

AGAINST DISCLOSURE

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ABSTRACT

In response to the development of international markets, business transactions, in general, have become transnational,¹ and so have the disputes arising therefrom.² International arbitration has become the principal forum for deciding these disputes. However, it can exact considerable monetary costs that may pose risks to the structural balance of arbitration. Alternative mechanisms have been developed accordingly to alleviate these risks, including “Third-Party Funding” (“TPF”).

Recently, the International Centre for Settlement of Investment Disputes (“ICSID”) approved amendments to govern the disclosure of TPF. Under these amendments, ICSID would mandate disclosure of the existence and the identity of any funders and would give discretion to arbitrators as to the extent of TPF disclosure based on necessity and relevancy.³ These amendments would effect a major change in traditional funding practice. Funders decry the disclosure of funding materials, but disclosure would also be at odds with arbitrators’ duty of impartiality, which promotes a neutral decision-making process free from external influence.

This Article discusses the impacts of TPF disclosure on arbitrator decision-making. Part I proceeds with an introduction of TPF as a way to fund arbitration. Part II discusses arbitrators’ decision-making process,

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¹ Although there might be a distinction between the words “transnational,” “international,” and “global” from an economic perspective, these terms will be used interchangeably in this Article, unless otherwise indicated.

² Even domestic business transactions consider the transnational dimensions of these transactions, especially with the computerization and advancement of telecommunications. See William S. Fiske, *Should Small and Medium-Size American Businesses ‘Going Global’ Use International Commercial Arbitration?*, 18 *TRANSNAT’L L.* 455, 465, 470 (2005).

³ Int’l Ctr. Settlement Inv. Disputes, *Proposals For Amendment of the ICSID Rules*, 37, 37-38 (ICSID, Working Paper No. 4, February 2020) [hereinafter ICSID Amendment Proposals, Working Paper No. 4], https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf [<https://perma.cc/FV9P-HV89>].

(1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding (‘third-party funding’) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding . . . if it deems it is necessary at any stage of the proceeding.

Although some states have requested more comprehensive disclosure rules that include the details of TPF agreements—such as the authority to settle or liability for adverse costs—these requests were not granted. This type of in-depth information was not included in order to provide tribunals with discretion to decide disclosure issues when they deem it necessary according to their inherent authority established in Article 44 of the ICSID Convention. *Id.* at 295.

addressing the cognitive illusions that the disclosure of TPF may create. It analyzes the five components of cognitive bias: (1) framing, (2) hindsight bias, (3) anchoring, (4) representative heuristics, and (5) egocentric bias. Part II also considers arbitrators' approaches to security for costs orders in light of the existence of TPF. Part III advocates against disclosure by citing the impacts of the cognitive illusions that TPF may cause on the arbitrators' decision-making power. Part IV concludes.

I. INTRODUCTION

Arbitration has become the principal alternative forum for national courts. It has come to be the “coin of the realm, first among equals.”⁴ The efforts of arbitration users, aided by longstanding reputable institutions, to make arbitration a viable alternative to commercial litigation have led to the development of international arbitration as a private consensual justice system with an autonomous legal order.⁵ Still, arbitration has taken on many features traditionally associated with litigation. TPF is no exception.⁶ Simply put, TPF introduces into the dispute an outside party with no prior interest in the matter, who offers financial services to help a claimant initiating, continuing, or completing an arbitration proceeding.⁷ In return, this funding party receives a portion of the arbitral award or settlement but also assumes the risk of receiving nothing if the claim is unsuccessful.⁸ TPF has become an important fixture of international arbitration. Similar to its “public

⁴ Jack J. Coe Jr., *Planning for International Disputes (and What Makes Them Distinctive)*, 5 PEPP. DISP. RESOL. L.J. 385, 387 (2005).

⁵ Although the structure of authority in the international arbitration field is non-hierarchical and pluralistic, the regime has gradually acquired the properties of a stable legal system. ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 1* (Oxford Univ. Press 2017).

⁶ See, e.g., Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 BOND L. REV. 225 (2007); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 87–88 (2008); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Carolyn B. Lamm & Eckhard R. Hellbeck, *Third-Party Funding in Investor-State Arbitration: Introduction and Overview*, in DOSSIER X: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (B. Cremades and A. Dimolitsa, eds., 2013); Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1665 (2013); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861 (2015); Maria Choi, *Third-Party Funders in International Arbitration: A Case for Protecting Communication Made in Order to Finance Arbitration*, 29 GEO. J. LEGAL ETHICS 883 (2016).

⁷ Recently, TPF has undergone a dramatic development. A 2015 Queen Mary survey reflects how quickly the use of third-party funding is growing compared to other financing mechanisms. The survey found that

39% of the respondent group have encountered third[-]party funding in practice; 12% have used it themselves and 27% have seen it used. This data suggests that its use is relatively widespread compared to, for example, insurance products for respondents in international arbitration. Only 15% of the respondent group have encountered such insurance products in practice; 3% have used them and 12% have seen them used.

PAUL FRIEDLAND & LOUKAS MISTELIS, *INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION* 45 (2015); U.N. Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Third-Party Funding*, Note by the Secretariat, ¶¶ 6–7, UNCITRAL Working Group III, U.N. Doc. A/CN.9/WG.III/WP.157, (Jan. 24, 2019) [hereinafter UNCITRAL Working Group III].

⁸ The scope of funding may cover legal fees and other out-of-pocket costs (such as expert fees, arbitrator fees, arbitral institution fees, and discovery-related fees) relating to the arbitration or reach beyond the arbitration costs to cover the costs associated with subsequent enforcement or annulment proceedings. It may also cover a single claim or a portfolio of claims. See Trusz, *supra* note 6.

cousin,”⁹ litigation, international arbitration exacts considerable monetary costs, particularly in complex disputes. In an arbitration, these costs may benefit the party with better financial resources, regardless of the merits of the dispute.¹⁰ Given how expensive the process is,¹¹ many proposals have been introduced to save time and costs associated with arbitration.¹² TPF may enable the less funded party to survive its war of attrition against the better funded one.¹³

Because arbitrators have become “guardians of the international commercial order,”¹⁴ it is important to determine how they decide disputes funded by third parties and, more specifically, whether they can be fair from legal and nonlegal perspectives. Arbitrators’ decision-making cannot be influenced by factors of which they are not aware. The least problematic scenario is where arbitrators freely decide a dispute with non-disclosed TPF. Here, an arbitrator does nothing to prejudice the funded claim or the opposing party’s position. Practice now dictates disclosure of at least the existence of TPF.¹⁵ Still, arbitrators may commence the proceedings neutrally and, upon disclosure of TPF, attempt to remain unaffected by its existence. However, arbitrators will inevitably be involved in one way or another with the funders. Arbitrators then may change their views on a matter in the time between pre-TPF disclosure and post-TPF disclosure.

Advocates of TPF disclosure are led by the analysis of conflicts of interest to exalt the idea of transparency because greater disclosure promotes a transparent adjudicative process. TPF may be seen as empowering the funded party, and disclosure may be seen as the process by which the funded party uses TPF to impact arbitrators rather than considering the conflict

⁹ Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness—Some Thoughts Concerning Arbitral Process Design*, 2 PEPP. DISP. RESOL. L.J. 53, 55 (2002).

¹⁰ A commonly used strategy in arbitration is that the dominant party overburdens and exhausts the weak party to deplete it of its money and compel it to settle the dispute, which may affect the right of access to justice.

¹¹ The high cost of arbitration has become one of the greatest disadvantages of this system. The average costs of arbitration in Investor-State Dispute Settlement (“ISDS”) cases were \$8 million as of 2012. See ORG. FOR ECON. CO-OPERATION & DEV. (OECD), REPORT ON GOVERNMENT PERSPECTIVES ON INVESTOR-STATE DISPUTE SETTLEMENT 8 (2012). The parties in just one case regarding mass claims spent almost \$40 million in legal fees alone. *Id.* Further, the average costs of legal counsels and experts constitute 82% of the total costs of the case, arbitrator fees average around 16% of the costs, and costs of the arbitration institutions in administered arbitration amount to about 2% of costs. *Id.*

¹² See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, ICC COMMISSION REPORT: CONTROLLING TIME AND COSTS IN ARBITRATION 6 (2012); UNITED NATIONS COMM’N ON INT’L TRADE L. (“UNCITRAL”), NOTES ON ORGANIZING ARBITRAL PROCEEDINGS 2 (2012).

¹³ Some arbitration disputes have become “wars of attrition in which the outcome may depend more upon which party is better financed than upon the merits of the dispute.” Coe, *supra* note 9, at 55. Other options to finance the claims of the parties include assignment of claims, success-based fee arrangements, insurance contracts, loans, or corporate finance instruments. As highlighted by Michelle Ainsworth, the Hong Kong Law Reform Commission’s Secretary, “a party with a good case in law should not be deprived of the financial support it needs to pursue that case by [a]rbitration and associated proceedings under the Arbitration Ordinance.” L. REFORM COMM’N H.K. (“LRC”), THIRD PARTY FUNDING FOR ARBITRATION 15–16 (2016).

¹⁴ JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 540 (1978).

¹⁵ For instance, on March 21, 2022, the International Centre for Settlement of Investment Disputes (“ICSID”) rules were amended to mandate the disclosure of TPF, including the name and address of the funder, to avoid conflicts of interest that may arise out of such financing arrangements. These amendments will come into effect on July 1, 2022. See Press Release, ICSID, ICSID Administrative Council Approves Amendment of ICSID Rules (Mar. 21, 2022), <https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules> [<https://perma.cc/UZ54-DRCY>].

check. The very fact that disclosure is needed to resolve the conflict of interests signifies a breakdown in the arbitrators' decision-making power. No one seems to acknowledge this but nonetheless hope that arbitrators remain unfettered by the knowledge of TPF in their decision-making. Disclosure is a truce more than a tool for curbing conflicts of interest, but it seems preferable even though it adversely impacts arbitrators' decision-making process.¹⁶

This account of disclosure rests on questionable premises. Disclosure as a general practice should not be evaluated solely through the conflicts-of-interest analysis nor practiced on a wholesale and indiscriminate basis. Disclosure should be viewed as highly problematic and treated in a way that streamlines arbitrators' decision-making powers. TPF is the civil analogue of expert opinions. A funder's evaluation of a dispute may subconsciously affect arbitrators in their decision-making process. The absence of a mechanism for appealing arbitrators' decisions renders subsequent remedies for any abuse of their decision-making powers troublesome. Although TPF disclosure may trim the conflict-check analysis by revealing any potential or existing conflict between the external funders and the arbitrators,¹⁷ justice still may not be done, given the effects TPF disclosure has on arbitrators' decision-making process. TPF disclosure can influence the members of the tribunal to steer into a particular decision based on the mere existence of TPF or its scope. As a result, disclosure would resolve the issue of conflict but fall short of eliminating the other adverse uncertainties it may generate.

II. ARBITRATOR DECISION-MAKING

In principle, the quality of the arbitration regime depends on the quality of the decisions that arbitrators make¹⁸ as human beings.¹⁹ Understanding an arbitrator's decision-making process is crucial to understanding the outcome

¹⁶ See Letter from Cory L. Andrews, Wash. Legal Found., to United States Dist. Ct. for the Dist. of N.J., in support for the Proposed Local Civil Rule 7.1.1. Disclosure of Third Party Litigation Funding (May 13, 2021) <https://www.wlf.org/wp-content/uploads/2021/05/WLF-Letter-Re-Proposed-Local-Civil-Rule-7.1.1.pdf> [<https://perma.cc/BHR4-RHNF>]. The letter noted that,

TPLF disclosure also would provide important information for any court navigating the questions of undue burden and cost in discovery disputes. The justification for producer-subsidized discovery to meet the proportional needs of an ordinary citizen plaintiff falls away when an institutional investor funding a portfolio of cases for profit is effectively a real party in interest. Adopting proposed Local Civil Rule 7.1.1 will put the Court in the legal mainstream and advance the goal of greater transparency.

