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The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform

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EXPANSIVE DISCLOSURE: REGULATING THIRD-PARTY FUNDING FOR FUTURE ANALYSIS AND REFORM

RACHEL DENAE THRASHER*

Abstract: Third-party funding (TPF) is a relatively new phenomenon in the field of international investment arbitration. TPF takes place when a non-party to a dispute provides funding to one of the parties (usually the claimant) in return for a percentage of the amount recovered. International investment arbitration is a unique context, however, because investor-states dispute settlement puts States always in the role of respondent and private investors in the role of claimants. Despite this apparent imbalance, TPF proponents argue, among other things, that it provides much needed access to justice for poorer clients and adds value to the system by providing a more disinterested evaluation of legal arguments. Those claims do not stand up to the facts as we have them, however. There have been several efforts to regulate TPF, including mandatory disclosure rules (applied only to the identity of the funder) and more expansive discretionary disclosure. These efforts do not go far enough. Instead, we need mandatory expansive disclosure of the identity of the funder and key terms of the funding agreement. This will provide scaffolding to the international investment arbitration system by avoiding conflicts of interest, aligning with institutional interests in transparency, and providing data for ongoing empirical research.

INTRODUCTION

> *It is a truth, universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.*
>
> —Jane Austen, *Pride and Prejudice*

It might be equally true, however, that a person in possession of a good fortune will seek new ways to grow that fortune. The Financial Crisis dried up certain financial markets for a time, leaving some corporations and investors to seek new avenues for building wealth, both for themselves and for their shareholders. One such avenue is commonly called third-party funding (TPF), in which an individual or corporation outside of a legal dispute provides financing to one of the parties—usually the claimant. In return, the non-party may receive a return on the amount of the claim recovered, if any (ICCA-

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QMUL 2017). What began in the context of domestic litigation, first in Australia, then in the United States and Great Britain, has taken root in other jurisdictions around the world—such as Singapore and Hong Kong, as well as certain countries in Latin America and Europe. It has also burst from the narrow context of domestic litigation and arbitration, into the realm of international commercial arbitration and international investment arbitration.

Historically, common law doctrines of *maintenance and champerty* had kept third-parties from participating financially in legal disputes. Outside of contingency fee arrangements, which played the primary role of increasing access to justice in the United States and elsewhere, the judicial system viewed other sources of funding with suspicion (Flake 2015, *citing* Martin 1999). Some attribute the introduction of TPF into the domestic litigation practice to both demand-side and supply-side sources. In addition to the rising costs of litigation, there has been a shortage of capital through more traditional forms of lending for litigation (Flake 2015, *citing* Beisner, et al., 2009). Likewise, investors gained an interest in "alternative capital outlets, where returns would not be correlated to traditional markets" (ICCA-QMUL 2017). Through pressure from potential funders and (possibly) an increased demand for additional funding opportunities from claimants, the common-law jurisdictions introduced statutory reforms permitting (and regulating) TPF.

On first glance, the availability of TPF (almost) uniquely to the claimants in any case, seems to place a thumb on one side of the scales of justice. In domestic litigation and arbitration, and even in international commercial disputes, TPF's effect may be more complex. In those cases, individuals and corporations may be on either side of a dispute. And even if they are brought before a tribunal as defendants on a contract claim, they may also be able to have access to TPF for any related counterclaims in the case. In short, private disputes do not only have a claimant and a defendant, but often *two claimants* and *two defendants*, affording both parties access to this type of funding.

The one unique context in which this presents a problem is international investment arbitration. In international investment treaties, as I discuss in more detail below, countries are *always* the respondents and private investors and corporations are *always* the claimants. The treaties impose no obligations on the private individuals which would make room for counterclaims. In that case, TPF is truly only available to one side of the system. This creates distinctive challenges for the states involved. This Essay begins with a thorough look at the extensive empirical analysis of investment arbitration, followed by a point-by-point inquiry into the arguments in favor of TPF. From that, I argue first that TPF suffers from a severe lack of access to information, that is, from a severe lack of transparency. Although the practice is currently permitted, we ought to seek expansive disclosure of TPF in the International Investment Arbitration context. Second, I argue that we ought not to stop at that, but instead we should

use the information gathered from that expansive disclosure to push against the status quo inasmuch as the data shows that TPF is not serving the goals of international investment agreements, or is resulting in unexpected side-effects.

