REVISITING THIRD-PARTY FUNDING– AN ANALYSIS OF THE NEW ICSID ARBITRATION RULES

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ABSTRACT

The use of third-party funding (TPF) as a means of financing investment arbitrations has seen an exponential surge in the last two decades. It has gained traction and credibility as it has the potential to increase access to justice, while allowing the funded party to maintain cash flow. However, in the absence of any governing regulations, such an increase in the use of TPF has led to two primary concerns: potential conflicts of interest,and increased risk in recovering arbitration costs. Against this backdrop, the International Centre for Settlement of Investment Disputes (ICSID) amended its arbitration rules in 2022 (ICSID AR) and introduced two new provisions to address these concerns around TPF:(i) Rule 14 of the ICSID AR introducing disclosure requirements for TPF; (ii)and Rule 53 of the ICSID AR directing an arbitral tribunal to consider the existence of TPF as evidence of the 'relevant circumstances' to be considered for the determination of a request for security for costs (SFC).

The author argues that while the mandatory disclosure requirement in terms of Rule 14 is well-motivated and necessary to reduce conflicts, the language of Rule 14 may fail to address some of the concerns around disclosure. These concerns include - the inadequacy of penalty for non-compliance with the disclosure requirement, issues of conflict arising on account of funding obtained by parties after the constitution of the arbitral tribunal, and the relevance of a specific provision granting an arbitral tribunal the power to order disclosure of any additional information. Further, this paper argues that TPF should have no bearing on requests for SFC. In this backdrop, this paper examines the viability of adding the existence of TPF as evidence of the

'relevant circumstances' to be considered for determination of a request for SFC.

1. INTRODUCTION

On 21 March 2022, the Member States of the International Centre for Settlement of Investment Disputes ("**ICSID**") confirmed extensive amendments to the ICSID Regulations and Rules ("**ICSID Rules**")-the flagship procedural guidelines for resolving international investment disputes. The comprehensive ICSID Rules, which came into effect from 01 July 2022, are an outcome of extensive consultation and deliberation carried out between the Member States for over five years. They are also the culmination of six working papers, intending to '*modernize, simplify, and streamline'* the ICSID Rules.[1]

The ICSID Rules include the amended ICSID Arbitration Rules ("**ICSIDAR**"),which are the rules of procedure for arbitration proceedings conducted under the aegis of the constituent treaty of the ICSID.[2] With the latest amendments, ICSID AR has also been significantly overhauled to increase transparency and efficiency, and enhance disclosures in arbitration proceedings.

One such amendment to the ICSID AR is the introduction of provisions addressing third-party funding ("**TPF**"), a fast-developing phenomenon, which previously remained unregulated by the ICSID Rules. The ICSID AR, after extensive deliberations,have now introduced two provisions, each concerning separate aspects of TPF – (a) Rule 14 of the ICSID AR, which governs the disclosure of TPF; and (b) Rule 53 of the ICSID AR, which permits the tribunals to consider the existence of TPF while assessing a request for security for costs ("**SFC**"). This paper seeks to critically analyse these two provisions governing the treatment of TPF under the new ICSID AR, while drawing parallels with the rules of other arbitral institutions and treaties/ agreements. Part-I of the paper briefly traces the evolution of TPF and the nuances and technicalities of a formal definition of TPF, which isan indispensable predicate to impose any regulations relating to TPF. It also briefly mentions the reasons for a sudden surge in the usage of TPF and the ethical and procedural concerns surrounding it, especially in investment

1. The ICSID Rules and Regulations (as amended 01 July 2022) https://icsid.worldbank.org/resources/rules-amendments accessed 15 October 2022 ('ICSID AR').
2. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention').

arbitrations. In Part-II, the author examines the disclosure requirement, the primary issue surrounding TPF in the investment arbitration. The author first evaluates the advantages and concerns regarding the disclosure requirement and how it has been addressed in the rules of other major arbitral institutions, treaties/ agreements, and decisions of the ICSID tribunals. Juxtaposing this with the new regime under the ICSID AR, the author thereafter examines the features and concerns in relation to the new disclosure requirement under Rule 14 of the ICSID AR. In Part - III, the author critically examines the new provision governing SFC and how the existence and terms of TPF affect the decision of the arbitral tribunal in granting SFC. Finally, Part-IV concludes with an examination of the viability of the disclosure requirement under the new ICSID regime, and consideration of TPF as evidence while determining any of the relevant circumstances for the grant of SFC.

2. UNDERSTANDING THE PREMISE: ON A DEFINITION OF THIRD-PARTY FUNDING

A. Evolution of TPF and Definitional Ambiguity

For a general understanding, in broad terms, TPF can be described as an arrangement in which a non-party funding entity, with no prior interest in the dispute, provides monetary and/ or other assistance to one of the contesting parties (in most cases, the claimant) and/ or its affiliate, with the expectation of receiving remuneration or reimbursement contingent on the outcome of the dispute.

