orders.\textsuperscript{118} It is therefore clear that regulation within the arbitral legislation could combat the issues of confidentiality potentially breached by TPF. Generally, express legislation is both possible and existing to regulate the issues of TPF in investment arbitration.

Some states have also acknowledged the threat of TPF however have not chosen to expressly regulate against it. Instead, they believe that they current law is strong enough to remedy any of the current issues of TPF in investment arbitration. For example, in the Netherlands, the Dutch Ministry of Justice have considered that the issues under TPF can be dealt with under their general procedural code.\textsuperscript{119} If there is a conflict of interest, they believe it can be regulated within their own code of conduct for solicitors rather than express legislation. Jurisdictions such as England and Wales have also not expressly regulated, instead letting the courts decide these issues. This extent of court intervention was shown in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*\textsuperscript{20}. The High Court here found, on the question of whether an English-seated ICC tribunal had exceeded it’s mandate, by that the inclusion the funder’s costs in a final costs award, was not exceeding their power. This power of tribunals was previously not considered possible within the TPF ambit.\textsuperscript{121} What this shows, is that by leaving the issues of TPF to national courts, they can decide what their nation’s unique approach to TPF regulation shall be on an ad hoc case basis. It has the benefit of flexibility required in a new developing area such as TPF, but the drawback of unpredictability for parties at the enforcement stage. Finally, the final jurisdiction worth noting is that of France. The French legislature have not discussed TPF in detail, and thus while not expressly prohibited is not properly recognised or regulated within any domestic regulation. For this reason, the Paris Bar Council adopted a resolution\textsuperscript{122} that guides and regulates their legal counsel on TPF rather than arbitration in general. The resolution is quite progressive in that it maintains to keep the funder’s influence to only the client, by

\begin{itemize}
\item \textsuperscript{118} See *Bulbank*, in which the request for confidentiality was not granted due to the Swedish legal system not recognising confidentiality within their arbitral system.
\item \textsuperscript{119} Krestin M and Mulder R, *Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?* (Kluwer Arbitration Blog, December 12, 2017)
\item \textsuperscript{20} [2016] EWHC 2361 (Comm)
\item \textsuperscript{122} On the basis of a internal report on TPF which also included the resolution, see Sicard F (2017), *'Le financement de l’arbitrage par les tiers* (‘Third party funding’), Advocats Burrea Paris
\end{itemize}
stating that contact from counsel should only be to the client and not the funder. It also requires the counsel to encourage the client to disclose the existence of the funding. These two requirements both significantly reduce the risk of breaching Confidentiality, while also contributing to improving transparency. Thus, national professional bodies may be able to regulate TPF in instances where the national legislature have not.

At a national level, many jurisdictions have recognised the issue of TPF and have implemented regulation, in some form or another, to varying degrees. While national regulation should be a contributing factor into minimising the risks introduced by TPF, it should not be the sole source of regulation. Firstly, as we have seen, in the 6 jurisdictions. all have taken a rather piecemeal form of regulation, i.e. with some regulating only disclosure and some others only confidentiality. Even within the two “model” jurisdictions, Singapore and Hong Kong, one can see disparity in the mechanism of disclosure, with one requiring it system-wide and the other only requiring it as part of counsel’s duty. This leads to the conclusion that if one was to only to regulate TPF at a national level, there will be disparity worldwide regarding how a funder and a client can act. For investment arbitration, this may cause potential claimants to “shop around”, for a governing jurisdiction that has limited or no regulation on TPF, for their seat of arbitration. Effective regulation of TPF therefore needs a unified approach globally, which given the sheer number of jurisdictions for arbitration may be impossible for national laws to achieve. Secondly, while the national law may be significant in commercial arbitration, it plays more of a subsidiary role in investment arbitration. The arbitral rules or the treaty or party agreement, rather than national law, answer most procedural questions, which is where the majority of issues of TPF arise. National laws will have a limited role in dictating TPF limits or requirements during the proceedings. As for post award, we have already established above that when it comes to enforcement it is unlikely that the mere existence of TPF will amount to an unenforceable award. Additionally, if the award was rendered under ICSID, then the fact that TPF was present contrary to a particular national law will be irrelevant.