I. Unequal Opportunities in an Imbalanced System: The role of TPF in Investor-State Dispute Settlement

TPF is problematic largely because of its presence in an already imbalanced system. Investor-state dispute settlement (ISDS) has been a staple of international investment disputes since the Germany-Pakistan Bilateral Investment Treaty (BIT) in 1959. In 1966, the World Bank created the International Centre for the Settlement of Investment Disputes, an institution established specifically for resolving these investor-state conflicts outside of the domestic court systems. In those early years, the system acted as a much-needed protection for foreign direct investors providing capital, employment and infrastructure to the developing world. Its value lay "in its role as a restraint against unjustified expropriation or unfair treatment when governments changed political direction" (Schultz & Dupont 2015). As Gus Van Harten has pointed out, many of the earliest arbitrations "followed in the wake of foreign invasion or occupation" (Schultz & Dupont 2015, *quoting* Van Harten 2007).

The system did not gain much traction, however, until the mid-1990s, when the number of BITs and modern free trade agreements (containing investment commitments) began to boom. In addition to investor protection, investment treaties became a signal, a "welcome mat," that developing countries could put out indicating that they were open for business. Including ISDS in the treaties helped governments "credibly commit to allow foreign investors to operate on their soil without undue interference" (Wellhausen 2016). Corresponding to the increase in the number of investment treaties, the average number of claims filed per year skyrocketed from under 5 (before 1994), to between 30 and 50 after the year 2000 (Schultz & Dupont 2015).

A. Structural Imbalance

Many people today argue that the presence of ISDS "tilts the scales too far" in favor of the investors (Wellhausen 2016). Structurally speaking, investment treaties are simply contracts between states that impose obligations on those states. The citizens of each state stand only as third-party beneficiaries and cannot be bound by obligations directly under the treaty. The preambles of many treaties highlight this tendency. In fact, investor-state arbitral tribunals have, in several instances, relied on the preamble to conclude that "the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment" (SADC 2012). The

substantive language of the treaty is also one-sided—protecting investors without safeguarding the host state (Schultz & Dupont 2015).

Consequently, in ISDS, investors are always the claimants and states are always the respondents. While, by itself, "this is a significant element of asymmetry in the system," some argue that the asymmetry is "not terribly relevant" (Schultz & Dupont 2015, *quoting* Alvarez 2011). If we assume that the investor is incredibly vulnerable under the domestic legal system of the host state, then ISDS is "nothing but the reverse mirror image of the investors' exposure to the host state's [sovereign regulatory power]" (Schultz & Dupont 2015, *quoting* Alvarez 2011).

The presence of TPF, however, changes the calculus here. Even if Alvarez is right and the system is well-balanced, some TPF practitioners would argue that large sums of money flowing to one side can throw off that balance. Furthermore, as some research has shown, filing matters. Even states that ultimately win the arbitration experience the negative consequences of being involved in the system, such as a decrease in foreign direct investment and in the sovereign bond market (Wellhausen 2016). If TPF increases the likelihood that an investor will bring a case under the investment treaty, states are more vulnerable to these consequences. Finally, even if state parties won a vast majority of the time, the cost of arbitration is a particular concern for lower income countries who have become the target of an investor-state dispute. The rise of TPF and other funding sources for investment arbitration has risen concurrently with the costs of these cases, and the impact of such cash flow has not yet been studied empirically in this context.

