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DISCLOSURE OF THIRD-PARTY FUNDING ARRANGEMENTS AND THE EXISTENCE OF THIRD-PARTY FUNDERS IN INTERNATIONAL INVESTMENT ARBITRATION

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Abstract

Third-party funding has been commonly used in International Investment Arbitration. Third-party funders increasingly usually finance the claimant who either (i) does not have sufficient funding to start legal proceedings, or (ii) adequately capitalized, but seek funding in order to minimize cash flow disruption and share risk during their arbitration proceedings. However, the notion of third-party funding gives rise to several issues; first, should funded parties be required to disclose their funding arrangements? Following the first research question, when does the funded party need to disclose the existence of a third-party funder? Then what legal measures can be taken to tackle the concern of transparency and disclosure in cases involving third-party funding? This research concentrates on the transparency and disclosure requirements, which is the central issue that influences further development and use of third-party funding arrangements in international arbitration. Analysis of relevant treaties, laws, guidelines, and case laws drives us to the conclusion that there exist measures and several drains the current international arbitration system that will serve a transparency system to control third-party funding. Hence, it would be appropriate for arbitration institute or investment treaties to take these tools into account in order to provide legal certainty for the disputing parties, arbitral tribunal, and ultimately, for the legal framework of third-party funding in investment arbitration..

***Keywords** : International Investment Arbitration, Investor-State Dispute Settlement, Disclosure, Third-Party Funding*

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I. INTRODUCTION

International investment has become an integral part of states as it brings revenues and specific benefits to their economic system, which contributes to their Gross Domestic Product (‘GDP’). To control international investment, a state uses its sovereign rights to regulate and oversee all foreign investment activities conducted within its jurisdiction.

Within this liberal international economic system era, states have regulated foreign investment regulations as a precaution to any dispute that might arise. As a result, there has been an immense development on international law limiting the control of the state over foreign investors by establishing international arbitration institutions such as the International Center for Settlement of Investment Dispute ('ICSID'), which is under the control of the World Bank. The main goal of the ICSID is to facilitate dispute settlement between the host state and foreign investors.[1]

A host state may exercise its sovereign rights to control foreign investors by entering into an international agreement called the Bilateral Investment Treaties ('BIT')[2] with the origin state of the foreign investors. Within the BIT, the host state and home state will set the parameters and regulations over the foreign investment of the investors. Furthermore, the BIT also grants substantial rights for foreign investors as well as legal remedies to enforce their rights. Some of the investors' substantive rights that are commonly found within a BIT are as follows: (i) prohibition of the host state enacting currency controls to prevent the free flow of capital; (ii) definite payment of adequate compensation in the event an investment is expropriated; (iii) fair and equal treatment by the host state; (iv) prohibition of discrimination against the investor in favor of the host state's citizen or other foreigners; (v) a guarantee by the host state that the investor will not be treated less favorably than the minimum requirements by customary international law; (vi) provision of full protection and security of the investment by the host state; and (vii) an agreement of the host state to honor all commitments made to investors.[3]

In the event where the BIT contains a clause of investment arbitration, investors will automatically have the right to initiate an arbitral proceeding against a state under the substantive law of the host state, which seeks redress for violation of the BIT conducted by that state.[4] In foreign investment cases, the parties seek to choose an arbitration forum,[5] and the arbitral tribunal is empowered to determine the applicable relevant regulation of the BIT as well as the contract between the parties in dispute.[6] At the same time, international investment arbitration includes elevated expenses in the procedures for both the investor and the states. The latest advent in arbitration proceedings is known

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1 Susan D. Franck, "Foreign Direct Investment Treaty Arbitraation, and the Rule of Law," *Global Business & Development Law Journal* 19 (2007): 337-38.

2 Bilateral Investment Treaties (BITs) are agreements between two governments ostensibly designed to promote investment flows and protect international investors and their investments. See ICSID, "Database of Bilateral Investment Treaties," ICSID, accessed July 2019. https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx.

3 Jan Hendrik Dalhuisen and Andrew T. Guzman, "The Applicable Law in Foreign Investment Disputes," *World Arbitration and Mediation Review* 8, no. 2 (2014)

4 Jarod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Dispues," *George Mason Law Review* 14 (2006): 143.

5 Hendrik & Guzman, "The Applicable Law," 5.

6 A. Roberts; "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" *TDM* 1 (2014)

as the third-party funding ('TPF').[7] TPF is a funding method by a third-party that has no significant nexus to the disputed case, but instead, invests in the procedure in the hope that the conflict will be settled in favorable to the party it funded, and thus provided the third-party funder with significant profits. The word 'third-party funder' refers to someone who is not engaged in an arbitration proceeding that provides money in exchange for an acceptable return to a party to that arbitration.[8] Over the years, this funding method has been commonly used in international investment arbitration.