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123 See note 117
due to the automatic enforcement of mechanism of Art. 54 of the convention, requiring no judicial review of a valid ICSID award.

Based on these two points, it seems that the national law is merely not sufficient itself to regulate the issues of TPF. While it is effective at adopting the right regulatory attitude for changing TPF, it’s piecemeal approach and lack of authority regarding procedure limits it as being the authoritative source of law for regulation of TPF.

3.3 Regulation through Treaties
States may still be able to regulate TPF through their creation and modification of investment treaties. An investment treaty will be able to dictate the rules and procedure of TPF requiring anything from disclosure to confidentiality or security for costs, as it limits are only the limits of agreement by the Contracting States. Given that the treaties are the lex specialis of the investment dispute, it is likely the most authoritative approach of regulation of TPF of the three approaches discussed here. While many States to take a “lean approach” in the procedural requirements for their investment treaty, preferring to leave procedural issues to the chosen arbitral institution’s rules, this by no means that they cannot set their own such requirements in the treaty. An interesting parallel here is the inclusion of the procedural rules in a treaty regarding the allowance and regulation of amicus curiae briefs. This shows that previous treaties have set the precedent for regulation of different third party issues within their own text. One must also consider that while no BIT provisions regarding the regulation of TPF currently exist, there is support for this idea in similar recent EU free trade agreements. The EU-Vietnam, CETA and TTIP all have areas devoted to the regulation of TPF in investment arbitration disputes. These provisions within these agreements set down mandatory requirement for a party that receives TPF. Theoretically, the inclusion of further powers regarding presumption for security of costs and upholding confidentiality orders on third parties could also be included here. Regulation of TPF through

126 For example, see Model Norwegian BIT (2012), Art. 18(3)
127 See point 2.2 above
128 CETA, Art. 8.26
129 TTIP, Section 3 , Art. 2.1
investment treaties, and similar instruments, is therefore not impossible and likely more effective than through domestic laws since it will apply directly into the proceedings, instead of being a subsidiary applicable law or as part of the enforcement proceedings.

This approach however, has other considerations that may dampen its regulatory efficiency. There is the issue of purpose of the investment treaties versus the purpose of a regulation of TPF. The prior seeks to be a set of protections for an investor that makes that jurisdiction attractive to invest in, while the latter is a restriction of an investor’s choice of dispute funding in favour for the procedural integrity of the ITA system. The examples we gave above were of Free Trade Agreements, which are traditionally much more comprehensive in their regulation due to its increased scope. Not only may it be legally inappropriate to implement sweeping restrictions in a BIT due to this mismatch of objectives, but it also may detract from that jurisdiction’s attractiveness as a place to invest. This will likely reduce the probability of State’s including such provisions in the treaty. One must also consider that practicality of introducing such provisions. While it may be useful for newer treaties to include such wording, it will be a much more difficult process retroactively applying TPF provisions to older treaties that have been in place for decades and likely have strict processes for amendments.\textsuperscript{130} This will lead to is a disparity of regulation in which only newer treaties will have the regulated TPF, while the majority of the older treaties will not. The majority of investors will therefore be able to use TPF unregulated. A connected issue to this is the applicability of treaty shopping and Most Favoured Nation Clauses (MFNs). Many jurisdictions may refuse to or delay introducing new provisions regulating TPF due to it being unattractive to investors. Similar to the issue with national laws, this means that there will be a disparity between jurisdictions regulating TPF, making the possibility of an investor going “treaty-shopping”\textsuperscript{131} to find the most TPF friendly jurisdiction. An added difficulty for investment treaties is the use of a MFN\textsuperscript{132} clause. If there exists a disparity, either by time or jurisdiction, between

\textsuperscript{130} Thrasher R.D, ‘The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform’ at 6
\textsuperscript{131} i.e. when a party sets up a shell corporation in a nation to gain the particular investor protections.
\textsuperscript{132} A clause allowing the claimant to gain any protection that the State gives to any other 3rd party.
regulation of TPF in the treaties signed by that State, then the claimant will be able to side-step any regulations of TPF by relying on a MFN clause to use the treaty with no regulation of TPF. The use of this clause could mean that any attempts of regulation in a treaty will be easily circumvented.