Id. See also Mark Popolizio, *Third-party litigation funding in 2022 -- three issues for your radar*, VERISK ANALYTICS (Jan. 31, 2022), https://www.verisk.com/insurance/visualize/third-party-litigation-funding-in-2022----three-issues-for-your-radar/-_cdn21 [<https://perma.cc/9SST-J9XY>].

¹⁷ See generally Trusz, *supra* note 6.

¹⁸ On judges' decision-making process, see generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

¹⁹ For a relevant discussion, see Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 67 (1983) ("Judges are like the rest of us. They interpret and they make law. They do so in a niche, and they have expectations about their own behavior in the future and about the behavior of others"); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 858–59 (1988) (noting that

legal reasoning is not a branch of exact inquiry in an interesting sense It is for the most part a branch of practical reason, and the methods of practical reason that it uses are the same rough tools that we use in coping with everyday life. There is no distinctive methodology of legal reasoning.)

of a particular case with the existence of TPF.²⁰ Although arbitrators enjoy broad discretion in conducting proceedings, they have an obligation to be impartial.²¹ Arbitrators are less likely to be fully impartial in the case of conflicts with third-party funders.²² In analysis, a potential conflict of interests should not be based merely upon the existence of TPF but, rather, on an objective standard through which an arbitrator may reasonably be influenced by the existence of external funding.²³

Commonly, the existence of TPF can be disclosed without raising any issues.²⁴ Somewhat more complicated is the scope of TPF disclosure, which creates a risk of informational asymmetries between the parties and the arbitrators. No doubt arbitrators presumptively make their own decisions after warily canvassing the detailed and complicated records, an action which would reflect a high level of accuracy in their decision-making.²⁵ However, arbitrators, no matter how experienced and well-trained, occasionally make mistakes.²⁶ These mistakes may be systematic errors that the public would expect arbitrators to avoid.²⁷ For instance, imagine a

²⁰ As Jerome Frank stated about judges' decision-making process, if a judicial decision is "based on the judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches makes the law." JEROME FRANK, *LAW AND THE MODERN MIND* 104 (1930).

²¹ NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 269 (6th ed., 2015).

²² In disclosing the arbitrator's equity ownership with the funders, it has been said that the concentrated effect of funding on a claim suggests that TPF in the aggregate creates a higher risk of bias than equity investments at the same level. CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* para 5.101 (2014).

²³ If an arbitrator has a personal interest in the outcome of a dispute, the parties may call his independence into question. See ICC INT'L CT. ARB., NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION 6 (2021) <https://icewbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration> [<https://perma.cc/9HQ6-GHQM>].

²⁴ In *Infinoto Gold Ltd. v. Costa Rica*, when the claimant informed the tribunal of its funding agreement with Vannin Capital, the tribunal found that the arrangement did not create a conflict, and the respondent did not object to the tribunal's decision. *Infinoto Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, ¶¶ 30–31 (Dec. 4, 2017); see also *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL Award, ¶ 127 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf [<https://perma.cc/3FV5-9FF6>] ("It is undisputed that Claimant is being assisted by a third[-]party funder in this arbitration proceeding. The Arbitral Tribunal has mentioned this fact in its Procedural Order Nos. 6 and 7. However, this fact has no impact on this arbitration proceeding.").

²⁵ This is manifested by the requirement of reasoned awards in arbitration rules. *E.g.*, INT'L CHAMBER COM., 2021 ARBITRATION RULES, art. 32(2) ("The award shall state the reasons upon which it is based"); INT'L CTR. FOR SETTLEMENT INV. DISPS., ICSID CONVENTION, REGULATIONS, AND RULES, art. 48(3) ("The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based"); INT'L CTR. FOR SETTLEMENT INV. DISPS., ICSID CONVENTION, REGULATIONS, AND RULES, art. 47(1) ("The award shall be in writing and shall contain: . . . (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based").

²⁶ In general, few studies have been conducted on the decision-making process. *But see* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994). Arbitrators, as judges of facts and law, may be compared to trial court judges. Most of the empirical studies that have been conducted on judicial decision-making have focused on appellate judges, not trial court fact-finding. *See, e.g.*, John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 HASTINGS L.J. 1491 (1998) (expressing disappointment regarding the little literature on trial court fact-finding); Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 980-83 (1994) (studying the incidence of egocentric bias on bankruptcy judges and lawyers); Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 776 (1999) (analyzing the factors that contribute to judges' assessments of damages and the severity of injuries).

²⁷ Generally, arbitrators should be accurate in their determinations. Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307 (1994) ("Even if precise quantification of various benefits of accuracy is impossible, decision-making will be enhanced by

situation in which an arbitrator considers TPF as an element in deciding an application for relief by either party. In practice, however, arbitrators and funders evaluate claims that involve similar facts or law. By definition, arbitrators are asked to evaluate and decide claims that were evaluated before by a neutral third party, namely the funder. What is a sitting arbitrator in this situation to do? It is facile to go on about intricate webs of legal issues and TPF considerations that arbitrators supposedly must disentangle. Like any process, TPF may create a cognitive bias in the arbitrators' decision-making process and ultimately affect the fairness of the arbitrators' decision. That effect would lend itself particularly well to certain situations, well enough to some arbitrators, and not at all to many others.

Cognitive illusions identify the predictable errors that arbitrators may commit in processing the information in their minds.²⁸ The systematic errors in arbitrators' decisions may result primarily from these cognitive illusions.²⁹ Of course, cognitive illusions are not the only factors that may influence arbitrators' decision-making. However, the influence of cognitive illusions may, with other factors, adversely impact the decision-making process—an impact that would be too challenging to be negligible. Therefore, it is equally important to understand how arbitrators think, both rationally and irrationally, and whether knowledge of TPF may change their minds, predictably or unpredictably, during a dispute.³⁰ There are no guarantees against the impact of cognitive illusions. Arbitrators may depart from their duty of neutrality if they fall prey to the cognitive shortcuts that TPF may create. As such, TPF disclosure may affect an arbitrator's final decision if the disclosure alters the arbitrator's evaluation of the parties' arguments, the arbitrator's belief about the chances of one party prevailing over another, or even the damages amount the arbitrator would have otherwise granted a party. Reality is more complex. Despite the absence of empirical evidence, arbitrators often make decisions under conditions of uncertainty and time constraints³¹ that may push them to rely upon cognitive or mental shortcuts.³²

Although arbitrators may follow various schools of thought in deciding cases,³³ the existence of an external funder creates cognitive bias that may

understanding why accuracy may be desirable"). Normally, an appeal is the regular response to systematic errors. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUDS. 379 (1995) ("[T]he appeals process allows society to harness information that litigants have about erroneous decisions and thereby to reduce the incidence of mistake at low cost"). However, in arbitration, there is no appellate mechanism that helps in correcting arbitrators' factual errors.

²⁸ Humans may have different approaches to information processing. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1124–31 (1974) [hereinafter Tversky & Kahneman, *Heuristics and Biases*] (heuristics are patterns of thinking in which the brain constructs mental shortcuts to process information in an efficient manner).

²⁹ Guthrie et al., *supra* note 18, at 778 (explaining that people frequently "fall prey to cognitive illusions that produce systematic errors in judgment").

³⁰ *Id.* at 821 (analyzing some decisions that manifest the impact of the cognitive illusions including the *res ipsa loquitur* doctrine that appears to be a product of overreliance on the representativeness heuristic and the prudent investor rule on cases of trustee liability which was a product of the hindsight bias and concluding that the "motivation, detail, and resources that judges have available in deciding cases do not necessarily enable them to avoid the effects of cognitive illusions").

³¹ The average duration of an LCIA arbitration is sixteen months. LONDON CT. INT. ARB., LCIA RELEASES COSTS AND DURATION DATA 5 (2015).

³² Nevertheless, without empirical evidence, the assertion that cognitive illusions affect arbitrators remains mere conjecture.

³³ See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (discussing the behavior of judges using a "model in which judicial utility is a function mainly of income, leisure, and judicial voting"); see also Edward L.

generate consistent and predictable mistakes on the part of the arbitrator.³⁴ It is difficult to design a framework that effectively reconciles the desire to issue awards unfettered by TPF with the competing desire to use TPF, all while preserving the fundamental principles of arbitration, namely justice and efficiency. Taken together, faith in the disclosure of TPF begins to seem somewhat misplaced. Still, if certain basic assumptions about human reality are considered, the risks that TPF may pose on arbitrators' decision-making become obvious. These risks will now be explored.

A. TPF COGNITIVE ILLUSION

Human minds are “intricate evolved machine[s],” and their evolution may guide behavior.³⁵ The art of persuasion “requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change.”³⁶ With the advancement of sociological jurisprudence³⁷ and behavioral decision theory,³⁸ discussion about the psychological impact of TPF on decision-makers, which often escapes the attention of arbitration users, has become indispensable.³⁹ Arbitrators consciously orient their approaches to disputes using different ideologies. Some arbitrators are textualists, others are contextualists, and some others adopt a mix of both approaches.⁴⁰ Moreover, arbitrators vary how they interpret the existence of TPF in an arbitration setting.

Humans generally have a “heuristics and biases” approach to information processing.⁴¹ Heuristics involve essential elements of information processing and may create biases.⁴² For arbitrators, arbitration rules often employ an objective standard to assess the independence and impartiality of the arbitrators.⁴³ However, the arbitrators' bias may be too

Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

³⁴ Similarly, psychologists may exhibit hindsight bias. Hal R. Arkes, David Faust, Thomas J. Guilmette & Kathleen Hart, *Eliminating the Hindsight Bias*, 73 J. APPLIED PSYCHOL. 305, 306-07 (1988).

³⁵ Bret Rappaport, *A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts by Constraining Writers' Choices and Influencing Readers' Perceptions*, 22 J.L. & POL'Y 197, 217-18 (2013).

³⁶ Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 412 (2006).

³⁷ FRANK, *supra* note 20.

³⁸ Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1501 (1998).

³⁹ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1053 (2000) (arguing that one can understand human behavior better through behavioral and sociocultural theories than through rational choice theory).

⁴⁰ Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 519-23 (2017) (describing the implications of legal interpretation for lawyers, businesses, and judges and explaining the two approaches that dominate legal interpretation: textualist and contextualist). Textualists focus primarily on the plain meaning of language, while contextualists consider a wider array of information outside the text of an agreement in order to comply with the parties' intended purpose. *Id.* at 519.

⁴¹ Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28, at 1124-31.

⁴² *Id.* at 1124-26, 1128, 1131.

⁴³ See, e.g., UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2013), art. 11, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> [https://perma.cc/GF6V-XUS7] [hereinafter *UNCITRAL Arbitration Rules*] (providing for an objective standard

difficult to be assessed by an objective standard. Hence, arbitrators may be poorly equipped to measure the impact of the existence of TPF on their assessment of a case.

Funders apparently have a baseline preference for not disclosing funding arrangements because they suspect that disclosure would adversely influence arbitrators and may lead to “frivolous defen[s]es,” which may, in turn, increase the costs of proceedings.⁴⁴ Arbitrators may have sufficient knowledge of irrelevant facts and circumstances so as to increase the likelihood that they would be influenced by factors other than the underlying merits of the dispute.⁴⁵ Although the comparative financial powers of the parties should not generally be considered in deciding the dispute,⁴⁶ this may not be adhered to when it comes to TPF.⁴⁷ Disclosure of TPF may prompt arbitrators to overstep the jurisdictional phase without fully considering the jurisdictional objections, based on the fact that the funder has objectively vetted the case. Normally, judges utilize some assessment mechanisms before reaching the merits of the underlying dispute, such as dismissing a case based on a plaintiff’s failure to state a claim or granting a summary judgment motion.⁴⁸ In some of these cases, judges ask whether the plaintiff would prevail if the facts claimed were true. In summary judgments, judges may grant a motion where the evidence is extremely one-sided.⁴⁹ Disclosure of the existence of funders may imply to arbitrators that a case is extremely one-sided. Therefore, arbitrators might consider whether a claimant would prevail merely because a third-party funder has assessed the facts and concluded that the plaintiff would prevail. This Section now proceeds by analyzing (1) arbitrators’ approaches and (2) their cognitive biases.

