“Who really drives the claim? Third-party funding and the future of investment arbitration”

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WHO REALLY DRIVES THE CLAIM? THIRD-PARTY FUNDING AND THE FUTURE OF INVESTMENT ARBITRATION

Abstract

The article highlights that third-party funding is a major issue in investment-State dispute resolution because it can fund worthwhile claims but also empowers a private party without legal status over proceedings. It presents an analytical model to manage third-party funding within investment-State arbitration by examining funding through the question of control: who drives the claim. Building upon doctrinal insights from existing literature, institutional materials, and case studies, this study aims to reinterpret funding through the lens of influence. The evidence suggests that control over proceedings does not inherently spring from the availability of third-party funds, but from material influence exercised over five critical arbitration stages: case selection, legal budget, settlement, tribunal constitution, and enforcement of arbitral awards. Thus, the article develops a six-part model incorporating five aspects of third-party control. The procedural points are mandatory disclosures at the initial arbitration stage and triggered disclosure of funding-related contract clauses. It proposes requiring proof of financial resources and segregating funded assets, while rebuttably presuming security for legal expenses if any discovered cost award would outweigh claimant finances. It also advocates formal protection for the client to direct claim management and settlement decisions, mandating similar disclosure for funded respondent actions. Supporting arguments identify three situations justifying the security for costs presumption and two instances where funding disclosures should be implemented. The study concludes that investment-State arbitration becomes genuinely equitable only when attention shifts from formal party status to third-party procedural influence.

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INTRODUCTION

Third-party funding has developed from a specialist financing technique to an issue that strikes at the legitimacy and governance of investor-State arbitration. Under a typical non-recourse structure, a funder pays some or all of the legal and expert costs of a party, in return for a share of any settlement or award in accordance with the contract; if the claim fails, the funder loses its investment, although it generally has recourse against the funding recipient if the latter withholds funds, acts negligently, or abuses the funder. Funding may address a liquidity constraint and allow potentially meritorious claims to proceed, but as this article notes, it can also raise thorny normative and policy issues - the subject of the ICSID Rules and the Ciarb Guideline. The topic is acute as the 2022 ICSID Arbitration Rules require third-party funding to be notified and permit third-party funding to be, without itself being decisive, a factor in applications for security for costs. Ciarb subsequently issued its final Guideline on Third-Party Funding on 11 September 2025 (ICSID, 2022, Rules 14 and 53; Ciarb, 2025a, 2025b); this article will rely on that rather than the Guideline circulated for consultation on 7 May 2025.

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The scholarly debate is usually organized around two competing perspectives. While the first considers third party funding mainly as an access-to-justice and risk-management mechanism that permits claimants to pursue proceedings without having to bear the full cost on themselves immediately, the second construes funding as the assetization or commodification of legal claims because disputes are screened and financed on probabilities, quantum, duration, enforceability and return expected (Hendel, 2010, pp. 67-71; Shao, 2021, pp. 427-429; Davitti & Vargiu, 2023, pp. 488-496). Although both perspectives are not short of genuine effects, neither alone provides a working test for the tribunals. The issue awaiting consideration is not simply whether outside money existed, but whether the funding arrangement altered who could direct the claim and who bore the downside risk.

The gap in investment arbitration is even sharper, because the respondent is a State, the costs of defense and eventual reward may affect public spending, and the subject matter of the dispute may involve regulatory measures taken for public goals. Identity-only disclosure may reveal conflicts involving arbitrators, but not whether the funder has the power to veto settlement, withdraw funding at a crucial stage, force a budget cut, influence appointment, or escape indemnity for adverse costs. While a routine disclosure of the funding agreement in toto discloses privileged merits assessments and commercially sensitive issues of pricing. The literature has mostly failed to account for each of the concerns of procedure and finance adequately in a single operational model to enable differentiation of legitimate third-party financing from materially influential Non-Party.

