Third-Party Funding: Toward the Development of an Incremental Methodology for Disclosure

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SUMMARY

This article explores issues associated with the disclosure of third-party funding ("TPF"). In particular, the authors move beyond the question of whether, in principle, there are circumstances in which TPF should be disclosed, a subject that has been addressed extensively in existing literature, and ask instead what types of disclosure are appropriate in different recurring scenarios. To this end, the authors identify specific legal issues that have been associated with requests for disclosure, and suggest the need for careful analysis of the "fit" between stated needs for disclosure and the level of disclosure that should be required. Above all, the authors argue for an incremental approach to disclosure, which seeks the most narrowly tailored disclosure possible at each stage of the arbitration, as opposed to an approach which would allow for wholesale disclosure at the outset of the arbitral proceeding. The authors then review and comment on recent investment arbitration decisions related to requests for the disclosure of TPF.

RÉSUMÉ

Le présent article examine certaines questions relatives à la divulgation de financements par les tiers (« TPF »). En particulier, les auteurs passent outre la question de savoir si, par principe, il existe des circonstances dans lesquelles la divulgation de TPF est nécessaire, question abondamment traitée par la doctrine existante, pour s'interroger plutôt sur les différents degrés de divulgation requis dans certains scénarios fréquemment rencontrés. À cette fin, les auteurs identifient les questions juridiques spécifiques posées par des demandes de divulgation et soulignent la nécessité de procéder à une analyse attentive de l'adéquation entre la portée de la divulgation demandée et les besoins auxquels elle répond. Fondamentalement, les auteurs défendent une approche progressive de la divulgation, tendant vers la divulgation la plus restreinte possible à chaque étape de la procédure arbitrale, par opposition à une approche qui permettrait une divulgation complète dès le commencement de celle-ci. Les auteurs examinent et commentent ensuite la pratique récente des tribunaux d'investissement en ce qui concerne les requêtes en divulgation de TPF.

I. – Introduction

Much ink has been spilled on the question of whether parties to arbitral proceedings do, or should have an obligation to disclose third-party funding ("TPF").[2] Yet, few arbitral decisions or sources of

regulation have addressed this issue. As discussed further below, with the recent adoption or proposal of international investment instruments and arbitral rules addressing the disclosure of TPF, and an emerging body of jurisprudence related to this issue, there is reason to believe that the disclosure of TPF will become an increasingly common phenomenon in arbitral proceedings. Thus, beyond considering the general question of whether TPF should be disclosed, a subject that has been well addressed in existing literature,[3] it is worthwhile to analyze how and when any such disclosure should take place.

At the present time, the disclosure of TPF will need to be approached on an *ad hoc* basis in most cases. With the exception of the draft SIAC Investment Arbitration Rules, which were circulated for comment in February 2016,[4] no arbitral institution has adopted rules addressing the disclosure of TPF by parties in receipt of TPF.[5] As discussed below, the only quasi-authority providing for disclosure at this time is found in the IBA's 2014 Guidelines on Conflicts of Interest in International Arbitration, which require parties to 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.*"[6] The IBA Guidelines, unless adopted as mandatory rules by the parties, are of course only a source of soft law.

At the same time, requirements for the disclosure of TPF have been proposed or adopted in certain recent instruments of international investment law.[7] Likewise, a series of recent investment treaty tribunals have ordered disclosure related to TPF, ranging from disclosure of the source of funding to one order reaching aspects of the funding terms.[8]

Part II of this article outlines methodological considerations that are relevant to implementing the disclosure of TPF. In particular, **Part II.A** begins by proposing a general methodological model for the disclosure of TPF, which is incremental in nature. **Part II.B** then considers the power of arbitral tribunals to order disclosure related to TPF. **Part II.C-D** applies the model of disclosure proposed in this article, asking at what stage particular types of information related to TPF, including the source of TPF and the terms of funding, may become relevant.

II. – An Incremental Model of Disclosure

A. General Methodological Considerations

The question of whether TPF should be disclosed is one that implicates several fundamental concerns.

On the one hand, every aggrieved party, which has secured the necessary agreement of its counterparty to submit disputes to an arbitral forum, has the right to be heard. If a party requires or wishes to seek financing in bringing arbitration, the party should not be penalized for having done so. Likewise, parties generally have a legitimate interest in maintaining the privacy of their business arrangements, including in relation to financing. In many cases, parties will be duty bound under the terms of financing agreements not to disclose the existence, source or terms of such financing. Moreover, funding agreements contain confidential and commercially sensitive information about the way litigation funders negotiate their funding agreements and conduct their business. Thus, unless the details of funding arrangements can be shown to be legally relevant, the funder's and funded party's right to organize their business affairs in a confidential manner should not be disturbed.

On the other hand, where parties agree to arbitrate, their agreement should be construed in light of the principle of good faith. Thus, it is legitimate to require the parties to produce such information as is necessary to ensure that the dispute will be decided by an independent and impartial arbitral tribunal. This may necessitate providing information to the arbitral tribunal in order to enable the arbitral tribunal to evaluate whether its members are independent of the parties.[9]

Likewise, no party should be permitted to pursue arbitration in a manner that exposes its counterparty to risks that could not have been reasonably anticipated as flowing from the agreement to arbitrate. Thus, where the parties have agreed to arbitrate in a setting in which it is understood that the losing party may be required to indemnify the prevailing party for costs, it may be legitimate in certain cases, depending upon the relevant circumstances, to require the posting of some form of security for costs.

Finally, parties to an arbitration may have a legitimate interest in identifying the real party to the dispute, particularly where there is reason to suspect that the named party is not the real party in interest. The fact that the named party is a nominal or formal party may have, among other things, a bearing upon the legal analysis of jurisdiction and admissibility in any arbitration,[10] as well as on questions of damages and the recoverability of costs. Thus, it may be legitimate for parties opposing funded claims to raise questions regarding the potential impact of any funding upon the right of the funded party to introduce or to pursue any claim asserted.

Each of the interests identified above, (i) the interest in safeguarding the integrity of the arbitral tribunal against undisclosed conflicts, (ii) the requirement that parties refrain from exposing counterparties to unreasonable and unforeseen default risk related to costs awards, and (iii) the potential need to ascertain the identity of the real parties in interest to any proceeding, may potentially trigger a need for disclosure related to TPF.[11] Each interest, however, will usually counsel for a different type of disclosure.

Whereas the disclosure of the mere existence of funding and identity of the funder will usually suffice in the first case, information regarding substantive terms of the funding relationship may be necessary to satisfy the second and third interests. For example, to ascertain default risk, it may be necessary to know whether the third-party funder has agreed to indemnify the funded party against adverse costs awards, and, on what conditions, if any, the funder has been authorized to terminate funding. The third interest, by contrast, may require disclosure related to the economic or legal nature of the relationship between the funder and funded party (going, for example, to the relative economic interests of these parties with regard to the claim or more generally) and/or regarding the level of control accorded to the funder in relation to the funded claim.[12]

An incremental approach to the disclosure of TPF would seek to identify the specific interest that is implicated at the relevant stage of the proceeding, and then ask what disclosure, if any, is necessary to satisfy the interest that has been identified.