1. Arbitrators’ Approaches

The decision-making process is subject to external and internal factors. While external factors include influences such as cultural and social factors, internal factors include a decisionmaker’s personal intuition of what is a fair and proper outcome,⁵⁰ as well as the players’ behavior. Arbitrators should decide disputes with a complete regard for legal conventions, despite the potential influence of their subconscious views. Nevertheless, the system of legal rules still allows for nonlegal factors to contribute to arbitral decision-making.⁵¹ Even if the decisions of the arbitrators turn out to be identical,

to assess the independence of the arbitrators by relying on “justifiable doubts” standard of the circumstances that may likely cast justifiable doubts on the arbitrator’s independence or impartiality).

⁴⁴ Maxi Scherer, Aren Goldsmith & Camille Flechet, *Third Party Funding in International Arbitration in Europe: Part I—Funders’ Perspectives*, 2 INT’L BUS. L. J. 207, 218 (2012).

⁴⁵ INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, 5, (2014) (“An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.”).

⁴⁶ *Cherry v. Champion Int’l Corp.*, 186 F.3d 442, 448 (4th Cir. 1999).

⁴⁷ Scherer et al., *supra* note 44, at 218.

⁴⁸ FED. R. CIV. P. 12 (Motion to Dismiss); FED. R. CIV. P. 56 (Summary Judgment).

⁴⁹ *Payne v. Orton*, No. 1:14-CV-00144, 2016 WL 5404635, at *13 (M.D. Tenn. Sept. 27, 2016) (“The inquiry on a summary judgment motion or a directed verdict motion is the same: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’”).

⁵⁰ Cf. Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. 35, 36 (2004).

⁵¹ Brian Z. Tamanaha, *A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications*, 75 FORDHAM L. REV. 1255, 1258 (2006) (“[I]n a subset of cases the legal

delving more deeply into the reasoning behind their decisions may reveal a divergence in their legal reasoning given their distinguished orientations.

i. Arbitrators: Conventional v. Liberal

Given that identical outcomes do not necessarily reflect equivalent reasoning, an analysis of an arbitrator's impartiality concerning the existence of TPF is always required.⁵² This analysis is significant for two reasons.⁵³ First, arbitrators in the same tribunal may utilize different approaches to the existence of TPF,⁵⁴ as reflected in their dissenting or assenting opinions.⁵⁵ This factor may impact the process and the outcome of the dispute or even the continuity of the funding arrangement. In *RSM v. Saint Lucia*, it was noted that the claimant's funding was terminated because the party-appointed arbitrator, who was blatantly opposed to TPF, remained on the tribunal, even after the challenging request, that was filed to disqualify that party-appointed arbitrator from the tribunal due to his opposing views on TPF, was denied.⁵⁶ The respondent alleged that terminating the funding arrangement to the claimant was the reason why the claimant did not provide security for costs in that dispute.⁵⁷ Second, tribunals' decisions have recently become seminal references for future tribunals, which creates a hidden force of implied precedents.⁵⁸ For instance, the tribunal in *RSM v. Grenada* declared an insufficient lack of assets to order security for costs by relying on the decisions in *Lihananco Holdings Co. Ltd. v. Turkey* and *Casado v. Republic of Chile*.⁵⁹ Therefore, the rationale of one tribunal on TPF may impact other tribunals.⁶⁰ The parties' behaviors may also influence how issues are decided. For instance, one tribunal denied a security for costs application because the claimants did not avoid any previous cost awards or

rules are so completely open that a decision requires that a judgment be made based upon nonlegal factors. Note the realism of these conditions, which deny a mechanistic view of judicial decision[-]making.”).

⁵² See, e.g., *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Provisional Measures (Apr. 12, 2017) (comparing the facts and circumstances of the dispute to the ones in *RSM Prod. Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10).

⁵³ As a threshold matter, the issue here is not the funding of a project that later became subject to a dispute but, rather, the funding of the arbitration of the dispute itself. Some investor-state panels have addressed the issue of funding a project underlying a dispute, but this may exceed the scope of the arbitration funding model discussed in this Article. See, e.g., *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award ¶ 200 (Apr. 4, 2016) (in which the funding of a project, not an arbitral proceeding, was at issue); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016).

⁵⁴ *RSM Prod. Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, ¶ 114 (Apr. 29, 2019) [hereinafter *RSM v. St. Lucia Decision on Annulment*].

⁵⁵ *RSM Prod. Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 12, 2014) (Griffith, assenting) [hereinafter *RSM v. St. Lucia, Request for Security*].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See, e.g., *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Provisional Measures (Apr. 12, 2017). On the role of precedent in treaty arbitration, see Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT'L L.J.* 1014, 1016 (2007) (“[A]lthough arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.”).

⁵⁹ *Grynberg v. Government of Grenada*, ICSID Case No. ARB/10/6, Decision on Security for Costs, ¶ 5.19 (Oct. 14, 2010).

⁶⁰ See, e.g., *Eskosol*, ICSID Case No. ARB/15/50 (comparing the facts and circumstances of the dispute to those of *RSM Prod. Corp. v. St. Lucia*).

similar obligations.⁶¹ Further, the tribunal found that the behavior of one of the claimants more than a decade ago, in unrelated proceedings, could not support the respondents' claim that the claimants would use every available means to avoid enforcement of any potential cost awards in the future.⁶²

Funders' involvement in the arbitral process produces roughly two broad categories of arbitrators. First are conventional arbitrators who decide the merits of a case using internal factors, including the framework of legal rules, to come up with an outcome. They give no regard to any external factor, such as the existence of TPF. A representative example of conventional arbitrators at work in the TPF context is the decision in *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, where the tribunal said that it knew of "no principle why any . . . third[-]party financing arrangement should be taken into consideration in determining the amount of recovery by the [parties] of their costs."⁶³ Second are unconventional or liberal arbitrators who decide a case using not only the relevant legal framework but also consciously apply their ideology to achieve a preferred outcome. Some scholars argue that, under this approach, arbitrators are required to take into account manifold capital structures, financial processes, and third-party funders.⁶⁴ The liberal arbitrator approach was implicitly referred to in *RSM v. Saint Lucia*, in which the claimant argued that the arbitrator was partial and biased against TPF, citing the arbitrator's approach of stepping outside his role as an impartial and open-minded arbitrator.⁶⁵ Liberal arbitrators may manipulate legal rules to achieve a more desirable outcome, using external factors such as the existence of TPF in a dispute. A representative example of this situation is the Assenting Opinion of Dr. Gavan Griffith in *RSM v. Saint Lucia*, which led to a challenge against him for partiality against the funded claimants.⁶⁶

ii. *Funding Experts*

As was just considered, liberal arbitrators may subconsciously consider TPF in weighing both parties' arguments. A funder's assessment of a claim may be substantively compared to expert opinions.⁶⁷ Generally, most

⁶¹ *Grynberg v. Government of Grenada*, ICSID Case No. ARB/10/6, Decision on Security for Costs, ¶ 5.24 (Oct. 14, 2010).

⁶² *Id.*

⁶³ *Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, ¶ 691 (Mar. 3, 2010).

⁶⁴ JONAS VON GOELER, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE* 5 (2016).

⁶⁵ *RSM Prod. Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Disqualification of Dr. Griffith, ¶ 44 (Oct. 23, 2014) [hereinafter *RSM v. St. Lucia Decision on Disqualification*].

⁶⁶ *RSM v. St. Lucia*, Request for Security, *supra* note 55 at ¶ 18; *see also* *RSM v. St. Lucia Decision on Disqualification*, *supra* note 65, at ¶ 44.

⁶⁷ A funder's evaluations can be compared to expert determination mechanisms. *Cf.* Brian C. Willis, *Resolving Disputes by Expert Determination: What Happens When Parties Select Appraisers, Accountants, or Other Technical Experts to Decide Disputes*, 91 FLA. B.J. 35, 35 (2017).

(Expert determination is a form of dispute resolution in which the parties use a subject-matter expert, rather than a judge, mediator, or arbitrator with legal training, to decide the dispute. It may be the least known form of alternative dispute resolution. In fact, it's been called the "secret alternative to arbitration." While the term "expert" may call to mind the concept of an expert witness, expert determination actually has its roots in the English common law of "valuation" or "appraisalment.").

Matthew W. Swinehart, *Reliability of Expert Evidence in International Disputes*, 38 MICH. J. INT'L L. 287, 288 (2017) ("[R]eliance on experts has increased dramatically in the last forty years. Human activity itself has become more complex—more scientific, more specialized, more reliant on experts—and so too have disputes that arise out of that activity.").

institutional rules allow the parties to rely on their own chosen experts.⁶⁸ Since arbitrators sometimes solicit expert nominations from disputing parties based on the identities and credentials of the potential experts,⁶⁹ arbitrators may be subconsciously inclined to view a funder's evaluation of the claim as a neutral expert opinion even if they were not procedurally appointed to provide expert opinions. In addition, party-appointed experts may be considered advocates or co-counsel for their appointing parties.⁷⁰ This view may conflict with the view that third-party funders are co-counsels who help the funded party not just from a financial perspective but also from a legal one.

Generally, experts in arbitration include legal, technical, and quantum experts.⁷¹ Technical experts are less likely to be compared to third-party funders because funders may lack scientific expertise. Funders, by definition, are considered financial experts and, more recently, have been considered legal experts. Due to the high stakes of the cases funders often finance, they can be compared to quantum, or valuation, experts. Comparably, they provide divergent damages estimates that help in reaching the final determination.⁷² Compared to quantum experts, who may be described as "hired guns,"⁷³ funders may regularly finance specific types of cases or claimants. This may make them appear to be hired guns to opposing parties and decision-makers due to the expertise they develop in financing those particular types of claims. This expertise may subconsciously signal to the decisionmaker that the funders' evaluation should be given the same weight as an expert opinion.

Financial or quantum experts are generally necessary in investor-state disputes.⁷⁴ Arbitrators in investor-state disputes are criticized for inadequately explaining their valuations of damages awards.⁷⁵ To escape this criticism, arbitrators may rely on succinct evaluations of damages prepared by funders and funders' methodologies of calculation compensation based on potential liability. A comprehensive claim evaluation conducted by a funder may have subconscious effects on arbitrators. These effects may be greater than those of an expert opinion, as arbitrators may subconsciously follow that succinct damage determination to avoid any potential

⁶⁸ INT'L BAR ASS'N, IBA TAKING OF EVIDENCE, art. 5(1) (Dec. 17, 2020), <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> [<https://perma.cc/V3MS-MDSN>]; UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES, art. 27(2), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> [<https://perma.cc/AL8G-TFHS>]. See also CHARTERED INSTITUTE OF ARBITRATORS, PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION art. 3–4 (2007). A number of investment arbitration decisions have relied on amicus curiae submissions presenting scientific and other technical evidence. See, e.g., Philip Morris Brands Sarl v. Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 394, 396 (2015) (relying on a World Health Organization submission).

⁶⁹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2280 (2014).

⁷⁰ For more details on this view, see Nigel Blackaby & Alex Wilbraham, *Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration*, 31 ICSID REVIEW 655 (2016).

⁷¹ Mélida Hodgson & Melissa Stewart, *Experts in Investor-State Arbitration: The Tribunal as Gatekeeper*, 9 J. INT'L DISP. SETTLEMENT 453, 454 (2018).

