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Third-Party Financing in ISDS

A Framework for Understanding Practice and Policy

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Third Party Financing in ISDS

A Framework for Understanding Practice and Policy Regarding Third-Party Financing in ISDS

I. Introduction

Modern forms of Third-Party Funding or Third-Party Financing (TPF)[1] are no longer new to international arbitration. Recent years have seen significant increases in the number of funders, the number of funded cases, the number of law firms working with funders, and the number of reported cases involving issues relating to funding. As a result, third-party funding has increasingly drawn the attention of commentators and scholars, and even more recently of arbitral institutions, national regulatory authorities, and State trade negotiators.

Debates over third-party funding in the field of investment arbitration in particular are closely linked to the different views about the overarching purpose of investment itself and the role of investment treaty arbitration. On one side of the debate, investment arbitration may be regarded as a legitimate process only to the extent it facilitates sustainable development. Under this view, certain categories of cases are considered directly objectionable, and the overall rise in the number of cases has also been an independent cause for concern. The profit incentive of third-party funders is often regarded as inherently incompatible. The notion that some amounts recovered from States would go to third-party funders, instead of solely to investors, is considered inconsistent with the goal of promoting sustainable development.

On the other side of the debate, investment arbitration is regarded as an essential means of providing recourse for foreign investors when governments act in ways that violate applicable treaty-based protections for their investments. Under this view, third-party funding is regarded as an essential tool for facilitating access to justice, particularly for that class of investors who have been wrongfully expropriated and therefore lack the means to pursue an investment claim in the absence of third-party funding.

In a related vein, others argue that investor-claimants should not have to forego business opportunities by using their own capital to pursue recourse caused by wrongful conduct by a State. Alternative means of financing claims allows claimants to minimize continued harm from the alleged misconduct, and strategically reduce the risks of pursuing the claims. Funders also argue, more generally, that modern third-party funding is not conceptually or economically different from alternative means of financing claims, and should not be singled out for different treatment.

Overall, the very existence of third-party funding has been a uniquely divisive issue in investment arbitration, which explains why this issue has become a central topic in the discussions and potential reforms of the UNCITRAL Working Group III, and the work of the Academic Forum of ISDS.

[1] Although some distinctions may be drawn in other contexts, the terms “third-party funding” and “third-party financing” are used interchangeably in this Paper.

In terms of organization and structure, this Paper starts with an overview of the existing state of regulation of TPF (Section II), it proceeds with a discussion on the complex question of definitions (Section III), and it then focuses on important policy issues affecting ISDS, most notably on potential conflicts of interest (Section IV) and security for costs (Sections V).

II. Existing State of TPF Regulation

Despite the extensive public discourse and legal scholarship, in the last five years in particular, surrounding the role and potential implications of TPF in international arbitration, regulation of TPF varies considerably even within national jurisdictions of the same legal tradition, such as common law jurisdictions, and largely remains limited in international arbitration.

In Ireland, for example, maintenance and champerty are both criminal offences and civil torts, and have been since the 1600s. The Irish Supreme Court in May 2017 reaffirmed the prohibition holding (with a clear majority of 4-1) that a third-party funding agreement between a claimant and an English third party funder violates the laws on maintenance and champerty under ancient statutes from the 14th century to the Maintenance and Embracery Act 1634. Importantly, the Irish Supreme Court rejected the view that it should harmonise the old position of the common law on maintenance with recent developments on litigation funding and modern policy considerations such the constitutional right of access to justice.[2]

However, having reaffirmed the position of the common law prohibition of third party, a number of SC judges expressed their disquiet over some important implications that such prohibition gives rise to. For example, Clarke J. noted that "*it is difficult to take an overview of the circumstances of this case without a significant feeling of disquiet*" observing that "*it is at least arguable that there is a very real problem in practice about access to justice* [which] *is growing*."

Importantly too, the judges invited the Irish legislator to act upon and regulate third-party funding in the future to address the conflicting considerations underpinning the doctrine of maintenance, on the one hand, and the right of access to justice on the other.

For example, McKechnie J. noted that it would prefer to defer the making of an order on this matter "*until such time as the State has been given an opportunity to address the deeply disturbing situation of the appellants being unable to prosecute this action solely because of the continuing existence of ancient principles of law, such as those of maintenance and champerty*", and observed that "*[t]o terminate an action of such magnitude is both highly disturbing and terribly disquieting… Whilst I fully acknowledge the decision of my colleagues and the reasons therefore, the conclusions so reached represents a deeply unsatisfactory outcome. […] The outcome of this case is manifestly troublesome from the perspective of the giving of effect to the constitutional right of access to the courts; indeed, all the more so given the importance of the questions at issue. On other occasions, one could expect the State to aggressively engage with the legal process by seeking the speediest trial possible so as to vindicate its integrity. Not so, however, in this case. Such is to be regretted*."

[2] Supreme Court Judgment *Persona Digital Telephony Limited & Sigma Wireless Networks Limited v The Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27.

Other common law jurisdictions, however, take a different, arguably more progressive, approach to third-party funding, by introducing reforms to expressly permit third-party funding in international arbitration. Notably, Singapore and Hong Kong recently enacted legislative reforms to permit third-party funding arrangements that were previously prohibited. The new legislation expressly provides that the doctrines of maintenance and champerty do not apply to domestic or international arbitrations.[3] The proposed amendments also establish certain disclosure obligations for funded parties, as well as ethical and other standards for counsel and third-party funders.

Specifically, Singapore, in 2017, amended its law and permit third-party funding in relation to prescribed dispute resolution proceedings under certain conditions and qualifications.[4] Specifically, Regulation 4 of the Civil Law (Third-Party Funding) Regulations of 2017 sets out a number of qualifications for funders including the requirement that the funder "*must carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third party funder is not a party*" and must have "*a paid-up share capital of not less than S$ 5 million or the equivalent amount in foreign currency or not less than S$ 5 million or the equivalent amount in foreign currency in managed assets*".[5]

In June 2017, Hong Kong enacted the Arbitration and Mediation Legislation (Third-party funding) (Amendment) Ordinance 2017 (Amendment Ordinance) which expressly now permits third-party funding arrangements that had arguably been previously prohibited under the doctrines of champerty and maintenance.[6] More recently, February 2019, the Hong Kong government published the Code of Practice for Third Party Funders, which was foreshadowed in the 2017 legislation. The Code is a significant piece of regulation of third-party funding activities, and setting out standards and practices which third party funders must abide to in order to operate in the Hong Kong arbitration market. These standards include the requirement that the funders maintain access to minimum capital of HK $20 million, maintain the capacity to "*pay all debts when they become due and payable*" and maintain the capacity to "*cover all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months*". The Code further prohibits that a funder seeks "*to influence the funded party or*

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[3] See M. CHAN, M. SECOMB and P. TAN, "Third-party funding: a New Chapter in Hong Kong & Singapore", (29 July 2016) available at http://www.jdsupra.com/ legalnews/third-party-funding-a-new-chapter-in-40360/.

[4] Civil Law (Amendment) Act 2017 was passed by Parliament on 10 January 2017. See A. HENDERSON and D. WALDEK, "Singapore Arbitration Update: Third-party funding and New SIAC Rules 2016", Herbert Smith Freehills Arbitration Notes (1 July 2016), available at https://hsfnotes.com/arbitration/2016/07/01/singapore-arbitration-update-third-party-funding-and-new-siac-rules-2016/.

[5] Section 2 of the Civil Law (Amendment) Act 2017 to amend the Civil Law Act (Chapter 43 of the 1999 Revised Edition) (the "Act") and to make a related amendment to the Legal Profession Act (Chapter 161 of the 2009 Revised Edition), passed 10 January 2017 and assented by the President on 3 February 2017 ("Civil Law (Amendment) Act 2017").

[6] It is currently unclear in Hong Kong whether the doctrines of maintenance and champerty apply to third-party funding for arbitrations taking place in Hong Kong: see the Court of Final Appeal judgment in *Unruh v. Seeberger* (2007) 10 HKCFAR 31, at para. 123 where the Court expressly left open this question. While earlier in *Cannonway Consultants Limited v. Kenworth Engineering Ltd*, [1995] 2 HKLR 475, Judge Kaplan had held that the law of champerty did not extend to arbitration, later in *Unruh v. Seeberger*, (2007) 10 HKCFAR 31, at para. 123, the Court did not refer to this aspect of Judge Kaplan's judgment. Accordingly, the permissibility of third-party funding with respect to arbitration in Hong Kong had been subject to uncertainty. See para. 1.6 of "The Law Reform Commission of Hong Kong Final Report on Third-party funding for Arbitration" (October 2016) available at http://www.hkreform.gov.hk/en/publications/rtpf.htm.

the funded party's legal representative to give control or conduct of the arbitration to the third-party funder, except to the extent permitted by law". Importantly, the Code sets outs clear provisions on conflict of interest, requiring funders to "*maintain, for the duration of the funding agreement, effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the third party funder in relation to the funding agreement*". Such procedures include the duty of the funder to monitoring the funders operations to identify and assess potential conflicting interests, disclosing conflicts of interest to funded parties and potential funded parties and protecting the interests of funded parties and potential funded parties.

In England and Wales, maintenance and champerty do not constitute criminal offences and civil torts, since the introduction of to the Criminal Law Act 1967. At the same time, England and Wales have not passed formal regulation on third-party funding, which is subject to self-regulation in the form of a voluntary Code of Conduct for Litigation Funders (Code) which was adopted in January 2014 by the Association of Litigation Funders.[7] While the Code refers expressly to "litigation funding", it is generally accepted that the Code includes arbitration.[8] Specifically, the Code provides:

> "Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant."[9]

This definition is similar to the older version of the Code published in 2011, is binding on all members of the Association, typically commercial funders,[10] and mainly aims to regulate non-recourse funding of individual cases, arguably excluding some more complex forms of third-party funding which comprise elements of both recourse and non-recourse funding. At the same time, the Code sets out a number of requirements for funders, notably that all funders members of Association retain a minimum of £2 million of capital and that they be audited by a recognised law firm. The Code also provides a dispute resolution procedure in case a disagreement over certain terms of third-party funding agreement arises. For example, Article 13.2 of the Code requires that, in case of a dispute over termination, "*a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council*". Only if the Queen's Counsel agrees with the funder that it is lawful to terminate, will the Termination Notice be valid.

[7] See BENCH NIEUWVELD and SHANNON SAHANI, *Third-Party Funding in International Arbitration* (Kluwer 2012) p. 114.

[8] See Article (2.4) of the Code of Conduct for Litigation Funders (January 2014) available at: http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf; B. OSMANOGLU, "Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest", 32 Journal of International Arbitration (2015) p. 325 at p. 338.

[9] See Association of Litigation Funders, definition available at: http://association oflitigationfunders.com/litigation-finance.

[10] See Article (2) of the Code of Conduct for Litigation Funders (November 2011) available at http://associationoflitigationfunders.com/wp-content/uploads/2014/02/CodeofConduct for LitigationFunders November20111.pdf.

Other jurisdictions have more recently enacted legislation on third-party funding. For example, the Chief Justice of Abu Dhabi Global Market Courts, acting under powers delegated to him by the Board of Directors of Abu Dhabi Global Market, prescribed the Litigation Funding Rules 2019 in April 2019.[11] Notable requirements here include the requirement for funders "*to carry on as a principal business the funding of proceedings to which the Funder is not a party*" and to have qualifying assets of not less than US$5 million or the equivalent amount in foreign currency. Further, under the Litigation Funding Rules 2019, a funder "*must not be owned (whether wholly or partly, and whether directly or indirectly, and whether by way of shares or otherwise) by a lawyer or a law firm: (a) who has introduced or referred the Funder to a client in relation to the proceedings; or (b) whose client has a Litigation Funding Agreement in force with the Funder in relation to ongoing proceedings*". Finally, the Litigation Funding Rules 2019, includes regulation on conflicts of interest, providing that "*the Litigation Funding Agreement must not contain any terms that: (a) could induce the Funded Party's lawyer or law firm to breach their professional duties which are owed to the Funded Party or to ADGM Courts including under the ADGM Courts Rules of Conduct; or (b) […] allow the Funder to influence the lawyer or law firm so that it takes control of the dispute or assumes conduct of it*" and that "*Litigation Funding Agreements which include more than one Funded Party must include provisions for managing conflicts of interest between the Funder, the Funded Parties and the lawyers*."

