Disclosing Third-Party Funding in International Investment Arbitration

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For several years now, third-party funding has been a controversial topic in the field of international investment arbitration. What began as a conversation about whether the practice should be permitted at all has since shifted to a debate about how the practice should be regulated to best preserve the integrity of the international investment arbitration system. At the heart of these discussions is the issue of disclosure: Should funded parties be required to disclose their funding arrangements? This Note contributes to the body of scholarly and regulatory work aimed at resolving this concern. After providing background on international investment arbitration and third-party funding, this Note proposes a disclosure regime intended to limit the harms of third-party funding while allowing the practice to continue in the face of growing demand. This proposal—which shifts the regulatory onus onto arbitral institutions—integrates disclosure procedures into the preexisting arbitrator appointment process in order to facilitate conflicts-of-interest assessments.

Introduction

In April 2018, a task force comprising over fifty legal practitioners and scholars released a report containing findings and recommendations on the subject of third-party funding in international arbitration.[1] The report integrates over five years of research, discussion, and public feedback over what has proven to be a controversial topic in the international arbitration field.[2] The scope of the task force's project alone is a testament to the industry's growing interest in third-party funding. But the debate that has

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1. INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018), https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [https://perma.cc/9UT9-Y9JK] [hereinafter ICCA-QUEEN MARY TASK FORCE REPORT].

2. *Id.* at ix. A draft of the task force's report was released in September 2017, initiating a public comment period through October 2017. *Id.*; *see also* INT'L COUNCIL FOR COMMERCIAL ARBITRATION & QUEEN MARY UNIV. OF LONDON, DRAFT REPORT FOR PUBLIC DISCUSSION OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2017), http://www.arbitration-icca.org/media/9/75899457734281/submission_version_for_public_comment_draft.pdf [https://perma.cc/ZG29-VW8B] (containing findings and recommendations to be subjected to public commentary).

accompanied the drafting and publication of this report demonstrates that attitudes toward third-party funding are far from settled.[3]

Although the concept of third-party funding is itself a subject of considerable debate, for the purposes of this Note it can be described as financing the costs of an arbitral proceeding for one party to the dispute in return for a "percentage of the compensation obtained by award or settlement."[4] Third-party funding is by now a familiar concept to litigation across jurisdictions, but the practice is still somewhat new to international arbitration.[5] And when third-party funding shifted to the arbitration sphere, critics initially questioned whether the practice had any place in international arbitration at all. Yet conversations surrounding third-party funding have since changed course. Rather than debate whether third-party funding is permissible, scholars and practitioners have turned their attention toward how third-party funding can be regulated to ensure efficiency, fairness, and procedural integrity.[6]

This attention on regulation has largely focused on the question of whether funding arrangements must be disclosed in the course of arbitral proceedings.[7] Given that disclosure requirements will guide the implementation of any further third-party funding regulation, this focus is

3. *See, e.g.*, Christopher P. Bogart, *Deeply Flawed: A Perspective on the ICCA-Queen Mary Task Force on Third-Party Funding*, BURFORD CAPITAL (Oct. 6, 2017), http://www.burfordcapital.com/blog/icca-queen-mary-task-force-report-flaws/ [https://perma.cc/93PT-G5T7] (criticizing the Task Force draft as outdated and lacking utility); Napoleão Casado Filho, *The Duty of Disclosure and Conflicts of Interest of TPF in Arbitration*, KLUWER ARB. BLOG (Dec. 23, 2017), http://arbitrationblog.kluwerarbitration.com/2017/12/23/duty-disclosure-conflicts-interest-tpf-arbitration/ [https://perma.cc/9K95-UYSV] (commenting on the Task Force's recommendation toward a general duty to disclose third-party funding); *see generally* COLUM. CTR. ON SUSTAINABLE INV. & INT'L COUNCIL FOR COMMERCIAL ARBITRATION (ICCA)-QUEEN MARY TASK FORCE ON THIRD PARTY FUNDING IN INT'L ARBITRATION, THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT: ROUND TABLE DISCUSSION ON THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION DRAFT REPORT FOR PUBLIC DISCUSSION (2017) [hereinafter CCSI ROUND TABLE DISCUSSION] (summarizing a roundtable discussion on the Task Force draft report and its relevance in investor-state dispute settlement).

4. Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID REV. 379, 381 (2012).

5. Valentina Frignati, *Ethical Implications of Third-Party Funding in International Arbitration*, 32 ARB. INT'L 505, 506 (2016).

6. *See* WHITE & CASE ET AL., 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 37 (2015) (reporting the results of a survey regarding international arbitration that revealed that 71% of respondents believe third-party funding in international arbitration requires regulation).

7. *See, e.g.*, Camille Fléchet, *Summary Report of the First Session Held on January 27, 2012*, 2012 INT'L BUS. L.J. 208, 217–18 ("The disclosure of the existence of the funding agreement is considered by the funders to be a central issue in third party funding."); Aren Goldsmith & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)*, 2012 INT'L BUS. L.J. 53, 54, 69 ("The question of when and how TPF should (if ever) be disclosed is evoked against the backdrop of the foregoing questions.").

appropriate. Nevertheless, there have been few concrete attempts to regulate the disclosure of third-party funding arrangements in international arbitration, and even fewer directed toward international investment arbitration, a system of international arbitration for resolving disputes between states and private foreign parties. Only in August of 2018 did the largest international investment arbitral tribunal, the International Centre for the Settlement of Investment Disputes (ICSID), release a set of draft rules addressing third-party funding arrangements.[8]

This Note examines how disclosure regulation can be implemented to properly address the issues that third-party funding poses for international investment arbitration. By considering how third-party funding can both benefit and threaten international investment arbitration, this Note aims to show that disclosure is a useful tool for mitigating the possible harms of such arrangements, while preserving their value. This Note proposes a disclosure regime that aims to achieve such a balance and suggests that ICSID's current draft rules are insufficient to achieve this goal.

Part I begins with a brief introduction to international investment arbitration, the focal point of this Note. Part II tracks the growth of third-party funding and summarizes its costs and benefits in the context of international investment arbitration. Part III introduces arguments for and against disclosure regulations. Part IV considers ICSID's draft rules and proposes a modified system of disclosure that preserves the benefits of third-party funding while curbing potential harms to the international investment arbitration system by shifting the regulatory onus onto arbitral institutions and adjusting the preexisting arbitrator appointment procedure.

I. International Investment Arbitration

International investment arbitration is a dispute resolution mechanism for resolving claims between sovereign nations and foreign investors. Historically, foreign investors lacked any substantive recourse against sovereign host states who interfered with foreign investments within their borders.[9] But in the past several decades, the proliferation of Bilateral Investment Treaties (BITs) and Foreign Trade Agreements (FTAs)[10] has

8. INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, PROPOSALS FOR AMENDMENT OF THE ICSID RULES—CONSOLIDATED DRAFT RULES 31 (2018).

9. Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 471 (2015).

10. The number of known international investment treaties grew from 1 in 1959 to about 3,100 in 2010. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 524 (2013). The United Nations reports that there are currently 3,322 international investment treaties worldwide. United Nations Conference on Trade and Development, *Recent Developments in the International Investment Regime*, IIA ISSUES NOTE, May 2018, at 2.

formalized the relationship between sovereign states and foreign investors.[11] Such treaties in effect ensure that signatory states do not interfere with investments within their borders made by parties originating in other signatory states.[12] In turn, these treaties incentivize foreigners to invest capital toward development abroad.[13] Should a conflict arise between a foreign investor and a host state, investment treaties "guarantee investors a forum to seek direct redress for violation of substantive rights"—international investment arbitration.[14] Over ninety percent of known international investment arbitrations have been hosted by the ICSID and the United Nations Commission on International Trade Law (UNCITRAL).[15]

International investment arbitration differs from other forms of dispute resolution, and thus requires unique considerations for evaluating third-party funding and disclosure. In contrast to litigation, uniform professional and ethical regulations are largely absent from international arbitration.[16] International arbitration attorneys are traditionally governed by the professional rules of their home states.[17] However, in some instances, it is not clear whether the home state's rules extend extraterritorially, and even when they do, the rules may conflict with those of other jurisdictions.[18] Although the International Bar Association publishes ethical guidelines of its own, its regulations are not binding in practice.[19] This lack of directive is significant because "[t]he professional status of international lawyers is in part what confers legitimacy, both real and perceived, on the international arbitration system."[20] And, as expanded upon below, conflicts of interest and other

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11. Mann, *supra* note 10, at 523–27.

12. Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Development World: Creating a Mutual Confidence in the International Investment Regime*, 55 SANTA CLARA L. REV. 881, 885–86 (2015).

13. *See id.* at 886 ("The enhanced security of a BIT and FTA is helpful as 'a "confidence-building" measure that sends a green light to the private investment community.'" (internal citation omitted)).

14. Franck & Wylie, *supra* note 9, at 463. In other words, investment treaties "permit[] investors to vindicate substantive treaty rights that states granted to investors by directly suing states for government conduct that allegedly breached a treaty and created an adverse effect." *Id.* at 469.

15. *See* United Nations Conference on Trade and Development, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA ISSUES NOTE, Nov. 2017, at 5 [hereinafter UNCTD, *Special Update*] (reporting that between 1987 and mid-2017, 61% of international investment arbitrations were settled through ICSID and 31% were settled through UNCITRAL). ICSID was established with the purpose of "facilitat[ing] the arbitration of disputes between states and investors." Moul, *supra* note 12, at 891.

16. Frignati, *supra* note 5, at 511.

17. Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 49, 49 (R. Doak Bishop & Edward G. Kehoe eds., 2010).

18. *Id.* at 49–50.

19. *Id.* at 51.

20. *Id.* at 65.

ethical ambiguities are of significant concern to critics of third-party funding.[21] In particular, given the small size of the international arbitration community, the lack of clear and binding professional rules has the potential to exacerbate the threat of professional conflicts.[22] In other words, the safeguards that typically protect litigation from ethical concerns are weakened in the international arbitration setting.

But even within international arbitration there are significant differences between commercial and investment proceedings that warrant attention. In contrast to commercial arbitration, investment arbitration is often not a private method of dispute resolution;[23] in fact, proceedings can be subject to transparency requirements.[24] Moreover, investment arbitration awards can have public consequences on the State regulatory decision making,[25] the citizens of the host State,[26] and even the development of public international law generally.[27] This broad impact mandates particular concern for the procedural integrity of international investment proceedings.

With these characteristics in mind, international investment arbitration merits special attention in assessing third-party funding. Because international investment arbitration is subject to few formal professional boundaries, it is often vulnerable to ethical concerns. But at the same time, due to the public character of investment arbitration, proceedings are evaluated under a global microscope.[28] Because third-party funding

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21. *See infra* subpart II(B).

22. *See* Moul, *supra* note 12, at 901 ("Among the hundreds of people who serve as investment arbitrators, there exists a group of fifteen arbitrators who have been involved in the majority of investor-state arbitration."); CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 13 ("It was noted by one participant that an increasing number of arbitrators were being asked to sit on the advisory boards for third party funders . . . .").

23. De Brabandere & Lepeltak, *supra* note 4, at 394.

24. *See, e.g.*, Press Release, UNCITRAL, UNCITRAL Adopts Transparency Rules for Treaty-Based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules, U.N. Press Release UNIS/L/186 (July 12, 2013), http://www.unis.unvienna.org/unis/pressrels/2013 /unisl186.html [https://perma.cc/4PNV-839R] (announcing transparency requirements to make international investment arbitrations accessible to the public). ICSID rules, however, "do not contain a general presumption of . . . transparency." *Confidentiality and Transparency – ICSID Convention Arbitration*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, https://icsid .worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx [https://perma.cc/45M2-MAAG].

25. *See* Moul, *supra* note 12, at 910 (asserting that an "investor's award is often arguably inequitable" in part because it "prohibits a state from regulating key domestic affairs").

26. OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, *in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE: A COMPANION VOLUME TO INTERNATIONAL INVESTMENT PERSPECTIVES 9, 24 (OECD Publishing, 2005).

27. Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 376 (2010).

28. Many critics—and even some states—believe the investment treaty system is stacked in favor of investors and view investment arbitration with particular scrutiny. *See generally* Moul, *supra* note 12 (describing the unequal bargaining power between investors and states).

introduces a host of ethical complications, it could conceivably disrupt the international investment arbitration system.

II. Third-Party Funding at a Glance

Controversy over third-party funding is as old as the practice itself. Historically, third-party funding was associated with claims brought by impecunious parties who could not afford access to justice on their own.[29] The practice was nevertheless viewed with suspicion;[30] under common law, third-party funding was considered a violation of the doctrines of maintenance and champerty.[31] Today, few jurisdictions continue to follow this common law approach,[32] but third-party funding still remains a source of contention. On one hand, third-party funding has advantages, particularly to the funder and funded party but also to arbitration as a system of dispute resolution. On the other hand, third-party funding can detract from arbitration proceedings and endanger the policies underlying the international investment arbitration scheme.

A. The Funder and the Funded Party

Modern third-party funding has advanced beyond the impecunious-claimant model.[33] Today, third-party funders increasingly finance claimants who are adequately capitalized, but seek funding in order to minimize cash flow disruptions and share risk during the course of their legal proceedings.[34]

29. *See* JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 85–86 (2016) (describing the benefit of third-party funding for impecunious parties).