⁷² See Joshua B Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 BERKELEY J. INT'L L. 196, 196 (2012) (discussing the role of quantum experts and the arbitrator's difficulty in reconciling widely divergent damage estimates by experts on opposing sides).

⁷³ Hodgson & Stewart, *supra* note 71, at 456.

⁷⁴ Blackaby & Wilbraham, *supra* note 70, at 655–63.

⁷⁵ See Simmons, *supra* note 72, at 214.

inconsistencies created by different damage determinations. By doing so, arbitrators exacerbate the weaknesses in their reasoning, for which they are criticized, in the final awards.

In principle, parties should be permitted to comment on expert opinions that arbitrators use.⁷⁶ An arbitrator's subconscious reliance on the funders' assessment without providing the parties an opportunity to challenge that assessment may expose the arbitrator's award to a challenge. Consider a situation in which an arbitrator previously acted as a counsel in a case funded by a funder and later hears a case funded by the funder. This may create problems. For instance, one arbitrator was challenged in a dispute because the quantum expert employed therein presented the same quantum valuation in a previous case on which the arbitrator relied when they served as counsel.⁷⁷ In the later case, it was argued that the arbitrator had a personal interest in promoting the same methodology because they had previously used it in their work as counsel.⁷⁸ That arbitrator eventually resigned from the case after the other two co-arbitrators on the tribunal were split on the challenge.⁷⁹ Similar scenarios may arise with funders.

To sum up, arbitrators may consult funding documents once they are disclosed, and arbitrators' decision-making may be affected by the funders' claim evaluations. In that sense, the decision-making process would favor the party who has a more robust financial support and may open the door for corrupt practices in the periphery.

2. Arbitrators' Cognitive Biases

Cognitive bias refers to a decision-making process that systemically deviates from rational choice⁸⁰ through its constituent components.⁸¹ As human decision-makers, arbitrators are subject to systematic judgment errors due to cognitive biases and mental illusions.⁸² Given that actual bias is too difficult to measure or prove,⁸³ the analysis of cognitive bias is normative. It reflects a heightened possibility of bias, not necessarily actual bias. Although the parties' economic positions are irrelevant to the underlying merits of a

⁷⁶ Hodgson & Stewart, *supra* note 71, at 457.

⁷⁷ Tethyan Copper Co. v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (Nov. 10, 2017).

⁷⁸ See, e.g., Tom Jones, *Alexandrov Survives Pakistan's Challenge Over 'Rare' Damages Model*, GLOBAL ARB. REV. (2017). Setting aside the allegations that Alexandrov failed to fully and properly disclose these ties, an issue posed by the challenges was the independence and credibility of experts who work multiple times with the same counsel.

⁷⁹ *Id.*

⁸⁰ Korobkin & Ulen, *supra* note 39, at 1053, 1102.

⁸¹ To reiterate, these components may be defined as anchoring (making estimates based on irrelevant starting points); framing (treating economically equivalent gains and losses differently and human's inclination to avoid loss rather than attaining gain); hindsight bias (perceiving past events to have been more predictable than they actually were and humans' tendency to overestimate the likelihood of anticipating a future event); the representativeness heuristic (ignoring important background statistical information in favor of individuating information); and egocentric biases (overestimating one's own abilities). See generally Guthrie et al., *supra* note 15. See also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 166–67 (2000); Allen v. Chance Mfg. Co., 873 F.2d 465, 470 (1st Cir. 1989) (using framing theory to analyze the jury's finding of proximate cause).

⁸² See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

⁸³ See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (referring to actual bias as an "insurmountable" standard).

dispute,⁸⁴ the presence of a funder may adversely impact, for instance, the outcome of a security for costs applications.⁸⁵

Seizing on a vivid TPF arrangement and using it to quickly categorize a party's position may not be optimal for deciding a dispute. The claimant in *RSM v. Saint Lucia* made a similar argument when challenging the party-appointed arbitrator, Dr. Griffith, for his bias against third-party funders and the funded claimants. Dr. Griffith described third-party funders as "mercantile adventurers" and associated them with "gambling" and the "gambler's Nirvana: Heads I win and Tails I do not lose."⁸⁶ The claimant contended that Dr. Griffith had a preconceived, radical, and general apprehension of TPF and funded claimants because he reached his decision by considering funding in general⁸⁷ and showed a clear preference for the respondent.⁸⁸ However, while the tribunal found Dr. Griffith's "figurative metaphors" and expressions to be "strong" and "extreme in tone,"⁸⁹ they purposefully clarified that his point on TPF contained no underlying bias against third-party funders in general or the claimant in the dispute in particular.⁹⁰ According to the tribunal, Dr. Griffith had not actually crossed the line between "radical" and "extreme" language, and clearly inappropriate and unacceptable reasoning.⁹¹ The tribunal reasoned that his views were not sufficient to establish his partiality toward the respondent.⁹² Despite this conclusion, this case illustrates that the cognitive illusions caused by the existence of TPF hinder, rather than facilitate, the prosecution of the cases, in terms of time and costs.

The repeated exposure of arbitrators to the concerns raised by TPF should help them develop a habit of analyzing these problems from both legal and economic perspectives.⁹³ Arbitration users view the procedural fairness of the process subjectively.⁹⁴ Arbitrators with industry experience are often called to decide disputes because they bring the benefit of expertise.⁹⁵ The same applies to TPF. An arbitrator's funding background

⁸⁴ In one case, the Fourth Circuit found that

the district court's reliance on its third ground, the parties' comparative economic power, to be error. Such a factor would almost always favor an individual plaintiff . . . over [their] employer defendant. Moreover, the plain language of Rule 54(d) does not contemplate a court basing awards on a comparison of the parties' financial strengths. To do so would not only undermine the presumption that Rule 54(d)(1) creates in prevailing parties' favor, but it would also undermine the foundation of the legal system that justice is administered to all equally, regardless of wealth or status.

Cherry v. Champion Int'l Corp., 186 F.3d 442, 448 (4th Cir. 1999).

⁸⁵ *RSM Prod. Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Provisional Measures, ¶¶ 71–74 (Dec. 12, 2013), [hereinafter *RSM v. St. Lucia Decision on Provisional Measures*].

⁸⁶ *RSM v. St. Lucia Decision on Disqualification*, *supra* note 65, at ¶ 43.

⁸⁷ *Id.* at ¶ 43.

⁸⁸ *Id.* at ¶ 50.

⁸⁹ *Id.* at ¶¶ 84, 86.

⁹⁰ *Id.*

⁹¹ *Id.* at ¶ 86.

⁹² *Id.* at ¶ 90.

⁹³ Repeat players often have strong incentives to figure out and account for their biases. *See generally* John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 671, 681 (1996).

⁹⁴ AKC Koo, *The Role of the English Courts in Alternative Dispute Resolution*, 38 LEGAL STUDS. 666, 672 (2018).

⁹⁵ *See* *Commonwealth Coatings v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring) (recognizing that arbitrators are often "of the marketplace").

would reflect their awareness of the complex process and the diligence exerted by the funder in making the funding decision.

Five components constitute cognitive bias: anchoring, framing, hindsight bias, representative heuristics, and egocentric bias.⁹⁶ Anchoring involves making a final estimate based on irrelevant starting points. Framing involves the different economic treatment of gains and losses.⁹⁷ Hindsight bias is the human tendency to perceive past events as more predictable than they actually were.⁹⁸ Representative heuristics involve ignorance of statistical information, particularly the frequency of a category of events.⁹⁹ Egocentric bias tests the human tendency to overestimate one's own abilities. These elements will now be considered.

i. Framing

The decision to fund a case reflects the funder's belief that pursuing litigation or arbitration will produce future gains.¹⁰⁰ This decision may frame the case as one in which the claimant expects that they will incur gains while respondent will likely incur losses.¹⁰¹ However, arbitrators may also favor the unfunded party over the supposedly well-funded party.¹⁰² When TPF is involved in a dispute, arbitrators should carefully employ an objective analysis of the dispute by consciously comparing the parties' arguments to reach a decision.¹⁰³ However, they may believe that the case should proceed in a particular way that it would not have proceeded had TPF not been present. Basing the outcome, even partly, on the existence of TPF undermines the neutrality of the decision-making process.¹⁰⁴

⁹⁶ See generally Guthrie et al., *supra* note 18, at 784.

⁹⁷ Allen v. Chance Mfg. Co., 873 F.2d 465, 470 (1st Cir. 1989) (discussing the framing effects on the decision makers and the choices on human judgment, and citing to literature on cognitive psychology by noting that "[p]eople's assessments of the causes of events are inevitably influenced by the array of possible causes that are made salient to them").

⁹⁸ Guthrie et al., *supra* note 18, at 784.

⁹⁹ *Id.*

¹⁰⁰ Otherwise, the funder would not have chosen to take a "gambl[e]" on the case. See AVM Techs., LLC v. Intel Corp., No. CV 15-33-RGA, 2017 WL 1787562, at *3 (D. Del. May 1, 2017).

¹⁰¹ Normally, when a court is in doubt as to the ownership of a commodity in dispute, it favors the one with possession, even if the possession is arbitrary. Guthrie et al., *supra* note 18, at 798. In TPF, the power asymmetry between the disputing parties is both financial and procedural. Similar to the courts' inclination in deciding the ownership of a commodity in case of doubt, an arbitrator may be inclined to find that the funded party should be favored over the opposing party because financial backing brings more credibility. See also David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOODE HALL L.J. 737, 749-69 (1992) (discussing the areas of law that create similarly arbitrary distinctions between gains and losses).

¹⁰² RSM v. St. Lucia, Request for Security, *supra* note 55, at ¶ 18.

¹⁰³ Tenielle Fordyce-Ruff, *Research Across the Curriculum: Using Cognitive Science to Answer the Call for Better Legal Research Instruction*, 125 DICK. L. REV. 1 (2020) (demanding that "law schools do better when teaching legal research."); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 551-54 (1994) (urging law schools to teach about the psychology of decision-making).

¹⁰⁴ In fact, one arbitrator openly stated that third-party funders and funded claimants undermine the integrity of investor-state arbitrations. RSM v. St. Lucia Decision on Annulment, *supra* note 54, at ¶ 163.

ii. *Hindsight Bias*

Arbitrators may also be psychologically vulnerable to hindsight bias.¹⁰⁵ As explained previously, hindsight bias is a person's tendency to overestimate the predictability of past events.¹⁰⁶ It occurs when a person replaces or updates information about an event or situation with more current information.¹⁰⁷ Funding arrangements could be seen as past events evaluating the dispute, compared to evaluating the dispute in the award as a future event.¹⁰⁸ Arbitrators are expected to be neither completely rational nor entirely irrational. They may, however, make rational use of the funding information¹⁰⁹ to update their beliefs about the case.¹¹⁰

An arbitrator's previous experiences are crucial in evaluating possible hindsight bias. An arbitrator's decision to evaluate a case, especially in investor-state disputes, may be informed by other cases that they have arbitrated before, or cases decided by other tribunals, some of which may have involved TPF.¹¹¹ Relatedly, arbitrators' predictions about the likely outcomes of disputes reflect their underlying assumptions about the different types of disputes based on past observations. Arbitrators who are familiar with TPF practices may greatly rely on the role that funders tend to play. This overestimation of the role of TPF may constitute a hindsight bias, as it reflects a cognitive disposition to focus on the forces behind the main dispute. This bias may cause arbitrators to give undue weight to a funding arrangement and undervalue the merits of the main dispute. For instance, in *RSM v. St. Lucia*, Dr. Griffith, a party-appointed arbitrator, has given an undue weight to the TPF arrangement to reflect on strong opposing views to that practice. Dr. Griffith's personal experience and views have been crucial in creating the hindsight bias against TPF. In this case, it can be said that Dr. Griffith's views overestimated the predictability of the impact of the TPF arrangement over the dispute and resulted in unnecessary discussion of the

¹⁰⁵ Some courts justify their decisions with the likelihood of occurrence of some events of which they are aware. One court noted that "[i]t was common knowledge, not only amongst bankers and trust companies, but the general public as well, that the stock market condition at the time of [the] testator's death was an unhealthy one, that values were very much inflated and that a crash was almost sure to occur." *In re Chamberlain's Estate*, 156 A. 42, 43 (N.J. Prerog. Ct. 1931). The court has relied on the likelihood of the crash, which was influenced by being aware of that crash.