Further sources of regulation of third-party funding come from arbitration institutions, professional codes of practices, including the International Bar Association for the Conflicts of Interest, as well as a number of International Trade and Investment Agreements. These forms of regulation mainly concern issues of conflicts of interest and are discussed in detail in the relevant section below.

This survey of the regulatory status of TPF in national jurisdictions is helpful background because some national regulation may affect the availability and status of TPF in investment arbitration. In particular, national regulation may affect the conduct of TPF or the attorneys who receive funds or represent parties who receive funds.

III. Definitions

Any effort to regulate requires a definition of the object to be regulated. The precise definition of third-party funding, however, remains elusive. Even funders themselves disagree over the precise definition of third-party funding, with some arguing that it is not capable of definition.[12]

A. *Evolving character of TPF and definitional challenges*

[11] The enactment was effected under section 225(3)(a) and (d) of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015.

[12] This confusion is apparent even at a terminological level. As one commentator describes, '[t]he nomenclature to describe this kind of third-party capital investment in arbitration or litigation claims is all over the map and woefully undescriptive. It has been referred to as "third-party funding", "third-party litigation funding or financing", or most commonly "alternative litigation funding or financing"'. Michele DESTEFANO, "Non-Lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup", 80 Fordham L. Rev. (2012) p. 2791 at p. 2794.

Third-party funding is difficult to define because various forms of financing claims and paying for legal expenses have long existed and many such forms are similar to or definitionally overlap with modern forms of third-party funding. In some jurisdictions, contingency fee arrangements facilitate legal representation and/or cover claimants' expenses. Although rarely referenced explicitly as a form of third-party funding, law firms are non-parties that advance costs and waive the cost of valuable fees contingent on the outcome of a case.[13]

Similarly, modern third-party funding can be functionally similar to, serve purposes similar to, and operate as a market alternative for before-the-event (BTE), after-the-event (ATE), or traditional liability insurance. Some third-party funders are providing products that are effectively a form of ATE insurance, and ATE insurance is often purchased contemporaneously with entering into a third-party funding agreement.

The definition of third-party funding is also difficult because of the wide range of funding models that already exist and the rapid evolution and introduction of new models, including some designed to get around efforts to define. Funding may be structured through corporate debt or equity, as risk-avoidance instruments, or full transfers of the underlying claims or through "special purpose vehicles" (SPVs).[14] Equity investing by third-party funders is also increasingly common. Under this mode, a funder purchase shares of a company (often one that is in financial distress) and then assumes seats on its Board. In that context, the funder (or its SPV) would be directly providing funding as an owner/shareholder. Under this scenario, neither the party nor the shareholder would be receiving funding from an outside source, which would make most traditional definitions inapplicable and may raise practical questions about the identity of the funder and the application of particular rules to a funder.[15]

More recently, "law firm financing" and "portfolio funding" have emerged as new models to fund an identified range of cases involving a particular party or law firm. In the latter instance, funding is provided to the law firm, not the party, which can raise additional practical and definitional challenges. One additional complexity with law firm and portfolio funding is that one portfolio of cases can be identified to receive funding, while another portfolio is the basis for a funder's return or securitization of its investment. In that case, funding may be provided

[13] For example, the Hong Kong Arbitration and Mediation Legislation (Third-party funding) (Amendment Ordinance), sections 98 K to N, expressly permits third-party funding provided for arbitration, mediation, and related litigation under the Arbitration Ordinance (Cap 609). Sections 98K and 98L provide that the common law offences of maintenance (including champerty) and barratry and the tort of maintenance (including champerty) do not apply to third-party funding of arbitration. However, its section 98O provides that these amendments to Hong Kong law does not apply to provision of funding to a party by a lawyer acting for any parties in relation to such arbitration, mediation, and related litigation proceedings. This exclusion suggests that, in the absence of such an exclusion, the Hong Kong definition of third-party funding could include lawyer funding through contingency fees (although section 64 of the Legal Practitioners Ordinance (Cap. 159) prohibits a solicitor from purchasing an interest in his client's contentious proceedings or agreeing to charge success fees for contentious work). See also Section 107(3A) read with Section 107(3B) of the Legal Profession Act, and Rule 49B of the Legal Profession (Professional Conduct) Rules 2015 (Singapore).

[14] See A.J. SEBOK, "The Inauthentic Claim", 64 Vand. L. Rev. (2011) p. 61, at pp. 63-67. See C. VELJANOVSKI, "Third-Party Litigation Funding in Europe", 8 J.L. Econ.& Pol'y (2011) p. 405 at p. 430 ('[Third-party litigation funding investors] rely on Special Purpose Vehicles, which … are legal entities created for … the acquisition, financing, or both, of a project or the setup of an investment. They are usually used because they are free from pre-existing obligations and debts, and are separate from the parties that set them up for tax and insolvency purposes.').

[15] For example, just as excessive repeat appointment of an individual arbitrator by a party or law firm can be a basis for challenging that arbitrator, under the IBA Guidelines on Conflicts of Interest in International Arbitration repeat appointment of an arbitrator by the same third-party funder can raise similar challenges. See IBA Guidelines 3.1.3. If funding is done through a special purpose vehicle created for the particular case, it may mask the repeated appointment by a particular third-party funder that owns the SPV.

for one case, but a funder may not have any interest in the actual outcome of that particular case. More recently, funded cases and particularly portfolios of funded cases can be "refinanced", meaning a second third-party funder (or multiple other investors) can invest in a portfolio or a "bundle" of cases of another funder.

Meanwhile, third-party funders may become involved either before a claim is filed or later in the process.[16] Some funders specialize only in award execution or funding for expert witness costs, while others fund all costs, including a potential adverse award of costs. These distinctions raise questions about potential enforcement of any regulation imposed on funders, which must necessarily impose an ongoing duty to be effective.

While most funders invest in claims, it is also possible to invest on the respondent's side of the case. For example, in the investment arbitration brought by Philip Morris against Uruguay, The Bloomberg Foundation and its 'Campaign for Tobacco-Free Kids' provided outside financial support for the Uruguayan government.[17] Such arrangements involve the funding of a case by a third party, but funding is for a respondent (not claimant) and the funder's interest was tied to the political and policy implications of the award (not financial). Other types of respondent-side funding, more functionally similar to after-the-event insurance, have been discussed, but the general consensus is that such funding models are at best occasional and perhaps only hypothetical.

Respondent States can also be funded by another State or, as has been reported anecdotally by some funders, have their costs for defence or for counterclaims funded through a model similar to after-the-event insurance. There has also been at least one case in which a respondent State was funded by an oil company that had a competing claim to the oil rights being sought by the investor in the funded case.[18] Given the use of precedent in ISDS, it is plausible that funders, as "repeat players", may "play for the rules" and intentionally select so-called test cases to establish precedent. Some might argue that the Bloomberg Foundation was aiming not only to defend Uruguay's state policies against smoking, but to deter future similar claims by tobacco companies.

In sum, the challenges in developing a complete definition are significant, but necessary. The nature of policy concerns may shift considerably depending on the funding models. Similarly, the definition of TPF may change depending on the regulatory context. The definition adopted as a target of disclosure obligations for the purpose of identifying potential arbitrator conflicts of interest, for example, may differ from the definition adopted for the purpose of prohibiting funding or for assessing security for costs.

B. Definitional challenges: a functional approach

[16] See M. KANTOR, "Third-Party Funding in International Arbitration: An Essay About New Developments", 24 ICSID Review (2009) p. 65 at p. 74; J. A. TRUSZ, "Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration", 101 The Georgetown Law Journal (2013) p. 1649 at p. 1654.

[17] See Press Release by Uruguay's Counsel, Foley HOAG LLP, "Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations", p. 8 (October 2010) available at http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation.

[18] See Fernando CABRERA DIAZ, "RSM Production Corp. files second arbitration against Grenada, sues Freshfields", available at https://www.iisd.org/itn/2010/04/08/rsm-production-corp-files-second-arbitration-against-grenada-sues-freshfields/.

Given difficulties in defining third-party funding in conceptual terms, this section examines functional and comparative aspects of funding that may be helpful in assessing alternative definitions. This functional approach aims to move beyond formal definitions to determine the key functions of different means of financing disputes in order to focus on those functions that are unique or not unique to third-party funding.

By identifying specific types of conduct, rather than conceptual categories, a functional or conduct-based approach may help avoid development of overly broad or unduly narrow standards, guidelines, or rules. A functional analysis may also facilitate more nuanced analysis to distinguish between conduct in which funders' activities do not raise issues that are or should be the target of such rules and guidance. Alternatively, functional similarities between third-party funding and other types of finance may provide a basis for extending existing rules or doctrines that apply to other actors. For example, the need to assess cases in both contexts is part of the reason why some jurisdictions have extended the common interest privilege from the insurance industry to third-party funding.[19]

1. *Case Assessment and Risk-Assumption*

Leading funders report an average review-acceptance rate of 10-1, meaning that for every ten cases reviewed, they only agree to fund one case.[20] In deciding whether to accept a case, funders assess its legal, factual, practical, temporal, and (sometimes) political variables to determine risks, likelihood of success, and potential rate of return. In making assessment, funders are arguably free from many of the pressures that can cloud a party's or law firm's assessment of the same claim. They are also, however, subject to pressures from shareholders to pick claims that are likely to deliver high rates of return.

In assessing claims, some argue that funders bring a level of sophistication and precision unique even among large, sophisticated multi-national companies and law firms.[21] There have also been anecdotal reports, however, of inadequate due diligence or inaccurate assessments in particular cases.[22] In addition, one point repeatedly raised is that effective risk assessment is most feasible by the leading commercial third-party funders, which have considerable expertise and experience with international arbitration. Meanwhile, because there are no requirements that funders possess such expertise, there are concerns that not all cases may benefit from careful risk assessment.

To assess risk, commercial third-party funders generally create a risk-assessment model or matrix that takes into account the percentage likelihood of different outcomes in light of specific factors. These factors include, among others, the jurisdiction of the claim, strength of the claimant's legal arguments, strength of facts supporting the arguments, extent of loss flowing directly from the respondent's conduct, a claimant's motivation, commitment and honesty, the experience of the claimant's legal team, the respondent's ability/likelihood to pay, reasonable duration to obtain an award, and costs of bringing the claim.

Data for the matrix is obtained through due diligence by the funder, its legal team, and accountants (and other experts, such as intelligence and data recollection). The analysis entails

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[19] For an analysis of the common interest privilege for insurers and related privilege extended to third-party funders, see Chapter 5, pp. 133-135.

[20] VELJANOVSKI, "Third-Party Litigation Funding in Europe", p. 420.

[21] See M. SMITH, "Chapter 2: Mechanics of Third-Party Funding Agreements: A Funder's Perspective", pp. 28-35, available at <http://www.calunius.com/media/ 7098/mechanics%20of%20third-party%20funding%20agreements%20(mick%20smith% 20-%202012).pdf; VELJANOVSKI, "Third-Party Litigation Funding in Europe", pp. 418-420.