30. Catherine A. Rogers, *Gamblers, Loan Sharks & Third Party Funders* ("[C]laim funding by a party who has no relationship to the dispute [was] at best an unwanted intrusion and at worst a corruption or commodification of justice."), *in* ETHICS IN INTERNATIONAL ARBITRATION 177, 177 (Catherine A. Rogers ed., 2014).

31. Frignati, *supra* note 5, at 505. Maintenance is "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case." *Maintenance*, BLACK'S LAW DICTIONARY (10th ed. 2014). Champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." *Champerty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32. In 2017, Singapore and Hong Kong loosened their prohibitions on third-party funding by abolishing the doctrines of maintenance and champerty. Sapna Jhangiana & Robert Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?*, KLUWER ARB. BLOG (Nov. 30, 2016), http://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/ [https://perma.cc/BBM3-JJR3].

33. CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 4.

34. *See* NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 6 (2016), http://www.nortonrosefulbright.com/files/international-arbitration-report-issue-7-142408.pdf [https://perma.cc/Z5SL-RPKZ] ("[M]ultinational corporations turn to funding, not because of lack of capital but because of a desire to share the risk or better manage their balance sheet.").

In the context of investment arbitration, for instance, funded parties are frequently large corporations.[35] The advantages to receiving such funding cannot be overstated, but most importantly, third-party funding allows claimants to share the risk of partaking in a largely uncertain and time-consuming process.[36] Still, funding does not come easily; the process for securing funding is competitive.[37] Although "very little is known about the methodology of third-party funders" for selecting cases to finance,[38] reportedly only one out of every ten claims considered by a funder received financing.[39] As sophisticated investors, funders engage in comprehensive due diligence before committing any capital to a claim.[40] Though the process no doubt differs depending on the firm and the case, Harbour Litigation Funding offers the following as priorities:

> (i) the prospects of recovery in the event of a successful outcome; (ii) the level of investment required to secure the expected realistic claim value; (iii) the chances of success; and (iv) whether the legal team has the necessary experience to successfully pursue the case to conclusion.[41]

Other important considerations for funders reportedly include the length of the proceeding[42] and the enforceability of the award.[43]

Still, financed parties are not the only ones who benefit from third-party funding. Investment arbitration is an attractive venture for third-party

35. CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 3. Third-party funders almost always finance claimants and plaintiffs—not respondents or defendants—because the ultimate return sought is a financial award. In investment arbitration, this means that a funded party is typically a company who invested capital in a sovereign nation. William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, 2015 AUSTRIAN Y.B. INT'L ARB. 113, 122 (2015).

36. NORTON ROSE FULBRIGHT, *supra* note 34, at 6.

37. *See* Gary J. Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Harm for the Sake of Profit*, 33 ARB. INT'L 109, 111 (2017) (describing funders' process for selecting claims to fund).

38. De Brabandere & Lepeltak, *supra* note 4, at 382.

39. ICCA-QUEEN MARY TASK FORCE REPORT, *supra* note 1, at 25; *see also* Frignati, *supra* note 5, at 509 ("[I]t is reported that [third-party funders] do not typically invest in a case that has less than 70 per cent probability of success . . . .").

40. Shaw, *supra* note 37, at 111. The process by which funders review case materials for merit is itself a subject of considerable debate concerning issues of privilege and confidentiality. *See generally* Meriam N. Alrashid, Jane Wessel & John Laird, *Impact of Third Party Funding on Privilege in Litigation and International Arbitration*, 6 DISP. RESOL. INT'L 101 (2012) (discussing the impact of document exchanges in third-party funding arrangements on privilege and confidentiality).

41. NORTON ROSE FULBRIGHT, *supra* note 34, at 4.

42. Frignati, *supra* note 5, at 509 (reporting that funders do not typically invest in claims with an "expected duration of more than two and a half years").

43. Fléchet, *supra* note 7, at 213.

funders, even as compared to other forms of dispute financing.[44] First, investment arbitration is lucrative for funders.[45] A claim for breach of an investment treaty typically involves substantial sums of money[46] and high returns for a successful funder, ranging from 30% to 50%.[47] Second, the success of an investment arbitration is arguably easier to predict than in a commercial arbitration. Because investment awards are often made public,[48] funders are in a better position to predict outcomes of investment claims during the due diligence process.[49] Third, arbitration claims are often not subject to lengthy evidentiary and discovery processes, so funders are frequently able to realize returns on their investments in arbitration faster and with lower costs.[50] Fourth, investment arbitration awards are—compared to litigation outcomes—easily recognized and enforced in foreign jurisdictions, particularly under the ICSID Convention, which governs the majority of investment arbitrations.[51] Therefore, funders are in a position to finance claims with greater security that a favorable award will produce returns.

B. Pros and Cons of Third-Party Funding

Scholars and practitioners have long debated whether third-party funding has any permissible role in international investment arbitration at all. In order to properly assess the suitability of disclosure regulations, it is necessary to consider which aspects of third-party funding add value to international investment arbitration, and which aspects require limitation.

As demonstrated above, third-party funding arrangements can be mutually beneficial to the funder and the funded party. However, advocates for third-party funding suggest that the practice also has broader value to the

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44. In general, litigation and arbitration are attractive to third-party funders because they are not tied up in traditional financial markets. *See* Shaw, *supra* note 37, at 113 ("Since the recession, investors are increasingly attracted to investment opportunities independent from market fluctuation.").

45. *See* VON GOELER, *supra* note 29, at 102 (listing "larger damages awards" as an incentive to fund investment arbitrations).

46. Park & Rogers, *supra* note 35, at 114.

47. Shaw, *supra* note 37, at 112.

48. The UN reports that in 2017, international investment arbitration "tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain." United Nations Convention on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2017*, IIA ISSUES NOTE, June 2018, at 5.

49. De Brabandere & Lepeltak, *supra* note 4, at 383. *But see* CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 7 (suggesting that funders cannot actually predict such outcomes because investment arbitration is "a 'shot in the dark' given that no regime of *stare decisis* applies . . . and treaty standards are exceptionally vague").

50. VON GOELER, *supra* note 29, at 80.

51. Eric De Brabandere, *'Mercantile Adventurers'? The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, *in* LITIGATION, COSTS, FUNDING AND BEHAVIOUR 105, 108 (Willem H. van Boom ed., 2017).

legal system as a whole. The most common argument in favor of third-party funding is that outside financing promotes access to justice and levels the playing field between sovereign nations and foreign investors.[52] True, many investor–claimants are not strapped for cash; in theory, many claimants could access justice without third-party funding. But still, "'losing' [an] arbitral proceeding, with the possible subsequent obligation of paying for the opposing party's costs, may have a tremendous negative impact on the future economic and financial viability and stability of [an] investor."[53] Investment treaties are intended to encourage private investors to hold states accountable for breaches of international treaties by providing channels for such accountability.[54] To its credit, third-party funding supplements this process by eliminating financial deterrents that may otherwise disincentivize investors—particularly small investors[55]—from making use of these channels.