¹⁰⁶ Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 288, 295 (1975) (empirically discussing the effects of hindsight on judgment).

¹⁰⁷ Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 800 (2002)

¹⁰⁸ Guthrie et al., *supra* note 18, at 800 (pointing out that courts are vulnerable to hindsight bias because they evaluate events after the fact, which is a threat to accurate determinations in many areas of law).

¹⁰⁹ As argued by some scholars that new information may reflect not illusion of judgment but a rational use of the new knowledge. See Mark Kelman, David E. Fallas & Hilary Folger, *Decomposing Hindsight Bias*, 16 J. RISK & UNCERTAINTY 251, 253–54 (1998).

¹¹⁰ Hindsight bias supposes that people use known outcomes to evaluate the probability that something will happen in the future. In one study, judges were presented with known outcomes that ultimately changed their beliefs about the likelihood of future events in question. Judges relied on this new information to re-predict past outcomes. See Guthrie et al., *supra* note 18, at 803–04.

¹¹¹ See, e.g., *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Provisional Measures (Apr. 12, 2017). On the role of precedents in treaty arbitration, see Cheng, *supra* note 58, at 1016 ("[A]lthough arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.").

TPF industry. Although the words used by Dr. Griffith regarding TPF did not result in his challenge, the tribunal held that his opinion was very extreme and expressed strong and unnecessary views on third party funding.¹¹²

An arbitrator's past exposure to TPF may help in making useful judgments in new disputes by way of comparison, but arbitrators must use care when comparing a given dispute to prior ones.¹¹³ If an arbitrator has observed improper behaviors by funders in prior cases, a moderate outcome in a current case with the same funder is not likely. If an arbitrator has encountered appropriate behaviors by funders in previous cases, then a moderate outcome in the current case seems more likely.¹¹⁴ In either scenario, hindsight bias on the part of the arbitrator based on past exposure to TPF is a relevant concern.

iii. Anchoring

Individuals in any given situation which requires estimation may make final estimates based on initial datapoints or anchors.¹¹⁵ Anchors, however, may impede rational decision-making.¹¹⁶ For example, a funder's initial evaluation of a claim may contribute to "anchoring" the final estimation.¹¹⁷ Arbitrators, no matter how experienced or well-trained, may not be able to ignore the funder's calculation of one party's likelihood of success and the funder's estimation of damages. Even if these anchors provide no useful information, being exposed to them might lead an arbitrator to unconsciously adjust their final estimates around them.¹¹⁸ Arbitrators may assume that these anchors are correct, regardless of their actual value to the analysis.¹¹⁹ This could cause arbitrators to doubt the viability of an unfunded party's case and surmise the strength of the funded party's claim. There is a thin line between positively assessing the case in favor of the funded party and doubting the case of the unfunded party based on the mere presence of TPF.¹²⁰ The funder's thorough claim screening¹²¹ may create an assumption of strength for the funded party's case. This may anchor the case for arbitrators from the start. The influence of irrelevant anchors on an arbitrator's final judgments casts doubts on their neutrality.

¹¹² RSM v. St. Lucia Decision on Disqualification, *supra* note 65, at ¶¶ 84, 86.

¹¹³ Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28.

¹¹⁴ Certainly, the specifics of individual cases should make it difficult to identify typical or like cases. Guthrie et al., *supra* note 18, at 784.

¹¹⁵ See generally Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28, at 1128–30.

¹¹⁶ *Id.* at 1128–30. See also Weinstein, *supra* note 107, at 787 (pointing out that cognitive bias studies gained momentum after World War II and had roots in logicians and mathematicians of the early twentieth century).

¹¹⁷ See generally Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28, at 1128–30.

¹¹⁸ Even ridiculously high anchors may result in estimate anchors being higher than they should be. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 146 (1993).

¹¹⁹ Similarly, in settlement negotiations, the opening offer may affect the adversary's acceptance of an offer to settle. See generally Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCH. 437, 437–39 (1997).

¹²⁰ There is a widely accepted presumption that the existence of a funder means that a claim has been diligently screened by the funder. See, e.g., Michael Abramowicz & Omer Alper, *Screening Legal Claims Based on Third-Party Litigation Finance Agreements and Other Signals of Quality*, 66 VAND. L. REV. 1641, 1646 (2013); 21st Investment Treaty Forum Public Meeting *The Economic and Financial Aspects of Investor-State Arbitration*, BRIT. INST. INT'L & COMPAR. L. (2013), <https://www.collectiveredress.org/event/786> [<https://perma.cc/WAS2-C23P>] (explaining that arbitrators may be swayed by the knowledge that one side of an arbitration has the support of a third-party funder.)

¹²¹ See, e.g., Abramowicz & Alper, *supra* note 120, at 1644.

It can also be argued that the relief requested by parties may also anchor arbitrators' decision-making. But anchoring effects are arguably more impactful when the estimates are conducted by third-party funders.¹²² Involved parties often overestimate the success and the potential recovery of their claims. However, funders' decisions are based on economic and legal calculations that identify, objectively, the probability of a claim's success in light of the potential counterarguments of the opposing party. Thus, arbitrators may be inclined to pay more attention to a funder's calculations than to a disputant's. As a result, arbitrators can be led to unconsciously produce biased decisions that are affected by funders' estimations.

iv. Representative Heuristics

Psychologists refer to mental shortcuts in making complex decisions as "heuristics."¹²³ Generally, people make categorical judgments based on the extent to which certain introduced evidence is representative of a category.¹²⁴ Although these heuristics may facilitate the decision-making, they may also result in erroneous decisions.¹²⁵ Certain fact patterns can mislead a decision-maker.¹²⁶ In arbitration,¹²⁷ financial backing by a third party may look like a categorical judgment on the strength of the funded claim,¹²⁸ causing the arbitrator to judge the claim itself as strong.¹²⁹ In one dispute, a claimant argued that it was forced to fund the entire arbitration as part of the respondent's "overall strategy to make arbitration expensive and frustrate claimant's access to justice."¹³⁰ The tribunal found that the claimants had "no history of non-payment of costs awards"¹³¹ but declined to decide the question of the financial conditions of the parties early in the dispute.¹³² Although not directly on point, this case may be relevant to the heuristics

¹²² Given the fact that funders may simulate the party-appointed experts, their evaluation of the claim may have an impact on the arbitrators' decision-making. See discussion on funding experts, *supra* Section II.A.1.ii.

¹²³ PLOUS, *supra* note 118, at 109–30, 145–52.

¹²⁴ Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28, at 1124–28. See also Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCH. 430, 431 (1972); Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCH. REV. 293 (1983) (defining the "conjunction fallacy" as a type of representativeness heuristic).

¹²⁵ Tversky & Kahneman, *Heuristics and Biases*, *supra* note 28, at 1124.

¹²⁶ *Id.*

¹²⁷ Cf. Guthrie et al., *supra* note 18, at 805 (discussing the effects of representative heuristics on judges' minds).

¹²⁸ See *supra* text accompanying note 28 (discussing the impact of representative heuristics on the doctrine of *res ipsa loquitur*).

¹²⁹ Leda Cosmides & John Tooby, *Are Humans Good Intuitive Statisticians After All? Rethinking Some Conclusions from the Literature on Judgment Under Uncertainty*, 58 COGNITION 1, 2–3 (1996).

¹³⁰ Transglobal Green Energy v. Republic of Pan., ICSID Case No. ARB/13/28, Decision on Shifting Costs, ¶ 17 (Mar. 4, 2015).

¹³¹ *Id.* at ¶ 43.

¹³² *Id.* at ¶ 44. In the tribunal's opinion on the case, it wrote,

The Tribunal has to balance the circumstances adduced by Respondent in the Request against Claimants' concerns that shifting of costs at this very early stage may limit [Claimant's] access to ICSID arbitration and create incentives for the defaulting party to make the proceedings unnecessarily expensive. On the whole, the Tribunal finds that the circumstances of the instant case differ substantially from the circumstances relied on by Respondent based on the decisions of the RSM tribunal, and do not justify altering the balance between the parties established in AFR 14(3)(d).

Id. at ¶ 47.

analysis. The tribunal in this case was not affected by the heuristics that TPF may have created on the claimant's financial position. The existence of TPF was argued to question the financial conditions of the claimant. However, the tribunal declined to consider that issue and took into consideration the claimant's history of paying costs awards without considering the mere existence of TPF in its decision.

Representative heuristics may also create an "inverse fallacy." Arbitrators may see the unfunded parties' claims as categorically weak, or at minimum, not as strong as the funded parties' cases.¹³³ Alternatively, representative heuristics can also create an inverse fallacy by causing arbitrators to treat the non-funded party favorably to counter the categorical judgment made for the funded party. That inference is a result of a cognitive illusion.¹³⁴ Still, the inverse fallacy can influence arbitrators' decisions.

v. Egocentric Bias

Egocentric bias is one's estimation of themselves as above average.¹³⁵ Arbitrators may interpret information in egocentric ways and, hence, overestimate their decision-making abilities.¹³⁶ The risk of overestimation is exacerbated by the fact that arbitrators' decisions are not reviewed on the merits.¹³⁷ Therefore, if an arbitrator wrongly considers a funder's assessment of a claim, that decision may not be reviewed by a court.¹³⁸ Egocentric biases may affect arbitrators' consciousness of their limitations, which may harm the disputing parties. Egocentric bias may make it difficult for an arbitrator to fully and neutrally decide a case that involves TPF.¹³⁹ The fact that arbitrators' decisions are not reviewed on the merits may open the door for arbitrators to possibly overestimate the strength of the funded claim just because it is funded by a third party and underestimate the strength of the unfunded claim. That possibility may create an added pressure on the unfunded party. An unfunded party might be under pressure to convince the arbitrator that the fact that its claim is not funded by a third party does not mean that its claim is not strong enough to be supported by a third-party funder, and the funder's analysis of the funded claim may be inaccurate as well.

¹³³ The inverse fallacy is the tendency to treat the probability of a hypothesis based on evidence as the probability of evidence based on a hypothesis. For instance, the probability that defendant was negligent because the plaintiff was injured would be the same as the probability that the plaintiff should be injured if the defendant was negligent. See Jonathan J. Koehler, *Why DNA Likelihood Ratios Should Account for Error (Even When a National Research Council Report Says They Should Not)*, 37 *JURIMETRICS J.* 425, 432 (1997).

¹³⁴ Guthrie et al., *supra* note 18, at 811.

¹³⁵ *Id.* at 812.

¹³⁶ Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 *J. ECON. PERSPS.* 109, 110–11 (1997).

¹³⁷ BLACKABY ET AL., *supra* note 21, at 570.

¹³⁸ These decisions cannot be reviewed unless they can be construed as extrinsic evidence in jurisdictions that do not permit that type of evidence. However, it may be too difficult to prove the unconscious impact of a funding assessment on an arbitrator's decision or establish a connection between them.

¹³⁹ Guthrie et al., *supra* note 18, at 815–16.