[22] See, e.g., R. BLACKETT, "Still Stuck in the Stone: Third Party Funding in the Excalibur Case" available at https://www.andrewskurth.com/insights-1491.html.

inquiries of the claimant's lawyers regarding timing and evidentiary issues, legal strategy, and compilation and assessment of material documents. Importantly, conducting this kind of due diligence often requires assessment of information that might otherwise be subject to privileges under applicable law. Based on this matrix, the funder determines the likelihood of estimated returns on investment over a period of years, which will be weighed against other investments in the funder's overall portfolio.

The extent of funders' due diligence in comparison with insurance is ultimately an empirical question and may vary among funders (or insurers), and from case to date.[23] For the purposes of definitions, however, the fact that insurers (most notably ATE and BTE insurers)[24] undertake similar due diligence confirms that case assessment is not new or unique to modern third-party funders, and indeed may be considered an essential predicate for any entity contemplating assuming risk tied to the outcome of a particular case. Notably, however, insurers are generally subject to much more detailed regulation and oversight than TPFs.

2. *Portfolio financing*

"Portfolio financing" is a relatively new model that may challenge some of these basic features of conventional third-party funding. It is uncertain the extent to which these case assessment procedures are as rigorous when cases are financed as part of a portfolio. As one funder describes, "the portfolio approach is inherently flexible and ideally suited for defensive matters as well as claims, and for matters that would otherwise be less attractive for funding. Pricing is generally lower because risk is diversified."[25]

Diversifying risk may make initial assessment of risk less essential. Indeed, in the words of one author, the "practice has shown that the losses can be offset by the wins across the board and as long as the value of the winning cases is greater than the amount expended on a losing case, the funder will make a profit."[26] As a consequence, it may raise concerns tat funders' initial assessment criteria are diluted when investment is made through a portfolio, which in turn increases the potential funding of higher risk cases that have a lower potential for success.

Control and Cost Containment

Another functional consideration that may affect whether or how to regulate third-party funding is the level of control that a funder may exercise over case strategy, particularly in its efforts to control costs. Control over case management is not viewed as either an inherently good or bad feature of funding, but it may be relevant in evaluating certain issues such as how similar modern third-party funding is to other means of dispute financing, which may in turn affect analysis of certain issues, such as disclosure and conflicts.

In some jurisdictions, the exercise of control by a funder – particularly over a case's larger objectives like settlement – can also raise ethical issues for counsel. As national ethical rules vary considerably both on whether and how they regulate these issues, it is difficult to consider

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[23] The Task Force did not pursue empirical research on this topic, but future empirical research on this issue may be useful.
[24] To the extent liability insurers undertake case assessment, it would most likely be for the purpose of assessing potential exposure and settlement values (rather than whether to pursue the case if they are obliged to under the relevant policy).
[25] Burford Capital, "Beyond Litigation Finance" available at http://www.burford capital.com/wp-content/uploads/2016/09/Burford-Beyond_Litigation_Finance-US_Web. pdf.
[26] See N. ROWLES-DAVIES, *Third-Party Litigation Funding* (Oxford University Press 2014) p. 72.

or endeavour to articulate any guidance about attorney obligations in light of funder control. The extent, nature, and conditions of control are largely a function of the funding agreement negotiated by the party and funder, applicable law, and, in some jurisdictions, applicable ethical or industry rules.

Unfortunately, there are inconsistent reports and no empirical evidence regarding the actual degree of control that funders exercise over management of a case. Some funders report that, after careful initial assessment, they function only as distant and detached monitors who are entitled to receive regular updates.[27] Other anecdotal reports indicate that, on more than one occasion, a third-party funder has directly appointed an arbitrator or physically appeared at an arbitral hearing.

Meanwhile, some argue that a relatively high degree of control would be important for funders to be able to protect their investment and ensure that a case is prosecuted consistent with the assumptions and analysis that facilitated the funding in the first place. This view has effectively been endorsed by the Court of Appeal in England, which reasoned that a third-party funder's "'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals' is what is to be expected of a responsible funder".[28]

Consistent with this view, third-party funders may control or exercise detailed oversight over numerous strategic decisions in a case, including arbitrator selection, expenditure of significant funds (such as retention of experts), changes in legal teams, drafting of memoranda, oral pleadings, and settlement. The extent to which any particular funder in any particular case exercises all or some of these controls will depend on internal practices and protocols of the funder, the nature of the case, the professional relationship the funder has with the funded party and legal team, the financial terms in the funding agreement (which may include financial incentives that reduce the need for monitoring), as well as specific provisions in the funding arrangement that either expressly authorize or limit certain forms of control.

Termination rights also factor into concepts of control. As Jonas von Goeler explains: "when some major litigation funders emphasise in their webpages that they do not control cases, perhaps what they mean is that such express contractual rights to veto specific decisions tend to be absent. However, to what degree a litigation funder will be able to exercise control over the conduct of a claim is not only determined by the existence or not of express veto rights over key decisions. This will also depend on the funder's termination rights and, not least, on the configuration of the litigation funder's case monitoring."[29]

In some respects, the control exercised by third-party funders is similar to the control exercised by liability insurers, at least in the United States. As Charles Silver describes: "Liability insurers manage quality and cost ruthlessly and creatively. They make defense-related decisions directly, thereby obtaining complete freedom to use their vast experience dealing with lawyers to minimize litigation costs. They decide which lawyers to hire, obtain volume discounts by concentrating work in a small number of firms, maintain staff counsel operations in areas where the volume of work is sufficient to justify the expense, subject lawyers to litigation management guidelines and audits, and use innovative fee arrangements to motivate

[27] J. MOLOT, "Theory and Practice in Litigation Risk" and "Burford has no control over litigation or settlement decisions and it does not interfere with the attorney client relationship", available at http://rippmedia.com/Molot-TheoryandPractice.pdf.
[28] *Excalibur Ventures v. Texas Keystone and others* [2016] EWCA Civ 1144.
[29] J. VON GOELER, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Kluwer 2016), p. 35.

outstanding performance. Insurers also control settlement negotiations and decision making. This enables them to act on their incentive to minimize costs by deploying their knowledge of claim values with maximum effect."[30]

The similarities between the control exercised by third-party funders and insurers are often treated as relevant to various questions regarding whether and how to regulate third-party funders. For example, the "common interest privilege" that applies to insurers in some common law jurisdictions is often pointed to as a basis for extending attorney-client privilege to third-party funders.

The comparison between funders and insurers is also raised with respect to issues of disclosure. For example, in many jurisdictions, such as the United States, the presence of an insurer that would be liable for all or part of the judgment in a case is required to be disclosed[31], but the fact that a party is insured may not be considered in assessing the damages to be awarded. Although legislative reforms have not yet extended the disclosure rules to third-party funders in the United States, the similarity in their function may be the reason why disclosure of third-party funding is required in some contexts in Australia, England, and New Zealand.[32]

IV. Potential conflicts of interest

Potential arbitrator conflicts of interest were among the first and most prominent issues that attracted attention with respect to third-party funders' participation in international arbitration. More specifically, questions have arisen as to whether, how, to what extent and by whom disclosures should be made to allow arbitrators, parties, and institutions to assess potential conflicts of interest involving funders.

1. *General observations*

Concerns about potential conflicts of interest have increased as a number of leading arbitrators have taken positions within, or *ad hoc* consultant roles with, some funders.[33] Other sources for concern about potential conflicts include the increasing number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in investment arbitration, the symbiotic relationship between funders and a small group of law firms, and related links among elite law firms and some leading arbitrators.[34]

[30] C. SILVER, "Litigation Funding Versus Liability Insurance: What's the Difference?", 63 DePaul L. Rev. 617 (2014), pp. 621-622.
[31] See U.S. Federal Rule of Civil Procedure 26(a)(1)(A)(iv); see also, SHANNON SAHANI, "Judging Third-Party Funding", pp. 413-416 (explaining why Rule 26(a)(1)(A)(iv) does not apply to third-party funders based on the legislative comments to the rule, which are called "Advisory Committee Notes").
[32] For an overview of disclosure obligations in various jurisdictions, see generally BENCH NIEUWVELD and SHANNON SAHANI *Third-Party Funding in International Arbitration*.
[33] It has also been reported by funders that they are occasionally approached directly by arbitrators or arbitration experts to provide such advice.
[34] See M. GOLDSTEIN, "Should the Real Parties in Interest Have to Stand Up?", 4 Transnational Dispute Management (2011) p. 7.

Until relatively recently, some contested whether it was even possible for funders, or at least certain types of funding arrangements, to create conflicts of interest for arbitrators.[35] Third-party funding, it had been argued, could not raise potential conflicts of interest because it is simply one among many possible forms of financial support for pursuing or defending a dispute. The source of financing for a dispute is irrelevant to the merits of the dispute, the argument went, and consequently there was no reason to treat third-party funding as subject to any special treatment that would not apply, for example, to a corporate loan taken out for the purpose of pursuing a claim.[36] This line of argument has largely faded from public discussions, but it did preview continuing challenges to define third-party funding in light of the expansion and evolution in funding models.

Opposition to disclosure, some funders claim, is not so much related to maintaining their presence or identity as secret. It is instead a reaction to perceived procedural and strategic consequences of disclosure, such as allegedly frivolous challenges to arbitrators and unfounded requests for security for costs.[37] It was also suggested by some that these responses to disclosure may not simply be a matter of case strategy, but an intentional effort to drive up the cost of the case to make the funding model untenable.

It has also been argued that unknown conflicts of interest cannot be a basis for an effective challenge to an arbitrator or an award.[38] Even though a resulting award may not always be subject to set aside or refused enforcement, however, there are other potential costs to undisclosed conflicts.

A conflict of interest relating to a third-party funder may be initially unknown, but discovered later in the process, with the result being removal of an arbitrator or an effective challenge to the award that costs the parties and the funder waste time and money. An arbitrator may suffer the embarrassment of a public questioning of his or her integrity. And finally, the integrity and legitimacy of international arbitration may suffer generally. It is for these reasons that legal frameworks and practices regarding arbitrator conflicts are not based on a see-no-evil model, but instead on an affirmative duty for arbitrators to investigate potential conflicts.

Today the prevailing consensus in the international arbitration community is that that the existence of third-party funding can raise potential conflicts of interest for arbitrators, and therefore the identity of funders should be disclosed.

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[35] See, e.g., C. BOGART, The European Arbitration Review 2017 (taking as a "given" that "there is no legal, logical, or equitable basis for requiring disclosure of funding without also requiring the disclosure of other parties with economic interests in the outcome of a matter"). Arguably, this language could be interpreted to that no test for disclosure regarding funders could be valid unless it applied equally to all forms of economic interests, not only equity investors. This interpretation is consistent with his earlier assertions that 'arbitration finance is really just specialty corporate finance'. See M. KANTOR, "Third-Party Funding in International Arbitration", 24(1) ICSID Review - Foreign Investment Law Journal (2009) p. 65; Maya STEINITZ, "Whose Claim Is This Anyway?" 11-13 University of Iowa Legal Studies Research Paper (2011) p. 1268 at p. 1292.

[36] See M. MANIRUZZAMAN, "Third-Party Funding in International Arbitration – A Menace or Panacea?", Kluwer Arbitration Blog (29 December 2011) available at http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/?doing_wp_cron=1503332583.8441140651702880859375.

[37] For an extended discussion of standards for granting security for costs, see ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018), Chapter 6, and for an extended discussion of competing views in the underlying policy debate, see Chapter 8 of the same ICCA-Queen Mary Task Force Report.

[38] Globally, there is some disagreement about the effect of an arbitrator's lack of knowledge of a conflict. In the United States, the approach of U.S. courts is summarized in the Reporters' Notes to the Restatement: "Some courts have taken the view that an absence of knowledge about a conflict per se precludes a finding of evident partiality.