Several studies have examined the outcomes in investment arbitration and determined that the results are split approximately 3 ways—1/3rd of the time states win, 1/3rd of time states lose and 1/3rd of the time states settle (Sweet, et al. 2017, Wellhausen 2016, Schultz & Dupont 2015).[1] Researchers disagree about how to treat settlements, however, as the settlement agreements are not available to the public and it is not immediately clear which party benefits the most from such a result. On the one hand, settlement could be viewed as a loss to states, since they still have to pay the investors some amount for the alleged treaty violation. On the other hand, the cost to settle is likely much lower than the cost to go through with the suit, especially if the state thinks it will lose. While it is not clear that as a rule ISDS prefers investors' claims over states'

[1] Unfortunately, we cannot measure the number or percentage of awards that the investors or states *should have* won, as it would require second-guessing the facts and legal arguments of hundreds of investment cases (Schultz & Dupont 2015). On average, claimants who won their case, were only awarded 30%-40% of the amount initially claimed (Wellhausen 2016). One could argue that claimants either inflate awards requests, knowing that they will get a small percentage of that, or that tribunals do a good job of constraining damage claims against states (Wellhausen 2016). Ultimately, however, we do not know.

interests, states (and their taxpayers) will be paying some amount 2/3rd of the time.

B. Practical North-South Imbalance

While the overall data on outcomes may not point unequivocally to ISDS outcomes strongly favoring investors, further research shows that for countries most vulnerable to the high costs of investment arbitration, these global trends obscure the true story. First, a vast majority of all claimant investors are from high income countries (88%). While respondent countries are more diverse than the home states of the claimants, the bulk of all claims are filed against states that are upper middle or middle-income countries. Additionally, from 1998-2010, 46% of high-income respondent states prevailed, but only 27% of low-income states won (Schultz & Dupont 2015). Another study showed that by the end of 2014, OECD states won 55% of the time, which is well above the 33% average, suggesting that the even 1/3rd split is not fully telling the story.

Proponents of ISDS credit the "good behavior" of countries like the United States, contrasted with the "fast and loose behavior" exhibited toward foreign investors by countries like Argentina (Hufbauer 2015). Others argue, however, that "a systematic prevalence of stronger parties . . . is taken [to indicate that] the rule of law is pursued less diligently" (Schultz & Dupont 2015). By looking at the nationality of the home states of the investors, for example, one study showed that investors from the wealthiest countries were less likely to have their claims dismissed on jurisdictional grounds (McArthur & Ormachea 2009).

These trends reveal fundamental imbalances within ISDS– both structurally between investors and states, and, in practice, between developed and developing countries. Introducing TPF, an inherently one-sided funding opportunity, into such a system could create a wealth of unknown impacts. It has the potential, certainly, of increasing the number of cases against vulnerable states and driving up the costs of arbitration through supply-side pressure. There still may be good reasons for permitting TPF, however, and we continue by examining those reasons one-by-one.

II. Arguments in Favor of TPF: Strengths and Weaknesses

Those who would support the continued access of TPF in the investment arbitration context rely on four principal arguments. First, they argue that TPF promotes *access to justice* for claimants who have meritorious claims and would otherwise be unable to bring a costly suit against a state. Second, they point out that, at least in theory, TPF is *available to both sides of the dispute*, using anecdotal examples to suggest that TPF may become more available fund defendants in the future. Third, they claim that funders can offer a

"*disinterested, dispassionate and highly detailed assessment* of claims," and indeed, that it is in their best interest to do so, thus reducing the incidence of weak or spurious claims filed. Finally, proponents highlight the *functional similarity* between TPF and other types of funding to argue that it should be treated similarly (i.e., universally permitted).[2] Depending on the viability of these claims, TPF may offer some benefits that would balance out concerns about state sovereignty and public policy