The objective of this article is to construct a control-based framework that preserves legitimate access to finance while limiting opacity, asymmetric risk transfer, and undocumented interference with investor-State proceedings. The enquiry will proceed with regard to three propositions. First, mandatory but staged disclosure serves to protect procedural integrity proportionally better than either identity-only disclosure or the automatic production of the full funding agreement. Secondly, whilst there is funding in place, adverse-cost liability is not adequately covered, the claimant appears unable to satisfy a costs award, a rebuttable presumption of security for costs is justified; and finally, the fact that a funder should be regarded as a procedurally relevant player (but still not as a formal party) when by contractual right or economic use it can materially influence the way the case is run, settled, appointments are made or payments or enforcement effected.

The study will follow a doctrinal-comparative-normative method of analysis using materials from the sources listed in the references. These have been selected purposefully for touching at least one of four points of interest: disclosure, contractual control over proceedings, risk of adverse-cost award, and enforcement against States. Rules and guidelines of institutions describe their current procedural standards. Literature by academics contains the main (legal and financial) explanations of the system. Selected cases offer non-exhaustive illustrations of how proceedings with external finance potentially work in certain instances, rather than provide a picture representing the prevalence of such financings or that of typical practice. The source materials are considered from five decision nodes (appointment of a case to be funded, financial constraints, settlement, composition of tribunal, enforcement efforts), influenced by three variables attributable to the underlying contract (contingent repayment in the event of success, risk of cost awards, continuity of invested funds). It is not claimed that results represent market prevalence or that the analysis explains causal effects. The objective of the method employed is to explore the internal consistency of such a regulatory model and to show why it may address potential loopholes without causing disproportionate harm.

1. THEORETICAL BASIS

The literature can be synthesized into three connected strands. The first examines third-party funding as a response to the high costs of arbitration and therefore as a means of access to adjudication. The second treats funding as a financial transaction in which a contingent legal claim is valued, screened, and incorporated into an investment portfolio. The third concentrates on gover-

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nance: conflicts of interest, disclosure, control of counsel and settlement, security for costs, and enforcement. These strands have often developed separately, although the same agreement that supplies capital also creates incentives, reallocates risk, and may alter procedural decision-making. The analysis below therefore moves from financing need to financial incentives, and finally to the legal controls required when those incentives become material to the arbitration. International arbitration has long been an expensive undertaking. Legal advice, expert expenses, the fees of arbitrators, translators, management of documents and the ultimate need to enforce a successful award may prevent even well-founded, serious cases from being heard. This potential cost can affect a party's conduct during proceedings and in settlement discussions and indeed dissuade it from pursuing a case at all. Third-party funding thus offers a potential means by which such costs and risks could be shared with outside capital and is a method that has emerged as an appropriate response to these costs and risks (Van Boom, 2016, pp. 1-4; Hendel, 2010, pp. 67-69; Kandavel & Srinivas, 2020, pp. 1138-1142; Qtiashat & Qtaishat, 2021, pp. 341-343). This aligns with the Chartered Institute of Arbitrators (Ciarb) Guideline, as the incidence and cost of arbitration have risen over the years and the use of third-party funding has increased in parallel (Ciarb, 2025b, p. 1).

Access to justice concerns justify a greater appreciation for this. The small investor or those who are financially hard-pressed may indeed have a valid claim under an investment treaty but no real means to finance arbitration. Shao notes that Funding permits investors who are otherwise impecunious to seek relief where they otherwise might have abandoned their claims (Shao, 2021, pp. 427-429). This fact is reason alone for shunning any blanket condemnation of funding; such hostility would simply ignore this aspect of international investment arbitration. Kadarisman's perspective seems pragmatic: Third-party funding is a fact that is changing international arbitration. Arbitration law-makers must necessarily address it (Kadarisman, 2019, pp. 107-108). The earliest commentary likewise recognized the use of third-party financing by an individual or state unable to bear the high costs of a major cross-border dispute (Hendel, 2010, pp. 67-71).

