

Revisiting transparency standards in investor–state dispute settlement vis-à-vis third-party funding: how much transparency is too much transparency?

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ABSTRACT

This article examines the relationship between transparency and legitimacy in investor–state dispute settlement (ISDS) jurisprudence, particularly in the context of Third-Party Funding (TPF). The initial section of the paper scrutinizes transparency as a vital facet of legitimacy, spotlighting recent measures aimed at enhancing procedural openness. The subsequent section assesses the disclosure dynamics of TPF arrangements in ISDS. It probes the implications of mandatory disclosure obligations, particularly those concerning the disclosure of the funding agreement. Emphasis is placed on developments such as the amended ICSID Arbitral Rules, the European Parliament’s proposed regulation of litigation funders, and United Nations Commission on International Trade Law’s Working Group III’s Code of Conduct. The final section navigates the delicate balance between transparency and confidentiality, outlining the outer bounds of the transparency movement concerning TPF. The paper concludes by contemplating future reforms and offers propositions within the evolving landscape of ISDS

KEYWORDS: transparency; third-party funding; UNCITRAL Working Group III; disclosure

INTRODUCTION

The confluence of confidentiality and transparency in the realm of international arbitration presents a nuanced and intricate dynamic.¹ International arbitration frequently includes

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¹ Florentino P Feliciano, ‘The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration’ (2012) 87 *Philipp Law Journal* 16, 20; Wendy Miles and Nelson Goh, ‘Transparency v Confidentiality: A Fork in the Road for Arbitration?’ in Gourab Banerji, Promod Nair et al (eds), *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (Permanent Court of Arbitration 2021), 389–405.

stringent confidentiality provisions as part of the disputing parties' stipulations. The overarching objective of such provisions is to safeguard sensitive trade secrets and financial particulars of the parties engaged in the dispute.² Accordingly, confidentiality stands as a foundational tenet in the realm of international arbitration. In a survey undertaken by Queen Mary University in 2018, an overwhelming 87 per cent of respondents regarded confidentiality as an indispensable aspect of arbitration,³ with 57 per cent explicitly deeming it 'very important'.⁴ The survey's significant revelation lies in the parties' discernible emphasis on confidentiality despite the absence of its explicit prescription in any convention. Subsequently, as the investor–state dispute settlement (ISDS) framework took shape, confidentiality, hailing from the domain of commercial arbitration, was seamlessly integrated into ISDS proceedings.⁵ This confluence, however, has engendered a prevailing perception that ISDS diverges from any transparency standards, evincing inherent opacity and exhibiting 'deficits in the availability of information regarding investor-state arbitrations'.⁶

The term 'transparency' in ISDS has several meanings,⁷ but generally connotes public dissemination of information relating to a dispute, disclosure obligations of arbitrators, or facilitation of third-party participation.⁸ For the present article, transparency refers to procedural transparency related to Third-Party Funding (TPF), including funding agreements and their contents. Procedural transparency is a nascent development in ISDS, which is multifaceted in nature. It encompasses the public availability of information about ISDS activities or institutions,⁹ as well as the publication of information about the applicable norms to disputes and the extent to which stakeholders can participate in the development of those norms and practice guidelines.¹⁰ The significance of procedural transparency in ISDS is four-fold: (i) it facilitates a participatory decision-making process by being 'informed and responsive to a wide range of interests'¹¹; (ii) it improves the equality of stakeholders in ISDS¹²; (iii) by way of publication of documents, procedural transparency enhances the accountability of

² Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Wolters Kluwer 2011), XV.

³ Queen Mary University of London and White & Case, *International Arbitration Survey: The Evolution of International Arbitration* (2018) <[https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-\(2\).PDF](https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF)> accessed 2 June 2025, 27. The respondent group consisted of private practitioners (47%), full-time arbitrators (10%), in-house counsel (10%), 'arbitrator and counsel in approximately equal proportion' (12%), and others including academics, judges, third party funders, government officials (21%).

⁴ *ibid.*

⁵ Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *International and Comparative Law Quarterly* 371.

⁶ Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 *ISLA Journal of International and Comparative Law* 337, 342.

⁷ Anne Peters, 'Towards Transparency as a Global Norm' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 534–535.

⁸ Esmé Shirlow, 'Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor–State Arbitration' (2016) 31 *ICSID Review* 622. See, Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 7.

⁹ Julie A Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky* (Cambridge University Press 2013) 6.

¹⁰ Cristoffer Nyegaard Mollestad, 'See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement' (2013) University of Oslo <<https://www.duo.uio.no/handle/10852/39772?locale-attribute=en>> accessed 2 June 2025, 4; Gabriele Ruscilla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?' (2015) 3 *Groningen Journal International Law* 2.

¹¹ Malcolm Langford, 'Another Rip in the Arbitration Veil? Transparency in the Wake of Forrester and Giovanna' (2013) No 2013-08 University of Oslo Faculty of Law, Legal Studies Research Paper Series 3. See also, Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59 *International and Comparative Law Quarterly* 373, 394; Barstow Magraw Jr and Amerasinghe (n 6).

¹² Shirlow (n 8).

actors involved in ISDS¹³; and (iv) it might improve or decrease the public acceptance of ISDS.¹⁴

The complex interplay between the policy implications of ISDS awards and the heightened public interest surrounding investment disputes has resulted in a conspicuous tension between the principles of confidentiality and transparency. Accordingly, the United Nations Commission on International Trade Law's Working Group III (UNCITRAL WG III) seeks to ascertain the precise scope of confidentiality and transparency obligations in ISDS.¹⁵ The crux of the conflict between transparency and confidentiality resides in striking an equitable balance between the legitimate interests of the disputing parties and the imperative for public access to the dispute.¹⁶ The former necessitates the protection of information concerning their commercial activities, including sensitive data that could potentially have adverse repercussions. These include *inter alia*, reputational harm to the investor or the host state and loss of competitive advantage through the revelation of proprietary technologies or trade secrets. The latter type of access impacts the policymaking of the host state, thereby influencing the broader public at large. As certain commentators have noted, however, the principle of confidentiality, now deeply entrenched within the fabric of ISDS, emerges as a foundational factor giving rise to other issues currently precipitating the legitimacy crisis of the ISDS system.¹⁷ Among these issues are concerns related to inconsistency, uncertainty, inaccuracy, and a concomitant erosion of public confidence in the ISDS regime.¹⁸ This delicate equilibrium is central to the present discussion.

The rising costs of ISDS proceedings have directly contributed to parties exploring legal financing from non-traditional sources.¹⁹ TPF is one such non-traditional source of external funding that can aid not only impecunious claimants but also solvent claimants looking to preserve their capital from litigation. In current practice, TPF is often referred to as 'dispute funding', 'litigation funding', 'arbitration financing', 'third-party financing', 'alternative litigation funding', or 'litigation investment'.²⁰ For the current article, 'TPF' is preferred and shall

¹³ Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 *American Review of International Arbitration* 121, 134; Krista Nadakavukaren Schefer, 'Article 1: Scope of Application' in Dimitrij Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press 2015), 33.

¹⁴ Barstow Magraw Jr and Amerasinghe (n 8), 339; See also, Nyegaard Mollestad (n 10), 79.

¹⁵ United National Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform) (hereinafter 'UNCITRAL WG III'), 'Possible Reform of Investor-State Dispute Settlement (ISDS). Third-Party Funding—Possible Solutions. Note by the Secretariat', UN Doc A/CN.9/WG.III/WP.172 (Vienna, 14–18 October 2019); UNCITRAL WG III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Fourth-Third Session', UN Doc A/CN.9/1124 (Vienna, 3–21 July 2023), 22–5.

¹⁶ Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 721–788. See also, Andrea J Menaker and Eckhard Hellbeck, 'Piercing the Veil of Confidentiality: The Recent Trend towards Greater Public Participation and Transparency in Investment Treaty Arbitration' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018), 282.

¹⁷ Gabriele Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard? I' (2015) 3 *Groningen Journal of International Law* 1, 2; Gu Weixia, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?' (2004) 15 *American Review of International Arbitration* 607.

¹⁸ *ibid.*

¹⁹ The current global recession triggered by the pandemic has undoubtedly accelerated the demand for TPF. The economic challenges brought about by the pandemic have heightened the financial constraints faced by parties engaged in legal disputes, driving them to seek external funding sources to pursue their cases effectively. See, Stavros Brekoulakis & Catherine Rogers, 'Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy' (July 31, 2019) *Academic Forum on ISDS Concept Paper* 2019/11. Caroline Simson, 'Third-Party Funders' Business Is Booming During Pandemic' (Law360, 8 April 2020) <<https://www.law360.com/articles/1261213/thirdparty-funders-business-is-booming-during-pandemic>> accessed 2 June 2025; Christopher Niesche, 'Litigation Funders Thrive as Companies and Law Firms Seek Legal Financing' (Law.com, 14 April 2020) <<https://www.law.com/international-edition/2020/04/14/litigation-funders-thrive-as-companies-and-law-firms-seek-legal-financing/>> accessed 2 June 2025; Paul Sullivan, 'Pandemic Is Expected to Bring More Lawsuits, and More Backers' (The New York Times, 19 June 2020) <<https://www.nytimes.com/2020/06/19/your-money/lawsuits-litigation-finance-coronavirus.html>> accessed 2 June 2025.