What would be avoided, under an incremental approach to disclosure, is the issuance of orders based upon *a priori* principles, generalities or preconceptions, that are detached from the procedural posture and particular characteristics of the specific case. Among other things, arbitral tribunals, proceeding incrementally, would not require, at the outset of the proceeding, that all funding documentation be disclosed on the basis that such disclosure might produce information of legal relevance to a potential issue in the arbitration. Instead, the arbitral tribunal would require the party seeking disclosure to make a showing that the information sought is relevant and material, based upon an established need for the information that has been sought, which goes beyond an interest in obtaining information that could support a future objection, argument or procedural maneuver.

B. The Powers of Arbitral Tribunals to Order Disclosure Related to TPF

Before discussing the mechanics of disclosure, it is important to recall the basic legal principles that may empower arbitral tribunals to order the disclosure of information related to TPF.[13]

Requests for disclosure of TPF-related information may be presented by parties during a dedicated "document production phase". Here, the disclosure would typically take place pursuant to the general procedural order authorizing the exchange of requests for the disclosure of information,[14] which usually take place following the first exchange of detailed submissions by the parties.

Requests for disclosure related to TPF may also arise at a different stage of the proceeding, for

example, following the discovery by the opposing party of the existence of TPF in relation to the proceeding.[15] Such "out of sequence" requests should not usually raise questions as to the power of the arbitral tribunal to address any request for disclosure.

Many sets of arbitration rules explicitly empower arbitral tribunals to order, including on an *ex officio* basis, the production of documents at any moment during the arbitration.[16] For instance:

– Article 25(5) of the ICC Rules provides: "*At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence*."

– Article 24(3) of the 1976 UNCITRAL Arbitration Rules contains a similar provision: "*At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine*."

– ICSID Arbitration Rule 34(2)(a) provides that "[t]*he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts* […]."

– Article 22(1)(v) of the LCIA Rules empowers a tribunal, upon a party's application or *ex officio*, "*to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant*."

In addition to the express provisions contained in the arbitration rules, it is generally accepted that international courts and tribunals have the inherent power to take measures that are necessary to protect the integrity of the proceedings, the parties' rights, and to prevent the international justice system from being undermined or abused.[17]

As several ICSID tribunals have confirmed, investment treaty tribunals are also empowered to exercise inherent powers in order to protect the propriety of the arbitration and to prevent abuses. For example, in *Hassan Awdi v. Romania*, the tribunal stated that "*like any other international tribunals it is endowed with the inherent power and corresponding duty to preserve the integrity of the arbitral process.*"[18]

The foundation of this power may also be found in the combined effect of Article 44 of the ICSID Convention, which empowers ICSID tribunals to decide any question of procedure that may arise and which is not expressly covered by the ICSID Convention, the Arbitration Rules or the rules agreed by the parties, and of Rule 19 of the Arbitration Rules, which empowers ICSID tribunals to make orders required for the conduct of the proceeding. At the same time, ICSID tribunals are not allowed to take measures that would be inconsistent with express provisions of the ICSID Convention, the Arbitration Rules or the procedural rules agreed upon by the parties.[19] Arbitral tribunals constituted under the UNCITRAL Arbitration Rules are endowed with similar powers.[20]

C. Disclosure of the Existence of TPF and Identity of the Funder

1. Defining TPF

Where mandatory disclosure of TPF is under consideration, it is necessary to begin by defining TPF. Defining TPF is easier said than done. Despite the importance of achieving a commonly understood definition of TPF for purposes of determining the scope of any disclosure obligation, the task has not yet been undertaken in any national arbitration law or set of arbitration rules that are currently in force.[21] Nor is it common drafting practice for parties to define TPF in their agreements to arbitrate.

That said, certain models do exist. As noted above, the provisions on investment protection contained in certain recent free trade agreements and investment treaties have tackled the problem of defining TPF. For example, the revised draft of the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") released by the EU and Canada on February 29, 2016,[22] contains, among the original features of Chapter VIII dedicated to investment protection, Article 8.26, which requires the funded party to promptly disclose the identity of the funder:

"*1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other*

disputing party and to the Tribunal the name and address of the third party funder.

2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made."

The CETA defines "*third party funding*", as "*any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute*."

This definition is noteworthy. If the term "*remuneration*" is understood to encompass not only a direct, pecuniary interest in the award, but also any kind of indirect benefit that a funder may obtain from the award, the definition does not restrict TPF to investments predicated upon an expected return, but also reaches costs indemnity agreements (in which remuneration to the insurer depends upon the outcome of the dispute).[23] Moreover, the independent reference to "*a donation or grant*" would reach funding agreements that are non-remunerative in nature, such as funding motivated by an interest in a particular public policy or in creating a favorable "*precedent*" for use in a related dispute. By contrast, the definition would not appear to cover a liability insurance policy (before or after-the-fact), under which the duty of the insured to make payment of premiums would not be contingent in nature.

The negotiating text for the Trade and Investment Partnership between the EU and the US published by the European Union on September 16, 2015[24] contains virtually identical provisions.[25]

The draft EU-Vietnam Free Trade Agreement, published by the European Union on February 1, 2016,[26] requires disclosure not only of the name and address of the third party funder, but also of "*the nature of the funding arrangement*," and expressly provides that the existence of the TPF, and its prompt and complete disclosure, are factors to be taken into account in deciding on security for costs and on the apportionment of the "*cost of proceedings*," respectively.[27]

The investment treaty and free trade agreements describe above have taken an approach to defining TPF that recognizes the multiplicity of forms in which funding can be provided. It is true that the most familiar model of funding involves the investment by a third party, in support of a claim, in exchange for an interest in any award issued in favor of the funded party. However, economically interested third parties can assume very different positions in relation to an arbitration. On the respondent side, funders can insure against awards of liability or fund the costs of arbitration in exchange for a return on investment linked to an outcome more favorable than a defined threshold of "*success*" (e.g. damages of less than x). Likewise, respondent-side funding can be provided in exchange for an interest in a contested asset, the title to which has been successfully defended, such as a patent. Both claimants and respondents may seek insurance against adverse costs awards.

Another expression of this multiplicity is seen in General Standard 7a of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), which provides:

"*A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution of 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. The party shall do so on its own initiative at the earliest opportunity.*"[28]

The IBA Guidelines recognize that what is relevant for purposes of defining the obligation to disclose in relation to interested third-parties, at least for purposes of avoiding conflicts of interest, is understanding whose economic interests are at stake in connection with the outcome of any given dispute. When it comes to disclosure that is designed to avoid conflicts of interest, which is typically the first interest in disclosure that arises in an arbitration, the IBA's approach is sensible.

