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Identification and Disclosure of TPF in International Investment Arbitration: A Perspective from ICSID Jurisdiction

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Abstract. This article aims to explore the multiple roles that third-party funding, or TPF, plays in international investment arbitration, or ISA. It also examines its growing influence and the risks it poses to the integrity of the arbitration process. The article emphasizes that it is necessary to carry out legal reforms within the framework of ICSID. The specific approach is to advocate for a more accurate definition of TPF, raise the standards of evidence, and emphasize the transparency of non-profit TPF. This is done to make the arbitration process more transparent and fair. It addresses the practical challenges caused by the current ambiguous definition of TPF and also offers some reform suggestions to reduce the risk of conflicts of interest. The purpose of this article is to ensure that the arbitration process can always remain efficient and fair and not be inappropriately influenced, so as to maintain the integrity and legality of the international dispute settlement mechanism. Let the public still have trust in the arbitration result. This kind of analysis is crucial for us to understand the development prospects of arbitration procedures in the international arbitration system and to shape future legal reforms that can ensure the fairness and efficiency of international arbitration procedures.

Keywords: TPF, ISA, ICSID, Disclosure, Legal Reforms

1. Introduction

The ISDS framework emerged in the 1960s. It grants international investors a right to initiate legal proceedings in the countries where they make investments, and such actions are supported by bilateral investment agreements and similar global agreements [1]. If determined, If it is determined that a country has violated the commitments it made in the treaty, then foreign investors have the opportunity to obtain a relatively large amount of economic compensation or other remedial measures. Let's think about it. There is already an imbalance between investors and the host country. The current system in place may require a third party to fund investors, making them willing to engage in arbitration against the country as a way to resolve disputes. This is what people call "third-party funding" (TPF).

According to a survey conducted by Global Arbitration Review, during the period from 2019 to 2023, an average of 196 international arbitration cases were related to TPF each year. As the use of TPF becomes increasingly common in practice, the frequency of TPF reviews has also increased. Take the annual TPF statistics released by the Hong Kong International Arbitration Centre as an

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example. According to the relevant provisions of the "Arbitration Rules of the Hong Kong International Arbitration Centre", the number of arbitration cases requiring parties to disclose TPF has rapidly risen from just 1 in 2018 to 73 in 2022 [2].

The popularity of TPF in private developing countries may be due to the mutually beneficial nature of this arrangement, which enables both TPF and the funders to benefit from it.

Because finality has been widely implemented in international arbitration, compared with the lengthy and complex court litigation, the international arbitration process is relatively more efficient. This efficient situation is also in line with TPF's mentality of wanting to quickly obtain a return on investment.

Particularly crucial is that, on a global scale, the enforcement of arbitration awards has received very strong legal guarantees. The New York Convention, formulated in 1958, provides extensive protection for the recognition and enforcement of international commercial arbitration awards throughout the world, and also offers broad protection for investment disputes arising outside the framework of ICSID. In conjunction with this, the 1965 Washington Convention, along with many bilateral and multilateral investment agreements, ensures that the investment arbitration awards supported by the International Organization for the Settlement of International Disputes can be strongly enforced globally. These conventions jointly guarantee reliable and consistent outcomes for TPFs and award recipients.

For those entities that provide third-party funding, inveural-state arbitration offers them a very persuasive and profitable investment prospect. Although the costs associated with financing arbitration procedures are generally as high as several million dollars, the average return on investment of third-party funding is estimated to be approximately between 30% and 50% [3]. As cash rewards become increasingly abundant, such returns may have significant benefits [4]. Take the case of *Indiana Resources Ltd. v. The Government of Tanzania* in 2023 as an example [5]. The arbitration tribunal ruled that the Tanzanian government should compensate the claimant approximately 110 million US dollars in accordance with the provisions of the third-party funding agreement. Of this, 17 million US dollars should be paid to Litigation Capital Management, which acts as a third-party funding provider.

If the claim is unsuccessful, TPF will have no right to receive any reimbursement and will also have to pay the legal fees owed to the legal representative of the claimant as stipulated in the funding agreement. The arbitration fees paid by the investor do not need to be reflected in the company's balance sheet, which can enable the company to have higher financial efficiency.

For the transferees, in the context of the continuous rise in international arbitration costs, TPF provides convenient conditions for investors who may not be able to bear the arbitration costs to use judicial channels. In this way, it Bridges the gap caused by financial constraints and gives these investors the opportunity to file claims against the state [6].

