NOTE

Third-Party Funding in International Investment Arbitration

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I. INTRODUCTION

International investment arbitration involves high costs both for the investor and the State appearing in the proceedings. A recently increasing phenomenon in international investment arbitration is the financing of the proceeding by a third-party funder. The third-party funder has no direct interest in the substantive issues of the arbitral proceedings, but instead invests in the proceedings hoping to obtain a considerable profit upon the settlement of the dispute or the case. The general scheme is to offer the third-party funder a certain percentage of the total compensation granted to the party they financially support.

The reasons behind the recent advent of third-party funding are multiple. First, the investor seeking to institute arbitral proceedings against a State may not have the necessary financial means to engage in a costly and lengthy arbitration proceeding. Second, investors may be unwilling to allocate their own resources to finance such lengthy and costly proceedings, and instead prefer to invest in other new opportunities within their normal business activities. Third, the inherent uncertainty in effectively obtaining the requested compensation through the proceedings may warrant a transfer of the risk of the proceedings to a third party. The enforcement of an arbitral award, either under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) carries an inherent risk for the successful party of not being able to effectively obtain the compensation granted by the tribunal.

Besides the advantages and disadvantages of third-party funding, it is beyond doubt that the presence of a third-party funder may influence the conduct of the proceedings. It has been argued that third-party funders should obtain control over the litigation and that this is not necessarily an unwelcome development.³ However, because of the substantial financial interests of the third-party funder and the transfer of control from the foreign investor to the third-party funder,

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third-party funding involves the inherent risk of affecting the arbitral proceedings, even when it is the respondent State who is being funded by a third party. Moreover, the question may be raised whether the existence of a third-party funding agreement has, or should have, any influence on the allocation of costs in international investment arbitration. Tribunals generally have a large amount of discretion in the allocation of costs, and there does not seem to be any clear, coherent system or procedure in this respect. Since the influence of third-party funders on arbitral proceedings may substantially increase, it might be necessary for international investment tribunals to be involved in and discuss the influence and power of a third-party funder, for instance when deciding on the allocation of costs.\footnote{See generally Marc J Goldstein, ‘Should the Real Parties in Interest Have to Stand Up?—Thoughts About A Disclosure Regime for Third-Party Funding in International Arbitration’ (2011) 8 Transnational Dispute Management 15–23.} In addition, in view of the transparency of arbitral proceedings in international investment disputes and the independence and impartiality of arbitrators, it may be argued that a third-party funding agreement will need to be disclosed to the tribunal.

Third-party funding is a relatively well-established way of funding judicial and arbitral proceedings in some jurisdictions, such as Australia and the United Kingdom,\footnote{See for an overview Craig Miles and Sarah Zagata Vasani, ‘Case Notes on Third-Party Funding’ (2008) 3 Global Arb Rev 35.} and has existed for many years in international arbitration generally.\footnote{Goldstein (n 4) 1.} Despite the lack of statistical data in this sense, there is evidence that the use of third-party funding in international investment arbitration is increasing rapidly.\footnote{Susanna Khouri, Kate Hurford and Clive Bowman, ‘Third-party Funding in International Commercial and Treaty Arbitration—a Panacea or a Plague? A Discussion of the Risks and Benefits of Third-party Funding’ (2011) 8 Transnational Dispute Management 1; Joseph M Matthews and Maya Steinitz, ‘Editorial: TDM Special Issue: Contingent Fees and Third Party Funding in Investment Arbitration Disputes’ (2011) 8 Transnational Dispute Management 1.} International arbitrators have in principle no competence to address the third-party funding agreement because their jurisdiction is limited to the dispute between the foreign investor and the host State. The funding agreement is thus alien to the legal relation between the foreign investor and the host State. In view of the specificity of international investment proceedings, third-party funding raises certain important questions. In a number of recent ICSID cases, tribunals and \textit{ad hoc} Committees have briefly addressed the new trend of third-party funding, especially in relation to the question of whether the existence of a third-party funding agreement influences the decision of the tribunal regarding the award of costs. In doing so, tribunals and \textit{ad hoc} Committees seem to take note of the influence and power of third-party funders. This is true at least when mentioning the fact of third-party funding when considering the allocation of costs. At the same time, tribunals and \textit{ad hoc} Committees have been reluctant to consider the relevance of a funding agreement when deciding the allocation of costs.

After an analysis of the rationale, concept and principles of third-party funding, this note will analyse whether tribunals may nevertheless use their discretion to intervene in or take into consideration the relationship between the investor and its third-party funder, especially regarding the allocation of costs. It will be argued that the decisive factor in this regard will be the level of influence of the third-party funder on the proceedings and the costs. If, as a consequence of the
influence of the third-party funder, the proceedings were, for example, delayed or the costs of the proceedings would be (substantially) increased, the tribunal may wish to consider such elements in the context of allocating costs. Doing so, of course, presumes that the tribunal is aware of the existence of a third-party funding agreement, the effect it has had on the proceedings and the contents of the funding agreement. This note will thus analyse whether the existence of a funding agreement is subject to either a rule of transparency, an obligation of disclosure or if the tribunal could request the disclosure of a funding agreement. Clearly, these questions bring to the forefront the tension between the *inter partes* effect of the funding agreement and the limited jurisdiction of international investment tribunals on the one hand, and the effectiveness and fairness of the proceedings and viability of the system of international investment arbitration, on the other. This tension will be made clear throughout this note.

The second section will address the concept of third-party funding and its application in international investment arbitration. The third and the fourth sections will address, respectively, third-party funding in relation to the allocation of costs and the question of disclosure of funding agreements. In doing so, this note will engage in a discussion of the few cases in which the issue of third-party funding has been raised.

II. THIRD-PARTY FUNDING: RATIONALE, CONCEPT AND PRINCIPLES

A. Rationale and Concept

Third-party funding can be described as the financing by a third party of a part or all of the costs of the arbitral proceedings for one of the parties to the dispute. In return for this financial liability, the financier receives a certain percentage of the compensation obtained by award or settlement. Conversely, if the claim fails, the funder will usually receive no compensation and will remain liable for the client’s legal fees, as well as for any other adverse costs.