However, there are also significant drawbacks to third-party funding in investment arbitration that merit attention. The issues detailed below suggest that third-party funding has the capacity to undermine the integrity of the investment arbitration system. Unregulated, this may ultimately undercut public confidence in the international investment system, or in some cases render arbitration awards unenforceable.[56]

First, as briefly noted above, third-party funding threatens to introduce conflicts of interest into arbitration proceedings. As a matter of principle, arbitrators are expected to perform their duties impartially and independently.[57] But, it is not difficult to imagine how third-party funding may complicate this expectation.[58] For example, given the high concentration of actors in the arbitration community, it is conceivable that "a person affiliated with a third-party funder, such as a consultant or member of its board of directors" may "also serve[] as an arbitrator in a case financed by

52. VON GOELER, *supra* note 29, at 82–87. In this context, "access to justice shall be understood as the sum of conditions affecting whether a person wishing to enforce or defend a legal right will have reasonable opportunity to do so." *Id.* at 82–83.

53. De Brabandere & Lepeltak, *supra* note 4, at 384.

54. Franck & Wylie, *supra* note 9, at 469.

55. Christian Hederer, Third-Party Funding in International Investment Arbitration – Economic Analysis and Regulatory Options 34 (Dec. 2016) (unpublished working paper), https://ssrn.com/abstract=2952488 [https://perma.cc/EUT8-UALH].

56. *See* Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1652 (2013) ("If the award has already been issued, the conflict may cause the award to be annulled or to be denied recognition or enforcement.").

57. De Brabandere & Lepeltak, *supra* note 4, at 395.

58. Park & Rogers, *supra* note 35, at 119 (arguing that "there are real and important concerns about potential conflicts" due to third-party funding).

that funder."[59] In fact, it has been reported that "an increasing number of arbitrators [are] being asked to sit on the advisory boards for third-party funders."[60] But this is not the only situation where conflicts of interest may arise. Third-party funding may also prove problematic if, for example, "colleagues in the arbitrator's law firm serve as counsel or adviser to a funder" or "an individual arbitrator [is] repeatedly appointed in cases involving the same third-party funder."[61]

Second, funders often play more than a mere financing role in the arbitrations they fund, which begs the question: Who is actually in control of the claim? Expertise is a clear selling point for the major third-party funding firms. Steven Friel, CEO of Woodsford Litigation Funding, for example, made the following pitch for Woodsford:

> In addition to cash, we also invest our expertise. The Woodsford team included a number of high-caliber legal and financial experts, who stand ready to assist the claimant's legal team at all stages of the arbitration. Our objective is to assist, but not to interfere.[62]

Ruth Stackpool-Moore of Harbour Litigation Funding advertised similar benefits at Harbour:

> [T]he engagement of a funder with deep experience of complex litigation and arbitration adds an extra dimension of commercial rationale, risk/reward analysis, rigour in budgeting and decision-making. In effect, funding can be seen as a comprehensive litigation risk management solution.[63]

This type of arrangement may confuse the relationship between attorneys and their clients. Once a funder has a seat at the table—not only as a financier, but also as an adviser and strategist—it may be difficult to distinguish who exactly the attorneys are meant to serve. From an ethical standpoint, "there is a genuine fear that the claimant's lawyer may be influenced by the funder . . . instead of being solely concerned with the claimant's interest."[64]

Third, because third-party funders make arbitration more accessible, the growth of third-party funding may also increase the incidence of nonmeritorious claims. On the one hand, funders almost uniformly insist that

59. Miriam K. Harwood, Simon N. Batifort & Christina Trahanas, *Third-Party Funding: Security for Costs and Other Key Issues*, *in* THE INVESTMENT TREATY ARBITRATION REVIEW 103, 103 (Barton Legum ed., 2d ed. 2017).

60. CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 13. Woodsford Litigation Funding, for example, "has an Investment Advisory Panel comprised, *inter alia*, of individuals who also act as arbitrators." Harwood, Batifort & Trahanas, *supra* note 59, at 104.

61. Park & Rogers, *supra* note 35, at 113, 119.

62. NORTON ROSE FULBRIGHT, *supra* note 34, at 4.

63. *Id.*

64. De Brabandere & Lepeltak, *supra* note 4, at 385.

only meritorious claims receive funding.[65] Some have even suggested that third-party funding can reduce the number of frivolous claims because funders essentially pre-screen cases for merits and possible success.[66] But, on the other hand, funders often have incentives to take risks on weak cases. Large funders can spread risk across portfolios or among their investors, meaning that these "companies have a high appetite for risk and are willing to fund speculative, high-yield cases."[67] As one litigation funder put it, "the perception that you need strong merits is wrong—there's a price for everything."[68] Moreover, as third-party funding grows, it is inevitable that more funders will seek to enter the market. Once there is greater demand for claims, it is plausible that the standards for investment will adjust to accommodate the supply of claims with lesser merit.[69] This growing potential for frivolous and nonmeritorious claims is particularly troubling in investment arbitration because states have practically no recourse to bring their own claims or counterclaims against investors[70] and the costs of arbitration are ultimately passed on to public funding in the respondent-state.[71]

Fourth, some commentators have expressed concern that third-party funding may lead to the inflation of damages. Before a funder even becomes involved, there is a possibility that a claimant seeking funding will inflate the value of its claim in order to attract funders.[72] And even once funding has

65. *See, e.g.*, NORTON ROSE FULBRIGHT, *supra* note 34, at 4 (including a statement by Steven Friel of Woodsford Litigation Funding that "Woodsford will fund only meritorious claims").

66. *See, e.g.*, VON GOELER, *supra* note 29, at 92–93 (arguing that third-party funding can provide "an additional filter for frivolous claims" and play a "gate-keeping role").

67. JOHN BEISNER, JESSICA MILLER & GARY RUBIN, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 6 (2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf [https://perma.cc/63GY-9MWJ].

68. *Id.*

69. CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 5 (reporting one participant's argument that "new entrants . . . may be less scrupulous" in selecting claims to fund).

70. *See id.* at 3 (noting that "[b]ecause States cannot initiate claims[,] there is very little downside for claimants" to bringing risky claims); *see also* Ylli Dautaj & Bruno Gustafsson, *Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration*, KLUWER ARB. BLOG (Nov. 18, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/18/access-justice-rebalancing-third-party-funding-equilibrium-investment-treaty-arbitration-2/ [https://perma.cc/VPC5-XYFQ] (arguing that third-party funding could allow well-resourced claimants an advantage over under-resourced states with little experience and knowledge about the investment arbitration system).