Existing sources that govern potential arbitrator conflicts of interest are numerous, and include arbitral rules, national law, and international soft law instruments, such as the IBA Guidelines on Conflicts. More recently in the context of proposals for amendment of the ICSID Rules, proposed Rule 13 introduces an obligation for a party to disclose the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defence of the proceedings.[39] Notably, the party is obliged to make the disclosure upon registration of the request for arbitration or immediately upon concluding a third-party funding arrangements after registration. This requirement will then allow the arbitrators, when accepting an appointment, to make a fully informed declaration of their independence, and/or disclose any relationship with any funder.

Given that modern third-party funding is a relatively recent phenomenon, however, many of these sources have not yet specifically addressed the issue of potential conflicts of interest involving third-party funding.

The IBA was the first organization to formally address issues relating to third-party funding conflicts by implementing the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. As examined in greater detail below, the IBA Guidelines define third-party funders and insurers as relevant to conflicts analysis if they have a “direct economic interest” in an award. This definition, however, still leaves unresolved some questions regarding the scope and application of the IBA Guidelines to certain types of dispute financing.

A definition similar to the IBA definition has subsequently been adopted by the Singapore International Arbitration Centre in its Practice Note[40] and the 2 February 2016 Guidance Note on conflict disclosures by arbitrators adopted by the ICC.[41] Other sources, such as recent legislative reforms in Hong Kong and Singapore, as well as proposed Bilateral Investment Treaties and trade agreements, have adopted different definitions.

2. *Policy considerations*

Potential arbitrator conflicts of interest were among the first and most prominent issues that attracted attention with respect to third-party funders’ participation in international arbitration. More specifically, questions have arisen as to whether, how, to what extent and by whom disclosures should be made to allow arbitrators, parties, and institutions to assess potential conflicts of interest involving funders.

A number of factors contribute to increased interest in potential conflicts of interest due to the involvement of third-party funders. One frequently noted factor is that a number of leading arbitrators have taken positions within, or ad hoc consultant roles with, some funders. Other factors include the increasing number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, related links among

[39] See proposed Article 21 in ICSID Working Paper (March 2019) paras 121 et seq.

[40] Singapore International Arbitration Centre Practice Note, PN – 01/17 (31 March 2017), Administered Cases under the arbitration rules of the Singapore International Arbitration Centre, On Arbitrator Conduct in Cases Involving External Funding (31 March 2017) available at http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf.

[41] See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (22 September 2016) p. 5, at para. 24; A. GOLDSMITH and L. MELCHIONDA, “The ICC’s Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction”, Kluwer Arbitration Blog (14 March 2016) available at http://kluwerarbitrationblog.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding -a-step-in-the-right-direction/. Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration (1 March 2017) para. 24, available at https://iccwbo .org/publication/note-parties-arbitral-tribunals-conduct-arbitration.

elite law firms and some leading arbitrators, and what might fairly be characterized as general calls for increased transparency, including with respect to potential arbitrator conflicts. Against this backdrop, the potential for conflicts of interest for arbitrators in funded cases can materialize out of several possible scenarios.

With such a complex and multi-faceted topic, it is not surprising that there is considerable disagreement on several issues on disclosure. Despite ranging debate, today there is general consensus that disclosure by the funded party of the existence and identity of funders is necessary so that arbitrators could make appropriate disclosures and decisions regarding potential conflicts of interest. This approach is keeping with global trends in regulation of third-party funding, which increasingly requires disclosure of the existence and identity of the entity providing funding. It is also proposed that, absent exceptional circumstances, no other information except the existence and identity of third-party funders was required for the purposes of analysing conflicts of interest.

Other issues which require further examination is whether insurance and insurers should be included within the definition of entities that should be disclosed for the purpose of assessing potential conflicts of interest, and whether disclosure of the existence and identity of a funder should be as a matter of course in every case, or based on a request or order for disclosure by the arbitrators.

Ultimately, a proposal for systematic disclosure is proposed. This approach finds support in the latest ICSID Proposals for Amendment of the ICSID Arbitration Rules, with proposed Rule 13 introducing an obligation for a party to disclose the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defence of the proceedings.[42] The proposal for systematic disclosure is further supported by empirical research, notably the results of the 2015 Queen Mary School of International Arbitration Survey, in which 76 per cent of survey respondents agreed that that disclosure of the existence of third-party funding should be mandatory, 63 per cent believed that disclosure of the identity of the funders should be mandatory, and 71 per cent that the full terms of the funding agreement should not be disclosed.[43] The Queen Mary Survey also revealed support for the notion that systematic disclosure may make the use of funding a more routine part of arbitral dispute resolution.

V. Security for costs and potential reforms

The introduction of TPF in ISDS gives rise to a both doctrinal and policy issues concerning orders for security for costs. Both types of issues are discussed in turn.

Doctrinal issues concerning the existence of TPF and security for costs orders

There are two main doctrinal questions which arise in connection to TPF and security for costs. The first, and more straightforward, question is whether arbitral tribunals have the power to

[42] See proposed Article 21 in ICSID Working Paper (March 2019) paras 121 et seq.

[43] Queen Mary, University of London and White & Case, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (2015) available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-inter national-arbitration-survey-2015_0.pdf>. Notably, the support for funding apparently expressed in the Queen Mary Survey may not necessarily be representative since only 39% of those surveyed had experience with third-party funding in practice, and 9% were not even aware of it.

award security for costs. Here, it is generally accepted[44] that arbitral tribunals have the power to award security for costs either pursuant to legal provisions which expressly authority the issuance of security for costs orders (for example, under the English Arbitration Act 1996)[45] or pursuant to general provisions on interim measures.[46]

In relation to ISDS arbitration proceedings under the ICSID Rules in particular, it has been noted that one of the reasons why the general clause on interim measures contained in Article 47 ICSID Convention should cover security for costs is that, when the ICSID Convention was drafted in 1965, "*issues such as third-party funding and thus the shifting of the financial risk away from the claiming party were not as frequent, if at all, as they are today*".[47]

The proposals for amendment of the ICSID Rules include a specific provision on security for costs granting ICSID Tribunals the authority to "order any party asserting a claim or counterclaim to provide security for costs" upon request of a party.[48]

Even if express legal provisions allow arbitral tribunals to grant orders for security for costs, it has been argued that a tribunal will still have the power to order security for costs on the basis of its inherent power to preserve the integrity of the proceedings.[49]

The second and more complex doctrinal question is whether the fact that a party is funded by a third-party funder affects the tribunal's decision on security for costs.

Before we discuss the doctrinal considerations surrounding this issue, it is worthy addressing an important preliminary question with regard to whether states have a protected right to security for costs under ICSID arbitration in the first place.[50]

ICSID Convention provides that each party must abide by and comply with the terms of the award.[51] However, it is generally accepted that execution of the award is left to the national applicable law,[52] and therefore, because the ICSID Convention is not concerned with execution

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[44] BORN, *International Commercial Arbitration*, pp. 2494-2495.

[45] Section 38(3) of the English Arbitration Act 1996 provides that "The tribunal may order a claimant to provide security for the costs of the arbitration." See also Article 25.2 of the 2014 LCIA Rules providing that "*[t]he Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances*".

[46] See, e.g., French Code of Civil Procedure (2011), Art. 1468; Swiss Private International Law Act (2017), Art. 183(1); German Code of Civil Procedure, (2013) Art. 1041(1)

[47] *RSM Production Corporation v. Saint Lucia*, (ICSID Case No. ARB/12/10) Decision on Saint Lucia's Request for Security for Costs (13 August 2014) para. 55. Whether the explanation offered by the Tribunal in this case is accurate or supported by the history of drafting the ICSID Convention is questionable, and the question of the propriety and jurisdiction to order a State to post security for costs is much more complex.

[48] See proposed Rule 51(1).

[49] CRAIG, PARK and PAULSSON, *International Chamber of Commerce Arbitration*, p. 467 (who report that even when the ICC Rules did not yet contain a general clause for granting interim measures, 'ICC tribunals had found that they had the power to grant security for costs as part of their inherent powers in connection with the conduct of arbitral proceedings') (with further references); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. the Republic of El Salvador*, (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs (20 September 2012), para. 45.

[50] See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018) p. 172-173.

[51] ICSID Article 53(1).

[52] ICSID Article 54(3).

or collection of awards, including the collection of a possible costs award, some tribunals and arbitrators have questioned whether a defendant state has a “right” to security for costs which is protected under the ICSID regime.

In *Maffezini v. Spain* for example, the tribunal noted that there was no present right of the respondent state to be preserved.[53] In *Grynberg v. Grenada*, the dissenting arbitrator stated that “the use of the words ‘preserve’ and ‘preserved’ in [ICSID] Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction”.[54]

Other ICSID tribunals, such as the tribunal in *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*[55] and the majority decision in *Grynberg v. Grenada*, accepted that states have a right in a security for costs application, which is protected under the ICSID regime, even if under the circumstances of the case, the requested security for costs was rejected.

Relatedly, the tribunal in the recent, *Eskosol S.P.A. in Liquidazione v. Italian Republic*,[56] noted that “there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant’s ability to collect on a possible merits award, nonetheless should intervene to protect a State’s asserted “right” to collect on a possible costs award”. While the tribunal in the *Eskosol* case decided not to address this matter as the respondent had failed to demonstrate that the security for costs request was urgent even assuming that the state had a protectable right, it went on to observe that:

> “The Tribunal accepts that respondent States have genuine concerns about their ability to enforce an eventual costs award against unsuccessful claimants, and some States are starting to raise the possibility of reforms to the ICSID system to protect themselves more systematically. But at the same time, such States would be unhappy to see a similar argument about a right to effective relief used against them, for example by claimants worried about collection risk associated with any final merits award of compensation.”[57]

While this is still an emerging issue, it is important to emphasise that eventually only a relatively small number of tribunals have questioned, and mostly in a tentative fashion, states’ right to security for costs under ICSID arbitration. Accordingly, it would be safe to argue that unless there is a critical mass of ICSID awards deciding otherwise, there is currently no valid doctrinal justification that would prevent a state from pursuing a security for costs application before an ICSID tribunal.

We now turn to discuss the question of whether the existence of a third-party funding agreement may affect the tribunal’s decision on security for costs.[58] From a review of a growing

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[53] *Emilio Agustín Maffezini v.Kingdom of Spain*, (ICSID Case No. ARB/97/7) Procedural Order No. 2 (28 October 1999) para. 15.

[54] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, (ICSID Case No. ARB/10/6), Tribunal’s Decision on Respondent’s Application for Security for Costs (14 October 2010), para. 5.16, in fn. 9.

[55] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015).

[56] *Eskosol S.P.A. in Liquidazione v. Italian Republic*, (ICSID Case No. ARB/15/50) Procedural Order No. 3 (Decision on Respondent’s Request for Provisional Measures), (12 June 2017) para. 35.

[57] *Ibid.*, para. 34.

[58] See in more detail, See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018), p. 173 et seq.

number of cases dealing with this matter, it appears that tribunals in ICSID arbitration tend to adopt a stricter test than the claimant's impecuniosity to order security for costs: they usually require evidence of abusive conduct or bad faith on the part of the claimant,[59] such as evidence that the claimant has a track record of deliberately failing to comply with costs awards.

While this appears to be an increasingly accepted test for investment arbitration tribunals, it is questionable whether such a high threshold is warranted. It can reasonably be argued that, if the respondent state was subject to an unsuccessful claim, it should be able to recover costs at the end of the arbitration regardless of whether the claimant is acting in bad faith or not. On the other hand, an investor may claim that it would be unreasonable for a tribunal to order an investor to meet a security for costs order, because the state's unlawful conduct (assuming that the state's conduct in question is indeed unlawful) has diminished or even expropriated their investment in the first place, and has left the investor with limited or no available funds to conduct a usually costly investor-state arbitration. This can be a powerful argument, not least because it raises, from the investors' perspective, issues of access to justice.[60] Of course, these arguments are predicated more on larger policy considerations, which are discussed in more detail below.