B. SECURITY FOR COSTS

TPF may also have an impact on recoverable costs and security for costs in arbitration.¹⁴⁰ The determination of costs is subject to the arbitrators' discretion.¹⁴¹ Absent financial security, respondents may not be able to enforce a costs award against claimants due to the lack of funds. Theoretically, in the absence of requisite financial resources of a funded claimant, a respondent may seek a security for costs order against the funder itself. A funding agreement may provide for a funder's liability to pay the adverse party's costs.¹⁴² If there is no existing agreement between the parties in a dispute, tribunals have the power under procedural law to make costs decisions.¹⁴³ Arbitrators can generally issue one of two types of cost-allocation orders: (1) each party pays its own costs, or (2) the losing party pays the reasonable costs of the winning party. Funders' potential liability for costs often arises in the latter.¹⁴⁴ The funder's existing, future, or conditional right in the claim may justify a tribunal's order for security for costs against the funded party.¹⁴⁵ Although arbitrators use various approaches in making cost determinations,¹⁴⁶ the tribunal's power to issue an order for security for costs against the parties is unquestionable.¹⁴⁷

Generally, a lack of assets, nonavailability of economic resources, or the financial difficulties of a party are not *per se* justifications for warranting a security for costs order.¹⁴⁸ Recall that in *Kardassopoulos*, the tribunal articulated that there is "no principle why any . . . third[-]party financing arrangement should be taken into consideration in determining the amount of recovery by [parties] of their costs incurred in arbitration proceedings."¹⁴⁹

¹⁴⁰ UNCITRAL Working Group III, *supra* note 7, at ¶ 27.

¹⁴¹ *Third Party Funding in ICSID Arbitration: Comments on ICSID's Proposed Revised Rules*, STEWARTS (Sept. 5, 2018), <https://www.stewartslaw.com/news/third-party-funding-icsid-arbitration-comments-icsids-proposed-revised-rules> [<https://perma.cc/53EE-BUJM>].

¹⁴² *See, e.g.*, INT'L CTR. DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, art. 20(7) (2014); INT'L CHAMBER COM., 2021 ARBITRATION RULES, art. 37(3) (2021) ("When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.").

¹⁴³ BLACKBAY ET AL., *supra* note 21, at 308.

¹⁴⁴ Vyapak Desai & Kshama Loya Modani, *Third-Party Funding: Liability of Third-Party Funders to Pay Costs in Arbitration; Entitlement of Successful Claimants to Costs of Third-Party Funding*, 87 IPBA J. 16, 18 (2017).

¹⁴⁵ *See* Grynberg v. Government of Grenada, ICSID Case No. ARB/10/6, Decision on Security for Costs, ¶ 5.24 (Oct. 14, 2010).

¹⁴⁶ Possible Reform of Investor-State Dispute Settlement (ISDS) Third-Party Funding, [2019], U.N. Doc. A/CN.9/WG.III/WP.157 (describing a decision that the legal costs of a respondent paid by a third-party "insurer" would have been recoverable had the respondent succeeded).

¹⁴⁷ *E.g.*, Arbitration Act 1996 § 61 (1996) (Eng.). *See also* Essar Oilfields Servs. Ltd. v. Norscot Rig Mgmt. Pvt Ltd., EWHC 2361 (2016) Eng. Wales High Ct. 2361 (Comm.), <http://www.bailii.org/ew/cases/EWHC/Comm/2016/2361.html> [<https://perma.cc/XUK6-X5NN>] (arbitrators have discretion to construe the phrase "other costs" in Section 59(1)(c) of the Arbitration Act of 1996 and "costs of the arbitration" in Section 63(3) as including costs of funding). INT'L CTR. SETTLEMENT INV. DISPS., ICSID CONVENTION, REGULATIONS AND RULES, art. 61(2) (Apr. 2006)

[T]he 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.

¹⁴⁸ S. Am. Silver Ltd. v. Plurinational State Bolivia, PCA Case No. 2013-15, ¶ 63 (Perm. Ct. Arb.) (Jan. 11, 2016) <https://pcacases.com/web/sendAttach/1562> [<https://perma.cc/R6TF-URRC>].

¹⁴⁹ *Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, ¶ 691 (Mar. 3, 2010).

In the abstract, it may seem difficult to “formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable.”¹⁵⁰ Some consider a funded party’s inability to comply with a security for costs order as a sufficient reason to issue that order.¹⁵¹ Arguably, “once it appears that there is third[-]party funding of an investor’s claims, the onus is cast on the claimant to . . . make a case why security for costs orders should not be made.”¹⁵² While the requesting party should still show additional evidence of impecuniosity, the funded party may provide evidence of its ability or willingness to comply with the order.¹⁵³ Although it is a relevant factor, TPF cannot be the sole reason to issue an order for security for costs.¹⁵⁴ This would increase meritless security for costs requests and risk blocking meritorious claims. As such, there is currently no specific set of principles that govern security-for-costs requests in cases involving TPF.¹⁵⁵

1. Costs Calculus

Rule 39 of the ICSID Rules entitles parties to seek provisional measures from the tribunals to preserve their rights.¹⁵⁶ In practice, funders are not parties to the dispute.¹⁵⁷ A party’s interest in securing compliance with the potential costs award is arguably a “right to be preserved” under Rule 39 of

¹⁵⁰ Grynberg, ICSID Case No. ARB/10/6, Decision on Security for Costs at ¶ 5.20.

¹⁵¹ “[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.” BORN, *supra* note 69, at 2496.

¹⁵² RSM v. St. Lucia, Request for Security, *supra* note 55, at ¶ 18.

¹⁵³ This view finds support in the Proposed Amendments prepared by the ICSID Secretariat on the Reform of the ICSID Rules. It provides that “proposed AR 51 requires the Tribunal to consider the responding party’s ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. As a result, the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51. On the other hand, the existence of TPF coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case.” STEWARTS, *supra* note 141.

¹⁵⁴ S. Am. Silver Ltd. v. Plurinational State Bolivia, PCA Case No. 2013-15, ¶ 75–77 (Perm. Ct. Arb.) (Jan. 11, 2016)

[W]hile the existence of a third-party funder may be an element to be taken into consideration in deciding on a measure as the one requested by Bolivia, this element alone may not lead to the adoption of the measure. The existence of the third-party funder alone does not evidence the impossibility of payment or insolvency. It is possible to obtain funding for other reasons. The fact of having funding alone does not imply risk of non-payment If the existence of these third[] parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.

¹⁵⁵ One tribunal stated that it “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.” Kardassopoulos v. Rep. Georgia, ICSID Case No. ARB/07/15, ¶ 691 (Mar. 3, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0347.pdf> [<https://perma.cc/8BZ9-PE44>].

¹⁵⁶ INT’L CTR. SETTLEMENT INV. DISPS., ICSID CONVENTION, REGULATIONS AND RULES, art. 39(1) (Apr. 2006)

At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

¹⁵⁷ Some authors viewed this possibility as a risk that TPF may create in relation to international arbitration proceedings such that claimants will be incentivized to generate and externalize excessive costs. Aren Goldsmith & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)*, 2012 INT’L BUS. L.J. 53, 56–57 (2012).

the ICSID Arbitration Rules.¹⁵⁸ However, TPF does not by itself constitute exceptional circumstances to justify the security for costs order.¹⁵⁹ Nonetheless, an agreement under which the funders are not bound to cover an adverse costs order might constitute extraordinary circumstances that justify an order for security for costs against claimants.¹⁶⁰

Parties may have legitimate reasons for seeking a security for costs order. Funders may, at certain points, lack adequate capital or terminate a funding agreement at any time, leaving the funded party in peril and the opposing party at risk of being unable to collect the potential award. In that sense, the request for security for costs may serve as equitable relief to protect the requesting party. However, the requesting party must demonstrate that its need for the measure is not outweighed by the hardships the opposing party would experience if the measure were granted.¹⁶¹ Otherwise, the measure would impede access to justice by creating a financial hardship and therefore should not be granted.¹⁶² In these cases, a request to procure an undertaking from the funder to pay the costs order against the claimant may be denied as well.¹⁶³

TPF may also reflect a claimant's inability to honor any security for costs award. In *RSM v. St. Lucia*,¹⁶⁴ the tribunal acknowledged that, among other relevant factors,¹⁶⁵ the participation of third-party funders evidenced the claimant's inability to honor the security for costs award. Nonetheless, one arbitrator found that funders "should remain at the same real risk level for costs as the nominal claimant,"¹⁶⁶ and that upholding the integrity of the Bilateral Investment Treaties ("BIT") regime requires real exposure of third-party funders to "costs orders which may go one way to it on success should

¹⁵⁸ See INT'L CTR. SETTLEMENT INV. DISPS., *supra* note 156.

¹⁵⁹ *EuroGas Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, ¶¶ 122–23 (June 23, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw6272_0.pdf [<https://perma.cc/E4ND-X5ZM>]. See also *S. Am. Silver Ltd. v. Plurinational State Bolivia*, PCA Case No. 2013-15, ¶ 61 (Perm. Ct. Arb.) (Jan. 11, 2016).

¹⁶⁰ *Armas v. La República Bolivariana De Venezuela*, No. 2016-08 (Perm. Ct. Arb.) (June 20, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9849_2.pdf [<https://perma.cc/E9K7-Y4TL>] (in Spanish).

¹⁶¹ *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Provisional Measures, ¶ 38 (Apr. 12, 2017).

¹⁶² *Id.*

¹⁶³ *Id.* at ¶ 39.

¹⁶⁴ The admitted third-party funding further supported the tribunal's concern that "Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award." *RSM Prod. Corp. v. St. Lucia*, ICSID Case No. ARB/12/10, Decision on Security for Costs, ¶ 83 (Aug. 13, 2014) [hereinafter *RSM v. St. Lucia Decision on Security for Costs*]. Therefore, the tribunal decided that it was "unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor." *Id.*

¹⁶⁵ The tribunal added the relevant urgency factor by stating that it

considers it necessary to order Claimant to provide security for costs before proceeding further with this arbitration. In light of the fact that in the above referenced prior proceedings costs accrued on the part of the opposing party (and the Centre) have not been reimbursed, the Tribunal further finds it inappropriate to wait for the final award before dealing with Respondent's legal costs.

Id. at ¶ 85

¹⁶⁶ *RSM v. St. Lucia*, Request for Security, *supra* note 55, at ¶ 14.

flow the other direction on failure.”¹⁶⁷ As such, a number of factors are considered in deciding whether to issue a security for costs order. First is the degree of the claimant’s compliance with the proceedings’ costs and expenses, including other proceedings or previous damage awards. Second is whether the claimant exhibited bad faith by disposing of assets to avoid the costs award. Third is whether the arbitrator holds a justifiable belief that the adverse award would not be enforced. Finally, fourth is the potential frivolity of the claim.¹⁶⁸ However, regardless of whether the law is properly applied to the facts, as long as a claimant has a *bona fide* claim and does not act with wanton disregard, the claim should not be considered frivolous.¹⁶⁹ In certain cases, counsel’s behavior throughout the proceedings could be considered as an additional element for the costs order. In one arbitration, a tribunal found that “neither of the [p]arties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both [p]arties worked professionally and efficiently in pursuing their clients’ interests.”¹⁷⁰ The tribunal divided the arbitration costs equally between the parties while each party bore its own fees for pursuing the claim.¹⁷¹ Another tribunal found no difference between TPF and insurance contracts for the purpose of awarding claimants full recovery.¹⁷² It found it fair and appropriate to award claimants their entire arbitration costs, which they had reasonably assessed.¹⁷³

Similarly, an arbitrator may consider an unfunded party’s conduct for the purpose of allocating costs. In one dispute, the arbitrator found that the respondent had financially incapacitated the claimants, which pushed them to seek funding.¹⁷⁴ The arbitrator issued a cost award to the funded party, which included the return owed to the funder under the agreement’s standard commercial funding terms.¹⁷⁵ The respondent challenged the award, asserting that it caused substantial injustice, but the challenge was rejected.¹⁷⁶ This decision illustrates the complexity of costs claims, especially with the allegation of duress in concluding TPF agreements. Further, the tribunal in *RSM v. St. Lucia* found that the claimant’s conduct—not advancing expenses and fees of ICSID throughout the proceedings and failing to pay expenses to the opposing party—gave rise to a reasonable

¹⁶⁷ *Id.* See also ABA, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets* (Mar. 22, 2014) (“BITs are agreements between two countries protecting investments made by investors from one contracting state in the territory of the other contracting state”), https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger [<https://perma.cc/ZV8B-49WX>].