Historically, TPF or any other form of funding by a non-disputing party was prohibited in common law jurisdictions on account of it being in violation of the doctrines of maintenance and champerty,[3] and was practically unknown in civil law jurisdictions.[4] However, recognition of dispute funding in Australia and the United Kingdom at the beginning of this century paved the way for a slow but accelerating usage of TPF across jurisdictions globally including Singapore, Hong Kong, China, Latin America, and Europe.[5] In less than two decades, TPF has now climbed from the fringes of acceptability in certain common law jurisdictions to

3. Max Radin, 'Maintenance by Champerty' (1935) 24 Calif. LR 48: Providing history of maintenance and champerty, dating back to Ancient Greece and Rome.
4. Frank J Garcia, 'Third-Party Funding as Exploitation of the Investment Treaty System' (2018) 59(1) Boston College Law School Faculty Papers 1, 2.
5. Lisa Bench Nieuwveld & Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (Kluwer Law International, 2nd edn., 2016).

occupying center stage in the global commercial and arbitration market. However, despite this continuous surge in the usage of TPF in domestic litigation and arbitrations worldwide, a precise definition of TPF, or its usage and acceptance, continue to be mooted.[6]

Originally conceived as a mechanism to enable impecunious or cash-constrained individuals and companies to afford litigation costs, dispute funding is now also increasingly being used by solvent companies to ensure smooth cash flow and risk management.[7] This has led to innovations in the variety and complexity of TPF models and funding arrangements prevalent today, thereby creating confusion surrounding the definition and usage of TPF.[8]

B. Differing Views on Adoption of TPF

Despite the definitional ambiguity and the lack of concrete regulations governing TPF, the use of TPF in investment arbitrations has witnessed an exponential growth on account of factors such as increasing arbitration costs, additional constraints on corporate legal budgets, etc.[9] In this background, the proponents of TPF list out its numerous benefits in investment arbitrations including (a) its ability to increase access to justice for investors, especially small and medium entities, who can now pursue valid claims otherwise unaffordable for them;[10] (b) its use for larger and solvent corporations to ensure cash flow while pursuing a meritorious claim;[11] and (c) its potential for reducing frivolous claims as a funder would filter them out to avoid losses.[12]

At the same time, several scholars and practitioners have criticised TPF for giving rise to multiple ethical and procedural issues. These issues include

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6. International Council for Commercial Arbitration, *Report of The ICCA-Queen Mary Task Force on Third-Party Funding In International Arbitration*, ICCA Reports No. 4 ('ICCA-Queen Mary Report') (April 2018), 46.
7. Victoria Shannon Sahani, 'Judging Third-Party Funding' (2016) 63(2) UCLA L. Rev. 388, 397.
8. *Ibid*.
9. Rachel Howie & Geoff Moysa, 'Financing Disputes: Third-Party Funding in Litigation and Arbitration' (2019) 57 Alta. L. Rev. 465, 471.
10. *Ibid*.
11. W Kirtley & K Wietrzykowski, 'Should an Arbitral Tribunal Order Security for Costs when an impecunious Claimant is Relying upon Third-Party Funding' (2013) 30(1) J. Int. Arb. 18.
12. Rachel & Geoff (n 9), at 471; Sahani (n 7) at 398; Maya Steinitz, 'Whose Claim is This Anyway? Third-Party Litigation Funding' (2011) 95 Minn. L. Rev. 1310.

inter alia (a) conflict of interest of arbitrators and lawyers involved in arbitration proceedings;[13] (b) issues relating to transparency and disclosure requirements regarding the funding arrangement;[14] (c) proliferation of frivolous and speculative claims being brought at the behest of funders;[15] (d) nature and degree of the funder's influence (a non-party) on the arbitration proceedings; (e) jurisdiction of the arbitral tribunal;[16] (f) allocation of cost and SFC;[17] and (g) creation of a structural imbalance between large corporate investors and smaller States.

However, in recent years, it has been seen that the benefits of TPF have outweighed its disadvantages and led to it becoming a popular avenue for dispute funding, thereby changing the discourse around it. Instead of considering a complete prohibition of TPF, arbitral institutions and/ or trade agreements and treaties are now mostly considering regulation of TPF to ensure transparency and fairness in arbitral proceedings.[18] The regulations aimed at TPF primarily seek to address two issues – the disclosure requirement of TPF, and the relevance of TPF in awarding SFC– which have been examined in detail in the following section.

3. DISCLOSURE OF THIRD-PARTY FUNDING

A. Understanding the Need for Disclosure

The independence and impartiality of arbitrators is paramount in arbitration proceedings for fair, free, and unbiased arbitral proceedings, primarily due to the private nature of such adjudication. Unlike judges of courts, who are state servant and are chosen and appointed by the state, the arbitrators are generally chosen by private parties or entities. Thus, the potential for conflict of interest of arbitrators and the question of the arbitrators' impartiality, which can significantly impact investment arbitration proceedings, has always been a fundamental consideration while regulating the use of TPF.

13. Sarah E. Moseley, 'Disclosing Third-Party Funding in International Investment Arbitration' (2019) 97 Texas LR 1181, 1189.
14. *Ibid*.
15. *Id*., at 1191.
16. *Id*., at 1189.
17. Kirtley & Wietrzykowski (n 11), 30.
18. Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed 16 April 2018.

It is to address this fundamental concern that formulation of disclosure requirements was necessitated.[19]

The proponents of disclosure requirements have argued that ascertainment of the existence of TPF is imperative to avoid any potential conflict of interest. The threat of conflict is even more exacerbated in investment arbitrations on account of factors like the high concentration of practitioners in the investment arbitration community who often play the role of both arbitrators and lawyers (in different arbitrations) and/ or have a relationship with the funding entities;[20] parties' involvement in the appointment of the arbitral tribunal; and the dearth of clear binding professional rules governing the arbitrators and lawyers. In addition to this apparent advantage of avoiding conflicts, some proponents have also argued that disclosure of TPF would also act as a catalyst in ascertaining costs or SFC requests, which will be examined by the author in Part III of this paper.