TPF initially arose in civil litigation; it was established as a litigation funding technique. TPF transpires when a third party, outside the disputing parties, agrees to pay legal fees of one of the parties (usually the claimant),[9] such as costs of lawyers, experts, external counsel, any other expenses that may be relevant or necessary in civil litigation following a stipulated agreement and budget.[10] The funder will pay the costs of the claimant's legal fee and provide security according to the consensus between both the funder and the funded party, as stipulated in a funding agreement.[11] One of the primary features of TPF is that the agreement is generally to be maintained confidential amongst the funded party and the funder.[12] However, there are significant issues in its doctrinal and legal analysis as well as concerns raised by both practitioners and academics that remain unresolved up until today.[13]

Some of the funding agreements allow or require the third-party funder's practical involvement in critical strategic choices, while other agreements are restricted to regular updates given by the funded party. The financing will typically cover the legal charges and costs incurred by the funded party in the arbitration proceedings. TPF has been frequently used in international investment arbitration, but due to its ambiguity regarding transparency and confidentiality, this method of funding may cause some issues for the parties

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[7] J. Von Goeler, "Third-Party Funding in International Arbitration and its Impact on Procedure," in *International Arbitration Law Library, Volume 35* (Kluwer Law International 2016), 1-2.

[8] Ahurst, "Third Party Funding in International Arbitration," Ahurst, accessed on 27 July 2019, https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration.

[9] Rowles Davies, *Third Party Litigation Funding* (Oxford University Press 2014), 60-61.

[10] *Ibid.,* 62

[11] Third-party funding agreement means 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., Lawinsider, "Third Party Funding Contract," Lawinsider, accessed 27 July 2019, https://www.lawinsider.com/dictionary/third-party-funding-contract.

[12] Victoria A. Shannon, "Harmonizing Third-Party Litigation Funding Regulation," *Cardozo Law Review* 36 (2015): 860-61.

[13] M. de Morpurgo, "A Comparative Legal and Economic Approach to Third-Party Litigation Funding," *Cardozo Journal of International & Comparative La*w 19 (2011): 350.

involved as well as the arbitral tribunal, i.e., conflict of interest between the funders and the arbitrators. The arbitrators also do not have any competence to address the TPF issue, as their jurisdictional competence is restricted only to the conflict between the parties involved.

Therefore, the notion of TPF gives rise to several legal issues; first, whether the funded party is required to disclose their TPF arrangements? Following the first research question, when does the funded party need to disclose the existence of TPF? Also, lastly, what are legal measures that can be taken to tackle the concern of transparency and disclosure in cases involving TPF?

II. GENERAL UNDERSTANDING ON INTERNATIONAL INVESTMENT ARBITRATION

International investment arbitration flourishes due to the increasing number of foreign investors in global business. In the event where a dispute occurs between the host state and a foreign private investor, it will be complicated for the foreign investor to file a claim against the host state in its national court,[14] particularly since the concept of sovereign immunity bars such claims in domestic courts.[15] This situation created uncertainty for foreign investors, and it led to the emergence of institutional investment arbitration as a variant of commercial arbitration to resolve and adjudicate disputes between foreign investors and the host state.[16]

Through the 1965 ICSID Treaty, an institutional alternative dispute-resolution system emerged, ICSID Treaty aims at safeguarding a balanced and transparent adjudication of international investment claims.[17] Through this mechanism, the possibility for a foreign investor to file a claim against the host state is an assurance for the foreign investor. Moreover, both foreign investors and the host state will have entree to independent and qualified arbitrators who will resolve the dispute and render and enforce a fair award[18].

Investment arbitration is a mixture of features from classical commercial arbitration, public adjudication, and domestic court litigation.[19] Generally, investment arbitration involves a sovereign host state, which is the respondent

[14] UNCTAD. *Investor-state Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II.* (New York: United Nations, 2014).
[15] *Ibid.*, 24.
[16] *Ibid.*, 28.
[17] *Ibid.*, 37.
[18] *Ibid.*, 42.
[19] Susan D. Franck, "Integrating Investment Treaty Conflict and Dispute System Design," *Minnesota Law Review* 92 (2007)

in the arbitration procedure.[20] Typically, the claimant is a foreign private investor who challenges acts and measures of the sovereign state that somehow detriment the investor's interests, i.e., nationalization and expropriation. The object of the investor's claim is to obtain compensatory damages for the harm caused by the state's alleged breach of the applicable standards of foreign investment. [21]

Maintaining sovereignty and independence while fostering a climate that sustains ongoing business relationships is a concern for both host and home states. Investment Arbitration claims are beneficial for attaining those goals.[22] Advantages of the arbitration system include the consideration that investors do not have to litigate before host state national courts courts or resort to political routes and diplomatic methods of intervention and protection.[23] As a result, investment arbitration has become increasingly popular. Since the 1990s onwards, there has been a steady surge in investment claims processed by arbitral tribunals.[24]

Roughly speaking, there are two major systems: institutional arbitration and ad-hoc arbitration. Institutional investment arbitration is overseen by several international bodies. Contiguous institutions that facilitate investment arbitration include the ICC Court of Arbitration ('ICA'), and ICSID. Ad hoc arbitration is the alternative route for investment arbitration. Usually, such ad-hoc tribunals operate under the UNCITRAL Arbitration Rules.[25] If a dispute ascends between a foreign investor and a host state, IIAs[26] will generally offer more than one type of arbitration system to foreign investors to solve these types of investment disputes.[27]

International investment arbitration institutes consist of: (i) The IC-

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[20] Karl P. Sauvant, *Appeals Mechanisms in International Investment Disputes* (Oxford: Oxford University Press, 2018).

