COMMENT COLUMN

THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: EVERYTHING YOU EVER WANTED TO KNOW (BUT WERE AFRAID TO ASK)[1]—PART TWO

Part 1 published at (2012) 5 I.B.L.J. 53

Aren GOLDSMITH and Lorenzo MELCHIONDA*

Awards; Bilateral investment treaties; Conflict of interest; Enforcement; Funding arrangements; International commercial arbitration; International investment disputes; Jurisdiction; Third parties

THIRD-PARTY FUNDING BEFORE THE ARBITRAL TRIBUNAL: STRATEGIC AND LEGAL IMPLICATIONS OF TPF

Part I of this article (published at (2012) 5 I.B.L.J. 53) addressed the nature of third-party funding ("TPF"), considering the phenomenon's origins, as well as some material issues often encountered in connection with the negotiating and structuring of TPF for use in international arbitration proceedings. Additionally, the article considered disclosure risks that the authors believe may exist in relation to TPF if attempts are made by opposing parties to obtain discovery of confidential information shared between the funder and funded party. In particular, the authors considered risks that may arise as a result of the sharing of otherwise privileged information in the context of a US statute, known as 28 USC § 1782, which has been held by the US courts to permit discovery in connection with international arbitration proceedings, wherever the seat of arbitration.

Notwithstanding the risks identified in Part I of this article, circumstances may arise in which TPF should be considered as a tool to assist parties in prosecuting or defending arbitration claims. TPF may enable parties to resist economic pressures that might otherwise force early settlement or abandonment of claims altogether, even where the merits might warrant a different strategy. Although, as presented in Part I of this article, there is often a substantial price to be paid to obtain outside funding, both in economic terms and in terms of the possible loss of control over the ability to independently manage the claim or its defence, that price may be perceived to be lower than the costs of settling early or on sub-optimal terms. Thus, TPF should arguably be considered by counsel as a tool that, under appropriate circumstances and with a full understanding of the attendant risks, may be available to support clients in connection with international arbitration proceedings.

As a general matter, before approaching any funder on behalf of a client, counsel should consider whether and under what circumstances it may be possible to do so under applicable ethical guidelines and local laws.[2] However, even where TPF is permitted under applicable regulations and laws, the initiation of discussions with a third-party

* Aren Goldsmith and Lorenzo Melchionda, are Senior Attorney and Senior Associate, based in the Paris office of Cleary Gottlieb Steen & Hamilton LLP, where they are members of the firm's international arbitration practice. Mr Goldsmith, whose practice focuses upon commercial arbitration matters, is a member of the New York and Paris Bars. Mr Melchionda, whose practice focuses upon investment treaty arbitration matters, is a member of the Milan and Paris Bars. The authors wish to thank Matthieu Grégoire and Jérôme Marty, Associates based in the Paris office of Cleary Gottlieb Steen & Hamilton LLP, for their assistance in the preparation of this article.

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

regarding an arbitration claim or defence may implicate a number of additional issues in relation to arbitration proceedings, which should be carefully considered in connection with any assessment of potential funding. Below, the authors focus upon a number of those issues.

In particular, the article begins by considering the potential relevance of TPF for the analysis of:

- liability and security for costs;
- conflicts of interest;
- the confidentiality of arbitral proceedings (where and to the extent that this principle is relevant);
- problems of jurisdiction and admissibility; and
- the validity and enforceability of arbitral awards.

The article then discusses a number of legal issues that may arise in connection with TPF in the specific context of investment treaty arbitration.

TPF: SOME ISSUES OF GENERAL RELEVANCE FOR INTERNATIONAL ARBITRATION

TPF and liability for costs

The involvement of TPF in the context of an arbitration proceeding may raise issues relevant for the analysis of liability for costs. The general standards governing awards of liability for costs and of security for costs in international arbitration have been dealt with extensively elsewhere, and, accordingly, will not be addressed in detail here.[3]

For present purposes, it should suffice to note that the allocation of liability for costs is usually left to the arbitral tribunal's discretion (absent party agreement directing costs or another set of rules or laws stipulating otherwise). Thus, at some point near the close of the proceedings, parties are often invited to make submissions as to how the costs of the parties and costs of the arbitration should be allocated.[4] Naturally, each side will typically argue that its adversary should be required to bear all costs.

While the "costs follow the event" rule, whereby the losing party pays for its adversary's costs, is far from universal,[5] where it is admitted, a party may win an award for all or a part of the costs incurred by it in prosecuting or defending the arbitration. Where such relief is available, the involvement of TPF may be of particular relevance in connection with:

- the interim award of security for costs; and
- the allocation of liability for costs.

Security for costs

Security for costs is a form of interim or conservatory relief that may be awarded, where the arbitral tribunal has authority to do so, based generally upon a showing of:

- *fumus boni iuris*, i.e. that the party seeking security has a prima facie chance of succeeding on the merits of its claims or defences; and
- *periculum in mora*, i.e. that there exists an imminent danger facing the applicant absent the award, such as its inability to satisfy a future award of costs against the assets of its adversary due to a degradation of the financial condition of that adversary.[6]

Although by no means a routine form of relief, circumstances may arise where it is appropriate for equitable reasons to protect the respondent against the risk that a claimant will lack sufficient assets to satisfy an award of costs against it.

Gary Born has commented that:

> "[w]here a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists".[7]

TPF may indeed be of relevance in relation to the issue of security for costs because, in claimant-funding scenarios, the availability of TPF may enable a party that would not otherwise be able to support the costs of pursuing its claim (at all, or in the manner made possible with the support of outside funding) nonetheless to proceed and thereby generate costs for the respondent where such costs would not otherwise exist (at all or at the level generated as a result of funding). Thus,

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

funding may permit a claimant to generate costs beyond those which it would otherwise have the financial means to support, were it forced to finance such costs internally.

The power of a party to externalise costs exceeding its own capacity to finance may become particularly problematic in the context of international arbitration proceedings. In particular, under common funding arrangements, the claimant will not bear the legal costs incurred by the funder unless the claim is successful, in which case, under the typical non-recourse funding arrangement, the claimant will usually bear such costs only to the extent of the damages recovered. While the claimant may, in theory, be assigned liability for its opponent's costs if unsuccessful, TPF may enable a party to generate greater costs than the respondent could satisfy against the claimant's assets in enforcement proceedings. For example, a party with limited or no means of its own may, through access to TPF, retain world class counsel, submit sophisticated expert evidence and embark upon an aggressive arbitration strategy. Such behaviour in many cases will increase the respondent's costs beyond those which the respondent would incur in the absence of TPF. In such a scenario, the costs incurred by the respondent could easily exceed the claimant's capacity for reimbursement.

In theory, a respondent who is unable to satisfy an award of costs might attempt to act against the funder itself. However, under existing practices, which would generally qualify the funder as a non-party to the proceeding, it would likely be difficult, if not impossible, to obtain an arbitral award for costs against the source of TPF.[8] Thus, in the absence of the availability of a remedy against the funder in the domestic courts (e.g. through a cause of action under local law seeking to hold the funder liable for the costs generated as a result of the arbitration), TPF may create a particular risk in relation to international arbitration proceedings such that claimants will be incentivised to generate and externalise excessive costs.

One potential answer to the problem described above would be to consider requiring the disclosure of funding and, where warranted on the basis of the funded party's financial condition, level of costs associated with the proceeding and nature of the funding relationship, ordering the funded party to post security for costs.[9] Security would not be necessary if the funded party were able to provide sufficient comfort as to its ability to satisfy any future award of costs against it. Similarly, even if the claimant itself appeared likely to lack sufficient means to satisfy a future award of costs against it, the funded party could offer appropriate security through alternative means, for instance, in the form of an After-the-Event (ATE) insurance policy or through secured undertakings by the funder to cover any costs award issued in the proceeding.

While the foregoing solution would provide additional comfort to respondents facing claims financed by TPF, many would resist the imposition of an automatic disclosure requirement in relation to TPF because of the additional costs that would likely be triggered by a resulting increase in applications for security for costs. In particular, with automatic disclosure of TPF, such disputes could be expected to proliferate, adding to overall costs and delaying proceedings. Before any disclosure could be required, it would also be necessary to develop clear definitions as to what types of funding must be disclosed. Any rational definition would need to go beyond generic understandings of the "third party funder" in order to include other economic actors who may have taken an interest in the claim. Developing appropriate and sufficiently specific definitions adapted to the question of security is not an easy task.

One alternative may be to consider requiring disclosure only where existing circumstances appear to warrant, prima facie, concern regarding the claimant's financial wherewithal or willingness to satisfy any award of costs rendered against it. Finally, in addition to analysis by individual arbitral tribunals called upon to consider whether to require disclosure in the context of security concerns, arbitral institutions may wish to consider providing some form of guidance in relation to TPF.

TPF and the award of costs

While they are ultimately a function of the tribunal's powers under the procedural law of the arbitration (typically, that of the seat), absent an agreement otherwise between the parties, arbitral tribunals generally have authority to make awards of costs.[10] Ultimately, such awards usually turn upon the exercise of arbitral discretion and often

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

are not tied to specific laws.[11] However, some principles are commonly observed. As Gary Born has described them:

> "(a) the prevailing party is presumptively entitled to a costs award; (b) only reasonable costs will be reimbursed; and (c) expenses that were inefficient and unnecessary will not be reimbursed, while costs resulting from the need to respond to unreasonable or uncooperative actions will be recoverable".[12]

TPF may give rise to a number of issues in relation to requests for the award of costs. At the outset, it is worth noting that objections to claims for costs based upon the fact that the party claiming reimbursement has been funded by a third party, have not been well received in the few reported decisions to date to have considered this issue.[13] In rejecting an objection based upon the allegation that the claiming party's legal costs had been financed by a third party, one tribunal, whose conclusion has been followed by at least two other tribunals, observed:

> "The Tribunal knows of no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs".[14]

While it may be true that there is no existing principle that *specifically* regulates the manner in which TPF should be treated when a tribunal is requested to award costs funded by a third party, certain general principles are arguably relevant for analysing this issue. In particular, absent consideration of the nature of the funding relationship at issue in the specific case, a tribunal will have no basis for assessing whether any award of costs would risk overcompensation or compensation for something *other than* the reimbursement of reasonable *legal expense incurred by the party claiming costs*. While such an award might be appropriate under certain circumstances, any tribunal granting costs on such an alternative basis would, ideally, provide supporting justification for its decision.

First, where a party seeks reimbursement for costs incurred by a third party, tribunals should consider whether the requesting party has standing to seek compensation. The fact that funding may have been channeled from the funder to counsel through the party to the proceeding should not in principle render this question moot. The answer may well be, as has been suggested in certain cases involving subrogation, that the prior payment will have no impact upon standing. The issue appears at a minimum, however, to warrant further consideration.

Secondly, under existing principles governing the "reimbursement" of legal expenses, which tend to require proof that expenses have actually been incurred, the involvement of TPF may require careful attention to avoid overcompensation. In particular, compensation paid by the successful claimant to its funder will not necessarily equal the legal expenses incurred in connection with the claim. For example, in exchange for its having covered legal costs of €1 million in support of a successful claim, the funder may be entitled to recover 30 per cent of a damages award in the amount of €10 million. Requiring the respondent to compensate the claimant in the amount of €3 million (rather than the €1 million in actual legal costs) under such circumstances would involve compensation not only for legal expenses incurred, but also for the return on investment owed to the funder. It is far from self-evident that the unsuccessful respondent should be required to indemnify the claimant for the costs associated with its choice to seek outside investment in its claim rather than financing legal costs internally.

Alternatively, the claimant seeking to recover total costs (funding and legal) could request compensation for costs incurred in connection with TPF as part of its substantive claim for damages. A claimant could, for example, attempt to establish that the respondent's conduct put it in a position in which it had no choice but to enter into such an arrangement. Subject to applicable law, such a theory could be considered, for example, where a party, having been forced to subscribe to a loan at an extraordinarily high interest rate in order to bridge a period of financial distress caused by the wrongdoer's conduct, claims that the interest actually paid for such a loan constitutes an additional head of damages (consequential damages).[15]

Third, particular attention may be warranted where TPF is provided in the form of an outcome-

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

based legal fee arrangement. As noted in Part I of this article, the lawyer in such a scenario is not only compensated for legal services rendered, but is also provided with a return on his investment in the claim. As such, it would appear necessary first to identify the value of professional services rendered in connection with the claim, so that the fee for such services can be distinguished from the lawyer's return on investment. Assuming such a disaggregation could be performed on a reliable basis,[16] only then would it be possible to undertake the requisite analysis of the *quantum* of legal costs to be awarded.[17]

Whatever the conclusion reached on the substantive issues identified above, it is clear that the presence of TPF is increasingly likely to become a relevant factor in the analysis of requests for the award of costs.