²⁰ Maya Steinitz, 'Incorporating Legal Claims' (2015) 90 *Notre Dame Law Review* 1155, 1164.

be construed as an all-encompassing term, which includes all the variations and diverse nomenclature mentioned above. Further, this article explicitly excludes loans from financial institutions, policies from insurance companies, assignments, funding received from law firms, and contingent or conditional fee arrangements from the ambit of TPF.²¹ Such sources share certain commonalities, yet they remain fundamentally distinct from TPF. In instances where funding is obtained from law firms or through conditional or contingent fee arrangements, the unequivocal and apparent involvement of the law firm or advocate in the dispute is evident. Conversely, TPF exhibits a divergent character, as the funder is not directly involved in the dispute.²² Similarly, regarding insurance mechanisms, such as liability insurance contracts or legal expense policies, the insurance company undertakes the obligation to provide financial assistance to the party for a premium payment. This is technically different from TPF, as the funder does not receive any money from the funded party for the investment but rather takes a share of the proceeds received from the award.²³ In the case of loans from financial institutions, the funded party is under an obligation to return the loan amount with interest, unlike with TPF, where the funded party does not have to return anything to the funder as the funder undertakes a risk on return. Lastly, the assignment of claims is different from TPF as, in the practice of assignment, there is a partial transfer of rights or interest from one party to another.²⁴

The concept of TPF in ISDS has garnered significant scrutiny and has been labelled as ‘problematic’ due to several reasons. One of the key issues lies in the inherent asymmetrical nature of ISDS.²⁵ A fundamental aspect that underpins TPF in ISDS is the profit-making motive of funders. Third-party funders typically invest in cases they believe have a strong likelihood of success to secure a share of the potential financial award. This profit-driven approach can potentially impact the dynamics of the dispute resolution process, as funders may exert influence on the case strategy and settlement decisions to maximize their returns.

Considering the above, this paper aims to examine the delicate balance between transparency (disclosure regimes) and confidentiality in the context of TPF in ISDS. It seeks to explore the question of ‘how much transparency is too much transparency?’ and evaluates whether the current transparency regime effectively maintains the equilibrium between disclosure and confidentiality. Notably, the discussion is situated within the ongoing discourse surrounding TPF, particularly considering the reform process led by UNCITRAL’s Working Group III, which seeks to regulate TPF in ISDS. TPF is chosen as a case study due to its current relevance in ISDS reform discussions as a procedural legitimacy issue in ISDS.

The article analyses the significance of transparency as a pivotal theme in ensuring the legitimacy of the ISDS mechanism. It is structured as follows: Section 2 discusses the core elements of a TPF arrangement, with a focus on the types of funders and their interests. The following section (Section 3) adopts a comprehensive approach to identifying various types of disclosure regimes addressing TPF arrangements. It examines the existing disclosure regimes in ISDS concerning TPF, the reform proposals discussed within UNCITRAL’s

²¹ For understanding the difference, see Mohamed Sweify, *Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal* (Elgar Publishing 2023), 4-5.

²² *ibid.*

²³ *ibid.* 5.

²⁴ *Wilson v Frederick R Ross Inv Co*, 116 Colo. 249, 180 P.2d 226, 230 (1947) [US]. See also, *Charlotte-Mecklenburg Hosp Auth V First of Georgia Ins Co*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995) [US].

²⁵ Nigel Blackaby and Alex Wilbraham, ‘Third-Party Funding in Investment Treaty Arbitration’ in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 698. Frank J Garcia, ‘Third-Party Funding as Exploitation of the Investment Treaty System’ (2018) 59 *Boston College Law Review* 2911, 2919.

Working Group III and the European Parliament's suggested regulation of litigation funders. It aims to assess both whether mandatory disclosure obligations encompass funding arrangements and to anticipate future dynamics.

DECODING TPF: DEFINITIONAL ANALYSIS AND THE IDENTIFICATION OF FUNDERS

The process of defining a funder lays the foundation for a fundamental comprehension of entities that may qualify as funders and the circumstances under which they do so. Notably, there is consensus in ISDS that funders possess certain inherent features that aid in their identification.²⁶ These features are:

- i) A funder typically stands as an entity not party to the arbitration proceedings.
- ii) The funder does not serve as counsel to any of the parties.
- iii) While diverse forms of funding may exist, the prevailing type of funding involves non-recourse financing by the funder. This entails that the funder's recovery solely depends on the amount awarded to the funded party, absent any recourse to other assets.

As a dynamic and evolving phenomenon, TPF encompasses a wide array of funding arrangements, sources, and purposes, making it difficult to encapsulate within rigid parameters. Thus, owing to its dynamic nature, there is no one accepted definition of TPF.²⁷ For instance, the ICCA-Queen Mary Task Force, which has extensively dealt with the subject of TPF, has defined it as

[...] an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

- a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
- b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.²⁸

Further, the UNCITRAL WG III has defined TPF as

[...] an agreement by an entity (the "third-party funder") that is not a party to a dispute to provide funds or other material support to a disputing party (usually the claimant or a law firm representing the claimant) in return for remuneration, which is dependent on the outcome of the dispute. The remuneration can take any form, although more common

²⁶ Association of Litigation Funders, 'Litigation Finance: What Is Litigation Funding?' (Association of Litigation Funders Website), <www.associationoflitigationfunders.com/litigationfinance> accessed 2 June 2025. Eric de Brabandere and Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2012) 27 ICSID Review 379, 381. Laurent Levy and Regis Bonnan, 'Third-Party Funding: Disclosure, Joinder and Impact on Arbitral Proceedings' in Bernardo M Cremades Sanz-Pastor and Antonias Dimolitsa (eds), *Third-Party Funding in International Arbitration (ICC Dossier)* (Kluwer Law International and ICC 2013), 78.

²⁷ Victoria Shannon Sahani, *Global Laboratories of Third-Party Funding Regulation* (Cambridge University Press 2021).

²⁸ International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (2018), ICCA Reports No 4, 17.

forms include a multiple of the funding, a percentage of the proceeds, a fixed amount, or a combination of these.²⁹

The 2022 Arbitral Rules and Regulations of the International Centre for Settlement of Investment Disputes (ICSID) have defined a funded party as a party that has ‘directly or indirectly’ received financial support either through a ‘donation’ or ‘grant’ for pursuing arbitration proceedings.³⁰ Similarly, other arbitral institutions which have attempted to define TPF include the Brazilian-Canadian Chamber of Commerce’s Center for Arbitration and Mediation and the China International Economic and Trade Arbitration Commission (CIETAC) (Hong Kong Centre).³¹ In addition, several treaty provisions, such as Article 8.1 of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA),³² Article 3.28 of the European Union–Viet Nam Investment Protection Agreement,³³ or Article 3.1 of the European Union–Singapore Investment Protection Agreement³⁴ connote a funder as a non-disputing party that finances the cost of proceedings in the form of a ‘donation’ or ‘grant’ or for ‘remuneration dependant on the outcome of the case’.

In summary, the current definitions of TPF can be broadly categorized as exclusive and inclusive in nature. The exclusive approach is highlighted by national legislations such as the Singapore Civil Law, which defines a TPF contract as

a contract or agreement by a party or potential party to dispute resolution proceedings with 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 or potential proceeds of the proceedings to which the party or potential party may become entitled.³⁵

The preceding definition of TPF adopts an exclusive approach, as it limits the scope of TPF solely to cases characterized by a profit-making motive on the part of the funder. Accordingly, the Singapore International Arbitration Centre (SIAC), in its investment arbitration rules, addresses TPF through its practice note on external funding while defining direct economic interest, which aligns with the exclusive approach of the Singapore Civil Law (Amendment) Act 2017.³⁶ Notably, the domestic legislation of Hong Kong also adopts the

²⁹ Third-party funding, *Possible Reform of Investor-State Dispute Settlement (ISDS). Third-Party Funding. Note by the Secretariat*, A/CN.9/WG.III/WP.157 (2019), 2.

³⁰ ICSID Arbitration Rules <https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf> accessed 6 May 2025, Rule 14.

³¹ China International Economic and Trade Arbitration Commission Arbitration Rules <<https://www.cietac.org/en/articles/32216>> accessed 6 May 2025. The new rules became effective on 1 January 2024, regulating TPF in Art. 48 through disclosure obligations, but not defining it. Previously, CIETAC defined TPF in its 2017 Guidelines for Third-Party Funding in Arbitration, which most applied to arbitrations administered by the CIETAC Hong Kong Arbitration Centre (para 1.2) <<https://hkarbitration.wordpress.com/wp-content/uploads/2017/09/cietac-hk-tpf-guidelines.pdf>> accessed 6 May 2025. See, also, the Brazilian CAM-CCBC Administrative Resolution No. 18 of 20 July 2016, available at <<https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/>> accessed 6 May 2025.

³² Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union [and its Member States (...)], of the Other Part (signed 30 October 2016, provisionally applicable since 21 September 2017), art 8.1.

³³ Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (signed 30 June 2019, not yet in force), art 3.28.

³⁴ Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (signed 15 October 2018, not yet in force), art 3.1(2)(f).

³⁵ Singapore Civil Law, Section 5B(10) <<https://sso.agc.gov.sg/Act/CLA1909>> accessed 3 June 2025.

³⁶ Singapore International Arbitration Centre, *Practice Note*, PN- 01/17 (2017).

exclusive approach regarding TPF by defining it along the profit-making motive of funders.³⁷ In comparison, the ICSID Arbitral Rules and Regulations³⁸ can be termed as ‘inclusive’ since they have defined TPF using broad language, such as a party that receives funding ‘directly or indirectly’ through a ‘donation’ or ‘grant’. The broad scope of the above terms ensures inclusivity as they attempt to encompass a wide range of funding arrangements.

