

THE INVESTMENT
TREATY
ARBITRATION
REVIEW

SECOND EDITION

Editor
Barton Legum

THE LAWREVIEWS

THE INVESTMENT TREATY ARBITRATION REVIEW

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PREFACE

Barton Legum

The past year confirmed the usefulness of *The Investment Treaty Arbitration Review's* contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to conclusion. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to, and the context for, those developments.

This second edition adds new topics to the Review, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum

Dentons

Paris

April 2017

THIRD-PARTY FUNDING: SECURITY FOR COSTS AND OTHER KEY ISSUES

Miriam K Harwood, Simon N Batifort and Christina Trahanas¹

I INTRODUCTION

Third-party funding, referring to the financing of lawsuits in exchange for a portion of the proceeds in the event of success, is a relatively recent phenomenon in investment arbitration. Professional funders appear to have realised the potential of a field where multimillion and multibillion-dollar cases are the norm rather than the exception. They may also be attracted by the lack of regulation of third-party funding. While some domestic laws limit or even prohibit third-party funding, investment arbitration was until recently a ‘legal no man’s land’ in that respect.²

But that situation is rapidly changing. As third-party funding is becoming more common, a growing body of arbitral decisions and commentary has highlighted serious concerns. This chapter discusses some of the key issues, including: (1) potential conflicts of interest arising out of the involvement of a third-party funder in an arbitration; (2) whether a party’s reliance on third-party funding constitutes grounds for ordering security for costs; (3) whether the involvement of a third-party funder has implications for the jurisdiction of investment treaty tribunals; and (4) whether and to what extent a party relying on third-party funding should disclose that arrangement.

II CONFLICTS OF INTEREST

The first issue raised by third-party funding concerns the conflicts of interest that may arise. The most obvious scenario is that of a person affiliated with a third-party funder, such as a consultant or member of its board of directors, who also serves as an arbitrator in a case financed by that funder. For example, a well-known third-party funder, Woodsford Litigation

1 Miriam K Harwood is a partner and Simon N Batifort and Christina Trahanas are associates at Curtis, Mallet-Prevost, Colt & Mosle LLP. The authors acted as counsel for the respondent in one of the cases discussed in this chapter: *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan*, ICSID Case No. ARB/12/6. This chapter revises and updates the chapter on third-party funding prepared by the same authors for the previous edition of this publication. See Miriam K Harwood, Simon N Batifort and Christina Trahanas, ‘Third-Party Funding: Security for Costs and Other Key Issues’, *The Investment Treaty Arbitration Review* 119 (2016).

2 Willem H van Boom, ‘Third-Party Financing in International Investment Arbitration’, December 2011, page 5.

Funding, has an Investment Advisory Panel comprised, *inter alia*, of individuals who also act as arbitrators.³ There would surely be a conflict of interest if a member of that Panel also served as an arbitrator in a case in which Woodsford supplied funding.

The potential for conflicts of interest has been widely recognised. For example, two members of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration have acknowledged that third-party funding raises ‘real and important concerns about potential conflicts’, especially given ‘the increase in the number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, and, relatedly, the often close relations among elite law firms and leading arbitrators’.⁴

Arbitral tribunals have also cited potential conflicts of interest as a factor warranting disclosure of third-party funding. In *Sehil v. Turkmenistan*, the tribunal ordered disclosure of third-party funding, underscoring the need ‘to avoid a conflict of interest for the arbitrator’ and the importance of ‘transparency’.⁵ Avoiding conflicts of interest was also cited as a concern justifying disclosure in *South American Silver v. Bolivia*.⁶ In *Guaracachi v. Bolivia*, after the identity of the third-party funder became known, the arbitrators confirmed that they had no link with the funder and that they were ‘not aware of any circumstance that could give rise to justifiable doubts as to their impartiality and independence on account of the financing of the Claimants’ claims by [the third-party funder]’.⁷

The IBA Guidelines on Conflicts of Interest as revised in 2014 also acknowledge this issue by providing that a third-party funder is the ‘equivalent of a party’, which has significant implications under those Guidelines.⁸ For example, the scenario mentioned above, where an

3 See Woodsford Litigation Funding, ‘About Us’, available at <http://woodsfordlitigationfunding.com>.

4 William W Park and Catherine Rogers, ‘The Arbitration Agreement and Arbitrability, Third-Party Funding in International Arbitration: The ICCA-Queen Mary Task Force’, *Austrian Yearbook on International Arbitration* 113 (2015), page 119. See also Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014), page 201, paragraph 5.79 (‘In sum, for arbitrators to assess the potential for conflicts and make necessary disclosures, third-party funders’ participation in particular international arbitration cases will necessarily have to be disclosed’); Catherine Kessedjian, ‘Good Governance of Third Party Funding’, *Columbia FDI Perspectives*, No. 130, 15 September 2014 (Kessedjian, ‘Good Governance’), pages 1–2 and n. 7 (‘The involvement of funders bears directly on, *inter alia*, the admissibility of claims and a potential conflict of interest’).

5 *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 (*Sehil v. Turkmenistan*), paragraphs 1 and 9.

6 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15 (*SAS v. Bolivia*), Procedural Order No. 10 dated 11 January 2016, paragraph 79.

7 *Guaracachi America Inc and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17 (*Guanacachi v. Bolivia*), Procedural Order No. 13 dated 21 February 2013, paragraph 9.

8 IBA Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014 (IBA Guidelines), General Standard 6(b), page 13 (‘If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party’); Explanation to General Standard 6(b), pages 14–15 (‘Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party’).

arbitrator serves as an adviser for a third-party funder, would fall under the list of non-waivable conflicts of interests in the IBA Guidelines.⁹ This also has important implications in terms of disclosure requirements under the IBA Guidelines, which are discussed in Section V, *infra*.

At least one arbitrator has been challenged on the basis of his relationship with a third-party funder. In 2013, the respondent in an ICC arbitration challenged an arbitrator on the basis that he ‘failed to disclose that his law firm and the third-party funder were linked in an unrelated investment treaty dispute’ – that is, the funder and the arbitrator’s law firm ‘had an ongoing financial relationship . . . in an unrelated case’.¹⁰ The challenge was rejected because the funder had a limited role in the arbitration, specifically, the funder was only ‘engaged to facilitate settlement negotiations between the parties, which never took place, and the arbitrator’s law firm had a role other than that of counsel in the investment treaty dispute in which the third-party funder was involved’.¹¹

III SECURITY FOR COSTS

A claimant usually has recourse to third-party funding because it has no or few assets of its own to finance its case. The respondent may therefore question whether the claimant will have the means to comply with a potential award ordering it to pay the costs of the proceeding. To address the risk of non-compliance with a costs award, the respondent may request the tribunal to order the claimant to post security for costs as a condition for continuing the proceeding.¹²

9 See IBA Guidelines, Part II: Practical Application of the General Standards, paragraphs 1.1, 1.2, 1.4 (listing as part of the Non-Waivable Red List the situations where ‘the arbitrator is a legal representative or employee of an entity that is a party in the arbitration’, where ‘[t]he arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration’, and where ‘[t]he arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom’).

10 Andrea Carlevaris and Rocio Digón, ‘Arbitrator Challenges under the ICC Rules and Practice’, in *ICC Dispute Resolution Bulletin* 2016 No. 1 (2016), page 39. The respondent initially requested the arbitrators ‘to provide information and make specific disclosures on the relations between themselves or their respective law firms and the alleged third-party funder’, and filed the challenge following receipt of the arbitrators’ responses. *Id.*, pages 39–40.