¹⁶⁸ *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Preliminary Objections, ¶ 277 (May 31, 2016).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at ¶ 278.

¹⁷¹ *Id.* at ¶ 279.

¹⁷² *Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Award, ¶ 691 (Mar. 3, 2010).

¹⁷³ *Id.* at ¶ 692.

¹⁷⁴ *Costs of Third-Party Funding Awarded in Arbitration*, ALLEN & OVERY LITIG. & DISP. RESOL. REV. (Oct. 19, 2016) (citing *Essar Oilfields Services Ltd. v. Norscot Management Pvt Ltd.* [2016] EWHC 2361 (Comm)); see also Robert Blackett, *The Gift Of Gold—Recovery Of The Costs Of Third Party Funding In Arbitration*, MONDAQ (Jan. 24, 2017), <https://www.mondaq.com/uk/arbitration-dispute-resolution/562928/the-gift-of-gold--recovery-of-the-costs-of-third-party-funding-in-arbitration> [<https://perma.cc/Y4XP-PS7E>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

inference that the claimant was unable or unwilling to pay.¹⁷⁷ Nonetheless, the tribunal found that TPF exacerbated the concerns raised by claimant's conduct, which "place[d] an unfunded [claimant] and the third[-]party funder(s) in the inequitable position of benefitting from any award in their favor yet avoiding responsibility for a contrary award."¹⁷⁸ As a result, in the tribunal's view, the involvement of TPF together with the claimant's past conduct meant that the fees and expenses would never be paid.¹⁷⁹ The tribunal found that "these circumstances constitute[d] a showing of 'good cause' to alter the presumptive allocation of advance payments," and claimant was ordered to pay all interim advances subject to the final award.¹⁸⁰ The ad hoc Committee reviewing this case found no basis for overturning the challenged award.¹⁸¹

The *RSM v. St. Lucia* decision has become a seminal reference. The claimants in *Transglobal Green v. Panama* distinguished themselves from the claimants in *RSM v. St. Lucia*, citing RSM's history of unpaid adverse costs awards, lack of financial capacity, and use of TPF.¹⁸² The claimants in *Transglobal Green* did not receive TPF,¹⁸³ and the tribunal in this case denied the security for costs application due to the absence of any exceptional circumstances.¹⁸⁴ In *Lao Holdings v. Lao People*, the respondent relied upon the claimant's use of TPF, which was provided by one of the company's owners as opposed to an outside funder, to support its application for security for costs and analogized the claimant's position to RSM's.¹⁸⁵ The tribunal, however, denied the application for security for costs and found that this case did not include the exceptional factors that led the tribunal in RSM to grant the order.¹⁸⁶ It added in its opinion that a "party that seeks to avail itself of discretionary relief under the ICSID framework should not, at the same time, insist on the other party funding in the entirety the very arbitral procedures necessary to consider its application."¹⁸⁷

Finally, it is worth noting that the ICSID Amendments provide for a moderate approach. Per the Amendments, TPF alone is insufficient to order security for costs; instead, it should be considered with other evidence

¹⁷⁷ *RSM v. St. Lucia* Decision on Provisional Measures, *supra* note 85, at ¶ 76.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *RSM v. St. Lucia* Decision on Annulment, *supra* note 54, at ¶ 165.

¹⁸² *Transglobal Green Energy v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision on Security for Costs, ¶ 19 (Jan. 21, 2016).

¹⁸³ *Id.* at ¶ 22.

¹⁸⁴ The tribunal added that,

[o]n balance and given the decision of the Tribunal to bifurcate the proceeding, the Tribunal is of the view that the potential limitation on the procedural rights of Claimants outweighs the relatively minor increase in arbitration costs. If requested, the Tribunal would be willing to reconsider this matter in light of its understanding of the case if the Tribunal in due course upholds jurisdiction.

Id. at ¶ 35.

¹⁸⁵ *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/16/2 ICSID Case No. ADHOC/17/1, Decision on Security for Costs, ¶ 16 (June 29, 2018).

¹⁸⁶ *Id.* at ¶ 41.

¹⁸⁷ *Id.* at ¶ 43.

presented by the parties.¹⁸⁸ The Amendments grant the tribunals discretion with no unnecessary restrictions.¹⁸⁹

2. Funders Liability

Funders can be held directly liable for costs. One appellate court decided that “[w]here . . . the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs.”¹⁹⁰ As such, a funder who controls the proceedings may become liable for the opposing party’s attorneys’ fees and costs.¹⁹¹ The appellate court also held that a “litigant may find himself liable to pay indemnity costs on account of the conduct of those whom he has chosen to engage—e.g., [l]awyers, or experts [who] may themselves have been chosen by the lawyers, or . . . witnesses The position of the funder is directly analogous.”¹⁹² Similarly, federal courts in the United States have the authority to sanction a party under Rule 11 of the Federal Rules of Civil Procedure (“FRCP”).¹⁹³ Although the rule does not expressly apply to funders, persons other than the parties may be sanctioned for violating Rule 11 in appropriate circumstances,¹⁹⁴ which may arguably extend to funders.

In another arbitration case, an ICC tribunal ordered security for costs on the ground that the funding agreement imposed no obligation on the funder to pay an eventual costs award, and the funder could “walk out at any time.”¹⁹⁵ A different ICC tribunal ordered security for costs in another case,

¹⁸⁸ ICSID Amendment Proposals, *Working Paper No. 4*, *supra* note 3, at 325. It is worth-noting that the Proposed Amendments were approved by the ICSID Administrative Council. *See supra* text accompanying note 15.

¹⁸⁹ ICSID Amendment Proposals, *Working Paper No. 4*, *supra* note 3, at 324.

¹⁹⁰ *Arkin v. Bochart Lines Ltd.*, [2005] EWCA (Civ) 655 [Eng.]. *Arkin* introduced a principle known as the “Arkin cap,” where the Court of Appeals held that the funder was liable for costs up to the amount of its own contribution, but that to impose liability over this limit would represent too great a risk for litigation funders. However, the court noted that, if the agreement had been champertous, in theory, liability could have been unlimited. *Id.* at 40. The judgement and the principle it established were designed to balance access to justice and the need for fairness towards successful defendants who should be able to recover their costs. *Id.* The court opined that access to justice would not be achieved if funders were deterred from funding litigation by the prospect of unlimited liability in costs, but it would not be fair to successful defendants if costs did not usually follow the event. *Excalibur Ventures v. Tex. Keystone* (2016) Eng. Wales High Ct. 3426 (Comm).

¹⁹¹ *See Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693–94 (Ct. App. Fla. 2009).

¹⁹² *Excalibur Ventures*, EWHC 3436 (Comm).

¹⁹³ FED. R. CIV. P. 11(c)(1) (“[T]he court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation”).

¹⁹⁴ FED. R. CIV. P. 11, advisory committee’s note to 1993 amendment

When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

¹⁹⁵ *See Miriam K. Harwood, Simon N. Batifort & Christina Trahanas, Third-Party Funding: Security for Costs and Other Key Issues*, 2 INV. TREATY ARB. REV. 103, 110 (2017) (quoting *X v. Y and Z*, Proc. Ord. at ¶ 40 (ICC Int’l Ct. Arb.) (Aug. 3, 2012)). The tribunal in *X v. Y and Z* applied a broad fairness test. The records of the case included the funding agreement that was transferred from the claimant to the respondent and which enabled the tribunal to examine its terms and ultimately grant the security order because (1) the claimant was a holding company based in Cyprus that was unlikely to be able to pay adverse costs; (2) the funding agreement did not cover adverse costs; and (3) in the tribunal’s view, the funder’s termination rights under the funding agreement meant that the funder was “empowered to terminate the Agreement at any time, entirely at its discretion.” *Id.*

finding that “[i]f a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party’s reasonable costs to be incurred.”¹⁹⁶

Moreover, if the funded party in a dispute was involved in improper conduct that resulted in financial sanctions, a question may arise about the possibility of sanctioning the funder. This sanctions issue may also arise during the discovery process. One U.S. judge found a funder in contempt of court for failing to comply with the opposing party’s discovery demands and the judge’s order.¹⁹⁷ A court reviewing the recommendation of the first judge to hold the funder in contempt found that the funder did not have knowledge of the first judge’s order to which it was not subject except that he was served with an order to appear in a deposition or respond to a subpoena and ignored it.¹⁹⁸

III. AN ARGUMENT AGAINST TPF DISCLOSURE

A. COGNITIVE ILLUSIONS

The logistics of the decision-making process call attention to the methods that arbitrators employ in reviewing complex claims or evidence, deliberating on their decisions, and even drafting awards or separate opinions disposing of uncommonly large numbers of possibly heterogenous claims. The importance of the hidden cognitive illusions that arbitrators can fall prey to in their decision-making emanates from the fact that arbitrators make decisions that affect the quality of justice that the arbitration regime aims to achieve. Arbitrators, as human beings, may unconsciously follow the cognitive illusions generated by their awareness of TPF. TPF may empanel a single tribunal, adversely affect efficiency, and lead to inconsistent outcomes. Due to the arbitrators’ prerogatives in deciding disputes, they may have different frames through which they make their decisions. One way to reduce the impact of cognitive illusions upon arbitrator decision-making is to control what information is presented by both parties. Additionally, arbitrators can limit their exposure to irrelevant information that may contaminate their decisions. Arbitrators with no prior exposure to TPF are especially susceptible to being swayed by the apparent strength of the funded claim, which they might assume from the presence of TPF itself. They may use representative heuristics when evaluating a claim, and thus arbitrators with TPF experience may be inclined to believe in the strength of the funded claim based on prior awareness of the mechanisms involved in making a funding decision. Arbitrators therefore should have the skill of objectively evaluating a claim despite the fact that the claim is, or is not, funded.

Hindsight bias is an integral part of the arbitrators’ decision-making process because it modifies memories of preceding events. Some ICSID

¹⁹⁶ *Id.* at 111 (quoting X SARL, Lebanon v. Y AG, Proc. Ord. No. 3, at ¶ 21 (ICC Int’l Ct. Arb.) (July 4, 2008)).

¹⁹⁷ *Frederick v. Panda* No. 1, 2018 U.S. Dist. LEXIS 166425 at *13 (D. Colo. 2018).

¹⁹⁸ *Id.* at *10.

tribunals clearly considered previous applications for costs, and compliance with damages awards, as elements in deciding security for costs applications. For instance, the respondent in *RSM v. St. Lucia* justified its request for security for costs by raising the material risk that claimant would be unable to comply with a costs award because it initiated a number of arbitrations and litigation proceedings subsequent to receiving costs awards that it did not comply with.¹⁹⁹ The respondent additionally argued that the funder would not comply with the claimant's obligations to the resulting costs award.²⁰⁰ Ironically, the claimant alleged that because the respondent was also funded by a third party, it would suffer no immediate disadvantage and that the security for costs would merely benefit the third party.²⁰¹ It can be inferred that the underlying funded dispute could become a mere tool for serving the irrelevant third-party funders. Further, the tribunal differentiated between the requirements of ordering security for costs and the requirements for a decision in which one party pays all advances, an exception to the rule upon a showing of "good cause."²⁰² The tribunal ultimately altered the presumptive allocation of advanced payments due to the presence of TPF.²⁰³

This tribunal seems to have been subject to cognitive bias because it considered that the existence of TPF might support the concern that claimant would not comply with a costs award.²⁰⁴ The tribunal was likely subject to the representative heuristics and hindsight biases because it considered circumstances that were brought forward in other proceedings.²⁰⁵ One arbitrator assented to the decision and added that the funders "should remain at the same real risk level for costs as the nominal claimant,"²⁰⁶ and that maintaining the integrity of the BIT regimes requires the real exposure of third[-]party funders to "costs orders which may go one way to it on success should flow the other direction on failure."²⁰⁷

Arbitrators in the same panel may have concrete differences in their approach to TPF. For instance, in *RSM v. St. Lucia*, Dr. Gavan Griffith, the party-appointed arbitrator, assented to the tribunal's decision on security for costs on three issues. He considered the primary basis for making the order

¹⁹⁹ *RSM v. St. Lucia* Decision on Security for Costs, *supra* note 164 at ¶ 32.