Of course, some amount of discretion will have to be exercised in determining whether an interest is "*direct*", as opposed to indirect. For example, while it will be obvious that a funder which has invested in a claim in exchange for a pecuniary interest in the award will have a "*direct*" interest in the claim, it

may be more difficult to determine whether a shareholder or private equity investor in the claimant company has a "*direct*" interest, or whether the funding of an unrelated party to establish a favorable "*precedent*" for the funding party, constitutes an "*indirect*" interest. And even indirect interests may be sufficiently consequential to warrant disclosure. For example, a shareholder that is providing general financing to a subsidiary, the sole or primary asset of which is an arbitration claim, would qualify as holding a significant indirect interest in the claim. For conflicts purposes, however, such a shareholder would be difficult to distinguish from a litigation funder that has invested directly in the claim of the subsidiary by paying the subsidiary's litigation costs. Determining who has a duty "*to indemnify*" should be more straightforward in most cases.

It is also possible to ask whether parties who have a direct, *non-economic interest* in the outcome of the dispute, but who have not assumed a *duty to indemnify* in relation to any award, should be disclosed. Under the IBA approach, which links TPF to a party that has "*an economic interest in*", or "*a duty to indemnify* […] *for, the award*", such parties would not necessarily be covered. However, where a party is backed by a third-party, which pays all costs associated with the prosecution of the claim or defense, for philanthropic reasons, public policy-oriented reasons, or for other reasons of its own, but which does not itself assume a duty to indemnify the funded party for any award (such as an award of costs), the same concerns that motivate disclosure for economically interested funders could be implicated.[29]

The definitions of TPF found in the investment treaties and free trade agreements described above, which apply to any party "*who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings* […] *through a donation or grant* […]", would capture this type of funding that is not in exchange for remuneration, and which does not include a duty to indemnify related to costs.[30]

Where no definition of TPF has been established, different parties may entertain different understandings of the meaning of TPF, and thus as to their respective disclosure obligations. Ensuring that the rules of the game are clear for all participants is necessary to ensure predictability and fairness in matters of disclosure. It is also of paramount importance to develop rules of disclosure that are economically rational and tailored to the interests underlying disclosure.

2. Determining When the Source of TPF Should Be Disclosed

Once TPF has been defined, the next logical question will be whether the funded party should be required to disclose the source of its TPF.

While this subject has given rise to debate, the authors believe that the adoption of formal rules of disclosure of the source of funding at the outset of the arbitration would generally be desirable. The reason for this is the need to avoid the undesirable consequences that can follow from belated or non-disclosure of relationships between the funder and the arbitral tribunal. To be clear, the parties' duty to provide information regarding the identity of the funder should not be understood to be based upon a general duty to disclose conflicts. This duty attaches only to the arbitral tribunal. Instead, the duty of the parties is one of good faith and loyalty, which consists in providing to the arbitral tribunal that information which its members require to fulfill their own disclosure obligations.[31]

It is true that disclosure will in many cases result in additional procedural incidents which might otherwise be avoided, risking increased delay and costs. Only a few years ago, it was therefore sensible to question whether such costs can be justified in view of what was then the relatively novel and rare involvement of TPF in arbitration proceedings.[32]

The situation today, however, is arguably different. The costs-benefits analysis appears to have shifted. Given the rise of TPF as an established and recurring phenomenon in arbitration, a trend which shows no sign of abating, it is not clear that the costs of potential procedural incidents derived from the revelation of TPF outweighs the costs associated with eventualities in which requisite disclosure does not occur or occurs belatedly. Such scenarios may include the annulment of arbitral awards, or, the need for late-stage removal of members of the arbitral tribunal. Given the costs and inefficiencies

that may result from the annulment of the award or the late replacement of an arbitrator, and the increased probability of such costs being incurred (insofar as the risk of such costs being incurred correlates with the increased use of TPF in arbitration proceedings), the time has arguably come to require the disclosure of the existence of funding by funded parties at the outset of arbitration proceedings. This disclosure may be provided for pursuant to arbitration rules, practice notes or guidelines introduced by arbitral institutions, by parties in agreements to arbitrate, or by State parties to instruments of international investment law.

As noted above, a series of recent investment treaty arbitral tribunals have ordered disclosure related to the source of TPF, citing concerns as to transparency and the integrity of the arbitration.[33] These orders track the requirements found in the IBA Guidelines and in emerging investment treaties and free trade agreements.[34]

3. How the Source of TPF Should Be Disclosed

The easiest way to ensure that any requisite disclosure occurs, is to require the party in receipt of funding to disclose the source of its funding. While alternative approaches may be considered, it is fair to question whether such approaches are sufficiently protective of the vital interests at stake.

For example, an *ad hoc* commission of the *Club des Juristes*, a group composed of influential members of the French arbitration community, hypothesized a creative mechanism whereby the funded party would ask the funder to identify to the funded party any ties between the funder and any member of the arbitral tribunal. The logic of this approach is clear given that only the funder will usually know what links, if any, exist between itself and the members of the arbitral tribunal. Only where such a link exists, would the funded party have a duty to evaluate the link, and to then potentially disclose the source of funding.[35] The group proposed the insertion of provisions in arbitral rules requiring that funding agreements used in connection with proceedings under the rules impose obligations on the funder related to the loyal performance of this screening function.[36]

This solution represents a laudable effort to strike a compromise between the interests of transparency and confidentiality. However, it is not clear that the proposed solution is sufficiently protective of the interests of the non-funded party, the arbitral tribunal and any arbitral institution. Unlike the funder, the funded party has a legal duty to comply with an order of disclosure. Moreover, while most funders would no doubt perform the screening function loyally, taking into account the problematic potential consequences of non-disclosure, it cannot be assumed that all will do so. Even where funders do endeavor loyally to perform screening, it is not self-evident that funders, which are not necessarily subject to the same mandatory legal or ethical obligations as lawyers and the parties, will be in a position to carry out such delicate work with the same degree of care that the parties and their counsel must exercise.

When part of the disclosure process is delegated to a non-party, a heightened risk comes into being. While the counterparty to the agreement to arbitrate might be seen as having accepted the risk that funding could be provided in relation to future disputes, it would be doubted in most cases that the counterparty consented *ex ante* to the delegation of duties associated with the execution of the agreement to arbitrate (including the duty to enable the constitution of an effective and valid arbitral tribunal), to an unknown third party.

Alternatively, the members of the arbitral tribunal could be asked, upon confirmation that funding exists, to disclose the identity of any person or entity with whom the arbitrators have a relationship, which would be covered by the relevant definition. Only in case of a match, would the funded party have to come forward with disclosure of the source of its funding.