11 *Id.*, page 40.

12 An order for security for costs has been defined as a ‘form of provisional relief’ that ‘require[s] one party (or both parties) to post security to cover the likely amounts that would be awarded to the counter-party in the event that it prevails in the arbitration and is entitled to recover its legal costs’. Gary B Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) (Born, *International Commercial Arbitration*), page 2495.

The threshold issue for a tribunal seized of a request for security for costs is whether it has the power to make such an order. Some arbitration rules and statutes expressly provide for that power.¹³ But even when there is no such express provision, it is well accepted that the power of arbitral tribunals to order provisional measures encompasses security for costs.¹⁴

That power has been recognised under the two main sets of rules applied in investment treaty arbitration: ICSID¹⁵ and UNCITRAL.¹⁶

-
- 13 See, e.g., Arbitration Rules of the London Court of International Arbitration (2014), Article 25.2; Arbitration Rules of the Singapore International Arbitration Centre (2013), Article 24(k); Arbitration Rules of the Australian Centre for International Commercial Arbitration (2016), Article 33.2(e); English Arbitration Act (1996), Section 38(3). The EU–Vietnam Free Trade Agreement and the draft of the Transatlantic Trade and Investment Partnership proposed by the European Commission provide ‘[f] or greater certainty’ that security for costs can be ordered by the arbitral tribunal ‘if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against’ it. EU–Vietnam Free Trade Agreement, Agreed text as of January 2016, Chapter 8: Trade in Services, Investment and E-Commerce (the EU–Vietnam FTA), Section 3, Article 22.1; European Commission, Draft of Chapter II (Investment) of the Transatlantic Trade and Investment Partnership, released on 12 November 2015 (the EU Draft TTIP), Section 3, Article 21.1. See also Arbitration Rules of the Singapore International Arbitration Centre, Draft for Public Consultation released 18 January 2016, Rule 26.k.
- 14 See, e.g., Julian D M Lew et al, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pages 600–601 (‘The respondent against whom the proceedings were brought has an interest in ensuring that at least part of the fees incurred will be recoverable. To this end several arbitration rules contain provisions empowering the tribunal to grant security for costs. . . . However, even where no such express provisions exist, tribunals can grant such orders under their general power to grant interim relief’); Nicolas Ulmer, ‘The Cost Conundrum’, 26(2) *Arbitration International* 221 (2010), page 230 (‘[I]t is widely accepted that the ordering of security for costs is within the power of arbitrators to order interim measures’); Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), paragraph 5-84; Nathalie Voser, ‘New Rules on Domestic Arbitration in Switzerland: Overview of Most Important Changes to the Concordat and Comparison with Chapter 12 PILA’, 28(4) *ASA Bulletin* 753 (2010), page 762.
- 15 See, e.g., *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs dated 13 August 2014 (*RSM v. St Lucia*), paragraph 54; *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal’s Decision on Respondent’s Application for Security for Costs dated 14 October 2010 (*RSM v. Grenada*), paragraph 5.16; *Commerce Group Corp & San Sebastian Gold Mines Inc v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador’s Application for Security for Costs dated 20 September 2012, paragraph 45 (finding that the *ad hoc* committee’s power to safeguard the integrity of the proceeding included the power to order security for costs); Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) (Schreuer, *The ICSID Convention*), page 782, paragraph 90 (stating that a claimant in an ICSID arbitration ‘may be required to provide a financial guarantee as a condition for the tribunal proceeding with the principal claim’).
- 16 The 2010 UNCITRAL Rules state that the tribunal may ‘[p]rovide a means of preserving assets out of which a subsequent award may be satisfied’, which undoubtedly covers security for costs. UNCITRAL Arbitration Rules (2010), Article 26(2)(c); Georgios Petrochilos, ‘Interim Measures under the Revised UNCITRAL Arbitration Rules’, 28(4) *ASA Bulletin* 878 (2010) (Petrochilos, ‘Interim Measures’), page 885 (‘[A] tribunal’s power to order security for costs is clearly encompassed in Article 26(2)(c) [of the 2010 UNCITRAL Rules]’); *Guaracachi v. Bolivia*, Procedural Order No. 14 dated 11 March 2013, paragraph 6; *SAS v. Bolivia*, Procedural Order No. 10 dated 11 January 2016, paragraph 52; Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Kluwer Law

A related issue that arises specifically in ICSID cases is whether the respondent's interest in securing compliance with a potential costs award qualifies as a 'right to be preserved', which is a requirement for ordering provisional measures under the ICSID Arbitration Rules.¹⁷ At least two tribunals have rejected a request for security for costs on the basis that this requirement had not been satisfied. One tribunal stated that the respondent did not have a 'right with respect to an eventual award of costs' but only 'a mere expectation'.¹⁸ The decision of the other tribunal is not public, but it has been reported that the tribunal considered the request to relate to protection of 'a right that as of yet does not exist'.¹⁹ However, several other tribunals have found that provisional measures, including security for costs, can protect not only 'established rights' but also rights that may arise in the future, such as the potential right to enforce a costs award.²⁰ That approach seems consistent with one of the main purposes of provisional measures, which is to 'secure compliance with an eventual award'.²¹

Assuming that the tribunal has the power to order security for costs, does the claimant's reliance on third-party funding constitute grounds for making such an order? Many commentators respond positively. They point out that, in the absence of security, the respondent will be unable to enforce a potential costs award against the claimant because it has no funds of its own, and will also be unable to enforce it against the third-party funder

International 2016) (von Goeler, Third-Party Funding), page 335. The 1976 UNCITRAL Rules do not contain such a provision, but at least some arbitral tribunals appear to have found that they had the power to order security for costs under those rules. See Petrochilos, 'Interim Measures', page 884.

- 17 ICSID Arbitration Rule 39 states: 'At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures'.
- 18 See *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010, paragraph 9. The dissenting arbitrator in *RSM v. St Lucia* also questioned 'whether the contingent claim to a cost award is a "right" at all'. *RSM v. St Lucia*, Dissenting Opinion of Edward Nottingham dated 12 August 2014, paragraph 6.
- 19 Luke Eric Peterson, 'In New Ruling, BIT Tribunal Holds that Alleged Right to Future Costs-Recovery Is Not a Right Capable of Grounding an Interim "Security for Costs" Request', Investment Arbitration Reporter (26 September 2016) available at www.iareporter.com (reporting on an unpublished decision, dated 21 September 2016, in *Valle Verde Sociedad Financieras SL v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, that dismissed the respondent's request for security for costs).
- 20 See, e.g., *RSM v. St Lucia*, paragraph 72 ('[T]he Tribunal finds that the right to be preserved by a provisional measure need not already exist at the time the request is made. Also future or conditional rights such as the potential claim for cost reimbursement qualify as "rights to be preserved". The hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures'); *RSM v. Grenada*, paragraph 5.8 ('To construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights makes no sense whatever in the context of a provisional measure for their protection. Any such measure must, by definition, precede a determination of their substantive validity'); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures Requested by the Parties dated 25 September 2011, paragraph 46; *Tethyan Copper Company Pty Limited v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures dated 13 December 2012, paragraph 137.
- 21 Schreuer, *The ICSID Convention*, page 780, paragraph 79. See also *ibid.*, page 759, paragraph 2 (one of the purposes of provisional measures is 'safeguarding the awards' eventual implementation'); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 dated 1 July 2003, paragraph 7 (provisional measures may be granted to protect a party from actions of the other party that may 'prejudice the rendering or implementation of an eventual decision or award').