The regulation of TPF through investment treaties at first sight may seem like an attractive approach. Yet, when considering the practical realities of regulation with this legal instrument, it results in regulation that is unlikely to be chosen by many jurisdictions. Even if it was chosen by a minority of jurisdictions, the fact there is potential temporal and jurisdictional disparity, negate global regulation of TPF through the existence of treaty-shopping and MFNs. For these reasons, Investment treaties are also unlikely to be the most effective forum for regulation of TPF.

3.4 Regulation through Arbitral Rules

The final approach to regulating TPF is through modification of arbitral rules. There would be inclusion of disclosure requirements, upholding confidentiality and the presumption against security for costs. The adopting of these powers from the arbitral institutions has been somewhat mixed. Institutions such as the Hong Kong International Arbitration Centre (HKIAC) are proposing a rule amendment,\textsuperscript{133} that will require that the funded party must disclose the identity and existence of the funder to be disclosed, similar to its legislation amendments. The Singapore Arbitration Centre (SIAC) newly released investment arbitration rules does not require mandatory disclosure by the parties, but does give the arbitrators the power to order disclosure of the existence and identity of the funder.\textsuperscript{134} Finally the ICC and CAM-CCBC both do not grant specific powers or duties of mandatory disclosure, but do “recommend” voluntary disclosure\textsuperscript{135}, in the later institution, or allow TPF to be one a factor for disclosure in favour of conflict of interest, in the prior institution.\textsuperscript{136} Surprisingly, UNCITRAL has not addressed TPF within it rules, meanwhile ICSID only recently noted possible rule changes, regarding TPF.\textsuperscript{137} It is noteworthy that two of the major investment arbitration institutions have been so

\textsuperscript{133} Krug Z, Morris C and Helena E, ‘Third-party funding in international arbitration’ (Getting the Deal Through, Thursday 28 December 2017)
\textsuperscript{134} SIAC IA Rules, Art 24.1
\textsuperscript{135} CAM-CBC, Resolution No.18/2016
\textsuperscript{136} ICC, “Guidance Note for the disclosure of conflicts by arbitrator” (2016), 12 February 2016
\textsuperscript{137} ICSID Secretary General, List of Topics for Potential ICSID Rule Amendment Update (2018)
slow to recognise or remedy TPF issues. It should be additionally noted that while all the institutions seem to deal with disclosure, none deal with confidentiality or any security for costs issues.

While the current reaction of arbitral institutions to TPF may seem mixed, it is the recommendation of this paper that this is likely to be the most effective forum for regulation. It is recommended that arbitral institutions regulate in the form of amendment to the rules to: (i) Have mandatory disclosure of the identity and existence of the funder in all cases where a party receives funding, and disclosure of funding agreement if there is an application for security for costs (ii) Require a rebuttable presumption that the party, receiving funding, will submit a security for costs, unless they can show they can satisfy a costs award independently (iii) Impose a specific duty of Confidentiality on the funder and grant the tribunal powers to extend any Confidentiality orders to the funder.