This approach would have serious shortcomings, however. As noted by the commission of the *Club des Juristes*, it could force the arbitrators to violate their confidentiality obligations vis-à-vis their clients or parties in other arbitrations, and could unduly expand the scope of the arbitrators' duty of disclosure.[37] Moreover, this approach would assume that an arbitrator can be aware of all of the activities and relationships of all of the persons or entities with which the arbitrator has some form of relationship. While the arbitrator would surely be able to identify any dedicated funding firms

engaged in typical funding activities with which the arbitrator has a relationship that could warrant disclosure, the arbitrator would not necessarily know whether other persons and entities that are not litigation funders with which he has a relationship are also engaged in funding. Thus, any such approach would likely be unreliable.

In summary, where it has been accepted that the identity of the funder should be disclosed, the most feasible and effective way to provide for this disclosure in most cases will be by requiring that the funded party disclose the identity of the funder, either at the outset of the arbitration proceeding or upon the formation of the funding relationship, if this should occur at a later stage of the proceeding.

D. Decisional Practice Related to the Disclosure of TPF

As discussed above, it would appear that there is increasing support for the proposition that the presence of funding and identity of any funder should be disclosed in order to protect the integrity of the arbitral tribunal, and for reasons of transparency.

However, the question of whether the terms of any funding agreement should also be disclosed is subject to greater controversy. The terms of any funding arrangement may be considered confidential and commercially sensitive. Four recent investment treaty arbitration decisions arising from common, claimant-side funding scenarios, provide interesting case studies showing how recurring issues related to the disclosure of TPF, including in one case, the terms of TPF, may be resolved. These decisions offer an opportunity to consider how an incremental approach to disclosure can be implemented. A fifth case is included in this discussion because it presents a relatively unusual, but not implausible, scenario that may call for the disclosure of funding provided to respondent States.

1. Muhammet Çap v. Turkmenistan

I n *Muhammet Çap v. Turkmenistan*,[38] the tribunal rendered two decisions on Turkmenistan's requests for disclosure in relation to TPF, only one of which is fully available.[39]

In the published decision,[40] the arbitral tribunal, after confirming its power to order disclosure and ordering the disclosure of the identity of the funder for reasons of transparency and to preserve the integrity of the arbitral tribunal,[41] ordered the claimant to disclose the nature of the funding agreement, including "*whether and to what extent* [the funder] *will share in any success that Claimants may achieve in this arbitration*."[42]

To justify its order in relation to the terms of funding, the arbitral tribunal first referred to Turkmenistan's statement that it intended to apply for security for costs.[43] The arbitral tribunal then noted, as "*additional factors*", that claimant had not denied that it was the recipient of TPF or that, in another ICSID arbitration involving Turkmenistan (*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1), a costs order issued by an arbitral tribunal had not been paid, even though the claimant had started annulment proceedings.[44] Finally, the arbitral tribunal stated that it was "*sympathetic*" to Turkmenistan's concern that if it should receive a costs award in its favor, "*Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this* arbitration."[45]

While it is entirely possible that the arbitral tribunal had greater insight into the nature of the claimant's position than the public record reveals, it is not entirely clear why the arbitral tribunal ordered disclosure regarding the terms of the funding relationship at issue. The respondent appears merely to have announced an intention to file for security for costs, where disclosure of the terms of funding might become relevant. However, no such application appears to have been filed at the time of the arbitral tribunal's order. Indeed, the arbitral tribunal noted explicitly that the basis on which the respondent would be making an application for security was "*unclear*".[46]

Under an incremental approach, the party seeking disclosure of the terms of funding would first be required to establish such predicates, explaining why the disclosure of funding terms would be

relevant in light thereof. For example, if the applicant party were able to make a showing that the claimant is impecunious, the presence of TPF could be considered relevant. On the other hand, if the party receiving funding were not shown to be incapable of meeting an order of costs, the terms of any TPF would likely be considered irrelevant. Under an incremental approach to disclosure, which would seek to balance the funded party's interest in or obligations of confidentiality (as well as the confidentiality interest of the funder), such issues would be briefed prior to the issuance of any order of disclosure regarding the terms of funding.

Ultimately, the nature of the disclosure ordered by the arbitral tribunal in relation to the terms of funding was rather limited. Specifically, the arbitral tribunal ordered only the disclosure of the "*nature of the arrangements… including whether and to what extent [the funders] will share in any successes*," which would not appear to require the disclosure of the funding documents, but would allow for a higher-level description of the basic structure and economics of the funding.

2. Eurogas v. Slovak Republic

A few months prior the decision in the above case, another ICSID tribunal issued an oral order for disclosure during a hearing. When discussing applications for provisional measures and for security for costs filed by the parties, the issue of disclosure of the identity of claimant's funder was debated. Respondent also requested that claimants enter into a confidentiality agreement in order to prevent claimants from sharing confidential information with the third-party funder, which claimants refused.[47]

In an oral order, the chairman of the tribunal ordered claimants to disclose the identity of their funder and held that the funder be subject to the "*normal obligations of confidentiality*."[48]

This case confirms that the disclosure of the identity of the funders is likely to be perceived by arbitrators as necessary to ensure transparency. The tribunal's decision not to subject the funded party or the funder to a special obligation of confidentiality is also noteworthy.[49] Indeed, the mere presence of a third party funder does not seem to require a special stipulation or a special order to protect confidentiality, as none is normally requested with respect to the other third parties that, in various capacities, may participate in an arbitration.

3. Guaracachi v. Bolivia

In *Guaracachi v. Bolivia*,[50] Bolivia requested the disclosure of information related to TPF in connection with an application for security for costs and in the interest of avoiding any risk of conflicts of interest. In particular, Bolivia requested that the arbitral tribunal order claimants to produce the funding agreement and the related documentation.[51] While Bolivia's application for security for costs was pending, Bolivia appears to have learned of the identity of the funder supporting the claimant. Thus, the first application for disclosure became moot.

The tribunal dismissed Bolivia's request for disclosure of the funding agreement. The tribunal held that, since Bolivia had already learned the identity of the third party funder, it would be sufficient for the arbitral tribunal to determine whether it had any conflict of interest to disclose, which the arbitral tribunal confirmed was not the case. The arbitral tribunal declined to order the disclosure of the funding agreement on the grounds that the applicant had failed to identify on what basis this document could be relevant to the issue of conflicts.[52] In addition, the arbitral tribunal noted that Articles 11 to 13 of the UNCITRAL Arbitration Rules governing conflicts of interest did not refer to the disclosure of documents, but rather required disclosure by the arbitrators of any circumstance that could create a conflict of interest.[53]

While declining to order disclosure related to the terms of funding, the arbitral tribunal did note that since claimants had not produced the funding agreement, or denied that the funder had no obligation to pay a costs award, the arbitral tribunal would reserve its right to draw "*such inferences as it deems appropriate*" from these facts in deciding Bolivia's application for security for costs.[54] Accordingly, the arbitral tribunal appears to have struck an artful compromise between claimant's confidentiality interest in not disclosing the funding documentation, and respondent's interest in

ascertaining the terms of funding that might be relevant to its pending application for security for costs.