A. Does TPF Contribute Substantially to Access to Justice, in Particular for Claimants Without Other Resources?

Proponents of TPF seem to speak out of both sides of their mouth when it comes to this argument. On the one hand, they argue that TPF is *necessary* so that all the truly meritorious claims can be brought before an impartial tribunal and decided fairly.[3] When the doctrines of *maintenance and champerty* reigned, the main argument for allowing contingency fee arrangements (arguably, a type of TPF or functionally similar to TPF) was for the benefit of the poor and middle-income plaintiff. However, that is not the norm in international arbitration today: "[M]uch of the focus of the litigation finance market today is on the growing corporate utilization of funding by large, well-resourced entities, who are looking for ways to manage risk, reduce legal budgets, or take the cost of pursuing arbitration off-balance sheet" (ICCA-QMUL 2017, 13). JLT Specialty, Ltd., a litigation funder, points out deliberately that "[TPF] is not just for those that have no means to pay legal fees. Business[es] and wealthy individuals are making greater use of [TPF]. Rather than paying lawyers, using [TPF] ensures [that] cash flow is not tied up in the dispute" (JLT 2018).[4]

Furthermore, the causality between the rising costs of international arbitration and the presence of TPF is unknown. One study of TPF in Australian courts demonstrated that there was a correlation between the increased use of TPF and the number of cases in the court system (Chen 2015).[5] While proponents argue TPF is a response to rising costs, and thus, a

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[2] There is a fifth argument, that due to the *wide use of TPF in other (domestic law and commercial arbitration) contexts*, it must be a legitimate way to fund cases. Since I address that argument above in Part I, *supra*, I do not go into more detail below.

[3] For a more detailed analysis of this Access to Justice argument in the TPF context, see Tara Santosuosso and Randall Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, LAW AND JUSTICE IN THE AMERICAS WORKING PAPER SERIES 8, B.C. L. SCH. (2018), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1008&context=ljawps [https://perma.cc/AMU6-6DFB].

[4] JLT Specialty, Ltd. points this out in response to the question: "I can pay my legal fees. Why should I use [TPF]?"

[5] In that particular study, Chen also tested whether the high number of court cases was driving the demand for litigation funding. Chen found no significant correlation. *See* Chen 2015.

rising demand for more funding, those costs could be partially attributable to the availability of additional funds as well. Finally, the apparent urgent need for "access to justice" is diminished somewhat by the argument that TPF is functionally similar to other sources of litigation funding, which I discuss below.

B. Is TPF Truly Available to Both Sides of Any Investor-State Dispute?

Those who would support the equality of opportunity inherent in TPF point to the theoretical possibility that financing could be made available even to respondent states in ISDS. Indeed, there are two key cases that show how probable such a situation would be. In the first case, *Philip Morris v. Uruguay*, the investor brought a claim against Uruguay for their tobacco regulations, which impacted the value of their investment. With the very clear public health concerns involved, Uruguay was able to seek out financing from the Bloomberg Foundation and its "Campaign for Tobacco Free Kids" to support their defense. In that case, the funder was not moved by the possibility of any financial recourse, but instead by its own interests in protecting states' tobacco laws. The second case was *RSM v. Grenada*, in which Global Petroleum Group funded Grenada's defense against RSM's claims. In that case, there were allegations that Global Petroleum had been promised the oil exploration rights previously revoked from RSM—which they were subsequently awarded (ITN 2010).

Outside of corporate-government collusion, there are two ways in which TPF might become more available to respondent states: pro bono funding (as seen in *Philip Morris*) and portfolio funding. There is some speculation that corporations and civil society would continue to mobilize to support countries in their efforts to uphold globally accepted values, such as public health, labor rights and environmental protection. It is certainly possible for multinational corporations to begin to fund cases that would improve their corporate image and help them fulfill some of their commitments toward corporate social responsibility. In those cases, the corporate sponsor would be highly incentivized to disclose not only the fact of their involvement, but also key details of the arrangement (e.g., amount of funding). Pro bono funding is not very likely, however, in the context of cases not involving larger issues of public goods or the global commons.