[21] Cameron A. Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims." *Journal of International Dispute Settlement* 3, no. 2 (2012)

[22] It could be divided into a variety of smaller requirements of jurisdiction: *Ratione Materige* – jurisdiction over subject matter; *Ratione Personae* – Jurisdiction over subject matter; *Ratione Temporis*- Jurisdiction over time; and *Ratione loci* - Jurisdiction over locations. *See* Emmanuel Gaillard and Yas Banifatemi, eds., *Jurisdiction in Investment Treaty Arbitration* (JurisNet & IAI, 2018).

[23] de Morpurgo, "Comparative Legal and Economic Approach," 309

[24] *Ibid.*, 315.

[25] UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2016," *IIA Issue Note*¸ iss. 1 (May, 2017). Accessed 27 July 2019, available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf.

[26] International Investment Agreement (IIA) is a type of treaty between countries that addresses issues relevant to cross-border investments, usually for the purpose of protection, promotion and liberalization of such investments.," UNCTAD, *Scope and Definition* (Geneva and New York: UNCTAD, 1999), accessed on 21 June 2019. available at https://unctad.org/en/Docs/psiteiitd11v2.en.pdf.

[27] *Ibid.*

SID Convention amongst States and foreign investors, which provides a legal procedural framework for dispute settlement between host states and foreign investors. Which was formulated by the Executive Directors of the International Bank for Reconstruction and Development of the World Bank [28] The ICSID Convention provides the benefit of a fixed set of rules and the support of experienced arbitral institutions, coupled with the flexibility and autonomy usually associated with the advantages of arbitration.[29] (ii) Permanent Court of Arbitration ('PCA') it is an intergovernmental organization providing a variety of dispute resolution services.[30]

As it is known, the PCA is not a judicial body, but a list of potential arbitrators and an institution administering the arbitration, conciliation, and fact-finding. Each contracting State has the right to nominate four persons to the list of 'Members of the Court' from which arbitrators will be appointed in case of disputes between States.[31] (iii) International Chamber of Commerce, The International Court of Arbitration of the International Chamber of Commerce ('ICC'), is the autonomous arbitration body of the ICC.[32] Since 1923, it has helped resolve difficulties in international commercial and business disputes to support trade and investment.[33] The statutes of the Court are outlined in the 2012 ICC Arbitration Rules. Although they are called in a court name, they do not make formal judgments on disputed matters but rather exercise judicial supervision of arbitration proceedings.[34]

A. JURISDICTION OF INTERNATIONAL INVESTMENT ARBITRATION

Since arbitration is based on the autonomy of the parties, the procedural rules regulating the arbitration proceedings are defined by an arbitration agreement and the will of the parties involved. The parties have a more deliberate choice to make in commercial arbitration between ad-hoc arbitration or institutional arbitration.[35] The selection of an institution to administer the arbitration most often means a choice to govern the dispute resolution by the

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[28] *Ibid*

[29] August Reinisch and Loretta Malintoppi, "Methods of Dispute Resolution," in *The Oxford Handbook of International Investment Law*, Peter Muchlinski, Federico Ortino, and Christoph Schreuer, eds. (Oxford: OUP, 2008), 699.

[30] 1907 Convention for the Pacific Settlement of International Disputes, UKTS 6 (1971) Cmnd. 4575, 1 Bevans 577, 2 AJIL Supp. 43 (1908), art. 41. (hereinafter "1907 Convention")

[31] Rudolf Dozler and Christoph Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2008).

[32] International Chamber of Commerce, "ICC International Court of Arbitration®," ICC, accessed on 28 July 2019, https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/.

[33] *Ibid.*

[34] *Ibid*.

[35] L. M. Moses, The Principles and Practice of International Commercial Arbitration (Cambridge: Cambridge University Press, 2012), 263.

arbitration rules of the designated institution. When parties have not decided on an institution and have chosen to arbitrate ad hoc, there are no administrators that contribute a framework to the procedure. This alternative provides a chance for the parties to tailor a procedure to their dispute's requirements. Although both possibilities have advantages and disadvantages, ICSID Arbitration Rules, followed by the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules, remain the most widely applicable procedural rules in these disputes. The followings are an elaboration of the Arbitration Institution.

B. INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID is an international arbitration institution and is a part of the World Bank Group. ICSID was established in 1966 through Washington Convention; to date, it has 163 member states.[36] It is irrefutable that ICSID plays a significant role in international investment arbitration, taking into account almost all investment cases that have been adjudicated by ICSID since 1966 up until today and the practice of tribunal that gives impact to the development of the international investment. The ICSID consists of an Administrative Council and a Secretariat, and it is the Secretariat that deals with the issues brought forward. In individual cases, the Administrative Council does not play a part but handles the Center's more administrative and economic regulations. As of 2 August 2019, ICSID had registered 748 cases under the ICSID Convention and Additional Facility Rules.[37] The jurisdiction of the ICSID is set out in Article 25 of the ICSID Convention. The following reads in Article 25(1) of the ICSID Convention:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*[38]

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[36] ICSID, "Database of ICSID Member States," accessed on 28 July 2019, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

[37] ICSID, "The ICSID Caseloads Statistics," ICSID Secretariat, accessed 2 August 2019, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

[38] PennJIL, "Denunciation of ICSID: Does it Really Mean no ICSID Arbitration?" Pennsylvania Journal of International Law, 4 April 2017, http://pennjil.com/denunciation-of-icsid-does-it-really-mean-no-icsid-arbitration/.

This means that there are three requirements of jurisdiction before ICSID can adjudicate a dispute.[39] Firstly, the dispute must arise between a contracting state and another contracting state national, hence the word dispute settlement between investor and country (ISDS).[40] Secondly, the dispute must originate directly from an investment, and finally, both parties must have consented to subject the dispute to arbitration by ICSID. Initially, disputes resolved by ICSID are based in the agreements of the parties on the consent in arbitration clauses.[41] However, since the proliferation of BITs, regional free trade agreements and multilateral investment treaties is based on the clauses in these treaties, the stipulation of parties' consent is based on. This so-called treaty-based consent is granted to all existing and potential investors who meet the criteria of nationality and whose investment is protected by the treaty. It is not the ICSID that adjudicates the cases; instead, according to Article 37 of the ICSID Convention,[42] an arbitral tribunal will be established for each new dispute.

C. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Established under the United Nations in 1966, UNCITRAL plays a significant part in the progressive harmonization and modernization of international trade law.[43] This involves formulating internationally acknowledged conventions, model legislation, and regulations. The most significant convention organized by UNCITRAL is Foreign Arbitral Awards Recognition and Enforcement Convention, known as the New York Convention, which makes arbitral awards nearly profitable worldwide. A new and significant convention approved by UNCITRAL is the UN Convention on Transparency in Investor-State Arbitration or the Mauritius Convention on Transparency.[44] This is a reaction to frequent criticism of the confidentiality feature of investment arbitration; UNCITRAL Model Law on International Commercial Arbitration,

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[39] Aurélia Antonietti, "the 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules," *ICSID Review - Foreign Investment Law Journal* 2, Issue 2 (2006): 427–448.

[40] Convention on the settlement of investment disputes between States and nationals of other States, (opened for Signature 18 March 1965, entered into force October 14, 1966), UNTS, vol. 575, 159. (hereinafter "ICSID Convention")

[41] M. Sornarajah, *International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), 306.

[42] ICSID Convention, Article 37 (1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36. (2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree. (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

[43] UNCITRAL, "About Us," accessed 29 July 2019, http://www.uncitral.org/uncitral/en/about_us.html.

[44] Convention on Transparency in Treaty-based Investor-State Arbitration from 10 December 2014, signed in New York, *UNTS*, I- 54749, 1.

enforces in 1985 and modified in 2006, is another significant realization. This model law is intended to serve as a guideline for the state to reform and modernize its legislation in order to meet the needs of international arbitration. Most states have focused on this model law in their domestic arbitration legislation.

D. PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration is the second most common forum for the resolution of investor-state disputes, with 105 decided cases and 39 awaited cases as of 2019. [45] Established at The Hague in 1899 by the Convention for the Pacific Settlement of International Disputes during the First Hague Peace Conference,[46] it is the first permanent intergovernmental organization to provide a forum for peaceful international settlement of disputes, and today it has 121 contracting parties.[47] Concerning the number of cases decided and pending, it must be recognized that the PCA is online.

E. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Whereas the United Nations Conference on Trade and Development is not a dispute settlement institution or forum, nor does it have its own rules of arbitration, it is a significant International organization in the investment sector.[48] UNCTAD was established by the United Nations in 1964 as a continuous intergovernmental body. UNCTAD has an Investment and Enterprise division specializing in tracking comprehensive investment policy, investment regulations, international investment treaties, and settlement of investment disputes. It tracks various changes, criticisms, and trends around the globe in the investment arena and publishes extremely regarded reports such as the annual "World Investment Report," Investment Policy Reviews' and 'International Investment Agreement Issues Note.' It also has an online investment dispute database that has been or is being settled, including information on which rules have been applied, which state have been parties and at which institution. Since investment arbitration and international investment are extremely topical fields, UNCTAD has taken on the responsibility of creating a forum for consultation with all the latest modifications and trends.