Subsequently, the arbitral tribunal rejected Bolivia's request for security for costs. Noting that security for costs is an exceptional measure rarely granted in investment treaty arbitration, the arbitral tribunal held that nothing in the record justified such an exceptional measure or suggested that claimants would have been unable to satisfy a costs award.[55] In particular, the tribunal stated that it cannot be inferred "*from the mere existence of third party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not.*"[56]

4. South American Silver v. Bolivia

In *South American Silver v. Bolivia*,[57] respondent requested that claimant disclose the identity of its funder, and produce the funding agreement along with related documents, in order (a) to allow the arbitrators to confirm the absence of any conflict of interest, (b) to identify the real party in interest in the arbitration, and (c) to ascertain whether the litigation funder would be required to satisfy any adverse costs award. Bolivia also filed a request for security for costs on the ground that claimant lacked sufficient resources to meet a future costs award, citing the fact that claimant sought external funding from a third party funder whose liability for any future costs award was uncertain.[58]

While offering to reveal the name of the funder, claimant refused to disclose the terms of the funding agreement, and dismissed Bolivia's request as a "*fishing expedition*," arguing that the content of the funding agreement was irrelevant to the issues at stake in the arbitration and that there was no evidence in the record, nor was it suggested, that a conflict of interest existed or that claimant had assigned its claim. Claimant also argued that the funding agreement was confidential and commercially sensitive, such that both claimant and the funder would be prejudiced by its disclosure (without indicating what kind of prejudice they would suffer).[59]

The arbitral tribunal ordered claimant to reveal the identity of the funder in order to promote transparency, but decided that the terms of the funding agreement need not to be disclosed.[60] This decision followed naturally from the arbitral tribunal's denial of the respondent's application for security for costs, which was based upon the absence of "*exceptional circumstances*" that could justify an award of security.[61] Absent such circumstances, the arbitral tribunal considered the question of whether the funder had assumed liability for any eventual costs award to be irrelevant.[62]

The approach taken by the arbitral tribunal in *South American Silver v. Bolivia* can only be praised. Here, the arbitral tribunal recognized the inherent danger of conflicts of interest associated with the failure to disclose the source of TPF, while refraining from ordering further disclosure regarding the terms of funding absent proof that such disclosure was needed as part of the analysis of whether to award security.

5. RSM Production Corporation v. Grenada

A claim brought by RSM Production Corporation against Grenada seven years ago involved an alleged respondent-side funding scenario.[63] In that case, the investor requested disclosure of the terms of the funding that the host State allegedly was receiving, not from a litigation funder, but from the investor's competitor, on the theory that the competitor had bribed a State official to steal the claimant's investment. According to the claimant, the alleged funding by the competitor of the host State's defense was part of the relevant alleged corruption scheme.[64] The relevant request for disclosure was first filed by the claimant during the annulment proceeding.[65]

Predictably, the Ad Hoc Committee dismissed claimant's application on the ground that it lacked the power to inquire into the corruption claim.[66] This issue resurfaced during the annulment proceeding when Grenada requested that the Ad Hoc Committee discontinue the annulment proceeding due to claimant's failure to pay the advance on costs as required by the ICSID Administrative and Financial Rules, and to award the respondent its full arbitration costs.[67] The Ad Hoc Committee rejected once again claimant's disclosure request on the ground that the involvement of a third party funder in the

proceeding was not a factor to be considered in the apportionment of costs, discontinued the annulment proceeding and ordered claimant to pay Grenada's arbitration costs.[68]

The Ad Hoc Committee's decision to dismiss claimant's application is unsurprising given the Ad Hoc Committee's lack of power of inquiry into the facts of the case or to reconsider the merits of the tribunal's decision, and the absence of any substantiated basis for claimant's accusations.[69] However, the scenario in which a successful foreign investor falls prey to the interests of powerful local actors with strong political connections, which secure the cooperation of the host State in misappropriating the investment, is one that is not inherently implausible.[70] Where such an investor files an investment treaty claim, the fact that third parties have agreed to indemnify the host State for its costs of defending the claim may be relevant to the claimant's allegations of concerted misconduct. In these circumstances, disclosure regarding the terms of any funding may not be inappropriate.

Conclusions

The discussion above has, it is hoped, illustrated the importance of taking a measured and case-specific approach to matters of disclosure related to TPF. While important policies and principles are at stake in this setting, some of which are increasingly taking on political overtones, disclosure should remain true to its purpose and function in international arbitration.

In particular, parties should be expected to support their positions with evidence, rather than relying upon the arbitral tribunal to generate material supporting desired claims, defenses or procedural applications. Only where a showing of relevance and materiality can be made out, or an institutional or systemic need for disclosure is established (as is arguably the case in relation to the disclosure of the identity of funders, which touches such needs), will disclosure be warranted. Finally, where disclosure is deemed to be appropriate, arbitral tribunals should strive to limit disclosure to information that is specifically relevant to the need justifying the issuance of any disclosure order.

1 –
1. The views expressed herein are those of the authors and do not necessarily reflect those of the law firms with which they are affiliated or their clients. The discussion in this article is current as of the date of its submission for publication, 16 June 2016.

2 –
2. For further discussion of the legal and procedural ramifications of TPF in international arbitration, *see, e.g.*, von Goeler J., "Third-Party Funding in International Arbitration and its Impact on Procedure," (Kluwer, 2016); Dupeyron C. and Valentini M., "Maîtriser les conséquences de la présence du tiers financeur sur la procédure à travers le contrat de financement," 4 Rev. arb. (2014) pp. 909-936; Le Club des Juristes, Ad hoc Commission, "Rapport sur le Financement de procès par les tiers," (June 21, 2014) (the "CDJ Report") (containing analysis and solutions to various problems raised by TPF); Third-Party Funding in International Arbitration: Dossier X of the ICC Institute of World Business Law (2013) (the "ICC World Institute Dossier on TPF") (containing articles on the subject by numerous leading commentators as well as TPF industry participants); Goldsmith A. and Melchionda L., "Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask), Part I," 1 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 53-76; Goldsmith A. and Melchionda L., "Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask), Part II," 2 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 221-243; Scherer M., Goldsmith A., and Fléchet C., "Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012, Part I," 2 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 207-219; Scherer M., Goldsmith A., and Fléchet C., "Third-Party Funding in International Arbitration in Europe: RDAI/IBLJ Roundtable 2012, Part II," 6 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 649-665; Pinsolle P., "Le financement de l'arbitrage par les tiers," 2 Rev. arb. (2011) pp. 385-414.