Beyond access alone are the financial effects of funding. The idea that capital offered in respect of claims against States could transform access to justice into assetization of claims is advanced by Vargiu and Davitti: a funded dispute is turned into a contingent financial asset, chosen and pursued for its institutional return (Davitti & Vargiu, 2023, pp. 488-496). Why funding could trigger new financial, agency, and externality problems can be understood through a law-and-economics perspective. The investment decisions of funders depend on probability-adjusted recovery, expected legal expenditure and duration, enforceability, and the rate of return on illiquid capital required. Through private calculation, funding can serve for external screening of the cases and diversification of risks; however, funding might not automatically internalize the cost of unrecoverable defense incurred by host States, nor the knock-on public effects associated with delaying regulation. Thus, whilst funding corrects the financing issue, it might also be responsible for the creation of agency or externality problems (Molot, 2010, pp. 65-115; Steinitz, 2011; Davitti & Vargiu, 2023, pp. 490-496). This is because the party enjoying the upside often does not absorb the full downside.

It is a matter of control. The distinction must be drawn between the funder that simply provides money and the funder that has contractual powers or whose economic power affects the filing of the case or the selection of the legal team or case framing or budget or the settlement decision or the enforcement strategy. Recognize certain contractual clauses in funding agreements on the subject matter of settlement, appointment of arbitrators, experts and counsel, confidentiality and grant of determination rights. Previous works done by ICCA and Queen Mary dealt with conflicts with arbitrators and funders, recoverability of costs, security of costs and relationship between funded party, counsel and financier (Park & Rogers, 2014, pp. 2-4; ICCA & Queen Mary University of London, 2018, pp. 81-117, 159-177; Ciarb, 2025b, pp. 17-19, 39, 50). The issue is no longer hypothetical nowadays; structural issues are prevalent with such funding models.

Control takes several different but connected forms.

- **Firstly**, claim selection is affected by funders' due diligence process and investment strategy. This is not necessarily wrong, but it may favor claims offering a large monetary award and identifiable enforceable assets over claims pursued primarily for legal principle.

- **Secondly**, the control of budget impacts who is chosen as an expert, the length of the claims, and the degree of witnesses' preparation and procedural tactics, because the actor financing the action has a say in how resources are deployed (Ciarb, 2025b, p. 50).

- **Thirdly**, control of the claim settlement creates another difference: investors' commercial or reputational interests versus funders' anticipated profit. While the Ciarb Guideline rightly states that lawyers still primarily owe their duty to the client, the level of fidelity is undermined if the contract gives the funder a say in the reasonableness of a settlement (Ciarb, 2025b, p. 19).

- **Fourthly**, influence over arbitrators and appointment mechanisms raises concerns around conflicts of interest. According to Sahani (2021, p. 34-36), the global issues are disclosure, definition, and oversight, and also include concerns about arbitrator conflicts and their "double hatting" as both advocate and adjudicator.

- **Fifthly**, control over enforcement is critical against a State, which may well need enforcement proceedings, including asset tracking, recognition, and enforcement orders in several countries before the claim is settled.

However, investment arbitration differs from commercial arbitration because the defendant is not a typical business concern, as States possess unlimited financial resources with public resources and can sustain costs, such as lengthy legal fees, even after losing. As Davitti and Vargiu (2023, pp. 490-492) explain, it is of critical concern for States to recognize and account for the considerable financial and non-financial pressures investment arbitration creates, including exerting unwanted pressure on State decision-makers who often need to consider these outcomes when formulating or modifying policy and regulations. Additionally, Wang's (2021, pp. 1-4) valuable discussion of the idea of public policy in dispute resolution is helpful in pointing out why transplanting rules from one context to another can lead to problems, especially given the differing nature of public and private spheres and institutions. Certain rules which might be accepted in private commercial arbitration require justification because of the different values at stake in investor-State cases, not least of which include both public legitimacy and a country's public resources. Although investment arbitration funding typically comes up in discussions related to claimants, external funding sometimes appears on the side of respondents. An excellent example of this is found in *ATA Construction v. The Hashemite Kingdom of Jordan*, wherein Dingwall and Haeri (2010, p. N34, see ICSID Case No. ARB/08/2, 2010) (ICSID, 2010) noted that Jordan was assisted by state-owned APC, which financed the State's costs of representation in the arbitration in the ICSID. Of course, the purpose here is not to pretend that a State is the same thing as an investor, but to show that importance in the legal context should hinge on influence and power rather than mere status or category.

