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Third Party Funding in International Investment Arbitration

Master's Thesis

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LIST OF ABBREVIATIONS

ALF	Association of Litigation Funders
Art./Arts.	Article/Articles
ATE	After-The-Event
AtJ	Access to Justice
BIT	Bilateral Investment Treaty
BTE	Before-The-Event
CETA	Comprehensive Economic and Trade Agreement
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GPG	Global Petroleum Group
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
NY Convention	New York Convention
p./pp.	page/pages
para./paras.	paragraph/paragraphs
TPF	Third Party Funding
UAE	United Arab Emirates
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
USMCA	United States-Mexico-Canada Agreement
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
v./vs.	versus
WB	World Bank

INTRODUCTION

International investment arbitration is an efficient, fast, and popular way of resolving international disputes between host states and foreign investors. Given the fact that these arbitrations are becoming more and more expansive, Third-Party Funding (hereinafter "**TPF**") has penetrated this lucrative area.

During the TPF arrangement, an individual or corporation, which is not a party of a dispute, provides financial support for one party of the dispute – usually for the claimant. In return, this funder will receive a share of the claim recovered from the dispute if a funded party is successful.[1] The concept of third-party funding was firstly introduced in the context of domestic legal disputes in Australia and later in the United States, followed by the United Kingdom. Lately, TPF has been adopted in most jurisdictions in Europe, Latin American countries as well as traditional trade centres of Hong Kong and Singapore. Moreover, TPF was extended beyond domestic litigations, and it is now an established practice in international commercial arbitrations and particularly important for this thesis even to international investment arbitrations, especially after 2008.

TPF is one of the 'hot topics' of international arbitration, especially in the Investor-State Dispute Settlement (**ISDS**) context. The presence of the TPF has however sparked a heated debate in the international arbitral community, as there are severe risks that could affect the whole ISDS system. The most debated risks are possible conflicts of interests, the amount of influence a funder has over the case, possible increase of frivolous claims and issues regarding security for costs. On the other side, the TPF is enabling insolvent investors to access justice by providing them with the necessary funds. Several possibilities of how to effectively deal with issues arising from the presence of funders in the dispute are presented, with the most emphasis is given to the general duty of extensive disclosure. There are however certain issues in implementing such regulation, as of today, the TPF has remained unregulated in most of the investment arbitrations and there is a great level of inconsistency from differing approaches of arbitral tribunals and other actors.

Therefore, this thesis will analyse and examine the impacts and implications caused by the presence of third-party funding in international investment arbitration. In addition, it will outline the possibilities of how to effectively deal with issues arising from the presence of funders in the dispute. The thesis is operating with the premise that there is currently no general requirement to disclose the presence and certain information about the third-party funding in international investment arbitration. This thesis will also further analyse if and how certain arbitration jurisdictions and arbitral institutions have addressed the issues of TPF.

[1] International Council for Commercial Arbitration (ICCA). "*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*", pp. 45-47.

The thesis aims to give arguments for which an extensive general duty of disclosure of TPF in investment arbitration is necessary. While working on this issue, the author will be using an analytical method of work based on primary scholarly literature, case law, trade and investment treaties, arbitrary rules, and their proposed amendments. All these legal sources will be dully cited and put into context as well as analysed in a critical way.

The objective of my thesis is to explain the phenomena of third-party funding in investment arbitration and analyses its risk as well as benefits, which are essential for the unusual system of ISDS. The questions that this thesis shall answer are (**1**) what risks and benefits third-party funding is posing for the ISDS system, (**2**) is general disclosure able to solve these risks and (**3**) how certain key players in the ISDS system (such as states, international arbitral organisations, and legal associations) are addressing these issues. The focus of the thesis is on the regulation of third-party funding in the form of mandatory disclosure of TPF in the dispute.

In the first part of this thesis, a short introduction to the specifics of the ISDS system will be provided, as it is crucial for this thesis to underline why the issue of third-party funding is severely different for the investment arbitrations than for domestic litigations or even commercial arbitrations, as in investment arbitration there are not two private entities, but the state is always present on the side of the respondent. Then, the definition and subjects of Third-Party funding will be presented. Subsequently, the origins of TPF will be introduced with the emphasis on reasons why the ISDS system is especially lucrative for TPF.

In the second part of the thesis, reasons for and against the TPF (as well as risks and benefits) will be presented and critically analysed. In the conclusion of this part, the findings will be evaluated. In the third part, following the evaluation of risk, solutions on the theoretical level will be presented with a focus on the duty of disclosure and regulation of TPF in general. The duty and scope of the disclosure will be presented as a way to eliminate or at least minimize risks presented in previous parts. In the last part, practical examples of how certain actors (states, organisations etc.) have already dealt with the issue of TPF will be shown. From this part, either confirmation or refusal of premises that there is not (yet) a general rule of disclosure of TPF in investment arbitration will be made. In conclusion, all findings will be mentioned and general trends about the regulation of TPF will be presented.

Given the limited space of this thesis, a thesis will be dealing with the issue of TPF solely in investment arbitration, although some general aspects, as well as origins and moves made by several selected actors, will also apply to the presence of TPF in international commercial arbitration and domestic litigations as well.

I have been personally introduced to the issue of TPF in investment arbitration thanks to the FDI Moot Court Competition, in which I was a team member of the Charles University team. The issue of third-party funding was one of the issues that we had to deal with in our 2019 case[2], and in which I was personally most interested. In the wake of the fact that during the hearing's rounds, this issue was not given enough attention, I have decided that this topic is worth more research and dedicated my thesis to elaborate more on this challenging and constantly evolving issue. I hope that the final version of my thesis will combine academic arguments together with selected case law, in which theoretical issues have arisen and I hope to bring new findings and perspectives into this complex issue.

[2] FDI International Arbitration Moot. "*FDI Moot Case 2019*", p. 53.

1. INVESTMENT ARBITRATION SYSTEM

The investor-state dispute settlement (ISDS) system is an instrument of public international law and is most often materialised through investment arbitrations.[3] International investment arbitration is a dispute resolution mechanism that resolves legal disputes between sovereign states and foreign investors.[4] This mechanism is based on numerous international treaties. These treaties are especially Bilateral Investment Treaties (**BIT**s) and Free Trade Agreements (**FTA**s). BITs and FTAs are together known as International Investment Agreements (**IIA**s).[5] These international treaties were signed with the aim to prevent illegal interferences by domestic states to foreign investments within their jurisdiction.[6] When a conflict arises, IIAs have mostly guaranteed to investors that a claim would be handled by an impartial international arbitration forum.[7] Globally, more than 3,000 of IIAs are currently in effect and these treaties have a profound effect on the flow of foreign direct investments (**FDI**) and thus promotion and development of international trade.[8]

1.1 Arbitral Institutions

There are several arbitral institutions and different arbitral rules which are being used to resolve ISDS disputes. The most used forum is under the rules of the International Centre for Settlement of Investment Disputed (**ICSID**) created by the World Bank (**WB**), which offers an international, professional, impartial forum for dispute resolution, which is independent of national law in a form of an ad hoc tribunals instead of a permanent court.[9] Investment arbitrations are also being held in front of other arbitral tribunals and arbitration institutions, which have their own different rules and different venues. The most important ones are the International Chamber of Commerce (**ICC**) located in Paris, the London Court of International Arbitration (**LCIA**), the Hong Kong International Arbitration Centre (**HKIAC**), Singapore International Arbitration Centre (**SIAC**) and the United Nations Commission on International Trade Law (**UNICTRAL**) Arbitration Rules.[10] However, more than 90% of all known international investment arbitrations have been filed either

[3] Schwarzer, "*Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone*", pp. 1-3.
[4] Franck, and Wylie, "*Predicting Outcomes in Investment Treaty Arbitration*", pp. 470-472.
[5] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", pp. 1365-1367.
[6] Moul, "*The International Centre for the Settlement of Investment Disputes and the Development World: Creating a Mutual Confidence in the International Investment Regime"*, pp. 885–886.
[7] Franck, and Wylie, "*Predicting Outcomes in Investment Treaty Arbitration*", p. 463.
[8] ICSID, "*Database of Bilateral Investment Treaties*".
[9] Moul, "*The International Centre for the Settlement of Investment Disputes and the Development World: Creating a Mutual Confidence in the International Investment Regime*", pp. 889–891.
[10] ISDS Academic Forum Working Group, "E*mpirical Perspectives On Investment Arbitration: What Do We Know? Does It Matter?*", pp. 5-6.

under ICSID or UNCITRAL Arbitration Rules.[11] For that reason, most of the cited cases in this thesis are ICSID and UNICTRAL ones.

1.2 Enforceability of Awards

Enforceability of awards is one of the key aspects of the ISDS system. If one of the above-mentioned tribunals concludes that an IIA was breached, the international investor is awarded financial compensation. The issue of the enforcement of these financial awards is enabled by the New York Convention (**NY Convention**.). The main principle of this treaty is that when the state is not willing to pay voluntarily, any assets of this state may be used in any signatory state of the NY Convention and directly pay to awarded investors.[12]

1.3 Origins of the International Investment Arbitration System

The first-ever Bilateral Investment Treaty (BIT) was signed between Germany and Pakistan in 1959[13], and in 1966, the World Bank had established the International Centre for the Settlement of Investment Disputes (ICSID)[14]. This ICSID arbitration forum was specifically created for resolving investor-state conflicts outside of the domestic court system.[15] In those alien times, the system was designed for much-needed international protection of foreign investors who were often unjustly expropriated without proper compensation due to the changes of government in developing countries, whose legal and economical level of development was not yet transformed to provide fair conditions for foreign investors.[16] As it is mentioned by Van Harten, most of the first investment arbitrations thus "*followed in the wake of foreign invasion or occupation*"[17] IIAs were the solution for these fears as they have granted certain legal securities and standards to foreign investors guaranteed by public international law.[18]

Such standards are especially "*full protection and security*", "*most-favoured-nation treatment*", "*fair and equitable treatment*", "*transfer of funds*" or the so-called "*umbrella clauses*" to mention the most important ones.[19]

[11] United Nations Conference on Trade and Development, "*Investor–State Dispute Settlement Cases: Facts and Figures 2020",* reporting that between 1987 and 2020, 61% of international investment arbitrations were settled through ICSID and 31% were settled through UNCITRAL.
[12] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1365.
[13] Ma, "*A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America*" p. 572.
[14] Tupman, "*Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*", p. 813
[15] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2937.
[16] Schultz, and Dupont, "*Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Study*", pp. 1151-1153.
[17] Harten, *Investment Treaty Arbitration and Public Law,* p. 17.
[18] Ryan, "*Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*", pp 725-733.
[19] Abdala,. "*Chorzów's Standard Rejuvenated: Assessing Damages in Investment Treaty Arbitrations*" p. 221.

1.4 Increase of IIAs and Investment Arbitrations

Even as waves of expropriations declined significantly in the late 1970s and 1980s[20], the number of BITs – mostly signed by Western states with newly liberalised post-communist European countries and Latin American countries – has risen significantly due to the geopolitical changes such as the fall of the bipolar world and dissolution of the USSR.[21] These newly transformed states, as Poulsen argues, have underestimated the costs which are associated with the right to arbitrate in front of international arbitrations, as numbers of investment arbitrations have risen significantly in the 2000s and onwards.[22]

1.5 Current Development and Challenges of the ISDS System

The highest number of new cases which were registered at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the leading institution for ISDS proceedings, was in 2018,[23] so it is clear that investment arbitrations are still very much a present topic. In total, more than 1100 arbitrations based on IIAs were initiated against states.[24] As it is noted by Bonnitcha and Williams, this unprecedented rise is caused also by the fact that investors are able to initiate investment arbitration to a larger scale of state measures than anticipated, including also legislation changes enacted by democratically elected officials.[25] In the European Union, some investment disputes were even initiated against new member states for adoption of legislations or policies that were implemented because of their obligations, arising from their membership in the European Union to comply with EU law.[26] This happened for example in the ICSID cases *of Electrabel S.A. v. Hungary*[27] and *AES v. Hungary*[28].[29]

[20] Pandya, "*Democratization and Foreign Direct Investment Liberalization, 1970–2000*", pp. 475-477.
[21] Simmons, "*Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment*" pp. 15-18.
[22] Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* , Chapter 1.
[23] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1365.
[24] UNCTAD, "*Investment Policy Hub – Investment Dispute Settlement Navigator*", as of December 2021, exactly 1104 known cases are registered of which 740 are concluded and 364 are pending.
[25] Bonnitcha, and Williams, "*Politically motivated conduct in investment treaty arbitration*".
[26] Olivet, "*A test for European solidarity: The case of intra-EU Bilateral Investment Treaties*", p. 4.
[27] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/1.
[28] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22.
[29] Both cases were caused by the fact that in 1990s, Hungary has privatised its energy sector but continued to provide state subsidies to electrical companies, such as British AES, Belgium Electrabel and French EDF. In 2004, Hungary has become an EU member state and following the obligations of this membership, Hungary had to stop its subsidiary policy to comply with EU competition law. Three electrical companies have sued Hungary claiming violation of BITs and claiming loss of future profits. European Commission has intervened with a written statement (a*micus curiae* briefing) arguing that state aid was unlawful, and the country was not breaching its treaty obligations since the changes in policy were introduced to comply with EU law. Cases of AES and Electrabel were eventually ruled in favour of Hungary, but Hungary nonetheless paid hefty legal and arbitration fees. In the case of AES, for example, Hungary's final bill amounted to US$5.5 million. Another case where the claim arose out of a new member state complying with EU law is the one of Dutch investor *Eastern Sugar vs Czech Republic* using Netherlands-Czech Republic BIT. The Czech government had passed regulations to comply with EU's Common Agricultural Policy. This led Eastern Sugar to claim breach of fair and equitable treatment.

Lately, while most respondent states are still developing countries, there has been an increase of investment arbitrations even against wealthy western liberal democratic states such Spain, Italy, and Germany, as these claims were initiated by a supposed breach of the Energy Charter Treaty (**ECT**)[30]. This boom in investor-state dispute settlements (ISDS) has indeed contributed to the increase of funder's interest in investment arbitration and opened an academic and scholarly debate about its risks as well as benefits.

[30] Eberhardt, Olivet and Steinfort, "*One Treaty to rule them all: The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition*", p. 24.