3 –
3. *See, e.g.*, Yeoh D., "Third-Party Funding in International Arbitration: A Slippery Slope or Leveling the Playing Field?" 33 J. of International Arbitration 1 (2016) pp. 115-122; CDJ Report pp. 47-55, 68-69; Scherer M., "Third-Party Funding in International Arbitration. Towards Mandatory Disclosure of Funding Agreements?" ICC World Institute Dossier on TPF; Darwazeh N. and Leleu A., "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding," 33 J. of International Arbitration 2 (2016) pp. 125-149.

4 –
4. *See* the Draft SIAC Investment Arbitration Rules ("Draft SIAC IA Rules"), Arts. 23(l) (authorizing orders of disclosure related to TPF), 32.1 (allowing consideration of TPF in apportioning costs) and 34 (authorizing legal costs awards against funders). The Draft SIAC IA Rules of course only recognize the power to order disclosure. They do not call for automatic disclosure by parties. As of the date of submission of this article, the Draft SIAC IA Rules have not been formally adopted.

5 –

5. The ICC's recent "Guidance Note for the Disclosure of Conflicts by Arbitrators," addresses disclosure by arbitrators in relation to TPF (noting that TPF relationships should be considered by arbitrators for purposes of disclosure), but not disclosure by parties. *See* Goldsmith A. and Melchionda L., "The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction," Kluwer Arbitration Blog (Mar. 15, 2016). Where arbitrators are unaware of the existence of TPF, they will not be in a position to make the disclosures that the ICC Guidance Note recommends. Thus, it will be interesting to observe whether the new ICC Guidance Note leads to party requests for the disclosure of TPF, so that arbitrators may carry out any necessary disclosures pursuant to the new standards announced by the ICC.

6 –

6. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 7a.

7 –

7 . *See infra* **Part II.C.1** (discussing the draft EU-Canada Comprehensive Economic and Trade Agreement, the negotiating text for the Trade and Investment Partnership between the EU and the US, and the draft EU-Vietnam Free Trade Agreement).

8 –

8. *See infra* note 40.

9 –

9. CDJ Report pp. 40-60; IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 7a.

10 –

10. Pinsolle P., "Le financement de l'arbitrage par les tiers," 2 Rev. arb. (2011) pp. 385-414; Goldsmith A. and Melchionda L., "Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask), Part II," 2 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 221-243; CDJ Report pp. 46-47; Lamm C. and Hellbeck E., "Third-Party Funding in Investor-State Arbitration. Introduction and Overview," ICC World Institute Dossier on TPF.

11 –

11. As reflected in the discussion below in relation to cases in which respondents are funded by alleged joint wrongdoers, additional interests may of course also come into play in certain cases.

12 –

12. Goldsmith A. and Melchionda L., "Third-Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask), Part II," 2 International Business Law Journal / Revue de Droit des Affaires Internationales (2012) pp. 228-229, 231-32 (addressing, among other issues, possible characterization as assignment as a result of certain approaches to funding).

13 –

13. In principle, the burden of proof for establishing the existence of an interest in disclosure and need for the disclosure sought, should rest upon the party seeking disclosure. That is, arbitral tribunals, absent special circumstances triggering their duty to investigate, should not be considered to have a general duty to inquire regarding TPF. *See, e.g.*, Lévy L. and Bonnan R., "Third-Party Funding. Disclosure, Joinder and Impact on Arbitral Proceedings," ICC World Institute Dossier on TPF.

14 –

14. *See*, *e.g.* IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 3.

15 –

15. *See, e.g., South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 7 (July 21, 2015) ¶ 26 (addressing request for documents related to TPF outside of the phase dedicated to document production: "*The arguments put forward by the Respondent and the objections of the Claimant* [...] *go beyond the discussion on the relevance and materiality of the documents in the context of the dispute, or the even simpler discussion about the need to produce documents or lack thereof, which is the purpose of this phase. Consequently, the Tribunal considers that this is not the form or the procedural phase to deal with these matters. Therefore, the Tribunal will deny the production of the Documents Requested, without prejudice to the Respondent submitting a separate duly justified request, if it so wishes, regarding the issue that it refers to as 'financiación del presente arbitraje', including a document request, in which case, the Tribunal will give the Claimant an opportunity to reply to such request and will decide as necessary.*").

16 –

16. *But see* Art. 26(3) of the SCC Rules ("*At the request of a party, the Arbitral Tribunal may order a party to produce any documents or other evidence which may be relevant to the outcome of the case.*").

17 –

17. The foundation of this power was illustrated by the International Court of Justice in the case *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Rep. (1974) p. 457, ¶ 23 and *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Rep. (1974) p. 253, ¶ 23; *Northern Cameroons*, Judgment, I.C.J. Rep. (1963) p. 29; *see also* Brown C., "The Inherent Powers of International Courts and Tribunals," 76 BYIL (2005) p. 195 (citing Sir Fitzmaurice G. who distinguished between inherent jurisdiction and preliminary or incidental jurisdiction); Abi-Saab G., Les exceptions préliminaires dans la procédure de la Cour internationale (1967) pp. 97, 146-147; Kolb R., "General Principles of Procedural Law," in The Statute of the International Court of Justice. A Commentary (Zimmermann A. *et al.*, eds.) (2006) pp. 806-807.

18 –

18. *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimant's Claims (July 26, 2013) ¶ 81. *See also Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (June 23, 2008) ¶ 78; *Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Participation of Counsel (May 6, 2008) ¶ 33; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 (May 30, 2008) ¶ 46; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) ¶ 365; *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Decision on RSM Production Corporation's Application for a Preliminary Ruling (Dec. 7, 2009) ¶ 20.

19 –

19. For instance, ICSID tribunals are not authorized to reopen, reconsider, amend or reverse prior decisions outside the context of Art. 49 (rectification of an award) or Art. 51 (revision of an award) of the ICSID Convention. *See, e.g., Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Reconsideration Motion (Apr. 10, 2015) ¶¶ 80, 97; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Respondent's Request for Reconsideration (Feb. 9, 2016) ¶ 23; *see also* Schreuer C., Malintoppi L., Reinisch A., Sinclair A., The ICSID Convention: A Commentary (2009) p. 688.

20 –

20. *See* Art. 15(1) of the 1976 UNCITRAL Arbitration Rules ("*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*"); *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012) ¶¶ 253-254; *see also* Pryles M., "Limits to Party Autonomy in Arbitral Procedure," 24 J. International Arbitration. 327 (2007) p. 335; Caron D. D., Caplan L. M., The UNCITRAL Arbitration Rules: A Commentary (2013).

21 –

21. The Draft SIAC IA Rules address certain issues related to TPF, such as the power to order disclosure, but do not provide a definition of TPF.

22 –

22. *See* European Commission, "CETA – Summary of the final negotiating results" (announcing the completion of the legal review of the English original version of this text, which will be translated into the other official languages of the EU and Canada to be submitted for approval.).