Proponents of TPF have also posited that portfolio funding could be used to support respondent states. In portfolio funding, an investor or multiple investors would fund a portfolio of cases, usually within a short span of time. In this case, the investor mitigates some of the risk of loss of one case, by receiving a return based on the "overall net financial performance of the claims" (ICCA-QMUL 2017, 29). Portfolio investing is a very common

investing strategy, allowing investors to combine high risk/high reward and low risk/low reward investments. As applied to the high risk/no reward circumstance of funding respondent states, however, it seems highly unlikely that funders would employ these risk sharing tools. Even a successful outcome for a state will not net a positive financial return to the portfolio, given that the only financial recovery a state may make is some portion of its legal fees and costs.

C. Does TPF "Add Value" by Introducing a Disinterested, Dispassionate and Highly Detailed Assessment of Claims?

Many TPF proponents point out that it would be an unwise financial decision to fund a case that is weak on the merits. Correspondingly, funders often engage in a comprehensive assessment of the details of the case before agreeing to partner with the claimant. Statistics show that they reject 90 percent of the cases that come before them. This evidence suggests that TPF does not contribute to spurious claims, driving up the number and cost of arbitration cases.

Given the possibility of relying on portfolio funding, however, it seems that high risk/high reward cases (those that may be weaker on the merits but would bring in a large award if won), may very well be considered by typical third-party funders. Mick Smith, co-founder of Calunius Capital, is often quoted as pointing out that "the perception that you need strong merits is wrong—there's price for everything" (U.S. Chamber of Commerce 2009). Jonathan Molot from Burford Capital, while emphasizing that funders primarily seek meritorious claims, also indicates that "[i]nvestment funds, in contrast [with insurers] are happy to bet on litigation if the returns are high enough" (Molot 2015). There have also been instances of litigation financing gone wrong—where the investor failed to do their due diligence and perpetuated frivolous lawsuits.[6] Although the evidence here is anecdotal, the possibility of TPF contributing to claimants bringing unmeritorious claims and the temptation by funders to take on large risks in the face of possibly large rewards is enough to suggest that TPF should, at the very least, be subject to careful oversight.

A second consideration in determining the third-party funders' ability to provide a disinterested assessment of claims is the interconnectedness between funders, attorneys and arbitrators involved in TPF. Due, in part, to the newness of the phenomenon and to the highly-specialized knowledge required to assess

[6] In the case of *Excalibur Ventures LLC v Texas Keystone Inc and Others*, the tribunal determined that the claims were "spurious", "contrived", and "grossly exaggerated", among other similar descriptors. Despite that, funders had provided up to £31.75 million over three years. *See Excalibur Ventures* 2016.

claims under investment treaties, the pool of experts involved is relatively small. Combined with the rising number of cases involving TPF, this small segment of society is finding itself repeatedly thrown together in arbitration. Even proponents of TPF acknowledge the "highly concentrated segment of the funding industry that invests in international arbitration cases, [as well as] the symbiotic relationships between funders and a small group of law firms, and relatedly, the often close relations among elite law firms and leading arbitrators" (ICCA-QMUL 2017). The potential for conflicts of interest, therefore, is very high. Furthermore, the interconnectedness creates incentives to perpetuate the system through the funding of more cases. To counteract these incentives and potential conflicts of interest, it seems we ought, at the very least, to increase transparency in order to minimize predatory behavior and reinforce the integrity of the dispute system.