2. THIRD-PARTY FUNDING

Third-party Funding, also known as Third-party Financing (both terms are used interchangeably in academic articles and books) have seen a massive increase in the last decades.[31] In the simplest description, third-party funding is a special type of dispute financing, in which a funder is paying all arbitral proceedings cost instead of a funded party.[32] In return for this financial support, TPF is usually receiving a certain degree of control over the case and most importantly it also receives a percentage of the awarded compensation if a funded party is successful in the arbitration.[33] The risk is in the fact that if a funded party is unsuccessful and no compensation is awarded, then the funder will obtain noting and in addition, is obliged to bear all the costs and fees of legal representation as well arbitration fees.[34]

In the last 10 years, TPF business has become much more specialised and is now dominated by several big litigation's finance firms (such as Juridica Investment LTD and Calunius Capital from the United Kingdom, Burford Capital and Fulbrook Management from the United States and Omni Bridgeway from the Netherlands to name the five most prominent firms specializing in third-party funding[35]), together with several investment banks as well as numerous hedge funds, which are operating capital collected from private investors who are seeking speculative investment opportunities to increase their capital.[36] These firms report that over 10% of their portfolio is invested in international commercial and international investment arbitrations and this trend is on a rise.[37] Overall, TPF in general is a new but fast-growing industry that is now much more present even in investment arbitration.[38]

2.1 Third-Party Funding in Investment Arbitration

Recent years have seen a massive increase in the number of cases in which third-party funding was present in investment arbitration.[39] This increase is visible in the increased numbers of funded cases, the rising numbers of legal firms collaborating with funders as well as the increase in the funders willing to financially assist both parties of the dispute.[40]

[31] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 1
[32] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2914.
[33] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", pp. 381-383.
[34] Perry, "*Crowdfunding Civil Justice*", pp. 1365-1366.
[35] Eberhardt and Olivet, "*Profiting from injustice How law firms, arbitrators and financiers are fuelling an investment arbitration boom*", p. 57 in the table
[36] Rogers, "*Gamblers, Loan Sharks & Third-Party Funders*", pp. 8-10.
[37] *Ibid*, pp. 8-9.
[38] Goeler, "*Third-Party Funding in International Arbitration and its Impact on Procedure*", p. 1.
[39] Brekoulakis and Rogers. "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 1
[40] *Ibid*, pp. 2-3.

Historically, third-party funding has been present in certain domestic jurisdictions for decades, but in the world of investment arbitrations, the phenomenon of TPF is quite new as it became commonly present just since 2008.[41] And unlike classical litigations, international investment arbitration is usually lacking any professional and ethical regulation, which makes the presence of TPF even more problematic.[42] In addition, given to the relatively small word of the investment arbitration community, conflicts of interest together with other ethical ambiguities are of significant importance in regards to issues caused by TPF.[43]

As a result of this, the risks and benefits of third-party funding in international investment arbitration have also gained significant rise of academic and scholars' papers about this new phenomenon, as well as arbitration institutions, national authorities and regulators also show interest in the issue.[44] As Joubin-Bret sees it, the TPF is a '*spill-over*' effect of commercial arbitration into investment treaty arbitration.[45]

2.2 TPF in Investment Arbitration v. Commercial Arbitration

There is also a difference in international arbitrations between the commercial and investment types. Investment arbitrations are subjected to much more transparency requirements as there are public interests involved in them.[46] Investment arbitrations are also having far greater impacts on citizens and public affairs of targeted states, and the final rulings of tribunals have also an impact on the public international law in general.[47] Given all this special importance of investment arbitration, TPF is being analysed much more thoroughly. As TPF introduces some ethical complications, its presence in investment arbitration could disrupt the entire investment arbitration system.[48]

Investment arbitrations are very lucrative and profitable to the TPF, as funders are able to gain much higher profits from it as compensations awarded in investment arbitration usually by far exceed the amount of compensation usually awarded in commercial arbitrations. In addition, investment alterations usually do not permit counterclaims for respondent states, which make investment arbitration even more attractive to funders.[49] The sizes of the claims in investment arbitrations are usually very high, often more than hundreds of millions of Euros.[50] The normal returns range for funders is usually between

[41] Leinen, "*Striking the Right Balance: Disclosure of Third-Party Funding*", pp. 115-116.
[42] Frignati, Valentina. "*Ethical implications of third-party funding in international arbitration*", p. 511.
[43] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1185.
[44] Brekoulakis and Rogers. "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 1
[45] Joubin-Bret, "*Spotlight on Third-Party Funding in Investor-State Arbitration*" p. 731.
[46] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1185.
[47] Ishikawa, "*Third Party Participation in Investment Treaty Arbitration*", p. 376.
[48] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1186.
[49] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2915.
[50] Van Boom, "*Third-Party Financing in International Investment Arbitration*" pp. 19-20 and 30.

15% to 60%, but it can be even more if there is a higher risk of losing.[51] This can be demonstrated by the ICSID case *Teinver v. Argentina*[52] from 2017, in which the US funding company Burford Capital as a funder was able to achieve a 736% return on its investment by selling its interest of a funded claim after a successful ruling. Burford Capital has invested 13 million US dollars in the claim and they sold their interest on the secondary market for 107 million US dollars, making a gain of 94.2 million US dollars.[53]

2.3. Definitions of TPF

Even though third-party funding is one of the most pressing issues in international investment arbitration, there is no precise and generally accepted definition of it. This problem is best described by the words of Scherer who stated: "*The exact definition of third-party funding, however, remains elusive and its legal and ethical implications in international arbitration, mostly unexplored.*"[54]

Why is the TPF so difficult to define? Brekoulakis and Rogers are arguing that it is because there are numerous types of financing claims or paying legal fees and that these have existed for a long time. Also, some modern types of TPF serve as a market alternative for before-the-event (**BTE**), after-the-event (**ATE**) insurances or even traditional liability insurance.[55] The lack of proper definition is however essential to other parts of this thesis, as some scholars are subsequently arguing that since TPF is not capable of definition, it is also not capable of being properly regulated.[56]

Perhaps the most commonly accepted definition of a third-party funder is that it refers "*to an entity that has no interest in the underlying merits of a dispute but provides funding or resources for the purpose of financing the legal costs and expenses of an international arbitration*".[57] Alternatively, TPF can be described as a "*contract where the pay-out under that contract is linked to the proceeds of litigation*".[58] The main concept behind the third-party funding business is that if a funded party is successful, the funder receives a certain percentage of the awarded compensation. If, however, the funded party is unsuccessful, the founder will not receive any money and is typically also responsible for the expenses of the funded party such as arbitration fees, costs of legal defence etc. The scale of compensation is varying between 15% to 60% and

[51] *Ibid*, p. 30.
[52] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1.
[53] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2916.
[54] Scherer, "*Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements*?" p. 95.
[55] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 5-7.
[56] *Ibid*, p. 5.
[57] International Council for Commercial Arbitration (ICCA). "*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*", p. 1.
[58] Scherer, Goldsmith, and Flechet, "*Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives*", p. 207.

is dependent on the individual agreement and on the risk involved in the case, as it was researched by Khouri, Hurford and Bowman.[59]

From all above-mentioned, key elements of a narrow definition of third-party funding are: (i) an agreement; (ii) with an entity that is not a party to the dispute; (iii) provision of financing or material support; (iv) in return for remuneration dependent on the outcome of the dispute.[60]

2.4 Subjects of TPF in Investment Arbitration

Subjects to all Third-Party Funding arrangements are a funder and a funded party.[61] In the Investment arbitration, the state is always a respondent, and the foreign investor is a Claimant, and there can be multiple of them.[62] It is also important to mention that third-party funders can become involved in the case either before the claim is filed or even later in the process, making the whole issue more complicated. In the investment arbitration system, funded partiers are usually big international corporations and funders are usually professional firms specifically operating in the business to provide litigation funding.

There is a view nowadays that majority of investment arbitrations were somehow in contact with funders, as one funder stated that: *"I know for a fact that it is very prevalent… it's a very small universe of claims. (…) I'm sure we've covered the entire market and I can say with some conviction that we are either funding [claims] ourselves, they are funded by somebody else, or they have actively considered funding and for whatever reason have chosen not to"*.[63] Another funder stated that in the investment arbitrations*:"…I would say about half of the cases I've done since '04 have had TPF"*.[64] Clearly, the presence of TPF in investment arbitration is very much present and in the following subchapters, the key aspects of TPF will be analysed in more detail.

2.4.1 The Funded Party

Third-party funders can, in theory, fund claimants as well as respondent states, but in real life, more than 99% of funders in investment arbitration are funding claimants as states (as respondents) are unable to recover awards through the ISDS system, which is making it unprofitable for funders to fund states.[65] In a survey conducted by Dafe and Williams amongst the 16 major funding firms, these firms have confirmed this trend as they said that

[59] Bowman, Hurford, and Khouri, "*Third party funding in international commercial and treaty arbitration - a panacea or a plague? A discussion of the risks and benefits of third-party funding*".
[60] International Council for Commercial Arbitration (ICCA). "*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*", p. 51.
[61] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 1
[62] Bastid-Burdeau, "*Defining the Respondent state in Investment Treaty Arbitration: are there specific standards of jurisdiction?* ", pp. 1-3.
[63] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1366.
[64] *Ibid*, p. 1367.
[65] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2916.

funding of a state is unlikely as there is a problem that the fundamental nature of ISDS is that only investors can act as claimants and so only investors can be awarded a financial compensation of damages.[66] Shannon also attributes the lack of state funding to the arguable inability of the state to file counterclaims.[67]

Respondent states could, in theory, be also funded by another state, or as some authors have highlighted, their costs for legal representation could be funded through a model similar to ATE insurance. In general, third-party funding for a respondent is usually tied not by the financial interests (as it is mainly on the side of the claimant), but rather it is about its political and societal implications. Lamn and Helbeck are however arguing that TPF in investment arbitration is not as one-sided and should not be attributed as strictly claimant-centric practice.[68] Sherer and Goldsmith are convinced that funding of states will increase in time, but predominantly TPF will remain to be provided to investors.[69]

2.4.2 Respondent as a Funded Party

In investment arbitration, there are just two known cases when a funded party was a respondent state. Both will be analysed in more detail as they are great examples of reasons why funders might be willing to fund states.

Phillip Morris v. Uruguay

The most prominent example is perhaps an ICSID case *Phillip Morris v. Uruguay*[70]. In this case, a multinational tobacco company Phillip Morris filed a complaint against Uruguay as this small South American country has adopted anti-smoking legislation. Phillip Morris has stated that this legislation violates Switzerland-Uruguay BIT, while Uruguay argued that it has adopted this legislation for public health reasons. As a result of a public outrage and international attention given to this case, Bloomberg foundation has decided to financially support Uruguay in this dispute through Blomberg's "Campaign for Tobacco Free Kids".[71] It is important to highlight that the Bloomberg foundation was not motivated and did not receive any financial recourse, but its main reason behind the funding was to protect new legislation which was seen as a necessary thing for improving public health in the country and especially to protect children. In 2016, the Tribunal had ruled in favour of Uruguay and forced the claimant to pay all of the expenses.[72]

[66] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1366.
[67] Shannon, "*The Structural Challenge of Investment Arbitration Viewed through the Lens of Third-Party Funding*".
[68] Lamm, and Hellbeck, "*Third-Party Funding in Investor-State Arbitration Introduction and Overview*", p. 102.
[69] Scherer, Goldsmith, and Flechet, "*Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives*".
[70] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.
[71] Tobacco Free Kids, "*Historic Win for Global Health: Uruguay Defeats Philip Morris Challenge to Its Strong Tobacco Control Laws*".
[72] Mander, "*Uruguay defeats Philip Morris test case lawsuit*".

RSM Production Corporation v. Grenada

The second known case is *RSM Production Corporation v. Grenada*[73] initiated in 2009. In this case, the oil company Global Petroleum Group (GPG) decided to act as a funder to Grenada and pay its legal defence fees and costs of arbitration.[74] After the Tribunal ruled in favour of Grenada, GPG was promised to receive oil exploration rights, which were previously held by the claimant in this case – RSM. After the Tribunal ruled in favour of Grenada, GPG was subsequently awarded these oil rights.[75]

These two cases are great examples of two ways in which Respondent states might receive more TPF in the future. Firstly, there is an argument that more funders will decide to fund states for *pro bono* reasons. This trend, when global companies, NGOs and other entities are mobilizing their support for civil society, environmental protection, labour rights, public health, and other globally recognised and protected values is on the rise. This is done by many companies to promote and improve their corporate image and to gain very positive media coverage, which is in today's world more and more important.[76] The second way when Respondent state could be easily funded is when a rival investor is providing finance in other to either gain some rights instead of the Claimant or as more general just to disrupt a rival company.

2.4.3 Third-Party Funders

The most common types of funders would be banks, hedge funds, insurance companies or even capital firms that are directly focused on providing third-party financing.[77] As TPF has become a profitable business, there have been established companies that are explicitly dedicated to investing in claims, the most prominent ones being: Bentham IMF Limited, Burford Capital Limited, or Harbour Litigation Funding Limited. Moreover, they are also some funders that have several business strategies and choose litigation funding to diversify their portfolios,[78] such as Credit Suisse or Deutsche Bank.[79] There has been a rapid boom in this TPF business, as the number of funding firms has increased significantly, as at the beginning of the 2000s, there were only a few of them operated mainly in Australia and Germany, but ever since that their numbers have risen significantly and in every important arbitration jurisdiction, we can find several of them.

[73] RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14.
[74] Diaz, "*RSM Production Corp. files second arbitration against Grenada, sues Freshfields*".
[75] Thrasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2941.
[76] Cremades, "*Third Party Litigation Funding: Investing in Arbitration*" pp. 17-18.
[77] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 4
[78] Goeler, "*Third-Party Funding in International Arbitration and its Impact on Procedure*", p. 74
[79] *Ibid*, p. 77.

2.5 Funding Agreement

In the following subchapter, the process of signing a funding agreement between the funder and the funded party is described with the emphasis on the elements on which funders are deciding whether to fund a case. The funding agreement is defined as: "*An agreement between a party or potential party to dispute resolution proceedings and a third-party funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds to which the party or potential party may become entitled."* [80] Normally, the funding is composed of financial terms, non-financial terms and often is also supported with annexes.[81]

2.5.1 Process of the Selection to Fund a Case

The process of conducting a funding agreement begins with thorough due diligence, which is conducted by the funder. Funders will firstly consider several factors, such as the probability of winning the case, the merits of the dispute, the amount of potential compensation and the skill and expertise of legal teams of both parties of the dispute.[82] If the funder evaluates that it is profitable to fund a case, it offers the funded party to sign a funding agreement. The terms of this agreement dictate the interactions between both parties and quite often also set disclosure restrictions and the level of influence that funder will have over the arbitral strategy.[83]

It is important to mention that only a small number of prospective cases are eventually funded. According to a study of large funding companies (such as Harbour, Calunius, Therium, Allianz or Woodsford), only about 1 of 10 cases examined by these companies is subsequently funded.[84] The process of selection which cases are to be funded is much more complex in investment arbitrations, as these firms are also examining legal, political, factual, and practical variables, as well as obviously likelihood of success and importantly the potential rate of money return for them. Moreover, the jurisdiction of the claim, the strength of the claimant's legal arguments, the strength of facts supporting the arguments, the experience of the claimant's legal team as well as respondent's ability to pay is also being evaluated.[85] Smith is concluding that especially in investment arbitrations, these large funding companies are operating with a level of sophistication and precision which is unique even among large multinational companies and law firms.[86]

[80] Government of Singapore, "*Civil Law (Amendment) Act 2017 of Singapore*", Article 5B(1).
[81] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 21.
[82] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", p. 382.
[83] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 111.
[84] Veljanovski, "*Third-Party Litigation Funding in Europe*", p. 420.
[85] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 7-9.
[86] Smith, "*Chapter 2: Mechanics of third-party funding agreements: a funder's perspective*, pp. 28–35.