There are many ways to calculate the final share that the financier would receive. For instance, it can be based upon the initial investment made by the funder, which will be multiplied by a certain number if the client successfully obtains compensation. It may be based on a percentage of the final award, which varies between 15 and 50 per cent of the recovery. Third, a combination of these two options is possible. The amount that the funder will receive can also depend on time, because the client may be obliged to return, if successful, the amount invested by the funder plus interest (which may vary depending on the time

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9 Khouri, Hurford and Bowman (n 7) 3.


11 Khouri, Hurford and Bowman (n 7) 3.
elapsed). Third-party funding essentially is an investment, which is very different from insurance contracts to cover the costs of arbitral proceedings (ie after-the-event or before-the-event dispute resolution insurance) or so-called ‘litigation loans’.\(^{12}\)

Before entering into a funding agreement with the investor, a funder will carry out thorough due diligence to examine all the facts of the case, the legal arguments, and the chances for the investor of obtaining a favourable award. Unfortunately, many third-party funders prefer to ‘fly under the radar’ and thus very little is known about the methodology of third-party funders in making a decision to finance a certain dispute.\(^{13}\) While the investment may produce substantial profit, it likewise entails a substantial risk. Financing a claim requires a combination of knowledge about international arbitration practice, rules and regulations on the one hand, and international finance\(^{14}\) on the other.

Clearly, different considerations are taken into account when deciding whether or not to fund an investor or a proceeding.\(^{15}\) In investor–State disputes, first of all, the funder will analyse whether the award may be enforced against the State. In this regard, whether the State will voluntarily obey the award is of substantial importance, as we will discuss below. Second, the funder will explore the merits of the case and estimate the value of the possible compensation, as well as the time required to obtain a satisfactory outcome. Third, the funder will take into consideration possible future costs, such as adverse costs or if the funder would be required to pay a share of the costs. Finally, the funder will analyse the expertise of the legal team of the party they are funding. Although due diligence investigations are very thorough, misrepresentation of the facts by the investor may occur. This is certainly a serious threat to the willingness of the funder to continue funding the proceedings, as will be discussed later.

All of the above regards for-profit third-party funding, but nowadays we are also witnessing the increase of another type of funding, which is not-for-profit third-party funding. In the latter case, the proceeding may be funded by a disinterested third party—such as a foundation—and the funder does not seek nor receive any financial compensation for the funding of the proceedings.\(^{16}\) This is the case in the ICSID proceedings instituted by Philipp Morris and others in *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay*\(^{17}\) in response to certain measures adopted by the Uruguayan Government in relation to the packaging of tobacco products. The Bloomberg Foundation and its ‘Campaign for Tobacco-Free Kids’ programme decided to help the Uruguayan Government by

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\(^{12}\) In the case of ‘litigation loans’ one of the parties receives a loan, essentially to cover their expenses pending the outcome of a lawsuit, most often in exchange for a share of the recovered compensation. See de Morpurgo (n 8) 356–7. See also, generally, Susan L Martin, ‘The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed’ (2004) 10 Fordham J Corp & Fin L 55.

\(^{13}\) See for a discussion Khouri, Hurford and Bowman (n 7) and Bernardo M Cremades Jr, ‘Third Party Litigation Funding: Investing in Arbitration’ (2011) 8 Transnational Dispute Management 12–15.


\(^{15}\) See generally, Cremades (n 13) and the various contributions, including by third-party funders in ‘The Dynamics of Third-Party Funding’ (2012) 7 Global Arb Rev 12, 19.

\(^{16}\) See for a discussion Cremades (n 13) 17–18.

\(^{17}\) *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (pending).
partly financing the legal costs. Such situations, however, may be better qualified as donations rather than funding agreements, and the risks inherent in third-party funding, which we will address later, are not pertinent in this scenario. Nonetheless, it is clear that problems in respect of control over the proceedings and conflicts of interest, which we will discuss later, may also be applicable in the case of donations.

Third-party funding in international arbitration has increased rapidly in the last decade. The first and most obvious reason for such increase lies with the heavy costs associated with lengthy international investment arbitration proceedings. For this reason, investors may be reluctant to engage in such proceedings, either because they lack the financial capacity to do so, or because they are unwilling to invest their own finances and funds in the proceedings. Furthermore, the reluctance to engage in international investment arbitration and the recent increase in third-party funding in international arbitration may well be the result of the global economic crisis. Investors have probably suffered the effects of the economic crisis, and are thus less willing to undertake risky investments in arbitral proceedings. Second, because of the uncertainty of the outcome of the arbitral proceedings—inherent in any arbitral or judicial proceeding—foreign investors may be reluctant to arbitrate. Shifting the risk of ‘losing’ the case and the management of that risk to a third party may thus provide the necessary incentive to the foreign investors, which may result in an increase of cases against host States. Finally, in view of the general increase in arbitral proceedings and the publication of most arbitral awards, the possible outcome of the proceedings may be more effectively determined and predicted, which somewhat decreases the uncertainty of the proceedings before their commencement. Third-party funders may have better tools to assess the possible outcome (and cost allocation) and thus may be in a more objective position to decide to invest in a particular case.

B. The Advantages of Third-Party Funding

Undoubtedly, third-party funding has several advantages, which may explain the current attention given to this device in international investment arbitration. The most important advantage is that arbitral proceedings that otherwise would be too expensive for certain investors become accessible as a result of financing. In short,
access to justice is increased and provides investors with equal footing vis-à-vis host States.\textsuperscript{23} This is also true for developing States litigating against well-funded international companies. As noted by Justice Kirby in the decision rendered by the High Court of Australia in the \textit{Campbells Cash and Carry Pty Ltd v Fostif Pty Limited}\textsuperscript{24} case:

[b]y ‘organising’ persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder \ldots does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.\textsuperscript{25}

Second, in connection with increased access to justice, investors may be reluctant to carry the burden of expensive costs in arbitration. A foreign investor ‘losing’ the arbitral proceeding, with the possible subsequent obligation of paying for the opposing party’s costs, may have a tremendous negative impact on the future economic and financial viability and stability of the investor.\textsuperscript{26} By having a third party finance the proceeding, the liability for costs is shifted to the funder, thereby giving more investors the opportunity to engage in an arbitral procedure.