D. Is TPF Functionally Similar to Other Funding Opportunities?

The fourth argument supporting the use of TPF in international investment arbitration is its functional similarity with other funding opportunities. Proponents point out that claimants (and respondents) have other similar ways to finance litigation, including corporate and equity financing, political risk insurance, after-the-event insurance, and even attorneys' contingency fee arrangements, so there is no real reason to treat TPF with more suspicion than other similar arrangements. It is worth noting that the similarity of these other funding sources somewhat undercuts an earlier argument made, which is that TPF is *necessary* in order to afford access to justice (why do we not just rely on those?). Nevertheless, assuming (so the argument goes) that TPF is similar to these other mechanisms, perhaps we should not treat it differently by demanding more disclosure or, in some cases, an award of security for costs.[7]

One alternative source of funding for claimants, especially corporate claimants, is to rely on internal corporate or equity financing. This is more like a traditional loan, allowing the company to shift costs internally with the hope of recouping the money with a successful case. It is similar to TPF in that it also provides non-recourse funding during the life of the claim. In structure, however, since the financier is (corporately) related to the complainant, that relationship is immediately discoverable in arbitration. Furthermore, the funder would not be a part of the "concentrated segment" of society already involved

[7] One main concern of third-party funders and the claimants they would represent is that disclosure of the relationships would lead the tribunal to award the respondent security for costs, for fear that claimants would not be able to pay costs if they were awarded against them. Funders argue that this is unfair prejudice against claimants and would delay the procedures and drive up costs. A full discussion of that argument is outside the scope of this paper, but I address the concern to a limited degree in discussing the specifics of disclosure, below.

in TPF, which would change the calculus of incentives. Any conflicts that arise during the course of the case would be ordinarily resolved by corporate governance mechanisms and other rules that govern corporate relationships.

Insurance is another mechanism that claimants (and respondents) have used in the past to finance litigation. Insurance, like TPF, provides funding (sometimes non-recourse) for claimants bringing a claim under an investment treaty. Political Risk Insurance (PRI) is sold beforehand to cover the costs of possible future litigation. After-the-event (ATE) insurance is sought after a claim is brought to cover the costs once they are beginning to accrue. There are three key differences, however, between insurers and third-party funders. First of all, insurance companies do not provide day-to-day financing for the case, but pay the amount after the claimant has submitted a claim. Second, the insurance premium is much lower on average than the typical return sought in a TPF arrangement. Third, insurance companies are bound by certain domestic regulation and professional rules of conduct. Insurance is considered a financial service, regulated under the country's prudential financial regulations, bound by consumer protection rules and governed by licensing. Indeed, some have argued that TPF ought to be regulated under the same rules, as a financial service provider.[8]

Finally, many have pointed to attorney-client contingency fee arrangements, which provide non-recourse funding for complainants. This practice is much older than many of the previous options, and was originally envisioned for the purpose of the impecunious client who would not otherwise be able to seek justice for their meritorious claim.[9] Contingency fees, however, are based on an already disclosed relationship—that of the attorney-client, so that hidden conflicts are not as likely to arise. Attorneys are also bound by the Rules of Professional Responsibility, which could result in disbarment in the case of gross violation of the rules, such as lawyers putting their contingent financial interest in the case ahead of the client's best interests in settlement negotiations. The main takeaway from each of these other funding opportunities is that they are often automatically disclosed in the arbitration process, and in each case, bound by other laws, regulations and codes of conduct. Since TPF is relatively new to the international investment arbitration regime, these safeguards are not yet in place consistently, which suggests that perhaps different treatment is merited.

III. EXISTING AND PROPOSED WAYS OF REGULATING TPF

As amply demonstrated, there are imbalances within ISDS, both structurally and in practice, as well as significant weaknesses in the case for the

[8] *See* Standing Committee of Attorneys-General (2006).
[9] As mentioned in Part II.A, *supra*. *See* Flake 2015.

value of TPF in international investment arbitration. Given the novelty of the practice, and the potential for abuse, we ought to seek more information about the positive and negative impacts of TPF on the rights and interests involved. In light of this, I argue that we need expansive disclosure of TPF arrangements to avoid *conflicts of interest*, to align with arbitration's institutional movement *toward transparency*, and to provide information for *ongoing empirical research*.

A. Evolving Disclosure Rules

Currently, there is no widespread requirement to disclose the presence or identity of third-party funders. The Canada-EU Trade Agreement ("CETA"), Article 8.26, for example, does include mandatory disclosure, while the Singapore Investment Arbitration Commission ("SIAC"), Article 23(1) gives the tribunal power to order disclosure of the funder and details of the agreement, but it is not mandatory. In many jurisdictions, TPF is left unregulated.