because it is not a party to the arbitration and is outside the jurisdiction of the tribunal.²² Moreover, the third-party funder may withdraw from the case at any time, leaving the respondent with no recourse to recover its costs – a situation that has occurred in several investment arbitration proceedings.²³

Some argue, however, that ordering security for costs based on the claimant's reliance on third-party funding may prevent access to justice to meritorious claims. But a third-party funder with confidence in the claims may well decide to finance the security, and some

22 See, e.g., Maxi Scherer, 'Third-Party Funding in Arbitration: Out in the Open?', *Commercial Dispute Resolution*, May 2012, page 57 ('The tribunal might order security for cost if the funded party lacks financial means to participate in the arbitration but for the existence of the funding agreement, and thus is likely not to be in a position to satisfy a future adverse costs award'); Jean Kalicki, 'Security for Costs in International Arbitration', 3(5) *Transnational Dispute Management*, December 2006 ('[S]ecurity is more likely to be awarded . . . where the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called "arbitral hit and run", and described by arbitrators and commentators alike as particularly compelling grounds for security for costs'); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), page 644; Otto Sandrock, 'The Cautio Judicatum Solvi in Arbitration Proceedings or 'The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant', 14(2) *Journal of International Arbitration* 17 (Kluwer Law International 1997), page 34.

23 See, e.g., Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted To Know (But Were Afraid To Ask): Part 1', 1 *International Business Law Journal* 53 (2012), page 59 (arguing that provisions on termination of funding in third-party funding agreements 'expose the opposing party to costs risks (i.e. the risk of being unable to collect costs from a defaulting entity no longer supported by TPF) in the event the funder should decide to withdraw funding because the claim appears to have weakened over time'); *Corporate Europe Observatory*, 'Profiting from Injustice' (2012), page 59 ('Third-party funding can also drive up legal tabs, burdening cash-strapped sovereign budgets with even heftier arbitration costs. One example is the investment dispute of S&T Oil Equipment and Machinery Ltd. against Romania. The case was eventually discontinued when the oil company stopped paying its legal bills, but only after having been kept alive for an extra two years thanks to a cash injection from Juridica. Romania is stuck with its legal costs, including for the two extra years'); Clovis Trevino, 'One of Three ICSID Argentine Bond Arbitrations Collapses Due to Lack of Funding', *Investment Arbitration Reporter*, 2 June 2015 (reporting that the *Ambiente v. Argentina* case was discontinued after the claimants, who were relying on third-party funding, failed to make advance payments to ICSID).

funders even consider this part of their normal commitment.²⁴ Moreover, the notion that funders finance only meritorious claims seems naïve. As one third-party funder put it: ‘The perception that you need strong merits is wrong – there’s a price for everything’.²⁵

How have arbitral tribunals dealt with these concerns? Several tribunals in both investment and commercial arbitration have ordered security for costs based at least in part on the claimant’s reliance on third-party funding. In *RSM v. St Lucia*, an ICSID tribunal found that the existence of third-party funding raised legitimate concerns as to the claimant’s compliance with a potential costs award.²⁶ Although this was not the sole basis for the

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- 24 Maxi Scherer, Aren Goldsmith and Camille Fléchet, ‘Third Party Funding in International Arbitration in Europe: Party 1: Funder’s Perspectives’, 2 *International Business Law Journal* 207 (2012) (Scherer et al, ‘Funder’s Perspectives’), page 215 (‘Regarding security for costs, a majority of the attending funders considers it to be part of the funder’s commitment and it is, as such, provided for in the funding agreement’); Mick Smith, ‘Mechanics of Third-Party Funding Agreements: A Funder’s Perspective’, in Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration 19* (Kluwer Law International 2012), n. 16 (‘It is also common for a third-party funder to be asked to provide additional capital either by way of provision for a future adverse cost orders, or for security for costs’); Jasminka Kalajdzic et al, ‘Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding’, 61(1) *The American Journal of Comparative Law* 93 (2013), page 100 (‘The [funding] agreement will often provide that the funder will . . . pay any amount required to be provided by way of security for costs’); Alison Ross, ‘The Dynamics of Third-Party Funding’, *Global Arbitration Review*, 7 March 2012, page 14 (quoting Selwyn Seidel of Fullbrook Management: ‘Personally I like to assume an obligation to pay adverse costs – because, if I believe in the case, I don’t think there are going to be adverse costs’).
- 25 Corporate Europe Observatory, ‘Profiting From Injustice’ (2012), page 59 (quoting Mick Smith, co-founder of third-party funder Calunius Capital). See also *ibid.* (‘One particular concern is an increase in frivolous disputes which would go uncontested without external funding. . . . A condition in the funding agreement can always make a weak case worthwhile for the financier. Eventually, frivolous, high-risk claims might inflate the value of funders’ portfolios. As the Burford Group notes: “If we shy away from risk for fear of loss, as some litigation investors do, we will not maximise the potential performance of this portfolio”’); UNCTAD, ‘Recent Developments in Investor–State Dispute Settlement (ISDS)’, May 2013, n. 172 (‘TPF companies, who build a “portfolio” of claims, have an economic incentive to put money even into weak cases that have at least some chance of a high monetary award’); *ibid.*, page 25 (‘[T]here are serious policy reasons against TPF of IIA claims – for example, it may increase the filing of questionable claims. From a respondent State’s perspective, such frivolous claims, even if most of them fail, can take significant resources and may cause reputational damage’); US Chamber Institute for Legal Reform, ‘Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States’, October 2009, pages 2 and 5 (‘[A]lthough providing non-recourse loans to fund litigation is inherently risky, it does not follow that litigation-finance companies will only finance claims that are likely to succeed. These companies – like all sophisticated investors – will base their funding decisions on the present value of their expected return, of which the likelihood of a lawsuit’s success is only one component. The other component is the potential amount of recovery. . . . Moreover, third-party funding companies are able to mitigate their downside risk in two ways: they can spread the risk of any particular case over their entire portfolio of cases, and they can spread the risk among their investors’); George Kahale, III, ‘Is Investor–State Arbitration Broken?’, *Transnational Dispute Management* (2012), page 33 (‘Third party funding is a bit like drilling for oil. You know you will be drilling a lot of dry holes, but one discovery can make it all worthwhile’).
- 26 *RSM v. St Lucia*, paragraph 83 (‘Moreover, the admitted third party funding further supports the Tribunal’s concern that Claimant will not comply with a costs award rendered against it, since in the absence of security or guarantees being offered, it is doubtful whether the third party [funder] will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent’s favor’).

tribunal's order – RSM had also failed to comply with its financial obligations in other cases – the tribunal made it clear that third-party funding was a relevant factor in ordering security.²⁷ One of the arbitrators, Gavan Griffith, went further in his concurring opinion, finding that the integrity of investment arbitration requires that third-party funders 'remain at the same real risk level for costs as the nominal claimant' and that a funder's 'real exposure to costs orders which may go one way to it on success should flow the other direction on failure'.²⁸ Another of the arbitrators, Edward Nottingham, dissented because he considered that ICSID tribunals do not have the power to order security for costs.²⁹ He nevertheless acknowledged that third-party funding may be a relevant consideration 'in deciding whether and when security for costs may be appropriate' and that this concern 'can and should be addressed' by ICSID's Administrative Council.³⁰ Subsequent to the decision ordering security for costs, the claimant informed the tribunal that it would be unable to pay the security. The tribunal ordered that the proceedings be vacated for six months and, just over a year after this order, the tribunal dismissed the case.³¹

In another case, an ICC tribunal ordered security for costs on the ground that the agreement between the claimant and their third-party funder provided that the funder had no obligation to pay an eventual costs award and that the funder could 'walk out at any time'.³² The tribunal explained that, although the existence of third-party funding was not by itself determinative, these 'specific features' of the third-party funding agreement warranted security for costs.³³ One author commenting on this case observed that provisions excluding

27 *Id.*, paragraph 85.