Third, since the costs of arbitration can be substantial, the funder usually carries out a thorough due diligence analysis of its investment, as well as of the possibilities of success, before entering into a third-party funding agreement with a foreign investor. This investigation can be considered as an additional examination of the possibilities of success of the case. To a certain extent, the funder’s involvement provides evidence that the claim is meritorious, which could decrease the likelihood of having (patently) frivolous claims submitted to international investment tribunals. Indeed, figures show that only a very small number of claims submitted to third-party funders are effectively funded by the major third-party funders.\textsuperscript{27} Clearly, the use of third-party funding for unmeritorious claims needs to be prevented. Because of the link between the profit of the funder and the positive outcome of the arbitral proceeding, it seems rather unlikely that third-party funders would be willing to engage their resources in manifestly unmeritorious claims.\textsuperscript{28} In addition, under the ICSID Convention, a special procedure has been crafted to ensure that manifestly unmeritorious claims are dealt with at an early stage of the proceedings in order to avoid lengthy and costly proceedings for assessing such claims.\textsuperscript{29} Despite the fact that requirements for this procedure are set high,\textsuperscript{30} this rule can prevent unmeritorious claims from being

\begin{footnotes}
\footnotetext{23}{de Morpurgo (n 8) 10.}
\footnotetext{24}{\textit{Campbells Cash and Carry Pty Ltd v Fostif Pty Limited}, [2006] HCA 41.}
\footnotetext{25}{ibid para 202.}
\footnotetext{26}{Steinitz (n 3) 1284 ff.}
\footnotetext{27}{Cremades (n 13) 15.}
\footnotetext{28}{Steinitz (n 3) 58.}
\footnotetext{30}{See \textit{Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan}, ICSID Case No ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, para 88 (12 May 2008).}
\end{footnotes}
pursued by the investor, even if third-party funders may be willing to invest in such proceedings because of the potentially high profits.

C. The Objections against Third-Party Funding

Besides the obvious advantages, several objections against the financing of proceedings in international investment arbitration may be highlighted. The main difficulty lies in the additional and different interests involved in each proceeding. In the course of the proceedings, the investor will not only have to manage its own interests, but also the interests of the funder, which is to make the largest possible return on its investment. In this situation, there is a genuine fear that the claimant’s lawyer may be influenced by the funder, who pays the fees of the lawyer, instead of being solely concerned with the claimant’s interest.\(^{31}\)

First, the existence of a third-party funding agreement may prolong the settlement of the dispute and may also ‘artificially inflate’ the scope of the dispute, because the investor knows that in the case of a success, it will need to hand over part of the award to the funder. The larger the amount of compensation received, the more the investor can retain. Because of the funder’s purely financial interests in the litigation, the funder’s influence on the proceedings may result in an ‘abuse of process’. Although no international investment arbitration award has thus far dealt with this problem, the issue was addressed by the High Court of Australia, where there is a well-established practice of third-party funding. In the above-mentioned \textit{Campbells Cash and Carry Pty Ltd} case,\(^{32}\) the funder’s influence on the proceedings raised the question of whether the funding agreement was ‘valid’ because of a possible ‘abuse of process’, and whether this was ‘contrary to public policy’.\(^{33}\) The arguments of the Applicant were \textit{inter alia} that the funder had a certain degree of control over the proceedings, which made the interests of the litigant ‘subservient’ to those of the funder.\(^{34}\) The Court did not side with these arguments and thus rejected the idea that the influence of the third-party funder constituted an abuse of process.\(^{35}\) The Court considered that it was unsurprising in the case of a third party willing to fund the litigation that the funder wants a certain control over the proceedings.\(^{36}\) It should also be added that, contrary to the fear that third-party funding may prolong the settlement of the dispute, it has been argued that the presence of a third-party funder may also result in pressuring the claimant to accept an early settlement of the case.\(^{37}\) In that case, however, the question whether an early settlement should take place may result in a conflict between the funder, the claimant and the claimant’s lawyer, since accepting an early settlement may be beneficial to the funder, or even the lawyer, but not necessarily in the best interest of the claimant.\(^{38}\)

Second, third-party funding may increase the number of international investment arbitration cases and may also have financial consequences for developing States in light of the substantial damages usually awarded in international

\(^{31}\) Khouri, Hurford and Bowman (n 7) 7.

\(^{32}\) \textit{Campbells Cash} (n 24).

\(^{33}\) \textit{ibid} paras 88–9.

\(^{34}\) \textit{ibid} para 87.

\(^{35}\) \textit{ibid} para 88.

\(^{36}\) \textit{ibid} paras 88–9.

\(^{37}\) Khouri, Hurford and Bowman (n 7) 7 and Cremades (n 13) 34.

\(^{38}\) \textit{ibid}. 
investment arbitration. However, it may be argued that if the claim has merit and the host State is eventually found in violation of its international treaty obligations, the fact that the proceedings were financed by a third party has little relevance. In this case, the increased access to justice—which is made possible through a third-party funder—will easily trump this argument.

Third, because of the existence of a third-party funding agreement, the effectiveness of the proceeding is subjected to the relationship between the third-party funder and the investor. Not only will the funder have an influence on the proceedings, but a muddled relationship or conflict between the third-party funder and the investor may disturb and negatively affect the arbitral procedure. Problems in the relationship between the third-party funder and the investor, or unwillingness of the funder to continue paying for the proceedings, may result in the discontinuance of the arbitral procedure. A good example of this is the S&T Oil Equipment & Machinery Ltd v Romania case, which was brought before an ICSID Tribunal, and the subsequent S&T Oil Equipment & Machinery, Ltd, et al v Juridica Investments Limited et al case brought before a US District Court concerning the relation between the original Claimant before the ICSID Tribunal and the funder of its ICSID claim. In this case, the third-party funder, Juridica, had taken over the funding of the proceeding against Romania, after which a dispute arose between S&T and Juridica concerning the alleged misrepresentation by S&T of certain facts and the disclosure of information. When the funder refused to continue funding the case and failed to deposit the cost advances requested by the Tribunal, the ICSID proceedings were discontinued.

Finally, it is worthwhile to mention that the existence of a third-party funding agreement may create problems when documents protected by the applicable rules of legal privilege, or documents that are immune from disclosure, are shared with the third-party funder. Doing so may result in the risk of a waiver of the protected documents for the client, in particular when the other party requests the disclosure of such documents.