TPF and conflicts of interest

While differing standards and terminology have been employed to describe the nature and form of the relevant obligation, it is generally recognised that arbitrators must be impartial and independent of the parties and interests involved in any arbitration. The obligation of independence is often analysed objectively, in light of both direct and indirect relationships.[18]

In certain jurisdictions, even indirect relationships that are not identified or known to the arbitrator at the outset of the proceedings, may give rise to a basis for challenge. For example, in a recent controversial matter in France, an ICC partial award was set aside by two French Courts of Appeal based upon a finding that a well-respected arbitrator allegedly had failed to inquiry with sufficient diligence regarding the work performed by the large international law firm with which he was then "of counsel", on behalf of certain affiliates of one of the parties to the arbitration.[19] In the relevant matter, the arbitrator was unaware of the ties between his firm and the related entities at the time of his appointment, but was alleged to have failed to make sufficient disclosures in relation thereto once the issue was raised at a later stage of the proceedings.

Whether such decisions are viewed as right or wrong, the very existence of this *jurisprudence* in a leading jurisdiction for international arbitration, to which courts and commentators internationally look for guidance, underscores the potential relevance of TPF as a source of potentially problematic (from the challenge perspective) indirect relationship that may exist in any given case between party and/or counsel and arbitrator. Arbitrators (or the law firms with which they are affiliated) may perform a number of professional services on behalf of funders, including representing funders for purposes of due diligence or as counsel retained at the request of the funder to conduct an unrelated claim (with or without a shared financial interest). Similarly, arbitrators may serve on advisory committees commonly established by funders or hold financial interests in funders (including common shares).

Under the IBA Conflicts Guidelines, which, while not of universal application are often consulted for purposes of considering problems of conflicts of interest in international arbitration, disclosure obligations may arise under a variety of circumstances that go well beyond the arbitrator's (or his law firm's) existing legal representation of a party or its affiliate, including based upon factors such as repeat prior appointments by a party or counsel, the existence of a financial interest in a party or its affiliates, or possession of a position of management or control in any party or its affiliate.[20] Whether similar ties between an arbitrator and a particular funder would give rise to a valid basis for a challenge under those standards, remains an open and (to the authors' knowledge) untested question.[21]

While much debate surrounds the questions of what arbitrators should disclose and the standards that should govern any disclosures made, it would appear relatively uncontroversial to observe, in relation to existing practices surrounding TPF and the contacts that can be imagined between arbitrators and funders, that relationships between arbitrators and providers of TPF could give rise to serious questions of independence and impartiality. To take one of the examples cited above, where an arbitrator presides over an arbitration in which the claimant is funded by a funder which at the same time is funding a significant matter being handled by the arbitrator's law partnership, it would not appear objectively unreasonable for the opposing party in the arbitration to wish to receive disclosure regarding the indirect relationship in order to assess whether a valid basis for a challenge exists. In particular, depending upon the nature

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

and depth of the relevant relationships, under the IBA Conflicts Guidelines, such a relationship could be analogised to non-waivable Red List Item 1.4 ("The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom"). Such a relationship could also be analogised to waivable Red List Item 2.3.6 ("The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties").

In each of the foregoing cases, the question would be whether the nature of the funder's interest in or involvement with the arbitration claim renders it comparable to an affiliate of the party—or, where the funder's interest in the claim is sufficiently great, whether the funder may be analogised to the party itself. Performing such an analysis properly would require substantial disclosure regarding both the terms of the funding relationship, including key elements such as the funders' right to control or influence the claim, as well as disclosure regarding the importance of the remuneration provided by the funder to the arbitrator's law firm. Excluding such questions on the sole grounds that the funder is neither the de jure party (the de jure party's de jure affiliate) nor the de jure client of the law firm, would do little to promote confidence in the integrity of arbitral justice.

It follows that disclosure of the involvement of funding in association with a claim may be necessary under certain circumstances. The challenge of course lies in developing standards for assessing:

- at what time such disclosure would be appropriate; and
- who should provide it.

One answer would be that TPF (assuming acceptable definitions can be agreed or provided under applicable rules) should always be disclosed. While such an approach would maximize the probability of detecting potential conflicts, many would respond that such an approach would create issues where none might otherwise have existed. What the arbitrator does not know cannot influence his decision-making. As noted above, however, it is not clear that the absence of knowledge—particularly where knowledge can be obtained through diligent inquiry—will suffice to clear objective conflicts of interest in all jurisdictions. Moreover, because the presence of a funder may be disclosed at any stage of the proceedings (for example, during an evidentiary hearing or during debates over who may access documents disclosed during the production phase), the failure to provide for full disclosure upfront could increase the risk of later stage, costly disruptions, including where the revelations result in recusal. While disclosure and analysis at the outset may entail additional costs and create delay as the parties debate the significance of any disclosures made, the loss of a member of the tribunal during the course of the proceedings (particularly, at a late stage) may create even greater costs and delay for the parties.

A second practical question is: Who should make any disclosure of TPF? Different possibilities have been suggested.[22] One is to place the initial disclosure obligation upon the arbitrator. However, requiring arbitrators to disclose all existing direct and indirect ties to funders may be unrealistic and unduly burdensome, particularly for arbitrators affiliated with large law firms. It may also place the arbitrator in the awkward position of being required to disclose confidential information—the very fact of having been engaged to provide legal services to a particular funder may be subject to a confidentiality obligation—in the presence of a conflict that may in reality not exist.

Alternatively, the parties could be required to make initial disclosures regarding reliance upon TPF. Such an approach would allow the arbitrators to exercise discretion as to whether to offer additional disclosure (or to step down) on the basis of the parties' disclosures. However, as noted above, this approach may create issues where none would otherwise have existed, giving rise to possible unmeritorious objections based on the simple fact that TPF is involved and making the resolution of the dispute unnecessarily more complicated.

A final possibility would be to ask the parties and members of the tribunal to submit lists of funders with whom any relationship believed to warrant disclosure exists, to a neutral third party. The third party could then act as a form of "clearing agent", commissioned with responsibility for identifying any potential conflicts. The disadvantage of such an approach is that it would

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

delay the process of constitution of the arbitral tribunal and it would, in many instances, once again place a heavy burden upon arbitrators (particularly those affiliated with a large law firm), and possibly require the disclosure of confidential information to avoid what might be a purely theoretical conflict. Moreover, it is not self-evident that an acceptable third party could be found that would be willing to assume the responsibility and potential liability that such a role could entail.

Of course, before anyone will be able to assess when disclosure should be made at all, it will be necessary to develop definitions as to the meaning of "TPF" and as to standards that should govern when TPF must be disclosed. To state the obvious, if there is no commonly understood framework for defining the phenomenon, it would be unfair to fault a party or arbitrator for having failed to disclose a relationship not understood to constitute TPF or involving circumstances not rising to a level warranting disclosure. Thus, arbitral institutions may wish to consider the viability and desirability of developing standards to assist the parties in assessing when disclosure would be appropriate.[23] Such efforts would no doubt proceed from relevant definitions. Accomplishing either of the above would be easier said than done. At a minimum, the development of well-considered and clearly-defined practices and/or guidelines would assist users in both deciding where to arbitrate and forming an understanding of whether disclosure would be appropriate in any given case.

TPF and confidentiality

Depending upon applicable legal norms or the terms of the parties' agreement in any given case, confidentiality may (or may not) be a requirement imposed upon the parties to an arbitral proceeding. The nature and degree of such an obligation, where it is found to exist at all, varies.[24]

Where a provider of TPF is not a formal party to the arbitral proceeding, but has secured rights to be informed as to developments therein, as is commonly the case, an issue may arise concerning whether any information deemed to be confidential for purposes of the proceeding may be shared with the funder. The issue becomes particularly relevant where information is shared on a restricted basis, for instance, pursuant to a form of protective order restricting the individuals and entities who may access the protected information.

Professor van den Berg has suggested that in instances in which the presence of TPF has not been disclosed, it would "probably not" be permissible for a party to the proceeding to share confidential information with its funder.[25] Accordingly, he has opined that it would be prudent to disclose the existence of a funder, "if and when confidentiality issues arise".[26] As an alternative, he has noted that parties could consider the desirability of entering into a form of general procedural order regulating the position of the TPF funders vis-à-vis the disclosure of confidential information, but expressed doubts as to whether parties would be willing to agree to such a stipulation before any issue has arisen.[27]

The comments of Professor van den Berg above reflect a sensible approach, which appears to be animated by a desire to avoid unfair surprises. Where there is a lack of clarity as to the status of the funder, as is now often the case, the problem of unfair surprise can affect both parties. Absent the existence of a clearly defined confidentiality order governing the status of the funder, something which is not a standard practice today, the funded party will often lack a clear basis upon which to evaluate whether it may disclose information regarding the proceedings to its funder. Similarly, the opposing party may be unpleasantly surprised to learn that its sensitive data has been shared with a third party, the conduct of which the arbitral tribunal will have no power to directly regulate.

In view of the concerns addressed above, it may be helpful for parties to attempt to tackle the problem of confidentiality up front, as part of an early-stage procedural conference. Such an approach would comport well with emphasis upon early-stage evidentiary consultations, adopted by the revised *IBA Rules for the Taking of Evidence in International Arbitration* (2010) ("*IBA Rules of Evidence*"). In an important revision, the most recent version of the *IBA Rules of Evidence* provides for mandatory consultation between the parties and the tribunal at the earliest possible stage "with a view to agreeing on an efficient, economical and fair process for the taking of evidence", including on issues of confidentiality.[28] It would not be unreasonable for the question of the status of the TPF funder to be considered

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

during such a consultation, particularly with respect to the question of whether any third-party funders may be granted access to information regarding the file. Appropriate confidentiality rules could be developed with or without the need, at that stage, for the disclosure of the presence or identity of any particular funder on either side.

TPF and problems of extension and jurisdiction/admissibility

The involvement of TPF in an international arbitration may give rise to questions concerning the formal status of funding entities vis-à-vis the arbitral proceeding. As a threshold matter, it is helpful first to define two basic scenarios, those of *extension*[29] and *assignment*, under which a funder could in theory become a party to the arbitration proceeding. After defining those scenarios, it will be possible to consider resulting questions of jurisdiction and admissibility that may arise.

The extension of the arbitration agreement to a funder, as non-signatory, could in theory be possible on a number of different grounds, including based upon notions of implied consent, equitable considerations, and/or based upon doctrines designed to prevent fraud and the abuse of rights, such as the alter ego doctrine and the piercing of the corporate veil.[30]

While possible in theory, as Pinsolle concludes under French legal standards, which are quite liberal in this regard, it would be difficult under common practices to justify an extension of the arbitration agreement to a funder based solely upon the funder's involvement in the litigation being funded.[31] In particular, in extension scenarios (at least, where the jurisdictional analysis is properly conceived),[32] the non-signatory is named as a party to the arbitral agreement based upon its real or apparent relationship to the execution or performance of the contract containing the agreement to arbitrate. By contrast, under ordinary circumstances, the funder in a TPF relationship enters the picture only after a dispute has arisen, at which point the funder enters the orbit of the arbitral agreement as an auxiliary, no more tied to performance of obligations within the scope *ratione materiae* of the agreement to arbitrate, than counsel or the arbitral tribunal, who become equally engaged in the "implementation" of the agreement to arbitrate.

As a practical matter, the inability to extend an agreement to arbitrate to a funder may create outcomes that are less than satisfactory, particularly where the funder has control over the determination of the litigation strategies and is believed to be responsible for abusive procedural conduct on the part of the funded party or has generated costs that the claimant would be unable to indemnify if found liable for them. Under existing practices, however, the arbitral tribunal would have jurisdiction to regulate such conduct only indirectly, through its powers over the funded party (for example, as discussed above, through an order of costs or security for costs). Subject to applicable law, recourse might also be available against the funder in the domestic courts.

While it may be difficult to extend the arbitration agreement to the funder based upon the funder's "involvement" in the arbitration, under a second scenario evoked by Pinsolle, that of assignment, the funder may more easily be designated as a party. In particular, under assignment scenarios, the funder would be made party to the dispute based upon its having stepped into the shoes (by operation of a de jure or de facto assignment) of a signatory to the agreement to arbitrate. Having "replaced" one of the parties to the original agreement and assumed the resulting benefits and/or liabilities arising out of the underlying performance of obligations that occurred within the scope *ratione materiae* of any agreement to arbitrate contained therein,[33] the funder could, subject to applicable law, validly be named a party to the proceeding.