In the context of any litigation or arbitration, there are competing interests when it comes to disclosure vs. confidentiality. In this case, both parties have a strong interest in a determination by an unbiased tribunal as well as in a swift and final resolution of a dispute. Meanwhile, the claimant has some interest in keeping the funding relationship confidential for fear of how it will affect other procedural issues in the case. In a few instances, respondents have viewed the presence of a third-party funder as evidence that the claimant will be unable to pay costs at the end of case, should the tribunal shift costs. A request for security for costs can result in a delay of the process and drive up the actual costs of the arbitration. Claimants and funders alike view this outcome as unnecessarily punishing claimants for using outside funding.

The likelihood of accidental or delayed disclosure, however, as well as the high cost to both parties in the event that an award is set aside, suggests that the interests in disclosure substantially outweigh those in confidentiality. The general consensus, therefore, is that both the existence and identity of a third-party funder should be disclosed—though practitioners differ with respect to who they believe ought to bear the burden of disclosing such information.

In the past decade, institutions governing international investment arbitration have begun to transition toward greater transparency in all their proceedings. Both ICSID (in 2006) and UNCITRAL (United Nations Commission on International Trade Law) (in 2013) modified their arbitration rules to increase transparency. In view of that trend, TPF should also be treated with more transparency. Although this approach does not go all the way towards demonstrating the importance of disclosing the *substance* of funding

agreements, it does show a general trend toward favoring transparency in the current institutional framework.

In addition to the current institutional needs of international investment governance, we ought to maintain a long-term investment in the legitimacy of these institutions. In order to support that, however, we need to provide ongoing research into the role of third-party funders. Since third-party funders are relatively new to this context, we do not know much about their direct and indirect impacts, the kinds of cases that will be funded, and the kinds of outcomes that will be seen. Proponents speculate that TPF will promote greater (and much needed) investment in developing countries because investors will feel more comfortable that their rights and interests will be preserved. Critics speculate on the other hand that it will increase both the cost and the amount of litigation, leading to draining State balance sheets and ultimately a regulatory chill. An even stronger argument put forth by Boston College Law School's Professor Frank Garcia is that TPF constitutes an "unjustifiable wealth transfer" from the developing world to the financial sector, amounting to "deliberate exploitation of the system".[10] However, until we have data, we cannot know the truth of any of these statements. And in order to gather this data, we need mandatory, expansive disclosure of TPF agreements: disclosing not only the existence and identity of third-party funders, but also the general structure of these funding agreements, the financial situation of the funded party, the expected return on the investment, as well as the control, priority and risk alignment provisions.

B. Expansive Disclosure

Funding agreements vary in their terms, but often contain the same main components. One the most important aspects is the control that the funder might exercise over litigation decisions. It makes sense that funders would have an interest in whether and when a claimant would decide to settle as opposed to pushing for an arbitral win. However, that makes the claimants extraordinarily vulnerable to the underlying profit-based incentives motivating the funder.

Funding agreements also lay out the return structure of the arrangement (how much the funder will make in the event of a win), the priority agreement (who gets the money first) and a risk alignment section (who bears the risk of increased costs and fees over initial predictions). All of these components are helpful in determining whether the funder is undertaking an appropriate amount of risk in the claim, and where the incentives lie for the claimant, the

[10] Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, B.C. L. SCH. FACULTY PAPERS (2018), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2129&context=lsfp [https://perma.cc/36PN-SE7X].

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

One way to approach this is to incorporate TPF rules into new trade agreements, as Canada and the European Union have done. This would work well for new treaties, but would be time consuming and costly for older treaties that have been in place for decades. Another option, which could provide a more rapid change throughout the investment arbitration system, would be to modify or expand arbitration rules for institutions like the ICC, ICSID, and UNCITRAL, all of which are already actively involved in related rulemaking.