These are the same recommendations for also treaties and national law; however, they do differ in their overall effect on regulating TPF. Firstly, the arbitral institutions rules would be significantly more consistent over any users of those particular institutions, regardless of the applicable national law or treaty law. There is of course the unfortunate fact that there may be disparity between institutions, however this is a smaller risk that having disparity between say few major different institutions rather than between hundreds of different national jurisdictions or thousands of different treaties. Even on this point, Treaties usually have a set list of 2 or 3 arbitral institutions (usually ICSID or UNCITRAL at a minimum), which means that the chance of choosing an unregulated institution is significantly lower than that compared to regulation of the national laws or treaties. Secondly, the time taken to modify the rules is much faster through institutional rules than via treaty or national laws, due to arbitral institutions being fairly independent and autonomous in their regulation compared to having to answer to legislature or the public.138 This will allow for regulation of TPF to be the status quo globally in a quicker fashion than would be expected from the previous two approaches. Finally, like regulation at a treaty level, the arbitral rules will be directly applicable to the

dispute. This means that arbitrators can regulate TPF issues as they arise, rather than as a validation check at enforceability stage. The argument could be made that parties could voluntarily contract out of any TPF rules. However, this is unlikely, as for investment arbitration, it would require a State to either agree during the proceedings or have a provision in the treaty that explicitly states that they wish for any issues of TPF to go unregulated. Giving the current regulatory attitude towards TPF globally, there would be very few states willing to do this and thus the risk of this is minimum. This rationale above, is why modification of arbitral rules is the best approach to regulating TPF.

Conclusion on Regulatory Approaches
We can therefore establish that while TPF is no longer a legal “no-mans” land, the current regulatory approaches within the arbitral world is piecemeal and fractured. While attempts with national jurisdictions to regulate TPF are not effective enough to neutralise the threats discussed in section two, they are useful as being a signal for support and a call for action to the large arbitral environment to begin taking seriously the threat of TPF. This being said, the future for regulation should rest on the arbitral institutions due to the increased applicability of their rules. Positive signs of arbitral institutions embracing this role include the fact that ICSID are currently undergoing discussions of modification of the rules to remedy TPF. It is likely that if ICSID release modified rules the rest of the major arbitral institutions will follow. Thus, effective regulation of TPF in investment arbitration may not be in the too distant future

Overall Conclusion
TPF in investment arbitration brings unique issues. At face value, one should welcome TPF to investment arbitration, as it allows for better facilitation of claims. Additionally, it is the parties choice to seek funding, and giving the sanctity of party autonomy in arbitration, why should the ITA system seek to restrict choice in arbitration. But one must look at the overall damage it causes the system. It allows a third party to have unprecedented access to the arbitration while also the ability to influence the overall decision. They do all this while having no threat of negative impact in the event of a loss, aside from a lost opportunity to gain profit. The mere fact of this alone stands in direct contradiction to the principle behind investment
arbitration, which is to provide an impartial system to disputes between an investor and a State. It not only threatens the system in its core principle but also other procedural aspects, ranging from conflict of interests to jurisdiction, that are key at providing that the arbitration is conducted in a fair and justified manner. The most detrimental effects of TPF can endanger multiple safeguards within the arbitral system. In reaction to the threat the call for regulation of this matter is not only logical but necessary to maintain the inherent character of investment arbitration. On the balance of things, TPF is multifaceted and it does contribute to further access and use of the investment arbitration, which can be argued to improve its image and overall fairness. This is TPF’s redeeming feature, which removes the option of an overall ban or abolition.

Therefore, the difficulty does not lie in the rationale behind regulation but instead in its actual implementation. At its heart, investment arbitration is a self-contained system, free from any national legislation or other international conventions, thus regulation of a global issue, such as TPF, within this system is difficult to do in a sweeping manner. For this reason, regulation of independent treaties or national legislation in the traditional manner will not be effective at ensuring a unified response to the threat of TPF. Instead, regulation must come from the gatekeepers of investment arbitration, the arbitral institutions. This may seem to be a heavy burden for the institutions to bear. However, considering that their existence is based on the proper, or at least belief in, functioning of the investment arbitral system as a whole, then they do have personal incentive for introducing regulation. For this proper functioning, the institutions are the best choice, as seen above, the institutions can seek to remedy the issues caused by TPF directly and consistently. Until this effective regulation is endorsed by the arbitral institutions, the “gambler’s nirvana” will remain untempered and the issues of TPF will exist to destabilise core aspects of the investment arbitration system.
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