Apart from the substantial benefits that TPF can bring, the lack of public participation of TPF actually poses a very serious threat to the integrity and fairness of litigation. Most financing companies and elite law firms are concentrated in a few major cities, which greatly increases the risk of conflicts of interest. This is because these entities are generally related either in the past or at present [7]. This connection may undermine the impartiality of arbitrators and may also lead to biased decisions, thereby undermining the legitimacy of arbitration.

The influence of the investor can permeate the selection of arbitrators and also disrupt the settlement negotiations, making the arbitration process more complicated. If there is a connection between the arbitrator and the third-party funder, this situation may undermine the impartiality of the arbitrator, cause potential bias, and affect the outcome of the arbitration [8]. The lack of transparency among third-party funders may cause arbitrators to resign due to undisclosed conflict issues or lead to the suspension of awards, thus undermining the stability and reliability of international arbitration.

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As the role of TPF in resolving investment disputes becomes increasingly significant, the urgency to enhance transparency and strengthen supervision to ensure the fairness of the arbitration process is also on the rise. Comprehensive disclosure of TPF agreements is crucial for transparency and can also provide certain assistance in the legality of investment arbitration. Taking into account the involvement of the national and international public law [9]. At present, the operation mode of TPF is mostly in an unclear state, which poses a relatively large risk to the arbitration process. Disclosing the situation of such funds is not only a worthwhile thing to do, but something that needs to be done.

This article aims to study the practical problems caused by the definition of TPF within the existing ICSID framework and propose some possible legal reform measures to address these issues.

2. Challenges of defining TPF in ICSID and possible legal reforms

To avoid potential conflicts of interest, this article needs to disclose the TPF. However, in many arbitration cases, one party may choose to hide such information, which can lead to disputes regarding procedural compliance. The party that does not disclose the information often raises different opinions on the applicability of the TPF standard. It is then necessary for the arbitration tribunal to make a ruling on the status of the relevant funding entities.

ICSID is aware that there may be conflicts of interest between tpf and arbitrators or those who may be appointed. The definition of TPF in ISA is mainly based on Article 14 of the ICSID Arbitration Rules, which serves as the fundamental standard for identifying and handling such financial arrangements. Generally speaking, Article 14 has three requirements: First, any non-party, The second is to pursue or defend the program, and the third is to rely on donations or grants, or to exchange for remuneration based on the results of the program.

This standard seems to be consistent with many other standards related to TPF. However, there are some minor differences in the various provisions of this standard, and these minor differences will still bring some practical challenges when implemented in practice.

2.1. The *Ratione Personae* requirement is too broad

Article 2 of the ICSID arbitration Rules clearly stipulates the specific requirements for "non-parties". The "parties" referred to here actually include the party that is the applicant and the party that is the respondent, all relevant parties.

Article 2 of the ICSID Arbitration Rules clearly defines the concept of "one party", stating that "one party" includes all entities acting in the capacity of the applicant or the respondent. Such a definition is actually very crucial because it plays a key role in determining the parameters for the participation of non-parties. On the surface, this parameter It is reserved specifically for entities that do not assume the roles of claimants or respondents.

2.1.1. Problem: the vague wording leads to conflicts of interpretation

However, in Rule 14, the word "any" related to TPF actually gives a certain degree of ambiguity. This ambiguity may lead to relatively significant legal and moral predicaments.

The general TPF industry actually includes types such as professional litigation firms, insurance companies, investment banks, and hedge funds. The description of TPF types in Rule 14 lacks specificity, which creates a "gray area" that can be exploited in practical operations.

When we consider those entities that may seem to be understood as "non-parties" on the surface but actually have complex relationships with the applicant or the respondent, this so-called gray area becomes particularly problematic. Although these entities have independent legal person status and different business locations, they may share some common features And these features will pose a challenge to the sanctity of its independent legal status, just as in the case of corporate veils. This veil

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can conceal the true nature of the relationship between the company and the applicant or the respondent, and this concealment can be proven by aspects such as consolidated financial statements, the existence of common leadership, relatively similar business operations, and very dense control relationships.

When such companies provide financial support to applicants or respondents through donations, grants, or remunerated means related to the outcome of litigation, the entire situation becomes increasingly complicated. Due to such concerns, conflicts have already emerged between scholars and tribunals.