The constantly evolving nature of TPF makes it challenging to define it in a single, definitive manner.³⁹ In such a scenario, the sensible approach would be to adopt an inclusive, wide-reaching definition, such as the definition propounded by ICSID. This would invariably include all TPF arrangements without solely relying on the profit-making motive as the distinguishing factor for TPF. For instance, adopting the exclusive approach, as highlighted above, which categorically focuses on the profit-making motive, would automatically exclude ‘not-for-profit funding’—the practice of funding arbitrations to set a favourable precedent or push forward a particular policy of the state.⁴⁰ The fundamental aim of any proposed definition for TPF must be to establish a robust foundation that ensures the effective disclosure of TPF arrangements. By formulating a precise and comprehensive definition, legal frameworks can delineate the contours and scope of TPF, facilitating the identification of instances where disclosure obligations are applicable. Hence, terms such as ‘financial support’ by a non-party for a ‘pecuniary benefit’ in any proceeds of the arbitration should be used as identifiers relating to the existence of TPF.⁴¹ Further, other identifying terms could include a classification of financial support in the form of ‘donations’ or ‘grants’. A broad and comprehensive definition of TPF, including the terms referred to above, would bestow upon it the necessary flexibility to remain relevant amidst the ever-evolving nature of TPF. Given the dynamic landscape of TPF, a definition that encapsulates diverse funding scenarios and motivations would be well-equipped to adapt to emerging trends and novel funding arrangements.

EXAMINING DISCLOSURE REGIMES APPLICABLE TO TPF

Why a disclosure regime of TPF arrangements is necessary in ISDS

TPF disclosure requirements help identify any potential conflicts of interest between members of the tribunal and the funder. Once the existence of a funder in an arbitration is confirmed, arbitrators can effectively assess and make appropriate disclosures themselves, thereby mitigating the risk of conflicts of interest. To this end, disclosing the funder’s existence, along with their identity and (certain) details of the funding agreement, becomes essential. According to one study, a striking 76 per cent of respondents expressed the view that

³⁷ See Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, 2017, Part 2 <www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf> accessed 6 May 2025 [hereinafter ‘Arbitration and Mediation Legislation Ordinance’].

³⁸ ICSID Arbitral Rules (n 30), Rule 14.

³⁹ For instance, see Victoria Shannon Sahani, ‘Global Laboratories of Third-Party Funding Regulation’ (2021) 115 AJIL Unbound 34, 36.

⁴⁰ See Gautam Mohanty, ‘Visualizing the Role of International Rule of Law in “Not-For-Profit Funding” in Investment Arbitration’ in P Sookrispaisarnkit and D Prasad (eds), *Blurry Boundaries of Public and Private International Law* (Springer 2022).

⁴¹ Didem Kayali, ‘Third-Party Funding in Investment Arbitration: How to Define and Disclose It’ (2023) 38 ICSID Review—Foreign Investment Law Journal 113. Brooke Guven and Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, CCSI Working Paper 2019, 12 (May 2019). See also, Derric Yeoh, ‘Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?’ (2016) 33 Journal of International Arbitration 115, 116. Eric De Brabandere and Julia Lepeltak, ‘Third Party Funding in International Investment Arbitration’ (2012) 27 ICSID Review—Foreign Investment Law Journal 379. See also, Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Kluwer Law International 2016) 74–75.

mandatory disclosure of the existence of a TPF arrangement should be required, while 63 per cent believed that disclosure of the funder's identity should also be compulsory.⁴² At the same time, 71 per cent of the respondents opined that full disclosure of the funding agreement's terms should not be mandated.⁴³ These findings reflect the widespread acknowledgement within the arbitration community of the indispensability of qualified transparency in relation to TPF.

Similarly, the ICCA Queen Mary Task Force ('Task Force'), in its comprehensive report on TPF,⁴⁴ has observed that arbitral tribunals and institutions can order disclosure of the funder and of relevant details of the funder.⁴⁵ Be that as it may, the determination of the prevalence of funders in ISDS poses challenges due to the absence of a rigorous disclosure mechanism, enabling funders to operate discreetly. Certain reports, however, provide insight into the extent of the involvement of funders. Already in 2012, for example, it was estimated that funders were financing approximately three-fifths of ISDS cases.⁴⁶ According to the 2015 Queen Mary Arbitration Survey, 39 per cent of the respondents had encountered TPF in practice, with 12 per cent having used it and 27 per cent having seen it being used.⁴⁷ In 2016, according to statistics, 40 per cent of claimants who initiated ISDS proceedings either secured or explored the possibility of obtaining funding.⁴⁸ Remarkably, one funder disclosed that it received funding requests for 28 out of 34 active ISDS cases within a single year.⁴⁹ Moreover, at least 20 states have been directly involved in disputes with claimants who are financially supported by funders.⁵⁰ These findings illuminate the significant role that funders play in the current landscape of ISDS. Furthermore, the absence of a robust disclosure mechanism highlights the potential for undisclosed financial interests, raising concerns about transparency and the potential implications for the impartiality and integrity of ISDS proceedings.

Intending to counter the 'shadow practice' of TPF, the European Parliament, in its Draft Resolution from 13 September 2022 (Resolution), has put forth a noteworthy proposal advocating a stringent and standardized regulatory framework governing TPF in the realm of litigation ('the Voss Report').⁵¹ The Resolution assumes particular significance as it offers

⁴² Queen Mary University of London and White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (QMUL 2015) <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 2 June 2025, 48. The respondent group consisted of academics (4%), arbitral institutions (staff) (2%), arbitrators (11%), arbitrator and counsel in equal proportion (12%), expert witnesses (2%), in-house counsel (8%) and private practitioners (49%). 12% were categorised as 'other', which included judges, third party funders, mediators, government officials and respondents who did not specify their position. The 'other' category also included respondents whose descriptions of their roles fell within the scope of the categories 'arbitrator', 'private practitioner', or 'in-house counsel'. The objective of the empirical study was to collate the views of a comprehensive range of stakeholders on improvements and innovations, both past and potential, in international arbitration.

⁴³ *ibid* 48.

⁴⁴ International Council for Commercial Arbitration (n 28).

⁴⁵ *ibid* 81.

⁴⁶ Corporate Europe Observatory, 'Chapter 5: Speculating on Injustice: Third-Party Funding of Investment Disputes' (Corporate Europe Observatory, 27 November 2012) <<https://corporateeurope.org/trade/2012/11/chapter-5-speculating-in-justice-third-party-funding-investment-disputes>> accessed 2 June 2025.

⁴⁷ Queen Mary University of London and White & Case (n 42), 45.

⁴⁸ Wang Hui, 'Third-Party Funding in Arbitration: Potential Trends and Implications for China' (2018) 2 *Journal of Business Law* 122.

⁴⁹ Florence Dafe and Zoe Williams, 'Banking on Courts: Financialization and the Rise of Third-Party Funding in Investment Arbitration' (2021) 28 *Review of International Political Economy* 1362.

⁵⁰ Nikhil Kalyanpur and Abraham L Newman, 'The Financialization of International Law' (2021) 19 *Perspectives on Politics* 773.

⁵¹ European Parliament, 'Responsible Private Funding of Litigation. European Parliament Resolution of 13 September 2022 with Recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL))' <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf> accessed 30 July 2023. The report also contains an Annex with a Directive proposal for the European Commission to initiate. Plans to regulate TPF at EU level, however, have been delayed, after the Commission decided to conduct a mapping study of the existing regulations concerning TPF in EU Member States; see, Pinsent Masons, *EU third-party litigation funding regulation delayed until further studies* (Pinsent Masons,

valuable insights into influential stances towards TPF within the European Union (EU). By advocating for a comprehensive and uniform regulatory regime, the European Parliament signals a proactive approach to addressing the complexities associated with TPF in litigation. The Resolution incorporates several notable provisions, such as:

- i) *Establishment of an Authorization System*⁵²: The Resolution proposes the introduction of an authorization mechanism for funders encompassing capital adequacy requirements. This measure would seek to enhance transparency and ensure that the funders possess the financial capability to responsibly engage in funding litigation matters.
- ii) *Imposition of Fiduciary Obligations*⁵³: The Resolution advocates for the imposition of fiduciary duties on funders, compelling them to act in the best interests of the funded party—especially when they might conflict with the funder’s interests. For instance, by limiting the funder’s control over legal proceedings, such a provision would aim to safeguard against undue influence and might aid in preserving the integrity of the dispute resolution process.
- iii) *Capping of Funder Returns*⁵⁴: The Resolution suggests restricting the maximum returns that a funder can receive, capping them at 40 per cent of the gross settlement or damages awarded to the claimants. This measure would seek to balance promoting access to justice with ensuring that funders do not unduly profit from litigation outcomes.
- iv) *Prohibition of No Liability Clauses*⁵⁵: The proposed Directive would prohibit funders from including no-liability clauses, which could potentially shield them from accountability in the event of adverse outcomes.
- v) *Disclosure of TPF Agreement*⁵⁶: A significant facet of the Resolution is the proposal for a requirement to disclose the third-party funding agreement. It is important to note that Article 16 of the proposed Directive stipulates that, upon the request of the court (which also includes an arbitral tribunal, according to the suggested TPF definition) or the administrative authority, the funded party would be under an obligation to provide a ‘complete and unredacted copy’ of the TPF agreement.
- vi) *Extended Jurisdiction over Funders*⁵⁷: Lastly, the Resolution proposes extending the jurisdiction of courts to funders in the event of adverse cost orders. This measure would seek to ensure that funders are held accountable for costs incurred by the opposing party in the event of an unfavourable outcome.

These provisions represent a comprehensive effort by the European Parliament to address the complexities surrounding TPF in litigation. Although the Resolution shows promising

07 July 2023), available at <<https://www.pinsentmasons.com/out-law/news/eu-third-party-litigation-funding-regulation-delayed-until-further-studies>> accessed 6 May 2025. See, also, European Law Institute, ‘Principles Governing the Third Party Funding of Litigation’ (European Law Institute 2024) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf> accessed 6 May 2025, 10. It is also important to mention that, although not excluding it directly, the proposed EU’s directive addressing TPF will not apply to investment arbitration since (enforcement) of intra-EU investment treaty arbitration in the EU became obsolete with the dawn of the *Slovak Republic v Achmea B.V.*, Case C-284/16, *Republic of Moldova v Komstroy* Case C-741/19, and *PL Holdings v Republic of Poland*, C-109/20 lines of cases and with the EU’s member states’ agreement to terminate intra-EU investment treaties. See generally, Francesco Sorace, ‘Enforcing an ICSID Award Issued in an intra-EU Investment Arbitration: an Italian Law Perspective’ (2023) 3 *The Italian Review of International and Comparative Law* 87.