Data for these calculations are obtained either by detailed due diligence conducted by the funder itself, its legal team, accountants, or other experts, such as intelligence and data collectors. The analysis entails inquiries of the claimant's lawyers regarding timing and evidentiary issues, legal strategy, and compilation and assessment of material documents.[87]

2.5.2 Main Reasons for the Lucrativity of Investment Arbitration to TPF

The main reasons why funding agreements in investment arbitrations are so lucrative is firstly due to its typically high returns for a successful claim, usually ranging from 30% to 50%[88]. Moreover, final awards are easily recognised and enforced thanks to the NY Convention, as third-party funders are less likely to fund cases that they know will be difficult to enforce against the respondent state.[89] For that reason, the most attractive for funders are ICSID cases as their awards are easily recognised and enforceable, as ICSID Convention Article 54 (1) impose an obligation on all states party to the ICSID Convention to enforce the award "*as if it were a final judgment of a court in that State*" with no review by national courts of that State.[90] Finally, it is argued that since investment awards are usually made available to the public, it is much easier for a funder to predict whether a claim will be successful according to previous rulings. This is making it more predictable than commercial arbitrations, which are usually completely private and no final awards are publicly available.[91] This is however questioned by some scholars as funders are not able to predict outcomes so easily as in an investment arbitration system there is no regime of *stare decisis* applied and also treaty standards and principles are notoriously vague.[92]

2.6 Origins of the TPF in ISDS System

In short, the concept of TPF is still relatively young, especially in investment arbitration. A short introduction about the TPF origins in domestic jurisdictions and commercial arbitrations will be described, as it is necessary for a general understanding of the TPF phenomena. But the most emphasis will be given to the reasons of why, when, and how TPF had penetrated the investment arbitration system.

2.6.1 Reasons behind the Rise of TPF

In the academic legal literature, there have been identified three main reasons which try to explain the rise of third-party funding. Firstly, it is because of changes in legal norms, as evidenced for example by the abandonment of ancient doctrines of *champerty* and *maintenance*, which have prohibited TPF in common law jurisdictions. The second reason is that it has emerged as a way of providing insolvent funders as their way to justice, as lots

[87] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 9.
[88] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 112.
[89] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2916.
[90] ICSID, "*ICSID Convention*", Article 54.
[91] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", p. 383.
[92] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1188.

of claimants were unable to initiate a claim without external funding provided by TPF due to the enormously high arbitral and legal fees. The final reason is that funding by third parties has proven to be a very lucrative and profitable industry, which was also accelerated by the financial crisis.[93]

2.6.2 Doctrines of Champerty and Maintenance

Historically, in the most common law jurisdictions, TPF was not possible due to the ancient doctrines of champerty and maintenance. These two doctrines were designed to prevent wealthy people from financing a civil dispute in which they have no genuine and legitimate interest, as these doctrines are designed to prevent from pursuing harassing and frivolous claims to ruin and bother their rivals and enemies.[94] In civil law jurisdictions, there is no such historical equivalent.[95]

The first common-law jurisdiction country that has shifted away from these ancient doctrines was Australia in the 1960s[96]. This is one of the reasons why Australia nowadays has one of the largest TPF industry in the world.[97] The United Kingdom followed and as it was the world's trade hub, the changes in the UK were very influential for other common law jurisdictions. Ever since that, it is argued by funders that the United Kingdom has become and remained the centre of international litigation funding.[98] Steinitz concludes that this led to the increase of TPF in other jurisdictions due to the competitive pressure.[99] More jurisdictions, which were and still are traditional hubs of trade and flow of investments and such also venues of international investment arbitration centres - such as Hong Kong and Singapore – have also decided to abandon champerty and maintenance lately in order to be competitive.[100]

2.6.3 TPF Emergence in Investment Arbitration

Since the 2000s, third-party funding has also penetrated international commercial and investment arbitrations. Several reasons make TPF of ISDS significantly attractive and profitable. Firstly, in comparison to domestic litigation disputes, investment arbitration tends to have much higher awards, as a 100-million-dollar case is practically standard. Secondly, the enforceability of the award is quite easy thanks to NY Convention.[101] Furthermore, given the lack of state-imposed regulation, investment arbitration has become even more attractive to TPFs.[102]

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[93] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", pp. 1367-1370.
[94] Richmond, "*Other People's Money: The Ethics of Litigation Funding*" pp. 651-652.
[95] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 39.
[96] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", pp. 1273-1275.
[97] Trusz, "*Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*", p. 1675.
[98] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1368.
[99] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", p. 1278.
[100] Decker, Maria. "*Third-party funding in Asia: Arrived, and set to thrive*".
[101] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", pp. 386-387.
[102]Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", pp. 1278.

2.6.4 Financial Crisis of 2008

Several authors have stated that because of the 2008 financial crisis, there has been a rapid rise in TPF business in the ISDS system as funders have realised that the investment arbitration system offers very high returns with reasonably small risk. Investors thus shifted their attention from certain financial markets towards investment arbitration via third-party funding.[103] This is because since the recession hits the economy, many investors were seeking new investment opportunities which were not affected so much by the market fluctuation.[104] Arbitration awards (or any other legal disputes in general) are not influenced by financial markets and this makes investors future profits in a way much more predictable (given of course that the funded party will win the claim and will be awarded compensation).[105] This was also confirmed by the ICCA-Queen Mary report, which has suggested that the 2008 financial crisis speeded the rise of TPF as funders and investors have looked to areas unaffected by market decline. Moreover, the demand for TPF has risen due to the insolvency and overall lack of capital due to the recession.[106]

[103] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2935.
[104] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 113.
[105] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", pp. 1283–1284.
[106] International Council for Commercial Arbitration (ICCA). "*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*", pp. 18-19.

3. ISDS - IMBALANCED SYSTEM

In the following subchapter, certain aspects of the ISDS system will be analysed as it is essential for this thesis to properly explain why the presence of a third-party funder can have significant consequences, particularly in investment arbitrations. Recently, the entire arbitration system had been a subject of a heated debate about its fairness, asymmetry, legitimacy, rule of law and other factors.[107] It is not in the scope of this thesis, neither is it its goal, to examine all these issues and fully analyse their causes, but it is important to mention some of the main issues, as new phenomena embodied by TPF can amplify some of these imbalances already present within the system.

3.1 ISDS – One-sided System Favouring Investors?

As it is argued by many legal scholars today (such as Roberts[108] and Wellhausen[109]), the current ISDS system is hugely favouring investors. Trasher is arguing that in its essence, the IITs are international agreements between states which are imposing obligations to these states and citizens on the other side are only beneficiaries of certain rights and standards of protection. Thus, according to Trasher, it is rather a one-sided system.[110] But this asymmetry is, as Alvarez is arguing, "*not terribly relevant*". Because if we look at the fact that investor is, in fact, most of the time vehemently vulnerable under the legal system of a domestic state, then, as Alvarez puts it, the ISDS system is "*nothing but the reverse mirror image of the investors' exposure to the host state's sovereign regulatory power*"[111].

3.2 Changes caused by TPF

But the presence of the TPF in investment arbitration might change this already unbalanced dynamic of the ISDS system. The flow of a huge amount of money, which is being transferred to one of the parties of the dispute, might violate the whole system.[112] States are already considered to be always '*a losing side*' in investment arbitration, as even if they are successful and tribunal rules in their favour eventually, they still have to deal with the negative consequences with have come together with the mere fact that they are being sued by foreign investors. These consequences might be the decrease in FDIs and bond markets, as new investors might be less willing to operate their business if there is an ongoing investment dispute, negative media outlook because of investment arbitration and bearing

[107] Linarelli, Margot and Sornarajah, "*The Misery of International Law: Confrontations with Injustice in the Global Economy*". pp. 147–148.
[108] Roberts,. "*Clash of Paradigms: Actors and Influences Shaping the Investment Treaty System*".
[109] Wellhausen, "*Recent Trends in Investor–State Dispute Settlement*".
[110] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2937.
[111] Alvarez, "*The Public International Law Regime Governing International Investment*", p. 117.
[112] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", pp. 2937-2946.

the costs of legal representation.[113] As TPF in theory is enabling more investors to initiate a claim, then the mere possibility of it is making states much more vulnerable to be sued.

3.3 Developed v. Developing States Imbalances

This is especially problematic for the low-income and undeveloped countries of Africa, Asia, and Latin America, which has been lately heavily targeted by investors lawsuits.[114] There is more to this geographical and economical division and imbalances. According to a study from 2015, more than 88% of claimant's investors are from high-income Western countries[115]. The winning ratio is also different, as high-income states as respondents are much more likely to win an investment dispute, as according to a study, these states are successful in 46% of claims, while only 27% of low-income countries prevails in legal disputes.[116] This division can naturally be explained, as some scholars pointed out, that more developed countries, such as UK or US, have a far more developed legal and economic level and good behaviour towards all investors, while some Latin American countries tend to have more of a "*fast and loose behaviour*" towards foreign investors which of course results in more disputes.[117] Some however are concerned that with the emergence of TPF business in investment arbitrations, poorer countries could be even more targeted and be more vulnerable.

For the above-mentioned reasons, the ISDS system seems to be much more vulnerable to be affected by the mere presence of the TPF in a dispute and for that reason, scholars, arbitration lawyers and international arbitral institutions are starting to take this issue seriously. The absence of any professional and ethical norms that are typically present in domestic litigation is making international investment arbitrations much more prone to violation of procedural integrity. To put it simply, while traditionally the world of investment arbitrations was dominated by foreign investors, signatory states and their legal counsels, ever since the 2000s the third-party funders have penetrated this lucrative field and added new features toward this already dynamic and unbalanced system. They have added benefits and at the same time risks to the system, both of which will be presented in detail and analysed in the following chapter.

[113] Wellhausen, "*Recent Trends in Investor–State Dispute Settlement*", pp. 3-11.
[114] Garcia, "*Third-Party Funding as Exploitation of the Investment Treaty System*", p. 2917.
[115] Schultz, and Dupont. "*Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Study*", pp. 1154.
[116] *Ibid*, pp. 1154-1155.
[117] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2939.

4. DEBATE – RISKS AND BENEFITS OF TPF IN INVESTMENT ARBITRATION

Ever since the TPF business has emerged into investment arbitrations, there has been a heated academic debate regarding certain issues which are associated with the presence of the TPF. This chapter will analyse the most pressing concerns and weigh their benefits as well as risks. Potential risks are analysed in the view of duty of disclosure. Moreover, examples of arbitration cases that have dealt already with some issues will be presented to each issue if they exist. Issues regarding the presence of TPF in investment arbitration examined above are (**i**) Access to Justice, (**ii**) influence over the case possessed by the TPF, (**iii**) conflicts of interests, (**iv**) possibility of increase of frivolous claims (**v**) jurisdiction and admissibility (**vi**) allocations of costs (**vii**) security for costs and (**viii**) that TPF is similar to other funding possibilities.

4.1 Access to Justice

The proponents of TPF are arguing that increase access to justice (**AtJ**) is its most significant advantage.[118] They are arguing that international arbitrations should be available for everyone, not just for the rich.[119] But as will be examined above, in international investment arbitration AtJ rationale is much more complex and there is a debate about its benefits as well as risks.

4.1.1 Rising costs of ISDS

There is no dispute that the ISDS mechanism is a very expensive method of solving disputes and in the last decades, the costs have risen profoundly.[120] The costs are composed of fees paid to arbitration institutions, the pay of arbitrators, the costs of legal representation and some other additional expenditures.[121] It was reported that the best professional legal firms, which are specialized in investment law, are billing for their services as much as 1000 US dollars per hour, and in addition, arbitrators fees in ICSID are as high as 3000 US dollars per day.[122] A study conducted by Australian arbitrations has proven the correlation between the rising use of TPF and rising costs of international arbitration.[123]

[118] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", p. 1276.
[119] Goeler, "*Third-Party Funding in International Arbitration and its Impact on Procedure*", p. 77.
[120] Eberhardt and Olivet, "*Profiting from injustice How law firms, arbitrators and financiers are fuelling an investment arbitration boom*", p. 7.
[121] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1371.
[122] Gaukrodger, David and Gordon, "*Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*", p. 20.
[123] Chen, "*Can markets stimulate rights? On the alienability of legal claims*".

4.1.2 Traditional Perception of TPF as a Provider of Access to Justice

Thus the proponents of the TPF have mostly advocated on behalf of the TPF in investment arbitration as a tool that provides access to justice, as without external financial support from a funder, an investor might not be able to initiate a claim against a state which has violated its obligations.[124] Especially in regards to the investment arbitration between state and investors, TPF is viewed as a tool that helps small and medium-sized investors who were unlawfully expropriated by the state and thus TPF is viewed as a provider of fair and just treatment in a global economic system.[125] In addition, TPF is making sure that claimants are truly able to pursue a claim instead of being forced to yield to a much wealthier opponent and sign a one-sided settlement, which is often the case in investment arbitration.[126] To sum it up, traditionally, the TPF is viewed as a provider of "Access to Justice". In the context of this thesis, "*access to justice shall be understood as the sum of conditions affecting whether a person wishing to enforce or defend a legal right will have reasonable opportunity to do so.*"[127]

4.1.3 'Upgraded' form of Access to Justice

This AtJ narrative is however diminished by the fact that most of the funded parties in investment arbitration are in fact not in financial distress and they would be completely capable to bear the legal fees and would not need funding.[128] This is because the TPF is no longer solely used just as a provider to AtJ, but it is predominantly used by investors as a corporate finance tool and as a way to take the cost of a claim off the corporate balance sheet.[129] Proponents are however making a counterargument that companies who are solvent could choose to use a TPF as they are not willing to use their corporate money for such a risky endeavour, especially if they were about to use this capital to expand to new markets for example.[130] And even the narrative of a claim that TPF is solely used as a business, it is argued that it is an "*upgraded form of Access to Justice*" as according to Duataj and Gustafsson, "*true AtJ in the Western economy is a business being able to compete while simultaneously litigating for justice.*"[131]

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[124] Santosuosso, and Scarlett, "*Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*", p. 10.
[125] Massini, "*Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs*", p. 325.
[126] Bowman, Hurford, and Khouri, "*Third party funding in international commercial and treaty arbitration - a panacea or a plague? A discussion of the risks and benefits of third-party funding*" p. 3.
[127] Goeler, "*Third-Party Funding in International Arbitration and its Impact on Procedure*", p. 82-87.
[128] Dafe, and Williams, "*Banking on courts: financialization and the rise of third-party funding in investment arbitration*", p. 1371.
[129] *Ibid*, pp. 1371-1373.
[130] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", pp. 113-114.
[131] Dautaj, and Gustafsson, "*Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration*".