On the other hand, the disclosure requirement has received certain backlash from funders and funded parties due to their imminent fear that disclosing the existence of TPF will be strategically misused by the opposite party to considerably delay the arbitral proceedings by filing frivolous challenges to the appointment of arbitrators and superfluous requests for SFC.[21] They have also contended that the existence of TPF is irrelevant to the conduct of the arbitration proceedings and cannot be treated differently from any other form of financing such as insurance, corporate loans or contingency fee arrangement.[22]

Gradually, there has been a prevailing consensus that TPF can raise potential conflicts of interest, and therefore, it should be disclosed. Therefore, the regulatory focus has shifted to determining the scope of disclosure, in order to strike a delicate balance between transparency to mitigate concerns around undisclosed TPF on the one hand and fairness and confidentiality for the funded party on the other. The two primary questions to be resolved are: whether there should be a mandatory disclosure of the TPF arrangements by parties and whether the arbitral tribunal should be allowed to call upon for disclosure of the contents of the funding arrangement.

19. Jennifer A. Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 Geo. L.J. 1649.
20. Sarah (n 13), 1190.
21. Trusz (n 19).
22. Sarah (n 13), 1194.

To analyse how ICSID AR have addressed this issue, by way of context, it is important to first examine the disclosure requirements under rules of other arbitral institutions and treaties, as also rules under the previous ICSID regime.

B. Disclosure Requirements Under Other Arbitral Institutional Rules and Treaties

Till 2014, there were no formal rules or guidelines of any organisation or major arbitral institution which governed TPF or called for its disclosure. In the absence of any formal rules, the requirement of disclosure of TPF was being examined by arbitral tribunals on a case-to-case basis. This led to uncertainty regarding the disclosure requirement. Thereafter, there have been developments in disclosure requirements on different fronts:

(i) IBA Guidelines **–**Before any arbitral institution made any strides towards addressing the issue of TPF and its disclosure, the International Bar Association ("**IBA**") first published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"),[23] which addressed the issue of conflict. The General Standard 6(b) read with General Standard 7, of the IBA Guidelines provides that the arbitrators shall disclose any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. This included third-party funders within the scope of relationships that the arbitrator must disclose to the parties to an arbitration.

(ii) Arbitral Institution Rules - While the IBA Guidelines are 'soft-law', they paved the way for arbitral institutions to gradually adapt and update their rules to address the issue arising from TPF arrangements. The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada[24] ("**CAM-CBCC**") was the first arbitral institution that recommended the parties to disclose TPF. The Singapore International Arbitration Centre ("**SIAC**"), a major arbitral institution, then followed the suit with the SIAC Investment

23. IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') (2014) http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx accessed 19 August 2017.
24. Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Administrative Resolution 18/2016, arts. 3, 4 and 5 http://www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016/en-US accessed 8 October 2022.

Arbitration Rules 2017 ("**SIAC Rules**"). While the SIAC Rules do not mandate disclosure, they allow the tribunals to order disclosure of TPF arrangements, including the identity of the funder, source of funding, interest of the funder in the outcome of the arbitration proceedings, and whether the funder has committed to take any adverse costs on itself.[25] Following this trend, the Hong Kong International Arbitration Centre ("**HKIAC**") also introduced TPF-related provisions in the HKIAC Administered Arbitration Rules, 2018 ("**HKIAC Rules**") wherein it has been made ***mandatory*** for the funded party to disclose the existence of TPF and the identity of the funder to the arbitral tribunal.[26] The HKIAC Rules further provide that the arbitral tribunal may consider TPF while determining costs. However, there is no express provision in the HKIAC Rules empowering a tribunal to ask for a direct disclosures of the contents of the funding agreement.

In continuation of this regulatory drift, the International Chamber of Commerce ("**ICC**") Arbitration Rules, 2021 ("**ICC Rules**"), arguably the gold standard of arbitral institutional rules, has also incorporated provisions on mandatory disclosure of TPF. The ICC Rules now mandate parties to disclose the existence and identity of any non-party funder to assist the arbitrators in avoiding any conflict of interest and maintain independence and impartiality.[27]

(iii) ***Trade agreements and treaties*** - In addition to the rules of arbitral institutions, TPF and its disclosure has also found a place in certain new-generation free trade agreements or bilateral investment treaties. One of the first treaties to lay down provisions regulating TPF was the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which provides its own definition of TPF and mandates disclosure of the existence of TPF by the funded party.[28] Thereafter, TPF has been regulated differently in the EU–Singapore Investment Protection Agreement,[29] the Canada–Chile Free Trade Agreement,[30] and the 2019 Netherlands Model Bilateral Investment Treaty,[31]

25. The SIAC Investment Rules 2017, art. 24(I).
26. HKIAC Administered Arbitration Rules, art. 44(1).
27. International Chamber of Commerce ("**ICC**") Arbitration Rules 2021, art. 11(7).
28. EU–Canada Comprehensive Economic and Trade Agreement, 14 January 2017, arts. 8.1 and 8.26.
29. EU–Singapore Investment Protection Agreement, 21 November 2019, arts. 3.1(f), 3.8 and 3.19(6).
30. Canada–Chile Free Trade Agreement, 5 February 2019, art. G-23-bis.
31. 2019 Netherlands Model Bilateral Investment Treaty, art. 19.

making trade agreements and bilateral treaties another important way to regulate TPF.