When Happ commented on ICISD Arbitration Rule 2022, it was mentioned that the scope of the personal claims in Rule 14 is relatively broad. In this sense, the personal claims actually include the shareholders of the company. In the case of forforori, it also includes the shareholders of the parent company and some other related entities [10]. However, judging from some recent case laws, such as the case where EMS Shipping & Trading sued Albania and the case where ABG sued Mexico, the conclusions they reached are somewhat different from the above. These case laws hold that, in terms of Rule 14, The term "TPF" does not include shareholders [11,12], nor does it include parent companies or affiliated entities.

The extensive personal requirements for TPF will indeed cause a predicament in future legal practice. That is, when shareholders exist as potential TPF, whether to disclose or not has become a headache-inducing issue.

2.1.2. Possible legal reform: a more specific definition

In the ICSID arbitration rules, the reform of TPF is specifically defined to provide a clear and accurate definition, excluding entities such as shareholders, parent companies, and affiliated entities. However, if they directly participate in the arbitration as investors, that is a different story. This approach resolves the ambiguity issue existing in Rule 14. Rule 14 now uses the word "any", which has led to a rather broad interpretation. By setting clear boundaries, this reform has increased legal certainty, reduced strategic exploitation, and is in line with the recent case law, which has a stricter view of TPF. It has also enhanced transparency by clearly determining the information to be disclosed, and increased transparency is conducive to maintaining trust in the arbitration process. And it is very crucial to ensure that all parties involved can understand the economic interests involved. Ultimately, this reform has promoted the fairness and integrity of ISA by preventing conflicts of interest and ensuring that only those with direct financial interests can be treated as TPF.

2.2. The standard of proof of ratione Materiae requirements

2.2.1. Problem: the standard of proof is vague

Just as stated in ICSID Arbitration Rules Working Paper 1 and Working Paper 2, ICSID does not require a protocol when defining TPF. This is because the funding agreement may be a privilege agreement or a confidentiality agreement [13]. However, this confidentiality situation creates a problem, that is, it is very difficult to disclose potential TPF.

In the actual operation of international arbitration, if one party claims that the other party intentionally concealed the TPF, then this party has to bear the burden of proof. Direct evidence, such as funding agreements or financial transaction records, is generally confidential and not easy to obtain. To prove the existence of the TPF, this task is often more complicated.

Then the prosecution may have to rely on indirect evidence and assumptions, which greatly reduces the possibility of discovering those deliberately hidden third-party funds and holding them accountable, as there is no formal agreement. This makes the issue even more complicated, as it is difficult to prove the intentions and conditions of the relationship between the funders and the

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third-party funds. Without clear document agreements, it is difficult to determine the specific conditions under which a certain party participates in legal proceedings related to third-party funding, as well as the financial rewards associated with the results of these lawsuits. This situation clearly indicates that in international investment disputes, a more transparent and standardized approach to third-party funding is needed.

In the *Benabderrahmane v. Qatar* case, the tribunal clarified the standards of evidence that all parties could claim. When the claimant made a request to the respondent to provide "any and all relevant documents" to disclose any possible source of TPF, and the respondent also made the same request to the claimant, The response given by the arbitration tribunal was "unspecified" and "not substantiated" [14]. In contrast, when the respondent made a request asking whether "any other person or entity who has provided any funding, directly or indirectly to the Claimant, has assumed liability to pay any costs Award which may be rendered against the Claimant in due course", the arbitral tribunal approved this request because "the question of whether and if so to what extent the third-party lender has assumed liability for any costs Award is also a basic question that could have implications for the proceedings in this case." [15]

This analysis actually raises a particularly crucial question: when the evidence demands made by one party reach an almost impossible level of acquisition and this party also puts forward specific and well-grounded demands, will the issue of confidentiality still become a significant obstacle?

2.2.2. Possible legal reform: the “exclusive control of evidence principle”

This article aims to address the inherent tension between the confidentiality and procedural efficiency of internal security institutions. In terms of TPF, a relatively practical approach is proposed. When encountering evidence requests related to TPF, if the party requesting evidence is unable to obtain it, the arbitration tribunal should have the authority to shift the burden of proof to the party controlling the evidence.

