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Volume 59
Issue 8 *Reforming International Investment Law*

Article 15

11-19-2018

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Recommended Citation
Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C.L. Rev. 2911 (2018), https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/15

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THIRD-PARTY FUNDING AS EXPLOITATION OF THE INVESTMENT TREATY SYSTEM

FRANK J. GARCIA*

Abstract: Third-party funding of international investment arbitration is on the rise. Through TPF funders will cover the legal fees of investors filing claims under investment treaties in exchange for a portion of the arbitral award. Proponents of third-party funding claim that it provides access to justice for parties that normally would not have the funds to arbitrate against state actors. Given that the international investment law that governs these claims is unbalanced, and that funding only flows towards investor-claimants, and at the expense of states and their taxpayers, allowing third-party funding in investment arbitration risks creating unjustifiable wealth transfers from the citizens of target states for the benefit of speculators. Reform is needed to prevent the deleterious effects of third-party funding on developing and newly-industrialized states and on the investment law regime itself.

INTRODUCTION

Third-party litigation funding ("TPF") is a rapidly expanding industry in which speculators invest in a range of legal claims in exchange for a measure of control of the case and a contingency in the recovery.[1] As recently as twenty

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* The author would like to thank Lise Johnson and Brooke Guven of the Columbia Center on Sustainable Investment, Herve Ascensio, Betty Buchsbaum, David Buchsbaum, Regis Chemaine, Kim Garcia, Cree Jones, Emmanuel Laryea, Sebastián López Escarcena, Camille Martini, Sergio Puig, Karl Sauvant and Louis Wells for their many helpful written and conversational insights, as well as participants in the Harvard Law School 2018 conference on "Rethinking Trade and Investment Law," the Monash University Law School and Business School faculty workshops, and the BC Law Faculty Colloquium Series. A special thank-you to the Boston College Law School Working Group on Investment Law Reform (Leo Gargne, Kirrin Hough, Tara Santosuosso, Randall Scarlett and Rachel Denae Thrasher) for their helpful comments. Thanks also to Keith Kaminski, Thomas Lampert, and Alex Galliani for their research assistance, and the Editors-in-Chief and Article Editors of the *Boston College Law Review* for their clarifying edits.

[1] *See* PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM 7 (2012), https://www.tni.org/files/download/profitingfrominjustice.pdf [https://perma.cc/LPC9-7GY2] (noting the rapid increase in third-party funding of arbitration claims). TPF has been active in fields as diverse as tort law, antitrust, intellectual property, and commercial law, and in class-action cases across a range of civil litigation settings. *See generally* Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011) (describing TPF and the various legal fields in which it is used).

years ago, TPF was illegal throughout the common law as a violation of the doctrines of maintenance and champerty, and virtually unknown in the civil law world.[2] Court decisions in the United Kingdom and Australia, however, have initiated a slow but accelerating process of legalization that has spread to Europe, the United States, and Asia, raising significant policy concerns.[3] Proponents of TPF argue that it provides a number of benefits across a range of dispute settlement platforms, including promoting access to justice and filtering out unmeritorious cases.[4] Critics argue, on the other hand, that TPF distorts the balance and incentives of traditional dispute resolution towards speculative gain in the place of justice and the orderly settlement of disputes.[5]

This Essay focuses exclusively on the role of TPF in disputes arising under international investment treaties. The contemporary international law regime for protecting foreign investment consists of a large number of bilateral investment treaties ("BITs") and related investment chapters of free trade agreements ("FTAs" or "incorporated BITs"), coupled with a controversial arbitration-based

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[2] *See* Steinitz, *supra* note 1, at 1286–91 (discussing the history of maintenance). Maintenance is defined as "[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 defined as "[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); *accord* Steinitz, *supra* note 1, at 1286–87 (defining champerty and noting that it is a form of maintenance); *see also* Peck v. Heurich, 167 U.S. 624, 630 (1897) (discussing the policy reasons behind prohibiting champerty, including the concern that it would "stir up baseless litigation"); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1546 (1996) (discussing policy reasons behind the prohibition of champerty including maintaining an incentive for settlement, prohibiting corporations from the practice of law, preventing the use of lawsuits to harass, and prohibiting a market in the sale of lawsuits).

[3] *See, e.g.*, Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd. (2006) 229 CLR 336 (Austl.); Mobil Oil Austl. Pty Ltd. v. Trendlen Pty Ltd. (2006) 229 ALR 51 (Austl.); Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ.) 655 (Eng.); *see also* JOHN H. BEISNER & GARY A. RUBIN, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD PARTY INVESTMENTS IN LITIGATION 1–2 (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf [https://perma.cc/ATU6-Z53Y] (discussing policy concerns created by an expansion of TPF); Lisa A. Rickard & Mark Behrens, *Third-Party Litigation Funding in U.S. Enters Mainstream, Leading to Calls for Reform*, FINANCIER WORLDWIDE (Nov. 2016), https://www.financierworldwide.com/third-party-litigation-funding-in-us-enters-mainstream-leading-to-calls-for-reform/#.Wz4CNthKjBI [https://perma.cc/H6Q4-FATS] (summarizing the negative reaction to TPF by the American legal community).

[4] INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 6, 18–20 (2018) [hereinafter ICCA, REPORT OF THE ICCA-QUEEN MARY TASK FORCE], https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [https://perma.cc/2YNF-7AL6]; Steinitz, *supra* note 1, at 1271–72 (noting the potential for TPF to help provide relief to parties who traditionally do not have the resources to access courts); Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* 7 (Grotius Ctr. Working Paper Series, Paper No. 2012/1, 2012), http://ssrn.com/abstract=2078358 (noting some of the benefits of TPF lawsuits).

[5] EBERHARDT & OLIVET, *supra* note 1, at 58–60; BEISNER & RUBIN, *supra* note 3, at 4–6.

investor-state dispute settlement mechanism ("ISDS").[6] If an investor considers that an investment rule in a BIT or FTA has been violated, ISDS provides a mechanism through which relief can be sought directly against the host state, with TPF funding now increasingly available for the claimant.

The BIT/ISDS system, however, is widely criticized today on fairness, governance, asymmetry, legitimacy, and rule of law grounds, among others.[7] This context is essential for properly evaluating the role of TPF in investment. Following the 2008 financial crisis, the demand by speculators for new investment vehicles rose, and TPF funders discovered that the political economy of the BIT/ISDS system offered the possibility of very high returns with comparatively little risk.[8] The structural deficits of the BIT/ISDS regime are not irrelevant to the TPF phenomenon, but in fact help drive the TPF funding model and make investment arbitration a very attractive investment market.[9]

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[6] A BIT is an "international agreement[] establishing the terms and conditions for private investment by nationals and companies of one state in another state." *Bilateral Investment Treaty,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/bilateral_investment_treaty [https://perma.cc/TQ5H-AZ3S]. An FTA is "[a]n agreement . . . between two or more countries concerning the buying and selling of each country's goods." *Trade Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014). ISDS is a mechanism, authorized by a treaty (either a BIT or FTA) or an investment agreement, through which disputes arising under that treaty or agreement may be settled through binding arbitration against the host state. *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Mar. 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds [https://perma.cc/EF8H-97WM].