71. *See* Frank J. Garcia et al., The Case Against Third-Party Funding in ISDS: Executive Summary 7 (Apr. 23, 2018) (unpublished working paper), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2130&context=lsfp [https://perma.cc/F5H6-Z2W8] (calling taxpayers the "residual risk-bearers" in a system in which third-party funding is permitted).

72. CCSI ROUND TABLE DISCUSSION, *supra* note 3, at 8. Reportedly, "it costs about $5 million to finance an [investment arbitration] claim, so damages must be at least $30-40 million in order to

been secured, "the presence of a funder may have a dilatory or cost-increasing effect on the proceedings."[73] In theory, a claimant—aware that a portion of its award would be owed to its funder upon success—could inflate its own damages in order to maximize recovery. However, beyond mere speculation, there is nothing to suggest that this damages inflation has or will occur because of third-party funding.

III. Regulating Third-Party Funding Through Disclosure

Thus far, there are few rule-making bodies that have implemented disclosure regulations directed toward third-party funding in investment arbitration. Nevertheless, a handful of investment arbitration tribunals have ordered disclosure of some kind. In *EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic*,[74] an ICSID tribunal ordered the claimants—who had already disclosed that their claim was financed by an outside funder[75]—to disclose the identity of the funder.[76] In *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*,[77] a UNCITRAL tribunal likewise ordered that the claimant divulge its funder's identity.[78] And in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*,[79] an ICSID tribunal went one step further, ordering claimants to disclose whether their claim was being funded by an outside party and if so, the identity of the funder and the terms of the funding agreement.[80]

If these tribunals are any indication, the current lack of regulation does not guarantee that third-party funding will truly remain undisclosed. Still, implementing disclosure regulations necessarily requires thoughtful attention to the arguments both in favor and against such regulation.

make the claim financially feasible for funders." *Id.* This may incentivize claimants to overestimate the value of their claims. *Id.*

73. De Brabandere & Lepeltak, *supra* note 4, at 396.

74. ICSID Case No. ARB/14/14, Respondent's Application for Provisional Measures and Opposition to Claimants' Application for Provisional Measures (Sept. 10, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw6263.pdf [https://perma.cc/9ZK6-72FU].

75. *Id.* ¶ 32.

76. EuroGas Inc. and Belmont Resources Inc. v. The Slovak Republic, ICSID Case No. ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures, 145 (Mar. 17, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw6267.pdf [https://perma.cc/AS3Y-8E2R].

77. UNCITRAL PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7176.pdf [https://perma.cc/G97S-HV6L].

78. *Id.* ¶ 79.

79. ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4350.pdf [https://perma.cc/D8L9-VTX2].

80. *Id.* ¶ 8.

A. Arguments in Favor of Disclosure Regulation

The most frequently cited argument in favor of third-party funding disclosure is that it would allow arbitrators to properly assess potential conflicts of interest.[81] As detailed above, third-party funding has the capacity to invite conflicts of interest into arbitral proceedings, particularly between funders and arbitrators.[82] But because arbitrators are expected to decide claims impartially and independently, such conflicts threaten to derail proceedings[83] and undermine the enforceability of awards.[84] Disclosure is therefore seen as a solution to this issue: divulging third-party funding early in arbitral proceedings—or as soon as the funding arrangement begins—"prevent[s] conflicts of interest from arising late in the process" or even after the award has been rendered.[85] And contrary to the frequent argument that arbitrators cannot be influenced by conflicts of which they are unaware, the "principles of independence and impartiality . . . besides targeting *actual* independence and impartiality . . . also cover the absence of an *appearance* of dependence or partiality."[86] In fact, "an arbitrator serving on [an] arbitral tribunal who *appears not to be independent* can be challenged and disqualified at any time."[87] Moreover, to entrust funders and funded parties with the responsibility to conceal their funding beyond discoverability would be counterintuitive.

Furthermore, formal disclosure regulations would bring certainty and consistency to the treatment of third-party funding. As described above, several arbitral tribunals have already addressed legal issues arising from third-party funding, and those examples provide a useful starting point for analyzing the status of third-party funding in international arbitration. Nevertheless, there is no principle of stare decisis in international arbitration,[88] and without formal regulations, there is no predicting how exactly future decisions will be resolved. By contrast, disclosure regulations would put all parties—claimants, respondents, funders, and arbiters—on

81. *See, e.g.*, De Brabandere & Lepeltak, *supra* note 4, at 395 ("A first compelling legal argument in favour of disclosure is the need to maintain the independence and impartiality of arbitrators . . . .").

82. *See supra* subpart II(B).

83. Maxi Scherer, *Out in the Open? Third-Party Funding in Arbitration*, COM. DISP. RESOL. (July 26, 2012), https://www.cdr-news.com/categories/arbitration-and-adr/out-in-the-open-third-party-funding-in-arbitration [https://perma.cc/2ZY3-4WJ5].

84. *See* Trusz, *supra* note 56, at 1652 ("If the award has already been issued, the conflict may cause the award to be annulled or to be denied recognition or enforcement.").

85. Shaw, *supra* note 37, at 116.

86. De Brabandere & Lepeltak, *supra* note 4, at 396.

87. Frignati, *supra* note 5, at 516 (emphasis added).

88. Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 135 (2007).

notice as to what role funding agreements should play in the arbitral proceedings.

In sum, mandatory disclosure would facilitate early conflicts review and take some of the guesswork out of the advocacy process. Both of these impacts would likely reduce delays in arbitral proceedings.[89] True, disclosure procedures may initially delay proceedings, particularly "as the parties debate the significance of any disclosures made[.]"[90] But the ultimate time that may be saved by these precautions—e.g., excessive motion practice, late-stage arbitrator replacement, or post-award annulment—may in fact be worth the delay.

B. Arguments Against Disclosure Regulations

As an initial matter, opponents of disclosure regulations argue that funding decisions are fundamentally private and beyond the reach of regulation.[91] From this perspective, because the relationship between the funder and funded party is governed by its own agreement, it is outside the purview of the tribunal—whose competence arises from the investment treaty—to make decisions regarding the relationship.[92] In other words, such an argument suggests that disclosure regulation is problematic on jurisdictional grounds.

Another concern expressed by disclosure critics is that disclosure regulation may ultimately increase—rather than reduce[93]—procedural delays.[94] In particular, such opponents argue that disclosure requirements would create space for respondent-states to engage in frivolous legal maneuvering intended to delay proceedings and increase costs for the funded claimant.[95] As one commentator noted, "if a party becomes aware of the other party's litigation budget, an incentive might be created to bring dilatory requests or arguments simply to exhaust that budget before the case is over."[96] At worst, such "guerilla tactics" could distract from the ultimate

89. Shaw, *supra* note 37, at 115.

90. Aren Goldsmith & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)—Part Two*, 2012 INT'L BUS. L.J. 221, 226 (2012).