28 *RSM v. St Lucia*, Assenting Reasons of Gavan Griffith dated 12 August 2014, paragraph 14. Gavan Griffith was the president of the *ad hoc* committee in the annulment proceeding relating to one of RSM's cases against Grenada, which was discontinued after RSM failed to make the required advance payments. See *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs dated 28 April 2011.

29 *RSM v. St Lucia*, Dissenting Opinion of Edward Nottingham dated 12 August 2014, paragraphs 1–16.

30 *Id.*, paragraphs 19–20.

31 *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings dated 8 April 2015; *IAReporter*, 'Investor's Failure to Post Security Bond Leads to "With Prejudice" Termination of Arbitration with St. Lucia', *Investment Arbitration Reporter* (27 July 2016) available at www.iareporter.com.

32 *X v. Y and Z*, ICC Case, Procedural Order dated 3 August 2012, reproduced in Philippe Pinsolle, 'Third Party Funding and Security for Costs', 2 *Cahiers de L'Arbitrage* 399 (2013) (*X v. Y and Z*), paragraph 40 ('The third-party funding mechanism at hand makes it possible for the Funder to secure a comfortable share of the proceeds for itself in case the litigation is successful while (i) taking no risk whatsoever with regard to the costs that may have to be paid to the other party as a consequence of an unsuccessful litigation and (ii) retaining the possibility to walk out at any time by simply ["pulling the plug" on [the Claimant] should it appear . . . that the case is going less well for the Claimant than had been anticipated'). Although the 2012 ICC Rules, which applied in that case, do not specifically provide for the power to order security for costs, the parties agreed that the tribunal possessed that power. See *ibid.*, paragraph 16. On the 2012 ICC Rules, see also Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publications 2012), paragraph 3-1036 ('Where, for example, there is a substantial risk that a party (usually the claimant) may not be able to cover the opposing side's arbitration costs (i.e., if ultimately ordered to do so), the arbitral tribunal may be prepared to order that party to place funds into an escrow account that is either controlled by the arbitral tribunal or jointly by the parties').

33 *X v. Y and Z*, paragraphs 40–41.

payment of costs awards by the third-party funder are quite common in funding agreements, and argued that the situation in which an impecunious claimant finances a case through such a funder justifies by itself granting security for costs.³⁴

Likewise, the tribunal in another ICC case ordered security for costs on the ground that '[i]f a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred'.³⁵ It has also been reported that a separate ICC tribunal granted a request for security for costs filed by Bulgaria on the ground that the claimant relied on third-party funding to finance its case.³⁶

However, requests for security for costs based on the claimant's reliance on third-party funding have been denied in at least three investment arbitrations. In *Eurogas v. Slovakia*, an ICSID tribunal held that security for costs may be ordered only in 'exceptional circumstances' such as 'abuse or serious misconduct', and that 'financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute *per se* exceptional circumstances'.³⁷ In *Guaracachi v. Bolivia*, an UNCITRAL tribunal also rejected the request for security for costs, having found that the existence of third-party funding was insufficient to demonstrate the claimant's inability to comply with a costs award.³⁸ And in *South American*

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- 34 Philippe Pinsolle, 'Third Party Funding and Security for Costs', 2 *Cahiers de L'Arbitrage* 399 (2013) ('The fact that this [third-party funding] agreement may exclude the payment of arbitration costs in case of failure, as it appears to be most often the case, places the respondent against a claimant who, by definition, now has the means to move forward with his arbitration without really taking any risk regarding its outcome precisely because of his insolvency. It seems to us that this asymmetrical situation, when it is clearly established, justifies by itself granting security for costs. Indeed, absent such a guarantee, the claimant will be in a position, in case of failure, to hide behind his impecuniosity to refuse to pay costs, despite the fact that he was able to advance his claim thanks to the funds of the third party. The claimant would thus benefit from the best of both worlds, which does not seem to be a desirable situation') (authors' translation).
- 35 *X SARL, Lebanon v. YAG*, Germany, International Court of Arbitration of the International Chamber of Commerce, Procedural Order No. 3 dated 4 July 2008, 28(1) *ASA Bulletin* 37 (2010), paragraph 21.
- 36 Jarrod Hepburn, 'ICC Costs Award in Favor of Bulgaria Is Upheld, as Domestic Court Rejects Claimant's Allegation of Tribunal Bias Against Third-Party-Funded Claimant', *Investment Arbitration Reporter*, 19 October 2015. See also *Swiss Entity v. Dutch Entity*, HKZ Case No. 415, Award dated 20 November 2001, 20(3) *ASA Bulletin* (2002), pages 467–471 ('The respondent had applied for security for costs on the ground that the claimant was 'not able to pay the costs of the proceedings and that it is therefore forced to obtain funds from external sources'. The tribunal granted the request, stating that 'it is most likely that if Respondent were to prevail in this arbitration, a future cost award in its favor could not be satisfied by Claimant').
- 37 *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 dated 23 June 2015, paragraphs 121 and 123. The type of 'abuse' or 'misconduct' the tribunal had in mind was apparently the situation in *RSM v. St Lucia*, which it acknowledged was 'exceptional', but which it distinguished because the *Eurogas* claimants, unlike *RSM*, did not have a 'proven history of not complying with cost orders'. *Id.*, paragraphs 122–123.
- 38 *Guaracachi v. Bolivia*, Procedural Order No. 14 dated 11 March 2013, paragraph 7 (finding that 'the Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third-party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not' and that the respondent's analysis of the claimants' financial information did not 'sufficiently demonstrate' that the claimants will 'lack the means to pay a costs award or to obtain (additional) funding for that purpose').

Silver v. Bolivia, another UNCITRAL tribunal observed that ‘the existence of a third-party funder may be an element to be taken into consideration’, but it rejected the request for security on the grounds that ‘[t]he fact of having financing alone does not imply risk of non-payment’ and that ordering security every time that third-party funding is established would ‘increas[e] the risk of blocking potentially legitimate claims’.³⁹

A key consideration in these three cases was that third-party funding was not sufficient to establish the claimant’s inability to comply with a costs award, and that the respondent had the burden of supplying additional evidence of impecuniosity. But it could be argued that, once it has been established that the claimant is relying on third-party funding, this constitutes *prima facie* evidence of the claimant’s impecuniosity, and the claimant should then be required to provide positive evidence of its ability to comply with a costs award. This was the solution suggested by Gavan Griffith in *RSM v. St Lucia*, where he stated that, once third-party funding is revealed, ‘the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.’⁴⁰ As also noted by Gary Born: ‘Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong *prima facie* case for security for costs exists.’⁴¹

Another noteworthy decision on this issue is the recent order for disclosure in *Sehil v. Turkmenistan*, where one of the factors that the tribunal took into account was that ‘the Tribunal is sympathetic to Respondent’s concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration.’⁴²

As the foregoing review of commentary and decisions indicates, the ability of respondents to collect on costs awards is a serious concern, in particular for states involved in investment treaty arbitrations. In that respect, ICSID has accepted a request from Panama that the ICSID member states be consulted regarding ‘the subject of improved protection for respondent states against judgment-proof claimants’.⁴³ Panama stated that orders for security for costs were one of the ‘tools’ available to protect respondent states, and it suggested that the ICSID Arbitration Rules be revised to require ‘disclosures concerning the financial condition of a claimant and the use of any third-party funding’.⁴⁴

IV JURISDICTION

The transfer of an interest in the claim to a third-party funder may also affect the jurisdiction of arbitral tribunals. If the agreement between the claimant and the funder is deemed to

39 *SAS v. Bolivia*, Procedural Order No. 10 dated 11 January 2016, paragraphs 75–77.