While assignment may occur in any number of different forms, it is the de facto scenario that is likely to raise the greatest difficulties in the context of TPF.[34] In particular, where sufficient rights have been conferred to the funder under a funding agreement in relation to a claim, it may be possible—depending, once again, upon applicable law—to qualify the package of rights conferred as constituting a form of de facto assignment. For instance, where a funder has been granted full control over the conduct of the claim or a disproportionate economic interest in the claim, the funder could, even in the absence of an express assignment, be viewed as having replaced the nominal claimant as the real party in interest behind the claim.

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

Whatever the basis for finding an assignment (i.e. whether de facto or de jure), where a funder has acquired rights through assignment, it will arguably be necessary to assess the potential impact of the assignment, both upon jurisdiction and the admissibility.[35] In relation to jurisdiction, where an assignment has been qualified, it would be worthwhile to consider whether a valid jurisdictional basis, *ratione personae*, exists to support the arbitration of any claim (or fractional interest in a claim) deemed to have been assigned *to the funder*. In particular, the respondent may object to the introduction of a claim by the non-signatory third party funder with which the respondent never transacted.

TPF may also have an impact upon admissibility. The most obvious problem would arise where a party has been found to have assigned away its rights in relation to a contract (including the agreement to arbitrate thereunder), yet nonetheless purports to assert claims under the arbitration agreement that was the subject of the assignment (e.g. acting as a claimant on behalf of the funder). Absent reservation by the assigning party of specific rights in connection with the claim and/or in relation to the agreement to arbitrate, consideration should be given to the question of whether the assigning party (under applicable law) retains standing to assert claims.[36]

Less obvious problems of standing may also arise. For example, it would arguably be appropriate for a tribunal to be aware that the claimant before it, seeking €100 in damages for an injury claimed to have been suffered, has already recovered €90 from a funder in exchange for the claimant's agreement to assign any award proceeds to the funder. In particular, it would be fair to ask in connection with such a claim whether the claimant remains the real-party-in-interest to pursue such relief.

Further complications may arise in cases where the parties to a contract are not entitled to freely assign their rights thereunder, or need the other party's consent to that effect.

The ability to analyse any of the foregoing issues assumes disclosure of the terms of the funding relationship. In particular, without disclosure, it may not be possible to assess whether an assignment has taken place and, where it has, what consequences should be drawn therefrom in relation to jurisdiction and admissibility. Both of the foregoing requirements represent threshold questions that may warrant consideration at the outset of the arbitral proceedings. For the reasons addressed above, however, such disclosure of TPF would not be without resulting costs.

TPF and problems of award validity/recognition

A generally recognised obligation of arbitral tribunals is to render an award that will be considered valid and enforceable, both at the seat of arbitration and abroad.[37] This notion is not without exception or limitation, however, particularly where recognition or enforcement may be denied based upon public policy considerations that are considered parochial in nature. Although not a proposition that is subject to one clear definition or without dangers of its own, many leading commentators agree that the "better view" is that only public policy considerations of an "international" nature should be invoked when a domestic court sets aside or refuses to recognise an international award.[38] Thus, it should be relatively uncontroversial to observe that in adjudicating any given dispute, arbitral tribunals should not blindly apply any and all local public policies that might become relevant at the seat of arbitration or likely place(s) of enforcement, but should take into account only those the violation of which would likely collide with broadly recognised values.[39]

As noted above, public policy principles in a number of jurisdictions may prohibit some or all forms of TPF—mandatory local rules may even create criminal liability for arrangements deemed to savor of maintenance or champerty. For example, both Mississippi and Illinois state law provide that maintenance is illegal.[40] The existence of such local public policies may become relevant in the context of international arbitration proceedings involving TPF. In particular, where it is anticipated that recognition and enforcement will be sought in any such jurisdiction, it may be necessary to consider whether the relevant jurisdiction should be expected to extend such local public policy restrictions to the recognition and enforcement of international awards obtained with the support of TPF. As noted above, not all jurisdictions do so. For instance, English law would not appear to extend such public policy

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

restrictions to arbitration proceedings taking place outside of the jurisdiction.[41] However, other important jurisdictions do extend their prohibitions against champerty and maintenance to international arbitration.[42]

The authors have not attempted to perform a general survey of the receptiveness of domestic courts internationally to international awards obtained with the support of TPF. Nor are the authors aware of any case (other than in matters involving the enforceability of the funding arrangement itself) in which an international award has been challenged on the basis of local public policies applied to restrict or prohibit TPF. While it is widely admitted that arbitral tribunals may, among other remedial measures, deem inadmissible claims introduced by parties that have acquired or presented their alleged claims through improper means, such as where a party comes before the tribunal with unclean hands, it would be rather surprising were such reasoning extended to refuse the admissibility of a claim on the basis of TPF. To do so would elevate what are generally considered relatively parochial public policy restrictions to the level of a "transnational public policy".[43] Such an approach would be difficult to reconcile with the wide trend of liberalisation of traditional restrictions of TPF in the common law world and lack of any international consensus condemning TPF as an immoral practice.

TPF AND INVESTMENT TREATY ARBITRATION

Third-party funding is becoming a recurring phenomenon in investment arbitration. Due to the substantial costs often associated with such proceedings, there is reason to believe that reliance upon funding will increase with time, particularly as litigants and counsel become increasingly familiar with this financing option.[44]

However, until recently, little attention has been dedicated to the phenomenon, in particular in the context of investment arbitration. Consequently, it is difficult to predict at this time how arbitral tribunals will address the various problems that may arise where a party relies upon outside funding in connection with investment arbitration. In general, there is no rule in public international law that expressly prohibits TPF. With the exception of existing provisions regarding subrogation in relation to political risk insurance, which are contained in a wide variety of investment protection treaties ("IPTs"),[45] bilateral or multilateral IPTs generally do not address TPF.

Therefore, at least in principle, there appears to be no reason to posit at this time that an investor or host State may not seek and obtain financial support to bring or defend a claim, including in the form of TPF. That said, certain types of TPF arrangements may raise serious legal issues in investment arbitration. For example, structures that enable the funder to assert substantial degrees of control over the claim or allocate to it a disproportionate economic interest therein may, as described above, raise questions of de jure or de facto assignment of claim. As a result, obstacles may arise as to jurisdiction, admissibility and/or the claimant's economic standing to recover damages for some or all parts of an investment claim.

Below, the core issues referred to above are examined. First, the potential impact of TPF upon the determination of the identity of the investor is considered, including related questions that may be triggered where the claim has de jure or de facto been assigned to the funder. Secondly, whether and in what contexts reliance upon TPF could become relevant to the analysis of damages claims asserted in investment arbitrations is considered.

The identity of the investor and the real party in interest

Only investors that qualify under bilateral and/or multilateral IPTs are entitled to treaty protection for their investments. The nationality of the investor is one of the fundamental requirements that must be satisfied in order to attract treaty protection under IPTs, as nationality defines the scope, *ratione personae*, of IPTs. IPTs contain various definitions of "investor."[46] The investor's nationality is also a fundamental requirement of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention, art.25(1)). In order to avail themselves of substantive treaty protections and to trigger the dispute settlement mechanism, investors seeking to assert claims under IPTs must fulfill threshold nationality requirements. Depending upon the terms of the funding employed, TPF may raise issues in respect of the

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

identity of the real party in interest behind the claim, which may in turn have an impact on jurisdiction and admissibility.[47]

In particular, if the terms of the financing agreement assign to the funder a preponderant role in the conduct of the claim or a disproportionate financial interest therein, it may be necessary to ask whether the claim has been transferred from the claimant to the funder.[48]

The assignment of claims: general overview

While a topic that has received relatively limited attention,[49] international adjudication bodies have generally recognised the validity of the claim assignment from one eligible claimant to another.[50]

Where fundamental conditions laid down by the governing instruments, and in particular in relation to the nationality requirement, were found to have been satisfied, the US Foreign Claims Settlement Commission,[51] the Iran-US Claims Tribunal,[52] and other mixed claims commissions[53] consistently upheld the assignability of claims.

However, one may still ask whether claims based on IPTs are assignable at all. In this respect, certain authorities have expressed doubts that treaty claims can be readily assigned "as shares in the stock-exchange market or other types of negotiable instruments,"[54] while other authorities have not excluded the possibility that rights arising under IPTs may be freely assignable.[55]

Assignment of claims in investment arbitration

The provisions contained in IPTs

Assuming that IPT rights are freely assignable, the possibility of enforcing IPT claims that have been assigned hinges, first of all, on the specific terms of the provisions of the IPT that delimit the scope of the IPT's application. Since IPTs, in general, do not contain provisions regulating the assignment of claims,[56] the assignment of treaty claims is not explicitly prohibited or restricted in existing instruments of which the authors are aware.

However, a possible restriction of the assignment of claims could be implied from the language of certain IPTs that define "investments" as any kind of asset "invested by the investor in the territory of the other Contracting Party."[57] In particular, such language could be interpreted as requiring something more than the simple possession of an investment: for example, the investor may be required to actually make an investment by contributing assets in the territory of the host State.[58] On the basis of such reasoning, it could be argued that where such restrictions apply, and the funder has acquired the claim without having invested in the host State's territory, the funder would not be able to avail itself of treaty protection, irrespective of the funder's nationality.

By contrast, TPF would be less likely to raise issues under IPTs which define "investment" as any kind of asset "owned or controlled by" the investor,[59] or which merely provide for a non-exhaustive list of assets that may constitute an investment, without any further qualification.[60] In these cases, since the *ratione matariae* scope of application of the IPT does not make reference to the process of "making an investment," an assignment to an entity having the same nationality would not necessarily appear to create jurisdictional problems,[61] at least under the definition of "investment."

Treaty shopping

Another issue that may be implicated in the context of assignment in relation to TPF is the problem of "treaty shopping", which involves the creation of artificial conditions to access the international adjudication mechanism provided by an IPT. Treaty shopping, which may take the form of a purchase of claims or investments by otherwise eligible investors for the sole purpose of creating investment treaty jurisdiction where none would have otherwise existed, has been regarded by arbitral tribunals and legal scholars as a form of abuse of process and, in certain cases, a valid reason to deny treaty protection.[62]

However, this does not mean that all forms of TPF, even those under which the funder has been allowed to exercise control over the arbitration or to purchase an interest in the claim, should automatically be disqualified as "treaty shopping". Such a conclusion could be justified only upon a close examination of the specific circumstances surrounding the making of the investment itself, the terms of the TPF agreement and those of the applicable IPT, in order to determine

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

whether the relevant financing may be said to operate as a form of "treaty shopping" in any given case.

Nationality issues: the real party in interest

In public international law, the proposition that only the real party in interest has standing to bring a claim before an international court or tribunal has been supported, particularly in the case of the beneficial as opposed to the nominal owner.[63]

In investment arbitrations, while certain tribunals seem to have given little importance to the fact that the claimant, while fulfilling the letter of the requirements of the applicable IPT, may not be the real party in interest,[64] other tribunals, in different situations, appear to have attributed more importance to this requirement.[65] Given the heterogeneous nature of the facts of the cases in question, the fact that none of the relevant decisions appear to have involved a clearly identified form of TPF, and the different ways in which the issues to be decided were shaped in the parties' pleadings, it is difficult to draw clear principles against which TPF arrangements may be evaluated for potential implications as to the identity of the real party in interest behind any claim.