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[45] Permanent Court of Arbitration, "PCA Case Reponsitory," accessed 29 July 2019, http://www.pcacases.com/web/allcases/.

[46] 1907 Convention

[47] Permanent Court of Arbitration, "Contracting Parties," accessed 29 July 2019, https://pca-cpa.org/en/about/introduction/contracting-parties/.

[48] UNCTAD, "About Us," accessed 29 July 2019, http://unctad.org/en/Pages/aboutus.aspx.

III. GOVERNING RULES IN INTERNATIONAL INVESTMENT ARBITRATION

In investment arbitration, the intentional choice anticipated by parties in commercial arbitration is most often dulled or non-existent, as international investment arbitration is governed mostly by a treaty between the host state party and the foreign investor's home state. In investment arbitration, treaties-based agreements between the host state and the home state of the foreign investor are the arbitration agreements in which both sides agree to refer disputes to arbitration if any dispute arises. These treaty-based agreements often involve an institution's intentional choice and arbitration rules. It can be noted that the most regular investment arbitration is institutional arbitration. As UNCTAD's Investment Policy Investment Dispute Settlement Navigator shows, the ICSID Center is the most famous investment dispute settlement institution, followed by the PCA.[49] The following are an elaboration of the Rules.

A. INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

Based on Articles 36 to Article 55, the ICSID Convention contains rules on arbitration which provide a rough procedural framework for arbitration. Article 44 of the Convention provides for the conduct of arbitration under the ICSID Arbitration Rules, except where otherwise agreed by the parties. These ICSID Arbitration Rules provide a more detailed procedural arbitration model. They were amended three times; the last amendment was conducted in 2006. Recently, in 2018, ICSID proposed amendments to the ICSID rules with the aim of (i) modernizing, streamlining, and making it more user-friendly (ii) addressing new and systemic issues in ISDS (iii) reflecting best practices.

Furthermore, these amendments are expected to be enforced by October 2019. When a procedural issue occurs, which is not regulated by the Convention or the Rules of Arbitration, it is the arbitral tribunal that will have the power to answer the question as it considers fit in the context.[50] ICSID also established the ICSID Supplementary Facility Rules governing certain disputes outside the scope of the ICSID Convention. For example, if one is not an ICSID member state or a national of an ICSID member state, arbitration disputes settlement between a state and a foreign national. With 54 renowned

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[49] UNCTAD, "UNCTAD Investment Dispute Settlement Navigator," accessed 28 July 2019, http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia

[50] ICSID Convention, Art. 44.

disputes[51] resolved under these Additional Facility Rules, they will certainly not be used infrequently.[52]

B. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The UNCTAD Navigator reveals that the UNCITRAL rules are the most frequently used arbitration rules after the ICSID Arbitration Rules. The UNCITRAL Arbitration Rules are an extensive set of procedural rules that have historically been designed to meet the requirements of the broadest spectrum of disputes possible. It follows from this that they are often used in business arbitration, ad hoc arbitration, conflicts between investor-state, and even state-to-state disputes.[53]

IV. GENERAL OVERVIEW ON THIRD-PARTY FUNDING

A significant rise in funding activity has been seen in recent years, which initially concentrated on commercial arbitration, but now, it expands to international investment arbitration as well. TPF is one of the increasingly global means of financing arbitration.

TPF is a funding method whereby a party that is not a part towards a dispute and the proceedings arising therefrom, finances all or part of a party's costs of proceedings, in return for a percentage of recovery made under the award. Thus usually, TPF is a non-re-course funding method, so in a situation where the claimant loses, the funder will acquire nothing.[54] TPF is commonly associated with non-recourse outcome-based financing, where funder's fees are reimbursed only upon success claims. Historically, TPF was introduced to facilitate access to justice for an impecunious party, which usually the claimant.

TPF initially arose in civil litigation, where it was established as a technique of funding litigation and, thus, as an instrument for reducing or eliminating the risk connected with the possibly unfavorable result of the arbitration proceedings.[55] One of the main features of TPF is that the agreement between a funded party and the funder usually is to be kept confidential. The

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51 ICSID, "ICSID Process Overview," accessed 28 July 2019, https://icsid.worldbank.org/en/Pages/process/Overview.aspx.

52 ICSID Convention, Art. 44.

53 UNCITRAL, "UNCITRAL Arbitration Rules," accessed 28 July 2019, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

54 Fulbrook Capital Management, "Investing in International Arbitration Claims," Burford Group's. Seidel, 2011, accessed 28 July 2019, http://www.fulbrookmanagement.com/publications/IL-Jan2011.pdf/.

55 Jures, "The new, new thing: A study of emerging market in third-party litigation funding," 2010, accessed 28 July 2019, http://www.jures.co.uk/whitepapers/QkLK6oHO_TPF%20report.pdf.

absence of precise and uniform regulations governing TPF has created debate and concerns in international investment arbitration.