[7] *See, e.g.*, JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 147–48 (2018) (discussing the unjust nature of international investment law); Lisa Sachs & Lise Johnson, *Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Investment Treaties Exacerbate Domestic Disparities*, *in* INTERNATIONAL RULES AND INEQUALITY: IMPLICATIONS FOR GLOBAL ECONOMIC GOVERNANCE (José Antonio Ocampo ed., forthcoming 2018) (discussing how international investment law helps rich countries at the expense of poor countries); Muthucumaraswamy Sornarajah, *International Investment Law as Development Law: The Obsolescence of a Fraudulent System*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 209, 211–12 (M. Bungenberg et al. eds., 2016) (discussing the negative effect of international investment law on developing countries); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 869–73 (2015); Steven Ratner, *International Investment Law Through the Lens of Global Justice*, 20 J. INT'L ECON. L. 747, 751–52 (2017) (summarizing criticisms for current international investment law); Anthea Roberts, *Clash of Paradigms: Actors and Influences Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 58–63 (2013) (discussing exploitative relationships that are created under international investment law); Gus Van Harten et al., *Investment Provisions in Trade and Investment Treaties: The Need for Reform*, BOS. UNIV.-GLOBAL ECON. GOVERNANCE INITIATIVE POL'Y BRIEF, Sept. 2015, at 1, https://www.bu.edu/pardeeschool/files/2014/12/Investor-State-Disputes-Policy-Brief.pdf [https://perma.cc/9B3Q-8HHD] (discussing the exploitation that exists under current international investment law).

[8] *See* Rebecca Lowe, *Investment Arbitration Claims Could Be 'Traded Like Derivatives,'* INT'L BAR ASS'N (Mar. 12, 2013), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=02decc8d-bf67-4b86-a023-f2ef2aa4843b [https://perma.cc/3CXW-ZJ32] (discussing the use of TPF as an investment opportunity).

[9] RSM Prod. Corp. v. St. Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 13 (Aug. 13, 2014) (Griffith, Q.C., Assenting Opinion). One arbitrator went

From a public policy perspective, however, these structural deficits, together with the nature of TPF investment, mean that TPF in investment arbitration could in fact be working as an exploitation of the investment law system, respondent states, and their citizens. In fact, as this Essay will argue, normative political theory strongly suggests that within the current BIT/ISDS system, TPF awards constitute unjustifiable wealth transfers from respondent host states (frequently, developing countries) and their citizens in favor of speculative finance.[10] For this reason, if not effectively regulated, TPF will further compromise not only the public's faith in the investment system, but also the viability of the system for states and other stakeholders such as traditional foreign direct investors.

Given these risks, states should consider banning TP, at least until the international investment regime can be reformed towards more balanced agreements. If TPF is to be allowed at all, it must, at a minimum, be strongly regulated to limit some of its damaging effects. Current developments, however, are moving in the opposite direction, facilitating increased use of TPF and therefore intensifying the exploitation.[11] If we are to move against TPF, and maintain the integrity of the investment treaty law system, the time to act is now.

I. How TPF Works

In order to understand how TPF can be characterized as an exploitation of the investment regime, it is first necessary to understand something of how TPF operates in an international setting, as a new element in the BIT/ISDS regime.

A. The TPF Funding Model

In the arbitration context, TPF is a specialized form of dispute financing in which a third-party finances the costs of arbitral proceedings for a party in a dispute that is subject to arbitration under a treaty-based ISDS provision.[12] In return, the funder requires some degree of control over the case and receives a

so far as to characterize the international investment arbitration market for third-party funders as a "gambler's paradise: heads I win, tails I do not lose." *Id.*

[10] *See* EBERHARDT & OLIVET, *supra* note 1, at 15–16 (noting the cost to Bulgaria of a TPF claim).

[11] For example, Hong Kong and Singapore have recently passed legislation explicitly allowing TPF in ISDS. Melody Chan, *Hong Kong*, *in* THE THIRD PARTY LITIGATION FUNDING LAW REVIEW 78, 78 (Leslie Perrin ed., 2017); Matthew Secomb & Adam Wallin, *Singapore*, *in* THE THIRD PARTY LITIGATION FUNDING LAW REVIEW 125, 126–29. Moreover, a 2018 industry self-study which largely whitewashes TPF in the BIT/ISDS system promises to only intensify this trend. *See generally* ICCA, REPORT OF THE ICCA-QUEEN MARY TASK FORCE, *supra* note 4.

[12] De Brabandere & Lepeltak, *supra* note 4, at 5. Outside of a treaty or private investment agreement, there is no right to arbitrate against a state on the part of a private investor.

percentage of the awarded compensation if the claim is successful.[13] If the claim fails, the funder receives no compensation and will bear the fees due to the claimant's legal team as well as other adverse costs.[14] The TPF industry is dominated by specialized litigation finance firms (such as Juridica in the United Kingdom, Burford Capital in the United States, and Omni Bridgeway in the Netherlands), investment banks, and hedge funds, all of whom raise their TPF capital from private investors seeking speculative portfolio investment opportunities.[15] Although the bulk of TPF funding goes towards domestic civil litigation, funders have reported that over ten percent of their investments are made in both international investment arbitrations and international commercial arbitrations.[16]

Investment arbitration claims have proven especially attractive to third-party funders because the amount of compensation resulting from such claims often far exceeds the compensation awarded in commercial arbitration, and investment treaty law offers virtually no counterclaim or offset possibilities for respondent states, thus making such claims very lucrative for funders.[17] Indeed, the size of the claim and costs associated with investment arbitrations can be enormous, often exceeding hundreds of millions of U.S. dollars, and the returns on such investments can be equally as staggering.[18] These returns range from 30 to 50% on a portfolio basis, with outcomes in specific cases even higher.[19] An example of this was recently reported by Burford Capital, which

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[13] *See id.* at 5, 7 (summarizing the concept of TPF). Many funders exert control over the case/client by monitoring legal fees and requiring progress reports of the case, demanding the right to approve the claimant's expenditures, having the choice of arbitrator, receiving updates of the case with any significant developments, and having direct access to the client's attorneys. ICCA, REPORT OF THE ICCA-QUEEN MARY TASK FORCE, *supra* note 4, at 28.

[14] Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357, 1365 (2018); De Brabandere & Lepeltak, *supra* note 4, at 5.

[15] Catherine A. Rogers, *Gamblers, Loan Sharks & Third-Party Funders, in* ETHICS IN INTERNATIONAL ARBITRATION 177, 178–79 (2014); *see* EBERHARDT & OLIVET, *supra* note 1, at 57 tbl.3 (listing well-known investment firms that engage in TPF of lawsuits).

[16] Rogers, *supra* note 15, at 182 n.33.

[17] *See* Rogers, *supra* note 15, at 178–79 (noting the significant opportunity present for funders in international arbitration); COLUM. CTR. FOR SUSTAINABLE INV., THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT: ROUND TABLE DISCUSSION ON THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT WITH ICCA/QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION DRAFT REPORT FOR PUBLIC DISCUSSION 1 (2017) [hereinafter ROUND TABLE], http://ccsi.columbia.edu/files/2017/11/Third-Party-Funding-in-ISDS-Roundtable-Outcome-Document-FINAL-2.pdf [https://perma.cc/BU5Y-SDP7] (noting that only claimants may file counterclaims, not states).

[18] Willem H. Van Boom, Third-Party Financing in International Investment Arbitration 30 (Apr. 25, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2043713_code342508.pdf?abstractid=2027114&mirid=1&type=2; *see* BURFORD CAPITAL, 2017 ANNUAL REPORT 23 (2017), http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf [https://perma.cc/SC4R-9LBX] (noting, for example, the sale of a claim worth $325 million).