⁵² European Parliament (n 51), arts 4 (Authorization system) and 6.

⁵³ *ibid* art 7.

⁵⁴ *ibid* art 14(3).

⁵⁵ *ibid* art 14(5).

⁵⁶ *ibid* art 16. It states: ‘[A]nd to provide, at the request of the court or the administrative authority or of the defendant, to the relevant court or administrative authority, a complete and unredacted copy of such third-party funding agreements relating to the proceedings concerned to the relevant court or administrative authority at the earliest stage of those proceedings.’

⁵⁷ *ibid* art 18.

signs of regulating TPF, such as capping the funder's profit to 40 per cent, the relevant provision proposal regarding the extent of disclosure of TPF is noteworthy. The Resolution, by expressly advocating for permitting even complete disclosure of the funding agreement, seeks to ascertain the influence of funders over the litigation proceedings. Such a provision, if adopted, would be in stark contrast to the practice of TPF in ISDS, where tribunals tend to avoid disclosure of the terms of the funding agreement and only focus on the details of the funder.

The EU has also incorporated disclosure provisions in certain international agreements, although they only require the disclosure of basic information surrounding the TPF arrangement, such as its existence or the name and address of the funder. Notably, both the CETA (provisionally applicable since 21 September 2017) and the EU–Viet Nam Free Investment Protection Agreement (not yet in force) mandate the funded party to divulge the funder's identity.⁵⁸ Similarly, under the Canadian Model Bilateral Investment Treaty (which has not yet been included in any treaty signed by Canada),⁵⁹ Article 42 stipulates an obligation for the funded party to disclose the funder's name and address to both the respondent and the arbitral tribunal. The Slovak Model BIT of 2019, in Article 21, imposes a comparable disclosure obligation on the funded party (not reflected yet in any treaty signed by Slovakia).⁶⁰ Importantly, the obligation of disclosure in the abovementioned (model) treaties is continuous, meaning that the funded party must reveal the existence and particulars of the funder at the time it receives the funding (irrespective of the stage of the proceedings at which this occurs). The requirement for continuous disclosure underscores the significance of maintaining transparency throughout the dispute resolution process.

ICSID's Arbitration Rule 14, dealing with the disclosure of TPF and which mandates that the parties to arbitral proceedings disclose the existence, name, and address of the funder, represents the most practically relevant regulation of TPF for investment arbitration. If need be, this provision also allows tribunals to order disclosure of the funding agreement.⁶¹ The *travaux préparatoires* of the ICSID Arbitration Rules illustrate that there were even some suggestions for a complete prohibition of TPF.⁶² However, most states recognized the potentially beneficial effects of TPF. They were in favour of regulating it by way of mandatory disclosure of the details of the funder to ensure no conflict of interest.⁶³

The ICC Rules of Arbitration 2021 adopt a similar approach whereby the Rules make it mandatory for the funded party to disclose the existence and identity of the funder.⁶⁴ Other

⁵⁸ See CETA (n 32) art 8.26; Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (signed 30 June 2019, not yet in force), art 3.37.

⁵⁹ Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>> accessed 6 May 2025.

⁶⁰ Slovak Model BIT 2019 <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5917/download>> accessed 6 May 2025, art 21.

⁶¹ ICSID Arbitration Rules 2022 (n 30), Rule 14. However, for an argument that the rule is qualified by the existence of certain situations, such as those in which signs exist that the funded party is impecunious, see Alberto Favro, 'New ICSID Arbitration Rules: A Further Step in the Regulation of Third-Party Funding' (Kluwer Arbitration Blog, 3 June 2022) <<https://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding/>> accessed 3 June 2025. Nonetheless, as arbitrators are empowered to order the disclosure of the funding agreement when they *consider* it necessary introduces a high degree of subjectivity and self-judgment in the assessment.

⁶² ICSID, 'Proposals for Amendment of the ICSID Rules—Working Paper. Volume 3' <https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf> accessed 6 May 2025, paras 241–44 and 262–3. The arguments for a complete ban, however, went beyond considerations of transparency, turning on aspects such as the encouragement of frivolous claims or the inadequacy for TPF in proceedings in which states are involved as disputing parties.

⁶³ *ibid.*

⁶⁴ International Chamber of Commerce, 2021 Arbitration Rules <<https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>> accessed 2 June 2025, art 11(7).

arbitral institutions, such as the CIETAC,⁶⁵ Singapore International Arbitration Centre,⁶⁶ the CAM-CCBC Rules, in a separate administrative resolution, AR 18/2016,⁶⁷ and HKIAC,⁶⁸ have also adopted similar provisions requiring the disclosure of the funder. Further, the International Bar Association's 2024 Guidelines on Conflicts of Interest in International Arbitration, in General Standard 7(a), provides that:

A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and (...) any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.⁶⁹

Upon close examination, the rules governing the disclosure of TPF reveal certain practical challenges. Notably, unless the other party knows about the funding arrangement and can prove its existence, identifying the source of (the potential for) conflicts of interest is not always possible. Furthermore, parties may not possess full knowledge of all the relationships that arbitrators might have with the funder, rendering it challenging to address this through subsequent challenges before annulment committees or domestic courts. This is further compounded, particularly in the context of a three-member tribunal, where the complexities of ascertaining potential conflicts of interest are amplified. It may also be arduous for an arbitrator to ascertain any potential conflict of interest arising from the presence of a funder. Such challenges are compounded by the fact that the standard of duty imposed on an arbitrator is one of reasonableness.⁷⁰ Consequently, arbitrators are expected to adopt reasonable measures to ensure their independence and impartiality, considering any potential conflicts. From a practical standpoint, these circumstances present intriguing nuances, as arbitrators must carefully navigate the disclosure process while remaining mindful of their duty to uphold the highest ethical standards.

ISDS cases regarding TPF disclosure considerations highlight the divergent approaches adopted by ISDS tribunals.⁷¹ For instance, in *Latam Hydro LLC & Others v Peru*,⁷² the

⁶⁵ China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules (For Trial Implementation) 2017 (adopted 12 September 2017, in force 1 October 2017) <<https://www.cietac.org/en/articles/32226>> accessed 2 June 2025, art 27.

⁶⁶ Singapore International Arbitration Centre Investment Rules 2017 (1st edn) <<https://siac.org.sg/siac-investment-rules-2017>> accessed 2 June 2025, Rules 24, 33 and 35 [hereinafter 'SIAC Investment Rules'].

⁶⁷ Centre for Arbitration and Mediation, 'AR 18/2016—Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-CCBC' (2016) <<https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/>> accessed 2 June 2025.

⁶⁸ Hong Kong International Arbitration Centre Administered Arbitration Rules 2024 <https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20ADMINISTERED%20ARBITRATION%20RULES%20-%20English.pdf> accessed 2 June 2025, art 44 [hereinafter 'HKIAC Rules'].

⁶⁹ International Bar Association, 2024 Guidelines on Conflicts of Interest in International Arbitration <<https://www.iba.net.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>> accessed 6 May 2025, General Standard (7)(a).

⁷⁰ Hélène Ruiz Fabri, 'Conflicts of Interests: Navigating in the Fog' (2019) 113 AJIL Unbound 307, 309.

⁷¹ *Rand Investments Ltd & Others v Serbia*, ICSID Case No ARB/18/8, Procedural Order No 1 (29 November 2018), para 10.4; *Astrid Benita Carrizosa v Colombia*, ICSID Case No ARB/18/5, Procedural Order No 1 (19 February 2019), para 10.4; *Latam Hydro LLC & Others v Peru*, ICSID Case No ARB/19/28, Procedural Order No 2 (13 May 2020), para 9.4; *South American Silver Limited v Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No 10 (11 January 2016), para 81; *Eskosol S.P.S. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Procedural Order No 3 (12 April 2017), paras 6 and 40; *Bacilio Amorortu v Republic of Peru*, PCA Case No 2020-11, Procedural Order No 2 (19 October 2020), paras 9–11; *Manuel García Armas et al. v Bolivarian Republic of Venezuela*, PCA Case No 2016-08, Procedural Order No 9 (20 June 2018), para 3; *Michael Ballantine and Lisa Ballantine v The Dominican Republic*, PCA Case No 2016–17, Procedural Order No 16 (2 October 2018), para 9.