In contentious political matters, opacity can be detrimental. In *Sulu v. Malaysia*, recounted by Ong et al., the role of the funder ultimately became apparent to the public due to investigative journalism followed by official admission, rather than any formalized transparent disclosure system (Ong et al., 2023, pp. 389-396). They connect the issue with problems such as conflicting interests, transparency, financial protection against adverse costs, and ethical conduct in serious international dispute resolution cases (Ong et al., 2023, pp. 400-404). While secrecy about the identities of commercial players is not perceived as protective of the legitimate interests involved in such high-stakes disputes due to the large economic, political, or enforcement effects of the outcome, it actively damages such legitimate interests.

Disclosure is a popular regulatory response. However, it is not the sole solution. Kadarisman points out that increased legal certainty requires further regulation by which parties could be held to greater disclosure, to avoid conflicts or to reduce time and expense that otherwise might not be necessary (Kadarisman, 2019, pp. 107-108). Sahani sees disclosure issues as critical given the evolving

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global regulatory approaches to investor-state arbitration, concluding that improved transparency is needed at the level of investment treaties and institutional rules alike (Sahani, 2021, pp. 34-36). The Ciarb Guideline points in this same direction as it requires knowledge of who stands behind the funder, whether the entity is financially capitalized for claims, and whether the funder possesses sufficient resources for the anticipated duration of the dispute (Ciarb, 2025a, pp. 17-18; Ciarb, 2025b, pp. 60-61). Nevertheless, disclosure of identity alone cannot indicate whether there is coverage of legal costs, control over settlement terms, the right to end the funding dispute strategically or the possibility of returns that deter compromise.

Confidentiality and privilege should protect the parties from unnecessary interference but not prevent disclosure of contractual provisions material to a procedural decision. Funding materials may provide merits opinions, budget estimates and strategy assessments that should not be disclosed without cause. Conversely, a clause providing veto right on settlement, a unilateral termination right or an exclusion of adverse-cost liability might become indispensable to the tribunal which decided security, conflicts, confidentiality or case management. The tension becomes most acute in circumstances where private agreement is enforced to remain absolutely secret, despite the institution having disclosure duties (Qtiashat & Qtaishat, 2021, pp. 352-354). A proportionate response to the problem would include partial supervision: analysis provided by lawyers and privilege should be preserved. Unimportant pricing clauses of the contract may be redacted, and only governance clauses essential to resolve a procedural issue would be disclosed.

Of all the possible areas, the obligation to furnish security for costs is where this tension has flared most starkly into view. In situations involving third-party financing, if that financing explicitly disallows coverage for adverse costs, Shao argues that there should be a strong default presumption of favoring security for costs (Shao, 2021, pp. 427-429, 440-442). The concern is precisely that the funded claimant, alongside the funder, may be allowed to enjoy all potential gains if the arbitration goes well while simultaneously forcing any potential cost loss to the respondent State rather than being absorbed internally by themselves. Even Ciarb's 2025 Guideline acknowledges that many investment arbitrations include financing that excludes the coverage of adverse costs, highlighting that after-the-event insurance can sometimes fill this deficit (Ciarb, 2025b, p. 46). These indicators are sufficient reason for tribunals to treat third-party funding as a relevant consideration when weighing an application for security for costs.