²⁰⁰ The respondent described this likely event as an "arbitral hit-and-run." *Id.* at ¶ 33.

²⁰¹ *Id.* at ¶ 44.

²⁰² *Id.* at ¶ 76.

²⁰³ *Id.* (referring to the first decision on the security for costs application that was decided on December 12, 2013).

²⁰⁴ The admitted TPF further supported the tribunal's concern that "Claimant [would] not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it [was] doubtful whether the third party [would] assume responsibility for honoring such an award." Therefore, the tribunal decided that it was "unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor." *RSM v. St. Lucia* Decision on Security for Costs, *supra* note 164, at ¶ 83.

²⁰⁵ The tribunal added the relevant urgency factor by stating that it

considers it necessary to order Claimant to provide security for costs before proceeding further with this arbitration. In light of the fact that in the above referenced prior proceedings costs accrued on the part of the opposing party (and the Centre) have not been reimbursed, the Tribunal further finds it inappropriate to wait for the final award before dealing with Respondent's legal costs.

Id. at ¶¶ 85–86.

²⁰⁶ *RSM v. St. Lucia*, Request for Security, *supra* note 55, at ¶ 14.

²⁰⁷ *Id.*

to be the presence of TPF.²⁰⁸ Dr. Griffith's assenting opinion represented an egocentric bias towards TPF. He depicted that in the industry it is

increasingly common for BIT claims to be financed by an identified, or (as here) unidentified third[-]party funder, either related to the nominal claimant or one that engages in the business venture of advancing money to fund the Claimant's claim, essentially as a joint-venture to share the rewards of success but, if security for costs orders are not made, to risk no more than its spent costs in the event of failure.²⁰⁹

Dr. Griffith added that "[s]uch a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose."²¹⁰ He considered that

as strangers to the BIT entitlement, such funders also should remain at the same real risk level for costs as the nominal claimant. In this regard, the integrity of the BIT regimes is apt to be recalibrated in the case of a third[-]party funder, related or unrelated, to mandate that its real exposure to costs orders which may go one way to it on success should flow the other direction on failure.²¹¹

Dr. Griffith concluded that unless contrary circumstances mitigate the situation,

exceptional circumstances may be found to justify security of costs orders arising under BIT claims as against a third[-]party funder, related or unrelated, which does not proffer adequate security for adverse cost orders. An example of contrary circumstances might be to establish that the funded claimant has independent capacity to meet costs orders.²¹²

Finally, he opined that "once it appears that there is third[-]party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made."²¹³ These views may represent an egocentric bias because they express unnecessary views on TPF based on the arbitrator's high regard for his own perspective about it. This was unsurprisingly the ground for seeking to challenge this arbitrator.²¹⁴ Although the tribunal rejected that challenge, it still considered the expressions of his views as "strong," "figurative metaphors," and "extreme in tone."²¹⁵ However, these views fell short, in the tribunal's view, to establish any underlying bias against TPF.²¹⁶

Moreover, Dr. Griffith appeared to fall prey to the anchoring and framing components of cognitive bias when he asserted that the existence of TPF should cast the onus on the claimant to make a case why security for costs

²⁰⁸ *Id.* at ¶ 11.

²⁰⁹ *Id.* at ¶ 12.

²¹⁰ *Id.* at ¶ 13.

²¹¹ *Id.* at ¶ 14.

²¹² *Id.* at ¶ 16.

²¹³ *Id.* at ¶ 18.

²¹⁴ RSM v. St. Lucia Decision on Disqualification, *supra* note 65, at ¶ 42.

²¹⁵ *Id.* at ¶¶ 84, 86.

²¹⁶ *Id.*

orders should not be made. In the same panel, another arbitrator, Mr. Edward Nottingham, dissented to the reliance of the majority decision on TPF to finance the case.²¹⁷ He opined that there was no evidence concerning the identity, financial means, or any other information on the funder nor any evidence on the funding arrangement between the claimant and the funder.²¹⁸ His dissent raised concerns about the definition of TPF and the extent to which it should be disclosed.²¹⁹

Hindsight bias makes an arbitrator more receptive to information that is consistent with the known outcome (funder's presence or assessment) than that which is inconsistent. Arbitrators may receive useful information through anchoring which may advance the quality of their decision-making,²²⁰ however, some anchoring may lead to absurd results. Arbitrators should be wary of the estimated values presented in a case and whether they reflect a true value. It may be difficult for arbitrators to avoid TPF-induced egocentric biases. Relying upon the assessment of a third-party funder may raise concerns about arbitrators' ethics.²²¹ Also, knowing the outcome of a funder's assessment may have a profound effect on an arbitrator's decision, which could create a hindsight bias problem. Generally, once the brain encounters an outcome, it is difficult to develop a new set of beliefs or even restore the state of mind that existed before encountering that outcome. When a decision is likely to be affected by a hindsight bias, arbitrators "should distrust their intuitive assessments of what the parties could have predicted."²²² Instead, they should consider ex ante standards of conduct.²²³

Cognitive illusions may negatively affect arbitration as a forum for doing justice. First, arbitrators may decide a case based on a faulty prediction about the likelihood of the outcome of the funder's assessment. Second, the potential impact produced by cognitive bias surrounding the existence of TPF may pave the way for funders to interfere with cases in order to avoid undesirable results. Understanding the true effects of cognitive biases on arbitrators could help to improve funding relationships. Even if the relationship began with indeterminacies, it should become clearer over time. Arbitrators' decision-making powers should not be reduced to pure mathematical calculations. Even if addressing arbitrators' cognitive biases may not produce perfect decisions, it would improve the process of producing these decisions. Although most arbitrators may say that they are entirely rational and be reluctant to acknowledge reliance on underlying cognitive illusions, cognitive illusions related to TPF nevertheless exist and they are in fact relied upon.²²⁴

²¹⁷ RSM v. St. Lucia, Request for Security, *supra* note 55, at ¶ 17 (Nottingham, dissenting).

²¹⁸ *Id.* at ¶ 18.

²¹⁹ *Id.* at ¶ 19.

²²⁰ Similar to expert opinions. *See supra* 0 (discussing the similarity between funders' assessments and expert opinions).

²²¹ There may exist ethical concerns raised by the consideration of ex parte communication to assess the certainty of a decision-maker's judgment. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3.3 (1986).

²²² Guthrie et al., *supra* note 18, at 825.

²²³ *Id.*

²²⁴ U.S. Court of Appeals for the Ninth Circuit Judge Marsha S. Berzon has conceded that "researchers have convincingly demonstrated that in many instances people do not act as the robotic preference maximizers the law often assumes them to be. It is not that humans are entirely irrational, but

However, there is a way to soften the effects of cognitive illusions caused by TPF.²²⁵ This can be achieved when the existence of TPF is not disclosed to arbitrators. At minimum, the disclosure of TPF should be entrusted to actors rather than arbitrators for conflict checks in order to avoid errors in decision-making due to cognitive illusions caused by awareness of TPF. Non-disclosure is a conclusive way to address all the concerns created by cognitive illusions. It will not reduce the effects of some cognitive illusions while failing to reduce the effects of others. In addition, it should not adversely affect either party's position in the case. For example, certain components of cognitive bias relating to TPF, especially anchoring, framing, and hindsight bias, generally benefit the funded party. The opposing party may not have the benefit of anchoring because it often takes the respondent's position. Any rules governing arbitration should address the effects of cognitive illusions on both sides in order to level the playing field and maintain the integrity of arbitration proceedings and decisions. Left unaddressed, cognitive illusions can skew arbitral justice by producing more systematic errors.²²⁶

B. SECURITY FOR COSTS

In practice, the existence of TPF can have a chilling effect on arbitrators deciding both the merits of a dispute and security for costs orders or awards. Arbitral decisions may create a fear that issuing security for costs orders would become the norm in any funded case. In addition to the procedural delays that may arise from frivolous applications for security for costs orders, the overall arbitration costs may also increase, and the claimant may not be willing to pay. In these cases, funders may increase their return in the dispute outcome and the monetary award in order to cover the expenses that result from these procedural delays. Hence, this may create a divergence between the funding parties that may lead to disagreements and more disputes, aside from the underlying funded dispute. Some funders consider this a regular part of being a funder.²²⁷ The mere presence of TPF may not justify automatically issuing a security for costs order in all cases.²²⁸ While some tribunals consider TPF as an element that justifies issuing a security for costs order, others consider it an element that evidences a party's ability to honor a security for costs award.²²⁹ Nonetheless, some cases, such as those involving insolvency, or insufficiency of assets, may trigger the frequent issuance of security for costs orders. This Article argues that TPF should not be an element in the decision to issue security for costs orders and that arbitrators should not be in a position to consider even the existence of TPF.

rather that our rationality is bounded." Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CAL. L. REV. 1479, 1483 (2012).

²²⁵ The ICSID Amendment Rules may be insufficient because they still allow arbitrators to consider TPF as evidence, which would raise all the concerns examined in the cognitive bias discussion. *Id.*

²²⁶ Similar to the effects that cognitive illusions can have on judges. See Guthrie et al., *supra* note 18, at 828–29.

²²⁷ Scherer et al., *supra* note 43, at 215. See also Mick Smith, *Mechanics of Third Party Funding Agreements: A Funder's Perspective*, in *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 19, 33 n.16 (Victoria Shannon & Lisa Bench eds., 2012).

²²⁸ The respondent may actually be the reason for the claimant's financial default.

²²⁹ RSM v. St. Lucia Decision on Security for Costs, *supra* note 164, at ¶ 83.

IV. CONCLUSION

Advocates of TPF disclosure might insist that this account of disclosure focuses on uncommon scenarios relating to arbitrator decision-making. This Article's analysis included cases in which arbitrators were affected by significant cognitive impacts once they were aware of TPF. This demands a certain kind of myopia for cases that are funded and cases that are not funded, as though all cases will not be equal simply because arbitrators happen to encounter TPF in some cases and not in the others. Sorting cases into two categories, funded and unfunded cases, would create inconsistencies and distract arbitrators from their main mission of deciding the underlying dispute based on the merits. TPF disclosure seems to concern itself with one universe, conflict of interests, and not with others, arbitrators' decision-making powers.

Arbitrators should be in a better position to decide cases even when the decision-making process is subject to cognitive illusions. The effects of cognitive bias should be limited by restricting arbitrators' access to funding information. In most cases, such information is irrelevant to the merits of the underlying dispute. The arbitration regime should respond to the effects of cognitive illusions discussed in this Article. Arbitrators should not be automatically positioned, by mere operation of the system,²³⁰ for exposure to cognitive illusions. Instead, arbitrators should be restricted in their access to the funding information. The existence of TPF may require reallocation of power in the arbitration system, especially between arbitrators and arbitral institutions as a means of reducing the influences of, among other things, cognitive illusions. The fact that a third-party funder is involved in a dispute for either party should not systematically influence the arbitrator's responses in deciding the case. The arbitration system itself should institute new disclosure rules that support this premise without leaving it to the arbitrators' unfettered discretion and authority while hoping for the same result.

²³⁰ ICSID Amendment Proposals, *Working Paper No. 4*, *supra* note 3.