4.1.4 AtJ as a Tool to Reduce the Number of Frivolous Claims

In addition, in the eyes of the AtJ perspective of TPF, funders will only fund meritorious claims, as their decision whether to fund some case or not is based on the three factors: the cost-benefit analysis, merits of the case and recoverability of damages.[132] According to this view, funders have no incentive to fund marginal and frivolous claims (as they would most likely be unsuccessful) and thus TPF is always also a tool for access to justice.[133] Given the thorough due-diligence process which precedes the signing of a funding agreement, this can be also considered as an early evaluation of the claim and its rate of success. Some even argue that if funders refuse to finance a claim, it is a good indication that the claim is not worth pursuing at all. This is a good thing in the sense that it can prevent a number of frivolous claims and thus ease the already heavily used arbitration system.[134]

4.1.5 Rebuttal – AtJ is increasing Frivolous claims

These views are however opposed by Santosuosso and Scarlett, as they point out that firstly, even when the merit of a case is very likely to succeed, but the recoverability of damages is low, no funder is likely to fund the case just for a sake of AtJ reasons and conversely, big funding companies are always funding some high-risk claims, in which merits of the case are very questionable but the recoverability of damages are potentially very profitable and thus even against the AtJ logic these firms are willing to fund the case.[135] Moreover, according to Santosuosso and Scarlett, TPF in investment arbitration is morally problematic as it allows speculation in the world of ISDS, in which outcomes could have a huge negative impact on states, especially in developing countries.[136]

Expressing the same concerns, Eberhardt states that the investment arbitration system has become increasingly integrated with the speculative financial world and that this financialization of investment arbitration has even extended to proposals to sell on packages of lawsuits to third parties, in the vein of the disastrous credit default swaps behind the global financial crisis.[137]

[132] International Council for Commercial Arbitration (ICCA), "*Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*", p. 25.
[133] *Ibid*, pp. 207-209.
[134] Lamm, and Hellbeck, "*Third-Party Funding in Investor-State Arbitration Introduction and Overview*", p. 105.
[135] Santosuosso, and Scarlett. "*Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*", pp. 10-14.
[136] *Ibid*, p. 15.
[137] Eberhardt and Olivet, "*Profiting from injustice How law firms, arbitrators and financiers are fuelling an investment arbitration boom*" p. 9.

4.1.6 Conclusion

To conclude, AcJ rationale is one of the most prominent and important reasons which proponents of TPF are using in order to justify it, yet as was proven in investment arbitration, as most of the funded investors are capable of funding their cases, its impact is diminished. They are some scholars who argue AcJ rationale has lost its purpose. There is also no consensus about the possible consequences of frivolous claims, as one side is arguing that given the thorough due diligence process, it could actually lead to a decrease of frivolous claims while others fear that the opposite is more likely.

4.2 Influence over the Case

Another important issue regarding the presence of TPF in investment arbitration is the level of control that the funder has over the case. Control over the handling of the case by the funder is inherently neither a good nor bad feature, but it can be important to evaluate certain issues such as disclosure and conflicts of interest.[138]

4.2.1 The Scope of Influence

In some cases, however, the extent of control by a funder can raise a significant ethical issue for a counsel. Unfortunately, there is no empirical analysis or evidence which could enable us to generalize about how much influence over the case funders has.[139] Commonly, the third-party funder is expected to control or at least supervise various strategic decisions in a case, namely arbitrator selection, expenditure of significant funds (expertise etc), changes in legal teams, drafting of memoranda, oral pleadings and settlements. The extent of the funder's power over these aspects varies significantly given each funding agreement is different and also they are different specific obligations according to applicable law and jurisdiction.[140]

Some funders are stating that after the initial phase of a thorough assessment, their role is diminished only to a distant and inactive observer who are merely entitled to receive regular updates about the case.[141] In other cases, however, funders are reported to hold a much more active role, even for example can influence the selection of the arbitrator or be physically present at the hearings.[142]

4.2.2 Benefits

There are some benefits from founders' involvement in the handling of a case, given the profound professionalism of most of these funding firms. They can prove to be a very valuable source of help to which arbitrator to nominate, how to proceed strategically, to set an appropriate settlement amount etc. Given that funding firms are in the business, they

[138] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 2-4.
[139] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", p. 385.
[140] Brekoulakis and Rogers. "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 10.
[141] Molot Jonathan. "*Theory and practice in litigation risk*" p. 7.
[142] Brekoulakis and Rogers. "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 9-10.

are in possession of a significant amount of know-how which they will share with the funded party in order to win.[143]

4.2.3 Risks

There are, however, some risks as well. The greater influence the funder possesses over the claim, the more likely it is that certain problematic situations might occur. For instance, there is an issue about attorney-client's privileges. Legal representatives are under the ethical obligations to always operate in accordance with the best interest of their clients, while third-party funders are not operating under any such rules. There can be moments when third-party funder will operate mainly with their own interests, which in some cases will not align with the best interest of the funded party (such as if TPF will put pressure on a funded party not to settle a claim).[144] In addition, the higher level of influence of TPF over the claim and its strategy can also lead to problems with confidentially and conflict of interest issues.

4.2.4 Cases involving Influence of TPF over the Case

Nevertheless, there are some valid arguments that support the funder's involvement in the case, as the funder is entitled to be able to protect its investment and to be sure that the funded case is prosecuted accordingly to the agreement. This view was even expressed by the Court of Appeal of England and Wales, which in the ruling of *Excalibur Ventures v. Texas Keystone and others*[145] of 2016 stated that a third-party funder's "*rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals' is what is to be expected of a responsible funder.*[146]

In the investment arbitration, there is one relevant case when the influence over the claim was addressed. In the ICSID case *RSM Production Corporation v Saint Lucia*[147], the Claimant has informed the tribunal that it is unable to provide a USD 750,000 guarantee or place that amount in escrow as it was ordered by the Tribunal because his funding agreement was terminated.[148] The case was thus discontinued and eventually terminated.[149] If the terms of the agreement would have been known, that the Tribunal could find out that the funder is able to terminate and stop funding the case, as funders have this kind of influence apparently.

[143] Bowman, Hurford, and Khouri, "*Third party funding in international commercial and treaty arbitration - a panacea or a plague? A discussion of the risks and benefits of third-party funding*", p. 5.
[144] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", pp. 384-385.
[145] Excalibur Ventures LLC v Texas Keystone Inc and others, [2016] EWCA Civ 1144.
[146] *Ibid*, para. 31.
[147] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10.
[148] RSM Production Corporation v Saint Lucia, "*Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings*", para 68.
[149] Honlet, "*Recent decisions on third-party funding in investment arbitration*", pp. 707 – 708.

4.2.5 Conclusion

Influence over the case performed by the funder is not necessarily bad, but in some cases, it might prove to hurt the investor as well as the state. The duty of disclosure of the presence of TPF and the terms of the funding agreement could prevent or at least minimalizes these concerns.

4.3 Conflict of Interests

The conflict of interest is considered by many scholars and legal practitioners to be the most concerning issue regarding the presence of TPF in investment arbitration.

4.3.1 Small Arbitral Community

There is a concern about possible conflicts of interest as some arbitrators themselves have been in a consultant position with some funders. Another issue arises from the fact there is a symbiotic relationship between some leading funders and a relatively small group of law firms, which are operating in the area of investment arbitration.[150] To sum it up, the entire arbitration society consists of a small number of professional arbitrators, law firms and funders firms, which are very much connected, and thus a potential conflict of interest is very plausible and often. Third-party funding may also prove problematic if, for example, "*colleagues in the arbitrator's law firm serve as counsel or adviser to a funder*" or "*an individual arbitrator is repeatedly appointed in cases involving the same third-party funder.*[151]

Perhaps surprisingly, traditionally the predominant paradigm regarding TPF in investment arbitration was that TPF could not cause any possible conflict of interest as it was considered simply a way of financial support for initiating or pursuing the dispute. This source of financing was thus not whatsoever connected to the merits of the dispute, and there was no need to treat TPF differently than any other way of obtaining money, such as a corporate loan.[152] This outdated perception was lately completely abandoned and is especially problematic since the very small arbitration community.

4.3.2 Possible risks

Possible issues might lead to the violation of procedural integrity. For example, if a conflict of interest would be found in already initiated proceedings, and a change of an arbitrator would be necessary as some conflict of interest would be found, then the whole arbitration would have to start again. This would be a waste of money and time for both parties as well as for a funder.[153]

[150] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 11-14.
[151] Park, and Rogers, "*Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*" p. 1.
[152] Maniruzzaman, "*Third-Party Funding in International Arbitration – A Menace or Panacea?*".
[153] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 12.

4.3.3 Cases involving Conflict of Interests

There have already been several arbitral cases in which arbitrators were questioned about his or her integrity and conflicts of interests, as this issue regarding the presence of TPF is perhaps the most serious threat to the whole international arbitration system in general.

EuroGas Inc v Slovak Republic

In the case *EuroGas Inc and Belmont Resources Inc v Slovak Republic*[154], the Tribunal has ordered the Claimant, which in advance made voluntary public disclosure that it was funded by a TPF from Luxemburg – to specify the name of a funder in order to check if there is no conflict of interest.[155]

Muhammet Cap v Turkmenistan

In the case *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*[156], another ICSID Tribunal ordered to disclose the identity of a third-party funder and additionally, for the first time, also the terms of the funding.[157] In this case, the Tribunal has firstly denied a request of disclosing, but at the same time reserved the right to order disclosure in the future if there would be "*additional information to justify the application*".[158] In procedural Order No. 2, the Tribunal has further stated that "*it has inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process*".[159] More important for this thesis was however the reasoning, which the Tribunal used to justify an order for disclosure of a third-party funder. These reasons are particularly: '(**i**) to avoid a conflict of interest between interested parties, (**ii**) to increase the transparency of the case, (**iii**) for fair decision made by a tribunal of allocation of costs, (**iv**) if there is an application for security of costs and (**v**) ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motive'.[160]

Subsequently, Respondent has decided to make a new application for disclosure based on several grounds. Firstly, there was a change of Claimants legal representatives (who are in addition also legal representatives of another claimant in another case against Turkmenistan).[161] Further, the Claimant has refused to disclose details of funder requested by the Respondent and lastly that this disclosure is necessary to ensure that there were no

[154] EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14.
[155] EuroGas Inc and Belmont Resources Inc v Slovak Republic, "*Transcript of the First Session and Hearing on Provisional Measures*", p. 145.
[156] Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6.
[157] Muhammet Cap & Sehil Ins_aat Endustri ve Ticaret Ltd Sti v Turkmenistan, "*Procedural Order No 3*", para 8.
[158] *Ibid*, para 5.
[159] Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan "Decision on Respondent's Objection to Jurisdiction under Article VII(2) ", para 50.
[160] *Ibid*, para 50.
[161] It was an ICSID case *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1

conflicts of interests with those involved in the arbitration, the arbitrators in particular. To be more appealing to Tribunal, Respondent's legal counsels choose to expressly cite IBA Guidelines on Conflicts of interests.[162] Moreover, Respondent announced that it was considering applying for the security of costs because it fears that TPF may elect to withdraw at any time and may be able to evade a costs award in the event of an adverse decision.[163] Finally, Respondent has indicated concern wheatear or not the Claimant is still fully in charge over the claim or if the funder took over.[164]

Tribunal has sided with Respondent due to two important factors. Firstly, it is important to ensure the integrity of the proceedings and to determine whether any of the arbitrators were affected by the existence of the third-party funder, as transparency without conflict of interest is important in cases like this.[165] The second key reason was that Turkmenistan is about to ask for security for costs.[166] Moreover, Tribunal had expressed that it shares Respondent's concerns about the possibility that if it is successful in the arbitration and a costs order would be made in its favour, Claimant will be unable to meet those costs and the third party funder will have disappeared as it is not a party to this arbitration.[167]

RSM Production Corporation v Saint Lucia

In the already mention ICSID case *RSM Production Corporation v Saint Lucia*, the opinion of Dr Griffith and the ideas expressed in his assenting opinion initiated a challenge against him by Claimant. The other two arbitrators however rejected this challenge.[168]

4.3.4 Conclusion

As we can see, the conflict of interest is perhaps the most concerning issue regarding the presence of TPF in investment arbitration and thus there is no doubt that there have been several cases that have addressed this issue. Tribunals have already ordered a request for disclosure not only to the presence of the TPF, but also to the terms of the agreement. Thus, it is a very effective tool to regulate and adopt a general duty of disclosure in order to prevent a conflict of interest which could jeopardize the entire procedural integrity of the arbitration.

4.4 Possible Increase in Numbers of Frivolous Claims

The next issue is concerned with the fact that TPF in investment arbitration can in fact cause an increased number of lawsuits against states which are not meritorious. In the world of investment arbitration, these frivolous claims are especially dangerous as states have

[162] More about IBA Guidelines in Chapter 6.5.
[163] Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan, "*Procedural Order No 3*", para 2.
[164] *Ibid*, para 2.
[165] *Ibid* para 9.
[166] *Ibid* para 2.
[167] *Ibid* para 12.
[168] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 707.

usually no recourse to initiate their own claims or counterclaims against investors.[169] And the cost of the arbitration is paid by public funds of the respondent state.

Proponents of TPF are arguing that most funders are about to fund only meritorious claims.[170] Some have even suggested that third-party funding can reduce the number of frivolous claims because funders essentially pre-screen cases for merits and possible success.[171] But there are cases when the funder is willing to find a case low on merits as it aimed for high rewards. After all, there is a price for everything.[172] This can be demonstrated by the words of an executive of a funding firm Buford Capital, Jonathan Molot, who has stated that "*investment funds, in contrast with insurers are happy to bet on litigation if the returns are high enough*".[173]

Moreover, as more funders are entering this lucrative business, the possibility of funding for claims with not so strong merits rises.[174] In addition, TPF might also lead to the inflation of damages. This could happen as a claimant, who is seeking a funder will increase artificially the value of a claim in order to attract a funder.[175]

4.4.1 Case

There have also been examples of funded frivolous lawsuits. In the case of *Excalibur Ventures LLC v Texas Keystone Inc and Others*[176], for example, the Tribunal ruled that case was grossly exaggerated and spurious, yet third-party funders provided over 31.75 million pounds to parties over the three years of the dispute.[177]

4.4.2 Conclusion

Thus, there is a potential of TPF to be able to contribute to the initiation of unmeritorious claims as funders might be tempted by possible high-profitable rewards. This could prove to be especially dangerous in regard to the investment arbitration system and duty of disclosure is an ideal tool to tackle these concerns.

[169] Dautaj, and Gustafsson, "*Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration*".
[170] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1191.
[171] Goeler, "*Third-Party Funding in International Arbitration and its Impact on Procedure*", p. 92-93.
[172] Beisner, Miller, and Schwartz, "*Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later*".
[173] Molot, "*Theory and practice in litigation risk*" p. 6.
[174] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1191.
[175] *Ibid*, pp. 1191-1192.
[176] Excalibur Ventures LLC v Texas Keystone Inc and others, [2016] EWCA Civ 1144.
[177] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2942.

4.5 Jurisdiction and Admissibility

There have also been some objections by respondent states regarding jurisdiction of the tribunals or admissibility of a claim linked to the presence of the TPF in the case. Nevertheless, all of these objections were rejected by Tribunals in all cases.