This approach was initially the same as the Corfu Strait case. In this case, the tribunal ruled that it would be very challenging to prove the intention without relying on indirect evidence and the ability of human inference and reasoning. This is because, generally, it is impossible to obtain direct evidence of the actor's intention. The Corfu Tribunal further holds that when the direct evidence is in one party’s exclusive control, other parties must "be allowed a more liberal recourse to inferences of fact and circumstantial evidence." [16] In practice, this situation may even lead to a shift in the burden of proof, as was the case in *Benabderrahmane v. Qatar*, where the arbitral tribunal shifted the burden of proof from the respondent to the claimant because the claimant had exclusive control over the key evidence.

The same situation is that the materiality requirement of Rule 14 is actually to require the party making the claim to provide certain specific evidence, which can prove that the non-party accused has the intention of funding a certain party to initiate the lawsuit or in exchange for the remuneration that depends on the final outcome of the lawsuit. These requirements actually constitute proof of intent. This is in line with the explanation given by the Corfu tribunal. As has been mentioned above, although one party can only rely on indirect evidence to raise some reasonable doubts, the tribunal has the right to choose to transfer the burden of proof to the other party, or the tribunal can also consider the existing indirect evidence at hand.

2.3. The disjunctive “or” in rule 14

2.3.1. Problem: whether the disjunctive “or” can be used as a reason to prove less

The existing problems are problematic and rather serious, which are caused by several reasons. Just as mentioned in cases such as *Cascade Investments v. Turkey* [17], *Beijing Urban Construction v.*

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Yemen [18], and *Generation Ukraine v. Ukraine* [19], Many ICSID Tribunals interpret the term "or" in Rule 14 as providing a "choose one of two" option that meets the requirements. This explanation implies that if one party can determine that the TPF is used to initiate litigation, there is no need to prove that the funds are also used to pay remuneration depending on the outcome of the litigation. Although this may seem like a logical shortcut, people can sense that there is a causal relationship, that is, one of the conditions is fulfilled, which is to provide funds for the pursuit. It seems that the other condition will be fulfilled naturally, that is, to provide funds for the remuneration. However, when the cause-and-effect relationship is reversed, there is a very crucial defect.

When we consider such a situation, that is, when there is no way to prove that the funds have actually been paid to the parties to the lawsuit, then from a logical perspective, it is impossible to infer the motive of TPF to obtain benefits from the litigation result. Under such circumstances, the severity of this problem becomes very obvious. This situation where the cause-and-effect relationship is reversed It reveals a fundamental flaw existing in the interpretation of Rule 14. If the initial condition, that is, the fact that funds are actually allocated to the project, has not been established, then the second condition, that is, the motivation of TPF is to obtain benefits from the project, can exist independently, which is illogical. This wrong understanding has undermined the integrity of the arbitration procedure. The reason is that it makes it possible for undisclosed financial interests and potential conflicts of interest that may affect the program to exist.

Moreover, this is not merely an academic issue. It has practical significance for the transparency and fairness of international arbitration. If the true nature and extent of TPF are not disclosed, it will be rather difficult to assess the independence and fairness of the arbitration process. If there is a lack of transparency, This might lead to a decrease in people's trust in this system, as the parties involved and observers might suspect that the outcome of the arbitration was influenced by those undisclosed financial arrangements. The first material requirement related to the nature of the subject matter and the actual payment of funds is not merely one of the two options. In fact, it is a very crucial prerequisite for ensuring the legality and credibility of the arbitration procedure. The disputes arising from the application of Rule 14 highlight the necessity of adopting a clear approach to TPF disclosure. This approach should give priority to the transparency and accountability of ISA.

2.3.2. Possible legal reform: a precise amendment to the rule

Precise amendments to the rules stipulating the purpose of disclosing third-party funding would clarify the need to prove the conduct of litigation and the remuneration depending on the outcome. This reform is necessary because it corrects the logical flaws existing in the current interpretation, which allows for incomplete disclosure. Incomplete disclosure may mask economic interests and conflicts of interest. By requiring comprehensive disclosure, this reform has enhanced the transparency of international arbitration and made it more impartial. It ensures that all parties involved in the arbitration have a clear understanding of the financial arrangements that may affect the arbitration process. It also prevents undisclosed economic interests from influencing the arbitration outcome, thereby maintaining public trust in the legality and credibility of the system. The integrity of the arbitration procedure has been strengthened. Reform is necessary. It conforms to the principles of natural justice and procedural fairness and is feasible because it meets the growing demand for transparency of security agencies and also reflects a broader trend towards the openness of dispute resolution mechanisms.