91. Frignati, *supra* note 5, at 516.

92. *See* VON GOELER, *supra* note 29, at 143 ("Arbitrators are not mediators between funder and funded party. They are competent and mandated to adjudicate the dispute between the parties that contracted to arbitrate . . . . [T]he procedural position of a third-party funder is virtually always that of a non-signatory not bound by the arbitration agreement.").

93. *See supra* subpart III(A).

94. Fléchet, *supra* note 7, at 218.

95. Goldsmith & Melchionda, *supra* note 90, at 223.

96. Jean-Christophe Honlet, *Recent Decisions in Third-Party Funding in Investment Arbitration*, 30 ICSID REV. 699, 711 (2015).

issues, with respondents "trying to pierce multiple levels of the corporate veil . . . as to maximize their procrastinating maneuvers."[97]

Finally, some critics fear that disclosure may lead to adverse decisions regarding cost allocation and security for costs.[98] Although these concerns are not per se invalid,[99] both can be alleviated by reference to past arbitral decisions. Regarding cost allocation, an ICSID tribunal in *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia*[100] declined to consider the existence of a third-party funder in allocating costs, as urged by the respondent.[101] The tribunal recognized "no principle why any such third-party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs."[102] And with respect to orders for security for costs,[103] tribunals have routinely considered third-party funding as one, but not the only, factor relevant to reaching a decision. In *Guaracachi America, Inc. & Rurelec plc v. The Plurinational State of Bolivia*,[104] a UNCITRAL tribunal refused to grant security because the respondent did not "show[] a sufficient causal link . . . from the mere existence of third party funding that the Claimants [would] not be able to pay an eventual award of costs rendered against them[.]"[105] And in an oft-cited case where a tribunal did in fact order security for costs, *RSM Production Corp. v. Saint Lucia*,[106] third-party funding alone was not the basis for its decision.[107] Rather, the tribunal was also convinced to order security because of "the claimant's proven history of non-payments in prior ICSD cases and its admitted lack of any other financial resources."[108]

97. Casado Filho, *supra* note 3.

98. Frignati, *supra* note 5, at 517.

99. It is frequently argued that because "the third-party funder may withdraw from the case at any time, leaving the respondent with no recourse to recover its costs," security for costs based on third-party funding is in fact warranted. Harwood, Barifort & Trahanas, *supra* note 59, at 108.

100. ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0347.pdf [https://perma.cc/ZJ2L-TV8N].

101. *Id.* ¶ 681.

102. *Id.*

103. Security for costs refers to "an order that requires the claimant to provide security in a certain amount . . . in order to preserve the respondent's ability to recover its legal costs should the claims be dismissed and such costs awarded." Frignati, *supra* note 5, at 517 n.54.

104. UNCITRAL PCA Case No. 2011-17, Procedural Order No. 14 (Mar. 11, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1331.pdf [https://perma.cc/K7TT-963E].

105. *Id.* ¶ 7.

106. ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf [https://perma.cc/K8QB-LWDB].

107. *See generally id.* (explaining basis for denying respondent's request for security for costs).

108. Frignati, *supra* note 5, at 518.

IV. A Proposed Approach to Implementing Disclosure Requirements

The prior Parts demonstrate that there are valid arguments both for and against permitting third-party funding in investment arbitration and for and against requiring disclosure of third-party funding in investment arbitration. To be sure, practitioners and scholars continue to advocate against third-party funding, even as claimants receive funding at increasing rates and continue to advocate against disclosure, even as rule-making bodies gradually implement disclosure regulations.

However, this Note takes the position that given the benefits of and demand for third-party funding, it is more valuable to mitigate the drawbacks of third-party funding through regulation than to seek to ban it outright. Accordingly, this Part proposes a model for effecting disclosure regulations that both preserves the integrity of the international investment arbitration regime and allows parties and funders to realize the benefits of third-party funding arrangements. This proposal offers three priorities: (1) reaching a wide breadth of international investment arbitrations; (2) achieving time and cost efficiencies; and (3) utilizing the procedures already available in international investment arbitration to achieve a useful disclosure regime. Still, the proposal below is merely a starting point for what must be a comprehensive regulatory scheme. As third-party funding continues to evolve, rule-making bodies must ensure that any enacted regulations adapt with the changes in funding models.[109]

A. Placing Regulatory Responsibility in the Hands of Arbitral Institutions

Because international arbitration is governed by several bodies of law, numerous entities—bar associations, nation-states, arbitral institutions, and investment treaties—have the legal competence to guide arbitration proceedings and third-party funding utilized therein. A handful of rule-making bodies from each category have taken initiative in this area. For example, in 2014 the International Bar Association became the first international institution to address third-party funding disclosure with its Guidelines for Conflicts of Interest.[110] The Guidelines—which are nonbinding, but still influential[111]—recommend that funded parties disclose

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109. Bogart, *supra* note 3 (criticizing the draft of the ICCA-Queen Mary Task Force report for its outdated focus on single-case funding arrangements and characterizing the draft as "rather like someone spending years earnestly considering typewriter regulation after the invention of the PC").

110. Marius Nicolae Iliescu, *A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact*, KLUWER ARB. BLOG (May 2, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/ [https://perma.cc/C9VT-D95M].

111. Margaret Moses, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, KLUWER ARB. BLOG (Nov. 23, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator [https://perma.cc/T6XE-TTWF].

conflicts of interest between funders and arbitrators if a conflict of interest arises "between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."[112] Moreover, Singapore and Hong Kong, two jurisdictions that only recently lifted their bans on third-party funding,[113] now require disclosure of third-party funding to the arbitral tribunal and other parties.[114] It is also becoming more popular for investment treaties to incorporate third-party funding provisions.[115]

This Note proposes that even with the increasing prominence of disclosure regulations across rule-making bodies, the entities most equipped to implement disclosure regulations are arbitral institutions. Although a few arbitral institutions responsible for investment arbitration proceedings have begun to implement disclosure measures already,[116] the tribunal best suited

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112. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, General Standard 7(a) (INT'L BAR ASS'N 2014).

113. Singapore's law "declare[s] that no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law." Civil Law Act, 5A(1) (1999) (amended 2017) (Sing.). Hong Kong's law "ensure[s] that third party funding of arbitration is not prohibited by the common law doctrines of maintenance and champerty . . . ." Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 98K (H.K.).

114. Singapore's Legal Profession (Professional Conduct) Rules require counsel for a funded party to disclose the existence of a funding agreement and the identity of the funder to the arbitral tribunal and other parties. Legal Profession (Professional Conduct) Rules 2015, 49A (Sing.). In Hong Kong, a funded party must disclose the existence of a funding agreement and the identity of the funder to the arbitral tribunal and other parties. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, 98U(1), (3) (H.K.).