⁷² *Latam Hydro LLC & Others v Peru*, ICSID Case No ARB/19/28, Procedural Order No 2 (13 May 2020), para 9.4.

tribunal, while adopting an inclusive approach to TPF, ordered the parties to disclose the details of the funder and the funds received directly or indirectly through a grant or donation for a pecuniary interest in the outcome of the proceedings.⁷³ In comparison, in *Guaracachi America Inc. and Rurelec Plc v Plurinational State of Bolivia*,⁷⁴ the UNCITRAL Tribunal refused to order disclosure of the funder. In *EuroGas Inc & Belmont Resources Inc v Slovak Republic*,⁷⁵ upon the Claimant's disclosure of a funder's involvement, the Respondent raised concerns and sought an order from the Tribunal to safeguard itself against the flow of confidential information to the funder. Eventually, the Tribunal issued an order stipulating that the identity of the funder must be disclosed and, further, that the obligations of confidentiality would extend to cover the funder as well.⁷⁶ In *Corona Materials, LLC v Dominican Republic*,⁷⁷ the tribunal adjudicating an environmental dispute ordered the claimant to disclose the details of the funds received from the funder, including, *inter alia*, the date of the funding agreement and whether the funder would cover an adverse costs award.⁷⁸

In *Muhammet Cap & Sehil Insaat Endustry ve Ticaret Sti v Turkmenistan*,⁷⁹ the tribunal, interestingly, ordered the disclosure of the funding arrangement between the claimant and the funder based on the past conduct of the claimant—where, according to the tribunal, the claimant had repeatedly failed to comply with a previous costs record. In *Tennant Energy LLC v. Government of Canada*,⁸⁰ the Tribunal ordered the disclosure of provisions of the funding agreement specifically relating to adverse costs awards after the Respondent had moved an application for disclosure of any funding agreement that the claimant might have entered into.⁸¹ In *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, the tribunal deemed it necessary to ascertain both the funder's identity and the terms of the funding arrangement, including any intermediary channels for funding sources.⁸² The tribunal's disclosure order rested on two key considerations. Firstly, it relied on its duty under ICSID Rule 6(2), which required it to proactively identify conflicts of interest and ensure transparency about funding sources. This was particularly influenced by Nigeria's inconsistent positions on its pro bono arrangements while simultaneously seeking recovery of costs in the present proceedings. Secondly, the tribunal affirmed its broad procedural authority under Article 44 of the ICSID Convention, rejecting Nigeria's sovereignty argument by emphasizing that participation in ICSID arbitration entails compliance with fundamental fairness obligations.

In summary, tribunals have generally ordered disclosure of TPF for primarily two reasons.⁸³ First, to ensure no conflict of interest, which ties into the independence and

⁷³ *ibid.*

⁷⁴ *Guaracachi America Inc and Rurelec Plc v Plurinational State of Bolivia*, PCA Case No 2011-17, Procedural Order No 13 (21 February 2013).

⁷⁵ *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (17 March 2015), para 33.

⁷⁶ *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (17 March 2015), para 145.

⁷⁷ *Corona Materials, LLC v Dominican Republic*, ICSID Case No ARB(AF)/14/3).

⁷⁸ *Corona Materials, LLC v Dominican Republic*, ICSID Case No ARB(AF)/14/3), Award on Respondent's Expedited Preliminary Objections (31 May 2016), para 22.

⁷⁹ *Muhammet Cap & Sehil Insaat Endustry ve Ticaret Sti v Turkmenistan*, ICSID Case No ARB/12/6, Procedural Order No 3 (12 June 2015).

⁸⁰ *Tennant Energy LLC v Government of Canada*, PCA Case No 2018-54, Procedural Order No 4 (27 February 2020).

⁸¹ *Tennant Energy LLC v Government of Canada*, PCA Case No 2018-54, Procedural Order No 4 (27 February 2020), paras 94-98 and 106-107.

⁸² *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, ICSID Case No ARB/13/20, Procedural Order No 5 (15 October 2016), para 88.

⁸³ MD Khairul Islam, 'The Impacts of Third-Party Funding on Cost Decisions in Investment Arbitration' (2023) 32 *Asia Pacific Law Review* <<https://www.tandfonline.com/doi/full/10.1080/10192557.2023.2232617>> accessed on 30 July 2023, 259-78.

impartiality of arbitrators and fits into the overarching transparency theme of ISDS. Secondly, disclosure has also been ordered in connection with a security-for-cost application.⁸⁴ Thus, it follows as a necessary corollary that provisions pertaining to mandatory disclosure of certain details are necessary to ensure transparency and the integrity of the proceedings, and to shape the tribunal's approach to costs decisions. These include details about the funder, the amount of the funding provided, and whether the funder would be liable to cover an adverse costs award. This paradigm shift towards mandatory disclosure recognizes the significance of transparency and accountability in ISDS. Funders, who often hold significant economic interests in the outcome of arbitral awards, frequently operate as unseen actors in arbitration proceedings. Thus, the disclosure of TPF plays a pivotal role in enhancing the legitimacy of procedural aspects in arbitration proceedings and serves to mitigate potential challenges in enforcing arbitral awards. Nevertheless, the precise scope and extent of such disclosure continue to generate considerable debate within the legal community.

Risks of a full disclosure policy

Notwithstanding the undeniable importance of TPF disclosure for promoting transparency and upholding the legitimacy of arbitration proceedings, the prospect of full disclosure, encompassing the provisions of the funding agreement, raises legitimate concerns. Such a comprehensive disclosure approach may pose inherent challenges, given its potential conflict with the confidentiality clauses commonly present in funding agreements.⁸⁵ The presence of confidentiality clauses in funding agreements serves as a critical safeguard for protecting commercially sensitive information (such as intellectual property rights or trade secrets) and proprietary interests of the parties involved, including funders.⁸⁶ Requiring complete disclosure of the funding agreement could potentially breach these confidentiality arrangements, undermine the fundamental rights of the parties to preserve the confidentiality of their contractual arrangements, and even affect their procedural rights.⁸⁷

UNCITRAL's WG III has acknowledged that mandatory disclosure is necessary. Nonetheless, the extent to which disclosure is necessary remains contested. The WG III is of the view that the disclosure obligation should not be limited only to the existence of TPF and the name of the funder but should extend to the agreement or its terms.⁸⁸ Moreover, the Draft Provisions confer authority on the tribunals to order further disclosure when necessary, specifically to ascertain critical aspects. This includes: whether the funder would cover an adverse costs award, the anticipated return sought by the funder, the extent of the funder's control over the arbitration proceedings, the number of cases funded by the funder

⁸⁴ Generally, see Nadia Darwazeh and Adrian Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding' (2016) 33 *Journal of International Arbitration* 125.

⁸⁵ Gary Shaw, 'Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit' (2017) 33 *Arbitration International* 109, 114; Rebecca Leinen, 'Striking the Right Balance: Disclosure of Third-Party Funding' (2020) 20 *Oxford University Commonwealth Law Journal* 115, 116; Alberto Favro, 'European Parliament Resolution on Third-Party Funding: A Step Too Far?' (16 February 2023, Kluwer Arbitration Blog) <<https://arbitrationblog.kluwerarbitration.com/2023/02/16/european-parliament-resolution-on-third-party-funding-a-step-too-far/>> accessed 3 June 2025; Cheng Yee-Khong, 'Monetizing Legal Assets: Social and Economic Benefits of Third-Party Dispute Finance in Asia' (2023) 10 *Asian Journal of Law and Society* 204, 206; Lisa Bench Nieuwveld, Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2024), 25.

⁸⁶ Columbia Center on Sustainable Investment, 'Concern: Third Party Funding' <<https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/short%20note%20-%20third%20party%20funding.pdf>> accessed 3 June 2025, 3-4; Khaldoun S. Qtiashat, Ali K. Qtiashat, 'Third Party Funding in Arbitration: Questions and Justifications' (2021) *International Journal for the Semiotics of Law* 341, 352; Can Eken, *Third-Party Funding in Investment Arbitration. A New Player in the System* (Springer 2024), 128, 135.

⁸⁷ This is explored extensively in Part IV.

⁸⁸ UNCITRAL WG III, Possible Reform of Investor-State Dispute Settlement (ISDS). Draft Provisions on Procedural Reform. Note by the Secretariat (Vienna, 5–16 September 2022), UN Doc A/CN.9/WG.III/WP.219, 16–18.

against the non-funded party, any existing agreements between the funder and the legal counsel representing the funded party.⁸⁹ An essential feature of the Draft Provisions is the envisioned enforcement mechanism for disclosure compliance. In the event of non-compliance by a party, the tribunal would be empowered to take appropriate action, including the suspension or termination of the arbitration proceedings until the required disclosure is made.⁹⁰ Additionally, the tribunal would have the power to consider the non-compliance while making determinations on the costs of the proceedings.

Against this background, it is arguably necessary for a disclosure regime to cover at least certain parts of the funding agreement. As a matter of necessity, for instance, tribunals might seek to ascertain whether the funder exerts influence over the decision-making process of the claimant. This could be reflected through specific provisions of the funding agreement, such as the funder's decision-making power regarding the settlement amount, the selection of the arbitrator, and other strategic decisions made by the claimant. Regarding the latter, however, a broad power to order disclosure of provisions that establish the claimant's strategic framework might conflict with other imperatives and values, such as protecting its right to a fair trial (discussed in Section V). As such, any decision to order the disclosure of the funding agreement should always be justified and proportionate to its aims—otherwise, a blind adherence to transparency might compromise the integrity of the entire arbitral process.

Tribunals are vested with the power to order disclosure of the funding agreement under several institutional rules. They must, however, utilize the power to order the funded party to disclose the funding agreement provisions only when this is objectively justified and qualified by certain safeguards.

The issue of disclosure of TPF gets further compounded when there is a confidentiality clause in the TPF agreement or when confidentiality aspects are generally invoked.⁹¹ For example, the position is clear that if a BIT has a mandatory disclosure obligation, the funded party cannot rely on the confidentiality agreement between the funder and the funded party. However, when a BIT does not entail a mandatory disclosure obligation vis-à-vis TPF, as is the case with most old-generation BITs, then the need to balance disclosure with confidentiality obligations arises. In any case, whether confidentiality should extend to investors and third-party funders in ISDS, particularly when their disputes implicate vital public interest concerns like human rights or environmental concerns, raises legitimate and complex considerations that warrant meticulous analysis from a legal perspective. The crux of this inquiry revolves around striking a delicate equilibrium between safeguarding the rights and commercial interests of investors and funders, on the one hand, and upholding public interests through transparency, on the other. The importance of public interest is well highlighted by the fact that arbitral institutions tend to administer cases involving, for instance, environmental issues related to oil, gas, and mining. For instance, by the end of 2022, 25 per cent of

⁸⁹ *ibid* 17.