40 *RSM v. St Lucia*, Assenting Reasons of Gavan Griffith dated 12 August 2014, paragraph 18.

41 Born, *International Commercial Arbitration*, page 2496.

42 *Sehil v. Turkmenistan*, paragraph 12.

43 ICSID News Release, ‘50th Annual Meeting of ICSID’s Administrative Council’ (7 October 2016) available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=196>; Memorandum from Panama’s Ministry of Economy and Finance to ICSID (12 September 2016) available at http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop_memorandum_to_icsid_administrative_council_re_effective_protection_english_version_2_219116_1641.pdf; Tom Jones, ‘ICSID to Explore Protections against “Judgment-Proof Claimants”’, *Global Arbitration Review* (21 October 2016) available at <http://globalarbitrationreview.com>.

44 Memorandum from Panama’s Ministry of Economy and Finance to ICSID (12 September 2016).

constitute a *de jure* or *de facto* assignment of the claim or a portion thereof, the funder arguably becomes the real party in interest, which may jeopardise the tribunal's jurisdiction *ratione personae*. This has particular significance in investment arbitration, where jurisdiction is conditioned upon nationality requirements.

The nature of the interest acquired by a third-party funder depends on the terms of the funding agreement. The agreement may expressly provide that the claimant assigns its claim to the third-party funder. This is the practice in Germany, where funding agreements usually contain a provision under which 'the plaintiff assigns to the financing company his asserted claim against the defendant as well as any later claims arising against the defendant or any other party for compensation for costs, fees and expenses incurred by him as a result of the litigation'.⁴⁵ Shannon and Nieuwveld state that the effect of such a provision is that 'the claimant no longer owns the claim' and 'must file the lawsuit in its name only after the funder gives it authorization to do so'.⁴⁶

Even where the funding agreement does not expressly assign the claim, the funder's entitlement to receive a portion of any damages paid to the claimant may be deemed to constitute a *de facto* assignment. This is especially the case where the agreement also contains provisions that confer a significant degree of control or influence to the funder, such as the right to approve the filing of a claim, control the selection of the claimant's counsel, decide on fact and expert witnesses, receive, review and approve counsel's bills, veto settlement agreements, or buy the claim at some point in the future.⁴⁷ As recognised by Goldsmith and

45 Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration* (Kluwer Law International 2012), page 166 (quoting Michael Coester and Nitzche Dagobert, 'Alternative Ways to Finance a Lawsuit in Germany', 24 *Civil Justice Quarterly* 49 (2005)).

46 Id.

47 Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part Two', 2 *International Business Law Journal* 221 (2012) (Goldsmith and Melchionda, 'Part Two'), page 228 ('[W]here sufficient rights have been conferred to the funder under a funding agreement in relation to a claim, it may be possible – depending . . . upon applicable law – to qualify the package of rights conferred as constituting a form of *de facto* assignment'); Philippe Pinsolle, 'Comment on Third-Party Funding and Nationality Issues in Investment Arbitration', in *Yearbook on International Investment Law & Policy 2010–2011* (Karl P Sauvant ed., Oxford University Press 2012) (Pinsolle, 'Third-Party Funding and Nationality'), page 646 ('Elements to be taken into account for an autonomous analysis would . . . include the following: the characterization of the agreement under its applicable law (if expressly chosen by the parties); the fact that the claimant no longer controls the claim, but that the third party does; the fact that the third party has a veto over any settlement proceedings; the fact that the third party chooses external counsel and/or experts; the fact that the third party may decide to terminate the claim or the funding at any time; and the portion of the proceeds which is to be recovered by the third party. These factors may be taken into account, individually or collectively, by an international arbitral tribunal in order to determine if, and to what extent, the claim has been assigned to a third party'); Anthony J Sebok, 'The Inauthentic Claim', 64 *Vanderbilt Law Review* 61 (2011), page 82 (stating that assignment occurs where a party 'lose[s] all control over the disposition of that cause of action, including whether to settle, for how much to settle, and every aspect of litigation strategy, including the selection and compensation of attorneys'); *Waterhouse v. Contractors Bonding Limited*, New Zealand Supreme Court, NZSC 89, Judgment dated 20 September 2013, paragraph 57 ('In assessing whether litigation funding arrangements effectively amount to an assignment, the court should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder'); Mark Kantor, 'Third-Party Funding in International Arbitration: An Essay About New Developments', 24 *ICSID Review – Foreign Investment Law Journal* 65 (2009) (Kantor, 'Third-Party Funding'), pages 76–77 ('What voice does the funding provider have in the management and pursuit

Melchionda, 'where a funder has been granted full control over the conduct of the claim or a disproportionate economic interest in the claim, the funder could . . . be viewed as having replaced the nominal claimant as the real party in interest behind the claim'.⁴⁸

Assuming that the third-party funding agreement is deemed to effect an assignment of the claim or a portion thereof, what consequences would it have on the jurisdiction of an investment arbitration tribunal? One principle of international law that may be relevant in this respect is that the beneficial owner, rather than the nominal owner, of a claim is the proper party before an international tribunal.⁴⁹ This principle was recently applied by the *ad hoc* committee in *Occidental v. Ecuador* when it partially annulled an investment arbitration award. The committee found that the tribunal 'illicitly expanded the scope of its jurisdiction' by compensating the claimant for 100 per cent of the investment, even though a third party was the beneficial owner of 40 per cent of the investment.⁵⁰ The committee applied the 'uncontroversial principle of international law' that 'when legal title is split between a nominee and a beneficial owner . . . international law only grants standing and relief to the owner of the beneficial interest – not to the nominee'.⁵¹ It explained that this reflected the 'more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents

of the claim, the arbitral proceeding, collection efforts, settlement negotiations and similar issues? Some providers seek a veto right: "Van Diepen [the funds provider] had to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements").

48 Goldsmith and Melchionda, 'Part Two', page 228.

49 David J Bederma, 'Beneficial Ownership of International Claims', 38 *International and Comparative Law Quarterly* 935 (1989), page 936 ('International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner'); *Oppenheim's International Law – Volume 1* (Robert Jennings and Arthur Watts eds., 9th ed., 1996, Oxford University Press 2008), page 514 ('Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim'); James Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press 2012), page 704; Marjorie Whiteman, 'Chapter XXIV: State Responsibility for Injuries to Aliens: Diplomatic Protection and International Claims: Nationality of Claimant: Natural Persons', in 8 *Digest of International Law* 1233 (1967), pages 1261–1262; Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing Co. 1915), pages 642–643.

50 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 (*Occidental v. Ecuador*), Decision on Annulment of the Award dated 2 November 2015, paragraphs 266 and 268.