115. *See, e.g.*, Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part art. 8.26, Jan. 14, 2017, 2017 O.J. (L 11) 23, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:011:FULL&from=EN [https://perma.cc/28RV-GVZY] ("Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder."); *Annex to the Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam of the Other Part (Annex 1)*, at 71, COM (2018) 693 final (Oct. 17, 2018), https://eur-lex.europa.eu/resource.html?uri=cellar:2d9b97ac-d2e7-11e8-9424-01aa75ed71a1.0001.02/DOC_2&format=PDF [https://perma.cc/FCQ6-73SG] ("In the case of third-party funding, the disputing party benefiting from it shall notify the other disputing party and the division of the Tribunal, or where the division of the Tribunal is not established, the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.").

116. *See, e.g.*, INT'L COURT OF ARBITRATION, NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION 6 (2017), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf [https://perma.cc/T453-JENU] (calling for arbitrators to disclose "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award"); SINGAPORE INT'L ARBITRATION CENTRE, INVESTMENT ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE 13 (2017), http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20R

to do so—ICSID—has only recently released draft rules regarding third-party funding disclosure.[117] ICSID's draft amendments were open for comment until December 2018, and a final draft is expected to go to a vote—where it must be approved by two-thirds of the ICSID member states—in 2019 or 2020.[118]

ICSID is uniquely equipped to handle the regulation, and it is significant that the institution is taking strides toward regulating third-party funding. As an initial matter, more than half of investment arbitrations are hosted by ICSID, and therefore, regulations enacted by ICSID would reach the largest number of investment arbitration proceedings.[119] Individual national laws and treaties, though useful, only govern claims that fall within their purview; such rules create only a patchwork solution to a global phenomenon.[120] Institutional rules, however, offer broader uniformity to international investment arbitration, promoting greater consistency and fairer outcomes. Moreover, ICSID rules would be tailored to international investment arbitration proceedings.[121] As described in Part I, international investment arbitration differs from commercial arbitration in material ways; therefore, it would benefit from institutional disclosure rules that reflect its unique characteristics. Once ICSID has established a successful disclosure regime,

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ules%20-%20Final.pdf [https://perma.cc/G9FV-QL7H] (empowering tribunals to order disclosure of third-party funding arrangements and funder identity).

117. INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, BACKGROUNDER ON PROPOSALS FOR AMENDMENT OF THE ICSID RULES (2018), https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf [https://perma.cc/HZV7-2QVJ] [hereinafter BACKGROUNDER].

118. *Id.*; *see also generally* INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, RULE AMENDMENT PROJECT – MEMBER STATE & PUBLIC COMMENTS ON WORKING PAPER OF AUGUST 3, 2018 (2019), https://icsid.worldbank.org/en/Documents/State_Public_Comments_Rule_Amendment_Project_1.17.19.pdf [https://perma.cc/K3B6-Q8Y3] (providing a compendium of comments received by ICSID in response to its proposed rules).

119. *See* UNCTD, *Special Update*, *supra* note 15 (reporting that from 1987 to mid-2017, 61% of international investment arbitrations were settled through ICSID); *see also* Francisco Blavi, *It's About Time to Regulate Third Party Funding*, KLUWER ARB. BLOG (Dec. 17, 2015), http://arbitrationblog.kluwerarbitration.com/2015/12/17/its-about-time-to-regulate-third-party-funding/ [https://perma.cc/XUS2-4FTK] (arguing that "[a]rbitral institutions could lead the effort of regulating the industry" because "[o]ther forms of regulation do not guarantee such a broad applicability").

120. *See* Marc Krestin & Rebecca Mulder, *Third-Party Funding in International Arbitration: To Regulate or Not to Regulate?*, KLUWER ARB. BLOG (Dec. 12, 2017), http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/ [https://perma.cc/SQ5X-7UGW] ("We would therefore propose not to opt for a highly fragmented system of national laws regulating third-party funding . . . ."); *see also* Fléchet, *supra* note 7, at 217 ("For one participant, any regulation of [disclosure] should be dealt with by the arbitration institutions.").

121. ICSID proceedings are only available for investor–state disputes. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES 5 (2006), https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf [https://perma.cc/6B3N-HQN9].

it can serve as a model for other arbitral institutions that host international investment arbitration.[122]

B. ICSID's 2018 Rule Amendments

Although ICSID's endeavor to regulate third-party funding constitutes a significant step toward placing disclosure responsibility in the hands of arbitral institutions, it nevertheless does little to ensure that such disclosure requirements actually resolve the primary issues that third-party funding creates. The disclosure language of the proposed amendment on third-party funding reads as follows:

> (2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.
>
> (3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.[123]

There are certainly benefits to this rule. First, it makes disclosure of third-party funding mandatory, reducing uncertainty about whether third-party funding will play a role in arbitral proceedings at all. And second, it endorses transparency, safeguarding the investment arbitration regime against persistent speculation about who is controlling and funding arbitrations.

However, the primary issue with the draft rule is that it allows parties to disclose funding arrangements "immediately upon registration . . . *or upon concluding a third-party funding arrangement after registration.*"[124] In other words, parties to an arbitration can enter arbitration agreements *at any time* during the course of proceedings, as long as the arrangement is immediately disclosed to the ICSID Secretariat.[125] This policy is problematic because it

122. ICSID has a history of providing a model for other institutions. Its 2006 amendments "have been widely emulated in the rules of other arbitral institutions . . . ." INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID RULES AMENDMENT PROCESS 1, https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf [https://perma.cc/6WZS-ZV2J].

123. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, PROPOSALS FOR AMENDMENT OF THE ICSID RULES—CONSOLIDATED DRAFT RULES 31 (2018).

124. *Id.* (emphasis added).

125. ICSID's characterization of the amendment in other sources produces contradictory guidance. *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, PROPOSALS FOR AMENDMENT OF THE ICSID RULES – SYNOPSIS 4 (2018) (noting that the draft rules impose on parties an obligation to keep funding information "current through the proceeding[,]" but also stating that "[t]he name of an involved funder will be provided to the arbitrators prior to appointment to avoid inadvertent

fails to curtail the main concerns regarding third-party funding: time and cost inefficiencies. If third-party funding is disclosed once proceedings have already begun, the proceedings may be interrupted or put on hold while the Secretariat considers possible conflicts of interest. And further, if the Secretariat does in fact uncover a conflict of interest between a funder and an arbitrator, it may force the arbitrator to recuse herself from the panel. As noted in subpart III(A), a late-stage recusal can add significant time and cost to an arbitral proceeding.[126] And an important benefit to a disclosure regime is the potential to reduce delays that might otherwise result from third-party funding.[127] The ICSID rule unfortunately falls short of this goal, so the next subpart suggests an alternative scheme.