23 –

23. For example, in the case of after-the-event insurance policies for adverse costs awards, the insurer typically receives a premium only in the event the insured party prevails and does not need to draw on the policy.

24 –

24. *See* http://ec.europa.eu/trade/policy/in-focus/ttip/.

25 –

25. EU negotiating text for the Trade and Investment Partnership between the EU and the US, Definitions ("*'Third Party funding' means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.*"); *id.* at Art. 8 "*(1) Where there is a third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder. (2) Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.*").

26 –

26. The published text is still subject to legal revision. *See* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

27 –

27. EU-Vietnam Free Trade Agreement, Definitions ("*'Third Party funding' means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.*"); Art. 11 *("1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder. 2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made. 3. When applying Art. 22 (Security for Cost), the Tribunal shall take into account whether there is third party funding. When deciding on the cost of proceedings pursuant to Art. 27(4) (Provisional Award) the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 have been respected.*").

28 –

28. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 7a (emphasis added). *See also* IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 6b ("*Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*").

29 –

29. To take one example, certain philanthropic organizations have supported Uruguay in the arbitration initiated against it by Philip Morris. *See* Press Release, "Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund" (Mar. 18, 2015) (http://www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/).

30 –

30. As noted above, these definitions would also arguably capture any funder who has agreed to indemnify costs or liability insofar as any such obligation has been provided in exchange for "*remuneration dependent on the outcome of the dispute*".

31 –

31. For discussion of this clarification, *see* CDJ Report pp. 43-51 (explaining that only the arbitral tribunal need to make this disclosure). Because disclosure may be ordered by the arbitral tribunal, contractual provisions restricting disclosure may place the funded party in an uncomfortable position. Thus, parties seeking funding should consider seeking the greatest possible flexibility under the funding contract in relation to disclosure.

32 –

32. *See* Lévy L. and Bonnan R., "Third-Party Funding. Disclosure, Joinder and Impact on Arbitral Proceedings," ICC World Institute Dossier on TPF.

33 –

33. *See, in particular, EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (Mar. 17, 2015) pp. 33-38, 144-145; *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015) ¶¶ 8-13; *South American Silver v. Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016) ¶¶ 79, 85. In *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, the arbitral tribunal did not need to order disclosure because the respondent discovered the identity of the funder independently. *See* UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 (Feb. 21, 2013). The arbitral tribunal did, however, confirm that its members were aware of no questions of independence or impartiality requiring disclosure on their part on the basis of the identity of the funder. *See id.* at ¶ 8. This confirmation represents an implicit recognition of the valid questions that the relationships between funders and arbitrators may raise as to the latter's independence and impartiality. Most recently, an ICSID tribunal constituted under the Dominican Republic-Central America-United States Free Trade Agreement accepted a respondent's request to order the claimant to disclose whether its claim was funded by a third-party funder and, if this were the case, the funder's identity and the date when the funding started. The respondent had objected that the claimant's claim was time-barred under the limitations period set out in Article 10.18 of the DR-CAFTA, an objection which led the relevant tribunal to dismiss the arbitration. Since the tribunal's actual decision on the disclosure of TPF has not been published as of this time, it is not possible to comment on this decision in detail. However, it is likely that the respondent's interest in ascertaining the date of funding related to arguments based on the relevant prescription period. See *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections of May 31, 2016, ¶ 22.

34 –

34. *See, e.g., supra* notes 25, 27, and 28.

35 –

35. CDJ Report pp. 41-43.

36 –

36. *Id.* at pp. 43-60.

37 –

37. *Id.* at p. 55.

38 –

38. *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6 (Hanotiau B., Boisson De Chazournes L., Chair: Lew J. D. M.).

39 –

39. *See* the procedural details on the ICSID website athttps://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/6&tab=PRD; *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015).

40 –

40. Portions of the first decision, which is contained in Procedural Order No. 2 (June 23, 2014) are reported in *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Art. VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (Feb. 13, 2015) ¶ 50. In its first decision, the tribunal confirmed that it had the power to issue an order of disclosure of the nature requested and indicated several grounds on the basis of which it can be issued, such as a potential conflict of interest, transparency, the identification of the real party in issue, the allocation of costs, an application for security for costs and the risk that confidential information which may emerge during the arbitration be disclosed to third parties. The tribunal, however, rejected Turkmenistan's request without prejudice because Turkmenistan failed to sufficiently substantiate its request. Turkmenistan merely suggested that claimant was likely funded by a third party, but failed to allege a conflict of interest, the disclosure or misuse of confidential information, or any other element that could be relevant to the tribunal's decision.

41 –

41. *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015) ¶ 6, ¶ 9.

42 –
42. *Id.* at ¶ 13.

43 –
43. Turkmenistan filed a request for security for costs on September 29, 2015.

44 –
44. It is unclear whether the tribunal in *Muhammet Çap v. Turkmenistan* cited the *Kılıç v. Turkmenistan* case because the claimants these two cases are related, or simply as an example. It appears, however, that in the annulment phase of *Kılıç* and in *Muhammet Çap*, claimants were represented by the same law firm, while in the arbitration phase of *Kılıç* claimant was represented by a different law firm.

45 –
45. *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015) ¶¶ 8-12 (*"[T]he Tribunal is sympathetic to Respondent's concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration."*). The arbitral tribunal did not link its order of disclosure of the terms of funding to the respondent's argument that such disclosure was necessary *"to check that Claimants [...] are still the actual owners of the claims."* *Id.* at ¶ 2. On this point, the arbitral tribunal noted the claimant's representation that it had not "*assigned*" any of its rights. *Id.* at ¶ 11.

46 –
46. *Id.* at ¶ 10.

47 –
47. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Claimants' Full Application for Provisional Measures (Aug. 11, 2014); Respondent's Request for Provisional Measures and Opposition to Claimants' Application for Provisional Measures (Sept. 10, 2014) ¶¶ 70-71; Claimants' Reply on Provisional Measures and Answer to the Respondent's Request for Provisional Measures (Oct. 16, 2014) ¶¶ 223-233; Respondent's Reply Application for Provisional Measures and Rejoinder to Claimants' Application for Provisional Measures (Nov. 21, 2014) ¶¶ 75-76; Claimants' Rejoinder to Respondent's Application for Provisional Measures (Dec. 22, 2014) ¶¶ 142-152; Transcript of the First Session and Hearing on Provisional Measures (Mar. 17, 2015).

48 –
48. *Id.* at pp. 33-38, 144-145.