51 *Ibid.*, paragraph 268. The *ad hoc* committee stated that '[i]nvestment arbitration case law has acknowledged the principle that under international law legal standing pertains to beneficial owners and not necessarily to nominees, and that unprotected parties cannot receive compensation, even if claimed on their behalf by protected investors'. *Ibid.*, paragraph 273. It referred in that respect to the dissenting opinion of Brigitte Stern in the underlying *Occidental v. Ecuador* arbitration, as well as *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005, paragraphs 131–139, 144–155 (finding that the claimant could not advance claims on behalf of an unincorporated joint venture and on behalf of other joint venture partners), *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 January 2007, paragraph 325 (finding that it would be improper 'if compensation is awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf of one of the Claimants'), and *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case

or otherwise) on behalf of third parties not protected by the relevant treaty'.⁵² The committee added that 'tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument'.⁵³

The above principles may apply by analogy in the context of third-party funding. If a claimant is deemed to have expressly or *de facto* assigned its claim or a portion thereof to a funder, the claimant may be seen as the nominal owner and the funder as the beneficial owner, at least as regards the portion of the claim that has been assigned.⁵⁴ Under the principle discussed in *Occidental*, any award of damages would therefore have to exclude the portion that was transferred to the third-party funder.

A second relevant principle in investment treaty arbitration is that tribunals can only adjudicate the claims of investors having the nationality of one of the contracting parties to the treaty.⁵⁵ If a claim or portion thereof is deemed to be owned by the third-party funder, and the funder does not have the same nationality as the claimant investor, this raises serious

No. ARB/00/2, Award dated 15 March 2002, paragraphs 24–26 (finding that the claimant was entitled to file a claim in its own name against the respondent, but not for the rights of its partner, a Canadian company).

52 *Occidental v. Ecuador*, Decision on Annulment of the Award dated 2 November 2015, paragraph 262.

53 *Ibid.* See also *Occidental v. Ecuador*, Dissenting Opinion of Brigitte Stern dated 20 September 2012, paragraphs 138 and 140 ('How would it be possible to grant damages pertaining to rights that no longer belong to OEPIC [the claimants], without disregarding the basic rules that confer jurisdiction on ICSID tribunals? In case two different investors are claiming an interference with their rights, they must both present a claim and one investor cannot bring a claim for the other, especially when they do not have the same nationality and cannot invoke the same BIT'). But see *Ceskoslovenska Obchodni Banka AS v. Slovak Republic*, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999, paragraph 32 (*in obiter*, 'absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless whether or not the beneficial owner is a State Party or a private party'); *RosinvestCo UK Ltd v. Russian Federation*, Final Award dated 12 September 2010, paragraph 323 ('Respondent argues that the Participation Agreements with Elliott International preclude the definition [of investor in the treaty] applying to Claimant as Claimant was a mere nominal owner. This analysis is not supported by a plain reading of the definition in the [treaty]').

54 See, e.g., Goldsmith and Melchionda, 'Part Two', pages 229–231 ('Whatever the basis for finding an assignment (i.e., whether *de facto* or *de jure*), where a funder has acquired rights through assignment, it will arguably be necessary to assess the potential impact of the assignment, both upon jurisdiction and the admissibility. In relation to jurisdiction, where an assignment has been qualified, it would be worthwhile to consider whether a valid jurisdictional basis, *ratione personae*, exists to support the arbitration of any claim (or fractional interest in a claim) deemed to have been assigned to the funder. . . . Depending upon the terms of the funding employed, TPF may raise issues in respect of the identity of the real party in interest behind the claim, which may in turn have an impact on jurisdiction and admissibility'); Carolyn B Lamm and Eckhard R Hellbeck, 'Third-Party Funding in Investor–State Arbitration Introduction and Overview', in *Third-Party Funding in International Arbitration* 101 (Bernardo M Cremades Román and Antonias Dimolitsa eds., Kluwer Law International 2013) (Lamm and Hellbeck, 'Third-Party Funding'), page 104 ('Typically, a litigation funding arrangement will provide that the third-party funder is to receive a portion of the proceeds of the eventual award (assuming a monetary award is rendered in favour of the funded party). Such an arrangement may take the form of an assignment granting the funder a beneficial interest in the claim. The question arises whether this affects the arbitral tribunal's jurisdiction and/or the funded party's standing').

55 See, e.g., Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009), page 285.

doubts as to whether the claim meets the requisite nationality requirements.⁵⁶ However, the tribunal in *Teinver v. Argentina* found that the alleged transfer of the claimants' interest to a third-party funder that did not meet the nationality requirements could not affect its jurisdiction because it occurred after the case was initiated.⁵⁷ The same result may not have followed if the transfer had occurred prior to the initiation of the arbitration.⁵⁸ Moreover, the timing may not be relevant where what has been assigned is not just the investment but the claim itself.⁵⁹

- 56 See, e.g., Goldsmith and Melchionda, 'Part Two', page 232 ('If we assume that the relevant nationality is that of the real party in interest – the real investor – and not that of the party that appears as such, in cases involving a *de jure* or *de facto* assignment of claims to a funder having a different nationality from the investor, it could be argued that neither the funder nor the original investor has standing to bring a claim. The investor, although a national of the contracting State, would no longer be the real party in interest. The funder, as the new owner of the claim, would not fulfil the nationality requirement. Therefore, if a protected investor assigns its treaty claims to a funder that does not have the requisite nationality – leaving aside the issue of the assignability of treaty claims – a risk may exist that the funder could find itself unable to enforce the claim'); Lamm and Hellbeck, 'Third-Party Funding', page 104 ('Thus, if the funded party and the funder do not share the same nationality in particular if a claimant's funder has the nationality of the host state, it is essential to assess whether the claim would continue to meet the nationality requirement under a bilateral investment treaty or the ICSID Convention to the extent of the funder's beneficial interest in the claim'); Angelynn Meya, 'Third-Party Funding in International Investment Arbitration The Elephant in the Room', in *Third-Party Funding in International Arbitration* 122 (Bernardo M Cremades Román and Antonias Dimolitsa eds., Kluwer Law International 2013), page 123 ('When funded by a third party, questions could arise as to whether an investor continues to have standing to bring claims. This includes such questions as whether the state's consent to arbitrate extends to disputes where the party with a real interest in the claims appears to be a third-party funder (as opposed to the investor) and whether such a dynamic is consistent with the object and purpose of the treaty. States have an interest in knowing the identity of the investor (and its funder). They are likely to resist any attempt to broaden the scope of consent or the definition of investor under the relevant treaty, especially where this would permit third parties to benefit from rights that were only intended for qualified investors'). But see Pinsolle, 'Third-Party Funding and Nationality', page 646 ('[I]t would seem that the nationality of the claimant would be unaffected by the fact that the proceeds of the award may go directly to a third party. After all, one would argue that the situation is no different from that where a claimant has received a corporate loan and uses the proceeds of the award to reimburse that loan'.)
- 57 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction dated 21 December 2012, paragraph 256. See also Pinsolle, 'Third-Party Funding and Nationality', page 647 ('[I]f the assignment has taken place after the initiation of the arbitration, and absent any other circumstances such as fraud, there is in principle no issue of nationality, and no objection can be raised by the respondent on that basis'); von Goeler, *Third-Party Funding*, page 240 ('[A] third-party funding agreement . . . should not affect the admissibility of the funded claim if the transfer of rights operated by that agreement becomes effective after the date on which the proceedings have been instituted').
- 58 See, e.g., Pinsolle, 'Third-Party Funding and Nationality', page 647 ('[I]f the assignment has taken place before the initiation of the arbitration, there may be an issue of nationality depending on the nationality of the third party'); von Goeler, *Third-Party Funding*, pages 244–245 ('If a funding agreement is found to have operated an assignment of the claim itself to the funder before the initiation of proceedings, the tribunal should declare itself incompetent to adjudicate the funded party's claim. In that case, the funded party has ceased to hold any legal position in the claim, and is therefore no longer entitled to enforce it').
- 59 See, e.g., *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 April 2006, paragraph 135 (stating that a transfer of the investment after commencement of the arbitration does not affect jurisdiction because the claimant continues to own the claim itself, 'unless, of course, it can be shown that it was sold with the investment').