Another angle from which the risk of enforcement solidifies this argument: The Monteiro and Ferreira authors show that awards against states are never really sought to be recovered using the common attachable assets, but recovery is tough because of sovereign immunity, coupled with the commercial vs. sovereign distinction (Monteiro & Ferreira, 2019, pp. 203-206, 214-224). The tough recovery would lead to the funder taking an aggressive post-award stance or expecting higher returns. Perhaps such contentious state-related investment arbitration will not stop until it becomes wars of enforcement and controversy, as Ong et al. (2023, pp. 397-401) note. How funding decisions are made is described in Honlet's erratum and follow-up commentary on a decision in investment arbitration, showing how investment arbitration was made by procedural decisions not codified (Honlet, 2016, p. 254; Alhasan, 2025, pp. 3-5).

Drawing on comparisons of legal systems and procedural techniques also warns against simply transplanting practices: Pair states that uniformity in arbitration rules cannot iron out ingrained differences in culture, expectations, and how procedures are followed (Pair, 2002, pp. 57-59, 73). Kaneko and Inoue observe that third-party funding has scarcely taken root in Japanese arbitration, suggesting that Japanese investors might be at a tactical disadvantage if their adversaries are frequently using it (Kaneko & Inoue, 2024, pp. 86-87). Raffa, studying arbitration within Islamic traditions, similarly shows that enforcement is filtered through the localized perception of legality and justice (Raffa, 2014, pp. 2-4). The fast-track arbitration field offers a parallel cautionary lesson: these shortcuts in procedures can work only if they suit the nature of the disputes at hand and are balanced with the principle of fairness (Welser & Klausegger, 2009, pp. 259-262; Serbest, 2013, pp. 309-312).

Stemming from this theory, three conclusions have arisen. First, seeking access to justice through third-party funding is a legitimate motivation that cannot and should not justify covert manipulation of the course of proceedings. Second, the public dimension of investor-state arbitration should not be reduced or disguised with private law concepts such as party autonomy. Third, control must be at the center of effective regulation that concerns uncovered adverse cost risks and the openness of any outside financial involvement. The regulatory framework proposed below sets forth a control-oriented set of responses aiming to allow legitimate cases where financing is needed and, conversely, to prevent opacity stemming from third-party funding, its strategic use, as well as the transfer of asymmetrical risk onto states/respondents.

2. RESULTS

The outcome is a model that is an original version of a control-and-risk model rather than a general endorsement or criticism of funding. According to the presented model, funding only raises problems when one of the two thresholds is passed, which is either the control threshold, according to which the funder has the right to modify or use a substantial decision, or the risk threshold, according to which such a funding arrangement creates a reasonably predictable situation where downside-cost risk or continuance risk remains beyond the funded party's scope. Thresholds applied at the remaining five points result in six tools of regulation, indicating for each trigger: proof that needs producing, the response of the tribunal, and proportionality safeguard.

The **first** result is that third-party funding rises in prominence at the governance stage, shifting away from finance alone. Five points were identified for this switch to occur: case selection, budget allocation, authority to settle, appointment influence, and strategy of enforcement. This aligns with the Ciarb Guideline's acknowledgement of funder involvement in settlements, candidate selection (both tribunal and experts), and other strategic matters. Earlier research already had voiced worries about conflicts of interest, cost control issues and problematic procedural management between the funded party, its lawyers and the funding body (Park & Rogers, 2014, pp. 2-4; Qtiashat & Qtaishat, 2021, pp. 352-354; Ciarb, 2025b, p. 50; Monteiro & Ferreira, 2019, pp. 203-206).

Secondly, investor-State arbitration warrants a more cautious regulatory approach than ordinary commercial arbitration. This is not because States ought to be free from legal challenges. Instead, funded actions against them are not primarily private in terms of cost; they can also involve significant expenses borne by public entities through arbitration, pressure to adopt lenient regulatory policies, a decline in reputation, and a complicated process to obtain post-arbitral payments from assets that are tied up with government entities. This result builds upon the assetization criticism of suits against governments, while also referencing literature on sovereign enforcement risk that explains how conflicts with outside third parties can produce public issues beyond the private relationship between the investor and the State (Davitti & Vargiu, 2023, pp. 490-496; Monteiro & Ferreira, 2019, pp. 214-224; Ong et al., 2023, pp. 389-396).