[19] Van Boom, *supra* note 18, at 30.

in 2017 realized a 736% return on its investment following the sale of its interest in an investment arbitration claim in *Teinver v. Argentina*.[20]

TPF in an ISDS claim offers a significant upside to investor-claimants as well, because TPF minimizes the financial risk of bringing a claim against a host-state by shifting some or all of the cost-burdens to the funder.[21] Third-party funders can—in theory—also provide support to the respondent states against whom the claims are brought. In reality, however, the overwhelming majority of funding goes to investor-claimants because states cannot recover financially through ISDS, thus offering no corresponding "upside potential" for TPF investors in funding states.[22]

When deciding whether to enter into a funding agreement with a claimant, third-party funders conduct extensive due diligence and weigh several considerations. One significant consideration is, of course, the merit of a claim.[23] Investment arbitration offers a unique advantage to potential funders insofar as the majority of ISDS arbitral awards are published.[24] This decreases uncertainty surrounding their litigation investment and allows funders to more easily determine the likelihood that a case will prevail when evaluated against the background of trends in arbitral interpretations of key BIT provisions.[25]

A second major consideration is the enforceability of the award against the host-state.[26] Third-party funders are less likely to invest in cases they know will be unenforceable or difficult to enforce against the host-state.[27] By way of example, arbitrations brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Conven-

[20] *Id.* An appeal is currently pending in the 2017 case *Teinver v. Argentina* in the International Centre for Settlement of Investment Disputes, following an arbitration tribunal award in excess of $325 million. *Id.* at 23. Burford Capital invested approximately $13 million in the matter and sold their interest on the secondary market for $107 million for a gain of $94.2 million. *Id.*

[21] EBERHARD & OLIVET, *supra* note 1, at 59 (noting that "a corporation can file a claim then pass the cash drain and the risk to a funder while waiting for a payout, making arbitration against states even more attractive for businesses").

[22] *See id.* at 7 (noting the greater financial upside for plaintiff side funding); *see also* Frank J. Garcia et al., *The Case Against Third-Party Funding in ISDS: Executive Summary* 6 (B.C. L. Sch. – PUC Univ. of Chile, Working Grp. on Trade & Inv. Law Reform, Third-Party Funding Task Force 2018), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2130&context=lsfp [https://perma.cc/BP8T-499U] (discussing the unbalanced TPF provided to plaintiffs compared to defendant-states in arbitration cases). In the few reported cases of third-party funders supporting respondent states, the funder often sought a share of funds recovered by the funded states in other disputes not related to the funded investment dispute or indeed the investment system generally. Interview with Lise Johnson, Head of Inv. Law and Policy, Colum. Ctr. on Sustainable Inv. (Apr. 23, 2018).

[23] De Brabandere & Lepeltak, *supra* note 4, at 5.

[24] *Id.* at 6–7.

[25] *Id.* These trends have in fact expanded the scope of key investment rules, making it even more likely for investment claims to succeed against states, hence making such claims even more attractive to TPF funders.

[26] *Id.* at 5.

[27] *Id.* at 10.

tion") are particularly attractive to third party funders due to the ease of recognizing and enforcing the award in the host-state under the ICSID Convention.[28]

Finally, in deciding whether to finance a claimant, funders also weigh the value of the compensation sought, the extent of anticipated legal costs, and the expertise of the legal team that they will be funding.[29] In particular, TPF funders have reported considering the level of development, expertise, and legal capacity of the target state, with preference given to claims against developing or newly industrialized states with both a capacity to pay the award and a respectable investment rating they are eager to protect, while having only modest legal capacity and legal defense budgets.[30]

B. TPF in the BIT/ISDS System

TPF cannot be fully evaluated without reference to larger structural and institutional questions in investment law and to the fairness of the global economic system as a whole. The current BIT/ISDS system is undergoing an historic level of criticism and calls for reform, a larger process within which the current TPF critique forms a part.[31] Even proponents of the current BIT/ISDS regime recognize the system's flaws with respect to traditional rule of law desiderata such as transparency, predictability, coherence, and accountability.[32] Moreover, there is growing concern among scholars, civil society, and even some within the investment community that bilateral investment treaties and ISDS, in their current form, are no longer justifiable, even granting arguendo that they may have been when invented. Critics argue that the current BIT-based international investment regime is fundamentally unbalanced in terms of norms and dispute resolution, offering investors a wide range of protections while offering states no meaningful basis for claims or counterclaims.[33] In-

[28] *Id.* Article 54(1) of the ICSID Convention imposes an obligation on all states party to the ICSID Convention to enforce the award "as if it were a final judgment of a court in that State" with no review by national courts of that State. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[29] De Brabandere & Lepeltak, *supra* note 4, at 5–6.

[30] *See* ROUND TABLE, *supra* note 17, at 7–8 (discussing the criteria used by investors to decide whether to invest in claims).

[31] *See, e.g.*, Linarelli, *supra* note 7, at 147–48 (criticizing TPF as unjust); Roberts, *supra* note 7 (discussing exploitative relationships that are created under international investment law); Sachs & Johnson, *supra* note 7 (discussing how international investment law helps rich countries at the expense of poor countries).

[32] *See, e.g.*, EBERHARD & OLIVET, *supra* note 1 (detailing economic issues found in TPF); Rogers, *supra* note 15 (calling for increased regulation of TPF); Van Boom, *supra* note 18 (calling for increased transparency in TPF).

[33] *See, e.g.*, EBERHARD & OLIVET, *supra* note 1; Rogers, *supra* note 15; Van Boom, *supra* note 18.

deed, this imbalance has recently been referred to as "The Great Asymmetry" in international investment law today.[34]

Even granting that there may have been valid historical reasons for this asymmetry in the post-colonial period, and that risks to the viability and security of foreign investment continue to be real, in the view of this author the asymmetry nevertheless represents a fundamental flaw in the investment regime.[35] The BIT/ISDS regime today is deficient from the perspective of both governance and fairness, two parameters critical to shaping a more effective investment law regime for the 21st century. The regime presents a governance issue because the investment treaty regime can no longer simply be considered as treaties granting private parties legal rights.[36] Global governance today expects that regulatory structures and decisions that affect a range of transnational and national stakeholders (including investors) be made according to norms of participation, accountability, transparency, due process, and the rule of law.[37] In these respects, the current international investment regime is lacking.

Moreover, this asymmetry means the investment system is unfair in its distributive effects. Given that investment law is an allocative social institution,[38] we must evaluate the investment regime according to the same fairness norms we would apply to any system of governance allocating economic rights and resources across a range of settings.[39] The BIT/ISDS system fails to take into account its distributive effects on a range of stakeholders other than investors, the only stakeholder whose concerns are effectively recognized.[40] Ensuring a secure return on investment is fair, but this does not exhaust what fairness requires of investment law.

Into this drama of doctrinal, procedural, governance, and fairness concerns, TPF enters the scene. As will be argued below, TPF exacerbates the unfair effects of the BIT/ISDS system by exploiting the system's weaknesses in

[34] *See generally* Alessandra Arcuri, *The Great Asymmetry and the Rule of Law in Trade and Investment Agreements*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY (forthcoming 2019) (discussing asymmetrical relationships which are created under many international investment treaties).

[35] *See, e.g.*, Garcia et al., *supra* note 7, 869–73 (discussing historical causes for, and contemporary effects of, the asymmetrical nature of international investment regime).

[36] *See id.* at 871; Roberts, *supra* note 7, at 65.

[37] *See* EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 17 (2018) (discussing how the international investment law system should take into account certain principles).

[38] Garcia et al., *supra* note 7, at 876.

[39] *See* Ratner, *supra* note 7, at 768; *see also* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 438–39 (1998) (discussing the role of fairness in international investment law). *See generally* FRANK J. GARCIA, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES (2013) (discussing the standards of fairness that apply to international investment law).

[40] Sachs & Johnson, *supra* note 7, at 15. *See generally* Garcia et al., *supra* note 7 (discussing the asymmetry found in investment treaties); Ratner, *supra* note 7 (discussing the unbalanced nature of the BIT/ISDS system).

ways that further undercut the regime's capacity to satisfy even basic norms of distributive justice.