In practice, when investor-state tribunals decide security for costs requests, usually at an early stage of the arbitration process, they tend not to presume that the state's conduct has actually left an investor with limited available funds to avoid prejudging the merits of the dispute and thus violating fundamental principles of procedural fairness.

This explains why investment tribunals tend to focus on other considerations, which are not directly related to the merits of the dispute, but nevertheless set a high threshold for a claimant to be subject to a security for costs order in investment arbitration, including for example the requirement that the claimant has exhibited abusive conduct by repeatedly failing to comply with costs orders or deliberately dissipating its assets.

Against this background, it is perhaps unsurprising that investment arbitration tribunals have consistently dismissed applications for security for costs in the past. In doing so, these tribunals have relied on a range of different arguments, such as the following:

- impropriety of prejudging the claimant's case on the merits;[61]
- failure on the part of the respondent to establish concrete risk of non-payment;[62]

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[59] See, e.g., *South American Silver Limited v. The Plurinational State of Bolivia*, (PCA Case No.2013-15), Procedural Order No. 10 (11 January 2016), para. 59; *RSM Production Corporation v. Saint Lucia*, (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (13 August 2014), para.75 and the cases cited therein.

[60] See similar concerns expressed in commercial arbitration by E. SCHWARTZ, "Security for Costs and Third-Party Funding, a Bridge Too Far", in *Liber Amicorum William Laurence Craig*, (LexisNexis 2016) 371-388.

[61] *Emilio Agustín Maffezini v. Kingdom of Spain*, (ICSID Case No. ARB/97/7), Procedural Order No. 2 (28 October 1999), para. 21; *Libananco Holdings Co. Limited v. Republic of Turkey*, (ICSID Case. No. ARB/06/8), Decision on Preliminary Issues (23 June 2008), para.59; *Guaracachi America, Inc. (U.S.A.) and Rurelec plc (United Kingdom) v. Plurinational State of Bolivia*, (PCA Case No. 2011-17), Procedural Order No.14 (11 March 2013), para. 8.

[62] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, (ICSID Case No. ARB/98/2), Decision on Provisional Measures (25 September 2001), para. 89; *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, (ICSID Case No. ARB/11/18), Procedural Order No. 2 (3 May 2012), para. 39; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, (ICSID Case No. ARB(AF)/07/3), Award (19 May 2010), para. 9; *Abaclat and others v. The Argentine Republic*, (ICSID Case No. ARB/07/5), Procedural Order No. 10 (18 June 2012); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, (ICSID Case No. ARB/10/6) Tribunal's Decision on Respondent's Application for Security for Costs

- there is nothing unusual in the fact that the claimant is a vehicle or has no assets and this does not justify a security for costs award;[63]
- a security for costs award would limit claimant's access to justice;[64]
- the rejection of the security for costs application does not pose a threat to the integrity of the proceedings.[65]

In a well-known assenting opinion in the *RSM Production Corporation v. Saint Lucia*, it was stated that the existence of a third-party funding agreement is in itself a reason for ordering security against the funded party, or at least shift the burden of proof to the effect that the funded party must make a case why security should not be granted.[66] The implication behind this view is that the existence of third-party funding can be taken as an element of bad faith on the grounds that the simple fact of recourse to funding can result in situations where the claimant's expenses are being covered by a third party who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost.

However, to date, the overwhelming majority of ISDS awards have rejected the suggestion that mere recourse to third-party funding is a manifestation of bad faith which can in turn justify a security for costs award. Thus, the existence of a funding agreement alone has not been found by arbitration tribunals to be sufficient to grant security for costs.

Specifically, the first case to explicitly address the issue was *Guaracachi America Inc. and Rurelec plc v. Bolivia*, in which the tribunal refused to order security for costs.[67] Given the controversy that the question generated in the wake of *RSM Production Corporation v. St Lucia*, discussed below, it is worth citing the tribunal's reasoning *in extenso*: "[a]lthough investment treaty tribunals clearly hold the power to grant provisional measures, an order for the posting of security for costs remains a very rare and exceptional measure. (…) The Respondent has not, however, been able to supply evidence to justify the extraordinary measure that it requests. As a factual matter, the Respondent has not shown a sufficient *causal link such that the Tribunal can infer from the mere existence of third-party funding that the* Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether

(14 October 2010), para. 5.21; *Libananco Holdings Co. Limited v. Republic of Turkey*, (ICSID Case. No. ARB/06/8), Decision on Preliminary Issues (23 June 2008), para.59; *Guaracachi America, Inc. (U.S.A.) and Rurelec plc (United Kingdom) v. Plurinational State of Bolivia*, (PCA Case No. 2011-17), Procedural Order No. 14 (11 March 2013), para. 7, *Dawood Rawat v. Republic of Mauritius*, (PCA Case No. 2016-20), Order Regarding Claimant's and Respondent's Requests for Interim Measures (11 January 2017), para. 144.

[63] *BSG Resources Limited v. Republic of Guinea*, (ICSID Case No. ARB/14/22), Procedural Order No. 3 (25 November 2015), para.78; *Libananco Holdings Co. Limited v. Republic of Turkey*, (ICSID Case. No. ARB/06/8), Decision on Preliminary Issues (23 June 2008), para.59; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, (ICSID Case No. ARB/10/6) Tribunal's Decision on Respondent's Application for Security for Costs (14 October 2010), para. 5.19.

[64] *Burimi S.R.L. and Eagle Games SH.A. v. Republic of Albania*, (ICSID Case No. ARB/11/18), Procedural Order No. 2 (3 May 2012), para.41; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, (ICSID Case No. ARB/07/24), Award (18 June 2010), para.17; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. the Republic of El Salvador*, (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs (20 September 2012), para. 52.

[65] *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs (20 September 2012), para. 49.

[66] See notably *RSM Production Corporation v. Saint Lucia*, (ICSID Case No. ARB/12/10), Assenting Reasons of Gavan Griffith (12 August 2014).

[67] *Guaracachi America Inc. and Rurelec plc v. Plurinational State of Bolivia* PCA Case No. 2011-17, Procedural Order No. 14 (11 March 2013).

the funder is liable for costs or not. The Respondent's analysis of Rurelec's balance sheet and other related financial documents also does not sufficiently demonstrate that Rurelec will lack the means to pay a costs award or to obtain (additional) funding for that purpose. To the contrary, Rurelec appears to be an ongoing concern with assets beyond those involved in this arbitration and the Claimants have promptly paid all the requested deposits of costs with no suggestion that they have had trouble finding the necessary funds to do so."[68]

In *RSM Production Corporation v. St Lucia*, where an ICSID tribunal – for the first time ever in investment treaty arbitration – issued a security for costs order.[69] The respondent argued that, while no ICSID tribunal had ordered security before, such measure would be justified here, pointing out that the claimant had failed to pay ICSID's advance on costs, had not honoured costs awards rendered against it in a number of previous ICSID arbitrations, and that "the proceedings initiated by Claimant are funded by third parties". Claimant's counsel had admitted this already at a hearing on ICSID's advance on costs. The respondent further claimed that these third parties would not be liable for adverse costs, enabling the claimant to engage in "arbitral hit and run". The claimant contested the tribunal's jurisdiction to order security and additionally argued that a difficult financial situation would not be sufficient to justify a grant of security payment against claimants in ICSID proceedings. Additionally, claimant challenged whether its current conduct would give reason to doubt about its willingness to pay adverse costs.

In reaching its decision to order security, the RSM tribunal did take into account that the claimant was impecunious and was funded by a third-party that could presumably not be made responsible for any adverse costs award. Notably, the tribunal pointed out that it would be "unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential cost award". Yet, the decisive factor for the tribunal to grant the requested security for costs was the fact that the claimant had a proven history of not complying with costs awards rendered against it. The fact that the third-party funder was not revealed (and was therefore unknown) to the tribunal was incidental in the tribunal's reasoning.[70]

In *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*,[71] the respondent advanced strikingly similar arguments, arguing not only that it had a good case on the merits, but also that the claimants "'have a history of engaging in fraud and reneging on payment obligations' and that they do not have the means to pay for the costs of the arbitration proceedings, which are entirely funded by third parties". The claimants contested the tribunal's power to order security for costs, argued that ordering security would unduly restrict their access to justice, and that their financial difficulties were "in large part attributable to acts and omissions of Respondent". The arbitrators explicitly distinguished the case before them from *RSM Production Corporation v. Saint Lucia* and denied the respondent's security request, pointing out that "the underlying facts in [the *RSM*] arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively." The tribunal went on to note that the respondent had failed to establish that the claimants had defaulted on their payment obligations in the present proceedings or in other arbitration proceedings. It concluded by making it clear that

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[68] *Ibid*., paras. 6-7.

[69] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014).

[70] *Ibid*., para. 86. It is worth noting that on fifteen pages of reasons, only one paragraph is in truth devoted by the tribunal to third-party funding.

[71] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, (ICSID Case No. ARB/14/14), Procedural Order No. 3 (23 June 2015).

"financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs".

In *South American Silver Limited v. The Plurinational State of Bolivia*, the respondent argued that the claimant was an impecunious shell company which was funded by a third party, which in combination, according to some arbitrators, would create "a prima facie case for granting the cautio judicatum solvi", meaning that the burden of proof is transferred to the funded party, who must prove why the cautio judicatum solvi should not be ordered.[72] Referring to *RSM v. St. Lucia*, the claimant pointed out that "the only investment tribunal that has ever issued security for costs did so primarily because of the claimant's notorious history of failing to pay prior cost awards", and that the position that "the mere uncertainty as to the existence of a third-party funder's obligation to reimburse constitutes 'compelling grounds for security for costs' correspond[s] to a minority view", while "[t]he majority of international tribunals have stated the contrary in recent decisions, and on the contrary, the existence of a funder indicates that the claim is plausible on the merits". The PCA tribunal transferred the "extreme and exceptional circumstances-test" favoured by ICSID tribunals into the framework of Article 26 of the applicable UNCITRAL Arbitration Rules, concluding that "Bolivia's mere analysis of SAS' or SASC's balances and other related accounting documents, or the mere existence of a third-party funder do not meet the high threshold set forth by investment tribunals."[73] In reaching this conclusion, the tribunal explicitly referred to the two previously mentioned cases, and confirmed that "the mere existence of a third-party funder is not an exceptional situation justifying security for costs", explaining that:

> "[i]f the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims."[74]

In a procedural order issued in April 2017 in the case *Eskosol S.P.A. v. Italy*,[75] the tribunal rejected the respondent's request for an order that the claimant post a bank guarantee of US$ 250,000 or prove it had obtained an undertaking from its third-party funder to pay any costs awards against it, notwithstanding the fact that the claimant had been declared insolvent and placed under receivership in 2013. In its security for costs application the respondent argued that the claimant's insolvency made it unlikely that it would be able to meet any adverse costs, if the claim was declined. The respondent further argued that a security for costs order was necessary and urgent because it had "a suspicion" that the claimant was funded by a third-party funder, which –according to the respondent- increased the risk that the claimant would not comply with a costs order. Responding to the security for costs application, the claimant confirmed that it had been funded by a third-party funder which had assisted the claimant to purchase an ATE insurance policy protecting the company against adverse costs of up to Euro 1 million. While accepting that the claimant's insolvency meant that the claimant would be unable to meet an adverse costs award from its own funds, the tribunal stated that the ATE

[72] *South American Silver Limited Bolivia v. The Plurinational State of Bolivia*, (PCA Case No.2013-15), Procedural Order No. 10 (11 January 2016), para. 27, citing *RSM Production Corporation v. Saint Lucia*, (ICSID Case No. ARB/12/10), Assenting Reasons of Gavan Griffith (12 August 2014).
[73] *South American Silver Limited Bolivia v. The Plurinational State of Bolivia*, (PCA Case No.2013-15), Procedural Order No. 10 (11 January 2016), paras. 59, 83.
[74] *Ibid*., para. 77.
[75] *Eskosol S.P.A. in Liquidazione v. Italian Republic*, (ICSID Case No. ARB/15/50) Procedural Order No. 3 (Decision on Respondent's Request for Provisional Measures), (12 June 2017). See also above p. 173.

insurance policy was sufficient to cover the amount of costs requested by the respondent. The tribunal thus concluded that the respondent had failed to demonstrate that it was either necessary or urgent to grant the security for costs application.