C. Disclosure Requirement Under the Erstwhile Icsid Regime

Prior to the amendments, TPF was completely unregulated in ICSID arbitrations. Parties to arbitration proceedings were not mandatorily required to disclose the existence of any funding arrangement to the arbitral tribunal or the opposite party. Thus, the disclosure of TPF by parties was either voluntary or when so directed by the arbitral tribunals on a request made by the opposing party. In order to address the issue of arbitrators' conflict and to ensure complete impartiality, the arbitral tribunals were generally lenient towards such requests for disclosure of the existence of TPF and the identity of the funder. It is probably for this reason that the funded parties had started to voluntarily disclose the existence of TPF and identity of funders if the non-funded parties made any such requests for disclosure, even in the absence of any express order from the arbitral tribunal.[32]

However, conflicts arose where non-funded parties sought disclosure of the details and terms of the funding agreements, which had no apparent link to the issues in dispute.[33] In such instances, the tribunals were generally reluctant to direct the funded party to disclose the terms of the funding agreement as these terms are confidential and privileged, and there is a high probability of their misuse by the non-funded parties.[34] For this reason, it is observed that the tribunals rarely ordered such disclosure of the terms of the funding arrangement, unless exceptional circumstances warranted such disclosure. For instance, in *S&T Oil Equipment & Machinery Ltd.* v. *Romania,*[35] the funder had ceased to pay for the funded party's fees and costs on account of some dispute regarding the termination of the funding arrangement which was being litigated separately. This led to

32. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #1', ('Working Paper #1') (3 August 2018), 135 WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf (worldbank.org) accessed 20 October 2022.
33. Kirstin Dodge, Jonathan Barnett, Lucas Macedo and Patryk Kulig, 'Third Party Funding and reform of the ICSID Arbitration' (2021) 15(3) Revista Romana De Arbitraj 15, 21.
34. RSM Production Corpn. v. Saint Lucia ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons (13 August 2014).
35. S & T Oil Equipment & Machinery Ltd. v. Romania ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceedings (16 July 2010).

the premature termination of the arbitral proceedings. In this instance, considering that the funding agreement itself was disputed, disclosing its terms had become necessary in the arbitral proceedings. Another instance was the case of *Muhammet Çap & SehilInşaat Endustrive Ticaret Ltd. Sti.* v. *Turkmenistan,*[36] where the Respondent State in its second request for security for costs additionally alleged that the Claimant would evade a cost against it (as done by the Claimant in a previous case), basis which the Tribunal directed the funded party disclose 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.*'

Besides these exceptions, the general trend of ICSID tribunals has been to direct limited disclosure of TPF only. However, considering there were no formal guidelines and there is no regime of *stare decisis* in investment arbitrations, there was an inordinate delay in resolving TPF issues. This reason, along with the risk of conflict, called upon the ICSID Secretariat to formally address disclosure requirements in its amended institutional rules.

D. Disclosure Requirements Under the New ICSID Regime

Learning from the experience of other arbitral institutional rules, investment treaties and trade agreements, and its own tribunal decisions, and after six extensive rounds of consultation with the members States, the ICSID Secretariat has introduced Rule 14 of ICSID AR to specifically address the issue of TPF in ICSID proceedings. Rightly dismissing the suggestions of a few Member States to prohibit TPF completely,[37] ICSID's introduction of Rule 14 is in consonance with its overarching aim to increase transparency and enhance disclosures in ICSID arbitral proceedings, while modernizing the entire process. The Rule 14 has been reproduced herein below for easy of reference:

'Rule 14

Notice of Third-Party Funding

1. *A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through*

36. Muhammet Çap & Sehil Inşaat Endustrive Ticaret Ltd. Sti v. Turkmenistan ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015).
37. Working Paper #1, 131.

a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

2. *A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.*

3. *The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).*

4. *The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).*'[38]

While the practical application and implications of Rule 14 remain to be seen, the author believes that Rule 14 offers the following primary features and concerns:

(i) Definition of TPF – Unlike rules of other arbitral institutions such as SIAC, HKIAC, and CAM-CBCC which have regulated TPF without defining its contours, the ICSID Secretariat was well aware that a clear definition of TPF is indispensable for regulating its use in investment arbitrations.[39] Accordingly, Rule 14(1) of the ICSID AR defines a '*third party funder*', and accordingly TPF as '*non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding").*'

The author is of the view that such a broad, yet simplified definition of TPF has the scope of accommodating various forms of contemporary TPF arrangements that are being employed in practice. This can

38. ICSID AR, r. 14.
39. Working Paper #1, 131.

significantly reduce interpretative issues on what qualifies as TPF for several reasons. *Firstly*, the definition expressly includes funding received through a '*donation or grant*', which captures agreements that are '*not-for-profit*. For instance, the arrangement between the Bloomberg Foundation and Uruguay in *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and* Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay.[40] This reduces the ambiguity around the non-inclusion of arrangements that are for the public interest or for purposes of advocacy. *Secondly*, from a perusal of the working papers and the inclusion of the word '*directly or indirectly*' in Rule 14(1) of the ICSID AR, it can be concluded that the definition includes arrangements with party representatives such as asuccess-based fee arrangements, thereby expanding the scope of its application. This is in significant contrast to the recent Vienna International Arbitral Centre (VIAC) Rules of Investment Arbitration and Mediation 2021 (Article 6), which expressly exclude arrangements with '*party representatives'*. Thus, a clear definition of TPF under the ICSID AR has immense potential to reduce interpretative ambiguities.