⁹⁰ *ibid* 19–20.

⁹¹ *South American Silver Limited v. Bolivia*, PCA Case No 2013-15, Claimant's Opposition to Bolivia's Request for *Cautio Judicatum Solvi* and Disclosure of Information (14 December 2015), para 40; Jennifer A Trusz, 'Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 *Georgetown Law Journal* 1649, 1675; Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure International Arbitration Law Library* (Kluwer Law International 2016), 11–72; Jonas von Goeler, 'Show Me Your Case and I'll Show You the Money—How to Balance Conflicts Between Third-Party Funding and Confidentiality in Arbitration Proceedings' (Kluwer Arbitration Blog, 21 July 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/07/21/show-case-ill-show-money-balance-conflicts-third-party-funding-aand-confidentiality-iin-arbitration-proceedings/>> accessed 3 June 2025; Shaw (n 85), 114–7; Rachel Denae Thrasher, 'Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform' (2018) 59 *Boston College Law Review* 2935, 2945; Leinen (n 85), 116; Julien Chaisse, 'Delays Expected but Duration of Delays Unpredictable: Causes, Types, and Symptoms of Procedural Applications in Investment Arbitration' (2021) *Arbitration International* 863, 886; Kayali (n 41), 119–20; Eken (n 86), 44.

ICSID cases related to the oil, gas, and mining sectors. An additional 17 per cent were cases dealing with electric power and energy, and another 8 per cent were cases related to agriculture, forestry, and water.⁹² The above figures illustrate that 50 per cent of all cases administered by ICSID involved environmental issues in one way or another. More recently, the ICSID statistics of 2024 also show that 28 per cent of all ICSID cases were related to the oil, gas and mining sectors while 17 per cent of ICSID cases were related to electric power and energy.⁹³

Nevertheless, any provision seeking to regulate confidentiality should also provide a space for it to operate, with a view to protecting the legitimate expectations of the foreign investor and its interests. The challenge lies in crafting an approach that respects the legitimate expectations of confidentiality of investors and funders while simultaneously ensuring a minimum level of transparency. The former is necessary for maintaining investors' confidence in the ISDS process. The latter permits the identification of conflicts of interest and the level of influence of the funder over the proceedings. The next section of the paper deals with this challenge. It provides solutions by way of best practices that tribunals can adopt to maintain the balance between transparency and confidentiality (when confidentiality might become essential to the funded party's right to a fair trial) and seeks to answer whether there is any scope for confidentiality in the current ISDS regime.

CONFIDENTIALITY OR TRANSPARENCY? THE TUG-OF-WAR IN ISDS

Confidentiality protects both state and investor interests

The reinforced focus on transparency is highlighted by the provisions of several BITs, which provide that arbitral proceedings shall not be confidential.⁹⁴ For instance, in the US Model BIT, a separate provision dealing with transparency is present whereby publication of certain documents, such as the notice of intent, the notice of arbitration, minutes of hearings and order, awards and decisions of the tribunal is mandatory.⁹⁵ Nonetheless, in past ICSID cases, Tribunals have observed that although there is no continuous duty to maintain confidentiality, it is important to provide a small window for confidentiality to operate.⁹⁶ In some

⁹² International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics*, Issue 2 (2022) <https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf> accessed 19 July 2023.

⁹³ International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics*, Issue 2 (2024) <<https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf>> accessed 22 May 2025.

⁹⁴ Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014), arts 28 (Public Access to Hearings and Documents), 29 (Submissions by a Non-Disputing Party) and Annex C.29 (Submissions by Non-Disputing Parties); Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (signed 4 November 2005, entered into force 1 November 2006), art 29 (Transparency of Arbitral Proceedings); Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (signed 19 February 2008, entered into force 1 January 2012), art 29 (Transparency of Arbitral Proceedings); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018), art 9.24 (Transparency of Arbitral Proceedings); Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (signed 15 October 2018, not yet in force), art 3.16 and Annex 8: Rules on Public Access to Documents, Hearings and Possibility of Third Persons to Make Submissions; CETA (n 32) art 8.36.

⁹⁵ 2012 U.S. Model Bilateral Investment <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 3 June 2025, art 29(1).

⁹⁶ *Metalclad Corp v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information (27 October 1997), paras 9–10. See also, *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3 (29 September 2006), para 122.

instances, the publication of documents and related information might lead to adverse consequences for one of the disputing parties.

From the perspective of states, a certain level of confidentiality is also desirable, especially in the context of protecting the public interest. For example, the host state might want to keep the proceedings confidential to maintain a conducive environment for investment, prevent any similar claims from being raised by other investors, or prevent any media narratives regarding sensitive state information.⁹⁷ It is beyond doubt that funders, on account of their funding, become procedural stakeholders in arbitration proceedings.⁹⁸ In ISDS, Tribunals have acknowledged the significance of funders as procedural stakeholders through confidentiality orders to protect the parties' confidential information. In the case of *EuroGas Inc & Belmont Resources Inc v Slovak Republic*,⁹⁹ when the claimant disclosed the presence of the funder, the respondent requested the tribunal to pass an order to prevent the flow of confidential information to the funder. The tribunal, after considering the arguments of both parties, directed the claimant to disclose the identity of the funder and passed a confidentiality order extending the confidentiality obligations to the funder.¹⁰⁰ Similarly, in *Einarsson et al v. Canada*,¹⁰¹ the tribunal disqualified a counsel from the Respondent's team on grounds that the counsel was privy to confidential information of the claimant because he previously worked for the funder. In the tribunal's opinion, the counsel from the Respondent's team posed a 'fundamental risk' to the arbitration proceedings.¹⁰²

In the context of TPF, numerous situations might raise issues surrounding an unencumbered use of transparency goals to disclose elements related to the TPF arrangement. However, the article focuses on two main aspects. The first one relates to classified business information and trade secrets pertaining to the parties to the funding agreement. The second turns on the possible violation of the funded party's right to a fair trial through absolute disclosure requirements—especially regarding the TPF agreement.

Regarding the protection of a party's classified business interests, by citing trade secrets as confidential business information in order to prevent full disclosure, an investor is ultimately looking to protect its value, future performance, competitive advantage and, arguably, even its survival.¹⁰³ A specific example where the disclosure of a TPF agreement can have unwanted consequences on protecting the funded party's commercial secrets is when the relationship between the funder and the funded party extends to multiple disputes. In that case, the funding agreement could contain confidential information that otherwise may not have any relevance to the underlying ISDS dispute. Should a full disclosure happen, the state

⁹⁷ Federico Ortino, 'Transparency of Investment Awards: External and Internal Dimensions' in Nakagawa J (ed), *Transparency in Trade and Dispute Settlement* (Routledge 2018), 119 and 132. See also, Delaney and Magraw (n 16). Ibrahim Shihata, 'Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA' (1986) 1(1) ICSID Review—Foreign Investment Law Journal, 5. See also, Christina Knahr and August Reinsch (eds), 'Transparency versus Confidentiality in International Investment Arbitration—the Bivater Gauff Compromise' (2007) 6 *Law Practice of International Courts and Tribunals* 97, 109. See also, Flavia Marisi, *The Importance of Transparency for Legitimizing Investor-State Dispute Settlement in Handbook of International Investment Law and Policy* (Springer 2021), 1563–1582.

⁹⁸ Shaw (85), 10. See also, Victoria Shannon Sahani, 'Third-Party Funders' in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023).

⁹⁹ *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (17 March 2015), para 33.

¹⁰⁰ *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No.2 (16 April 2015), para 7.

¹⁰¹ *Einarsson et al v Canada*, ICSID Case No UNCT/20/6, Decision on Claimants' Motion to Disqualify Counsel (24 February 2022).

¹⁰² *Idem*, para 167. In the opinion of the Tribunal, 'there is a real risk that she may recall something of significance as a result of a triggering event. The test to be applied is not a determination that confidential information was passed, but that there is a real risk to this effect.'

¹⁰³ Freya Baetens, 'Transparency Across International Courts and Tribunals. Enhancing Legitimacy or Disrupting the Adjudicative Process?' (2022) 91 *Nordic Journal of International Law* 595, 631.

and even the public in general could access such information, putting the funded party in a severely (competitive) disadvantageous position. Even the ICSID Rules, ensuring transparency to an even greater degree than before the 2022 amendment, maintain a window of confidentiality regarding such sensitive business information.¹⁰⁴ The UNCITRAL Rules on Transparency in Investment Arbitration also expressly safeguard confidential business information in Article 7 (titled 'Exceptions to transparency').¹⁰⁵

Ultimately, any attempt to seek full disclosure of a funding agreement should always be counter-balanced by the risk of exposing confidential business information benefiting the funded party.

The full disclosure of a funding agreement may interfere with the investor's procedural rights

Any investor bringing a claim before an ISDS tribunal can legitimately expect to benefit from the right to a fair trial and due process safeguards.¹⁰⁶ This creates a duty for arbitrators to observe and guarantee the respect of such rights. There is no specific source of the right to a fair trial in ISDS, as multiple mechanisms may trigger its application. In ICSID arbitration, the right to a fair trial must be respected throughout the arbitral proceedings. Otherwise, the ICSID Convention permits the annulment of an award rendered in violation of a fundamental rule of procedure, which arguably includes the right to a fair trial.¹⁰⁷ The right to a fair trial also becomes applicable as a result of integrating other rules of international law, such as those found in the International Covenant on Economic, Social and Cultural Rights,¹⁰⁸ in the interpretative process.¹⁰⁹ Elements of the right to a fair trial, such as the principle of equality of arms, are even considered to have attained *jus cogens* status.¹¹⁰ As such, the ICSID Convention, the ICSID Arbitration Rules, and other non-ICSID arbitration frameworks (for instance, the UNCITRAL Arbitration Rules), generally reinforce due process safeguards and the right to a fair trial or their interpretation is shaped by it when it comes to arbitral proceedings.¹¹¹ Additionally, the recently agreed (draft) code of conduct

¹⁰⁴ Gary Shaw, 'The 2022 ICSID Rules: A Leap Toward Greater Transparency in ICSID Arbitration' 38(1) ICSID Review—Foreign Investment Law Journal 54, 63.