4.5.1 Cases about jurisdictions and admissibility

RosInvestCo UK Ltd v The Russian Federation

In the investment claim *RosInvestCo UK Ltd v The Russian Federation*[178], which was an SCC case, a Claimant was funded by Elliott Group, whose business, according to Russian Federation, was buying lawsuits and securities not because they offer the prospect of a reasonable return but because they furnish *"a pretext to threaten legal action*".[179] Russia has demanded that because Claimant signed a 'Participation Agreements' with a funder, the Claimant was not an investor under the UK-Russia BIT. However, Tribunal has rejected this argument.[180]

Abaclat and others v Argentine Republic

Other objections were raised in the ICSID case *Abaclat and others v Argentine Republic*[181], which is the first of a 'mass claim' arbitration, as there were around 60,000 Italian bondholders as Claimants, who initiated arbitration pursuant to alleged violation of Italian-Argentina BIT.[182] Although this case was primarily interesting because of its mass claim nature and legal issues and questions arising from it, the aspect of TPF was also present. Claimants were represented by a legal entity called Task Force Argentina (TFA), which was created and funded by a handful of Italian banks. Argentina raised an objection to jurisdiction as TFA acted as a funder and not as a Claimant, thus not being properly a party of the dispute, but this reasoning was also rejected by the Tribunal.[183]

Quasar de Valors and others v The Russian Federation

Another SCC Tribunal had to deal with objection towards its jurisdiction based on the existence of the third-party funding. In the case *Quasar de Valors and others v The Russian Federation*[184], Spanish investors were funded by Group Menatep, which already had a separate arbitration against Russia with much higher stakes. Russia thus claimed that

[178] RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005.
[179] RosInvestCo UK Ltd v The Russian Federation, "*Final Award*", para 5.
[180] *Ibid,* paras 322–323 and 381–383.
[181] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic).
[182] Allen & Overy, "*Abaclat and Others v The Argentine Republic (Formerly Giovanna A Beccara and Others v The Argentine Republic*".
[183] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 701.
[184] *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007.

Claimants have no real motives to pursue the claim and only did so because TPF, whose motives were different, offered to pursue the claim. Russia thus called the entire arbitration abusive and frivolous and urged Tribunal to deny jurisdiction.[185] Tribunal however rejected Russia's claim as it was stated that: "*there is no reason or principle why the Claimants were not entitled to pursue rights available to them under the BIT, and to accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case. Ultimately, the Respondent's complaint, in the event its liability is established, can hardly be raised against the Good Samaritan, but rather against its own officials who acted in such a way as to give rise to that liability*".[186]

4.5.2 Conclusion

From the above-mentioned cases, we can see that TPF is often used by Respondent as a way why jurisdiction and amiability of Tribunal should be challenged, but in all cases, Tribunal has rejected these arguments. It is nevertheless an indication of the importance of TPF for legal reasoning in investment claims.

4.6 Allocation of Costs

Several tribunals have addressed the issue of allocation of costs regarding the presence of the TPF in the case and in all cases, the Tribunal has rejected to take the presence of the TPF into consideration.

4.6.1 Cases involving Allocation of Costs

Kardassopoulos and Fuchs v Georgia

In the two sister ICSID cases *Kardassopoulos[187] and Fuchs[188] v Georgia*, the respondent has requested that Claimants should be denied having their legal cost paid simply because of the presence of the TPF. The Tribunal has rejected this request as it knew "*of no principle why any such third-party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs".[189]*

ATA Construction v Jordan

This reasoning was subsequently used by two other ICISD Tribunals (in cases *RSM Production Corporation v Grenada[190]* and *ATA Construction v Jordan[191]*), which have literally quoted this paragraph in their reasoning.

[185] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 702
[186] Quasar de Valors and others v The Russian Federation, "Award" (20 July 2012) para 33.
[187] Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18.
[188] Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB/07/15.
[189] Ioannis Kardassopoulos and Ron Fuchs v Georgia, 15, "*Award*" para 691.
[190] RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14.
[191] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2.

RSM Production Corporation v Grenada

RSM Production Corporation v Grenada is specifically interesting in regard to the TPF. In this case, Respondent (small Caribbean Island state of Grenada) was the funded party which is very rare and unusual. In this case, the Claimant who was the initiator of arbitration was not able (or willing) to fund this case further and subsequently, the Tribunal stopped this arbitration. The claimant then stated that it should not bear the costs of proceedings for Respondent, as in fact, it was not Grenada who was paying for it in the first place as it has the funder. The tribunal has refused this assertion and rejected it.[192]

Siag & Vecchi v Egypt

In another ICSID case, *Siag & Vecchi v Egypt*[193], the Claimants were funded by a law firm who also represented them, based on a contingency fee arrangement.[194] Tribunal was aware of the existence of this agreement, but not on its terms.[195] The Tribunal had stated that: "*because of the Claimants' financial circumstances, they had asked, and the Claimants' counsel had agreed, that the Claimants will pay attorney's fees only on a successful recovery in this matter. It was argued that since the Claimants were contractually obligated to pay such fees, they should be entitled to an award of fees equal to the value of the time worked by their counsel."*[196] By this statement, Tribunal has implicitly recognised a principle of neutrality on the allocation of costs of the funding of the Claimants by TPF, which principle became explicit in the subsequent cases.

4.6.2 Conclusion

As we can conclude from the above-mentioned examples, the presence of the TPF is not taken into consideration when Tribunals is deciding about the allocation of the costs.

4.7 Security for Costs

The final extremely important issue regarding the presence of TPF in investment arbitration is the security for costs. Normally, a Tribunal in investment arbitration will grant the winning party a right to recover its costs from the losing party.[197] But often, parties do not know whether their opponent can afford an adverse cost award and for those reasons, they can request security for costs at the beginning of the proceedings.[198] The TPF is an indication that the funded party in the case of a loss will be unable to pay for their opponents' costs.[199] Scherer is stating that they are two main reasons why the winner side would not be able to recover its costs from a third-party funder: *Some funding agreements*

[192] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 703.
[193] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15
[194] Commission, "*Counsel success fees: More common than you think*".
[195] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 703.
[196] Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt, , "*Award*", para 604.
[197] Scherer, "*Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements*?" pp. 94-95.
[198] Ibid.
[199] Kirtley, William and Wietrzykowski, Koralie. "*Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third Party Funding?*" pp. 20-22.

specifically provide that the funder is not liable for adverse costs. More importantly, however, the arbitral tribunal very likely lacks jurisdiction to order the third-party funder to pay adverse costs because the funder is not a signatory to the arbitration agreement or a party to the arbitration proceedings.[200]

4.7.1 Cases involving Security for Costs

There have been at least three cases with TPF involved in which one side of the dispute has requested security for costs. Two of them were rejected, in one case however the Tribunal has granted the security for costs for the first time in history in investment arbitration.[201]

Guaracachi America, Inc and Rurelec plc v Bolivia

The first case in which TPF occurred and where the issue of security for costs was dealt with was a UNCITRAL case *Guaracachi America, Inc and Rurelec plc v The Pluractional State of Bolivia*[202]. In this case, the Tribunal has refused to grant security for cots as the Respondent "*…has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third-party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not*".[203]

EuroGas Inc and Belmont Resources Inc v Slovak Republic

In the ICSID case *EuroGas Inc and Belmont Resources Inc v Slovak Republic*[204], the Tribunal has rejected a request for security for costs with the similar reasoning as in Guaracachi Tribunal.

RSM Production Corporation v Saint Lucia

In the already cited case *RSM Production Corporation v Saint Lucia*[205], the Tribunal granted the security for costs sought in an amount of USD 750,000, apparently for the first time in the ICSID case ever. As this case is very essential, it will be analysed in detail as the context in this case is needed to fully understand Tribunal's decision. This decision and two separate opinions are important as they have acknowledged the influence and consequences of the presence of TPF to their decision and in addition, they are also demonstrating that a proper definition of TPF is necessary as well as disclosure is vital in order to bring more transparency into investment arbitrations.[206]

The decision was based on a Request from Saint Lucia, as Tribunal has acknowledged Respondent's objections that the same Claimant had initiated an ICSID case against

[200] Scherer, "*Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements*?" pp. 94-95.
[201] Honlet, "*Recent decisions on third-party funding in investment arbitration*", pp. 704.
[202] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17.
[203] Guaracachi America, Inc and Rurelec plc v The Plurinational State of Bolivia, "*Procedural Order No 14*", para 7.
[204] EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14.
[205] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10.
[206] Joubin-Bret, "*Spotlight on Third-Party Funding in Investor-State Arbitration*" p. 728.

Grenada in which then lodged an Annulment Proceeding, which was consequently discontinued.[207] For these reasons, Tribunal in decision held that: "*The third-party funding exacerbates the concern engendered by RSM's conduct in the Annulment Proceeding and the Treaty Proceeding. It places an unfunded RSM and the third-party funder(s) in the inequitable position of benefitting from any award in their favour yet avoiding responsibility for a contrary award.*"[208]

Regarding his history of not paying costs in his previously involved ICSID as well as non-ICSID legal proceedings, the Tribunal has decided to grant Saint Lucia's request for security for costs.[209] This decision was further influenced by the fact that RSM as a Claimant has been a repeated player, involved in numerous ICSID claim, which it initiated against several states (so far, RSM have been involved in six ICSID cases against Grenada, Saint Lucia, Ecuador, Equatorial Guinea, Central African Republic and Cameroon.)[210] Tribunal then concluded that overall given the history of the Claimant's behaviour with the fact that TPF is present constituted the exceptional circumstance according to Article 47 of the ICSID Convention.[211]

Tribunal further stated that: "*Moreover, the admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honouring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favour.*"[212] In addition, the fact that also Respondent had relied on TPF is according to the Tribunal "*is merely based on suspicion and not substantiated*".[213]

In his Dissenting Opinion, Arbiter Judge Nottingham have been focusing on the fact that the presence of TPF has heavily influenced the majority decision. He noted that TPF's presence in the dispute was not anticipated by the ICISD Convention at the time that it was drafted and put a number of questions that should be answered to deal with the issue of TPF in investment arbitration today.[214] Firstly, according to his dissenting opinion, a proper definition of third-party funding is needed. Then there is an issue of the legitimacy of TPF as it can allow to initiate an unmeritorious and frivolous claim and to start arbitration simple for the purpose of profit.[215] Moreover, Arbiter Nottingham has questioned the availability of information concerning TPF, the terms of the funding agreement and the identity of a founder. He has concluded dissenting opinion by: "*In my*

[207] Honlet, "*Recent decisions on third-party funding in investment arbitration*", pp. 704 – 705.
[208] RSM Production Corporation v. Saint Lucia, "*Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons*", para 76.
[209] *Ibid*, paras 82-88
[210] ICSID, "*Cases Darabase – Search Cases*", search by Claimant=RSM, which found 6 cases
[211] ICSID, "*ICSID Convention*", Article 47.
[212] RSM Production Corporation v. Saint Lucia, "*Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons*", para 83.
[213] *Ibid*, para 84.
[214] *Ibid*, "*Dissenting opinion of Edward Nottingham*", paras 14- 18.
[215] *Ibid*, "*Dissenting opinion of Edward Nottingham*", para 19.

view, the general concerns about third-party funding and security for costs can and should be addressed by the Administrative Council in its rule-making capacity, if there is a problem that needs to be dealt with. Until the Administrative Council is more explicit about the matter, an individual tribunal should not be using general language of unlimited elasticity to accomplish the result which the tribunal regards as appropriate. "[216]

In an Assenting Reasons, Arbitrator Gavan Griffith had highlighted that the phenomenon that TPF in investment arbitration is becoming increasingly common in two main forms: by entity corporately linked to Claimant or by funders who engage in TPF for business purposes. Gavan Griffith is critical to the TPF business when he stated that: "*Such a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose.*"[217]

He further continued to express his concerns: "*The founders of the Convention could not have foreseen in any way the emergence of a new industry of mercantile adventurers as professional BIT claims funders. It is no reach to find that, as strangers to the BIT entitlement, such funders also should remain at the same real risk level for costs as the nominal claimant. In this regard, the integrity of the BIT regimes is apt to be recalibrated in the case of a third party funder, related or unrelated, to mandate that its real exposure to costs orders which may go one way to it on success should flow the other direction on failure*".[218]

Arbitrator Griffith has concluded that he fully supports the decision of the Tribunal and is calling for disclosure, as he said that: "*My determinative proposition is that once it appears that there is third party funding of an investor's claims , the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.* "[219]

4.7.2 Conclusion

The security of costs issue has shown that the presence of the TPF led to the first-ever granted provision of this provisional measure. It also highlights the need for duty of disclosure, as the mere knowledge of a presence of a funder in the dispute can help each party to decide to ask Tribunal for security for costs. This is in accordance with the hypothesis of this thesis that disclosure of all relevant factors regarding TPF in investment arbitration should be required. In the light of this case, it is also important to highlight that Saint Lucia is a very small island state, in which powerful claimant supported by TPF could provide crucial if the security for costs would not be granted.

4.8 TPF is Similar to Other Funding Possibilities

There is also an issue regarding the very nature of the TPF. Claimants, as well as Respondents, have other possibilities how to obtain necessary finances. Other ways how to

[216] *Ibid*, "*Dissenting opinion of Edward Nottingham*", para 20.
[217] *Ibid*, "*Assenting Reasons Of Gavan Griffith*", para 13
[218] *Ibid*, "*Assenting Reasons Of Gavan Griffith*", para 14
[219] *Ibid*, "*Assenting Reasons Of Gavan Griffith*", para 18

obtain necessary finances are - for example - corporate loans, equity financing, after-the-event insurance, attorney's contingency fee arrangements or political risk insurance. The proponent of TPF in investment arbitration, for this reason, believes that there is no additional risk arising from third-party funding compared to other means of financing. [220] In this regard, as Trasher is correctly observing, this view is undermining the first and the most important rationale of TPF as an enabler of AtJ, as their proponents are making statements that TPF is very similar to other ways of financing and thus seems to be obsolete.[221]

4.8.1 TPF v Corporate and Equity Financing

Other ways of financing, such as internal corporate and equity financing serve, in a way as a traditional corporate loan, which enables an investor to shift finances to claim and eventually receive them back if the claim is successful. The structure is however different as the provider of money is corporately related to the receiver, which makes this relationship discoverable in an ongoing dispute. There is also no risk of conflict of interests.[222]

4.8.2 TPF v Insurances

Insurance mechanisms, which are quite often used to finance litigations, also differ from the TPF mechanism. The main difference between insurances and TPF are threefold. Firstly, insurance is paid after the claimant has submitted a claim and do not provide daily financing of costs as TPF does. Secondly, an insurance premium is lower than the return which is sought in TPF agreements. And thirdly, insurance companies are, unlike third-party funder companies, already regulated by numerous domestic and international norms as well as by ethical and professional rules of conduct.[223] For this reason, some are calling that TPF should be regulated and subjected to similar rules and norms.

4.8.3 TPF v Contingency Fee Arrangements

Attorney-client contingency fee arrangements are another source of possible financing. This is the oldest and traditional way of financing insolvent and distressed clients to be able to initiate the legal proceeding. These contingency fee arrangements however differ significantly from TPF as on the onset of dispute they are disclosed. Moreover, attorneys could face disbarment if a serious violation occurs.[224]

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[220] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", p. 9.
[221] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2943.
[222] *Ibid*, p. 2943-2944.
[223] Dhawan, Aastha. "*The Regulation of TPF with a view to the UNCITRAL Investor-State Dispute Settlement Reform*".
[224] Trasher, "*Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*", p. 2944.