V DISCLOSURE OF THIRD-PARTY FUNDING

Given the concerns raised by third-party funding, the issue arises as to whether and to what extent third-party funding arrangements should be disclosed. This issue is discussed here in connection with the three concerns addressed above: conflicts of interest, security for costs and jurisdiction.

i Disclosure and conflicts of interest

A consensus is developing that a claimant should automatically disclose whether it is being funded by a third-party funder and, if so, the identity of its third-party funder, to assess potential conflicts of interest. Commentators refer to the need for disclosure in that context as a ‘vital’ ‘best practice’, without which ‘the independence of an arbitrator cannot be assured’.⁶⁰

As noted earlier, the revised IBA Guidelines also support this position. The Guidelines provide that a party shall disclose, ‘on its own initiative at the earliest opportunity’, ‘any relationship, direct or indirect, . . . between the arbitrator and any person or entity with a direct economic interest in . . . the award’, and recognise that a third-party funder has a ‘direct economic interest’ in the award.⁶¹ Similarly, the EU–Vietnam Free Trade Agreement, the Comprehensive Economic and Trade Agreement between Canada and the European Union and the European Union’s draft proposal for the investment chapter of the Transatlantic

60 See, e.g., Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014), page 201 ([F]or arbitrators to assess the potential for conflicts and make necessary disclosures, third-party funders’ participation in particular international arbitration cases will necessarily have to be disclosed’); Club des Juristes, ‘Financement du procès par les tiers’ (June 2014), page 59 (‘It is undeniable that the presence of a third-party funder in the arbitral proceeding may generate potential conflicts of interest. In this sense, the current situation that does not require anyone to disclose anything cannot persist’) (authors’ translation); William Stone, ‘Third Party Funding in International Arbitration: A Case for Mandatory Disclosure’, *Asian Dispute Review* 62 (April 2015), page 68 (‘Absent disclosure of a funding relationship within the arbitration, the independence of an arbitrator cannot be assured’); Burcu Osmanoglu, ‘Third Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest’, 32(3) *Journal of International Arbitration* 325 (2015), pages 339–340 (‘[A]n obligation on the parties to disclose the presence of third-party funders in the arbitration proceedings is vital and would closely relate to the obligation of the arbitrators to disclose any relationship that they have with third-party funders that may imperil the arbitral tribunal’s independence and impartiality’); Kessedjian, ‘Good Governance’, pages 1–2 (‘Some of the best practices for arbitral tribunals confronted with third-party financing could include the following: Financing by third parties must be disclosed for arbitration proceedings to be conducted appropriately’).

61 IBA Guidelines, Guidelines 6(b) and 7(a) and Explanations to General Standards 6(b) and 7(a).

Trade and Investment Partnership contain an obligation to disclose ‘the name and address of the third-party funder’.⁶² Municipal jurisdictions have also considered initiatives for requiring parties to an arbitration to disclose third-party funding.⁶³

Tribunals have also referred to the potential for conflicts of interest between arbitrators and funders as a basis for ordering claimants to disclose whether they are being financed by third-party funders and, if so, to disclose their details.⁶⁴

Apart from the issue of disclosure of third-party funding by the parties, the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration refers to disclosure by the arbitrators themselves, stating that they should consider disclosing ‘relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award’.⁶⁵

62 EU–Vietnam FTA, Section 3, Article 11.1 (‘Where there is third-party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third-party funder’); Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, signed 30 October 2016, Article 8.26(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’); EU Draft TTIP, Section 3, Article 8.1 (‘Where there is third-party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third-party funder’).

63 See, e.g., *Law Reform Commission of Hong Kong, Report: Third Party Funding for Arbitration* (October 2016), paragraph 3.47, Annex 1 (Draft Provisions to amend the Arbitration Ordinance, Article 98Q).

64 See, e.g., *Sehil v. Turkmenistan*, paragraphs 9–12 (ordering that the claimants disclose ‘whether their claims in this arbitration are being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding’. The reasons for the tribunal’s order included ‘the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder’); *SAS v. Bolivia*, Procedural Order No. 10 dated 11 January 2016, paragraphs 70, 79 (‘Bolivia considers that the identity of the funder should be disclosed to preserve the integrity of the arbitration given that there could be conflicts of interests between the funder and the arbitrators. . . . [T]he Tribunal considers that, for purposes of transparency, and given the position of the Parties, it must accept Bolivia’s request of disclosure of the name of SAS’ funder’); *Eurogas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, First Session and Hearing on Provisional Measures dated 17 March 2014, page 145 (ordering disclosure of the identity of the third-party funder); Jarrod Hepburn, ‘ICSID Tribunal Orders Identification of Third-Party Funder, But Denies State’s Request for Security for Costs and Claimants’ Request for Provisional Measures’, *Investment Arbitration Reporter*, 3 August 2015 (‘Although the [*Eurogas*] tribunal did not elaborate any reasons for the order, Slovakia had urged disclosure in order to verify whether any conflicts of interest might exist’). In *Corona v. Dominican Republic*, the tribunal also ordered the claimant to ‘indicate whether it had received funds from any third-party funder to cover the costs of this arbitration, and if so, to disclose its/their name(s), and the date when such funding started’, but the reasons for this order, which is not public, are not known. *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in accordance with Article 10.20.5 of the DR-CAFTA dated 31 May 2016, paragraph 22.

65 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 March 2017, paragraph 24.

ii Disclosure and security for costs

The terms of a funding agreement that are most relevant to security for costs are those concerning whether the funder is liable to pay an adverse costs order against the claimant and whether and under what conditions the funder can stop funding the claimant.⁶⁶ As discussed earlier, where a claimant is impecunious and its third-party funder is under no obligation to pay an adverse costs award or to remain in the case, there is a serious risk that the respondent will not be able to enforce a costs award.