If we assume that the relevant nationality is that of the real party in interest—the real investor—-and not that of the party that appears as such, in cases involving a de jure or de facto assignment of claims to a funder having a different nationality from the investor, it could be argued that neither the funder nor the original investor has standing to bring a claim. The investor, although a national of the contracting State, would no longer be the real party in interest. The funder, as the new owner of the claim, would not fulfil the nationality requirement. Therefore, if a protected investor assigns its treaty claims to a funder that does not have the requisite nationality—leaving aside the issue of the assignability of treaty claims—a risk may exist that the funder could find itself unable to enforce the claim.[66]

The (continuous) nationality rule and the investor's right to sell its investment

A related problem that may arise in this context is the continuous nationality of the claimant.[67] Under the traditional rule developed in the domain of diplomatic protection, a claim must be held by the injured party continuously from the date of the injury (*dies a quo*) up to a later date, which may be the date of the presentation of the claim or that of its final adjudication (*dies ad quem*).[68] Continuous nationality is a thus prerequisite to the State's right to exercise diplomatic protection under customary international law.[69]

In reality, given the dissimilarity between diplomatic protection and investment arbitration, the continuous nationality requirement is viewed, to a large extent, as a false problem. In investment treaty arbitration, the injured investor is entitled to enforce its treaty rights directly against the host State, without the assistance of its home State. Therefore, the prevailing view is that the requirement of continuous nationality applicable to the espousal of claims through diplomatic protection does not apply in investment arbitration.[70] In the same vein, IPTs typically do not require the investors to hold their investments until the issuance of the award.[71]

In any event, in investment arbitration, the *dies a quo*, i.e. the date of the injury, is regarded as the critical date to evaluate whether the requirements provided for by the applicable IPT are fulfilled. If the conditions for application of the IPT (essentially, to be a national of one contracting party with a protected investment in the territory of the other contracting party) are not met by the investor when the host State breaches the IPT, the investor is not entitled to invoke the IPT because, at that time, the treaty was not applicable and the host State was not bound by any treaty obligation vis-à-vis a non-eligible investor. The subsequent accession to the status of protected investor would not be sufficient to create a valid jurisdictional basis.

The lack of the requisite nationality or the absence of a protected investment at the critical date will most likely lead to the dismissal of the claim because IPTs do not apply to acts or omissions that occurred when the investor did not have the relevant nationality or did not hold a protected investment.[72] However, in this case, the problem would not be one of *continuous* nationality, but, instead, it would be one of nationality *tout court* in the context of the inter-temporal application of the IPT.[73]

The principles outlined above could require consideration in the context of TPF. Thus, for instance, if a claim were assigned from a non-protected investor to a funder that possesses the requisite nationality, an objection could be raised

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

for lack of jurisdiction. In such a case, it could be concluded that no jurisdiction exists because the funder that owns the claim did not hold the investment at the time of the injury, while the investor that made the investment and suffered the injury did not possess the requisite nationality. In such circumstances, the lack of the requisite nationality of the party that made the investment would not be cured via an assignment of the claim to an otherwise protected entity. In particular, such a strategy would likely fail under the principle *nemo potiorem potest transfere quam ipse habet*.[74]

The timing of the assignment and the nationality of the investor

In cases involving the assignment of a claim, a very important issue is the time when the assignment is made. In particular, it is of critical importance whether the claim is de jure or de facto assigned before or after the commencement of the arbitration.

In the context of TPF, both situations may occur. It may be the case that the funding agreement that entails a transfer of the claim was signed before the commencement of the arbitration.[75] Alternatively, TPF may be sought after the arbitration has been commenced. There is also a third possibility, namely, that the investor contacts the funder before starting the arbitration, but the parties agree that the assignment of the claim will take place only once the arbitration has commenced (this could also be arranged via suspensive conditions built into the funding agreement).

An assignment of claim that takes place after the arbitration has commenced will not ordinarily have a significant impact on the tribunal's jurisdiction.[76]

It is generally accepted that an investor is not required to retain an economic interest in the investment after commencing arbitration against the host State.[77] Conversely, if the assignment occurs before the commencement of the arbitration, it may have fatal consequences for the investor's claim.[78]

Arbitral tribunals have held that the assignment of claims after the commencement of the arbitration does not deprive the claimant of *ius standi*.

For instance, in *CSOB v. Czech Republic*,[79] the tribunal rejected the respondent's objection that an assignment of claim transformed the assignee into the real party in interest in the arbitration on the ground that since the assignment occurred after the filing of the request for arbitration and the registration of the case by the ICSID Secretariat, it did not affect claimant's standing.[80]

Likewise, in ICSID arbitrations, the critical date to evaluate the investor's nationality is the date of consent to arbitration. Article 25(2)(b) of the ICISD Convention defines "National of another Contracting State" as any juridical person having the nationality of a Contracting State other than the host State "on the date on which the parties consented to submit such dispute to conciliation or arbitration" and any juridical person having the nationality of the host State on that same date but controlled by the investor and which the parties have agreed to treat as a national of the investor's State.[81]

This rule was applied in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*,[82] where the ad hoc Committee confirmed the tribunal's decision to retain jurisdiction over an Argentine company that was controlled by the investor when the arbitration was commenced.[83]

At the same time, the ad hoc Committee questioned whether an investor protected under a particular IPT may purchase and validly enforce the claim of another investor protected under a different IPT, and raised the question (without answering it), of whether the transfer of control of a local company from one shareholder to another shareholder of a different nationality could have an impact upon the local company's standing under the relevant IPT.[84]

The tribunal in *CME Czech Republic B.V. v Czech Republic* seems to have taken the view that a change in shareholder control should not impact the investor's standing. In rejecting the respondent's objection that the purchase of the shares in a Czech joint venture by a Dutch company from a German company before the commencement of the arbitration constituted forum shopping, the tribunal noted, inter alia, that the rights of the claimant's predecessor under the Germany-Czech Republic BIT were coextensive to those granted under the Netherlands-Czech Republic BIT, and upheld the claimant's standing.[85]

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

The tribunal's decision may be read as implying that, in the presence of a continuous treaty protection, which would exist also when an investor covered by an IPT purchases an investment from another investor covered by a different IPT, with both IPTs granting similar protections, the claims arising under one treaty may be assigned to an investor acting under a different treaty.

On the basis of this idea of free transmissibility of treaty rights, the tribunal also disposed of another objection, this time related to a second transfer of shares from the claimant's parent company to the claimant itself, both incorporated in the Netherlands. Since the forum clause in the Netherlands-Czech Republic BIT covered disputes related to the "investment" of "investors," and the BIT expressly covered indirect investments, the tribunal concluded that a:

> "broad interpretation of the investment [...] allows the (Dutch) parent company's investment to be identified as an investment under the Treaty" and thus "[i]f the Treaty allows—as it does—the protection of indirect investments, the more the Treaty must continuously protect the parent company's investment assigned to its daughter company under the same Treaty regime."[86]

The situation would be different if the claimant were found to have transferred away its interest in the claim before the commencement of the arbitration. In such a case, it is generally accepted that the claimant, no longer the owner of the claim, would not be entitled to enforce it.[87] Conversely, if the investor had sold its investment, but had taken care to carve out any claim that might have accrued against the host State, the investor would arguably have standing to enforce those claims against the host State.[88]

Damages

According to the leading case in the matter of compensation in public international law, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[89] In other words, compensation should consist in the "payment of a sum corresponding to the value which a restitution in kind would bear."[90] As confirmed by the commentaries to art.36 of the ILC Articles on State Responsibility, which concerns the State's obligation to compensate for damages caused by an internationally wrongful act for which it is responsible, "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act."[91]

Therefore, where a claimant has already been totally or partially compensated under a TPF agreement for damages it has suffered at the hands of the host State, a serious argument may be raised that such compensation would have to be considered in order to avoid double recovery.[92] Indeed, double recovery would run foul of the basic principle that a claimant should be put back into the position it would have been in had the breach not been committed, but not in a better position.

Although not likely to be an issue under standard TPF models, TPF arrangements structured to lock in a guaranteed benefit for the claimant could trigger concern in this context. For example, where a strategic funder has indemnified a claimant in return for the claimant's agreement to pursue an arbitration in the hopes of creating a favourable "precedent" (see Part I of this article), it would be appropriate to consider such a recovery in the context of any claim for damages.

It would also be likely to raise issues where the funder has purchased the claim. In this case, the funder assumes the risk of overpricing the claim, since funder's profit is represented by the difference between the price it is ready to pay, which is based on its valuation of the claim, and the amount of damages awarded by the tribunal.

Consequential damages and incidental expenses

Where an investor has been forced to seek external financing in order to bring a claim against the host State to seek compensation for damages suffered by it, the investor could try to recover the costs incurred in relation to such financing as a form of consequential damages or incidental expenses. In particular, it could be argued that the costs incurred for bringing the claim should be assimilated to the costs of a loan that the investor was forced to take in order to surmount a period

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

of financial distress caused by the host State's actions in violation of an IPT.

Given the absence of precedents when considering such a theory, it is difficult to assess whether it would be well-received (see above). However, in the context of any such request, it would arguably be necessary to consider whether the costs associated with TPF requested by the investor were reasonable, and whether the situation of financial constraint that forced the investor to resort to TPF was the consequence of the host State's actions in breach of the applicable IPT, rather than other events (such as a worldwide financial crisis or bad business decisions of the investor itself).

CONCLUSION

The discussion above hopes to show that TPF, while of clear utility and interest for many parties, particularly in a world of rapidly escalating arbitral costs, presents a number of challenges for the institution of international arbitration. None appears in and of itself to warrant the need for urgent intervention. Thus, like other challenges that have engaged the arbitral community over time, it is hoped that ongoing reflection will yield answers and new approaches that will recognise the place for TPF in arbitration, while safeguarding the interests of those who may be affected where it is misused.

Notes

1. The views expressed herein are those of the authors alone, and do not necessarily reflect those of their firm or its clients. Readers are referred to Part I of this article for further background on TPF and for additional detail regarding the nature of certain industry sources relied upon by the authors in researching and preparing this article. For the avoidance of confusion, this Part II was not reviewed by any of the funders referred to in Part I. Terms referred to herein, but not otherwise defined, are to carry the meaning ascribed to them in Part I. The final version of this Part II was submitted on February 12, 2012. For additional background information and analysis regarding TPF in international arbitration, the reader is referred to the additional articles that are to appear in I.B.L.J. as part of its investigation of TPF. In particular, the reader is referred to Camille Fléchet's report regarding the January 27, 2012 roundtable organised by I.B.L.J., which appears in this issue. Subsequent to the date of completion of this article, *Global Arbitration Review* published the transcript of a similar roundtable discussion regarding TPF, held in London in late 2011. The transcript contains a rich discussion among leading arbitrators and practitioners touching on many of the issues addressed in this article.

2. Very limited guidance exists in relation to the relevant ethical issues. This situation appears, however, to be changing. As noted in Part I of this article, the American Bar Association recently published a "White Paper" regarding the ethical implications of TPF under United States law. See American Bar Association Commission on Ethics 20/20, *White Paper on Alternative Litigation Finance* (released for public comment in October 2011). The ABA's study makes reference to a number of additional opinions that have been rendered by local bar authorities in the United States. One that may be relevant for many members of the international arbitration community is the Formal Opinion issued by the New York City Bar Association in June 2011. See New York City Bar Association, *Formal Opinion 2011-02: Third Party Litigation Financing*. While the New York Rules of Professional Conduct obviously are not applicable universally, the considerations addressed in the Opinion, including the need for sensitivity to privilege and confidentiality, the prohibitions against advising in connection with an unlawful transaction, the need to avoid conflicts between the interest of the funder and those of the client, and the need to ensure that (absent a waiver) the client preserves control over the litigation, will no doubt be relevant to lawyers practicing in many other jurisdictions.

3. For a helpful recent discussion of the issue of security for costs, See U. Draetta, "Short Practical Notes on Security for Costs in Arbitration", (2011) 1 Les cahiers d'arbirtage 77. For a helpful recent discussion of principles governing the award of costs, See, e.g. N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford University Press, 2009), paras 9.87–9.100.

4. Costs of the arbitration may include costs such as fees, traveling and other expenses payable to the members of the tribunal and related expenses of the institution administering the arbitration and/or of any experts appointed by the arbitral tribunal. Costs of the parties may include fees and expenses of the lawyers, as well as of other professionals retained in connection with the case, such as experts. A decision on costs may be rendered in the award on the merits or as part of a subsequent award on costs. For a discussion of these issues under various procedural rules and national laws, See *Redfern and Hunter on International Arbitration* above, paras 9.87–9.100.

5. Indeed, it is often not followed in the context of investment treaty arbitration.

6. For more detailed discussion of these factors, See Draetta, "Short Practical Notes on Security for Costs in Arbitration", above, fn.3. As Professor Draetta notes, a threshold question for any application is whether the tribunal has the legal authority to grant such relief. A division of opinion exists over the question of whether such authority is inherent or must be specifically conferred upon the tribunal, for instance, by operation of national laws, arbitral rules or the agreement of the parties. Professor Draetta reviews various provisions under major arbitral institutional rules related to security, noting that among leading rules, the Rules of Arbitration of the London Court of International arbitration are one of the few that explicitly recognise the power to grant security for costs. As *Redfern and Hunter* notes, "This is a somewhat special form of interim measure of relief, since . . . the tribunal must weigh the cost to a respondent of defending a claim, with the possibility of not recovering those costs even if successful, against the risk of stifling a genuine claim by a claimant who is short of funds, possibly because of the conduct of the respondent which is the reason for the arbitration". See *Redfern and Hunter on International Arbitration*, above fn.3, para.5.31. Such relief may be sought by a respondent against a claimant or by a claimant against the respondent-counterclaimant. Security for costs is generally more difficult to obtain outside of England and some common law jurisdictions. In other jurisdictions, tribunals may fear that the award of security for costs could unduly interfere with the parties' right to be heard. See G. Born, *International Commercial Arbitration*, (Kluwer, 2009), Vol. II, p.2005.