D. The Benefits of Investment Arbitration under the ICSID Convention for Third-Party Funders

In addition to the important amounts of compensation requested (and granted) in investment treaty claims, making investor–State disputes very lucrative for third-party funders, the rules of the ICISD Convention are particularly attractive because of how awards are enforced under such rules. The ICISID Convention can

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39 de Morpurgo (n 8) 17.
40 ibid 11.
41 S&T Oil Equipment (n 19). See for a discussion, Cremades (n 13) 25–32.
44 See S&T Oil Equipment (n 19).
45 See extensively Andreas Frischknecht and Vera Schmidt, ‘Privilege and Confidentiality in Third-party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration’ (2011) 8 Transnational Dispute Management 1–35.
46 ibid.
be considered as the driving force behind international investment arbitration and has been described as the ‘key turning point in international dispute settlement’.\(^{47}\) International investment arbitration under the ICSID Convention is particularly appealing to third-party funders.

One of the specific benefits of ICSID arbitration is that the awards can easily be recognized and enforced through the ICSID Convention, especially in comparison to the recognition and enforcement of foreign arbitral awards in domestic courts, and even compared to enforcement of arbitral awards under the New York Convention. Although it facilitates enforcement, the New York Convention contains several possibilities for review by domestic courts which are broader than the grounds for annulment provided under the ICSID Convention.\(^{48}\) This makes the ICSID Convention generally more favourable to recognition and enforcement than the New York Convention.\(^{49}\) Article 54(1) of the ICSID Convention imposes an obligation on all States which are parties to the Convention to enforce an ICSID award ‘as if it were a final judgment of a court in that State’,\(^{50}\) with no possibility of review by the national courts of the States in which enforcement is sought. Needless to say, the enforcement of the award does not necessarily have to be sought in the State which was a party to the proceedings, but can be sought in any State which is a party to the ICSID Convention where the respondent has assets.

At the same time, the annulment mechanism set forth in Article 52 of the ICSID Convention, which is the counterpart of the absence of judicial review by domestic courts, may delay the arbitral procedure. It should also be added that because of the involvement of a State acting in its sovereign capacity, and the fact that State immunity is not waived under the ICSID Convention, the effective execution of ICSID awards may prove difficult. This is present despite the relatively favourable provisions in respect of recognition and enforcement of awards in the ICSID Convention.\(^{51}\)

In any event, the enforcement of arbitral awards is as important as the arbitral procedure itself\(^{52}\) and, therefore, is of paramount importance to the third-party funder. The funder may not be willing to invest if it knows in advance that the award will likely be unenforceable or if enforcement may present problems. Consequently, the compensation awarded will likely not be received or received within an acceptable timeframe.


\(^{49}\) Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* 96 (Kluwer 2010).

\(^{50}\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States art 54(1) (opened for signature 18 March 1965, entered into force 14 October 1966) (‘ICSID Convention’).


\(^{52}\) See Reed, Paulsson and Blackaby (n 49) 95.
III. THIRD-PARTY FUNDING AND THE ALLOCATION OF COSTS

A. The ICSID Convention, Bilateral and Multilateral Treaties on the Allocation of Costs

There is no general system or mechanism in international investment arbitration for the allocation of costs. Tribunals often have a large amount of discretion in this respect. It is clear, however, that the allocation of costs plays a significant role within investment arbitration proceedings. The liability for adverse costs has large implications for an investor starting the proceedings, and the uncertainty regarding the costs creates a substantial and non-negligible risk. Although investment arbitration automatically brings the risk of losing on the merits, an additional award on the payment of the respondent State’s costs would be an additional undesirable drawback.

A tribunal’s decision on the allocation of costs is based on a number of principles: the discretionary power of the tribunal, the (limited) rules or regulations regarding cost allocation in the applicable procedural rules, the practice established by previously decided cases and the success rate of the claimant or respondent State. It is not the purpose here to engage in a general discussion of cost allocation in international investment arbitration. However, a brief restatement of the leading principles and practice in this respect is important to more effectively grasp the influence that third-party funding agreements may have on the allocation of costs, as well as generally on the arbitral procedure. In particular, cost-shifting schemes used in arbitral proceedings may affect the willingness of foreign investors to start a proceeding in the future, and it is precisely here that the inclination of a third-party funder to finance the proceedings may influence the decision for a party to effectively engage in international arbitral proceedings.

The ICSID Convention is one of the few conventions dealing with international arbitration that mentions the allocation of costs. The ICSID Convention, however, does not provide the arbitrators with any real instructions regarding the cost allocation decision. During the drafting of the ICSID Convention, a balanced solution had to be found between legal systems that apply the costs-follow-the-event principle and the so-called ‘American Rule’, which implies that both parties will cover their own costs and share equally the procedural costs. The drafters of the ICSID Convention eventually came up with the current solution, which gives tribunals very wide discretion regarding the allocation of the costs between the foreign investor and the host State. The ICSID Convention provides that ‘[i]n the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom, those expenses, the fees and expenses of the members of the Tribunal and the charges

for the use of the facilities of the Centre shall be paid. Such decision shall form a part of the award.\textsuperscript{56} It should be added that even when investment treaties contain provisions regarding cost allocation, they often are vaguely formulated and thus leave room for discretion by the arbitrators.\textsuperscript{57}

The ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) also offer little guidance with respect to the allocation of costs. Rule 28(1) provides that:

Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.\textsuperscript{58}

Finally, it should be added that while Rule 28(1) allows the tribunal to deal with costs at any time during the proceedings, which may be done through interim or partial orders on costs, Article 61(2) of the Convention provides that the decision of the tribunal on the costs forms part of the award.