(ii) **Mandatory Disclosure of '*Name*' and '*Address*'** – The ICSID AR has followed the recent trend (under ICC Rules*et al*) of making disclosure of TPF mandatory, instead of envisaging tribunal-ordered disclosure as provided under the SIAC Rules. Rule 14(1) read with Rule 14(2) of the ICSID AR unequivocally mandates the parties to file a written notice disclosing the 'name' and 'address' of the funder. This requirement sets a clear threshold for disclosure and leaves no room for ambiguity. This mandatory disclosure of funding arrangement, prior to the registration of request for arbitration, may prove to be advantageous to avoid any conflict of interest without any additional cost or delay. On this basis, the arbitrators and/ or ICSID will be able to run a conflict check even before the constitution of the arbitral tribunal. This is a welcome addition.

However, the language of the second part of Rule 14(2) of the ICSID AR may give rise to certain issues. This part of Rule 14(2) effectively permits parties to avail TPF even after the constitution of the arbitral tribunals. While a continuing disclosure requirement seems to have

40. 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.

sound underlying intentions, it could have catastrophic consequences in terms of additional cost and time. For instance, in a situation where TPF is disclosed post-initiation of arbitral proceedings, it will force the arbitrators and/ or the ICSID to re-run the conflict check, and in case of any conflict, it may lead to the reconstitution of an arbitral tribunal. Such late-stage reconstitution will increase time and costs and take away one of the most important advantages of disclosure.[41] Thus, the author believes that to avoid such disruption of the arbitral proceedings, the ICSID AR should have clarified that post-registration, the parties shall mandatorily disclose any funding proposed to be availed, but only be allowed to avail such funding from a particular funder if it does not result in any conflict.

(iii) Disclosure of the identity of the ultimate beneficial owners – The most unique feature of the amendments lies in the last line of Rule 14(1) of the ICSID AR, which mandates parties to disclose the names of persons or entities in control of the funder. Initially rejected by the ICSID Secretariat during five rounds of consultation,[42] this provision was incorporated in the last round on account of constant pressure from several Member States. These States requested for a disclosure of the funder's corporate structure and ultimate beneficial owner ("**UBO**") as an additional safeguard to avoid potential conflicts.

The author agrees that this provision (unique to the ICSID AR) can potentially avoid any latent conflicts, especially in circumstances where the funder is a shell company/ special purpose vehicle incorporated only for avoiding direct conflict. However, this unique feature is also the subject of major criticism as the ICSID Secretariat, or the proposing Member States have failed to address the following issues regarding the disclosure of UBO:

a) They put a higher threshold of mandatory disclosure on the funder as compared to the funded party itself, which is not required to provide any information about its corporate structure or UBO;

b) The corporate structure of funders and/ or their holding investors is considered to be highly confidential and sensitive commercial information. Sharing such information might put the funders at risk

41. Sarah (n 13), 1200.
42. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #6', ('Working Paper #6') (12 November 2021), 18 https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf accessed 20 October 2022.

of being in violation of confidentiality agreements or pose other financial risks;

c) This provision has the potential to create significant confusion among parties about the extent of the disclosure, making it unclear and difficult to comply with; and

d) In any event, Rule 14(4) of the ICSID AR grants discretionary power to arbitral tribunals to order such disclosure, if and when required. Therefore, there was no need to make disclosure of UBO mandatory in all proceedings.

Thus, it remains to be seen if this provision will be beneficial in avoiding conflicts or will cause further confusion for the parties.

(iv) The Funding Agreement Dilemma - The ICSID AR seem to adopt a balanced approach regarding the controversial issue of disclosure of terms of the TPF agreement. Unlike other institutional rules such as ICC, which do not address the issue of tribunals' power to call for disclosure of terms of the agreement,Rule 14 (4) of the ICSID AR reinforces the tribunals' discretionary power to '*order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3)*'. This seems to be a restatement of the unamended position as tribunals have always had the discretion under the previous general rules on evidence (AR 34(2)(a)) to order disclosure of relevant materials, arguably including the funding arrangement.[43]

Furthermore, the fact that this discretionary power has to be exercised cautiously and only in compelling circumstances is evident from the discussions surrounding the finalisation of the text of Rule 14(4) of the ICSID AR, and the ICSID Secretariat's dismissal of the suggestion of some Member States to make disclosure of '*further information*' mandatory on request of a non-funded party. This is primarily because a funding agreement is an outcome of negotiations between the funding parties and contains sensitive information, access to which may give the arbitrators or the opposite party insights on the funder/ funded party's view on the merits of the matter, weakness, settlement strategy, etc.

It is for this reason that the ICSID was also quick to dismiss the suggestion of one Member State to disentitle a party from invoking Confidential Business

43. RSM, ICSID Case No. ARB/12/10; S&T Oil, ICSID Case No. ARB/07/13.

Information ("**CBI**") privilege as the basis for not disclosing information. The ICSID Secretariat rightly realised that the funding arrangement would contain confidential and protected information, and tribunals would have the power to address this under Rule 14(4) of the ICSID AR so as to order disclosure without violating any evidentiary privileges of the parties on a discretionary and scarce basis.[44]

Nevertheless, while the practical implications of this rule and how the tribunal will address the issue of disclosure of further information remain to be seen, it appears that Rule 14(4) has the potential of opening a new battlefield around whether and to what extent, such powers ought to be exercised, especially in relation to SFC requests.