II. Third-Party Funding as Economic Exploitation

Despite the claims of its advocates and the possibility that impecunious investor-claimants could, in principle, be helped (counterarguments which will be addressed below), it is the view of this author that on the whole third-party funding in a legal system as unbalanced as the investment regime works as an exploitation of the system's flaws, to the detriment of stakeholders and for the benefit of speculative financiers. It does so by taking advantage of the system's weaknesses to effect what amount to unjustified wealth transfers from the citizens and taxpayers of target states and into the hands of speculative finance, a class of beneficiary the BIT/ISDS system never intended.

To recognize the risks posed by TPF, however, one need not adhere to a fundamental premise of this Essay, namely that the BIT/ISDS system today is fundamentally flawed. Even if one is of the view that the current BIT/ISDS system is appropriately designed for the protection of foreign direct investment, there are still important reasons for concern over TPF's systemic effects. By opening the system to the resources (and priorities) of speculative investment, TPF risks intensifying the criticism and controversy surrounding an already-embattled system and overheating the system through an increase in the number of claims, thus undermining the benefits traditional investors have come to expect from the BIT/ISDS system, all for the benefit of speculative finance.[41]

A. TPF Is an Exploitation of an Unbalanced System

Under normative political theory, in order for TPF to qualify as an exploitation, it must constitute an "unfair advantage-taking" of flaws in the structure and operation of the BIT/ISDS system to the detriment of other participants. After first explaining the nature of exploitation, I will then set out in what ways TPF takes advantage of the investment regime's flaws, and how that advantage-taking is unfair.

1. Economic Exploitation as Unfair Advantage-Taking

Theorists offer a number of accounts of what renders an economic arrangement exploitative.[42] What the various accounts share in common is the notion of unfair advantage-taking.[43]

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[41] *See infra* notes 43–72 and accompanying text.

[42] *See, e.g.*, Mathias Risse & Gabriel Wollner, *Three Images of Trade: On the Place of Trade in a Theory of Global Justice*, 1 MORAL PHIL. & POL. 201, 214 (2014) (defining exploitation); Matt

Unfair advantage-taking occurs when there is a flaw in the circumstances of the transaction, what Risse and Wollner call a "moral defect" in a distribution and its history.[44] This flaw might be an injustice in background conditions, a vulnerability,[45] a rights violation, or some other form of disabling disrespect.[46] Whatever its nature, the flaw operates in a specific socio-economic context between parties to result in one party accepting—seemingly inexplicably—a bargain that is *not fair*, though with no evidence of direct coercion.[47] We characterize the party benefitting from the flaw as exploiting the situation, and the vulnerable party as the exploited party.

2. Why TPF in ISDS Is an Exploitation of States Through the BIT Regime

TPF is an exploitation because in the context of the current BIT/ISDS system it constitutes a case of unfair advantage-taking. TPF funders are intentionally targeting the BIT/ISDS system as a speculative investment vehicle due to its unique structural characteristics.[48] They are doing this in order to achieve wealth transfers—in the form of TPF-funded settlements or arbitral awards—which represent unjustifiable transfers from target states and their citizens.

a. TPF Takes Advantage of the BIT/ISDS Regime by Design

That TPF is a case of *intentional* advantage-taking of the BIT/ISDS regime can hardly be denied. By funders' own account, TPF involvement in ISDS is predicated on precisely those aspects of the system that are most subject to criticism today.

To begin with, there is the basic structure of the ISDS system. TPF funders fully recognize that under BITs, states have no substantive rights and therefore cannot assert counterclaims or offsets which would jeopardize or reduce any recovery. Moreover, ISDS gives claimants a direct voice in the selection of adjudicators and arbitration rules, allowing TPF funders a degree of influence over the tribunal that is unthinkable in domestic civil litigation. Fi-

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Zwolinski*, Structural Exploitation,* 21 SOC. PHIL. & POL'Y 154, 156–57 (2012) (explaining exploitation in the context of economic arrangements).

[43] Risse & Wollner, *supra* note 42, at 214; Zwolinski, *supra* note 42, at 156–57. *See generally* ALAN WERTHEIMER, EXPLOITATION (1996) (explaining exploitation as a situation where one party takes advantage of another party).

[44] Risse & Wollner, *supra* note 42, at 215.

[45] Vulnerability is a useful term to describe a situation that makes one ripe for exploitation, whether an individual or a state.

[46] *See* Robert E. Goodin, *Exploiting a Situation and Exploiting a Person*, *in* MODERN THEORIES OF EXPLOITATION 166, 166–71 (Andrew Reeve ed., 1987) (explaining exploitation as a situation where one party takes advantage of another party).

[47] *See* Zwolinski, *supra* note 42, at 158–61 (proposing that we consider exploitation in terms of fairness and injustice on a micro and macro level).

[48] *See* EBERHARDT & OLIVET, *supra* note 1 at 58–59 (discussing different types of exploitation).

nally, the awards are unappealable and legally binding, and the global investment market makes ignoring an arbitral award a very risky course of conduct for any responding state concerned with its investment rating.[49]

Jurisprudential trends in investment arbitration also make conditions better for TPF and worse for states. Current expansive trends in arbitral interpretation of key BIT doctrines such as fair and equitable treatment ("FET") favorably alter the TPF risk calculus, making it more likely that states will face an increasing number of ISDS claims and an eroding legal basis for defending against those claims.[50] The positive effects of these trends for TPF, and the negative effects for states, are magnified in a system that allows losing states no right of appeal, meaning that there is no coherent system for addressing jurisprudential outliers and moderating at an appellate level interpretive approaches taken at the tribunal level.

The investment portfolio model of TPF that is fast becoming the norm also means that claimants will be incentivized to take more chances with weaker and riskier claims, contrary to what TPF proponents claim. The costs of losing (spread over the portfolio) are low relative to the possible gains from either settling or in fact prevailing on a novel theory in that arbitration and, potentially, an even more lucrative one in the future.

Thus, in an already unbalanced system, funders confer additional advantages on investors (advancing at the same time their own interests) in a growing number of claims against responding states with limited substantive rights and no appellate rights. This is an additional challenge for states that are already burdened by competing sovereign budgetary responsibilities to many stakeholders and that hold an attractive monopoly on the taxing power.

b. TPF Advantage-Taking is Unfair

But is this advantage-taking *unfair*? In the view of this author, it is, and resoundingly so. First, TPF represents a threat to fairness because it increases the resources available in a dispute to an already privileged class of investor-claimants, to the detriment of other stakeholders who are not granted similar benefits and will bear the additional costs. TPF thus gives a small class of investors even more resources to prosecute an increasing number of claims against constrained states in (to the author's eye) an already unbalanced system. Moreover, it introduces a new class of beneficiaries, TPF funders, who were not originally intended as beneficiaries and yet who will profit from this

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[49] *Id.* at 56–61.

[50] *See generally* Sebastián López Escarcena, *Investment Disputes* Oltre lo Stato: *On Global Administrative Law, and Fair and Equitable Treatment*, 59 B.C. L. REV. 2685 (2018) (discussing the doctrine of fair and equitable treatment).

system to the tune of somewhere between 30 and 50% of any settlement or award.

Second, this advantage comes at a significant cost to target countries and their citizens. It has been estimated to cost states an average of $8 to $10 million dollars to defend against a claim, even a spurious one.[51] Moreover, states either lose or settle two-thirds of all investment disputes, adding settlement or judgement costs to these litigation costs.[52] The scale of impact of these costs can be appreciated from a number of interacting factors: the upwardly-trending size of arbitral awards (recently averaging approximately $522 million per dispute),[53] the share of these awards that goes to TPF (estimated at 30 to50% although precise data is hard to come by due to secrecy),[54] and the increase in TPF-funded ISDS claims filed, part of the general increase in investment claims.[55]

What is even worse from a fairness point of view is that these settlements and awards will ultimately be paid by a large class of stakeholders underrepresented in the current system: the respondent state's public, who as taxpayers and citizens are the "residual risk-bearers" in the current system. The public pays in the form of both fiscal and welfare burdens because losses and settlements must (1) be paid out of the public fisc, with (2) money that is therefore no longer available for social welfare or other government spending priorities.[56] This is markedly different from the equities of domestic TPF litigation

[51] U.N. Gen. Assembly, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 Nov.–1 Dec. 2017), Comm'n on Int'l Trade Law, U.N. Doc. A/CN.9/930 (2017).