¹⁰⁵ UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf>> accessed 3 June 2025.

¹⁰⁶ Generally, on the right to a fair trial/due process/procedural fairness in investment arbitration, see Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), 627. In the context of TPF and security for costs, see Young Hye (Martina) Chun, 'Security for Costs' under the ICSID Regime: Does it Prevent 'Arbitral-Hit-and-Runs' or Does it Unduly Stifle Third-Party Funded Investors' Due Process Rights?' (2021) 21 Pepperdine Dispute Resolution Law Journal 477, 479.

¹⁰⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, art 52. See, also, Johannes Hendrik Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68 International and Comparative Law Quarterly 741, 751; Thomas Nektarios-Papanastasiou, 'The Role of Human Rights in International Investment Arbitration: Arguments Raised by the Parties and Procedural Implications' (2022) 21 The Law and Practice of International Courts and Tribunals 149, 172.

¹⁰⁸ Julian Scheu, 'Trust Building, Balancing and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration' (2017) 48 Georgetown Journal of International Law 449, 476.

¹⁰⁹ Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331, art 31(3)(c).

¹¹⁰ Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021), 5–26. See, also, Charlet T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), 157–202; Federica Cristani, 'Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview' (2014) 13 The Law and Practice of International Courts and Tribunals 153, 154.

¹¹¹ David Caron, 'ICSID in the Twenty-First Century: An Interview with Meg Kinnear' (2010) American Society of International Law. Proceedings of the Annual Meeting 413, 426; Meng Chen, 'Embracing Non-ICSID Investment Arbitration? The Chinese Perspective' (2019) 39 Northwestern Journal of International Law & Business 249, 253; Carly Coleman, 'How International is International Investment Dispute Resolution? Exploring Party Incentives to Expand ICSID Arbitrator Demographics' (2016) 26 Transnational Law & Contemporary Problems 121, 125.

for arbitrators, under the UNCITRAL's WG III mandate, envisions a requirement for arbitrators to conduct ISDS proceedings 'in accordance with high standards of (...) fairness'.¹¹² Transnational public policy and, in the case of non-ICSID localized arbitration, overriding mandatory laws also reinforce arbitrators' duty to safeguard the disputing parties' due process rights.¹¹³

While respect for the right to a fair trial involves certain obligations for arbitrators, not every violation of a procedural rule will automatically determine a breach of due process.¹¹⁴ That explains why the extent to which disclosure obligations surrounding TPF may breach the right to a fair trial depends on several factors. The most important for present purposes is the extent to which disclosure of the agreement prevents the funded party from exercising its right to a fair trial. One such situation can arise when the TPF agreement contains the (entire) procedural strategy of the funded party. While the TPF agreement may not always establish the degree of control exercised by the funder over the funded party,¹¹⁵ certain agreements may still contain such provisions—including obligations on the funded party to pursue a specific procedural strategy.¹¹⁶ Some agreements may contain sufficient information at least to make it easy to assess 'the claimant's view of the merits of the case or its expected procedure or duration'.¹¹⁷ One reason why funding agreements may contain the procedural strategy is to ensure that the funded party is under a precise legal obligation to pursue a specific procedural approach.¹¹⁸ Funders might also want to ensure contractually that the funded party follows a specific procedural strategy because that potential procedural strategy might have influenced the funder's assessment of the merits of the case before deciding to invest.¹¹⁹

Funding agreements are inherently characterized by their tailor-made and private nature. These agreements are meticulously crafted to suit the unique circumstances of each arbitration case, reflecting the parties' specific needs, risk assessments, and strategic considerations.¹²⁰ This customization extends to various facets, including funding amounts, fee structures, and the extent of the funder's involvement in strategic decisions. The private nature of funding agreements and limited public disclosure, however, make it challenging to ascertain the true contours of such agreements. While the specific details of funding

¹¹² United Nations Commission on International Trade Law, *Draft Code of Conduct for Arbitrators in International Investment Dispute Resolution and Commentary*, Fifty-Sixth Session, UN Doc A/CN.9/1148 (Vienna, 3-21 July 2023), art 6.

¹¹³ George A Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) 18 *The American Review of International Arbitration* 1, 16. For a discussion of how mandatory overriding rules can find relevance in ICSID arbitration (based on a premise that the choice of law can support the application of overriding mandatory rules, see Andrea K Bjorlund, 'Mandatory Rules of Law and Investment Arbitration' (2007) 18 *The American Review of International Arbitration* 175, 203; Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (2019) 10 *Journal of International Dispute Settlement* 496, 499; Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melbourne Journal of International Law* 205, 206 (although focusing on commercial arbitration, the article expressly mentions due process as an example of procedural mandatory rules in international arbitration).

¹¹⁴ Clooney and Webb (n 110), 10.

¹¹⁵ Stavros Brekoulakis and Catherine Rogers, 'Third-Party Financing in ISDS. A Framework for Understanding Practice and Policy' (2019) *Academic Forum on ISDS Concept Paper 2019/13* <<https://www.jus.uio.no/ior/english/research/projects/copiid/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-ids-af-13-2019-version-2.pdf>> accessed 3 June 2025, 10.

¹¹⁶ Victoria Shannon Sahani, 'Judging Third-Party Funding' (2016) 63 *UCLA Law Review* 388, 394; Gary Shaw, 'Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit' (2017) 33 *Arbitration International* 109, 111.

¹¹⁷ Kyrstin Dodge et al., 'Can Third-Party Funding Find the Right Place in Investment Arbitration Rules' (Kluwer Arbitration Blog, 31 January 2022), <<https://arbitrationblog.kluwerarbitration.com/2022/01/31/can-third-party-funding-find-the-right-place-in-investment-arbitration-rules/>> accessed 3 June 2025.

¹¹⁸ Shaw (n 116) 115.

¹¹⁹ Brekoulakis and Rogers (n 115) 10.

¹²⁰ Mick Smith and Antonio Wesolowski, 'Mechanics of Third-Party Funding Agreements: A Funder's Perspective' (2018) 5 *BCDR International Arbitration Review* 225.

agreements may remain undisclosed, anecdotal evidence suggests that these agreements provide valuable indications about the procedural strategies of the claimant and the funder, depending on the nature of the dispute and the goals of the parties involved. Some examples of strategies that may be generally outlined in a funding agreement include, *inter alia*:

- A. Risk Assessment: Funders conduct a thorough risk assessment of the potential legal claim. This includes evaluating the merits of the case, the likelihood of success, and potential challenges that may arise during the legal proceedings. In a funding agreement, the thorough risk assessment conducted by funders is likely to find expression in various clauses and provisions that outline the terms and conditions of the funding arrangement. One such provision may relate to the evaluation of the merits of the case, the likelihood of success, and identifying potential challenges. For example, the funding agreement may specify that the funder has undertaken a comprehensive review of the legal claim in exchange for providing financial support. This may include an assessment of the legal arguments, the strength of evidence, and potential counter-arguments that opposing party could raise.
- B. Due Diligence: Funders engage in due diligence to assess the financial viability of the funded party. The funding agreement may explicitly address the funder's evaluation of the claimant's financial health, assets, and potential for recovery in the event of a successful arbitration outcome. Accordingly, disclosing the aforesaid financial assessment may lead to an unfavourable situation that could impact how the arbitrators perceive the funded party's ability to bear the financial burdens of the arbitration. Further, the funded party's negotiation leverage may be affected, as the opposing party could use disclosed financial information to argue for more stringent security for costs measures, for instance.
- C. Negotiation of Terms and Adjustments: Funders negotiate the terms of the funding agreement with the funded party. This includes determining the funding amount, the percentage of recovery to be received by the funder, and any conditions or milestones that trigger adjustments to the funding arrangement. Disclosure of such terms can grant the opposing party knowledge of conditions or milestones that trigger adjustments to the funding arrangement, which may thereby allow the opposing party to strategically manipulate case developments to the disadvantage of the funded party, anticipating adjustments that could weaken the funded party's position.
- D. Settlement Considerations: The funding agreement may address the circumstances under which the funded party may consider settlement offers. This includes factors such as the financial implications, likelihood of success, and potential costs of continuing the dispute.
- E. Success Fee Structures: In some cases, the funded party may agree to pay the funder a success fee based on a percentage of the amount recovered. The funding agreement may specify how this fee is calculated and under what conditions it is payable.
- F. Early Termination Conditions: If the funding agreement includes conditions under which the funder can terminate the funding arrangement early, disclosure of such conditions might be strategically sensitive. Opposing parties may exploit the potential vulnerability created by the risk of termination.