4.8.4 Conclusion

The argument that TPF is simply another funding opportunity similar to other forms of financing, such as corporate loans, insurances and contingency fees, is not very convincing especially in investment arbitrations as these methods of obtaining finances differ significantly. The TPF business is rather unique and as such need to be regulated in the form of an extensive disclosure.

5. ADDRESSING THE ISSUE ON THE THEORETICAL LEVEL

In the previous chapter, the main issues regarding the presence of the TPF in investment arbitration were introduced. This chapter will present ways of how to deal with these issues on a theoretical level. As it was shown in Chapters 3 and 4, the very existence of the TPF has caused a division in the arbitration community and is it thus not surprising that even numerous states and international arbitrational organisations have decided to react to it.[225] In recent years, we have witnessed discussions and even amendments of treaties regarding the topic of TPF from several actors – from national policymakers who are revisiting their national model of BITs to arbitral organisations such as ICSID or UNICTRAL that are amending their arbitral rules to address the presence of TPF.[226]

5.1 Possible Policy Recommendations

Given all pros and cons, third-party funding in investment arbitration is unique and the debate about the need for its regulation or complete ban will not disappear. Some funders often asserted that regulation is not needed, as most funders are already somehow regulated (such as banking entities for example).[227] But it is important to bear in mind that these market regulations are not taking into consideration selected ethical issues and often does not represent enough public concerns. Thus, two options remain for policymakers, either to ban TPF completely or to adopt a proper regulation with the extensive duty of disclosure in heart of it. As we will see in Chapter 7, several jurisdictions have chosen between those two options.

5.2 Ban of Third-Party Funding

There are few who are arguing to make TPF completely illegal and ban it from investment arbitrations for good, as proponents of this drastic notion believe that TPF in ISDS is not offering any or very limited advantages and who believed that TPF actually imposes serious and systematic risks to the whole system.[228] They acknowledge that in private international commercial arbitration and traditional litigation, the TPF has its merits, however, in investment arbitration, it creates extreme asymmetry. Frank Garcia is referring to TPF in investment arbitration as exploitation as states as they have no right to appeal.[229]

Several states have been voicing that they are favouring a complete ban on third-party funding in ISDS. During the UNCITRAL's Working Group III on ISDS reform, states

[225] Brekoulakis and Rogers. "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 1-5
[226] *Ibid*, pp. 15-26.
[227] Guven, and Johnson, "*The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*", p. 38,
[228] Garcia, "*The Case Against Third-Party Funding in Investment Arbitration*".
[229] *Ibid.*

such as Nigeria, Burkina Faso, Kenya, South Africa, Morocco, and Argentina have all raised some concerns about TPF and urged for a reform.[230] In addition, United Arab Emirates (**UAE**) and Argentina have even decided to act unilaterally as in 2018 they have adopted a complete ban of TPF to their BIT.[231]

It can be expected that some other states, especially from low-income countries, might follow Argentina and UAE and will include a ban of TPF altogether by explicit expulsion of this practice in their BITs. But it is important to mention that this ban of TPF is an extreme measure and it is highly unlikely that the majority of countries will follow this trend. There is a much more appropriate option – a regulation of TPF by adopting certain rules and norms.

5.3 Regulation of Third-Party Funding in ISDS

There are many forms and scope of regulations of TPF, as there are many methods of how to regulate it. It is important to highlight that even some funders are not categorically against regulation. Australian funding firm OMNI Bridgeway (formerly IMF Bentham), for example, has stated that it welcomes some regulatory changes and that has been calling for appropriate regulations themselves for a long time.[232]

Regulation seems to be the path that is taken by most countries and arbitrary organisations. The most common issue, in which the regulation is aiming is conflicts of interest between arbitrators and funders – which could be effectively solved by mandatory disclosure of the existence and identity of a funder. As mentioned by Steinitz, if there are concerns about the amount of influence possessed by the funder over the dispute, regulation in form of rules which would diminish such influence need to be adopted.[233] Furthermore, imposing certain ethical duties and an improved level of transparency in investment disputes will, according to Steinitz, minimalize risks that TPF imposed.[234]

5.4 Regulation of TPF – Debate

From its origins, investment arbitrations tend to be much more transparent than the commercial ones, as in investment arbitrations a public element is involved, and both leading arbitral rules – ICSID's and UNCITRAL's - are providing rules to secure the appropriate level of transparency bearing in mind confidentiality principle.[235] This is much

[230] United Nations, "*Working Group III: Investor-State Dispute Settlement Reform*".
[231] UNCTAD, "*Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates*", Article 24.
[232] OMNI Bridgeway, "*Annual Report 2018*" p. 20
[233] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", pp. 1327-1330.
[234] *Ibid.*
[235] Martinez, "*Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation*".

in contrast with the TPF element, as most of the third-party funding agreements tend to have a confidentiality clause, which often specifies what information is restricted for disclosure.[236]

In addition, funders are not a party of a dispute and thus often arbitral tribunals have no jurisdiction over them as these funders are legally disconnected from the proceedings.[237] This means that tribunals are not able to coerce a third-party funder to disclose a funding agreement. But as it was proven by several cases in Chapter 4, Tribunals have indeed the power to request disclosure from the funded party, which is of course the party of a dispute. But as it is clear from these cases, a strict regulation addressing this issue would be preferable.

5.4.1 Arguments against the Duty of Disclosure

Why are funders in the first place so unwilling to disclose their funding agreements? There are several reasons for this, the first being that funded parties, as well as funders, are concerned that the tribunal might impose costs of proceedings to the funded party.[238] Moreover, there is an argument that any TPF contracts and funding decisions are private and thus should not be under any regulation.[239]

There is also a concern that disclosure requirements might actually lead to the delay of the arbitration proceeding, which would also lead to the increase of costs as states would as respondents would engage in frivolous legal demands based on TPF concerns.[240] According to Honlet, if a party becomes aware of the other party's litigation budget, an incentive might be created to bring dilatory requests or arguments simply to exhaust that budget before the case is over.[241]

Moreover, concerns that the mere existence of the funding relationship could negatively affect the behaviour of the opposing party during the settlements negotiations is also one of the reasons.[242] It is also very common, when third-party funding is involved, that the opposing party uses this fact as some sort of reasoning for frivolous accusations and in general, it could be viewed by some as a negative aspect, which could have an effect on the results of the decision.[243] Lastly, the public image of the companies that provide funding could be harmed if the funded party is responsible for operations that are in the violence

[236] Trusz, "*Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*", p. 1675.
[237] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", p. 380.
[238] Trusz, "*Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*", p. 1672.
[239] Frignati, "*Ethical implications of third-party funding in international arbitration*", p. 516.
[240] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1194.
[241] Honlet, "*Recent decisions on third-party funding in investment arbitration*", p. 711.
[242] Trusz, "*Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*", p. 1672.
[243] Ross, "*The Dynamics of Third Party Funding*".

of ethical, human rights practises or environmental standards, which could greatly deteriorate their credibility and reputation.[244]

5.4.2 Arguments in Favour of Disclosure Regulation

There are, nevertheless, compelling arguments for the full disclosure of the presence of the TPF in the dispute as well as the terms of a funding agreement. The argument which is usually the first one to mention is that disclosure of TPF would lead to better transparency and it would enable to properly evaluate any conflict of interests.[245] As mentioned previously, TPF is significantly increasing the likelihood of possible conflict of interests, especially between arbitrators and funders. This is very problematic in investment arbitration, as *raison d' être* of investment arbitration is that they are meant to provide an impartial and independent forum for deciding the legal dispute. Any conflict of interest could severely threaten or slow down the processing[246], and in addition, also undermine the enforceability of possible awards.[247]

There is also an argument that general disclosure would unify the currently different treatment of TPF by individual tribunals. As it is clear from the above-mentioned cases, some tribunals have already decided to order disclosure of TPF, but as there is no principle of *stare decisis* in international investment arbitration[248], only disclosure requirements in arbitral rules would be a unifying solution. These rules would apply to all parties involved in the proceedings and would clearly state what is it necessary to disclose

It is further believed that disclosure is leading to prevent expensive and frivolous proceedings which could be caused by the signing of the funding agreement. This can be illustrated by the fact that funders will often gain a significant amount of influence over the claim, and consequently, internal disagreements may arise between the interests of funders and the funded party, which could lead to the extension of the dispute as well as an increase of the costs. As Cremades points out, this could also be considered as a violation of procedural good faith and have a negative impact on the whole arbitration proceeding.[249] Conversely, if there is a disclosure of a funding agreement, the tribunal is able to evaluate the outside influence of the funder and prevent any unnecessary costs as well as delays.

In regard to the disclosure, Van Boom is describing the third-party funding in investment arbitration as a "*legal no man's land*" due to the lack of regulations in the investment

[244] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 115.
[245] Brabandere, and Lepeltak, "*Third Party Funding in International Investment Arbitration*", p. 395.
[246] Scherer, "*Out in the Open? Third-Party Funding in Arbitration*".
[247] Trusz, "*Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*", p. 1652.
[248] Douglas, "*Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?*", pp. 104-106.
[249] Cremades, "*Third Party Litigation Funding: Investing in Arbitration*" pp. 7-8.

arbitration.[250] Shaw concludes that TPF, in general, is beneficial, especially for the insolvent claimants, but more rules need to be adopted so funders would not operate in shadows, unaccountable for their actions and behaviours.[251]

An 'expansive disclosure', or a 'total disclosure' of TPF agreements could address many of the concerns. First, it could alleviate concerns that delayed or accidental disclosure would lead to an award set aside or a miscarriage of justice for the claimant and the respondent. Second, increased transparency of the funding agreements aligns well with the general institutional trend toward transparency and highlights funding agreement provisions that create perverse incentives. For funded parties, mandatory disclosure could normalize TPF, leading to fewer orders of security for costs. Finally, expansive disclosure will provide the much-needed data for future research into the benefits and harms involved in TPF and enable more effective regulation going forward.

5.5 Proposed Approach

As proven by heated debate earlier in my thesis, there are valid and justified reasons on both sides regarding the question of whether or not should third-party funding be regulated in investment arbitration. Having in mind all of them, the author of this thesis is inclined to state that TPF in investment arbitration should be regulated by disclosure rules, as it is the most effective rule to solve most of the risks arising from the presence of the TPF in ISDS system. In addition, it is further recommended that as the phenomena of TPF will involve, so might the regulation need to be improved to reflect all the changes.

Proposed expansive disclosure of TPF agreements could address all of the already addressed issues and in addition, put back trust into the investment arbitration system. Increased transparency of the funding agreements aligns well with the general institutional trend toward transparency and highlights funding agreement provisions that create perverse incentives. For funded parties, mandatory disclosure could normalize TPF, leading to fewer orders of security for costs. Finally, expansive disclosure would also be good as much-needed data for future research into the benefits and risks caused by the presence of the TPF and enable more effective regulation going forward.

[250] Van Boom, "*Third-Party Financing in International Investment Arbitration*", p. 10.
[251] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 117.

6. ADDRESSING THE ISSUE ON THE PRACTICAL LEVEL

In this chapter, examples of specific regulations of TPF in selected jurisdictions and arbitrary institutions will be analysed, as in the last few years, several states and arbitrary bodies have put theoretical speculations about the regulation of TPF into practice. Again, in accordance with the main hypothesis of this thesis, an emphasis will be on the duty of disclosure.

6.1 Challenges of Regulation of TPF in ISDS

There are several challenges that the regulation of Third-Party Funding is facing. Above all else, there is no single body of law that would govern all investment arbitrations. Rather, international investment arbitrations are conducted in accordance with numerous actors - such as states, bar associations, investment treaties and of course international arbitral institutions and forums. Subsequently, individual national laws and treaties, though useful, only govern claims that fall within their purview; such rules create only a patchwork solution to a global phenomenon.[252]

Only several actors in each category have already decided to address the issue of TPF. For that reason, there are numerous ways of regulation of TPF, such as amendments to the arbitral rules, national laws, amendments to IIAs or even adopting of non-binding international guidelines. Furthermore, the level and way of regulation of third-party funding are very much diverse and inconsistent within legal jurisdictions, even within the jurisdictions of the same legal tradition such as the common law one.[253]

There is a general trend towards greater transparency in major investment institutional arbitration forums. In 2006, ICSID has modified their rules to increase transparency and UNICTRAL have followed this trend in 2013. The duty of disclosure of TPF is yet another step in this general trend.[254] According to United Nations Conference on Trade and Development (**UNCTAD**) statistics, over 90% of all investment's arbitrations are filed either under the ICSID Convention or UNCITRAL Arbitration Rules, thus these two institutions could offer a broader uniformity if they would adopt rules regulating the TPF.[255]

In the following sections, an example of how selected players from each category have decided to handle the issue of regulation of TPF will be presented. The most detailed analysis will be given to the arbitral organisations and forums, as they are most likely to directly affect most investment cases. ICSID and UNCITRAL Rules in particular will be

[252] Krestin, and Mulder, "*Third-Party Funding in International Arbitration: To Regulate Or Not To Regulate?*".
[253] Brekoulakis and Rogers, "*Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy*", pp. 2-4.
[254] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", p. 114.
[255] UNCTAD, "*Special update on Investor–State Dispute Settlement: Facts and Figures*" p. 5.

presented in greater detail, and ICC and SCC will be also mentioned. Furthermore, non-binding rules from IBA are presented. Moreover, certain selected domestic jurisdictions which are interesting from an arbitration's perspective (Hong Kong and Singapore) will be mentioned together with Ireland, which does not have such an important arbitration position but its development regarding the regulation of TPF is very unique and thus it is provided as an example of the completely opposite approach. Lastly, the examples of regulation in investment treaties themselves will be presented by the examples of CETA and other IIAs. Remarks and findings will be concluded in the chapter's conclusion. Given the limited scope of this thesis, only a handful of examples were selected, nevertheless, each category of actors is presented.

6.2 ICSID and TPF Regulation

ICSID is by far the most used venue for investment arbitrations, as more than 60% of claims (654 out of 1104 known cases) were held according to either ICSID Arbitration Rules or ICSID Additional Facility Rules, which is making ICSID the most important and influential investment organisation in the world.[256] If ICSID is successful in the regulation of TFP, most of the investment arbitration would be affected by it and other institutions might follow.[257]

Regarding the regulation of the TPF, ICSID has been working on amendments since 2018 and already five rounds of negations have been concluded, yet so far these amendments were not accepted as the COVID-19 pandemic has halted the process.[258]

6.2.1 ICSID Process of Amendment of its Rules

ICSID working paper I was receiving suggestions and ideas from the public until December 2018, and a final draft was expected in 2019 or 2020 to be approved by 2/3 of all ICSID member states.[259] This did not materialise as to this date, the 5th version of ICSID amendments rules was published in June 2021 and so far, they have not been approved. Since ICSID is so much influential organisation in the investment arbitration world, the whole new Rule regarding the Notice of Third-Party funding is presented below in its form in the Working Paper #5th version[260], the newest version. There are indications that these new proposed rules could be finally adopted in late 2022.