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

7. G. Born, *International Commercial Arbitration,* above.

8. See*,* e.g. P. Pinsolle, "Le financement de l'arbitrage par les tiers", 2 Revue de l'arbitrage 385 (2011), pp 400–01 (analysing the possibility of an extension under French law and concluding that it is doubtful, absent unusual circumstances, that the funder's interest in the litigation, as opposed to involvement in the negotiation or performance of the contract giving rise to arbitration, would be sufficient to treat the funder as a party to the arbitration clause).

9. A further question would be the amount of disclosure that should be made. In addition to the fact of funding, the terms of funding could have a bearing upon the degree of risk generated by TPF in the specific proceeding. For example, as noted above, capital adequacy questions (for the funder) and/or the nature of termination rights enjoyed by the funder, would likely have a bearing on the overall level of risk associated with the funding relationship for the opposing party.

10. For an overview of the issue, See G. Born, *International Commercial Arbitration,* above, pp 2488–2502.

11. G. Born, *International Commercial Arbitration,* above. For an example of the broad discretion afforded to arbitral tribunals in the treaty arbitration context, See art.61(2) of the ICSID Convention ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.")

12. G. Born, *International Commercial Arbitration,* above.

13. Pinsolle, "Le financement de l'arbitrage par les tiers", above fn.8, pp.409–13 (discussing *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Final Award of March 3, 2010 and *Siag and Vecchi v. Egypt*, ICSID Case No.ARB/05/15, Award of June 1, 2009. See *also RSM v. Grenada*, ICSID Case No.ARB/05/14, Order of ad hoc Committee of April 28, 2011; *ATA Construction v. Jordan*, ICSID Case No.ARB/08/02, Order of ad hoc Committee of July 11, 2011.

14. *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, Final Award, ¶ 691.

15. See also below, "TPF and Investment Treaty Arbitration".

16. Philippe Pinsolle has explored in particular detail the complications created by contingency fees, illustrating the problem of valuing reasonable costs and addressing a concern of overcompensation. See Pinsolle, "Le financement de l'arbitrage par les tiers", above fn.3, pp 409–14 ; See also E. Bertrand, "The Brave New World of Arbitration: Third-Party Funding", (2011) 29(3) ASA Bull. 607, pp 613–14.

17. This assumes that the party claiming costs would not be entitled to recover the full costs of TPF, a proposition on which views may differ.

18. See generally, D. Cohen, "Indépendence des arbitres et conflits d'intérêts", 3 Revue de l'arbitrage 611 (2011). For a discussion of the standards applied by one leading arbitral institution, the LCIA, in deciding arbitral challenges, See T. W. Walsh and R. Teitelbaum, "The LCIA Court Decisions on Challenges to Arbitrators: An Introduction", (2011) 27(3) Arb. Int. 283. In LCIA practice, arbitral independence is assessed on an objective basis; by contrast, impartiality is assessed subjectively for the presence of bias. Both have been assessed by Divisions of the LCIA Court on the basis of "whether the fair-minded and informed observer, having considered the facts, would conclude that there [i]s a real possibility that an arbitrator appears to be dependent on a party or is partial to a party" (Walsh and Teitelbaum, internal citations and quotation marks omitted). *The IBA Guidelines on Conflicts of Interest in International Arbitration* ("IBA Conflicts Guidelines"), which are widely applied in international arbitration, also speak of "independence and impartiality". See International Bar Association, *The IBA Guidelines on Conflicts of Interest in International Arbitration* (2004), General Principle 1 ("Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated."). Further general discussion of independence and impartiality obligations under numerous sources of law and normative guidelines, including national curial laws and institutional rules, See Born, *International Commercial Arbitration* above, Vol. 1, Ch.11.E.

19. For a news report discussing the matter, See A. Ross, "French Court Rules on Arbitrator Independence in Jarvin Saga", *Global Arbitration Review* (November 11, 2011). See also Cohen, "Indépendence des arbitres et conflits d'intérêts" above, fn.18, pp 628–29 (citing cases and relevant literature).

20. The *IBA Conflicts Guidelines* deal with these various relationships (and others) in a specific fashion depending upon the nature and depth of the relevant links, treating some as triggering disclosure obligations and others as rising to the level of non-waivable conflicts.

21. If such ties were found to provide a valid basis for challenge, due diligence obligations upon arbitrators would likely increase in tandem. In particular, some diligence in identifying information warranting disclosure is often expected of arbitrators. Indeed, it is common practice to consider the arbitrator's failure to disclose information that arguably should have been disclosed, as a circumstance that may support a challenge. See*,* e.g. Walsh & Teitelbaum, "The LCIA Court Decisions on Challenges to Arbitrators: An Introduction" above, fn.18 (describing LCIA practices in this respect: "The failure by an arbitrator to disclose circumstances likely to give rise to any justifiable doubts as to his impartiality or independence is not likely to be a sufficient ground to sustain an arbitrator challenge. However, such a failure may be considered by the LCIA Court as one of a number of factors that in the aggregate may be sufficient to warrant the removal of an arbitrator".) (internal quotation marks omitted).

22. The distinguished arbitrator, Professor Albert Jan van den Berg, expressed the view that it is important to avoid conflicts between arbitrators (and their firms) and a funder behind a party appearing before the arbitrator. According to Professor van den Berg, the "surest" solution would be to always require disclosure by the parties of their funding. This solution, however, was seen as difficult to justify legally. A second option, according to Professor van den Berg, would be the "reverse conflict check", in which the arbitrator discloses ties to the parties. Such an approach would, as noted above, generate significant burdens for arbitrators. A final solution, according to Professor van den Berg, would be to require the funded party to ensure during the course of the proceeding that no conflict exists. The difficulty of such an approach would of course be policing. See S. Perry, "Third-Party Funding: An Arbitrator's Perspective", *Global Arbitration Review* (November 23, 2011).

23. For the case in favour of institutional involvement, See Bertrand, "The Brave New World of Arbitration: Third-Party Funding" above, fn.16, p.615.

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

24. Confidentiality represents another complex and divisive subject, the full treatment of which would be well beyond the scope of this article. For a discussion of general principles, See Born, *International Commercial Arbitration* above, fn.3, Ch.19. For the avoidance of doubt, not all legal systems assume that international arbitration proceedings are to be treated as confidential. See G. Petrochilos, "The ILA Tackles Confidentiality: The 2010 ILA Findings and Recommendations on Confidentiality", 1 Les cahiers de l'arbitrage 51 (2011) (noting lack of consensus or homogeneity in the treatment of confidentiality in arbitration laws and rules and recommending party agreement as best means of regulating confidentiality). For example, under the new French law governing international arbitration, confidentiality is not provided for as a default feature of international arbitration proceedings. See E. Schwartz, "The New French Arbitration Decree: The Arbitral Procedure", 2 Les cahiers de l'arbitrage 349 (2011), pp 367–68 (discussing Decree No.2011-48 of January 13, 2011 and observing that in view of the absence of an express provision, parties seeking confidentiality in international arbitration proceedings in France would be well advised to stipulate such a requirement).

25. Perry, "Third-Party Funding: An Arbitrator's Perspective" above, fn.22.

26. Perry, "Third-Party Funding: An Arbitrator's Perspective" above.

27. Perry, "Third-Party Funding: An Arbitrator's Perspective" above.

28. International Bar Association, *IBA Rules for the Taking of Evidence in International Arbitration* (2010), art.2.1 and 2.2(d).

29. This term is not without its detractors and surrounding controversy. See Aren Goldsmith, "Erga Omnes Commercial Arbitration? A Comparative Discussion of Extension Based Upon 'Alternative Estoppel'", 1 Les cahiers de l'arbitrage 59 (2011), p.60, fn.2 (referring to the debate over term "extension", including the objections of Bernard Hanotiau).

30. For an overview of such theories, See Born, *International Commercial Arbitration*, above, fn.2, pp 1142–1205 (discussing the following theories of what the authors would characterise as forms of extension (as opposed to forms of assignment): agency relationships; apparent or ostensible authority; implied consent; alter ego and veil-piercing; the "group of companies" doctrine; third-party beneficiaries; estoppel and related doctrines; ratification; extension to corporate officers and directors; extension based upon shareholder derivative rights; extension to state non-signatories; and extension based on joint-venture relationships or conspiracies); non-consensual bases for extension are addressed at Born, *International Commercial Arbitration*, pp 1205–1210. In a presentation at the 2011 IBA Conference in Dubai, Reza Mohtashami evoked several possible bases for the extension of an agreement to arbitrate to a third party found to have exercised "effective control of the case" (incorporation by reference, assumption, agency, veil-piercing/alter ego and estoppel). Mark Kantor has evoked the same theories as a possible basis for extension. See M. Kantor, "Costs and Third-Party Funding in International Arbitration" (2010) 5(2) G.A.R. (noting that the extension of an agreement to arbitrate to a TPF funder (for purposes of an award of costs) would involve an "extraordinary step")).

31. Pinsolle, "Le financement de l'arbitrage par les tiers", above, fn.8, p.401.

32. See Goldsmith, "Erga Omnes Commercial Arbitration? A Comparative Discussion of Extension Based Upon 'Alternative Estoppel'", above, fn.29 (critiquing certain practices of extension in the US courts based upon estoppel that are difficult to justify under either consensual or estoppel-based norms).

33. Domestic laws recognise numerous forms of assignment, including through express contractual agreements to assign, and assignments of rights and liabilities that occur by operation of law, for instance, via subrogation and/or in the context of corporate law doctrines providing for the migration of rights through corporate reorganisation. For a comparative law discussion of assignment and international arbitration, See S. Jagusch and A. Sinclair, "The Impact of Third Parties On International Arbitration – Issues of Assignment", in J. Lew and L. Mistelis (eds) *Pervasive Problems in International Arbitration* (Kluwer, 2006).

34. In particular, the de jure assignment scenario will call for analysis under existing rules to assess whether or not the particular assignment will be recognised. By contrast, in the de facto scenario which may be implicated by TPF arrangements, an additional threshold question be resolved, i.e. whether or not an assignment has occurred. Only then will it be possible to assess the implications of any assignment.

35. It is difficult to conceive of assignment scenarios on the respondent side. Thus, this discussion will be restricted to TPF for claimants.

36. See Jagusch and Sinclair, "The Impact of Third Parties On International Arbitration – Issues of Assignment" above, fn., pp 310–11.

37. See, e.g. art.41 of the ICC Arbitration Rules (2012) ("In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.").

38. The problem of public policy as a ground for annulment or refusal to recognise/enforce is subject to an enormous amount of debate and characterised by conflicting decisional practices. For an overview of the terms of the relevant debates and related literature, See Born, *International Commercial Arbitration* above, fn.3, pp 2620–33 and 2827–63. In the context of annulment, Born describes the "better view" of "international public policy" as "those public policies of the forum intended for international settings, but only insofar as that public policy is consistent with applicable international law principles." Born, *International Commercial Arbitration,* at p.2622. In the recognition/enforcement context, Born observes that a "narrower" concept of public policy should apply than in the annulment context, observing that "[O]nly those national public policies which mandatorily demand application to international matters, taking into account the potential absence of any direct connection to the judicial recognition forum, constitute public policy for purposes of Article V(2)(b) [of the New York Convention]". Born, *International Commercial Arbitration*, at p.2838. For the avoidance of confusion, Born's discussion of public policy in both of the foregoing contexts is under New York Convention principles. For commentary highlighting dangers associated with the notion of "international public policy", See W. M. Reisman, "Law, International Public Policy (So-called), and Arbitral Choice in International Commercial Arbitration", in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 13 ICCA Congress Series (van den Berg, ed., 2007), pp. 849-856. For commentary advocating attempts to define and apply "international public policy" where appropriate, See C. Kessedjian, *Transnational Public Policy*, in van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007), ICCA Congress Series, Vol. 13. pp 857-70.