However, in two recent procedural orders issued in July 2017 in relation to the same investment dispute in the parallel cases of *Luis Garcia Armas v. Venezuela* and *Manuel Garcia Armas et al. v. Venezuela*,[76] the tribunal (sitting in both cases) ordered the funded claimants to provide evidence on their solvency before deciding a request for security for costs made by the respondent state.

In these two cases, the claimants had voluntarily disclosed the existence of a third-party funding agreement. In response to a request by the respondent state, the tribunal had subsequently ordered the claimants to disclose the actual terms of their funding arrangements. Because the funding agreement included a provision that the funder did not undertake to finance any adverse costs related to the arbitration, the respondent requested the tribunal to order the claimants to post a US$ 5 million bond as security for adverse costs.

Before deciding on the request for security, the tribunal, siting under the UNCITRAL Arbitration Rules, asked the claimants to provide reliable evidence of their solvency, including asset valuations. The claimants were also directed to inform the tribunal of the jurisdictions where those assets were located, in order to assess the enforceability of any future adverse costs order. Eventually, in a procedural order dated 20 June 2018, the arbitral tribunal ordered the claimants to issue a security for costs in the amount of US$1.5 million holding that the existence of a third-party funder and the fact that the third-party funding agreement expressly provided that the funder will not cover any adverse costs were relevant for determining if the claimant should be ordered to issue a security for costs.

A. Policy considerations concerning the existence of TPF and security for costs orders

The discussion above sets out the legal framework and practical considerations which emerge through existing case law addressing security for costs in ISDS. In developing legal rules and principles on security for costs applications against the existence of third-party funding agreements, ISDS arbitral tribunals are naturally constrained by the applicable legal framework of the existing ISDS rules and BIT/IIA's.

However, it is increasingly accepted that the existing legal framework does not necessarily capture some important policy considerations which have emerged in the course of the public and scholarly discourse in the last decade. This partly explains why the recent ICSID proposals for amendment of its Rules introduce a stand-alone provision on security for costs, which while it does not refer to the existence of third-party funding, it expressly confers wide discretion on ICSID tribunals, pursuant to proposed Rule 51(3), to "*consider all relevant circumstances in determining whether to order security for costs*".[77]

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[76] *Luis Garcia Armas v. Venezuela and Manuel Garcia Armas et al. v. Venezuela*, (ICSID AF Case No. ARB(AF)/16/1) Procedural Order (7 July 2017) administered by ICSID's Additional Facility Rules; PCA Case No. 2016-08, administered by the Permanent Court of Arbitration, (Both with the seat in The Hague, The Netherlands).

[77] Proposed Rule 51 which currently reads as follows:
"Rule 51 Security for Costs
(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs
(2) The following procedure shall apply:
(a) the request shall specify the circumstances that require security for costs;
(b) the Tribunal shall fix time limits for written or and oral submissions, as required, on the request;

The recent ICSID Working Paper # 2 explains in this regard:[78]

> *"*Proposed AR 51(3) does not include other specific criteria suggested by commentators. In particular, WP # 2 does not implement the suggestion of many States to include an express reference to third-party funding. Including third-party funding among the listed factors in AR 51(3) would suggest that third-party funding is relevant in every case. However, there appears to be a consensus among the comments received that third-party funding is not always relevant to a request for security for costs. Parties know of the existence of third- party funding from an early stage in accordance with the disclosure obligation in proposed AR 13, and can assess whether to raise this fact in the context of a request for security for costs. To the extent third-party funding is relevant to a party's ability to comply with an adverse cost award in a particular case, it would be considered under AR 51(3)(a).*"*

In this context, therefore, it is important to explore a number of wider policy considerations that may affect the approach of ICSID tribunals in deciding security for costs applications, or further inform potential future reforms outside the context of ICSID Rules.[79]

Specifically, one of the main purposes of security for costs orders is to deter frivolous claims and make a prevailing respondent whole at the end of a case. Those purposes, however, assume that a losing claimant will be able to pay the adverse costs award.[80] These concerns were historically also accompanied by assumptions that the provision of third-party funding necessarily implied a funded party was impecunious or would otherwise be unable to satisfy a potential adverse costs award.

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and
(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:
 (i) the constitution of the Tribunal;
 (ii) the last written submission on the request; or (iii) the last oral submission on the request.
(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider:
 (a) that party's ability to comply with an adverse decision on costs and;
 (b) that party's willingness to comply with an adverse decision on costs;
 (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim;
 (d) the conduct of the parties; and
 (e) all other relevant circumstances.
(4) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.
(5) If a party fails to comply with an order for to provide security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
(6) A party must shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
(7) The Tribunal may at any time modify or revoke its order for on security for costs, on its own initiative or upon a party's request."

[78] Para 363.

[79] See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018) pp. 221 et seq.

[80] See Memorandum of 12 June 2016 from I. A. ZARAK, Acting Minister of Economy and Finance of Panama, to Meg Kinnear, International Centre for Settlement of Investment Disputes, available at http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop_memorandum_to_icsid_administrative_council_re_effective_protection_english_version_2_219116_1641.pdf.

However, the assumption that funding *necessarily* signals an impecunious claimant is not always accurate.[81] Third-party funding can provide resources for a respondent state, and is sometimes also being undertaken not out of financial necessity, but as a means of allocating corporate resources and risks. Nevertheless, there are still many cases in which claimants seek funding because they do not otherwise have the resources to pursue those claims. In this category of cases, third-party funding can indeed enable a party that has had all of its assets wrongfully expropriated to nevertheless to pursue a remedy. In such a case, an order for security for costs could prevent a party that has no or limited resources to meet a security for costs award, even though its lack of resources was caused by the responding state's allegedly improper expropriation of its assets.

On the other hand, a number of respondent states and related stakeholders have suggested that it would be particularly unfair, now that the trend in the allocation of costs in ISDS cases is for costs to follow the event, if a prevailing state cannot collect costs against an impecunious claimant or be reimbursed by the third-party funder that was prepared at the outset to share in the risk of making a potential gain. As noted by Panama in its letter to ICSID, prevailing states have pursued costs awards not voluntarily paid by investors, and in a significant percentage of cases, states have been unable to collect on costs awards.[82] Following Panama's letter, the ICSID Secretariat conducted a survey on compliance with and enforcement of costs awards. The survey demonstrated a significant number of non-compliance, namely 12 of the 34 Awards of Costs and/or Damages in favour of the State.[83] The same concerns have been expressed by some states at the UNCITRAL Working Group III, which also pointed out that that investors had also used shell companies, or became impecunious, making cost recovery by States impossible.[84]

Relatedly, some commentators suggest that third-party funding is an enabling factor for the increase of investment arbitration caseloads and the potential financial strain on states.[85] Thus, to the extent the availability of funding may increase the overall number of cases brought, some states and commentators are concerned that an overall increase in the number of investment arbitration cases will pose a unique burden on states, particularly small states and states facing domestic economic challenges.

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[81] See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018), Chapter 2, pp. 20-24; 33-37 (describing why parties seek funding, and different types of financing or insurance that can provide for satisfaction of an adverse costs award).

[82] Reporting on a recent survey, the letter notes that "Responses to the survey also indicated that, among the twenty-two costs awards in favor of respondent states that had been paid either in full or in part, fourteen awards were paid voluntarily (64%), two awards were paid pursuant to a settlement (9%), and six awards were paid through enforcement (27%)." *Ibid*. at 3 (citing J. GILL QC and M. HODGSON, "Costs Awards – Who Pays?", 10 Global Arbitration Review (15 September 2015, Issue 4), available at http://globalarbitrationreview.com/article/1034757/costs-awards-%E2%80%93-whopays.

[83] See https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf.

[84] UN Doc. A/CN.9/964, paras. 129–130, https://undocs.org/en/A/CN.9/964.

[85] M. MORPURGO, "A Comparative Legal and Economic Approach to Third-Party Litigation Funding", 19 Cardozo Journal of International and Comparative Law (2011) p. 352; and M. STEINITZ, "Whose Claim Is It Anyway? Third-Party Litigation Funding", 95 Minn. L. Rev. (2011) p. 1267.

This type of concerns relates to the broader structural imbalance in the ISDS system that generally allows investors, but not states, to bring claims before ISDS tribunals,[86] with some commentators arguing that the existence of third-party funding "may exacerbate problems with underlying investment standards and the ISDS mechanism" as it "introduces a new actor into the ISDS system with its own incentives for challenging, inter alia, the type of robust government regulation that is needed to advance sustainable development objectives".[87] These views even challenge the broader contribution of third-party funding to the ISDS system, suggesting that while the risks associated with the existence of third-party funding "are increasingly apparent", the "value of third-party funding to actors other than funders and some claimants has not yet been made clear".[88]

Of course, there is nothing that should, as a matter of principle, prevent funders to fund states, and many actually claim that offer equal funding opportunities to both claimants and investors, including in ISDS cases. One of the most prominent examples of pro bono third-party funding of a respondent state is the financial support for Uruguay in the *Philip Morris v. Uruguay* case.[89] In addition, there are reports of funding that is structured akin to ATE insurance and available for states is from a commercial funder, as well as funding for states' counterclaims or claims pursued against investors in alternative fora. The availability of such commercial funding would arguably encourage states to pursue claims or counterclaims (typically in other fora) that they might otherwise not forego for budgetary reasons. Some commentators, however, raise policy concerns about a portion of potential recovery awarded to a state to remediate local harms instead going to a third-party funder, and also note that under most investment treaties the ability to bring a counter-claim is extremely narrow. While the development of funding for states appears to be limited currently, the introduction of policies aiming to increase state funding is an important question to be considered. These policy considerations should also include proposals for the introduction of a system of legal aid for states in ISDS. This approach might be easier to conceive and introduce in the context of the proposed Multilateral Investment Court.

Other commentators note that the introduction of third-party funding is actually an important factor of reducing unnecessary costs and expenses in ISDS cases. Given their incentive to keep legal costs within predicted budget projections, the argument is that third-party funders may be more focused on efficiency than law firms that operate based on an hourly rate.[90] While it is ultimately funders' self-interest that motivates them to control costs, the effect of lower costs

[86] For an overview of State counter-claims, see, A. VOHRYZEK-GRIEST, "State Counterclaims In Investor-State Disputes: A History of 30 Years of Failure", 15 Int'l L.: Revista Colombiana de Derecho Internacional (2009) p. 83.

[87] Columbia Centre on Sustainable Investment Working Paper May 2019 (by Brook Guven and Lise Johnson), p. 38.

[88] Ibid.

[89] "The Anti-Tobacco Trade Litigation Fund", available at http://global.tobacco freekids.org/en/about_us/trade_litigation_fund/ ("The fund will support low- and middle-income countries that have been sued by tobacco companies in arbitration under international trade agreements. Managed by the Campaign for Tobacco-Free Kids, the fund will provide financial and technical assistance to governments committed to defending their laws to reduce tobacco use."). While that case was funded on a pro bono basis, there are reports that viable funding models are being developed both for States as respondents.

[90] Funders' cost-monitoring function has raised some questions about attorneys' independent professional judgments. These issues are generally the province of national ethical rules and the funding agreement, and for these reasons not considered directly in this Report, other than generally in ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018) Chapter 7 in a discussion of Best Practices. See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018) Chapter 2, pp. 29-30 and Chapter 7.

expended by claimants would arguably carry some potential incidental benefits for states, particularly if a successful claimant is awarded costs against a state.