As has been stressed before, there were concerns raised by both practitioners and academics regarding TPF that remain unresolved until today. The Queen Mary University London Task Force's on Third-Party Funding in International Arbitration, Report emphasizes that the central issue in the concept of TPF is, as described below: [56]

> *"economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require the active participation of the third-party funder in key deliberate decisions in the case, while other agreements are limited to periodic updates."*

In the context of a TPF, a potential claimant may approach a funder for various reasons, i.e.: (i) The price to conduct an arbitral proceeding could be expensive. If a claimant does not have the funds to pursue a worthy claim, TPF may be their only choice; (ii) Risk managing Claimants with the funds to arbitrate may need to lay off some of the risk related with costly arbitration and be prepared to relinquish a quantity of any recoveries to do so. It also enables a corporation to invest that money somewhere else. Additionally, the funded party is relieved of cost pressures and cash-flow issues associated with the legal costs of the arbitration proceedings. (iii) Endorsement: funders are only attracted to good claims. Therefore, They will conduct extensive due diligence and carry out their examination of the merits before agreeing to offer to fund.[57] This analysis may assist the claimant to form its case strategy and may also encourage early settlement once the other party is aware that the claim has the backing of a funder.

Nonetheless, there are several disadvantages of TPF in arbitral proceedings (i) a successful claimant will generally have to pay a significant percentage of their retrievals to the funder, following the agreement concluded between them (ii) Even though funders are generally prohibited from taking excessive control or impact in an arbitration proceeding, there may be some loss of autonomy on the part of the funded party as funders may reserve the right of approval of the settlement.; (iii) Substantial costs can be incurred

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[56] ICCA, "Report of the ICCA – Queen Mary Task Force on Third Party Funding in International Arbitration," April 2018, The ICCA Reports No. 4, 2018. Available at https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf, accessed 29 July 2019.

[57] C. R. Flake, "In Domestic Arbitration: Champerty or Social Utility?" *Dispute Resolution Journal* 2 (2015): 115-117.

when packaging the case for presentation to a funder. All of this cost will be wasted if the application for funding is unsuccessful, even if successful, the funders are not liable for any costs sustained before the funding arrangement is put into place, including the costs of negotiation the funding arrangements.

V. ANALYSIS OF TPF IN CASES STUDY

Currently, several institutions have drafted disclosure of regulations on TPF in investment arbitrations.[58] TPF had also been regulated in several investment treaties such as the EU Transatlantic Trade and Investment Partnership, and some Bilateral Investment Treaties draft or models.[59] There have been past precedents where the arbitral tribunal ordered the parties in dispute to voluntarily disclosed the existence of a funder in their dispute, such as in *EuroGas Inc and Bellmont Resources Inc. v. The Slovak Republic*,[60] as well as in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*.[61] In these cases, the arbitration tribunal ordered the claimants to disclose whether their claims had been funded by an external party of the dispute and if so, the tribunal ordered that the funded party disclose the funding arrangements. Still, instigating disclosure regulations necessarily requires considerable attention to the arguments both in favor and against such regulation.

The most crucial issue that raised awareness of practitioners and scholars on TPF is on the issue of disclosure, since the existence of a funder in a dispute may raise conflict of interest with one of the arbitrators.[62] However, since arbitrators are expected to produce an award of the dispute impartially and independently, such disputes threaten to disrupt proceedings and demoralize the process of enforcing the final award.[63] Thus, as a solution to the issue above, by disclosing a funder as soon as the proceedings begin or as soon as the arrangements have been made in order to prevent conflict of interest in the middle of the procedure or even in the stage of rendering the final award.[64]

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[58] Frank J. Garcia., *et. al.* "The Case Against Third-Party Funding in ISDS: Executive Summary," *Boston College Law School – PUC University of Chile, Working Group on Trade & Investment Law Reform, Third Party Funding Task Force* (2018), available at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2130&context=lsfp, accessed on 29 July 2019.

[59] *Ibid*

[60] ICSID, Case No. ARB/14/14, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, available at: https://www.italaw.com/cases/3210, accessed on 29 July 2019.

[61] ICSID, Case No. ARB/12/6, *Muhammet* Çap *& Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, available at: https://www.italaw.com/cases/2036, accessed on 29 July 2019.

[62] Eric de Brabandere and Julia Lepeltak, "Third-Party Funding in International Investment Arbitration," *ICSID Review – Foreign Investmment Law Journal* 27, no. 2 (2012): 395.

[63] Maxi Scherer, "Out in the open? Third-party funding in arbitration," ICLG, 26 July 2012, accessed 29 July 2019, https://iclg.com/cdr/arbitration-and-adr/out-in-the-open-third-party-funding-in-arbitration.

[64] Gary J. Shaw, "Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit," *Arbitration International* 33, no. 1 (2017): 109-120.