B. Cost Allocation Principles

While tribunals have discretion, there are generally three different cost allocation schemes which are used in practice by tribunals: the ‘costs-follow-the-event’ or ‘loser-pays’ principle (the ‘English rule’), the ‘pay-your-own’ or ‘pay-as-you-go’ approach (the ‘American rule’) and the factor-dependent approach, sometimes referred to as the ‘Welamson approach’.\textsuperscript{59} The first principle implies that the ‘losing’ party bears the costs of the ‘successful’ party.\textsuperscript{60} The main objective of this approach is to ‘indemnify’ the successful party.\textsuperscript{61} At the same time, it serves to prevent frivolous arbitral proceedings and it recreates the situation before the breach of the obligation occurred.\textsuperscript{62} The second principle, the ‘American approach’, implies that—regardless of the outcome of the procedure—both parties are responsible for their own expenses and that the administrative and procedural costs are split evenly between the parties. Even when this approach is adopted by a tribunal, as a matter of principle, the tribunal can deviate from it, for example, in the case of bad faith or because the claimant brought a frivolous case.\textsuperscript{63} The third principle, the factor-dependent approach, implies that both parties are liable for

\textsuperscript{56} ICSID Convention (n 50) art 61(2).
\textsuperscript{57} Schill (n 54) 695.
\textsuperscript{58} ICSID Arbitration Rules (n 29) r 28(1).
\textsuperscript{59} Susan D Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011) 98 Wash Univ L Rev 769. Besides these methods, a fourth method may be used. The so-called ‘Lodestar method’ consists in the multiplication by a court or tribunal of the hours spent by the attorney by the attorney’s hourly rate, subjected to certain adjustments and fee enhancements. This method however is of limited relevance in international investment arbitration. See for a discussion Justin Lamb, ‘The Lodestar Process of Determining Attorney’s Fees: Guiding Light or Black Hole’ (2003) 27 J Leg Profession 203.
\textsuperscript{60} Franck (n 59) 791.
\textsuperscript{61} ibid 792.
\textsuperscript{62} ibid.
\textsuperscript{63} ibid 792; José Rosell, ‘Arbitration Costs as Relief and/or Damages’ (2011) 28 J Intl Arb 119.
the costs based on the level of success.\textsuperscript{64} This approach thus uses a ‘sliding scale’ to assess how the costs should be divided between the parties.\textsuperscript{65} If the foreign investor, for instance, is not successful on all issues in the merits, the tribunal may decide that some of the costs should be covered by the respondent State.

Recently, ICSID tribunals seem to be moving away from the applicability of the ‘American rule’ towards the ‘loser-pays’ principle by adopting a ‘middle of the road’ approach, taking into consideration the specific facts of the case.\textsuperscript{66} The tendency for tribunals to move away from the ‘American Rule’, without necessarily resulting in a rigid application of the ‘loser-pays’ principle may be illustrated by the \textit{RSM Production Corporation v Grenada} case.\textsuperscript{67} In this case, the Tribunal was unwilling to apply the ‘loser-pays’ principle since both parties prevailed in certain parts of the proceedings, and it found the ‘American rule’ most appropriate to apply.\textsuperscript{68} However, the Tribunal did come up with a cost-shifting approach which was between the ‘loser-pays’ principle and the ‘American Rule’, namely, the ‘issue-based approach’.\textsuperscript{69} This approach implied that the Claimant received the payment of its costs from the Respondent in the same percentage of its success.

\textit{International Thunderbird Gaming Corporation v United Mexican States} is also an example of an investment arbitration case where the arbitrators clearly moved towards an application of the ‘loser-pays’ principle. In this case, the costs of the Respondent State had to be paid by the Claimant\textsuperscript{70} because the Tribunal considered that certain claims were frivolous and that the proceedings were conducted in bad faith.\textsuperscript{71} In \textit{EDF (Services) Limited v Romania}, the ICSID Tribunal also chose the middle road between the ‘loser-pays’ principle and the ‘American rule’,\textsuperscript{72} recognizing that there might be a change of approach in the allocation of costs in investment arbitration.\textsuperscript{73} The unsuccessful Claimant was ordered to pay $6,000,000 to the Respondent State, which was one-third of the Respondent State’s total costs.\textsuperscript{74}

It should be added that the respondent State may occasionally recover (some of) the costs in case of certain misconduct by the claimant. Shifting the costs to the claimant is a ‘signal’ for the investor to prevent engaging in similar claims in the future.\textsuperscript{75} This was, for instance, decided by the Tribunal in \textit{Phoenix Action Ltd v Czech Republic},\textsuperscript{76} which focused on questions of corporate restructuring and access to investment arbitration. The Tribunal, after noting that the Claimant’s ‘initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration…’,\textsuperscript{77} declined jurisdiction on the basis that the investment

\begin{footnotes}
\item[64] Franck (n 59) 793.
\item[65] ibid 794.
\item[66] Smith (n 53) 758; Rosell (n 63) 116.
\item[67] \textit{RSM Production Corporation v Grenada}, ICSID Case No ARB/05/14, Award, paras 487–97 (13 March 2009).
\item[68] ibid para 499.
\item[69] ibid para 492.
\item[70] \textit{International Thunderbird Gaming Corporation v United Mexican States}, UNCITRAL, Award, para 219 (26 January 2006).
\item[71] See for a discussion Schill (n 54) 660.
\item[72] \textit{EDF (Services) Limited v Romania}, ICSID Case No ARB/05/13, Award, para 327 (8 October 2009); Smith (n 53) 759.
\item[73] \textit{EDF (n 72) para 325.}
\item[74] ibid para 329.
\item[75] Schill (n 54) 665.
\item[76] \textit{Phoenix Action Ltd v Czech Republic}, ICSID Case No ARB/06/5, Award (15 April 2009).
\item[77] ibid paras 142–4 (footnotes omitted).
\end{footnotes}
was not a protected investment under the ICSID Convention and the Israel–Czech Republic Bilateral Investment Treaty, and ordered the Claimant to pay both the costs and the Respondent’s legal fees and expenses. A similar decision was taken by the Tribunal in *RSM Production Corporation and others v Grenada* and the *ad hoc* Committee in *RSM v Grenada*.

**C. Can International Investment Tribunals Consider Third-party Funding Agreements when Deciding on the Allocation of Costs?**

Article 61 of the ICSID Convention, in conjunction with Rule 28 of the ICSID Arbitration Rules, provides the basis for a tribunal to take a proactive approach in general and to include the third-party funding agreement in its decision on the allocation of costs. Besides the problem of an obligation for parties to disclose the existence of a third-party funding agreement, which we will address in the next section, several tribunals have refused to take into consideration, as a matter of law or principle, the existence of such an agreement in their decision on the allocation of costs.