[52] UNCTAD, *Recent Trends in IIAS and ISDS*, IIA ISSUES NOTE NO. 1, Feb. 2015, at 7, https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf [https://perma.cc/T5B6-X9FX] (noting that funders win in 37% of cases and settle in 28% of cases).

[53] UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA ISSUES NOTE NO. 3, Nov. 2017, at 1, 5, https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf [https://perma.cc/9MWW-KYP3] (noting an average of $522 million awarded per successful claimant).

[54] Van Boom, *supra* note 18, at 30 (noting that investors generally receive between 30–50% of the arbitration award).

[55] Although data on the extent of TPF in the BIT/ISDS system is hard to come by, in domestic litigation Australia, for example, saw an estimated 16.5% increase in claims filed after relaxing its TPF prohibitions. Moreover, a 2015 survey of investment lawyers by Queen Mary Law School found that 39% of respondents had encountered TPF in practice. *See* James Egerton Vernon, *Taming the "Mercantile Adventurers": Third Party Funding and Investment Arbitration—A Report from the 14th Annual ITA-ASIL Conference*, KLUWER ARBITRATION BLOG (2017), http://arbitrationblog.kluwerarbitration.com/2017/04/21/taming-the-mercantile-adventurers-third-party-funding-and-investment-arbitration-a-report-from-the-14th-annual-ita-asil-conference/ [https://perma.cc/EHD7-FMVT] (citing to the 2015 Queen Mary/White & Case International Arbitration Survey); Tara Santosuosso & Randall Scarlett, Essay, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 B.C. L. REV. E. SUPP. (forthcoming 2019), http://lawdigitalcommons.bc.edu/ljawps/8/ (discussing flaws in the "access to justice" argument in favor of TPF).

[56] Moreover, regulatory settlements (for example, waivers of environmental law requirements) can impose negative externalities on the public as well.

between commercial parties, where the costs of losing the case are borne by a commercial entity and its shareholders.

c. TPF in ISDS Results in Unjustified Wealth Transfers

For all these reasons, a settlement or arbitral award in a TPF-funded case can be understood as an unjustified wealth transfer. One can justify, at least in principle, an award or settlement paid to a traditional ISDS claimant on the basis of the larger "social contract of investment" between the investor, the host country and its stakeholders. In that contract, the original investor put its capital at risk and to work in the host country, offering development benefits in exchange for investment returns and a degree of legal protection. On the contrary, TPF funders are not parties to this social contract and TPF "investment" is purely speculative, at no time offering even the possibility of any development benefits to the host country that might mitigate the equities of any subsequent arbitration-based transfers.

This would be morally problematic even in cases where the respondent state is wealthy (should TPF funders decide to come after such states, which is unlikely), but it is particularly egregious (and sadly more frequent) when the transfers come from the citizens of developing and newly industrialized states, as they are likely to do, given that TPF funders have admitted taking development status into account in their preliminary evaluation of a potential claim/investment.[57] Such states are particularly vulnerable to TPF, given that the vast majority (88%) of all claimant investors are from high-income countries, and developing countries successfully defeat investment claims only about half as often as developed countries do.[58]

For all these reasons, such transfers (in the form of TPF-funded awards) should be considered as *prima facie* unjustified—in fact, they appear to turn generally accepted norms of fairness upside down, amounting to an uncompensated taking from the less-favored many for the benefit of the wealthy few, with no compensating social justification.[59] Unless TPF advocates can justify such transfers, allowing speculative finance a stake in the outcome of ISDS claims, a voice in the determination of which cases to bring, which arbitrators to choose, and which cases to settle amounts to nothing less than a deliberate exploitation of the flaws in the BIT system for the benefit of speculators and at the cost of already-burdened respondent states, their taxpayers, and citizens. It is to those justificatory efforts that we now turn.

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[57] ROUND TABLE, *supra* note 17.

[58] Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1154, 1266–67 (2015).

[59] Ironically, they also run counter to basic investment rules against expropriation, in that they serve no public purpose and offer no compensation to the burdened.

B. ISDS Wealth Transfers to TPF Funders Cannot Be Justified

Attempts by TPF proponents to justify the role of TPF in ISDS offer three kinds of arguments in its defense. First, even conceding some TPF-related costs, TPF proponents argue that such costs are justifiable given the need to increase access to justice. Second, they argue that, given the fact that the claimant remains in all cases the original productive investor, the claimant's choice of financing mechanisms is irrelevant to the underlying equities of the situation. Finally, TPF advocates could claim that the availability of litigation finance in investment arbitration could lead to an increase in productive investment, if potential investors know they need not face alone the high costs of vindicating their rights under the treaties in any future arbitrations. All three rationales, however, fail to adequately justify this practice.

1. TPF Is Not About Access to Justice

Proponents of TPF in ISDS have drawn justification from traditional TPF rationales, arguing that funding of investment claims provides access to justice for investors who wish to seek redress but lack sufficient financial resources. This is a view favored by funders, as it frames their role as a vital one, which facilitates and contributes to global economic justice.[60] In the ISDS context, however, this rationale is fundamentally flawed—the role of TPF in the ISDS system cannot be equated with providing financing for disadvantaged claimants.[61]

Traditionally access to justice has meant capacity-building for social justice, or, in other words, providing financing or other support for parties who lack the human and financial resources to litigate. In contrast, as TPF funders readily and publicly acknowledge, TPF in ISDS is primarily about balance-sheet management, offering well-resourced claimants the ability to minimize the risk associated with bringing a claim, and does not focus on providing funding to impecunious or disadvantaged claimants.[62]

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[60] *See* Kelsie Massini, *Risk Versus Reward: The Increasing Use of Third Party Funders in International Arbitration and the Awarding of Security for Costs*, 7 Y.B. ARB. & MEDIATION 323, 325 (2015) (discussing reforms to TPF in international investment law).

[61] *See* Santosuosso & Scarlett*, supra* note 55 (arguing that "it seems morally objectionable to allow speculation in the context of ISDS, where outcomes can result in devastating economic implications for developing nations, even if in limited circumstances a claimant actually is impecunious and thereby granted access to justice through the involvement of a funder").

[62] *Id.* In fact, in the words of a leading TPF funder:

> Much 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, or other business reasons for not wanting to allocate resources to financing an arbitration matter.

In fact, when one considers access to justice in its broadest social context, TPF actually risks impairing access to justice for developing respondent states and their citizens. TPF funding exacerbates the inherent imbalance in the BIT system, disproportionately affecting already disadvantaged states' ability to control regulatory change within their borders and deliver important social welfare benefits. TPF further shifts power and resources towards private investors, which can in turn negatively impact the political affairs and social welfare of developing nations by sapping their resources.[63]

2. TPF Does in Fact Alter the Equities of Investment Arbitration

It could be argued that, at least formally speaking, the presence of TPF in ISDS arbitration does not change the identity of the claimant, nor the fact that in principle the entire award goes to the claimant. In that sense, how the claimant has decided to fund its claim and allocate the award (or settlement) should not affect the underlying equities of ISDS arbitration. Investors file claims, arbitrators adjudicate them, and, if the claim is successful, states pay them—business as usual.

