

On Third-Party Funding: Proposal on Further Review of the ICSID's 2018 Rule Amendments With hopes that this may still be considered before the adoption of the proposed amended ICSID rules under reference, may I make the following proposal: Permit me to say that the steps taken by ICSID in 2018 to review its extant dispute resolution rules are indeed the right steps in the right direction; particularly the intended regulation on Third-Party Funding (TPF) by making the institution responsible for ensuring disclosure of TPF arrangement. However, the manner with which the provision on TPF is being couched is inadequate or, to say the least, overstretched to the point that it now seems to further compound the issue that TPF creates in international arbitration. For clarity, Rule 21 of the Draft Arbitration Rules provides that: (continue in my COMMENT 2 below).

COMMENT 2 (2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration. (3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement (NB: There is a corresponding provision under Rule 32, Annex B, of the Draft Additional Facility Arbitration Rules) (continue in COMMENT 3 below)

COMMENT 3 The above provision is indeed a welcome development in the circles of investor-state arbitration. The provision makes disclosure of TPF arrangement mandatory, thereby reducing (if not dispossessing of) the uncertainties and speculations that trail the impact of TPF in an arbitral process, especially when not disclosed. However, the above provision is faulty. An eagle-eye analysis of the second sentence in Rule 21(2) of the above provision would reveal a hidden fault: "Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration." The above allows a party to disclose a third-party funding arrangement immediately upon registration or upon concluding a third-party funding arrangement after registration. In other words, parties to an international arbitration are free to enter into a TPF agreement at any time during the course of the proceedings, in as much as such party immediately sends notice of such funding arrangement to the Secretariat. (continue in COMMENT 4 below)

COMMENT 4 The above provision is inherently faulty and calls for an immediate review because it is time and cost inefficient. For instance, if a party decided to contract a third-party funder when the arbitral proceedings have made a considerable progress, it is undeniable that such step would automatically interrupt or even truncate the entire proceedings because the Secretariat would then have to consider if such TPF arrangement gives rise to conflicts of interest. The golden question now is 'what if it does?' What if the presence of this funder occasions a conflicts of interest issue with an arbitrator. The arbitrator would have no choice than to recuse himself from further participation in the proceedings. That being the case, the search for a new arbitrator becomes inevitable. This would not only waste time but also resources, and most likely truncate the entire proceedings. Therefore, it is proposed that ICSID should further review this provision to give room for automatic conflict check by the institution upon a mandatory TPF disclosure by a party prior to the appointment of arbitrators in respect of the dispute in question.

Thank you. Ayodeji Akindeire