Furthermore, as described above, several past precedents have already addressed legal issues arising from TPF, and the said cases provide a useful starting point to analyze the status of TPF in international investment arbitration.[65] However, without any clear and binding regulations, there are no concrete predictions on how future disputes on this issue will be resolved.[66] True,[67] disclosure processes may initially delay proceedings, primarily as the parties discuss the importance of disclosing the existence of a TPF, and such action could delay several stages, e.g., delayed-stage arbitrator replacement or post-award annulment. However, these stages may probably be worth the delay.[68]

Another issue may arise, by regulating disclosure of TPF, will it increase or decrease delays on the arbitration proceedings? Several practitioners commented in specific that disclosure rules would give an opportunity for respondent states to participate in frivolous legal positioning aimed at delaying proceedings and raising expenses for the financed claimant.[69] Jean-Christophe Honlet, a partner in Denton's Paris Office and head of Denton's International Arbitration Practice Group, states that :

> *"[i]f a party turn out to be aware of the other party's litigation budget, an incentive might be formed to bring dilatory needs or arguments simply to exhaust that budget before the case is over."*[70]

Moreover, rule-making bodies gradually implement disclosure regulations, a proposed approach to the implementation of disclosure requirements. Consequently, the advantages on regulating disclosure of TPF will both conserve the integrity of the international investment arbitration rule and consents disputing parties (also the tribunals and institution) and funders to comprehend the benefits of third-party funding arrangements. The proposal suggests three main concerns: (i) achieving time and cost efficacies; (ii) achieving a broad range of international investment arbitrations; and (iii) utilizing the arbitral procedures that are already facilitated in international investment arbitration in order to achieve a convenient disclosure scheme. As TPF continues to develop, rule-making bodies must ensure that any enacted regulations adapt

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65 *Ibid.*, 115.

66 Valentina Frignati, "Ethical implications of third-party funding in international arbitration," *Arbitration International* 32, no. 3 (2016): 515.

67 Note "Contrarily, the making of regulations regarding disclosure will assert all parties in the arbitral proceedings to define the measures on the role of the funding agreements and the existence of TPF in arbitral proceedings. Thus, both effects in arbitral proceedings would probably decrease delays."

68 Aren Goldsmith & Lorenzo Melchionda, "Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)," *International Business Law Journal* 53 (2012): 53.

69 Jean-Christophe Honlet, "Recent Decision in Third-Party Funding in Investment Arbitration," *ICSID Review – Foreign Investment Law Journal* 30, no. 3 (2015): 205.

70 Honlet, "Recent Decision," 206

to the changes in funding models.[71]

International investment arbitration is regulated and held by various entities such as investment treaties, bar associations, and arbitration institutions that are legally competent to oversee arbitration proceedings. Hence, the instrument above and institutions possess the authority to issue ordinance or regulations pertaining to disclosure in TPF.

Besides, several entities have also considered making regulations on TPF. Such action has been made by the International Bar Association in 2014, which became the first international institution to discourse TPF disclosure with its guideline for conflict of interest. Moreover, Hong-Kong and Singapore have also recently regulated TPF in their arbitration ordinances.[72]

Even though few arbitral institutions responsible for investment arbitration proceedings have begun to implement disclosure measures, still, the tribunal best suited to do so is ICSID, which recently released draft rules regarding third-party funding disclosure.[73] The recently proposed amendments to the ICSID Rules was open for written comments due by 28 December 2018 and target for a vote in October 2019 or October 2020. This amendment must be approved by two-thirds of ICSID member states,[74] before its adoption to the Convention.

As a preliminary matter, more than half of investment arbitrations are hosted by ICSID, and therefore, regulations enacted by ICSID would reach the most significant number of investment arbitration proceedings.[75] Specific national laws and treaties, nonetheless beneficial, solitary oversee claims that fall in their purview. Such rules create only a collaged solution to a widespread global phenomenon.

Institutional rules, nevertheless, offer broader uniformity to international

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[71] Burford Capital, "Deeply Flawed: A Perspective on the ICCA-Queen Mark Task Force on Third-Party Funding," Burford Capital, accessed 30 July 2019, https://www.burfordcapital.com/blog/icca-queen-mary-task-force-report-flaws/

[72] Marc Krestin, "Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?" Kluwer Arbitration Blog, 12 December 2017, accessed 31 July 2019, http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/

[73] Yarik Kryvoi, "ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them," Kluwer Arbitration Blog, 11 November 2018, accessed 31 July 2019, http://arbitrationblog.kluwerarbitration.com/2018/11/11/icsid-arbitration-reform-mapping-concerns-of-users-and-how-to-address-them/.

[74] Martina Polasek, "Overview of Proposed Amendments to the ICSID," (Presented at UNCITRAL WG III, 31 October 2018), accessed on 31 July 2019, https://uncitral.un.org/sites/uncitral.un.org/files/icsid_-_overview_of_rules_amendment_presentation.pdf.