TPF does not mean business as usual, however, but quite the opposite. The role of TPF funders in case management decisions means that the goals and interests of speculative finance—maximizing return on investment in a context (a system to facilitate long-term productive investment) in which TPF funders as speculators are not repeat players—may take the place of the goals and interests of a traditional claimant who must balance settlement value against the risks, costs (to their own funds), and possible returns of litigation in the context of a possibly ongoing business relationship.[64] This is precisely the risk that common law notions of maintenance and champerty were intended to prevent.

To this must be added the systemic effects of TPF investment, with available (though limited) evidence suggesting that TPF is both increasing the

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Christopher P. Bogart, *Third-Party Financing of International Arbitration Global Arbitration Review*, GAR (Oct. 14, 2016), https://globalarbitrationreview.com/insight/the-european-arbitration-review-2017/1069316/third-partyfinancing-of-international-arbitration [https://perma.cc/DB4W-73TX]. Christopher Bogart is the co-founder and CEO of Burford Capital. *Christopher Bogart*, BURFORD CAPITAL, http://www.burfordcapital.com/directory/christopher-p-bogart/ [https://perma.cc/9VMB-GCLV].

[63] Public health, public safety, and environmental protection measures have all been challenged under the BIT/ISDS system and developing states cannot weather the burden to public finances that even non-public welfare arbitration claims will create when paid out of public finances. *See* EBERHARDT & OLIVET, *supra* note 1, at 7 (discussing the negative impact of investment arbitration on developing nations).

[64] This risk is heightened by the fact that conflicts rules for TPF funders, investors and their counsel are unclear, and relationships among TPF funders, investors' counsel and even arbitrators are complex and murky. *See* ROUND TABLE, *supra* note 17 (discussing possible reforms to the TPF system).

number of claims filed and increasing the likelihood that weaker claims will be pursued.[65] Both trends increase the burden on already-burdened states to defend against or settle such claims, while undercutting the justification for this.

Finally, there are the differences in the political economy of ISDS arbitration when compared with the civil litigation and commercial arbitration environments TPF originally came from. The underlying asymmetry of BITs—the fact that under BIT rules, only states face the risk of large damage payments versus private litigants in any TPF-funded commercial litigation or arbitration—means that TPF changes the game unilaterally for states in a way it does not for commercial parties.

Finally, the fact that in ISDS arbitration the residual risk bearers for the losing states are citizens and taxpayers, not the shareholders of private enterprise, means that the investor's decision about funding does affect the equities in that it affects the source of TPF returns on investment. We should be concerned when states and their citizens, not other shareholders, bear the brunt of TPF wealth-maximization.

3. There Is No Evidence That the Availability of TPF Promotes Foreign Direct Investment

If the availability of TPF funding could be shown to promote an increase in foreign direct investment ("FDI") flows because it reduced a potential investor's future legal costs, this could offer justification for the public and systemic costs of TPF. There is no evidence, however, suggesting that the availability of TPF would in fact increase the amount of FDI, the only compensating factor that could potentially be of benefit to states and their citizens.

Given the secrecy surrounding TPF in ISDS, it is difficult to determine with precision the extent to which TPF is involved in ISDS, making it impossible to determine if any increases in FDI would be TPF-related. Available evidence suggests that it is unlikely that TPF would have such an investment-promoting effect. To begin with, the economic data on the role of BITs in increasing FDI is inconclusive.[66] It seems likely that if BITs have no clear effect on FDI, then the availability of litigation funding would have even less effect. Moreover, there is a recent study suggesting that even pro-investor reforms to the provisions of investment agreements similarly have no clear incentivizing effect on FDI.[67]

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[65] EBERHARDT & OLIVET, *supra* note 1, at 7.

[66] *See* AISBETT ET AL., *supra* note 37, at 35–51(noting the increased use of TPF in international arbitration venues).

[67] *See* Cree Jones, *Do Legal Remedies Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204964 (discussing the effect of international legal remedies on TPF investments).

Instead, what seems clear (but again, on survey and anecdotal evidence only), is that the number of *disputes* against states is increasing, which by itself offers no benefit whatsoever to states or their citizens.[68] Insofar as the availability of TPF is a factor promoting this increase, the social justification for TPF in ISDS only gets weaker.

C. Even the Regime's Defenders Should Fear TPF

It is a fundamental premise of this argument that the current BIT/ISDS system is flawed and that TPF funders take advantage of these flaws to the detriment of traditional stakeholders. Proponents of the ISDS system as currently constituted should also recognize, however, that opening the ISDS system to TPF is unwise for anyone relying on the system's long-term survival.

Whether or not one considers the many critiques of the BIT/ISDS system to be valid, it is clear that together they create a legitimacy crisis for the regime. Not only are many states, stakeholders, academics, and civil society organizations highly critical of the regime, but there have also been recent high-profile exits from the regime, and significant changes in policy on the part of a number of states that span the development spectrum.[69]

In this environment, the growing role of TPF in ISDS risks further overheating ISDS to the point of collapse, giving resentful states additional reasons—and excellent public relations talking points—for exiting the regime. This may not be in the long-term interest of traditional FDI investors, insofar as they are counting on the long-term viability of ISDS for the protection of their traditional—and legitimate—investment interests.[70] For similar reasons, business and commercial interests in the United States of America have, through the Chamber of Commerce, resisted the rise of domestic TPF-funded litigation as inimical to the long-term health of the civil litigation and arbitration systems its business membership depends on.[71]

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[68] EBERHARDT & OLIVET, *supra* note 1, at 8 (noting the large increase in investor-state arbitration).

[69] *See The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game [https://perma.cc/4EE6-X428] (noting that the United States, Australia, India, South Africa, and Ecuador, for example, have all exited or are renegotiating their ISDS commitments). Canada must now also be added to this list. Heather Gies, *NAFTA Out, USMCA In: What's in the Canada, Mexico, US Trade Deal?*, AL JAZEERA (Oct. 1, 2018), https://www.aljazeera.com/news/2018/10/nafta-usmca-canada-mexico-trade-deal-181001195545440.html [https://perma.cc/HT59-8PBM].

[70] Industries making capital-intensive long-term investments, such as the automotive and automotive parts industries, view any threat to the stability of ISDS as inimical to their interests, including threats from the backlash to TPF's effects. *See* Interview with Cécile Toubeau, Dir., Better Trade & Regulation, Transp. & Env't (Apr. 23, 2018).

[71] BEISNER & RUBIN, *supra* note 3, at 1–2 (suggesting possible reforms to the TPF system).

TPF thus creates risks that threaten the long-term viability of ISDS and the current international investment regime. Allowing TPF to skew the BIT/ISDS system into a facilitation mechanism for controversial wealth transfers for the benefit of speculators hurts everyone else, including traditional stakeholders such as FDI investors.

III. ADDRESSING THIRD-PARTY FUNDING AS EXPLOITATION THROUGH LAW REFORM

As an exploitative mechanism for unjustified wealth transfers, TPF should be barred from all ISDS cases until the system is fundamentally reformed both substantively and procedurally. At present, however, the TPF industry is in the midst of an aggressive worldwide lobbying campaign to increase the number of jurisdictions permitting TPF.[72] Moreover, the industry has undertaken an attempt at self-regulation and produced a report ("Report"), sponsored by the International Council for Commercial Arbitration and the Queen Mary Law School, which not only fails to recognize adequately the detrimental role of TPF in ISDS, but also seeks to normalize it TPF in ISDS and facilitate its increased use.[73] Together these efforts create serious risks for all stakeholders, and contradict sound public policy.