49 –
49. Art. I of Annex B to the 2012 Canada-Slovak republic BIT, on the basis of which one of the claimants (Belmont Resources, Inc.) commenced arbitration, contains detailed provisions on public access to the arbitration hearings and confidentiality of the arbitration. In particular, Art. I.5 provides: "*A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.*" Art. I(b) of the 2012 Canada-Slovak Republic BIT defines the term "*confidential information*" as "*confidential business information and information that is privileged or otherwise protected from disclosure according to the laws and regulations of each Contracting Party.*" The effect of this provision was debated at the hearing, in particular whether the disclosure of documents to the third party funder was "*necessary for the preparation of* [the funded party's] *case,*" *see*, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (Mar. 17, 2015) pp. 33-37. The 1992 US-Slovak Republic BIT, which was invoked by the second claimant, did not contain specific provisions on confidentiality.

50 –
50. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17 (Conthe M., Vinuesa R., Chair: Júdice J. M.). The case was commenced on the basis of the UK-Bolivia and the US-Bolivia BITs and conducted under the 2010 UNCITRAL Arbitration Rules.

51 –
51. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Solicitud de *Cautio Iudicatum Solvi* (Feb. 12, 2013). Notably, Bolivia relied on an article authored by Kalicki J., *Security for Costs in International Arbitration*, published on TDM, Vol. 3, issue 5 (2006). Bolivia, which learned about the TPF from a press release, was able to obtain further information about the funding agreement from the MG01 Forms filed by one of the claimants with the United Kingdom Company House (we understand that a MG01 Form is the form that was in use in the United Kingdom to register mortgages and charges). *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Solicitud de *Cautio Iudicatum Solvi* (Feb. 12, 2013) ¶¶ 18-23. The MG01 Form revealed the identity of the funder (a Guernsey company named Salvia Investment Limited) and the fact that claimants, not the funder, were liable for the arbitration costs.

52 –
52. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 (Feb. 21, 2013) ¶ 9; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (Jan. 31, 2014) ¶ 66.

53 –
53. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 (Feb. 21, 2013) ¶ 8. As discussed at **Part II.B** above, had the arbitral tribunal considered any such document to be relevant, the arbitral tribunal arguably would have been able to rely upon its inherent powers to order disclosure.

54 –
54. *Id.* at ¶ 10 (citing Art. 9 of the IBA Rules on the Taking of Evidence in International Arbitration).

55 –
55. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia,* UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14 (Mar. 11, 2013) ¶¶ 6-7.

56 –
56. *Id.* at ¶ 7.

57 –
57. *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15 (Orrego Vicuña, Guillelmino, Chair: Zuleta Jaramillo).

58 –
58. *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 7 (July 21, 2015) ¶¶ 23-27 and the attached Redfern Schedule; Solicitud de Cautio Judicatum Solvi y Comunicación de Información (Oct. 8, 2015) ¶¶ 27-40. Bolivia relied, *inter alia*, on General Standards 6b and 7a of the 2014 version of the IBA Guidelines on Conflicts of Interest in International Arbitration, the oral order in *Eurogas v. Slovak Republic* and the procedural order in *Muhammet Çap v. Turkmenistan*, commented above.

59 –
59. *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Oposición Del Demandante A La Solicitud De Cautio Judicatum Solvi Y Comunicación De Información De Bolivia (Dec. 14, 2015) ¶¶ 37-40.

60 –
60. *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016) ¶¶ 79-82 ("*Concerning the second point, the disclosure of the name of the funder, the Tribunal considers that, for purposes of transparency, and given the position of the Parties, it must accept Bolivia's request of disclosure of the name of SAS' funder. Finally, concerning the disclosure of the terms of the financing agreement entered into with the third-party funder, the Tribunal will reject such request. Firstly, because, for the above-mentioned reasons, exceptional circumstances required to order security for costs are not present and the mere existence of the funder is not sufficient to order it. Therefore, it is not relevant under these particular circumstances to determine whether the third-party funder would assume or not an eventual costs award in favor of Bolivia. Secondly, because no additional circumstances have been proven that, in the opinion of the Tribunal, warrant the modification of the decisions already taken concerning document production in the corresponding procedural phase.*").

61 –
61. *South American Silver Limited v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Procedural Order No. 10 (Jan. 11, 2016) ¶ 81.

62 –
62. *Id.* While the arbitral tribunal did not motivate its finding that no other circumstances were proven that could warrant disclosure, it would appear that the arbitral tribunal concluded that the respondent had not made an adequate showing on any of the other grounds cited in support of its application, such as issues as to jurisdiction and admissibility, to warrant an order of further disclosure, *see* ¶ 82.

63 –
63. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Tribunal: Nottingham, Tercier, Chair: Rowley; Ad Hoc Committee: McLachlan, Abraham, Chair: Griffith).

64 –
64. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Decision on the Application of RSM Production Corporation for a Preliminary Ruling of 29 Oct. 2009 (Dec. 7, 2009) ¶¶ 1-11.

65 –
65. It appears that, in the arbitration proceeding, claimant did not request that the tribunal make a finding on its allegation of corruption, but simply that it consider the underlying facts in the assessment of the credibility of the Grenadian Senator accused of having been bribed, who testified at the hearing. The tribunal appears to have rejected claimant's allegations of corruption. *See RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Decision on the Application of RSM Production Corporation for a Preliminary Ruling of 29 Oct. 2009 (Dec. 7, 2009) ¶¶ 5-7 and 25; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (Dec. 10, 2010) ¶¶ 7.1.25-7.1.26.

66 –
66. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Decision on the Application of RSM Production Corporation for a Preliminary Ruling of 29 Oct. 2009 (Dec. 7, 2009) ¶¶ 26-30. The grounds for annulment under Art. 52 of the ICSID Convention are very limited and do not permit an *Ad Hoc* Committee to review the merits of a tribunal's decision, much less to consider merits arguments that could have been made during the arbitration, and RSM Production did not argue that the award was the product of corruption or false testimony (*see* Art. 52(c) of the ICSID Convention).

67 –
67. Claimant made the same request in *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs (Oct. 14, 2010) ¶ 4.5. Claimants' request for disclosure was not addressed by the tribunal and its claims were dismissed as manifestly without legal merit under Rule 41(5) of the ICSID Arbitration Rules. Claimants were ordered to pay respondent's arbitration costs in their entirety. *See RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (Dec. 10, 2010).

68 –
68. *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs (Apr. 28, 2011) ¶¶ 27, 54-69. The same claimant asserted that the respondent State was funded by a third party funder also in the unrelated ICSID case *RSM Production Corporation v. Saint Lucia*, which was dismissed by the tribunal as "*merely based on a suspicion and not substantiated.*" *See RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014) ¶¶ 44, 84; Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings (Apr. 8, 2015) ¶¶ 30, 67.

69 –
69. *See supra* note 65.

70 –
70. A situation of this kind, without apparently involving TPF, occurred, for instance, in *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, where the tribunal found that Czech Republic sided with a powerful a local businessman who appropriated for himself the foreign investor's business in the Czech Republic.

Issu de Cahiers de l'arbitrage - 01/07/2016 - n° 2 - page 339
ID : CAPJA2016339

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