Relatedly, funders raise cost-related concerns regarding disclosure. They argue that when the presence and identity of a funder is revealed, respondents often use that disclosure as a basis for bringing challenges to arbitrators, requests for further disclosure, and requests for security for costs. These reactions to disclosure of funding arrangements can slow arbitral proceedings, funders complain, and consequently significantly increase the costs of an arbitration. Funders and funded parties argue that many of these efforts are substantively unfounded and are instead simply tactics to delay proceedings and increase the costs of proceedings to make the funding model untenable.[91] In fact, the potential for such challenges is the primary reason why funders express reluctance at having their presence and identity disclosed.

Other funders take a more radical approach altogether arguing that security for costs should not have a place in arbitration generally. Under this view, the risk of an unenforceable award (including an unenforceable award for costs) is like any litigation risk, and should not be treated differently in the investment context. Systematic issuance of security for costs orders will simply raise the cost of third-party funding for investors, which will translate into reduced recovery margins for funders or a restriction on the availability of funds. Either scenario, it is argued, will reduce the ability of genuinely aggrieved investors to seek redress for alleged wrongs through investment arbitration.

Further funders state that, as a general matter, they are relatively ambivalent about the imposition of security for costs because that amount can be factored into a funding agreement. The greater problem, under this view, is the uncertainty about whether security for costs will be granted, and the time and delay that often accompanies the request for costs. In light of this observation, some proposals have been made to make security for costs more generally available.

In light of the above policy considerations a number of potential policy options on third-party funding and security for costs exist.

First, to expressly include the existence of third-party funding as one of the factors which should be considered by ISDS tribunals in deciding security for costs applications. This was the preferred view of a number of states that participated in the public consultation for the proposed amendments on the ICSID Rules. For example, while it agreed that the mere existence of third-party funding is not necessarily sufficient to require a party to provide security for costs, Canada expressed the view that the existence of third-party funding "*might be a relevant factor*" and noted that it "sees no reason not to list it in Rule 51(3)", adding that "merely including it in the list does not suggest that it is determinative in every instance, just that the Tribunal should consider it".[92] A similar view was expressed by Australia,[93] Costa Rica[94] and Argentina.[95]

[91] Unforeseen delays or increases in legal costs can change the assumptions on which funding was provided and make otherwise potentially meritorious claims unprofitable from the funder's perspective. See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018) Chapter 2, pp. 29-30.
[92] https://icsid.worldbank.org/en/Documents/Canada_CommentsWP2_06.10.2019.pdf
[93] https://icsid.worldbank.org/en/Documents/Australia_CommentsWP2_06.14.19.pdf
[94] https://icsid.worldbank.org/en/Documents/Costa%20Rica_CommentsWP2_06.13.2019.pdf
[95]https://icsid.worldbank.org/en/amendments/Documents/Argentine%20Republic_Comments_12.28.18.pdf

At the same time, it should be noted that some other states took a different position. For example, in their comments to the proposed amendments to the ICSID Rules, the European Union and its Members States stated on this point that they "*support the proposal of the ICSID Secretariat that the mere presence of third-party funding should not* ipso facto *warrant a security for costs order*".[96]

Relatedly, the proposed Rule 51(3) has also been criticised on the ground that it is not appropriate to allow security for costs orders against both claims and counterclaims. As is argued by the International Institute for Sustainable Development, security for costs should be intended to remedy the inherent structural imbalance in the current ISDS system whereby, while "states often face problems enforcing an order of costs against claimants who declare bankruptcy, move across jurisdictions or hide their assets, investors can rely on the enforcement mechanism of the ICSID Convention to obtain satisfaction from a state."[97] Accordingly, it is argued that ICSID member states should consider amending proposed 51 to allow for the security for costs *of the state only*.[98]

Of course, while the ICSID amendment process is rightly concerned to take account of the, often diverging, views and interests of a wide range of Member states, individual states can pursue their own policy priorities by considering whether to introduce in BITs/ IIAs provisions different requirements for ISDS tribunals to grant security for costs orders. Indeed, some BIT's, including EU-Vietnam FTA, the EU-Mexico FTA, the Australia-Indonesia FTA, do include specific provisions on security for costs orders. In this regard, they can introduced more detailed rules or guidelines aiming to prevent the possibility that third party funders avoid paying the costs of the prevailing states at the end. Such guidelines, for example, may include the listing circumstances in which an arbitral tribunal should (or indeed must) order security for costs where there is a reason to believe that the investor has structured the enterprise or divested assets to avoid the consequences of the arbitral proceedings; or the investor has disclosed the existence of a third-party funding arrangement in which the third-party funder has not committed to irrevocably undertake adverse costs liability.[99]

Another option would be for states to include provisions to the effect that funders are required to accept a "deed of submission" to the jurisdiction of the tribunal, similar to how some funders in Australia submit to a court's jurisdiction for the purpose of the court to make adverse costs orders directly against the funder should that become necessary.[100] This proposal could provide an alternative source of assurance to states and avoid the need for applications for security for costs.

Second, to consider lowering the currently high threshold for granting securing for costs applications, as above. While lowering the current standards for security for costs can, arguably, work to prevent frivolous claims, it may also increase the funding costs and eventually the costs that the state may have to pay if it loses the arbitration.[101]

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[96] Para 29: https://icsid.worldbank.org/en/Documents/EU_6.7.2019.pdf
[97] IISD Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules, Section. 3.5
[98] Ibid.
[99] Ibid.
[100] See *Traderight Pty Ltd v. Bank of Queensland Ltd* [2010] NSWSC 1502 at [95] per Ward J.
[101] Cf Nadia Darwazeh and Adrien Leleu, "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding', Journal of International Arbitration" (2016) 33 (2) Kluwer Law International 125.

Third, to adopt a presumption that that security for costs would be posted in every case, and a parallel presumption that the costs of that security (i.e., the cost of funding, the cost of ATE insurance premiums, or the cost for a bank guarantee) would be shifted at the end of the case, along with other costs.[102] Under this policy option, proposed by the Columbia Centre for Sustainable Investment, each party would be made financially whole at the conclusion of the case – if the state prevails it would be sure to recover on any costs award, and if the investor prevails it would recover not only its legal costs, but also costs associated with security. Arguably, however, each side would also benefit by the reduction or elimination in the often costly and time-consuming process for applying for and resisting an order for security for costs.

While this is an interesting idea, a number of practical issues will have to be addressed to make this idea into a workable proposal. One potential concern with tis proposal, for example, is that the cost of security is likely to be much higher than interest on the amount. An impecunious claimant does not likely have cash on hand to put in escrow, or have the option of obtaining a traditional loan from a bank. As a consequence, that party might seek the amount for security of costs through a conventional third-party funder. In that instance, from the state's perspective, the cost of that security would be exceptionally high. As one commentator explains,

> "if a claimant is ordered to post USD 500,000 as security for costs by a tribunal, the cost of that security for the claimant (if the claimant is impecunious and has to require that additional amount from the third-party funder, which will often be the case) may be USD 1,000,000 or more, that will come in deduction of the claimant's entitlement if it prevails in the arbitration. Should states that do not prevail in arbitration bear that additional cost?"[103]

A bank guarantee may be an alternative to a cash deposit, but can be similarly expensive. Yet another option may be ATE insurance, which is already often procured together with third-party funding, and which may be a lower cost alternative. The purpose of this type of insurance is to provide for coverage in the event a claimant is liable for adverse costs.[104] In *Eskosol S.p.A. v. Italy*,[105] the tribunal found that Italy's request for security for costs was not urgent because the claimant had purchased ATE insurance that would cover a potential adverse award of costs. Claimants in financial difficulties may not be able to afford the premiums for ATE insurance.

B. Binding costs orders on Funders

An important issue which gives often rise to discontent on the part of respondent states is whether whether a third-party funder may be ordered to pay adverse costs should the funded claim fail. This is an issue which closely relates to the previous discussion about the limitations of the current system of security for costs: if a prevailing respondent state is unable to enforce at the end of the arbitration an award order against the funder behind a claimant, which can either be a shell company or a company with limited financial resources, the justification for a security for costs order at the outset of the proceedings becomes obvious. However, and as discussed above, making security for costs orders easier to obtain may have some unintended

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[102] See in more detail ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018), p. 224-225. See also CCSI Working Part p.40 and fn. 171.
[103] See HONLET, "Recent decisions on third-party funding in investment arbitration", p. 712 and n. 76.
[104] See *Eskosol S.p.A. v. Italy*, ICSID Case No. ARB/15/50.
[105] *Eskosol S.P.A. in Liquidazione v. Italian Republic*, (ICSID Case No. ARB/15/50) Procedural Order No. 3 (Decision on Respondent's Request for Provisional Measures) (12 June 2017).

consequences both for investors and for the states, including for example that the funding costs can increase so that access to justice may be restricted for the claimant and costs awards may become more expensive for unsuccessful states at the end.

In the light of the possible limitations associated with a possible reform of the current system of security for costs, it is important to explore other policy options to address the structural imbalance in the existing ISDS system and the reasonable concerns on the part of the states that claimants are currently allowed to receive the benefit of third-party funding but prevailing respondents are typically left without any means to recover their costs at the end of the proceedings. In this regard, one important policy option to consider is to make costs orders binding on funders. This issue tends to divide commentators. For example, in the public consultation period of the ICCA-Queen Mary Task Force, a large number of comments where received on this point.[106]

On the one hand, some comments sought to challenge the idea behind the proposition that funders should be liable for adverse costs. As it was noted, a funder cannot be equated to a party, as it does not have the same degree of control over the conduct of the dispute or knowledge of all the facts (for example, which might lead to the claim being dismissed). On the other hand, the majority of the comments suggested that it would be fair for a funder whose investment might turn out to be very profitable in the event of a successful claim, to be directly liable for adverse costs in case its investment turns out to be unsuccessful. The fairness implications of the majority are, in our view, compelling, clear and straight-forward: a funder who benefits financially if the client wins should not be able to walk away without any responsibility for adverse costs if the client loses.

There is force in the argument that a third-party funder, who stands to profit if the arbitration outcome is successful for the funded party, should be held directly liable for costs awarded against the funded party or at least for costs which are awarded as a consequence of the outcome of the case.[107] By contrast, for any costs incurred as a result of the funded party's conduct in the arbitration, third-party funders should not typically be held accountable, especially when they exercise limited control over the way the funded party and its counsel conduct themselves in the arbitration.

Further considerations would militate in favour of according tribunals the power to award costs directly against funders. For example, the ability of a tribunal to make direct costs orders against a third-party funder would provide counterparties in arbitration with appropriate certainty that any adverse costs orders will eventually be paid, if not by the funded party then by the third-party funder itself. Importantly too, the eventuality that funders may be held accountable for costs awards would offer further disincentive for funders to fund proceedings which are not clearly meritorious. This risk to third-party funders is often addressed by them by requiring the funded party to take out ATE.

These views are in line with the "substantial majority" of the submissions received by the Hong Kong Law Reform Commission during its public consultation, which supported the position that tribunals should be "given the power to make Third Party Funders directly liable for

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[106] See ICCA-Queen Mary Task Force Report on Third-Party Funding International Arbitration, ICCA Reports No. 4 (2018).
[107] Hong Kong Law Reform Commission's Final Consultation Paper, (2015).

adverse costs awards in appropriate circumstances".[108] As the HK Law Reform Commission's further noted, "there is no evidence that full liability [of funders] for adverse costs would stifle third-party funding or inhibit access to justice";[109] if a third-party funder has confidence in the matter it is funding, it will not be concerned with its potential liability.