The **third** result is that disclosure should be mandatory but staged. First, parties should have to disclose the funding's existence, who is providing it, who is controlling it, and whether payment is contingent on outcomes. This provides crucial notice to ensure arbitrators can check for conflicts and general fairness. Then, if there is a live procedural issue (e.g., security for costs, settlement authority, confidentiality, arbitrator challenges, cost allocation), the tribunal should be allowed to inspect only the specific clauses necessary to resolve it. This compromise offers many of the benefits of more disclosure-focused approaches without creating excessive administrative burdens or inviting potentially premature examination of irrelevant parts of an entire contract (Kadarisman, 2019, pp. 107-108; Sahani, 2021, pp. 34-36; Ciarb, 2025a, pp. 17-19; Ciarb, 2025b, pp. 60-61; Davitti &, Vargiu, 2023, p. 499).

The **fourth** result relates to security for costs. Three conditions should lead to a rebuttable presumption that security for costs will be ordered:

1) the claimant relies on funding;

2) the funding arrangement does not protect against adverse costs or provide equivalent security; and

3) the claimant is unable to satisfy adverse costs.

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This proposal attempts to meet Shao's key concern about unilateral risk transfer while preventing it from unduly prejudicing deserving parties; the rebuttal presumption should mean that the default in cases where there are few protections is a form of security for costs (Shao, 2021, pp. 427-431, 440-442). It aligns, broadly, with the idea that the transparency offered by disclosure alone cannot address the financial risk raised by adverse cost exposure for a funded claimant (Kadarisman, 2019, p. 108; Ciarb, 2025b, p. 46).

The fifth finding is a six-component framework. First, parties must disclose the existence, identity, beneficial control, and outcome-dependent character of material external finance. Second, tribunals may compel targeted production of a clause only where a live procedural issue makes it relevant. Third, the funded party should certify that committed capital is sufficient for a reasonable duration scenario and is segregated or otherwise protected from unrelated withdrawals. Fourth, the cumulative conditions identified above should trigger a rebuttable presumption of security for costs. Fifth, the funding agreement should preserve client primacy over legal instructions and settlement, while permitting consultation and objective budget monitoring. Sixth, a respondent should disclose material external finance or indemnification where the financier possesses comparable strategic influence. These components convert the control model into a replicable sequence while avoiding routine supervision of funder pricing or business strategy. These six components also incorporate findings about security for costs from an analysis by Shao and facts about external financial influence, illustrated by the example involving ATA Construction case, which shows that this influence exists for the respondent as well (Dingwall & Haeri, 2010, p. N34; Shao, 2021, pp. 440-442; Ciarb, 2025a, pp. 17-19, 39, 46, 50; Ciarb, 2025b, pp. 60-61).

The **sixth** result is concerned with procedure. Issues related to third-party financing should be discussed early. An abbreviated preliminary conference for the funding dispute could be held for the specific reason of determining issues of disclosure, confidentiality, possible conflicts of interest, and security for costs. Such a conference would, by necessity, result in funding issues being decided separately but would only marginally hinder an arbitration case. Such proceedings will be more efficient, much in the same way that recent research suggests that the value of early procedural intervention in modern litigation practice lies in its tying to real disputes that need resolution (Welser & Klausegger, 2009, pp. 259-262; Serbest, 2013, pp. 309-312; Kadarisman, 2019, pp. 107-108).

The results clearly show that such a control model is neither exclusively anti-funding nor unrestricted. The model accommodates the functional benefits of funding, provided it avoids serving as secret administration. Similarly, it allows for confidentiality without it functioning to hide material procedural influences or even being granted access under a false pretense.

The financial contribution from the model is limited but concrete. Funders' price on spending is not to be prescribed, nor can there be an acceptable return multiple that is commercially fair. The paper instead asks three relevant balance-sheet questions from an arbitral sense: who funds the expected spending, who covers for adverse-cost risk, and whether committed capital remains available for continuation through the proceeding. By tying such financing variables back to disclosure, commitment to the capital, and security on costs, the framework resolves risk allocation and continuance without condemning funding on its part.