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2.4. The Not-For-Profit TPF (NFP-TPF)

2.4.1. Problem: the ignorance of its transparency

NFP-TPF has unique properties, which give rise to significant risks that are overlooked in the arbitration process. The reason is that it may bring about some conflicts of interest that are not immediately obvious. *Philip Morris v. Uruguay* [20] is an example that can illustrate this issue. In this case, The NFP-TPF of an anti-tobacco fund in Uruguay has raised concerns about the potential impact that employers may have on arbitration, considering the imbalance in resources between small countries and multinational companies. Such a situation emphasizes the need for a high degree of transparency in NFF-TPF, which is done to prevent undisclosed interests from undermining the integrity of the arbitration and the principle of treating the parties equally, Quasar de Valores SICAV S.A. The lawsuit against the Russian Federation [21] presents the complex situation of NFP-TPF. In this case, the dual role of the investor as a shareholder at the same time may set a precedent that could influence the handling of future disputes. It can be clearly seen from these cases that the unique characteristics of NFP-TPF require clear disclosure rules, so as to ensure that international arbitration is fair and impartial.

2.4.2. Possible legal reform: emphasizing NFP-TPF's distinctive characteristics

In order to address the unique challenges faced by NFP-TPF in international arbitration, this article believes that some specific legal reform measures should be implemented. These measures should highlight the unique characteristics of NFP-TPF in the arbitration rules. This reform will put forward clear requirements. That is to say, it is necessary to clearly disclose the values of the funders, the goals they have set, and any potential conflicts that may exist. This is done to ensure that the arbitration process remains transparent at all times and is not affected by factors that have not been disclosed and may undermine the integrity of the process.

3. Conclusion

As discussions about TPF in ISA continue to grow, it is clear that we have now reached a very critical moment, as if at a watershed. People's demands for transparency and regulation are higher than ever before. With the continuous development of the ISDS system, the role of TPF will definitely become greater. This requires a positive and comprehensive legal response. This conclusion not only reiterates the pressing issues surrounding TPF but also boldly presents a future-oriented perspective on possible reforms and the impacts they may bring.

At present, the landscape of TPF seems like a hodgepodge, with various arbitration institutions adopting different disclosure and regulatory methods. This existing divergence can lead to a lack of uniformity, which may undermine the consistency of international arbitration and also affect its predictability. In ISA, the future of TPF depends on striving to formulate a set of consistent rules to address these existing inconsistencies. This set of rules should prioritize the transparency, fairness and independence of the arbitration process.

Looking ahead, legal reform should take the formulation of a universal code of conduct for arbitration tribunals in international arbitration as its guiding direction. Such a code of conduct will establish minimum standards in terms of disclosure and transparency, providing a fair competitive environment for all relevant parties. It will also offer clear and definite guidance on the management of conflicts of interest. This ensures that the impact of third-party funding on arbitrators and the arbitration process can be minimized as much as possible.

The future of TPF regulation must take into account the impact of technological progress and the increasing digitalization of arbitration. Currently, arbitration is shifting towards more virtual

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platforms, and in this context, the possibility of undisclosed third parties exerting influence may increase. Strong digital security measures are needed, as well as ethical guidelines for online litigation.

Another aspect of future reforms needs to consider establishing a centralized registry for TPF arrangements. This registry will become a transparent database that can record all TPF agreements, providing arbitrators, parties to the agreements, and the public with a resource to assess potential conflicts of interest and TPF participation.

Providing arbitrators with education and training on the complexity of TPF is also crucial for ensuring the fairness of international arbitration. By enhancing arbitrators' awareness and understanding of TPF, including identifying potential funders and understanding the nature of the agreements they have signed, the arbitration community can more effectively address the various challenges brought about by TPF.

Overall, the future of TPF in ISA will undergo significant changes. The international arbitration community can address the complexity of TPF by adopting a unified regulatory approach, leveraging technology to enhance transparency, and investing in the education of arbitrators, ensuring that the process remains fair, efficient, and impartial. There will be many challenges ahead However, as long as everyone works together to address the existing deficiencies and make predictions about future development, international arbitration can continue to be a trusted dispute settlement mechanism on the global stage.

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