39. See, e.g. A. Mourre and L. G. Radicati di Brozolo, "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back", (2006) 23(2) J. Int. Arb. 171, at 187 (for the avoidance of confusion, the authors advocated a restrictive interpretation of "public policy" by national courts and were not addressing the question from the perspective of the arbitral tribunal).

40. See American Bar Association Commission on Ethics 20/20, *White Paper on Alternative Litigation Finance* above, fn.2, pp 10–11 (quoting relevant statutes).

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

41. See, e.g. M. Willems, *Third Party Funding – A paper for the Society of Construction Arbitrators* (October 2009) (noting that English public policy is not applied extraterritorially). See e.g. C. Miles and S. Z. Vasani, "Third-Party Funding – Case Notes on Third Party Funding", *Global Arbitration Review* (February 1, 2008) (Singapore report); J. Ng, "The Role of the Doctrines of Champerty and Maintenance in Arbitration", (2010) 76 Arbitration 208 (2010) (contrasting Hong Kong, where champerty not extended to arbitration proceedings, to Singapore).

42. See, e.g., C. Miles and S. Z. Vasani, Third-Party Funding – Case Notes on Third Party Funding, Global Arbitration Review (February 1, 2008) (Singapore report); J. Ng, The Role of the Doctrines of Champerty and Maintenance in Arbitration, 76 Arbitration 208 (contrasting Hong Kong, where champerty not extended to arbitration proceedings, to Singapore).

43. The authors do not exclude the possibility of circumstances under which the relevant funding arrangement or conduct of the funded party require an appropriate sanction, including denial of admissibility. Such remedies would no doubt be reserved for egregious circumstances.

44. While it is probably fair to assume that in numerous cases TPF has been provided but never disclosed, in certain cases TPF has been made public. See, for instance *S&T Oil Equipment & Machinery Ltd. v. Romania*, ICSID Case No.ARB/07/13 (the investor, S&T Oil Equip. & Mach. Ltd, brought a case against the funder, Juridica Invests. Ltd., before the Southern District Court of Texas); *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No.ARB/05/15 (the investor and Ms Vecchi's heir, Mr Siag, brought a case against against King & Spalding, Mr Siag's counsel in the ICSID arbitration and de facto funder of the arbitration, before the Southern District Court of Texas); *Ron Fuchs v. The Republic of Georgia*, ICSID Case No.ARB/07/15 and *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No.ARB/05/18 (TPF was mentioned in the Awards of March 3, 2010, ¶ 691);

45. In general, these provisions grant to the insurer, generally a financial institution of the investor's State or the investor's State itself, the right of subrogation if the latter has made a payment for damages incurred by investors under an insurance contract for non-commercial risks. In this case, without prejudice to the rights of the investor, the insurer is entitled to exercise any right or claim as the investor by virtue of subrogation. See R. Oleschak, "Export Credit and Investment Insurance Agencies Extraterritorial Obligations of Home-States of Investors", in A. Reinisch, C. Knahr, *International Investment Law in Context* (Eleven International Publishing, 2008), pp 115–139; R. Dolzer, M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1990) pp 156–164, and the examples cited therein. See also M. Kantor, "Nationality and Control Issues Involving Financing Parties In ICSID Arbitrations" in *ADR & the Law*, 18th ed (American Bar Association, 2002), pp. 384–409.

46. With respect to individuals, "investor" is generally defined in IPTs as a physical person having the citizenship (or permanent residence) in one of the contracting parties. See R. Dolzer and M. Stevens, *Bilateral Investment Treaties* above, pp.31–34; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), pp 140–143, paras 5.22–5.42. With respect of companies, the majority of investment treaties contain the so-called "pure incorporation test," which requires that a company be incorporated in one of the contracting States to be covered by the IPT. Alternatively or cumulatively, certain IPTs require that the company's seat be in one of the contracting parties. Other treaties combine the place of incorporation or the seat with the existence of real business activities in the country of incorporation or the seat. Sometimes control is also required and companies incorporated in third States under control by nationals of one of the contracting parties may be qualified as protected investors. See K. J. Vandevelde, *Bilateral Investment Treaties, History, Policy and Interpretation* (Oxford University Press USA, 2010), pp 157–164; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration* above, pp 142–143, paras 5.31–5.37.

47. See B. M. Cremades, "Third-Party Funding in International Arbitration" (2011), pp 6–7 available at *http://www.luzmenu.com/cremades/(S(bufeeg0e0kmyiazhlmdws0ei))/ing/Publicaciones.aspx* [Accessed February 26, 2012] (work distributed at the roundtable "Third Party Funding of International Arbitration Claims: The Newest 'New New Thing'" organised by the New York State Bar Association and Fordham University School of Law on June 15, 2011 (observing that "Exactly who is behind the official claimant is highly relevant. Investment protection treaties characterise very precisely the investor and the investment in such a way that the entity with the real interest in a claim can be of any nationality, thus changing the scope of a bilateral treaty. Furthermore, the investing party acquires certain rights and commitments with regard to the host state and cannot appear and disappear frivolously in the same way as with a purely financial transaction. The state has an interest in knowing the identity and origin of the investment.")

48. On the choice of law issue of which law governs the assignment of claims, See S. Jagusch and A. Sinclair, "The Impact of Third Parties on International Arbitration – Issues of Assignment", above, fn.33, pp 291–319. On the related issue of the assignment of the arbitration clause, See V. V. Veeder, "Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris", in Albert Jan van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, (ICCA Congress Series No.7) (Kluwer, 1996), pp 268–293; D. Girsberger and C. Hausmaninger, "Assignment of Rights and Agreement to Arbitrate", (1992) 8(2) Arb. Int. 121–166. In general, the laws that may come into play are the law governing the contract (and the claims) that have been assigned, the law governing the assignment agreement itself, or the law of the seat of the arbitration, but it cannot be ruled out that an arbitrator or a judge will resort to a combination of these laws. Consent from the host State to any assignment, the lack of which may be particularly problematic in commercial arbitration, is in principle not required in investment arbitration. Indeed, State consent contained in the forum clause of IPTs is not addressed to a specific investor, but rather to a class of entities and individuals that fulfill the requirements provided for in the treaty. Therefore, anyone who qualifies as a protected investor that made an investment as defined in the applicable treaty is entitled to avail itself of treaty protection. On the nature of the host State's offer to arbitrate disputes with qualified foreign investors, See *ex multis* R. Dolzer and M. Stevens, *Bilateral Investment Treaties* above, fn.45, pp 131–132; J. Paulsson, "Arbitration Without Privity", (2005) 10(2) ICSID Review – Foreign Investment Law Journal 232 and following; *Lanco International, Inc. v. Argentine Republic*, ICSID Case No.ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, December 8, 1998, 40 ILM 457 (2001), ¶¶ 31-33 and 43-44; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No.ARB/04/14, Award of December 8, 2008, ¶ 160(2). However, when the express consent is required under domestic law of the host State for the assignment of the rights associated to an investment, notably in relation to a State contract to which the investor is a party, the absence of the host State's consent to the assignment of the contractual rights may be an issue that the tribunal will have to consider under other aspects (illegality of the investment, breach of contract, etc.). See, on similar problems, *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No.ARB/02/3, Decision on Respondent's Objections to Jurisdiction of October 21, 2005, 20 ICSID Rev.—FILJ 450 (2005), ¶¶ 156-180.

49. This topic has not received the attention it deserves from legal scholars. Among the few recent contributions of particular interest, See S. Jagusch and A. Sinclair, "The Impact of Third Parties in International Arbitration" above, fn.33, pp. 291–319, which deals with assignment of claims at pp.295–298. See also the valuable contribution of F. A. Mann, "The Assignability of Treaty Rights", (1953) 30 British Yearbook of International Law 475.

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

50. See I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) p.480 ("If during the critical period a claim is assigned to or by a non-national of the claimant state, the claim must be denied. However, assignment does not affect the claim if the principle of continuity is observed"); R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., (Oxford University Press, 2008), p.508 ("In cases of succession on death, and of assignment, a claim will normally be allowed if the continuity of nationality is maintained and disallowed if it is not"); C. Santulli, *Droit du contentieux international* (Montchrestien, 2005), pp. 241–242; R. B. Lillich, *International Claims: Postwar British Practice*, (PAIL Institute Publication, 1967), pp.56–57. More recently, in the context of modern diplomatic protection, the International Law Association seems to have adopted a liberal approach towards assignment of international claims, See International Law Association, Committee on Diplomatic Protection of Persons and Property, London Conference (2000), *First Report*, pp.37–38; International Law Association, Toronto Conference (2006), Committee on Diplomatic Protection of Persons and Property, *Final Report*, pp.13–14, ¶¶ 74-78 (discussing the need for flexibility in the application of the continuous nationality rule, the Committee observed "In fact, the application of the [continuous nationality rule] in the context of globally structured financial markets where shares, bonds and other instruments change hands, and consequently nationality, constantly and speedily, can only be regarded as an anachronism that could amount in given instances to deprive legitimate owners and investors of protection on the part of states of nationality.")

51. See R. B. Lillich, G. A. Christenson, *International Claims: Their Preparation and Presentation* (PAIL Institute Publications, 1962), p.22; J. J. Brow, "The Jurisprudence of the Foreign Claims Commission: Vietnam Claims", 27 Va J. Int'l L., 1986–1987, pp.99-152, at p. 113. Lillich noted that in certain instances – particularly in case of continuous nationality – the International Claims Settlement Act, and the United States Foreign Claims Settlement Commission that interpreted and applied it, departed from traditional rules of international law (*op. cit*., p. 10).

52. See G. H. Aldrich, *The Jurisprudence of the United States Claims Tribunal,* (Clarendon Press, 1996), pp.124–128 ("In a number of cases, the Tribunal accepted the assignee of a claim as the owner of the claim.")

53. See for instance the British-Mexican Claims Commission: *William E. Bowerman and Messrs. Burberry's v. Mexico*, UNRIAA Vol. V, February 15, 1930, pp.104–107, at p.106 (the right to claim assigned to Messrs. Burberry Ltd. was considered as a "marketable asset from the time when the loss occurred" that "may be assigned or inherited as appears from the decisions of numerous International Commissions."); and the US-German Claims Commission: *Jeanette Selinger (United States) v. Germany*, UNRIAA Vol. VII, August 13, 1926, pp.358–359. Conversely, by expressly including "All claims owned by citizens of the United States of America against the Republic of Venezuela," the Protocol of Agreement between the United States and the Venezuela of February 17, 1903 that created the American-Venezuelan Claims Commission has been interpreted as to extend the Commission's jurisdiction to any claims assigned to United States nationals by assignors of any nationality, as confirmed in the *Orinoco Steamship Company Case*, 1903–1905, UNRIAA Vol. IX, pp.180–204, at p. 192, and *Raymond et al. Case*, 1903-1905, Vol. IX, pp.310–317, at p.312.

54. See *Mihaly International Corporation v. Sri Lanka*, ICSID Case No.ARB/00/2, Award of March 15, 2002, 17 ICSID Rev.—FILJ 142 (2002), ¶ 24 ("[a] claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit.")

55. See M. S. Duchesne, "The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes", 36 Geo. Wash. Int'l L. Rev. (2004), 783-815, at 808 ("[O]nce a State has breached a private investor's rights under an investment treaty or other investment agreement, the separate right to recover damages for that breach is really a property right vested in the claimant. As such, any subsequent change in the investor's nationality, or even subsequent transfer of the claim, should be irrelevant. These changes do not affect the fact that the respondent state breached its obligations under a binding agreement, and so should not affect the state's liability for that breach.")

56. A notable, albeit uncommon, exception is the protocol to the Netherlands-Czech Republic BIT of April 29, 1991, whereby the Netherlands and the Czech Republic confirmed that the investors are free to assign their investments as well as their claims under the BIT. See "Consultations on the interpretation and application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech Republic, Agreed Minutes", signed by the Netherlands on June 17, 2002 and by the Czech Republic on July 1, 2002, ¶ 3. Another, more recurrent exception is found in provisions concerning subrogation in the event that the investor has been indemnified by its home State or by a financial institution of its home State under foreign investment insurance for non-commercial risks. As explained above at fn.45, the host State is required to recognise the assignment of any right or claim of the investor to the insurer and the right of the insurer to exercise any such right or claim by virtue of subrogation.