C. Integrating Conflicts Checks with Arbitrator Selection

This Note proposes a regulatory scheme aimed at maximizing the time-saving benefits of disclosure, while shifting the burden of regulation onto the parties seeking to utilize third-party funding. This proposal has three components: (1) disclosure must be mandatory for any party receiving third-party funding; (2) the party must disclose its funding to the arbitral tribunal and other party prior to the appointment of arbitrators; and (3) the procedure of appointing arbitrators must integrate a process for assessing arbitral candidates for conflicts of interest with disclosed funders.

First, under this regulatory scheme, any party receiving third-party funding must disclose the existence of its arrangement and the identity of its funder to the arbitral tribunal and opposing party. Requiring disclosure on a mandatory basis will facilitate assessments of conflicts of interest between funders and potential arbitrators. Because this proposal is aimed at reducing delays in the arbitral process, it is imperative that the regulation eliminate the possibility of undisclosed funding arrangements that may, if revealed later on, inject late-stage conflicts into the proceedings. Moreover, by mandating the disclosure of third-party funding and subsequently clearing funders of conflicts, this process ought to remove any lingering speculation that conflicts of interest persist under the surface of the proceeding. Such speculation may otherwise result in the sort of excessive legal maneuvering that the disclosure regime is intended to curb.

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conflicts of interest, and the Arbitrator Declaration requires confirmation that there is no conflict with the named funder"); BACKGROUNDER, *supra* note 117 ("This obligation [to disclose third-party funding] applies throughout the proceeding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest."); INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, PROPOSALS FOR AMENDMENT OF THE ICSID RULES – WORKING PAPER 136 (2018) [hereinafter WORKING PAPER] (stating that the draft rules "make[] early disclosure of the existence of TPF mandatory in every case" but noting that the "duty of disclosure is a continuing one throughout the proceeding").

126. *See supra* subpart III(A).

127. *Id.*

Second, the funded party must disclose its funding to the opposing party and arbitral institution prior to the appointment of arbitrators to the proceeding. This requirement is intended to facilitate the process described below in which conflicts-of-interest assessments can be made alongside arbitrator appointments. Relatedly, this requirement precludes parties from seeking and procuring third-party funding arrangements once the proceedings have formally begun, at which time any conflicts of interest could severely interrupt, or even derail, the arbitral process. Under current ICSID rules, if the tribunal is not fully appointed within ninety days of the respondent receiving notice of the claim against it—or another period agreed upon by the parties—the Chairman of the ICSID Administrative Council will appoint the remaining arbitrators.[128] This timeframe can serve as a general framework for how early disclosures of third-party funding would need to be. Admittedly, this component favors the claimant because the claimant can procure funding in advance of registering its claim with the arbitral institution. A respondent interested in funding, on the other hand, would need to quickly seek out and get approval for funding before the appointment window closed. Although this is a serious concern, it should also be noted that due to the award structure of arbitration proceedings, funding for respondents is atypical.[129]

Third, this proposal recommends that the procedure for appointing arbitrators be modified to incorporate simultaneous conflict checks regarding disclosed funders. In other words, once all funding arrangements and funder identities are disclosed among the parties and arbitral institution, arbitrators may be appointed to the tribunal through the normal appointment mechanisms. Under ICSID rules, the parties may decide on the number and identity of the arbitrators, with the opportunity for the ICSID Chairman to step in if an agreement cannot be met.[130] The only modification to this system is that under the proposal, arbitrators that produce a conflict of interest with respect to a funder can be immediately dismissed. Using this method, an arbitrator candidate who presents a conflict of interest will never assume the arbitrator role, and therefore, will not create the risk of late-stage recusal that could significantly set back a proceeding in both time and cost. Although this mechanism may initially slow down the process of appointing an arbitrator, the delay could be well worth it in the long run if it prevents more serious interruptions down the line.

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128. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES, art. 38.

129. ICCA-QUEEN MARY TASK FORCE REPORT, *supra* note 1, at 23.

130. *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES, arts. 37–38 (providing default procedures for instances in which parties cannot agree upon a process for appointing arbitrators and allowing the Chairman to make appointments when such an agreement has not been reached within ninety days of registration).

In sum, the proposal creates a compromise between all actors to an investment arbitration proceeding. For the party seeking funding, this method unmistakably permits third-party funding to endure, so long as the funding is procured and disclosed early in the arbitral process. For the party opposite the funded party, the existence and identity of the funder will be known, and the risk of new funders and possible conflicts of interest arising late in the arbitral proceeding will be eliminated. Finally, for the arbitral institution, this proposal only requires minor modifications to preexisting arbitration rules. The ICSID draft rule for implementing disclosure regulations places an undue burden on the arbitral institution to review and clear conflicts of interest throughout the lifetime of the arbitration. By contrast, this proposal utilizes an established characteristic of arbitration—arbitrator appointment—to achieve the end goals of facilitating disclosure and reducing conflicts and costly delays.

D. Setting Limitations on Disclosure

Although disclosure is a useful tool for facilitating conflict-of-interest assessments, it is not enough to limit regulation of disclosure to evaluating conflicts of interest alone. Rather, it is conceivable that without further guidance from the arbitral institution, information obtained through disclosure could be used improperly. For example, as described in subpart III(B), disclosure critics have expressed concern that funding information may be used to reach cost decisions or to order security for costs. As they are currently written, the draft ICSID rules do not address the relationship between third-party funding and security for costs.[131] And ICSID's commentary on proposed rules suggests that "the mere fact of [third-party funding], without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs . . . ."[132] Following the lead of arbitral tribunals who have addressed these issues in the past,[133] this proposal likewise advises against allowing disclosure to be used for these purposes, except in extraordinary circumstances. Still, ICSID and other tribunals may benefit from enumerating such limitations on the use of disclosure information in their rules.

Conclusion

Despite ongoing debate, it seems that third-party funding in international investment arbitration is here to stay: the proliferation of third-party funding has outpaced policies aimed at limiting the practice; jurisdictions that previously outlawed third-party funding have since

131. WORKING PAPER, *supra* note 125, at 137.
132. *Id.*
133. *See supra* subpart III(B).

softened their bans; and arbitral tribunals that have considered challenges to third-party funding arrangements have declined to prohibit them. But as Part II highlights, there are still valid concerns about how third-party funding will impact the integrity of international investment arbitration. It is therefore necessary to implement regulations aimed at curbing these negative effects; disclosure is a logical starting point. Not only will disclosure ease the implementation of further guidelines and regulations, it will also promote transparency within an important public international law mechanism, while ensuring that the benefits that parties seek from third-party funding are not lost. Fortunately, the current system of international investment arbitration is already equipped with the tools that will best serve a disclosure regime for regulating third-party funding. It would be wise for ICSID, in reaching its final proposed amendments, to take these tools into account to better serve the goals of time and cost efficiency that such a disclosure regime could provide.