One of the first ICSID cases in which the question of allocation of costs was raised in the context of a third-party funding agreement was the combined cases of *Ioannis Kardassopoulos v Georgia* and *Ron Fuchs v Georgia*. In these cases, the Claimants requested that their costs be awarded, supporting their reasoning on a number of arguments, including the fact that they prevailed on the jurisdiction and liability phases. Georgia responded by claiming that the ‘loser-pays’ principle should be avoided in international investment arbitration cases and based its argument on a number of reasons, such as the delay caused by the Claimants and actions by the Claimants, which complicated the case. Georgia also argued that since the Claimants’ costs were borne by a third party, it was arguable whether the costs should be recoverable. The Tribunal stated that it ‘knows of no principle why any such third-party financing arrangement should be taken into consideration in determining the amount of recovery by the claimants of their costs.’ Additionally, the Tribunal referred to the Georgia–Greece and Georgia–Israel Bilateral Investment Treaties which, although not applicable in this case, both included a provision stating that a contracting party cannot object at any stage that the other party received ‘compensation or an indemnity under an insurance contract in respect of all or part of the damages incurred’. As a result, the Tribunal did not see any reason for third-party funding to be regarded as any different from one of these arrangements. The Tribunal consequently decided that the Respondent had to pay the Claimants’ costs.

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78 ibid paras 145–52 (footnotes omitted).
79 *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/6, Award, para 8.3.4 (10 December 2010).
80 *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, para 68 (28 April 2011).
81 Franck (n 59) 799.
82 *Kardassopoulos* (n 19) para 680; *Ron Fuchs v Georgia*, ICSID Case No ARB/07/15, Award, para 680 (3 March 2010).
83 *Fuchs* (n 82) para 680.
84 ibid para 683.
85 ibid para 686.
86 ibid para 691.
87 ibid.
88 ibid.
89 ibid para 692.
In the annulment proceeding in *RSM v Grenada*, an ICSID ad hoc Committee was similarly confronted with a third-party funding agreement. However, in this case the existence of such agreement was only based on an allegation of RSM and concerned the funding of the costs of the proceedings for the Respondent State. The Applicant, RSM, requested the annulment of the Award based on several grounds for annulment contained in Article 52 of the ICSID Convention. However, RSM failed to fulfil its financial obligations under the ICSID Convention and the ad hoc Committee stayed the proceeding. Six months after the proceeding had been suspended, Grenada requested that the ad hoc Committee discontinue the proceeding. The ad hoc Committee decided that the annulment proceeding would be discontinued, although it still had to decide on the application for costs. The Applicant did not object to the discontinuance, but Grenada asked to have its full costs covered by RSM. Grenada considered it to be reasonable to recover its costs, as it claimed that the Applicant has ‘manipulated and abused the ICSID process’ and that it was ‘entitled to finality and to reimbursement of the costs it has been forced to waste on an annulment proceeding that was always without merit and that [the Applicant] has now abandoned’. The Respondent argued that the ad hoc Committee could award costs to RSM based on Article 45(2) of the ICSID Convention, Rule 42 of the ICSID Arbitration Rules and the inherent powers of the ad hoc Committee.

RSM agreed that the ad hoc Committee had the power to order payment of the legal costs from one party to the other, but that it could only do so after it investigated whether the Respondent paid for any costs and whether the Respondent’s costs were reasonable. The Applicant, while not suggesting ‘that the alleged payment of the Respondent’s legal fees by an undisclosed third party amounts to a bribe’, considered that ‘it would be improper for the Tribunal “to award payment to an undisclosed party”’. The ad hoc Committee refused to categorize the proceedings as an abuse of process, but considered that because RSM had abandoned its claim, an award of costs against the investor was reasonable. The ad hoc Committee believed that, because of the circumstances of the case and the attitude of the Applicant, the Respondent’s costs were justified. It furthermore considered that the Applicant had ‘effectively abandoned the annulment proceeding’ and regarded the Respondent’s costs as reasonable. With respect to the alleged existence of a third-party funding agreement, the ad hoc Committee rejected RSM’s submission that it did not have to pay for the State’s costs because of a third-party funder. Expressly referring to the *Kardassopoulos* case, and citing the above-referenced

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90 *RSM v Grenada* (n 80).
91 ibid para 2.
92 ibid para 24.
93 ibid paras 28, 37, 42.
94 ibid para 44.
95 ibid para 42.
96 ibid para 51.
97 ibid para 52.
98 ibid para 65. The ad hoc Committee referred to *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1, Award (4 August 2010), and sided with the Tribunal in the case *Quadrant Pacific Growth Fund LP and Canasco Holdings Inc v Republic of Costa Rica*, ICSID Case No ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs (27 October 2010).
99 *RSM v Grenada* (n 80) para 65.
100 ibid paras 66, 67.
passage from that decision, the *ad hoc* Committee reiterated that 'it knew of no principle why any...third-party financing arrangement should be taken into consideration in determining the amount of recovery' by the parties of costs incurred in the proceedings.\(^\text{101}\) The *ad hoc* Committee consequently ordered the Applicant to pay the Respondent its claimed costs.\(^\text{102}\)

A similar decision was made by the *ad hoc* Committee in *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*.\(^\text{103}\) Again citing and adopting the Decision of the Tribunal in *Kardassopoulos*, and referring to the Decision of the *ad hoc* Committee in *RSM*, the *ad hoc* Committee in *ATA* rejected the claim by the Claimant that, because of the existence of a third-party funding agreement, the costs of the proceedings could not be shifted to the Claimant.\(^\text{104}\)

In the *Kardassopoulos, RSM* and *ATA* cases, the Tribunal and the *ad hoc* Committees did not address the (growing) influence of third-party funders, and adopted the relatively unequivocal and sound policy of not including third-party funding in the allocation of costs. This line of reasoning is generally in line with the *inter partes* effect of contractual agreements and the limited jurisdiction of international investment tribunals, which clearly do not cover third-party funding agreements. In addition, third-party funding agreements usually contain their own dispute settlement clauses and are subject to a different applicable law.

However, future tribunals and *ad hoc* Committees may make a distinction between cases in which third-party funders did actually (heavily) influence or delay the proceeding and cases where the existence of a third-party funding agreement had no or very limited influence on the proceedings. Tribunals and *ad hoc* Committees could then focus on the consequences of the interference of third-party funders and their possible negative influence on the proceeding. It is indeed only then that a tribunal may decide to take into account a third-party funder and its (influential) role and indirectly consider it in the decision on the cost allocation. This possibility is in line with several recent decisions of tribunals and *ad hoc* Committees on the allocation of costs, as discussed above. Although the 'loser-pays' principle has not fully been adopted by tribunals and *ad hoc* Committees, one clearly sees an increasing tendency to depart from the American Rule in case of bad faith conduct or abuse of process by one of the parties. The question remains, however, how the tribunal or *ad hoc* Committee may know of the existence of a third-party funding agreement.