A. Regulation Is Not Enough

Although the Report offers useful recommendations for addressing important ethical and professional issues raised by TPF across a range of dispute platforms, it almost entirely sidesteps the risk of exploitation of TPF in the ISDS system.[74] For this reason, the Report risks doing more harm than good in the area of investment because it normalizes an exploitative practice under the guise of regulating it.[75]

The Report adopts a disclosure-based regime with conflict of interest rules.[76] This is not an unprincipled view in itself and represents an improvement over the status quo. However, given the stakes involved, the exploitative nature of TPF in ISDS, and the costs to respondent countries' taxpayers and citizens, it is not enough of a regulatory response. Certainly, it is a step in the right direction to know who is exploiting the Great Asymmetry, by how much, and for whose

[72] Burford Capital, for example, touts its role in lobbying the Hong Kong and Singapore governments to relax rules against maintenance and champerty and create TPF opportunities in the investment arbitrations they host. 2017 ANNUAL REPORT, *supra* note 18, at 11.

[73] *See generally* ICCA, REPORT OF THE ICCA-QUEEN MARY TASK FORCE, *supra* note 4.

[74] *See id.* at 255–56 (discussing concerns about TPF in an ISDS system).

[75] *See id.*

[76] *See id.* at 81 (encouraging self-disclosure by parties of TPF, authorizing forced disclosure at the direction of the tribunal, and authorizing measures to mitigate conflicts of interest that arise as a result of TPF).

benefit, but in light of the fundamental inequities described above it is inadequate. By failing to conclusively acknowledge the underlying structural risks of TPF in ISDS, the Report amounts to a call for regulated exploitation, whatever the bona fides of its authors.[77]

Moreover, at a rhetorical and strategic level, the approach of the Report itself implies that the *presence* of TPF in ISDS is beyond regulation or review, that there will be no further public consideration or regulatory response except to moderate some of its effects.[78] One can see in the careful wording of Chapter Eight, for example, that the Task Force had to contend with strong differences of opinion on this question.[79] Nevertheless, there is reason for concern that, by its omissions and elisions, the ISDS portions of the Report will be read more as a ratification of the status quo with respect to TPF than as the opening contribution to a searching and public-minded regulatory conversation on TPF and investment arbitration that the Report ostensibly seeks to be.

Thus for the reasons set forth above, and the Report's recommendations notwithstanding, TPF should be barred from all ISDS cases until the system is fundamentally reformed both substantively and procedurally. Simple disclosure is not an adequate remedy when the structural defects of the system are so basic and so prone to exploitation. Allowing TPF to operate within ISDS—even under an enhanced disclosure regime—reduces an institution designed to protect and incentivize allocations of development capital, address injustice (albeit imperfectly), and maintain order, into a speculative investment opportunity. This is the kind of economic distortion of dispute resolution that traditional prohibitions on maintenance and champerty were designed to prevent.

This pattern—de-regulating traditional safeguards in order to facilitate speculative finance's exploitation of a substantive regime for extraordinary short-term gain—bears an uncomfortable similarity to the regulatory decisions taken in the United States, such as the elimination of the Glass-Steagall Act, that gave speculation an increased role in home mortgage finance, creating tremendous wealth for a few but also unleashing the greatest global economic recession

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[77] *See generally id.*

[78] *See id.* at 255–56.

[79] *Id.* at 199–226. These differing opinions can be seen in an introductory explanation to chapter 8:

> One of the primary challenges was linguistic. The language used by different stakeholders in debates about investment arbitration can be particularly stark. Terminology that is part of the basic lexicon of one group of stakeholders is often regarded by those with competing views as inherently biased or unduly inflammatory. Despite these challenges, this Chapter aims to provide a full-throated presentation of competing viewpoints in a manner that both respects particular stakeholders' frame of reference, but also facilitates meaningful discussion.

Id. at 199–200.

since the 1920s.[80] Granted, the systemic risks from TPF in ISDS may not be as great as the systemic risks created by mortgage-backed securities and their relationship to financial derivatives, but for citizens of targeted countries the threats to wealth, savings, public goods, and public welfare are equally great, as are the uncompensated wealth transfers which TPF effects from the needy many to a privileged few.

Prudent voices have expressed the view that until there is a richer empirical data set on the scale, role, and effect of TPF in ISDS, it would be premature to ban or heavily regulate TPF.[81] Although this Essay recognizes the importance of data-driven regulation, it must also be recognized that the scale of current investment, even imperfectly estimated, and the increasing rate of TPF funding, suggest strong momentum and powerful financial interests behind increased TPF activity in ISDS.[82] Simply put, by the time we understand more empirically the full nature of the risks and effects, it may be too late to stop TPF. Certainly, many citizens of developing and other target countries will have seen public resources intended for their welfare diverted into portfolio returns to speculative financiers, at rates as high as seven-hundred percent-plus ROI.[83]

Under such conditions, it would seem that the precautionary principle, an established guideline of international law designed for such situations, would support quick action in the face of large-scale and potentially irreversible harm to human well-being.[84] Essentially, the precautionary principle reminds regula-

[80] KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS 16 (2011) (discussing deregulation of the financial industry and its effect on the housing industry).

[81] *See* Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935 (2018) [hereinafter Thrasher, *Expansive Disclosure*].

[82] It is difficult to determine with any precision the exact extent of TPF activity in investment arbitration, principally because TPF funders and funded litigants have been loath to disclose the presence of TPF and on what terms. There is, however, general consensus even within the arbitral community that the TPF presence is significant and increasing. *See* William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 113, 115 (Christian Klausegger et al. eds., 2015) (according to an estimate from a major funder on the Queen Mary Task Force, "at least two-thirds of ICSID cases filed in 2013 implicated claimants which had sought resources from a major funder"); *see also* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 37 (OECD Working Papers on Int'l Inv., No. 2012/03, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207366 ("Commercial third party funders generally prefer not to disclose their role to the other parties or to the adjudicators, and funders and parties appear to consider that no clear disclosure requirements currently exist. Accordingly, it is not possible to determine the scope of third party funding in ISDS. However, available evidence suggests an already significant role.").

[83] *See* 2017 ANNUAL REPORT, *supra* note 18, at 23 (noting sale of a stake in an arbitration claim for 736% ROI).

[84] *See* Sonia E. Rolland, Note, *The Precautionary Principle: Development of an International Standard*, 23 MICH. J. INT'L L. 429, 430 (2002) (explaining the precautionary principle and its application in international law).

tors that there is a social responsibility to protect the public from exposure to harm when a serious substantive investigation has found a plausible risk, and justifies them in exercising discretion to prevent such harms even in the face of scientific uncertainty.[85]

The well-documented asymmetries in investment treaty law, coupled with the clearly "fit-to-purpose" funding model employed by TPF funders, amount in this case to the responsible identification of a plausible risk, and would in the view of this author justify regulation in the face of a relatively less-developed empirical record. That this record is in fact lacking due to the deliberate secrecy policies of TPF funders themselves only reinforces the urgency and appropriateness of this response. In fact, given that funders have the information to reduce such uncertainty but have chosen for self-interested reasons not to disclose it, the presumption should be that the information, if disclosed, would raise—not alleviate—concerns about TPF in ISDS. It would be a further injustice to allow TPF's cloaking behavior to become the pretext for further delaying regulatory action.

B. How TPF Could Be Banned

Banning TPF as a finance mechanism for ISDS would require concerted action in a number of venues and jurisdictions. To begin with, states which currently prohibit TPF in their domestic legal systems should maintain this ban, at least as far as banning the recognition and enforcement in their jurisdictions of TPF-funded investment arbitral awards.[86] For example, as recently as May 2017, the Supreme Court of Ireland, in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*, confirmed that third party funding is prohibited by law due to the violation of the torts of maintenance and champerty by TPF.[87] States should also make it clear in any subsequent or amended BITs that TPF is prohibited from disputes arising under the BIT in question. States banning TPF from their jurisdictions would also be in a position to object to the

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[85] *See id.* The precautionary principal is defined by the United Nations in the Rio Declaration on Environment and Development: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development* princ. 15, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.1), annex 1 (Aug. 12, 1992).