4. SECURITY FOR COSTS AND TPF

Security for costs, as the name suggests, is a form of provisional/ interim measure which mandates a party to deposit security to cover the parties' (predominantly the respondent's) estimated costs to be incurred in the arbitral proceedings, including legal costs, tribunal and administrative fees.[45] It is aimed at guarding the parties (primarily respondents) against an unfortunate yet probable circumstance of having to incur legal costs on an unmeritorious or frivolous claim, but are unable to recover or enforce potential costs award passed in their favour due to the opposite party's reluctance or incapability to pay. Thus, it must be distinguished from other forms of security, for instance, the security for anticipated damages.[46]

The policy consideration underlying SFC, especially in the context of investment arbitrations, is to balance the interests of the respondent State to recover legal costs (which are less likely to be judgment-proof) on the one hand,[47] and the claimant's right of access to justice (who may be facing financial difficulties on account of the respondent State's actions and/ or misappropriation).[48] This problem is further exacerbated on account of the existence of TPF as it could lead to a situation of '*arbitral hit-and-run*'

44. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #5', (15 June 2021), 279 https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf accessed 20 October 2022.
45. Sarah Brewin & Nathalie Bernasconi-Osterwalder, 'IISD Best Practices Series: Securities for Costs (2018) 1.
46. Miriam K Harwood, Simon N Batifort and Christina Trahanas, 'Third Party Funding: Security for Costs and other key issues' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (2nd edn, 2017) 10, 104.
47. Working Paper #6, 230 para 498.
48. *Ibid.*

in which the claimant's arbitration cost is funded by a third-party funder but who might not be liable to meet any cost award passed against the claimant.[49]

Against this context, the author examines two questions: *First*, whether, and in what circumstances, do arbitral tribunals have the authority to award SFC. *Second*, in the event that arbitral tribunals have the power to award SFC, how does the existence and terms of TPF affect the decision of grant of SFC.

A. Role of TPF While Granting SFC – An Examination of Other Arbitral Institutional Rules and Treaties

The primary issue before an arbitral tribunal adjudicating a request for SFC is to first determine whether it has the authority to entertain such requests. With time, it has become clear that most institutional rules grant the tribunal the power to award SFC, either expressly or impliedly. For instance, Article 25.2 of the Arbitration Rules of the London Court of International Arbitration (2014), Article 24 of the HKIAC Rules, Article 24(j) of SIAC Rules, and Article 38 of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2017 give explicit power to the arbitral tribunal to order SFC.

On the other hand, most other major arbitral institutions, including the ICC, do not contain a specific provision governing SFC. Even then, it is recognised and accepted that the general power of a tribunal to grant provisional or interim measures can be extended to encompass SFC.[50]

Even though most of the institutional rules grant implied or express authority to award SFC, they do not contain any guiding principles for the arbitral tribunal while adjudicating on a request for SFC. Further, none of these institutional rules, expressly or impliedly, address the implications of TPF on requests for SFC.[51] Thus, the principles and factors for determining SFC and the role of TPF in this process is left to tribunal's discretion.

In general, arbitral tribunals constituted under the aegis of these institutional rules have been reluctant to grant SFC. This is particularly true

49. Young Hye (Martina) Chun, '"Security for Costs" Under the ICSID Regime: Does it Prevent "Arbitral Hit-and-Runs" or Does it Unduly Stifle Third-Party Funded Investors' Due Process Rights?' (2021) 21 Pepp. Disp. Resol. L.J. 477, 479.
50. Miriam (n 46), 105.
51. ICCA-Queen Mary Report (n 6), 176.

for investment arbitrations, as SFC has been ordered in rare circumstances. One such instance is the arbitration of *Serafín García Armas and Karina García Gruber* v. *The Bolivarian Republic of Venezuela*,[52] ***(Armas)*** wherein the Tribunal concluded that there were '*exceptional circumstances*' which warranted the grant of SFC. These circumstances were that the absence of any resources available with the Claimant to pay the adverse costs order; and the Claimant had availed TPF arrangement which precluded the funder from paying any potential costs.[53] Therefore, the tribunal concluded that there were '*exceptional circumstances*' which warranted the grant of SFC. However, the tribunal in *Armas* clarified that mere existence of TPF cannot be a ground to grant SFC.

Additionally, recent investment agreements like the EU-Vietnam Investment Protection Agreement[54] and the draft EU-Mexico Global Agreement[55] also empower the arbitral tribunals to grant SFC. However, as is the case with institutional rules, these agreements do not provide any determining factors for the grant of SFC, although they impose a somewhat lower threshold of '*reasonable grounds*' to ascertain the inability of a Claimant-investor to pay costs. Pertinently, however, the EU-Vietnam Investment Protection Agreement provides that while considering these requests for SFC, the tribunal shall take into account the existence of TPF,[56] thereby promoting the general view that TPF can play a role while assessing requests for SFC.

B. SFC Requests and the Role of TPF Under the Erstwhile ICSID Regime

To effectively understand the significance of the ICSID reforms, it is imperative to examine how SFC was regulated under the erstwhile ICSID regime. Similar to other major institutional rules, under the previous ICSID regime, there was no separate rule pertaining to SFC and it was regulated as a provisional measure in terms of Article 47 of the ICSID Convention and Rule 39 of the ICSID AR. Therefore, while addressing the issue of SFC, arbitral tribunals generally applied the settled basic standard for the grant of provisional measures,[57]: (a) identification of the rights to be

52. Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela, UNCITRAL, PCA Case No. 2013-3.
53. *Ibid*.
54. EU-Vietnam Investment Protection Agreement, 30 June 2019, art. 3.48.
55. EU-Mexico Global Agreement, 21 April 2018, art. 22.
56. EU-Vietnam Investment Protection Agreement, 30 June 2019, art. 3.37.
57. Young (n 49), 482.

preserved; (b) requested measures are necessary to protect that interest; and (c) existence of urgency and necessity.