Whichever approach we take, language which combines the mandatory disclosure of CETA Article 8.26[11] with the voluntary expansive disclosure of SIAC Article 24[12] could accomplish the goal. The Canada-Europe agreement, as mentioned above, makes disclosure mandatory for any TPF, either at the time of the submission of a claim or as soon as the funding agreement is

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[11] CETA, art. 8.26 provides:

> 1. Where there is third-party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third-party funder.
> 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

Id.

[12] SIAC Investment Arbitration Rules (2017) Art. 24:

> Unless otherwise agreed by the Parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal Shall have the power to:
>
> (l) order the disclosure of the existences of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability[.]

Id. art. 24(l).

concluded. The disclosure obligation is set squarely on the shoulders of the funded party and is non-discretionary. By contrast, the obligation under SIAC places the responsibility of ordering disclosure on the tribunal, while also giving them the power to uncover certain details of the funding arrangement.

An expansive disclosure provision may put the burden of disclosure on the funded party, for example:

> 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 as well as amount of funding, the expected recourse in the case of a successful outcome and any other provisions which may affect the decision-making of the funded party.

Another provision may give the tribunal the responsibility to order full disclosure of the agreement as a matter of course:

> The Tribunal shall order the disclosure of the existence of any Party's third-party funding arrangement, as well as the identity of the funder, the amount of the funding, expected recourse in the case of a successful outcome, and any other provisions which the Tribunal deems relevant to the decision-making power of the funded party.

Other models may give the Tribunal more discretion in deciding which portions of the funding agreement are important to disclose in any particular case. All of these texts would serve the purposes of avoiding conflicts of interest, protecting against awards set-aside, ensuring ongoing transparency within ISDS, and providing data for future research into the role of TPF.

CONCLUDING THOUGHTS: RORSCHACH TESTS AND REAL DATA

Rusty Park has said that TPF, like ISDS, acts as a bit of a Rorschach test for researchers. He said that our conclusions say more about the researcher than about the process itself (Park 2017). Assuming that TPF represents just another market for investors to grow their capital and ISDS is just another international legal process, what should keep a corporation from making a corporate decision to get a "loan," so to speak, in order to bring a lawsuit? So what if that loan is a very special kind of loan where the lender recovers only if the plaintiff succeeds? In a place where the freedom to control one's own property (and not to have a government interfere with its use or value) is held in high esteem, it seems that TPF is nothing over which we should lose sleep.

But some jurisdictions have begun to recognize that there are a few additional factors playing a role here. First, ISDS is a very specific, and

particular kind of international legal process. It represents a very specific exception to the rule of sovereign immunity—in which a country cannot be sued outside of its own state courts. States consent to the jurisdiction of these international legal institutions as a concession to investors who have had a historical difficulty seeking redress for economic wrongs in the domestic courts of the investor's host state. Second, respondent states in international investment arbitration are in a unique position given that many of the measures complained of are measures "of general public interest"—environmental laws, labor protections, and other social and economic rights.

Despite the fact that TPF is currently accepted in the realm of international investment arbitration, and that critics calling for it to be banned have been unable to "move the needle" in terms of making practical changes, as some experts have said, we ought not to give in and accept that TPF is here to stay. The ISDS system itself has been in place for more than 50 years, yet even now, in light of empirical evidence demonstrating some of its weaknesses, countries are pushing back on the status quo. In 2011, Australia announced that it would no longer include ISDS provisions in its trade agreements. Bolivia, Ecuador and Venezuela have terminated several investment agreements and withdrawn from ICSID. If, at 50 years old, the ISDS system can be re-examined (and in some cases discarded), then TPF may be as well.

As with any legal practice or institution, we ought to welcome ongoing scrutiny which pushes us to provide greater justice with greater transparency and consistency. Expansive disclosure could make this scrutiny possible.

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