3. DISCUSSION

The findings should be distinguished from the literature review. Their purpose is to explain how the proposed model confirms, qualifies, or departs from earlier approaches. The model agrees with access-to-justice scholarship that funding can make the unaffordable claim possible but rejects the implication that access alone solves any questions of control, even if it alleviates. Similarly, funding does not in itself make the problem of adverse-cost exposure go away. The model accepts the assetization critique to the extent to which claims are modelled as contingent investments but rejects the inference that all-profit driven arrangements are abusive. Material influence and externalized downside risk are the decisive regulatory thresholds.

Indeed, the findings partially concur with and partially refine existing findings. They lend credence to the access to justice explanation, as funding permits claimants to start proceedings otherwise barred by prohibitive arbitration costs, a crucial concern when the expense prevents one from bringing a meritorious claim (Shao, 2021, pp. 427-429; Kandavel & Srinivas, 2020, pp. 1138-1142; Qtiashat & Qtaishat, 2021, pp. 341-343). At the same time, the findings reflect the assetization critique, showing that funding helps ensure funded investment arbitration cases brought against states become investable financial products geared more toward earning profits than simply vindicating rights (Davitti & Vargiu, 2023, pp. 488-496). This paper distinguishes itself from this literature by connecting both accounts to the more operationally relevant question of control, another factor already raised in institutional guidelines about funder influence over settlement, counsel, experts, and the process itself (Ciarb, 2025b, p. 50).

Disclosure by itself, therefore, proves insufficient. Earlier disclosure literature is accurate in highlighting conflicts and tribunal independence but only addresses the most superficial form of conflict. It does not explain whether negative costs will be covered, whether a settlement must be approved by a funder, what constraints exist about the choice of counsel, or if an ability to cancel would pervert strategizing. Thus, support is given to the phased approach in which basic disclosures would combine scrutiny over terms that determine how the procedure runs, how costs work and who has control (Kadarisman, 2019, pp. 107-108; Sahani, 2021, pp. 34-39; Qtiashat & Qtaishat, 2021, pp. 352-354; Ciarb, 2025a, pp. 17-19; Ciarb, 2025b, p. 50, pp. 60-61).

Furthermore, the question of security for costs may be clarified. Blanket security demands for all sponsored claims could stifle meritorious lawsuits and undermine legal access by preventing poorer parties from seeking damages or remedies. Nevertheless, dismissing funding altogether might leave States vulnerable in a setup where both the funder and the claimholder benefit from winning, but the State suffers uncompensated defense expenses if the suit is unsuccessful. A disputable presumption seems the most fitting compromise between preserving access and ensuring fairness. It addresses concerns solely when funding is present, potential adverse costs are inadequately covered, and the claimant is seemingly without means (Shao, 2021, pp. 427-431, 440-447; Kadarisman, 2019, p. 108; Ciarb, 2025b, p. 46).

The proposed framework departs from laissez-faire because it acknowledges that arbitral processes are subject to their contractual nature when arbitration procedures are implicated. Likewise, it distinguishes itself from restrictive models by refraining from labeling funding as inherently corrupt or illicit. This approach is targeted, focusing on bringing to the procedural forefront only those terms and relationships relevant to resolving issues about conflict, liability for costs, settlement strategy, the funder's capital reserve adequacy, and control over claim direction. This response acknowledges the multifaceted nature of regulation, as detailed by Sahani, without undermining the beneficial role of funding in facilitating access to justice, which is well - documented in the access to justice literature (Sahani, 2021, pp. 36-39; Shao, 2021, pp. 427-429; Ciarb, 2025a, p. 17, 19, 39, 50).