Additionally, SFC requests were granted only in '*exceptional circumstances*' - such as abusive conduct or bad faith.[58] This reflects the balancing act between the grant of SFC requests and the claimant's right to access to justice, which does not arise while considering requests for other provisional measures. Thus, ICSID tribunals have previously put a higher burden on respondent States, resulting in the dismissal of most SFC applications, except in '*two and a half*' arbitration proceedings.[59]

The first instance where SFC was granted by an ICSID Tribunal was in the case of *RSM Production Co. v. St. Lucia,*[60]***(RSM)*** wherein the majority Arbitrators granted St. Lucia's request for SFC based on the Claimant's history of non-compliance with costs awards, its admitted poor financial status, and its reliance on a third-party funder who was presumably not liable for any adverse costs.[61] In *RSM*, the Claimant's history of non-compliance was considered a compelling exceptional circumstance, which was further supported by other factors such as the existence of TPF. In his assenting opinion, the Arbitrator Gavan Griffith proposed that in instances where there is TPF, the burden be shifted on the Claimant to prove why SFC should not be ordered.[62]

Relying on *RSM*, in 2018, another ICSID Tribunal in *Armas v. República Boliviariana de VenezuelaI*[63] granted SFC. In *Armas*, the Tribunal's order was significantly influenced by the existence of a funding arrangement under which the funder was not liable for an adverse costs order. Thus, the Tribunal shifted the burden of proof, directing the Claimant to prove its solvency and ability to pay potential cost orders. On the Claimant's failure to discharge this burden, the Tribunal had ordered SFC to the applicant party.

58. Dr. Sam Luttrell, 'Observations on the Proposed new ICSID Regime for Security for Costs' (forthcoming) 36(3) Journal of International Arbitration, 5.
59. Young (n 49), at 480.
60. RSM, ICSID Case No. ARB/12/10.
61. RSM, ICSID Case No. ARB/12/10, paras 81-82.
62. RSM, ICSID Case No. ARB/12/10, para 18.
63. Luis García Armas v. Bolivarian Republic of Venezuela ICSID Case No. ARB(AF)/16/1, Judgment of the Hague Court of Appeal on Set Aside (19 January 2021).

Following *RSM* and *Armas,* the majority Arbitrators *in Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan,*[64] though having ordered the grant of SFC initially owing to the Claimant's lack of funds and reliance on TPF, later rescinded the order on account of the Claimant's failure to arrange for a security amount. This was done as the order on SFC would have resulted in denial of access to justice to the Claimant.[65]

A closer look at the above arbitral decisions makes it evident that SFCs have been ordered sparingly and only on determining the existence of '*exceptional circumstances'*. While there is no definitive test to determine the existence of such circumstances, tribunals have generally considered factors such as past non-compliances, bad faith, and financial incapability to cover adverse costs. At the same time, tribunals have consistently observed that the mere existence of TPF is not sufficient to constitute '*exceptional circumstances'* so as to warrant the grant of SFC. For instance, the Tribunal in *Euro Gas Inc. and Belmont Resources Inc. v. Slovak Republic*[66] observed that '*...third party funding which has become a common practice do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs*.'[67] That said, as observed in RSM, Armas and Herzig TPF arrangements which preclude the funder's liability for adverse costs has been crucial in the determination of SFC in requests.

C. Role of TPF While Granting SFC – Examining The New ICSID Regime

Considering the increase in SFC applications and inconsistency in the approach of the arbitral tribunals, the ICSID Secretariat has now introduced a new standalone provision (Rule 53 of ICSID AR) governing SFC requests. This marks a shift from the previous provisional measure-based regime.

64. Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan ICSID Case No. ARB/18/35, Decision on Security for Costs (27 January 2020), paras 1, 2, 22.
65. Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan ICSID Case No ARB/18/35, Procedural Order No. 5 (9 June 2020), paras 22–23.
66. Euro Gas Inc. and Belmont Resources Inc. v. Slovak Republic ICSID Case No. ARB/14/14 Procedural Order No. 3 Decision on the Parties' Request for Provisional Measures (23 June 2015).
67. *Id*., paras 121-123.

The Rule 53 of the ICSID AR has been provided herein below for easy of reference:

'Rule 53

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counter claim to provide security for costs.

(2) The following procedure shall apply:

(a) the request shall include a statement of the relevant circumstances and the supporting documents;

(b) the Tribunal shall fix time limits for submissions on the request;

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

(a) that party's ability to comply with an adverse decision on costs;

(b) that party's willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counter claim; and

(d) the conduct of the parties.

(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.

(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.'[68]

Rule 53(1) of the ICSID AR provides that an arbitral tribunal may order any party to provide SFC, upon a request being made by a party. Specifically, Rule 53(3) provides a list of non-exhaustive factors an arbitral tribunal should consider while deciding an SFC request. These factors include a party's ability to comply with an adverse decision on costs, its willingness to comply with an adverse decision on costs, the effect of SFC on a party's ability to pursue its claims/ counter claim, and the conduct of the parties.