### IV. THE DISCLOSURE OF THIRD-PARTY FUNDING AGREEMENTS

Investment arbitration is increasingly becoming more transparent.\(^\text{105}\) Transparency of the proceedings is particularly desirable in international investment arbitration, which has more in common with public law litigation than purely commercial

\(^\text{101}\) ibid para 68.
\(^\text{102}\) ibid para 69.
\(^\text{103}\) *ATA* (n 19).
\(^\text{104}\) ibid paras 34–5.
\(^\text{105}\) As evidenced for example by the modification in 2006 of the ICSID Arbitration Rules in order to accommodate the submission of *amicus curiae* briefs. See Eric De Brabandere, ‘NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes’ (2011) 12 Chicago J Intl L 85.
methods of solving disputes between two private parties. Moreover, international investment arbitration involves reviewing acts of a State acting in its sovereign capacity, which may imply certain obligations towards its own government and citizens (in particular with respect to access to and transparency of the proceedings). International investment arbitration is substantially different than commercial arbitration in various respects, and requires certain procedural transparency usually not required in international commercial arbitration, which largely remains private and confidential.

Given the lack of consent to submit disputes in respect of the funding agreement to the tribunal, the tribunal’s jurisdiction does not extend to disputes between a foreign investor or a host State and a third-party funder. A fair balance will thus need to be struck between the need for transparency and the *inter partes* effect of third-party funding agreements. We mentioned previously, for example, that several tribunals and *ad hoc* Committees refused to consider the existence of a third-party funding agreement in their decisions on the award of costs, which entails an application of the principle that a third-party funding agreement is of no relevance to the investment proceedings.

A funding agreement may be voluntarily disclosed by the funded party, which happened in the UNCITRAL case *Oxus Gold plc v Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources and Navoi Mining & Metallurgical Kombinat*. Whether the existence of a third-party funding agreement will be disclosed to the tribunal and the other party will usually depend on the funding agreement itself, but most funding agreements contain a confidentiality clause. This regulation of disclosure, however, merely concerns the obligation of the funded party towards the funder, but does not address the issue of whether the funded party would have an obligation to disclose the existence of a funding agreement during the arbitral proceedings towards the tribunal or the other party. It is clear that investors are reluctant to mention the third-party funding agreement to the tribunal, not only to avoid exposing the position of the third-party funder in relation to the allocation of costs, but also to prevent the application of a negative cost allocation scheme. Arbitrators may find that the mere existence of a third-party funding agreement has an influence on the allocation of costs, although we have seen that the few tribunals and *ad hoc* Committees which have explicitly dealt with the question so far have confirmed the irrelevance of third-party funding for the allocation of costs. However, when arbitrators know that the investor is being funded, the tribunal could reason that the ‘pay-your-own’ approach should be applied instead of the ‘loser-pays’

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109 Khouri, Hurford and Bowman (n 7) 9.

110 See for a discussion of the various contributions in ‘The Dynamics of Third-Party Funding’ (n 15) 19.
principle, since the investor has a ‘back-up’ for the costs. There are also strategic reasons why the funded party does not want to disclose that it is being funded. For instance, the respondent may then decide to change its strategy and deliberately increase the claimant’s costs or create tension between the claimant and its lawyers and/or funder.\footnote{ibid 3.}

In general, however, and beyond the confines of the funding agreement, it is difficult to argue that there is, at this stage, a general obligation to disclose third-party funding agreements. Neither the ICSID Convention, the ICSID Arbitration Rules nor the UNCITRAL Arbitration Rules, contain any relevant provisions requiring a funded party to disclose such information to the tribunal and the other party. One thus has to inquire whether the arbitral proceedings, generally, and the specific characteristics of international investment arbitration, may warrant the disclosure of a third-party funding agreement, either automatically or at the request of the tribunal.

A first compelling legal argument in favour of disclosure is the need to maintain the independence and impartiality of arbitrators, which is generally considered to be a fundamental principle of arbitration.\footnote{Nigel Blackaby and others, Redfern & Hunter on International Arbitration para 4.72 (5th edn, Oxford University Press 2009).} The current rules provide in this respect that arbitrators should disclose their past or present relationships with the parties to the dispute and the law firms representing the parties.\footnote{See the IBA Guidelines on Conflicts of Interest in International Arbitration (22 May 2004) <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictofinterest> accessed 16 April 2012.} Independence and impartiality have particular importance in international investment arbitration because they usually concern relatively similar applicable laws, and even a similarity in the factual circumstances of disputes. In addition, awards of international investment tribunals are typically made public, at least in the context of ICSID. For this reason, the issue of ‘repeat arbitrators’, namely, when arbitrators are appointed by the same party or by the same law firm in different disputes,\footnote{See generally Houchi Kuo, ‘The Issue of Repeat Arbitrators: Is it a Problem and How Should the Arbitration Institutions Respond?’ (2011) 4 Contemp Asia Arb J 247.} may pose certain difficulties. The ICSID Convention and Arbitration Rules, as well as the arbitration rules of other major arbitration institutions, do not generally address the issue of repeat arbitrators. The matter simply falls under the general rules relating to the independence and impartiality of arbitrators. Taking into account the repetitive appointments by one party, the arbitrator could be considered to be no longer independent because it has created a form of financial dependence on the appointing party.\footnote{See generally, Alan Scott Rau, ‘On Integrity in Private Judging’ (1998) 14 Arb Intl 115.} Although this is currently only assessed in relation to the parties to the dispute and the law firms representing the parties, there is no reason why one should not apply these same principles to the third-party funder.\footnote{See also, Goldstein (n 4) 2 ff.}

While there is no general and automatic influence of the funder on the choice of the arbitrator, it may happen that the funder has a certain weight in the choice of the arbitrator since their decision to fund a procedure will also take into account the choice of the arbitrators.\footnote{See the discussion in ‘The Dynamics of Third-Party Funding’ (n 15) 17–18.} In addition, conflicts may arise if the same funder is backing both a party in an arbitration case, while financially supporting a party...
in another dispute which is represented by the same law firm as the arbitrator in
the first case. If the funding agreement, or at least the identity of the third-party
funder, is not disclosed, then such conflicts will not be made public, even if they
are well known by the third-party funder. This will endanger the independence
and impartiality of the tribunal and thus the legitimacy of the proceedings in
general.