57. See for instance 2002 Korea-UAE BIT (art.1(1)); 2000 Mauritius-Romania BIT (art.1(2)); 1996 Italy-Russia BIT (art.1(1)); 1997 Spain-Costa Rica BIT (art.1(2)); 1997 Israel-Czech Republic BIT (art.1(1)); 1996 Croatia-Bulgaria BIT (art.1(1)); 1990 Denmark-Poland BIT (art.1(1)(a)). Other treaties, which refer to any kind of assets "owned or controlled by" the investor (e.g. the Energy Charter Treaty, art.1(1)(6) and the 1994 US Model BIT, art.I(d)) or provide for a non-exhaustive list of assets that may constitute an investment, without any further qualification (e.g. the 2006 French Model BIT, art.1(1), the 1991 German Model BIT, art.1(1) and the 1991 UK Model BIT, art.1(a)), should not present this problem.

58. Although in *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Arbitration, Partial Award on Jurisdiction of September 8, 2006, ¶¶ 126-136, the tribunal concluded that the past tense of the verb "to invest" was added merely to define the term "investment" in a "grammatically satisfactory way," without adding anything to the definition of "investment" as "any kind of asset," a different interpretation such as the one indicated in the text seems also to be possible on the basis of the plain meaning of text.

59. See, for instance the Energy Charter Treaty, art.1(1)(6)) and the 1994 US Model BIT (art.I(d)). The 1994 US Model BIT was revised in 1998, but art.I(d) was left unchanged. Conversely, the 2004 US Model BIT introduced a more stringent definition of investment requiring the existence of certain features such as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk.

60. See for instance the 2006 French Model BIT, art.1(1)); the 1991 German Model BIT, art.1(1)); and the 1991 UK Model BIT, art.1(a)).

61. See for instance the case-law of the Iran-US Claims Tribunal, according to which art.VII(2) of the Claims Settlement Declaration of January 19, 1981 ("Algiers Declarations"), which extends the Iran-US Claims Tribunal's jurisdiction to any claims "owned" by nationals of the United States or Iran continuously between the date on which the claim arose and the date on which this Algiers Declarations entered into force," requires the continuity of the claimants' nationality, not the continuity of the claimants' identity. See *Richard D. Harza, et al. and The Islamic Republic of Iran, et al.*, Award No.232-97-2 (May 2, 1986), 11 Iran-U.S. C.T.R. 76, p.84, ¶ 22; *General Electric Company and The Government of the Islamic Republic of Iran, et al.*, Award No.507-386-1 (March 15, 1991), 26 Iran-U.S. C.T.R. 148, p.154, ¶ 20. See also J. J. Brow, "The Jurisprudence of the Foreign Claims

Commission: Vietnam Claims'', 27 Va J. Int'l L., 1986–1987, 99, at 113, with respect to the practice of the US Foreign Claims Settlement Commission in adjudicating the claims submitted by American citizens against Vietnam.

62. See *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No.ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, July 29, 2008, ¶ 80; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No.UN 7927, Award on Preliminary Objections to Jurisdiction of September 19, 2008, ¶ 39; Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), pp.290–291, ¶ 542; pp.297-298, ¶ 551; p.461, ¶ 869; and p.465, ¶ iii. See also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No.ARB/06/5, Award of April 15, 2009, ¶¶ 77, 93, 100; 106-107, 113, 136-144; *Cementownia ''Nowa Huta'' S.A. v. Republic of Turkey*, ICSID Case No.ARB(AF)/06/2, Award, September 17, 2009, 153–157 and 159.

63. See R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, above, fn.50, Vol.1, p.514; I. Brownlie, *Principles of International Law,* above, fn.50, pp.480–481; D. J. Bederman, ''Beneficial Ownership of International Claims'', International & Comparative Law Quarterly, 1989, Vol.38, p.935, p.936; G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* above, fn.52, p.133; *James M. Saghi et al. v. The Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No.544-298-2 of January 22, 1993, Iran-US Claims Tribunal Reports, Vol.29, 20, pp.27–28, ¶ 26; *Rondu Holdings Inc. v. The Islamic Republic of Iran et al.*, Iran-US Claims Tribunal, Award No.137-312-2 of June 22, 1984, Iran-US Claims Tribunal Reports, Vol. 7, 26, pp.28–29; *International Technical Products Corporation et al. v. The Government of the Islamic Republic of Iran et al.*, Iran-US Claims Tribunal, Final Award No.196-302-3 of October 24, 1985, Iran-US Claims Tribunal Reports, Vol. 9, 206, pp.232–233; *Howard Needles Tammen & Bergendoff v. The Government of the Islamic Republic of Iran et al.*, Iran-US Claims Tribunal, Award No.244-68-2 of August 8, 1986, Iran-US Claims Tribunal Reports, Vol.11, 302, p.313, ¶ 41; *Foremost Tehran, Inc. et al. v. The Government of the Islamic Republic of Iran et al.*, Iran-US Claims Tribunal, Award No.220-37/231-1 of April 10, 1986, Iran-US Claims Tribunal Reports, Vol. 10, 228, pp.239–240; *SEDCO, Inc. v. National Iranian Oil Company*, Iran-US Claims Tribunal, Award No.309-129-3 of July 2, 1987, Iran-US Claims Tribunal Reports, Vol.15, 23, p.101, ¶¶ 264-266; *In the Matter of the Claim of The First National City Bank of New York against the Soviet Government*, US Foreign Claims Settlement Commission, Decision No.SOV-3126 of July 20, 1959, in *Foreign Claims Settlement Commission of the United States. Decisions and Annotations* (1968), p.324, p.333; *American Security and Trust Company Claim*, US Foreign Claims Settlement Commission, Decision of January 30,1957, International Law Reports, Vol.26, p.322; *Binder-Haas Claim*, US International Claims Commission, undated decision, International Law Reports, Vol.20, p.236, p.237; *Division of World Missions of the Board of Missions of the Methodist Church Claim*, US Foreign Claims Settlement Commission, Decision of November 6, 1957, International Law Reports, Vol.26, p.279; *Yankopoulos Claim*, US International Claims Commission, Decision of July 21, 1957, International Law Reports, Vol.26, p.340, pp.301–341.

64. See for instance *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of March 17, 2006, ¶ 130; *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No.ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999, in 14 ICSID Rev.—FILJ 251 (1999), ¶ 32.

65. See for instance *Gemplus S.A. and Talsud S.A. v. United Mexican States*, ICSID Case Nos.ARB(AF)/04/3 and ARB(AF)/04/4, Award of June 16, 2010, ¶¶ 5.26-5.35; *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No.ARB/03/8, Award of January 10, 2005, 19 ICSID Rev.—FILJ 426 (2004), ¶¶ 37-41; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No.ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction of May 29, 2009, ¶ 53.

66. In the same vein, it may also be argued that if the claimant is not the real party in interest, it has no standing to pursue the claim against the host State because it lacks the requisite *intérêt à agir*. P. Pinsolle, *Le Financement de l'Arbitrage par les Tiers*, (2001) Rev. Arb. 385–414, at 397–398 and 404 (pointing out that the notion of *intérêt à agir* may considerably differ from one legal system to another and that it may happen that the assignor retains a residual interest in the claim). However, such analysis raises the question of whether the concept of *intérêt à agir*, which is common in Civil Law jurisdictions, applies in investment arbitration.

67. One of the reasons behind the introduction of the continuous nationality rule in public international law was ''to prevent states from buying up or acquiring . . . claims for purposes of political pressure.'' See E. M. Borchard, ''Protection of citizens abroad and change of original nationality'', 43 Yale L. J. 379 (1933-1934), p.379. This rationale may be contrasted with the reasons that inspired the doctrines of maintenance and champerty (see Part I of this article). As in the case of champerty and maintenance, where many of the considerations that motivated their adoption have weakened, the concern that powerful States could buy claims in order to exercise undue pressure upon weaker States may now be regarded as obsolete. See *First Report on Diplomatic Protection* by J. R. Dugard, Special Rapporteur (2000), A/CN.4/506/Add.1, p.14, ¶ 23; M. S. Duchesne, ''The Continuous-Nationality-of-Claims Principle'' above, fn.55, pp.805–806.

68. See *Oppenheim's International Law* above fn.50, Vol.1, pp.512–513 (continuous nationality is required from the time of the injury until the making of the award); I. Brownlie, *Principles of International Law* above, fn.50, pp.478–479 and 659–660 (continuous nationality is required from the time of the injury until the making of the award, but ''there is a respectable body of opinion which would reject the principle altogether''); S. Friedberg, ''Unjust and Outmoded – The Doctrine of Continuous Nationality in International Claims'', 4 International Lawyer (1969-1970) at 835 (continuous nationality is required from the time of the injury until the filing of the claim); G. I. F. Leigh, ''Nationality and Diplomatic Protection'', Int. Comp. Law Quart. (1971), at 453(continuous nationality required from the time of the injury until the filing of the claim); E. Wyler, *La Règle Dite De La Continuité De La Nationalité Dans Le Contentieux International* (Presses Universitaires de France, 1990), pp.262–263 (continuous nationality is required from the time of the injury until the filing of the claim); W. K. Geck, ''Diplomatic Protection'', in *Encyclopaedia Of Public International Law*, Vol. 1 (Max Planck, 1992), at pp.1055–1056 (observing that ''[p]revalent practice and opinion seem to favour the date of presentation over the date of settlement''); I. M. Sinclair, ''Nationality of Claims: British Practice'' (1950) 27 B.Y.I.L. 125, (continuous nationality is required from the time of the injury until the filing of the claim, but the continuous nationality rule is regarded as ''harsh and oppressive in many of its aspects'' and ''far from sacrosanct''); M. S. Duchesne, ''The Continuous-Nationality-of-Claims Principle'' above, fn.55, pp.783 and following (questioning the existence of a uniform rule on continuous nationality). The International Law Commission, which adopted the draft Articles on Diplomatic Protection at its 58th session in 2006, accepted the continuous nationality rule only up to the date of the ''official presentation of the claim'' (See Articles 5 and 10, ''Report of the International Law Commission on the Work of its Fifty-eighth Session'', in *Yearbook of the International Law Commission*, Vol.II(2) (2006), A/61/10, at pp.35–38, ¶¶ 1-5 and 55-56, ¶¶ 1-3)

69. Under the traditional customary international law rules of diplomatic protection, it is the bond of nationality that confers upon the State the right of diplomatic protection. See *Panevezys-Saldutiskis Railway Case*, *Estonia v. Lithuania*, PCIJ, Judgment of February 28, 1939, Series A/B, No.76, p.4 at p.16. In exercising that right, the State ''is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

of international law." See *also Mavrommatis Palestine Concessions Case*, *Greece v. Great Britain*, PCIJ, Judgment of August 30, 1924, Series A, No.2, p.6 at p.12.

70. See M. Mendelson, "The Runaway Train: the 'Continuous Nationality Rule' from the *Panevezys-Saldutiskis* Case to *Loewen*, in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005), p.97 at p.124; F. O. Vicuña, "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement", (2000) 15 ICSID Rev. – Foreign Investment Law Journal 340, at 348–352; J. Paulsson, "Note - Loewen v. United States, ICSID Additional Facility Case No. ARB/AF/98/3 - Continuous Nationality in Loewen", (2004) 20 Arb. Int. 213 at 215; M. Duchesne, "The Continuous-Nationality-of-Claims Principle", above, fn.55, p.808. See, contra, *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No.ARB (AF)/98/3, Award on merits of June 26, 2003, ¶¶ 220-239, which extended the continuous nationality requirement up to the date of the award. The *Loewen* decision has been subject to widespread criticism and disapproval and has not been regarded as a compelling precedent, See *Seventh Report on Diplomatic Protection* by J. R. Dugard, Special Rapporteur (2006), A/CN.4/567, p.17, ¶ 42; M. Mendelson, "The Runaway Train" above, pp.117–125; M. S. Duchesne, "The Continuous-Nationality-of-Claims Principle", above, fn.55, pp.802–804; J. Paulsson, "Continuous Nationality in Loewen" above, pp.213–215.

71. See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No.ARB/07/24, Award of June 18, 2010, ¶ 95, citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case No.ARB/03/15, Decision on Jurisdiction of April 27, 2006, ¶ 126 ("no continuous ownership is required, as the ICSID Convention was meant, among other things, to protect against nationalisations and expropriations, i.e. in cases where the national no longer owns the investment but seeks compensation for having been deprived of it by the host State.")