These are reasons why results arise specifically in investor-State arbitration. The costs incurred by the State respondent are public, the dispute may often relate to a regulatory issue falling under the responsibility of the State toward the wider public, the enforcement of any award against the State may meet issues of sovereign immunity or the unavailability of state assets, whereas a funder's expected return is solely private. Therefore, the legal rule and principles deemed acceptable or desirable in a purely commercial dispute may well be considered unsuitable for an investor-State arbitration and may therefore counsel in favor of not lightly adopting rules derived from different contexts (Davitti & Vargiu, 2023, pp. 490-496; Wang, 2021, pp. 1-4, 23-27; Monteiro & Ferreira, 2019, pp. 203-206, 214-224).

The limitations of this study must also be acknowledged. It is a theoretical study relying on doctrine but is not an empirical study based on measuring outcomes. The extent to which funders affect case outcomes, e.g., in settlements or the enforcement of awards, has not been empirically measured, and neither the economic extent to which funding influences the behavior of

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States in dispute settlement nor the prevalence of each possible model of funding as outlined earlier are provided by hard data or figures. Future studies based on concrete case law, disclosed funding arrangements, decisions relating to security for costs, and rule changes adopted by arbitral institutions might be useful for shedding further light on these questions. At present, regulation is still patchy among different jurisdictions and arbitral institutions.

So what would be a viable policy framework for future funding and control in investor-State arbitration? Arbitral institutions could develop and adopt standard rules that include initial mandatory disclosure and empower arbitral tribunals to inspect key provisions when such scrutiny is required in the case. Arbitral tribunals could hold an early case management conference or meeting for parties and discuss any potential funding arrangements that might cause delays in the proceedings. In drafting such funding arrangements, funding agreements should expressly stipulate and ensure client primacy in decision-making, guarantee the adverse cost protection available under the applicable investment law or contract, and show the funder's adequate funding capacity to cover costs.

CONCLUSION

This study's objective has been to create a control-based model controlling third-party funding of investment arbitration. It started with an obvious and relevant point of analysis: who actually drives the claim? It is far from given that the investor and its lawyer drive every claim. Funds can indeed dictate aspects such as case selection, budgeting, settlement and award negotiations, arbitral tribunal selection, and even strategy concerning the enforcement of the award. Once the funder's influence over a case is material, then that funder has legal/procedural relevance in arbitrations, even though it is not a legal party to the arbitration.

As a result, three conclusions were made:

1) A simplistic A vs. B framing exercise should not be adopted between, on the one hand, access to justice and, on the other hand, the commodification of arbitration. Access may still be preserved where arbitration, although influenced by funders, is used to address cases that otherwise could not be heard;

2) Disclosure is essential and should be applied stage-wise. Tribunals should have the funder's identification details at the early stage of proceedings and information on the controlling individuals or entities behind the fund. Further information is only required where specific aspects of a funding contract become relevant to procedural matters being considered by the tribunal. Beyond that, it should not be open to inspection by the parties; and

3) Tribunals should consider security for costs with greater urgency where an arbitral claim has been funded by an investor who is not financially in a position to cover an adverse costs award and the funding contract doesn't protect the investor and other party from the risk of unrecoverable legal costs.

The proposed framework that the study sets out comprises six elements: initial disclosure, disclosure triggered on material clauses, a capital adequacy and ring-fencing certification, a rebuttable presumption of security for costs, the protection of client-advocate privilege, and symmetrical disclosure of significant respondent-side external financing. The framework aims not to obstruct the financing of legitimate investment disputes. Instead, it is intended to stop the behind-the-scenes political control that can result from the provision of secret financial influence behind public law arbitration forums.

Investment arbitration is doomed to failure unless it continues to accept the dominance of powerful commercial non-party actors behind closed doors in deciding arbitral claims, just as it is doomed to be seen as unfair if it stigmatizes all funded disputes. The alternative should be one based on selective and carefully drawn visibility: support is good and should be welcomed where it means the provision of capital. Control should not be.

The article concludes by noting the need to ensure transparency in the control of the procedure or some downside risks where this is important to ensure fairness, continuity, or consideration of public costs of arbitration proceedings.

AUTHOR CONTRIBUTIONS

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