Although it has been argued that the absence of knowledge by the arbitrator that
a third-party funder is actually supporting one of the parties to the dispute would
eliminate the lack of independence or impartiality,\(^{118}\) the principles of independ-
ence and impartiality of arbitrators—besides targeting \textit{actual} independence and
impartiality—also cover the absence of an \textit{appearance} of dependence or partial-
ity.\(^{119}\) As a consequence, whether the arbitrator in question is in effect dependent
or partial is of little relevance for the application of the rules in this respect. In
addition, because the third-party funding agreement may be disclosed after the
end of the proceedings, even outside the will of the parties (for instance, in the
case of a dispute between the funder and the funded party, as happened, for
example, in the previously mentioned dispute between Juridica and S&T Oil) the
entire legitimacy of the arbitral process, which is even more important in
international investment arbitration because of the presence of a State, may be
jeopardized.\(^{120}\)

A second argument in favour of disclosing a third-party funding agreement, and
this is of course linked to the question of the award of costs, is that the presence of
a funder may have a dilatory or cost-increasing effect on the proceedings, which
begs the question of whether the host State should be required to pay for such
costs. Under these circumstances, the disclosure of the third-party funding
agreement may not only shed light on the reasons behind the increase of the costs
in the proceedings, but will be necessary in order to determine the liability of the
funded party to pay the costs of the counterparty.\(^{121}\)

Third, because of the control exercised by the funder on the conduct of the
proceedings, and the possibility that the tribunal may, for example, decide on the
use of certain cost-efficient procedures based on the alleged limited financial
resources of the funded party, disclosure of a third-party funding agreement may
be warranted.

In the latter two cases, disclosure may be requested by the tribunal as part of
the tribunal’s general power to preserve the integrity of the arbitral process,\(^{122}\) and
the good faith of the proceedings.\(^{123}\) The suggested power of the tribunal to then
request the disclosure of (the existence of) a third-party funding agreement is,
however, limited in cases where there are doubts as to the impact of the funding
agreement on the fairness of the proceedings. It should be emphasized here, again,
that there is to date no practice in international investment arbitration to support
such requests for disclosure. In addition, and more generally, because the funder is
not a party to the proceedings, the question remains to what extent the arbitrators
may engage in a discussion of the funder’s power, in the absence of any specific

\(^{118}\) See the comments by Robert Volterra in ‘The Dynamics of Third-Party Funding’ (n 15) 20.
\(^{119}\) See Blackaby and others (n 112) para 4.74.
\(^{120}\) See for a discussion Goldstein (n 4) 5–7.
\(^{121}\) See ibid 15 ff.
\(^{122}\) See ibid 9 ff.
\(^{123}\) Khouri, Hurford and Bowman (n 7) 10.
circumstances giving justified doubts as to the negative effect of the third-party funding agreement on the proceedings. We have argued that in certain circumstances, disclosure of third-party funding agreements should be considered. However, there is, to date, no general competence for international investment tribunals to regulate third-party funding, which means that arbitrators have limited power to make orders against third parties and they have no power regarding the disclosure of funding,\textsuperscript{124} with the exception of the tribunal’s powers to preserve the integrity of the arbitral process. Additional rules regulating third-party funding may be an option, but it is very uncertain whether this is feasible and necessary. Moreover, recent attempts to introduce self-regulatory instruments to regulate third-party funding in domestic litigation in the United Kingdom have been severely criticized for their inadequacy.\textsuperscript{125}

V. CONCLUSION

Third-party funding is a fast growing industry and will undoubtedly play a key role in investment arbitration in the future. Investors will need or want to outsource the financial risks involved with investment arbitration. An investor needs the third-party funder to start the proceeding, but at the same time is likely to lose some of its power to the funder.

In addition to the advantages of third-party funding, it is beyond doubt that the presence of a third-party funder may influence the conduct of the proceedings. Third-party funding may thus create some problems in international arbitration proceedings. Because of the need for transparency in international investment arbitration, and the involvement of a State acting in its sovereign capacity, third-party funding may be even more irreconcilable with proceedings in international investment arbitration.

The main tension caused by third-party funding agreements is that they are disconnected from the main investment dispute, both in the sense of applicable law and the jurisdiction of the tribunal. This note has argued that, despite the general absence of an obligation to disclose third-party funding agreements, the need to maintain the independence and impartiality of international arbitrators, which is generally considered to be a fundamental principle of arbitral procedure, may require disclosure of third-party funding agreements. The independence and impartiality of an arbitrator have particular importance in international investment arbitration because they concern relatively similar applicable laws, and even a relative similarity in the factual circumstances of disputes. The arbitral process needs to be both legitimate and transparent because of the involvement of a State.

Tribunals and \textit{ad hoc} Committees have thus far refrained from considering the relevance of a funding agreement on the question of the allocation of costs. This line of reasoning is reasonable, provided that the influence of the third-party funder on the proceedings is absent or remains limited. However, in the future, tribunals and \textit{ad hoc} Committees could make a distinction between cases in which third-party funders actually influenced or delayed the proceeding and cases where

\textsuperscript{124} ibid.

the existence of a third-party funding agreement had only limited influence on the proceedings. Tribunals and ad hoc Committees may then focus on the consequences of the interference of third-party funders and their possible negative influence on the proceeding. If, as a consequence of the influence of the third-party funder, the proceedings were delayed or the costs of the proceedings would be increased, the tribunal may request the disclosure of the funding agreement, as part of its general power to preserve the integrity of the arbitral process and the good faith of the proceedings.

Clearly, these questions bring to the forefront the tension between the inter partes effect of the funding agreement and the limited jurisdiction of international investment tribunals on the one hand, and the effectiveness of the proceedings and viability of the system of international investment arbitration on the other. Failure to adequately address the issue, in the case of a negative influence on the proceedings, may, however, jeopardize the legitimacy of international investment arbitration.