[75] Francisco Blavi, "It's About Time to Regulate Third Party Funding," Kluwer Arbitration Blog, 17 December 2015, accessed 31 July 2019, http://arbitrationblog.kluwerarbitration.com/2015/12/17/its-about-time-to-regulate-third-party-funding/.

investment arbitration, promoting greater consistency and fairer outcomes.[76] International investment arbitration contrasts from commercial arbitration in substantial ways, and consequently, it would benefit from institutional rules on disclosure that reflect its unique characteristics. It also could be an example for other Arbitration Institution that conducts International Investment Arbitration once ICSID has regulated a fixed disclosure regulation and TPF.

Although ICSID's attempt to regulate TPF constitutes a significant step toward placing disclosure obligation in the hands of arbitral institutions, it, however, does little to ensure that such disclosure requirements resolve the primary issues of TPF. As stipulated in the Proposal for Amendment of the ICSID Rules Consolidated Draft Rules on Rule 21 regarding Disclosure of Third-Party Funding reads as:

> *(1) "Third-party funding" is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute ("third-party funder"), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:*
>
> *(a) through a donation or grant; or*
> *(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.*
>
> *(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of he Request for arbitration, or upon concluding a third-party funding arrangement after registration.*
>
> *(3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement."*[77]

This rule has advantages. Firstly, it imposes a legal obligation for the parties to disclose the presence of TPF. This provision offers transparency between the parties as well as the tribunal, and it decreases the ambiguity regarding disclosure of the TPF. Secondly, it also preserves the investment arbitration system against the controls and funds of the arbitration proceedings.

[76] ICSID Convention, Article 5.
[77] ICSID, "The ICSID Proposal Amendment of the ICSID Rules," ICSID Secretariat, 1 August 2019, https://icsid.worldbank.org/en/Documents/III.%20Amendments_Vol_Two-English_AR.pdf.

However, the main issue on Rule 21 of the ICSID Proposal Amendment of the ICSID Rule is that it grants consent to parties to disclose the funding arrangements "immediately upon registration or upon concluding a third-party funding arrangement after registration" as stipulated in Rule 21(2) of the ICSID Proposal Amendment of the ICSID Rules.[78] This section is problematic as it fails to restrain the main concerns regarding TPF on the time and cost inefficiencies. In the event where the ICSID Secretariat discovers a conflict of interest amongst a funder and an arbitrator, it might force the arbitrator to recuse the panel. Thus, a late-stage recusal can preserve significant time and cost to an arbitral proceeding, and an essential benefit to a disclosure regime is the potential to reduce delays that might otherwise result from TPF.

The ICSID rules, regrettably, fall short of this goal. The proposed amendment of ICSID rules for instigating disclosure regulations places an undue burden on the arbitral institution to review and unclear conflicts of interest during the arbitral proceedings. Due to these uncertainties, the author suggests several alternative suggestions:

Assimilating forms of conflicts on the arbitrator selection

Funded parties must be obliged to disclose the existence of a third-party funder by instructing the disclosure of TPF right prior to the commencement of the proceeding or as soon as the proceeding begins, this procedure ought to remove any lingering speculation that conflicts of interest keep at under the outward of the proceeding;

The funded party is obliged to disclose its funding arrangements to the opposing party and arbitral institution prior to the appointment of arbitrators. This requirement impedes parties from looking for and acquiring third-party funding arrangements once the proceedings have formally initiate, at which time any conflicts of interest could severely damage the arbitral process;

As soon as the funding arrangements and funder identities are disclosed amongst the parties and institution, arbitrators may be selected to the tribunal through the ordinary appointment mechanisms

Setting limitation grounds on disclosure.

Although disclosure is a useful instrument for facilitating conflict-of-interest assessments, nevertheless, it is not enough to limit regulation of disclosure to evaluate conflicts of interest. Instead, it is conceivable that without further guidance from the arbitral institution, information obtained through disclosure

[78] Chang Law, "ICSID to Require Disclosure of Third Party Funding in," Chang Law, accessed 1 August 2019, https://changarbitration.com/2018/08/icsid-to-require-disclosure-of-third-party-funding-in-amended-arbitration-rules/.

could be misused. As mentioned above, disclosure critics have raised awareness that funding information may be used to reach cost decisions or to order security for cost, primarily since the ICSID Proposal Amendment of the ICSID Rules does not address the relationship between third-party funding and security for costs.

VI. CONCLUSION

Despite ongoing debate, it appears that TPF in international investment disputes is here to stay: TPF spread has outstripped practice-limiting steps; a state that had previously prohibited TPF, have since loosened their bans and arbitral tribunals that have considered TPF problems have reduced. Fortunately, there are already measures in the current international investment arbitration system that will best serve a disclosure system to control TPF. Therefore, it will be appropriate for the arbitration institute and the investment treaties to incorporate legislations on TPF and specifically a clear and concise regulation about disclosure, into account in order to provide legal certainty for the disputing parties, tribunals, and the institution for the practice of TPF in international investment arbitration proceedings. Moreover, most treaties need much revising because they are way out of date not only on this issue but many. Additionally, the language is so ambiguous that it is not possible to know what the states intended and leave too much leeway for tribunals to misinterpret that. The author sees that as the biggest problem with the treaties now.

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