[256] UNCTAD, "*Investment Dispute Settlement Navigator*", search by arbitral rules and administering institutions.
[257] Blavi, Francisco. "*It's About Time To Regulate Third Party Funding*".
[258] ICSID, "*Updated Backgrounder on Proposals for Amendment of the ICSID Rules*".
[259] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1198.
[260] ICSID, "*Proposals for Amendment of the ICSID Rules*".

6.2.2 Proposed Amended Rule

Rule 14
Notice of Third-Party Funding

(1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding").

(2) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(3) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).

(4) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).[261]

6.2.3 Comments

The first remark is that this rule makes the disclosure of the presence of TPF mandatory, which will be done by written notice. Regarding paragraph (2) however, there is an issue of time of disclosure. If third-party funding is disclosed once proceedings have already begun, the proceedings may be interrupted or put on hold while the Secretariat considers possible conflicts of interest. And further, if the Secretariat does in fact uncover a conflict of interest between a funder and an arbitrator, it may force the arbitrator to recuse herself from the panel. The ICSID rule, unfortunately, falls short of this goal, so the next subpart suggests an alternative scheme. Moreover, as they are currently written, the draft ICSID rules do not address the relationship between third-party funding and security for costs[262], however, an ICSID's commentary on proposed rules suggests that "*the mere fact of [third-party funding], without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs . . . .*[263]

[261] ICSID, "*Proposals for Amendment of the ICSID Rules*", Rule 14.
[262] Moseley, "*Disclosing Third-Party Funding in International Investment Arbitration*", p. 1198.
[263] Luttrell, "*Observations on the Proposed new ICSID Regime for Security for Costs*" p. 394-395.

It seems that the 5th version of the ICSID Amendments Rules could be finally adopted in early 2022, which would be a good start towards the duty of disclosure of the presence of the TPF. However, it is fair to point out that these amendment rules are not very ambitious as they provide only a general duty of disclosure of a presence and a name of a funder, but not the extensive disclosure which would also include funding agreements and they do not address the issue of security for costs. Nevertheless, it is a move in a good direction and progress for such influential institutions as ICSID and other amendments addressing more issues regarding TPF might follow.

6.3 UNCITRAL and TPF Regulation

The UNICTRAL Arbitration Rules provide a comprehensive set of procedural rules which are widely used in ad hoc as well as administered arbitrations. UNCITRAL Rules are after the ISCID the second most used rule in investment arbitration, as there were used in 351 ISDS cases.[264]

In May 2021, the UNCITRAL Secretariat has published initial draft provisions on the regulation of third-party funding in Investor-State Dispute Settlement (ISDS).[265] Since the effectiveness of any regulation on third-party funding depends on the use of clearly defined terms, the draft provides definitions of some key third-party funding terminology, including: "proceeding," "third-party funder," "funded party" and "third party-funding."[266]

In regards to the mandatory disclosure, the draft requires that the following information must be disclosed by the funded party to the Tribunal as well as to the opposing parties: (**i**) the name and address of the third-party funder; (**ii**) the name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder; and (**iii**) the funding agreement or the terms thereof.[267]

In addition, certain information may be required by the tribunal, such as: (**i**) whether the third-party funder agreed to cover the costs of an adverse cost award; (**ii**) the expected return amount of the third-party funder; (**iii**) any rights of the third-party funder to control or influence the management of the claim, or the proceedings and to terminate the funding arrangement; (**iv**) a number of cases that the third-party funder has provided funding for claims against the respondent State; (**v**) any agreement between the third-party funder and the legal counsel or firm representing the funded party; and (**vi**) any other information deemed necessary by the tribunal.[268]

[264] UNCTAD, "*Investment Dispute Settlement Navigator*", search by arbitral rules and administering institutions.
[265] United Nations, "*Initial draft on the regulation of third-party funding*".
[266] Leathley, "*UNCITRAL publishes initial draft on the regulation of Third-party Funding in Investor-state Dispute Settlement*".
[267] United Nations, "*Initial draft on the regulation of third-party funding*", Draft Provision 7 para 1. (Disclosure).
[268] *Ibid*, Draft Provision 7 para 2. (Disclosure)

6.3.1 Other rules

In addition, the draft is stating that a third-party funder is not considered as an investor, as this aims to preclude third-party funders from raising claims against a state based on any loss or damage suffered by funding a claimant. In addition, the draft also addresses potential approaches to the ordering of security for costs where a party has received third-party funding. Finally, it is expressly stated that Working Group may wish to consider whether a code of conduct for third-party funders should be prepared. Issues that could be addressed in such a code includes disclosure, transparency, limitation on funder returns, limitation on funder control, limitation on the number of funded claims against a single State, and due diligence for frivolous claims. The draft ends with a general call for the collection of data on third-party funding in ISDS.[269]

6.3.2 Comment and Comparison with ICSID Rules

The UNCITRAL draft goes further than proposed amendments of ICSID Arbitral Rules, as UNCINTRAL is also focusing mainly on disclosure requirements, which aim to address the risk of conflicts of interest that may arise when a third-party funder is involved, but at the same time goes further by proposing model regulations that could either completely prohibit third-party funding or narrowly restrict it, reflecting the States' perception that third-party funding could enable the proliferation of frivolous claims. These new UNICTRAL Rules should be accepted in 2022.

6.4 SCC and TPF Regulation

Currently, neither Swedish legislation (the Swedish Arbitration Act (SAA) nor the Stockholm Chamber of Commerce (SCC) impose any duty to disclose the presence of the TPF in the dispute.[270] The SCC venue was used in 49 investment cases.[271] Nevertheless, in 2019 SCC has adopted a policy named "disclosure of third parties with an interest in the outcome of the dispute"[272], which is aiming to minimise risks of conflict of interest among arbitrators. The policy sets out that each party is encouraged to disclose in its first written submission the identity of any third-party interests in the dispute, including the existence of third-party funders. This is however not a mandatory disclosure, and it is likely that mandatory rules dealing will the TPF issues will soon follow.

[269] Leathley, "*UNCITRAL publishes initial draft on the regulation of Third-party Funding in Investor-state Dispute Settlement*".
[270] Sidklev, Persson, and Gustafsson, "*The Third Party Litigation Funding Law Review: Sweden*".
[271] UNCTAD, "*Investment Dispute Settlement Navigator*", search by arbitral rules and administering institutions.
[272] Arbitration Institute of the SCC, "*SCC Policy Disclosure of Third Parties with an interest in the outcome of the dispute*".

6.5 ICC and TPF Regulation

The International Chamber of Commerce was selected as a venue for 19 investment arbitrations.[273] It is one of the most pro-active organisations regarding the regulation of TPF, as its Amended Arbitration Rules dealing with the issue entered into force on the 1st of January 2021.[274] The newly added paragraph 7 of Article 11 of the ICC Arbitration Rules states a definition of TPF is: "*non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*," and parties must inform "*the Secretariat, the arbitral tribunal and the other parties*" of "*the existence and identity*" of the third-party funder's existence.[275] The reason behind this provision is "to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3)." Articles 11(2) and 11(3) regulate the arbitrators' duty to disclose any facts or circumstances concerning the arbitrator's impartiality or independence.[276] This is to prevent any possible conflict of interest. It is also important to mention that ICC rules are not requesting disclosure of the funding agreement, but solely the existence and identity of a funder.

6.6 IBA and TPF Regulation

The International Bar Association (IBA) was the first international organization which has dealt with the issues of third-party financing in international arbitrations. [277] IBA has adopted IBA Guidelines on Conflicts of Interest in International Arbitration in 2014. The IBA Guidelines defines a third-party funder as someone who has a "*direct economic interest in an award"*. Moreover, they regulate the potential conflicts of interest. The IBA and its Guidelines are very influential in the arbitral community worldwide especially on the issues of disclosure and conflict of interests.[278] However, the IBA rules and guidelines are not legal provisions and thus do not override any applicable national law or arbitration rules chosen by the parties. They become binding only upon agreement by the parties.[279]

6.7 Selected Domestic Jurisdictions and TPF Regulation

For centuries, in common law jurisdictions, funding of another party's legal dispute was considered as crimes and torts under the doctrines of *maintenance* and *champerty*, which were a way to prevent that legal system would be violated.[280]

[273] UNCTAD, "*Investment Dispute Settlement Navigator*", search by arbitral rules and administering institutions.
[274] Budak, "*An Overview of Third-Party Funding in the 2021 ICC Arbitration*".
[275] ICC, "*Arbitration Rules 2021*", Article 11 para 7.
[276] ICC, "*Arbitration Rules 2021*", Articles 11 paras 2-4.
[277] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 12-13
[278] Shaw, "*Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*", pp. 108-109.
[279] Aceris Law, "*IBA Rules and Guidelines Regarding International Arbitration: An Overview*".
[280] Barrington, "*Chapter 3: Third-Party Funding and the International Arbitrator*", p. 16.

6.7.1 Doctrines of Maintenance and Champerty

These ancient principles are described as: "*Maintenance refers to the funding or providing of financial assistance to a holder of a claim, which allows the claim to be legally pursued when the funder or provider of financial assistance holds no connection or valid interest in the claim itself. Champerty is essentially a type of maintenance with the addition of the funder or financial provider having a direct financial interest in the outcome of the claim. Under champerty, the financial provider provides the money in exchange for a portion of the damages should the claim prevail*".[281] Civil law jurisdictions have no such equivalent.[282]

These principles were justified by the concerns that third-party funder "*might be tempted, for his own personal gain, to inflame the damages, to suppress evidence or even to suborn witnesses*".[283] In addition, „*an agreement to share in the spoils of litigation may encourage the perversion of justice and endanger the integrity of judicial processes*", not least because "*it involves a stranger to the litigation in 'trafficking' or 'gambling' in the outcome of the litigation"*.[284]

6.7.2 TPF in Common Law Jurisdictions

In most of the common law jurisdictions, these historic doctrines were abandoned and TPF thus become legal. Australia was the first country to do so in 1958.[285] In England and Wales, the third-party funding in the litigation was decriminalised as soon as in 1967 by the Criminal law Act of 1967, which has abolished both the crimes and torts of maintenance and champerty.[286] England and Wales have not passed any formal regulation on third-party funding, which is only subject to self-regulation in the form of a voluntary Code of Conduct for Litigation Funders, adopted in January 2014 by the Association of Litigation Funders (**ALF**).[287] In the United States of America, some states have already abandoned maintenance and champerty while others apply them fully as there is no consensus on a federal level.[288]

Below three common law jurisdictions and their approach towards TPF will be analysed in more detail. Hong Kong and Singapore have been selected as they have been the latest common law jurisdictions which have abandoned doctrines of maintenance and champerty and more importantly to this thesis, both Asian city-states have been commercial hubs and subsequently and venues of commercial arbitrations institutions (HKIA - Hong Kong International Arbitration Centre and SIAC - Singapore International Arbitration Centre). As will be analysed below, the changes in their

[281] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 39.
[282] *Ibid*, p. 39.
[283] Secomb, "*Third Party Funding: a New Chapter in Hong Kong & Singapore*".
[284] *Ibid.*
[285] Nieuwveld, and Sahani, "*Third-Party Funding in International Arbitration*", p. 40.
[286] *Ibid*, p. 101.
[287] ALF, "*Code of Conduct for Litigation Funders*".
[288] Steinitz, "*Whose Claim Is This Anyway? Third-Party Litigation Funding*", pp. 1289-1290.

domestic jurisdiction have also influenced the Arbitral rules of these two centres. The Ireland example is mentioned because it is one of the examples of a jurisdiction which have decided to adhere to ancient doctrines of maintenance which was recently confirmed by the Supreme Court of Ireland.

6.8 Hong Kong and TPF Regulation

As soon as in 2016, the Secretary of Justice of Hong Kong have spoken about the issue of third-party funding in his jurisdiction and pledge to reform current laws as part of Hong Kong's agenda of making this city-state an „*arbitration-friendly jurisdiction*.[289]

In 2017, Hong Kong has abolished the common law doctrine of champerty and maintenance and passed new legislation[290] and subsequently, in 2019, the Government of Hong Kong has published the Code of Practice of Third-Party Funding of Arbitration[291]. This Code sets important new standards and obligations, which funder, as well as funded parties, must adhere to. The most important obligation imposed by this Code is that TPF must have minimum capital adequacy of at least 20 million HK dollars.[292] In addition, the funder makes sure that no conflict of interest will arise from their funding arrangement for the whole duration of the funding agreement. The funder is also not able to seek influence over the funded party and it is required to observe the confidentiality of all information related to the arbitration.[293]

The arbitration academic world is talking positively about Hong Kong's new legislation, as it is anticipated that it will help Hong Kong to develop extend its arbitration status.[294]

6.9 Singapore and TPF Regulation

Singapore, similarly, to Hong Kong, is a small city-state that is an investment hub and global venue for international arbitration, having been the 3rd most preferred venue to hold an arbitration (beating Hong Kong which was 4th) in 2018.[295] In regards to third-party funding, Singapore has changed its law in 2017 and allow TPF for international arbitrations, given that funders will meet certain criteria.

[289] Department of Justice of HK, "*Keynote Speech by Mr Rimsky Yuen, SC Secretary for Justice of the Hong Kong SAR at 2nd ICC Asia Conference on International Arbitration on 29 June 2016 (Wednesday)*", p. 5 (para 16).
[290] Department of Justice of HK, "*The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6*".
[291] Department of Justice of HK, "*Code of Practice of Third Party Funding of Arbitration*".
[292] *Ibid*, Article 2.5(2).
[293] *Ibid*, Articles 2.6 – 2.9.
[294] Secomb, "*Third Party Funding: a New Chapter in Hong Kong & Singapore*", page 9.
[295] Brekoulakis and Friedland, "*2018 International Arbitration Survey: The Evolution of International Arbitration*".