To date, the only case in which disclosure of the terms of a funding agreement was ordered because of their relevance to a potential security for costs application is *Sehil v. Turkmenistan*. The tribunal stated:

*Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.*⁶⁷

Among the ‘factors’ justifying this decision, the tribunal expressly stated:

*although it has not yet done so, Respondent has indicated that it will be making an application for security for costs. It is unclear on what basis such application will be made, e.g., Claimants’ inability to pay Respondent’s costs and/or the existence of a third-party funder.*⁶⁸

Two other investor–state tribunals have denied requests for disclosure of the terms of a funding agreement on this basis. In *Guaracachi v. Bolivia*, the tribunal noted that the claimants had not denied that the funding agreement ‘would not cover the payment of a possible award on costs’ and that it would ‘draw such inferences as it deems appropriate when deciding on’ the respondent’s request for security for costs.⁶⁹ The tribunal ultimately denied the security for costs application, but did not indicate what ‘inferences’ it drew.⁷⁰

In *South American Silver v. Bolivia*, the tribunal also rejected the respondent’s request for disclosure of the terms of the financing agreement between the claimant and its third-party funder.⁷¹ The tribunal explained that, as it decided not to award security for costs, disclosure

66 Von Goeler, *Third-Party Funding*, pages 195–196 ([R]easonable grounds for wanting to know about certain parameters of the relationship between the litigation funder and the funded party embodied in the litigation funding agreement seem more likely to exist because funding-related facts can have an impact on issues of arbitral procedure. To take one of the situations . . . an issue relating to security for costs and third-party funding shall be invoked: the risk that a funded claimant is suddenly left without funding (and thus without means to satisfy a potential adverse costs award) may depend on the precise circumstances under which its litigation funder is contractually entitled to terminate the funding agreement (only on narrow enumerated grounds or entirely at its discretion?), thereby affecting the respondent’s entitlement to security for costs’).

67 *Sehil v. Turkmenistan*, paragraph 13.

68 *Id.*, paragraph 10.

69 *Guaracachi v. Bolivia*, Procedural Order No. 13 dated 21 February 2013, paragraphs 8 and 10.

70 *Id.*, Procedural Order No. 14 dated 11 March 2013, paragraph 10.

71 *SAS v. Bolivia*, Procedural Order No. 10 dated 11 January 2016, paragraph 80.

of the terms of the agreement was ‘not relevant under these particular circumstances to determine whether the third-party funder would assume or not an eventual costs award in favor of Bolivia’.⁷²

iii Disclosure and jurisdiction

As explained above, whether the third-party funder is the real party in interest to a claim could manifest itself in various ways, including through the proportion of the claim being funded, the proportion of an award to be received by the funder, and the role of the funder in appointing counsel and experts, in deciding the witnesses for the claimant, or in making other calls about strategy. Accordingly, to determine whether the third-party funder is the real party in interest, the claimant should disclose provisions relevant to these matters.

To date, only the *Sehil v. Turkmenistan* tribunal has recognised that disclosure of the terms of a funding agreement may be justified to ‘identify the true party to the case’.⁷³ In *South American Silver v. Bolivia*, this was one of the reasons presented by the respondent in support of disclosure of the terms of the funding agreement, but the tribunal does not seem to have analysed this reason in its ultimate decision.⁷⁴

iv Scope of disclosure and privilege

Two additional issues arise in the context of disclosure: first, whether disclosure of an entire funding agreement is warranted, and second, privilege.

With respect to the first issue, disclosure of certain provisions of a funding agreement, such as those identified as relevant to security for costs and jurisdiction, may not be sufficient for a complete analysis of the impact of the third-party funding relationship on the case. Accordingly, it may be necessary to disclose the entire funding agreement, as the tribunal ordered in *Sehil v. Turkmenistan*, rather than selected provisions.

72 Id., paragraph 81.

73 *Sehil v. Turkmenistan*, paragraph 1.

74 *SAS v. Bolivia*, Respondent’s Request for Cautio Judicatum Solvi and Disclosure of Information dated 8 October 2015, paragraph 39(a) (‘The disclosure of the terms of the funding agreement will allow verifying at least . . . who the real interested parties in this arbitration are. Indeed, the information requested is necessary for Bolivia to confirm whether – as part of the funding agreement – Claimant has assigned some or all of its claims in this arbitration to the third-party funder’); *SAS v. Bolivia*, Procedural Order No. 10 dated 11 January 2016, paragraph 82 (‘[N]o additional circumstances have been proven that . . . warrant the modification of the decisions already taken concerning document production in the corresponding procedural phase’). In its order for document production, the *SAS v. Bolivia* tribunal decided that the respondent’s request for disclosure of the third-party funding agreement and any documents related to its conclusion and performance ‘go beyond the discussion on the relevance and materiality of the documents in the context of the dispute, or the even simpler discussion about the need to produce documents or lack thereof, which is the purpose of this phase. Consequently, the Tribunal considers that this is not the form or the procedural phase to deal with these matters. Therefore, the Tribunal will deny the production of the Documents Requested . . . without prejudice to the Respondent submitting a separate duly justified request’. *SAS v. Bolivia*, Procedural Order No. 7 dated 21 July 2015, paragraph 26(iv).

Second, a potential objection to the disclosure of the terms of a funding agreement is that the agreement is privileged. However, municipal courts have ordered the production of entire funding agreements, with and without redactions.⁷⁵ And at least some funders recognise the need to disclose certain terms of their funding arrangements.⁷⁶

VI CONCLUSION

Investment arbitration is no longer a ‘no man’s land’ as far as third-party funding is concerned. The field is increasingly populated by arbitral decisions, commentaries and attempts to codify applicable rules on this issue. A consensus is forming around some issues, such as conflicts of interest and certain disclosure obligations. With respect to other issues, such as security for costs and jurisdiction, there is less agreement. During this formative period, it is particularly important that arbitral tribunals provide fully reasoned decisions on issues relating to third-party funding, in the interest of assessing the legal implications of this phenomenon and developing the most appropriate principles.

⁷⁵ See, e.g., *Berger v. Seyfarth Shaw LLP*, US District Court for the Northern District of California, Opinion dated 22 October 2008, 2008 US Dist LEXIS 88811 (ND Cal 2008), pages 8–9 (finding that a letter and agreement relating to the financier’s financial contribution were not privileged and should be produced); *Charge Injection Technologies Inc v. E I DuPont De Nemours & Company*, Superior Court of Delaware, Opinion dated 27 February 2014, 2014 WL 891286, n. 14 (“The Court noted that the bulk of the Financing Agreement does not appear to fall under the work product doctrine and DuPont has substantial need of the Agreement”); *Charge Injection Technologies Inc v. E I DuPont De Nemours & Company*, Superior Court of Delaware, Opinion dated 31 March 2015, 2015 WL 1540520, page 5 (finding only that the payment terms in the financing agreement, which were redacted, were covered by the work product doctrine); Federal Court of Australia, Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) dated 9 October 2013, Clause 3.6 (“At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party”). US courts have also ordered production of fee arrangements with lawyers and have held that they are not privileged. See, e.g., *Murray v. Stuckey’s Inc*, US District Court for the Northern District of Iowa, Western Division, Order dated 29 December 1993, 153 FRD 151 (ND Iowa 1993), page 153; *Montgomery County v. Microvote Corporation*, US Court of Appeals for the Third Circuit, Opinion dated 30 April 1999, 175 F.3d 296 (3d Cir. 1999), page 304; *In the Matter of Richard D Priest et al v. Hennessy*, Court of Appeals of New York, Opinion dated 8 July 1980, 51 N.Y.2d 62, pages 69–70; *In re Grand Jury Subpoena served upon John Doe, Esq. (Slotnick). Richard Roe (Colombo) v. United States of America*, US Court of Appeals for the Second Circuit, Opinion dated 9 January 1986, 781 F.2d 238 (2d Cir. 1986), pages 247–248.

⁷⁶ Scherer et al, ‘Funder’s Perspectives’, page 218 (one funder observed that ‘once the proceedings are in place, the decision may be in the hands of the tribunal either because of conflicts issues or because the tribunal wants disclosure of the real player behind the claimant. Funders therefore have to anticipate their possible exposure in arbitral proceedings even where the funding agreement provides for a confidentiality clause. Such disclosure ultimately may be justified in certain circumstances’).

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