[86] It would thus be possible for a state to allow TPF in domestic litigation and arbitration while banning it in ISDS-related actions.

[87] Persona Digital Telephony Ltd v. Minister for Public Enterprise [2016] IEHC 187, ¶ 81, 87 (Ir.). The Court found that it "is clear that the provision of assistance with a view to supporting litigation in return for a share of the proceeds in the absence of a bona fide interest is contrary to public policy and constitutes an abuse of process." *Id.* ¶ 81.

presence of such funding in any investment arbitrations for which they are the situs.

States should also seek collective action opportunities to ban TPF. Such collective action could include the negotiation of TPF bans in the investment chapters of any regional trade agreements they are party to, as well exercising their role in arbitral associations such as ICSID and the United Nations Commission on International Trade Law (UNCITRAL) to support a TPF ban in the arbitral rules of these key associations.[88] By acting in concert, states could minimize any real or perceived risks of alienating foreign investment or investment arbitration business through unilateral bans.[89]

Even though the prospects for a multilateral investment treaty (an ideal place in which to ban TPF) are not strong, there are important regional trade and investment projects currently underway which could also offer important regulatory opportunities in this regard. For example, as the European Union's leadership on the investment-court model demonstrates, a strong and reform-oriented jurisdiction that stands at the hub of a number of investment treaties can exercise leadership towards creating new paradigms through its own treaty practice.[90] Moreover, as the Organisation for Economic Co-operation and Development (OECD) tax avoidance project illustrates, innovative multilateral strategies for coherently amending a multitude of bilateral treaties do exist, which is what the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") accomplishes in the area of bilateral tax treaties, base erosion and profit-shifting.[91]

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[88] Efforts are already underway to include TPF in the agenda of the current UNCITRAL and ICSID rules reform efforts, in which this author and others have participated. *See generally* ICSID SECRETARIAT, PROPOSALS FOR AMENDMENT OF THE ICSID RULES—SYNOPSIS (2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf [https://perma.cc/QX5N-KBPK] (outlining proposals for amendments to ICSID's rules); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 416–19 (2018); Anthea Roberts & Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL: TALK! (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/ [https://perma.cc/R3PE-BNDV] (summarizing different states' concerns regarding ISDS).

[89] The Mauritius Convention may also be one such avenue by which states could unilaterally ban confidential TPF. G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, (Dec. 10, 2014) (establishing rules geared towards increased transparency in TPF arbitration). Moreover, clarifying that a state law ban affects only investment TPF and not commercial arbitration should allay any fears of alienating commercial arbitration business, an important industry for many jurisdictions.

[90] The EU is developing a proposal for a multi-lateral investment court and has inserted language in its recent investment and trade agreements permitting the grafting-in of such an option if it is adopted. *See The Multilateral Investment Court Project,* EUR. COMM'N, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 [https://perma.cc/3L7W-CN6V] (outlining the proposal for a multilateral investment court).

[91] *See generally* OECD, MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING: INFORMATION BROCHURE (2018),

More work needs to be done to develop an effective multi-prong legal strategy towards banning TPF in ISDS. Although the legal and practical challenges are real, the goal is a worthy one: in law, one does not aim to regulate exploitation—one aims to stop it.

C. Stronger Regulation Is Needed if TPF Is to Be Allowed

If TPF is to be allowed in ISDS in some form, then ISDS arbitral rules should require mandatory, expansive disclosure of third-party funding agreements, coupled with mandatory security for costs.[92] Although there is growing consensus that the existence and identity of a TPF funder should be disclosed, such disclosure should go farther and include the terms of funding agreements.[93] This aligns well with general institutional trends toward increased transparency and highlights funding agreement provisions that create perverse incentives. Such expansive disclosure will also provide the much-needed data for future research into the benefits and harms involved in TPF and enable more effective regulation going forward.

Although there is currently no systemic requirement to disclose the presence or identity of third-party funders, some promising steps have been taken. The Report, although flawed, does call for limited disclosure.[94] On the regulatory front, Article 8.26, of the Canada-European Union Trade Agreement includes mandatory disclosure of the presence and identity of TPF funders, and Article 23(1) of the Singapore Investment Arbitration Commission Rules provide the tribunal the discretionary authority to order disclosure of the details of the agreement as well.[95] The strengths of both of these approaches should be com-

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http://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf [https://perma.cc/7YNS-J6CW]. The MLI is an innovative multilateral legal instrument to amend bilateral income tax treaties in order to implement Base Erosion and Profit Sharing standards through a single-instrument unifying framework that offers flexibility to signing countries to: (i) identify the treaties they are willing to amend and (ii) identify optional amendments they agree to adopt in those treaties they propose to amend, in addition to the minimum standards required by the treaty. *Id.* Over 80 countries have agreed to amend income tax treaties under this instrument (subject to individual country ratification procedures), which entered into force on July 1, 2018. ORG. FOR ECON. CO-OPERATION AND DEV., SIGNATORIES AND PARTIES TO THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHARING (2018), http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf [https://perma.cc/LK79-UVKU].

[92] *See* Rachel Denae Thrasher, *The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform* 5–6 (B.C. L. Sch. L. & Just. in the Americas Working Paper No. 9, 2018), http://lawdigitalcommons.bc.edu/ljawps/9/ [https://perma.cc/4RVC-3NKV] (calling for reforms to TPF to provide for more disclosure).

[93] *See generally* Thrasher, *Expansive Disclosure*, *supra* note 81.

[94] ICCA, REPORT OF THE ICCA-QUEEN MARY TASK FORCE, *supra* note 4, at 81 (calling for limited disclosure of third-party funding).

[95] *See* Comprehensive Economic & Trade Agreement, Can.-E.U., art. 8.26, Oct. 30, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf [https://perma.cc/6H53-E2SL] (providing "[w]here there is third party funding, the disputing party benefiting from it shall disclose to the other

bined into a single requirement for both mandatory and comprehensive disclosure of the presence of TPF and its terms.[96]

As an adjunctive strategy to mandatory expansive disclosure, tribunals hearing claims involving TPF funding should be empowered to impose mandatory security for costs as a matter of course.[97] Security for costs orders require the claimant to pay the state's legal costs in the event the claim is denied and can provide a disincentive to funders from pursuing weak cases merely for their settlement or future precedential value.

CONCLUSION

It is critically important that states, their negotiators, academics and civil society take a careful, transparent, and sustained look at the risks that TPF poses to the public and to the investment regime itself. Rather than be positioned as a *fait accompli*, TPF should be properly understood as posing exploitation and other risks to the current investment regime, and should be eliminated outright while the possibility still exists. If, however, TPF is to be allowed, for example in order to permit data collection towards future regulation, it should be restricted by the constraints outlined above and others yet to be formulated.

It is important to recognize, however, that the benefits of regulating towards disclosure and further data collection come at the cost of accepting in the meantime a rapidly growing TPF presence in ISDS and foregoing the broad systemic benefits of a TPF ban. This could make it difficult if not impossible to effectively regulate TPF down the road. The risk we undertake is to look back at this moment as we do to the run-up to the 2008 financial crisis, as a story of opportunities missed at the cost of suffering unleashed.

disputing party and to the Tribunal the name and address of the third party funder"); SIAC, INVESTMENT ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE 12 art. 23(1) (1st ed. 2017), http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf [https://perma.cc/KG7M-DS2S] (providing that "[u]nless otherwise agreed by the Parties, the Tribunal may . . . require a Party to give any expert appointed under Rule 23.1(a) any relevant information, or to produce or provide access to any relevant documents, goods or property for inspection").

[96] Thrasher, *supra* note 92, at 7–8.

[97] An example of this would be the arguments in favor of this approach made by Gavan Griffith, arbitrator in the RSM case. *See supra* note 9 and accompanying text.