As the other party may gain access to the funded party's procedural strategy without reciprocity in the event of an unqualified full disclosure requirement, this could severely affect the equality of arms between the disputing parties. A party should have an opportunity to present its case 'under conditions which do not place [it] at a substantial disadvantage vis-

à-vis [its] opponent'.¹²¹ Furthermore, regarding the risk that the arbitrators might be exposed to the funded party's arguments too early, while this may not necessarily affect impartiality, it may determine a biased view of the funded party's procedural strategy.¹²² For instance, disclosure of a party's funding agreement may expose the arbitrators to all the arguments at once. This prevents a party from strategically presenting its arguments to the extent that it would be procedurally permissible anyway. The funded party does not benefit from a gradual exposure of the arbitrators to the arguments, with the possibility to ask for clarifications before moving to subsequent issues. The other party, however, would still be able to progressively present its position, with additional chances to develop its arguments as the arbitrators would be gradually analysing them and would be able to ask for clarifications as the pleading unfolds. While such an imbalance may not amount to a typical situation of inequality of arms (such as precluding a party from presenting its case, addressing key arguments, or introducing new evidence),¹²³ it still affects the existing equilibrium between the parties to a dispute, which is essentially what the right to a fair trial, in general, and the right to equality of arms, in particular, seek to ensure in this context.¹²⁴

Nonetheless, a violation of the right to a fair trial will most likely not occur when applicable rules, such as those contained in the treaty underlying the tribunal's mandate, involve mandatory disclosure requirements surrounding the TPF agreement.¹²⁵ As such, if an express obligation to disclose the TPF agreement does not exist either under the applicable treaty or under the applicable arbitration rules, situations may arise where tribunals could abusively order the disclosure of the contents of a TPF agreement. This can either happen in the context of rules permitting arbitrators to order the disclosure of the contents of the TPF agreement or when they act pursuant to their inherent powers.¹²⁶ A perfect example of the former stems from the ICSID Arbitration Rules. Rule 14 establishes that '[t]he Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding'.

Guidelines for good practices informing arbitral tribunals

As shown throughout the article, a selective disclosure requirement extending to the contents of the TPF agreement may have benefits for transparency and accountability purposes. Arbitrators, however, should avoid abusing this position by following a series of good practices and guidelines that will safeguard—to the largest extent possible—the parties' procedural rights, especially their right to a fair trial. Firstly, as an exception to the disclosure obligation, arbitrators may—if the applicable rules permit—waive this requirement if the funded party declares that this would compromise its procedural strategy. As argued earlier, this could affect the equality of arms between the disputing parties. Since a party benefitting from such an exception could abuse this safeguard, arbitrators, instead of completely waiving this requirement, could delay the moment of disclosure. Secondly, another solution would

¹²¹ *Dombo Beheer B.V. Netherlands*, App No 14448/88, European Court of Human Rights, Judgment (27 October 1993), para 33.

¹²² *ibid.* Dodge and others (n 117).

¹²³ *Kotuby and Sobota* (n 105) 178–9.

¹²⁴ *ibid.* 176–7; *Clooney and Webb* (n 105), 748–9.

¹²⁵ However, a disclosure obligation under an international treaty may still interfere with the right to a fair trial. If one assumes the peremptory status of the right to a fair trial, international law mandates that the right to a fair trial will be given precedence over any conflicting rule (including those found in the investment treaty)—unless a limitation is justified, usually, on necessity and proportionality grounds. As such, arbitral tribunals could, at least in theory, discard the treaty rule when it conflicts with a peremptory rule of international law. In practice, this will be highly unlikely, owing to a risk of tribunals directly exceeding their powers by refusing to apply the investment treaty underlying their mandate.

¹²⁶ Generally, on the inherent powers of arbitral tribunals, see Chester Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law', in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), 666–9.

be to request a redacted version of the funding agreement without delaying the moment of disclosure. In such a case, arbitrators should identify the type of information they would consider important and ask only for disclosure of those sections/clauses that fit such categories. Furthermore, the arbitrators could also give the concerned party opportunities to identify what amounts to confidential information. However, this option would still entail a complete disclosure to verify whether the funded party intentionally withheld any relevant information.

Thirdly, the obligation of disclosure of the TPF agreement could limit the entities that have access to it to the members of the tribunal. While this might raise risks in terms of the other party's procedural rights (e.g., for lack of opportunity to comment on issues affecting it directly), the arbitrators could select the actual risk elements and further disclose them to the opposing party—but limit the latter's exposure to the other parts of the TPF agreement as long as they do not present any risk. Fourthly, just as sometimes is the case with challenges to arbitrators,¹²⁷ the scrutiny of the TPF agreement may be left to a third party that is not involved directly in the proceedings, such as the arbitral institution through its permanent staff. This could involve an analysis of the possible conflicts of interest and, potentially, of further undue influence from the funder over the proceedings. However, there is a difference between disclosure, which seeks to avoid conflicts of interest and disclosure for other reasons—under specific rules and under a regulatory framework designed to prevent any undue influence. In the latter case, a more complex regulatory framework should apply, as envisioned by the European Parliament.¹²⁸

Fifthly, arbitrators should always strive to balance transparency and confidentiality by always looking to conduct a proportionality assessment¹²⁹ of any specific disclosure requirements—to the extent that this involves arbitrator discretion.¹³⁰ In fact, the proportionality principle should generally guide the decision-making process throughout the process of applying any disclosure (transparency) requirements in dispute settlement.¹³¹ As such, arbitrators can either apply a strict proportionality test (by assessing the necessity of disclosure, the specific goal that disclosure might achieve, and whether other, less intrusive measures exist) or a more relaxed proportionality test by simply accounting for the competing interests. Even when a rule of full disclosure of the TPF applies, proportionality can still play a role. For example, limiting the parties that can access the funding agreement (as discussed earlier). Furthermore, this guideline can be combined with one of the former ones—immediate disclosure but only to a third party not directly involved in the proceedings. The UNCITRAL Rules on Transparency in Investment Arbitration already contain an approach that integrates a proportionality assessment of the need for disclosure (to the public, in this case) when, for instance, confidential business information might militate against this. Article 7(3) provides that the arbitral tribunal may prevent certain information from being made public after consultation with the disputing parties and expressly establishes certain

¹²⁷ For instance, the ICSID Convention's art 58 provides that the Chairman of the Administrative Council shall make the decision to disqualify an arbitrator pursuant to a challenge if the other arbitrators are equally divided, if the tribunal is composed of only one member, or whether there is a challenge against the majority of the arbitrators. The specific procedure for disqualification of arbitrators can be found in the ICSID Arbitration Rules, 2022, Rules 22 and 23. See also, Cristani (n 110), 171–2.

¹²⁸ European Parliament (n 51).

¹²⁹ Anne Peters, 'The Transparency Turn in International Law' (2015) 1 *The Chinese Journal of Global Governance* 3, 9.

¹³⁰ ICSID Arbitration Rule 14(4) (explicitly establishing the arbitrator's power order the disclosure of the funding agreement) refers to Rule 36(3), which qualifies the arbitrator's power to order disclosure only in those situations in which it 'deems it necessary.' Nonetheless, the self-judging nature of the provision could make it highly difficult in practice to prevent any forms of abuse. For a further, arguably more optimistic, assessment, see Favro (n 61).

¹³¹ For an argument that the proportionality principle applies to both substantial and procedural matters, see Xu Qian, 'Revisiting Proportionality in Investment Arbitration: Theory, Methodology, and Interpretation' (2022) 21 *Chinese Journal of International Law* 547, 554.

safeguards, including, for instance, ‘procedures for the prompt designation and redaction of the particular confidential or protected information’.

Finally, as another exception to the rule on full disclosure, arbitral tribunals may seek to gain only specific information regarding the TPF agreement. While this mechanism would likely involve a third party who could assess the parts of the agreement, the disclosure of which is necessary for such purposes, its application can turn on the most controversial elements of an agreement. This includes whether the funder would cover an adverse cost award, the anticipated return sought by the funder, the extent of the funder’s control over the arbitration proceedings, the number of cases funded by the funder against the non-funded party, and any existing agreements between the funder and the legal counsel representing the funded party. This is not to say that the arbitrators should seek all this information—the tribunal might seek to ascertain only specific information. Furthermore, the most sensitive type of information here could turn on the funder’s control over the arbitral proceedings. The risk of disclosing the funded party’s procedural strategy exists in this case. However, as already discussed earlier, a funded party may resort to its fundamental procedural interests to limit arbitrator discretion.

CONCLUSION

The advent of TPF and its ubiquity in ISDS raises serious concerns about the interference of third-party funders in arbitral proceedings and whether this may affect the integrity of ISDS. Risks abound, with funders potentially exercising undue (hidden) influence on arbitrators in specific disputes, overtaking the disputing parties’ position and determining—unjustifiably—the procedural strategy of disputing parties, and even distorting investment arbitration when major funders severally influence the types of claims that are being brought in this area. The involvement of public interests and sovereign considerations compound this issue to the point where major monetary awards may be sought at the behest of a host state’s regulatory interests and even its fiscal health. It, thus, becomes clear that such covert influence exercised by TPFs should be brought to light and dealt with in a forum informed of the actual extent to which the funder operates—even regulating the activities of a funder might be in order, as shown by debates in the European Parliament. An important number of those goals can be reached by removing any covert influence exerted by funders and bringing it into the spotlight through the application of transparency principles and instruments.

However, an unconstrained exposure of the funding agreement through the absolute application of transparency mechanisms risks undermining certain legitimate interests, such as those of the funded investors. The latter may include confidential information in their funding agreements and their procedural strategy in an underlying ISDS dispute. Thus, any push toward transparency should always be followed by an acknowledgement of its risks—to the competitive advantages of a funded party, to the procedural rights of a disputing party, or even to the viability of ISDS—which might be undermined if parties are discouraged from resorting to it because they feel that transparency considerations might affect their fundamental business interests and their chances of succeeding in ISDS proceedings.

It is with this transparency/confidentiality dichotomy in mind that the present analysis has proposed a middle ground that establishes an obligation on the part of the funded party to disclose its TPF agreement—but at the same time informed by several exceptions designed to safeguard that party’s fundamental business interests and procedural rights in ISDS proceedings. TPF, as a specific case study, demonstrates that an absolute push towards

transparency can have several undesirable consequences—some even with systemic ramifications. Thus, irrespective of how far disclosure obligations go, they should always be limited by overriding considerations that seek to safeguard equally important interests, such as the right to a fair trial or competitive advantages obtained by an investor through the operation of its investment—or through its more extended transnational activity.

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