72. See, in the context of investment restructuring, *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No.UN 7927, Preliminary Objections to Jurisdiction of September 19, 2008, ¶¶ 104-111 ("Thus, the investment could not be protected by this Treaty until both this Treaty entered into force and Claimant, as a French company, acquired the investment and it became a French investment. Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment, that is on November 12, 2004, at which time the investment became protected under the Treaty to the benefit of French nationals and companies only. It follows that the Tribunal will only have jurisdiction over acts and omissions that took place after November 12, 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national," ¶ 107); *Phoenix Action Ltd v. Czech Republic*, ICSID Case No.ARB/06/5, Award of April 15, 2009, ¶¶ 67-68 ("It does not need extended explanation to assert that the Tribunal has no jurisdiction *ratione temporis* to consider Phoenix's claims arising prior to December 26, 2002, the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix 'invested' in the Czech Republic. The Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State."); *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No.ARB/07/27, Decision on Jurisdiction of June 10, 2010, ¶¶ 202-205.

73. See M. Mendelson, "The Runaway Train", above, fn.70, pp.127 and 133–134; Z. Douglas, *The International Law of Investment Claims*, above, fn.63, pp.290–291, ¶¶ 542-543, p.297, ¶ 551 and p.465.

74. See *Mihaly International Corporation v. Sri Lanka*, ICSID Case No.ARB/00/2, Award of March 15, 2002, 17 ICSID Rev.—FILJ 142 (2002), ¶ 24; *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No.ARB/98/7, Award of September 1, 2000, 17 ICSID Rev.—FILJ 382 (2002) (excerpts), ¶¶ 5-6; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No.ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité of July 29, 2008, ¶ 61; *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No.UN 7927, Preliminary Objections to Jurisdiction of September 19, 2008, ¶ 111. See *also* Z. Douglas, *The International Law of Investment Claims*, above, fn.63, p.461, ¶ 869.

75. There may also be situations where third parties other than funders take control of the investment, including any claim against the host State. For example, in project financing, the project lenders that grant loans are often given security over the borrower's assets and are able to assume control of the project if the project company is unable to comply with the terms of the loan. See, for instance, G. D. Vinter, *Project Finance* (Sweet & Maxwell, 1998), pp.85–116.

76. See P. Pinsolle, "Le Financement de l'Arbitrage par les Tiers", above, fn.8, p.405.

77. See, for instance, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No.ARB/08/16, Award of March 31, 2011, ¶ 124 ("The Tribunal agrees with the Claimant. The Respondent, in effect has attempted to create a standing requirement (i.e. a requirement of ownership or control of the investment at the time of registration of the Request) that does not otherwise exist under the BIT, ICSID Convention or ICSID Rules. Indeed, such a requirement, if it existed, would exclude a significant range of cases where claims are made in respect of the divestment or expropriation of an investment."); *Mondev International Ltd. v United States of America*, ICSID Case No.ARB(AF)/99/2, Final Award of October 11, 2002, ¶ 91 and *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No.ARB/04/13, Decision on Jurisdiction of June 16, 2006, ¶ 135-136.

78. P. Pinsolle, "Le Financement de l'Arbitrage par les Tiers", above, fn.8, p.405 ("[S]i la cession intervenait une date antérieure au dépôt de la demande d'arbitrage, le tribunal pourrait se déclarer incompétent. La question de la compétence des tribunaux arbitraux statuant sur le fondement des traites de protection des investissements exige en effet non seulement que le demandeur ait la nationalité requise, mais qu'il ait cette nationalité au moment du dépôt de la demande d'arbitrage.")

79. *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No.ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999, in 14 ICSID Rev.—FILJ 251 (1999). According to the summary of the facts in the decision, CSOB assigned its claims against the Slovak Republic to its home State under a complex scheme under which CSOB still retained an interest in the claim, See ¶¶ 29-30.

80. *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ¶ 31. In an obiter dictum, the tribunal added that "absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding, regardless of whether or not the beneficial owner is a State Party or a private party." *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ¶ 32. The tribunal's statement can be understood in the context of the case, where the assignment occurred after the commencement of the arbitration. Under different circumstances, it may be forcefully argued that a claimant is not entitled to enforce a claim if that claim has been assigned to a third party before the commencement of the arbitration (see below).

© 2012 Thomson Reuters (Professional) UK Limited and Contributors

81. Outside the context of ICSID arbitrations, See *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*), Judgment of February 14, 2002, ICJ Reports 3 (2002), pp.12–13, ¶ 26 ("The Court recalls that according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction."), and the numerous precedents cited therein; S. Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., (Martinus Nijhoff, 2006), Vol.II, p.510. This rule, which is known in several Civil Law countries as *perpetuatio jurisdictionis*, has also been endorsed in non-ICSID investment arbitrations, See *National Grid plc v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of June 20, 2006, ¶ 117.

82. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No.ARB/97/3, Award of November 21, 2000, 40 ILM 426 (2001). This case was brought by a French company, Vivendi Universal (formerly Compagnie Générale des Eaux, "CGE") and Compañiá de Aguas del Aconquija ("CAA"), an Argentine company that was originally owned by CGE, Dragados y Construcciones Argentina S.A. ("Dragados", a Spanish company) and Benito Roggio & Hijos S.A. (an Argentine company), none of which had a controlling shareholding. Subsequently, CGE purchased Dragados' interest in CAA and acquired control over CAA. The tribunal found that CGE controlled CAA from the date of the concession contract and was thus a French investor since that date, and summarily dismissed Argentina's objection that CAA was not a French investor because CGE did not control CAA at that time. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No.ARB/97/3, Award of November 21, 2000, 40 ILM 426 (2001), pp.447–448, ¶ 24, fn.6.

83. *Compañiá de Aguas del Aconquija S.A. and Universal v. Argentine Republic*, ICSID Case No.ARB/97/3, Decision on Annulment of July 3, 2002, 19 ICSID Rev.—FILJ 89 (2004), pp.110–113, ¶¶ 46-50. The ad hoc Committee also observed that CGE had a protected investment in CAA since the date of the conclusion of the concession contract and was thus a protected investor in respect of its own shareholding. The ad hoc Committee concluded that, in any event, the tribunal's decision on CGE controlling CAA from the date of the concession contract "played no part in the subsequent reasoning of the Tribunal, or in its dismissal of the claim." In the subsequent Decision on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award of May 28, 2003, 19 ICSID Rev.—FILJ 139 (2004), the ad hoc Committee confirmed its findings that CGE/Vivendi had always been an investor irrespective of its control of CAA and that control of CAA at the time the arbitration was commenced was sufficient to retain jurisdiction over CAA (¶¶ 13-21). However, the ad hoc Committee seems to have changed its position with respect to the timing of CGE's acquisition of control of CAA, as the ad hoc Committee referred to the "partial[] annul[ment] [of] the Tribunal's decision, including its finding that CAA was controlled by CGE from the effective date of the Concession Contract." (¶ 21)

84. *Compañiá de Aguas del Aconquija S.A. and Universal v. Argentine Republic*, p.112, ¶ 50 ("In accordance with these provisions, which determine the scope of operation of the BIT, issues might well arise where there has been a transfer of control of a local company from a shareholder of one nationality to a shareholder of another. For example, if Dycasa had a Spanish treaty claim prior to March 1996, questions might arise as to how that claim could be later transferred to a French company, or as to how CGE could have acquired a French treaty claim in respect of conduct concerning an investment which it did not hold at the time the conduct occurred and which at that time did not have French nationality. At least, such questions might affect the quantum of recovery, but they might have further and even more basic legal consequences.") The ad hoc Committee finally refrained from deciding "on the precise extent of CAA's and CGE's treaty rights at different times." The tribunal's and ad hoc Committee's decisions, as well as the decisions of the tribunal to which the *Vivendi* case was resubmitted, were criticised by Z. Douglas, *The International Law of Investment Claims,* above, fn.63, pp.294–296 (the author remarking that "Unless forum shopping is to be wholly condoned, the claimant must also have the requisite nationality at the time of the alleged breach of obligation that forms the basis of the claim" and that "for *ratione personae* jurisdiction to be asserted over CAA, the tribunal must have concluded that it was under 'foreign control' of CGE at the time of the arbitration proceedings were commenced, and was 'effectively controlled directly or indirectly' by CGE at the time of the alleged breach of obligation forming the basis of the claim.")

85. *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration, Partial Award of September 13, 2001, ¶¶ 396-397 ("CEDC [the German company], when making the investment in CNTS [the Czech joint venture] in 1993/1994, was under the protection of the German-Czech Republic Investment Treaty which, in essence, provides a similar protection as the [Netherlands-Czech Republic BIT]. The assignment of the investment in CNTS from a German corporation to a corporation having its legal seat in the Netherlands does not have, on the face of it, the stigma of an abuse. [...] The Arbitral Tribunal's view is that the contribution made by CEDC and the assignment thereof in compliance with the investment structure approved by the Media Council to CME Media Enterprises B.V., qualifies as an investment under Article 8 of the Treaty. The Respondent's argument in respect to an alleged forum (or treaty) shopping is not sustainable." The transferability of the right to arbitration under the ICSID Convention has been endorsed in the context of a case based on an ICSID arbitration clause: See *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No.ARB/81/1, Decision on Jurisdiction of September 25, 1983, 23 ILM 351 (1984), at pp.372–373, ¶¶ 31-32 ("[T]he right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in P.T; Amco, and may be transferred with those shares." [The underlining is in the original]) The *CME* case has been commented extensively in treaty arbitration literature; See in particular Z. Douglas, *The International Law of Investment Claims,* above, fn.63, pp. 462-464, ¶ 870.

86. *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration, Partial Award of September 13, 2001, ¶¶ 420-424. While the transactions in question did not bear the hallmarks of impermissible forum shopping, the question remains whether treaty rights arising under different IPTs are transmissible among investors of different nationalities, even if the IPTs in question contain similar or identical provisions. A transfer of treaty rights among investors having different nationality once the alleged treaty violations have been committed remains a thorny issue. In addition, it remains to be seen whether the tribunal's reasoning, which was developed in the context of a sale of shares between companies belonging to the same group in connection with company reorganisation, would apply to the assignment of claim to a funder in the context of TPF.

87. See *Harrington and Associates, Inc. and The Islamic Republic of Iran*, Award No.321-10712-3 of October 27, 1987, 16 Iran-U.S. C.T.R. 297, ¶ 20 (the claimant assigned its claims to a third party before the commencement of the arbitration); *Herman Allen Claim*, United States Foreign Claims Commission, March 16, 1959, International Law Report, Vol.30, pp.158-160 (the claimant was entitled to enforce two claims that it purchased and partially re-assigned to a third party, but only to the extent of interest that it retained). See also, *a contrario, Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No.ARB(AF)/04/3 & ARB(AF)/04/4, Award of June 16, 2010, Part V, ¶¶ 5-29, 5-33 (the tribunal affirmed jurisdiction over a claimant that sold its shares to another claimant but retained the claims accrued against the host State, and denied jurisdiction over the buyer of the shares that never acquired the right to bring claims).

 © 2012 Thomson Reuters (Professional) UK Limited and Contributors

88. See, *Gemplus*, Part V, ¶¶ 5-29, 5-33; *National Grid plc v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of June 20, 2006, ¶ 121 (''The Respondent has also argued that, if a right to pursue the claims under the dispute would be recognised, then such right would have been transferred to the purchaser of the shares. The Tribunal observes that such right was retained by the Claimant as part of the terms of the sale of shares and that such terms were approved by the competent authorities of the Argentine Republic''). See also *First Travel Corporation and The Government of the Islamic Republic of Iran, et al.,* Award No.206-34-1, December 3, 1985, 9 Iran-U.S. C.T.R. 360, p.365 (the claimant transferred all its assets to a third party except for the claim against Iran).

89. *Case Concerning The Factory At Chorzow* (Claim For Indemnity), September 13, 1928, Series A.-No.17, p.47.

90. *Case Concerning The Factory At Chorzow* (Claim For Indemnity), September 13, 1928.

91. *Yearbook Of The International Law Commission* (2001), ''Report of the Commission to the General Assembly on the work of its fifty-third session'', Vol. II, Pt Two, p.99, ¶ 4.

92. The situation where an investor is compensated by a funder may be compared to that of the investor which sells its residual investment after having been injured. In this case, it is often accepted that the assignment of the investment has an impact on the final calculation of the compensation. See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No.ARB/07/24, Award of June 18, 2010, ¶ 97; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No.UN3481, UNCITRAL Arbitration, Award of February 3, 2006, ¶ 131; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No.ARB/03/15, Decision on Jurisdiction, April 27, 2006, ¶ 126 (but See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No.ARB/03/15, Award of October 31, 2011, ¶¶ 739-742).

© 2012 Thomson Reuters (Professional) UK Limited and Contributors