A bare reading of Rule 53(3) evidence the ICSID Secretariat's intent to provide general guidelines based on the existing practice of tribunals, without inhibiting the flexibility to address varying and developing factual circumstances. The broad formulation of '*all relevant circumstances*' further reflects the practice of arbitral tribunals to consider all relevant factors cumulatively and not in isolation. Thus, while not explicitly providing that SFC should be ordered in '*exceptional circumstances'*, Rule 53(3) of the ICSID AR envisages similar conditions and factors that were being considered by the arbitral tribunal under the erstwhile ICSID regime.

The exclusion of TPF as a relevant circumstance in Rule 53(3) is laudable. This is in consonance with the general position of arbitral tribunals that the existence of TPF *per se* is not the sole determinative factor for grant of SFC requests, as it could lead to parties obtaining SFC on a systematic basis and thereby blocking legitimate claims.

However, an issue arises with the ambiguous and uncertain language of Rule 53(4) of the ICSID AR, which provides that an arbitral tribunal shall consider *all* evidence adduced in relation to the circumstances in Rule 53(3) of the ICSID AR, including the existence of TPF. It is possible that Rule 53(4) of the ICSID AR, read with Rule 14(4) of the ICSID AR will unnecessarily increase requests for disclosure of terms of the funding

68. ICSID AR., R. 53.

agreement, specifically regarding the liability of the funder in case of adverse costs. Read with the language of Rule 53(4) of the ICSID AR, which provides that the tribunal '*shall*' consider the existence of TPF as evidence of relevant circumstances mentioned in Rule 53(3) of the ICSID AR, this will mandate the tribunals to order disclosure of terms of the funding agreement. The author believes that the specific inclusion of TPF in Rule 53(4) of the ICSID AR may prove to be counterproductive since arbitral tribunals have always had the power to order such disclosure and consider the existence of TPF while determining a request for SFC in terms of Rule 53(3) of the ICSID AR, if required.

Going one step further, the author argues that the existence of TPF or even the fact that a TPF agreement precludes the funder from any potential costs, should have no bearing on the determination of SFC requests. TPF should not be considered as evidence of the existence of any '*relevant circumstance*' in terms of Article 53(3) of the ICSID AR, including the financial ability of the claimant to cover adverse costs. Consideration of TPF as evidence of '*relevant circumstances*' under Rule 53(3) of the ICSID AR appears to be based on an incorrect and dated premise that TPF is only obtained by impecunious claimants, and the existence of TPF will reveal their impecuniosity. As set out in Part I of this paper, TPF is now being availed by impecunious and solvent claimants alike, and therefore, no presumption can be drawn regarding the financial capabilities of the claimant.

The author argues that a solvent claimant using TPF as means of financing its arbitration cost should not be treated differently from a claimant who is self-financing its arbitration cost. In reality, the fact that the claimant has obtained TPF may put it in a better position to satisfy any cost liability in comparison to a party that would have used its own assets to pursue the arbitration claim. Further, even for an impecunious claimant, requests for SFC should be adjudicated on the basis of other '*relevant circumstances*' to be determined on a case-to-case basis. In the event that the respondent State is able to prove the existence of such '*relevant circumstances*', which warrant a grant of SFC, the impecunious claimant may be called upon to demonstrate that it either has sufficient funds to cover the adverse costs order or it is due to the wrongful act of the respondent State that it is so impecunious that an order of SFC would impede its ability to continue with the case. In such a scenario, the claimants may also be allowed to use any provision obliging the funder to bear adverse costs as a defence to the SFC order. Thus, the existence of TPF should have no bearing on the

determination of the SFC request, except as a defence for an impecunious claimant. Against this context, the inclusion of TPF as evidence of '*relevant circumstances*' under the ICSID AR may be redundant and unnecessary.

5. CONCLUSION

The proliferation of TPF in investment arbitrations in the last two decades and the continuous deliberations surrounding its usage prompted the ICSID Secretariat to address the issue. Accordingly, the new ICSID AR include specific provisions governing the disclosure of TPF and its implication on SFC requests.

The systematic mandatory disclosure requirement introduced under Rule 14 of the ICSID AR has been lauded by all stakeholders, as the disclosure regime is most conducive to the development of TPF while maintaining the independence of arbitral tribunals. However, a careful analysis of Rule 14 of the ICSID AR highlights that the ICSID Secretariat may have failed to address some of the emerging concerns around such disclosure. *First*, there is no clarity as to how arbitral tribunals will address any conflict issue arising on account of funding obtained by the parties post the constitution of the arbitral tribunal. This may be misused by the respondent States to delay the arbitral proceedings by entering into a bogus funding agreement with a conflicted party, which might result in the reconstitution of the arbitral tribunal. *Second*, the imposition of costs as penalty for non-compliance with the disclosure requirement, especially when such misrepresentation or non-compliance could result in late-stage reconstitution of the tribunal, does not adequately satisfy the purpose of the rule itself. *Third*, there remains a question on the necessity for introducing Rule 14(4) of the ICSID AR which explicitly empowers arbitral tribunals to order disclosure of further information, as this further information is irrelevant to the issue of conflict.

In addition to these concerns around disclosure, the ICSID Secretariat has also failed to clarify the role of TPF in determining SFC requests. The reference to TPF as a factor to be considered while determining '*relevant circumstances*' in Rule 53 (4) of the ICSID AR may further convolute the existing practice, rather than clarifying it. The author believes that the ICSID Secretariat could have examined the possibility of TPF being entirely irrelevant to the determination of SFC requests while formulating Rule 53 of the ICSID AR.