The amended Civil Law Act of 2017[296] abolishes civil liability for the tort of maintenance and champerty and established several requirements for funders, such as the necessity to own a minimal capital of 5 million dollars. Furthermore, funders are required to adhere to the principle of confidentiality. The disclosure of the basic funding information to the court or tribunal is also the central requirement anticipated by the new legislation.[297]

This positive development regarding the TPF was one of the reasons behind a rapid increase of cases solved by the SIAC. In 2019 for example, nearly 500 new cases were held in front of SIAC from 59 jurisdictions and the sum of all the new cases exceeded 10.9 billion US dollars annually.[298] In addition, Singapore also saw a rapid increase in the market of third-party funding services, as cases involving funded parties have grown and a number of international funders have established their permanent offices in this Asia city-state.[299]

6.10 Ireland and TPF Regulation

Ireland (also part of the common law jurisdictions) is an example of a jurisdiction which have decided to adhere to antique doctrines of maintenance and champerty, which have been criminal offences and civil torts since the 1600s.[300]

On 23rd of May 2017, the Supreme Court of Ireland has decisively (by a majority of 4 to 1) upheld a ruling of a High Court which have previously found that Irish law precludes persons with no interest or connection to the litigation to fund on behalf of one of the parties.[301] The Court effectively ruled that ancient legal statutes from the 14th century - Maintenance and Embracery Act of 1634 – is still valid and thus such third-party funding is in violation of principles of maintenance and champerty. These ancient statutes have not been repealed in Ireland for centuries, yet no criminal prosecution has been initiated under them since the foundation of the Republic of Ireland in 1922.[302] In its decision, Irish Supreme Court has also stated that due to the separation of powers, it is unable to repeal these old doctrines of the common law system even if a constitutional right of access to justice is in threat.[303]

This decision has been criticised by the number of Irish legal scholars as well as Judges. Judge Clarke J., for example, has stated that "*it is difficult to take an overview of the circumstances of this case without a significant feeling of disquiet*" and acknowledged that "*it is at least arguable that*

[296] Government of Singapore, "*Civil Law (Amendment) Act 2017 of Singapore*", Article 5B(1).
[297] Patoul, "*The Third-Party Litigation Funding Law Review: Singapore*".
[298] SIAC, "*Where the World Arbitrates: Annual Report 2019*", pp. 12-27.
[299] Patoul, "*The Third-Party Litigation Funding Law Review: Singapore*".
[300] Collins, "*Irish Supreme Court holds third party funding prohibited by maintenance and champerty but expresses "disquiet*".
[301] Jermyn, and Nolan, "*Persona case and the law of maintenance and champerty in Ireland*".
[302] Collins, "*Irish Supreme Court holds third party funding prohibited by maintenance and champerty but expresses "disquiet*".
[303] Jermyn, and Nolan, "*Persona case and the law of maintenance and champerty in Ireland*".

there is a very real problem in practice about access to justice [which] *is growing.*"[304] In his dissenting opinion, judge Liam McKechnie has stated that "*it is of immense concern that legislation of such enormous antiquity has the capacity of preventing any merit review of such allegations*".[305]

In this unprecedented and unique ruling, Judges have called to the Irish legislatures to act and modernise Irish legislation to enable third-party funding in Ireland. The same opinion is also expressed by David Capper from Belfast University, who is also calling for the change of legislation in Ireland and acceptance of TPF in litigation as a way of access to justice, which is a constitutional right in Ireland.[306] As of 2021 however, the ancient doctrines of maintenance and champerty are remaining valid in Ireland and most types of the TPF in litigations are not possible.[307]

6.11 Regulation of TPF in IIAs

Lately, it has also become more and more common to incorporate third-party funding provisions directly into the investment treaties. One of the most cited examples is the Comprehensive Economic and Trade Agreement (**CETA**) signed between the EU and Canada in 2016.[308] Article 8.26 (named Third-party funding) of CETA provides:

1. Where there is third-party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third-party funder.

2. The disclosure shall be made at the time of the submission of a claim, or if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.[309]

The same requirement as in CETA about TPF can be found in the EU-Mexico Trade Agreement.[310] However, the EU is rather alone in its requirements of disclosure of TPF. Besides the currently negotiated treaties by the EU, TPF disclosure is not globally required. This can be demonstrated by the fact that in a new generation of investment treaties, such as, for example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam or United States-Mexico-Canada Agreement ("**USMCA**") does not provide for mandatory disclosure of TPF.[311]

[304] Collins, "*Irish Supreme Court holds third party funding prohibited by maintenance and champerty but expresses "disquiet"*
[305] *Ibid.*
[306] Capper, "*Third party litigation funding in Ireland: time for change*? " pp. 214-215.
[307] Monaghan, "*Dispute Resolution Update: Third Party Litigation Funding in Ireland*".
[308] Zwolankiewicz, Agata. "*Third party funding in International Investment Arbitration: a dire need of disclosure*", p. 10.
[309] European Commission, "*Comprehensive Economic and Trade Agreement (CETA) between Canada the European Union*", Article 8.26.
[310] European Commision, "EU-Mexico Trade Agreement", Art.10.
[311] Zwolankiewicz, Agata. "*Third party funding in International Investment Arbitration: a dire need of disclosure*", p. 10.

Some states have also decided to act unilaterally and put a ban or disclosure of TPF directly into their BITs. So far, however, the only case is Argentina-UAE BIT from 2018. In this BIT, the issue of TPF is solved very easily as there is Article 24 which simply stated this: *Third party funding is not permitted.*[312]

6.12 Chapters finding and Conclusions

As it is apparent from this Chapter, there is still no general duty of disclosure regarding the issue of TPF. Several Arbitral institutions have been modifying and amending their Rules, yet the only investment arbitration that has already adopted such rules is the ICC. UNCITRAL's draft seems to be very promising, as it requires extensive disclosure of TPF and terms of funding agreements and is also addressing the issue of security for costs. ICSID, on the other hand, seems to be going a minimalistic way as his proposed amendments are requiring only disclosure of the presence and the name of a funder. Nevertheless, neither UNICTRAL nor ICSID have yet accepted those proposed Rules. SCC has adopted a non-binding policy which probably will have only a limited effect. The same can be said about IBA Guidelines, which can only serve as an inspiration and recommendation but will not be able to be enforced.

Regarding domestic jurisdictions, Ireland is rather unique in its approach of adhering to the ancient doctrines of maintenance and champerty, as most of the other common law jurisdictions have adopted a much more liberal, progressive and modern approach towards the issue of TPF by expressly allowing them or even by repealing or limiting principles of maintenance and champerty. As it was demonstrated by the cases of Singapore and Hong Kong, change of legislation led to the increased numbers of arbitrations (although commercial ones) in their jurisdictions and well as a boom in TPF companies. The regulation – rather than a complete ban – thus seems to be the best approach to adopt and arbitral institutions and states could take examples of TPF duty of disclosures requirements which were adopted in those two city-states to extend them even to the world of investment arbitrations. Some states have chosen to act unilaterally and put regulation of TPF directly into investment treaties, but so far, the EU is the only important actor to do so.

The whole arbitration community is watching closely the process of amendment of new ICSID's and UNCITRAL's rules as if successful it will have a profound effect on the presence of the TPF in investment disputes and is able to prevent or at least minimalize most of the risks associated with the presence of the TPF in ISDS system.

[312] UNCTAD, "*Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates*", Article 24.

7. CONCLUSION

The heated debate about the presence of the TPF in investment arbitration is an ongoing issue and even though a large number of legal scholars is vehemently critical of this new phenomenon, the TPF is here to stay. This means that its benefits, as well as its risks, will be still present in the ISDS system, which is lately being heavily questioned and criticised in its current state). The emergence of the TPF seemed to have divided the arbitral community even further, as its proponents are arguing with access to justice rationale and emphasise that states are able to obtain funding as well as investors, while its opponents are describing TPF in investment arbitration as an exploitation of the entire system by greedy funding firms, which have realised how lucrative and profitable investment arbitrations might be and come to line their pockets. Yet there seems to be a solution – a regulation of the TPF by imposing an extensive duty of disclosure. This regulation would enable to overcome most of the issues associated with the TPF industry and at the same time, funders would no longer be operating in the shadows. Recently, most of the arbitral organisations and states have realised that the issue of TPF in the ISDS system needs to be addressed as they are currently working on ways how to regulate it.

The aim of this thesis was to explain why an extensive general duty of disclosure is needed in investment arbitration and how to achieve it. Moreover, this thesis has also answered all three of its questions. Firstly, the risk and benefits of TPF were presented, analysed and evaluated. The undisputed benefit of TPF is that it enables an insolvent party to be able to initiate arbitration by providing necessary funding. There are however several risks, such as the conflict of interests given the small arbitral community, problems with the possibility of increase of frivolous claims, influence over the case and security for costs. As it was proven in this thesis, investment tribunals have dealt already with the above-mentioned issues connected with TPF and in many cases, they have requested disclosure of the presence and identity of the funder and terms of funding agreements. Moreover, they also granted security for costs because of the presence of the TPF in the dispute. It was also explained why TPF differs from other funding possibilities. Furthermore, it was concluded that the extensive duty of disclosure can solve most of the issues connected with TPF, as any possible conflict of interest would be found immediately at the beginning of the proceedings together with how much influence a funder poses over the case and thus the procedural integrity and fears of delays would be minimalized.

Lastly, the concrete examples of how selected actors have decided to solve and regulate third-party funding were introduced, with the most promising one seeming to be the amendments to UNCITRAL's Rules, which are imposing extensive disclosure requirements. ICSID, the most influential arbitral organisation in the ISDS system, has decided to adopt less ambitious rules, yet it is still a move in the right direction. Moreover, the hypothesis that, at present, there is no general duty of disclosure in investment

arbitration was proven to be correct, as the only arbitral institution that has already adopted the regulation of TPF is the ICC. IBA was the first organisation to address the issue of TPF, but since its guidelines are non-binding, their effect was only limited. In addition, it was shown that certain arbitral jurisdictions – such as Hong Kong and Singapore – have decided to abandon ancient doctrines of maintenance and champerty in order to allow TPF, which subsequently led to a boom in funded cases and an increase in litigation firms in their jurisdictions and arbitral venues. Finally, some states have decided to act unilaterally and put regulation of TPF directly into investment treaties, but so far, the EU is the only important actor to do so.

To conclude, third-party funding is still a relatively new but fast-growing industry in investment arbitration, which is likely to bring new possibilities and risks to the already imbalanced system. As this thesis is however arguing, the general extensive duty of disclosure needs to be required to put balance back into the ISDS system. This general duty of disclosure is not yet required, although there is a promising development. As the author is stating, without it the whole TPF in investment arbitration is about to stay a very controversial and dangerous feature. Finally, it is for the arbitral community as a whole to continue to observe and watch developments in this area. And even more importantly, it is necessary that key players finally act and adopt appropriate measures, which would in general bring more transparency and trust back into the system of investor-state dispute settlement.

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ABSTRAKT

Financování třetí stranou v mezinárodní investiční arbitráži je poměrně nový, nicméně rychle se rozvíjející fenomén, který však kromě řady pozitivních aspektů přináší i velké množství rizik a hrozeb, které mohou narušit celý systém řešení sporů mezi investory a státy. Systém mezinárodních investičních arbitráží čelí v posledních letech kritice, podle které je systém nevyvážený a zvýhodňuje mezinárodní investory. Pokud by se v tomto systému začalo více prosazovat financování třetí stranou, mohlo by to tento už tak dost křehký a nevyvážený systém ještě více narušit.

Tradičně se financování třetí stranou používalo jako prostředek k dosažení spravedlnosti v případech, kdy se vnější strana, která nebyla nijak ve sporu angažovaná, rozhodla poskytnout jedné ze stran finanční prostředky k tomu, aby se mohl domáhat nezávislého přezkumu právního problému. Mezinárodní investiční arbitráže se staly v posledních letech velmi nákladné, a tudíž se financování třetí stranou zdálo jako vhodný nástroj k pomoci středně velkým investorům, které hostitelský stát v rozporu s mezinárodní investiční dohodou poškodil. Nicméně zejména po finanční krizi roku 2008 se z financování třetí stranou v mezinárodní arbitráži stal velmi lukrativní a výnosný obchodní model, na který se specializují velké mezinárodní finanční firmy. Tyto firmy mají velmi sofistikované metody výběru, které investiční případy zafinancovat pro získání co největšího podílu ze zisku z kompenzací udělených tribunálem, pokud bude financovaná strana ve sporu úspěšná.

Financování třetí stranou v mezinárodní investiční arbitráži se tak stalo zejména výnosným obchodem, kdy sponzoři financují v naprosté většině případů pouze zahraniční investory, což ještě více narušilo rovnováhu tohoto systému řešení sporů. Navíc se ukázalo, že samotná přítomnost sponzora ve sporu je potencionálně riskantní, a to zejména z toho důvodu, že celá arbitrážní komunita je velmi malá a propojená, a proto zde může docházet k častému střetu zájmů. Problémem může být i zvýšení frivolních arbitrážních sporů a narušení procesní integrity celého systému. Z těchto důvodu se značná část arbitrážního světa začala o problematiku financování třetí stranou aktivně zajímat a hledat vhodné nástroje, jak rizika s tím spojená eliminovat. Nejefektivnějším řešením se jeví nastavení povinného zveřejnění přítomnosti financování třetí stranou a případně i podmínek smlouvy o financování.

Smyslem autorovy práce je představit podrobně jednotlivé problémy spojené s přítomností financování třetí stranou v mezinárodní investiční arbitráži a představit možnosti, jak jim předcházet. Autor operuje s předpokladem, že v systému řešení sporů mezi investory a státy není stále vyžadována povinnost strany zveřejnit přijetí finančních prostředků od třetího subjektu. Autor ve své práci pracuje s arbitrážními pravidly, rozhodnutími arbitrážních

tribunálů a dalších zdrojů za účelem potvrzení či vyvrácení hypotézy. Autor také představuje příklady, jak na daný problém reagují jednotliví aktéři arbitrážního světa.

KLÍČOVÁ SLOVA

Financování třetí stranou, investiční arbitráž, arbitrážní instituce, řešení sporů mezi investory a státy, povinnost zveřejnění

ABSTRACT

Third-Party Funding (TPF) in investment arbitration is a relatively new, but fast-growing phenomenon that is attracting a lot of attention as besides providing certain benefits, it is also connected with significant risks that could endanger the entire Investor-state dispute settlement system. This system is heavily criticized for its imbalance and for favouring investors in the arbitrages. The increasing use of TPF can even further disrupt this already fragile and unbalanced system of dispute resolution.

Traditionally, TPF was used as a way of access to justice, as the external party, which was not connected to the dispute, has decided to provide finances to one of the parties of the dispute so this party would be able to initiate an impartial legal dispute settlement. International investment arbitrations have become very expensive in the last decades, and thus TPF seemed to be an ideal way of how to help an insolvent investor to access justice against states that have violated their obligations arising from investment treaties. However, ever since the 2008 financial crisis, TPF in investment arbitration has become a very profitable business operated by several big litigation funding companies. These corporations are conducting a very sophisticated due diligence method of selection of cases, which they should fund in order to get as much profit as possible if a funded party is successful in the arbitration.

Third-party funding has thus abandoned its original purpose of an enabler of access to justice and rather became a business, which is supported by the fact that in an overwhelming majority of funded cases, the recipients of funds are foreign investors and not states. In addition, the mere presence of the funder in the dispute was proven to be a source of concerns, as several risks arise from it. The arbitral community is very small and thus a potential conflict of interests between the funders, arbitrators and legal counsel is very likely. Moreover, there are legitimate concerns that TPF would increase the number of frivolous and unmeritorious claims, which could affect procedural integrity. For these reasons, the entire arbitral world has taken a profound interest in these new phenomena and ways of how to address these issues are being examined. The most efficient way seems to be a general duty of extensive disclosure, which would force parties of an investment dispute to disclose the presence and terms of the funding agreement.

The thesis is aspiring to analyse selected issues regarding TPF in investment arbitration and present ways of how to deal with them. The author is operating with the hypothesis that there is no general duty of disclosure in investment arbitration. This thesis is working with selected arbitral rules, arbitral cases, and academic sources to prove the hypothesis and to present effective ways of regulation of TPF. The thesis also contains examples of how certain key players in the arbitral community has addressed these issues.

KEY WORDS

Third-party funding, Investment arbitration, Arbitral institutions, Investor-state dispute settlement, Duty of disclosure,