Doctrinally, this is a challenging option to pursue in the context of arbitration, including ISDS arbitration. In national judiciaries which can have default authority over third party funders who operate within their jurisdiction and are involved in a dispute before them. Indeed, courts in England[110] and the United States[111] have ruled, in the context of litigation funding, that costs can be awarded against third-party funders if they have obtained a sufficient degree of economic interest and control in relation to the claim. In the context of litigation funding, courts have emphasized that the third-party funders seek to gain financially from claims as much as the funded parties and that "the derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs" on the same basis as the funded claimant.[112]

In contrast, international arbitral tribunals have no authority over a third party funder who, even when their existence is disclosed, remain typically third parties vis-à-vis the arbitration agreement and the arbitration process. Thus, unlike state courts, which may be endowed with the power to order third parties to bear procedural costs by virtue of statutory procedural law, arbitral tribunals will typically lack jurisdiction to issue a costs order against a third-party funder because of the consensual nature of arbitration.

In the context of commercial arbitration, a number of non-signatory theories and legal constructs have developed in the course of the last thirty years, in particular, to address concerns the question of non-signatories.[113]

For example, a wide number of jurisdictions, including Austria,[114] England,[115] France,[116] Germany,[117] Switzerland[118] and the US[119] accept the idea that when a claim or a contract is

[108] Hong Kong Law Reform Commission's Final Consultation Paper, (2015).
[109] Hong Kong Law Reform Commission's Final Consultation Paper, (2015) para. 4.70 citing Jackson LJ.
[110] *Excalibur Ventures LLC v. Texas Keystone Inc. & Ors v. Psari Holdings Limited & Ors*, English High Court (Queen's Bench, Commercial Court), (Case No. 2010 Folio 1517), Order of 23 October 2014, [2014] EWHC 3436, paras. 4, 161 confirmed by the Court of Appeal in *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2016] EWCA Civ 1144; *Arkin v. Borchard Lines Ltd. & Ors*, English Court of Appeal, Judgement of 16 May 2005, [2005] EWCA Civ 655 ("[w]here … the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs"). See also the most recent case about a non-party costs order against insurers *Legg and others v. Sterte Garage Ltd and another* [2016] EWCA Civ 97, where the Court of Appeal held that a costs order against the insurers was warranted because "(1) the insurers determined that the claim would be fought; (2) the insurers funded the defence of the claim; (3) the insurers had the conduct of the litigation; (4) the insurers fought the claim exclusively to defend their own interests; (5) the defence failed in its entirety".
[111] *Mohammed Abu-Ghazaleh et al. v. Gerard Martin Demerutis Chaul et al*, Florida Third District Court of Appeal, (Nos. 3D07–3128, 3D07–3130) Decision of 2 December 2009, 36 So. 3d 691.
[112] *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2016] EWCA Civ 1144.
[113] See more generally, Stavros Brekoulakis, *Third Parties in International Arbitration* (OUP 2009).
[114] OGH 13 June 1995, 4 Ob 533/95, SZ 68/112.
[115] E.g. *Montedipe v JTP-Ro Jugotanker* (*The Jordan Nicolov*) [1990] 2 Lloyd's Rep 11.
[116] CA Paris, *CCC Filmkunst v EDIF* 28 January 1988, (1988) Rev Arb 565.
[117] 12 November 1990—Bundesgerichtshof (Federal Supreme Court), in A-J van den Berg (ed), *Yearbook of Commercial Arbitration xvii* (Kluwer 1992) 510–12.
[118] E.g. Switzerland Swiss Federal Tribunal, 9 May 2001, (2002) 20 ASA Bull 80.
[119] *E.g. Asset Allocation and Management v Western Employer 892 F 2d 566* (7th Cir 1989).

transferred to a third party by way of assignment, the arbitration clause contained in that contract will be transferred to that party too.

Similarly, under most national laws, when two parties agree to grant the substantive benefit of their contract to a third party, the third party beneficiary may benefit from the arbitration clause in that contract too.[120] Likewise, it is generally accepted that when an agent possesses actual authority and power to sign an arbitration agreement in the name and on behalf of the principal, the non-signatory principal will be bound by the arbitration agreement.[121] General principles of agency law also come into play when a non-signatory, typically a State, attempts to rely on idiosyncratic formalities of its national law to deny that it has validly authorised a state entity to sign an arbitration agreement on its behalf. In these circumstances, tribunals have applied the legal doctrine of *apparent* or *ostensible authority* to compel the non-signatory State to arbitrate, especially if the State has given the reasonable impression that the state entity was generally acting on behalf of the State.[122]

On other occasions, national courts, mostly in the US, have relied on principles of *estoppel* to compel a non-signatory to arbitrate when the latter seeks to enforce substantive rights under a contract that contains an arbitration clause.[123] When, for example, a non-signatory buyer brings a claim directly against the manufacturer relying on warranty provisions in the contract between the manufacturer and the distributor, the non-signatory buyer may be estopped from denying the arbitration clause in the contract between the manufacturer and the distributor.[124]

Further, the doctrine of lifting the corporate veil, which was originally developed in company law to prevent abuse of the legal principle of limited liability,[125] has been used to deal with non-signatories in arbitration too. Some national courts and arbitration tribunals, albeit in exceptional only circumstances, have lifted the corporate veil of the signatory subsidiary to find that the non-signatory parent company is the true party to an arbitration agreement, especially if the subsidiary is insolvent at the time a dispute arises or lacks sufficient funds to cover the damages requested by the claimant.[126]

Finally, a number of arbitration tribunals in the 1980s and 1990s relied on the doctrine of group of companies to assume jurisdiction over non-signatories in disputes involving corporate groups. [127]

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[120] E.g. *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm) and more recently *Fortress Value Recovery Fund I LLC & Ors v. Blue Skye Special Opportunities Fund LP & Ors* [2013] EWCA Civ 367. Cf also UK Contracts (Rights of Third Parties) Act 1999, s 8 provides that where a party conferred to a third-party beneficiary is subject to a valid arbitration clause, the third party shall be treated as a party to that arbitration clause as regards disputes between the third party and the promisor For France, see Cour de Cassation 11 July 2006, (2006) Rev Arb 969, with note C Larroumet.

[121] For England, see *Capital Trust Inv Ltd v Radio Design TJ AB* [2002] EWCA Civ 135 (English Court of Appeal); for the US, see for example *Westmoreland v Sadoux*, 299 F 3d 462 (5th Cir 2002). For France, see Cass 2e civ, 14 October 1987, *Ampafrance v Wasteels* (1988) Rev Arb 288, with note J-L Goutal.

[122] See for example ICC Partial Award on Jurisdiction and Admissibility in case no. 6474 of 1992 in A-J van den Berg (ed), *Yearbook of Commercial Arbitration*, XXV (Kluwer Law International, 2000) 279–311.

[123] By way of example, see *Deloitte Noraudit A/S v Deloitte Haskins & Sells* 9F 3d 1060 (2d Cir 1993).

[124] *International Paper v Schwabedissen Maschinen & Anlagen Gmbh* 206 F 3d 411 (4th Cir 2000).

[125] P Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (Little Brown 1989) 105–6.

[126] See, for example, Ad hoc award of 1991, (1992) 2 ASA Bull 202.

[127] Interim Award of 23 September 1982, ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131 and Clunet 1983, at 899 et seq.; ICC Case no 5103 of 1988, (1991) 2(2) ICC Bull 20; ICC Case no 6519 of 1991, J Arnaldez, Y Derains, and D Hascher (eds), ICC Collection of Arbitral Awards 1986–1990 (Kluwer, 1997) 420.

The question is whether any of the above legal theories can successfully address concerns relating to the non-binding nature of costs orders against third party funders in ISDS arbitration. Again, from a doctrinally point of view, most of these theories appear to not cover a third party funder. Given the typical one-off and arm's length commercial relationship and the lack of corporate links between a third-party funder and a funded party, nor any involvement in the performance of the underlying contract or its termination, it would be difficult to envisage factual circumstances under which a third-party funder might be brought within the jurisdiction of an arbitration tribunal as the third-party beneficiary of the arbitration agreement between the funded party and the respondent, or the principal or alter ego of the funded party, or the assignee of the funded party's claim (albeit one can envisage the partial assignment concept being developed). Equally, while funders, in certain circumstances, might be involved (occasionally actively) in the arbitration proceedings, this will not usually be sufficient to establish implied consent to the arbitration agreement by conduct.[128] The test for treating a non-signatory as a party in arbitration is demanding, and courts, particularly in common law jurisdictions, have noted that there is a strong presumption that it is only the signatory parties (in this case, the funded claimant and the respondent) who should normally be considered as parties in an arbitration and subject to the tribunal's jurisdiction.[129]

Part of the problem with these doctrines, including for example the doctrine of apparent authority, piercing the corporate veil and group of companies, is that they have a narrow scope and rely on technical, often stringent, requirements. What is further problematic is that each of the non-signatory doctrines is subject to very different, and often contentious, conflict-of-law approaches. For example, the question of whether a non-signatory party will be bound by an arbitration agreement can be decided under a number of national laws, including the law of the arbitration clause or the law of the main contract (for the theory of assignment and third-party beneficiary),[130] the law of the agent (for the theory of representation),[131] the law of the seat of arbitration or the law of the company (for the theory of piercing the corporate veil).[132]

Importantly, the various doctrines on non-signatories are not consistent across national jurisdictions.[133] Accordingly, a national court that takes a broad approach to non-signatories, perhaps at the initial stages of arbitration (allowing the non-signatory to be brought in an arbitration) may lead to enforceability issues if the award seeks enforcement in a jurisdiction that takes a narrow approach to non-signatories. Indeed, as explained above, numerous awards assuming jurisdiction over non-signatories have been set aside and prominent courts have taken

[128] See VON GOELER, *Third-Party Funding in International Arbitration and Its Impact on Procedure*, pp. 419-420.
[129] See for example, the decisions of the English Supreme Court in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, and the decision of the English High Court in *Peterson Farms Inc v. C&M Farming Ltd* [2004] 1 Lloyd's Rep 603, the decision of the Court of Singapore in *PT First Media TBK v. Astro Nusantara International BV and others* [2013] SGCA 57, the decision of the Swiss Federal Tribunal, Decision 4A_450/2013 7 April 2014.
[130] For assignment see D. Girsberger, 'The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement' in F Ferrari and S Kröll (eds), *Conflict of Laws in International Arbitration* (2010) 387; for third-party beneficiary, see Born, above (note 37) p. 1457 and *Am Patriot Ins Agency v Mut Risk Mgt* 364 F 3d 884, 890 (7th Cir 2004).
[131] Cf Art.6 of the 1978 Hague Convention on the Law Applicable to Agency.
[132] ICC 10758 of 2000 and ICC 7626 of 1995.
[133] Cf Aubrey Thomas, "Non-Signatories in Arbitration: a Good Faith Analysis" 14 Lewis & Clark L. Rev. 2010, 953, who suggests the application of the principle of good faith by the US courts to determine whether tribunals should extend their jurisdiction to non-signatories.

diametrically opposing views on whether the same facts suggest that a non-signatory has consented to arbitrate. Eventually, the multiplicity of non-signatory doctrines and national laws on non-signatories in different jurisdictions has led to uncertainty and fragmentation of arbitration law on an important legal issue.

Thus, it would be important to consider to develop doctrinal options for the purposes of binding third party funders on costs awards in the context of ISDS arbitration in particular. In this regard, the most straight-forward way would be to insert provisions (either in the applicable arbitration rules, laws or IIAs) requiring claimants to ensure that, if they are funded by a third party in an ISDS arbitration, the third party funder accepts and submits to the jurisdiction of the tribunal at the outset so. Otherwise, the proceedings may be suspended or eventually be discontinued. Submission to the jurisdiction of an arbitral tribunal can be achieved by a “deed of submission” similar to how some funders in Australia submit to a court’s jurisdiction for the purpose of the court to make adverse costs orders directly against the funder should that become necessary.