

STUDENT NOTES

Regulating Foreign Third-Party Litigation Finance Under IEEPA: A National Security Imperative

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ABSTRACT

The United States, chiefly through the Committee on Foreign Investment in the United States, focuses most of its oversight of foreign economic influence on foreign direct investment and acquisitions. But when foreign capital enters in the form of foreign third-party litigation funding, the United States declines, at a federal level, to even require its disclosure. Given the broadening conception of what implicates national security, foreign funding in United States courts and against United States interests in arbitration and investor-state disputes is a threat to national security. Third-party funders can take control of cases, allowing them to replace the litigants' priorities with their own. Funders disproportionately fund intellectual property cases where they may access sensitive data, all while subject to ill-defined confidentiality requirements. Certain funders may act as proxies for adversarial states and their private sectors to strategically finance cases against United States interests, without profit as the intrinsic motivation. Using the International Emergency Economic Powers Act, President Trump is uniquely positioned to quickly and effectively investigate, require disclosure, and regulate this secretive industry. Specifically, President Trump should declare a national emergency, gather information through an investigation and disclosure requirements, and utilize his discretion through a process akin to that employed by the Committee on Foreign Investment in the United States, to prohibit, under threat of sanctions, certain foreign litigation funding that threatens the national and economic security of the United States of America. This paper proposes language for a draft executive order in Appendix I that would realize such legal authority.

INTRODUCTION

In commercial arbitration, investor-state dispute settlement (“ISDS”), and in the U.S. court system, foreign adversaries of the United States can use third-party litigation funding (“TPLF”) to undermine U.S. national interests. TPLF allows adversarial foreign actors to fund, and often gain control over, claims that serve

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their strategic goals, such as achieving competitive advantages over key U.S. companies, accessing litigants' sensitive data (especially in intellectual property suits), and undermining strategic aims of the United States and its allies through resource drain and regulatory chill. On June 16, 2025, the Senate Finance Committee released a draft of the One Big Beautiful Bill Act that contained Senator Thom Tillis's proposal to regulate "Predatory Litigation Funding."¹ It would have established a special excise tax of 40.8% on all "qualified litigation proceeds," which, with a small number of exceptions, covers entities and persons regardless of nationality.² Like other TPLF legislation,³ the arguably misguided provision⁴ was not in the final version of the bill, leaving foreign funders free to continue operating in U.S. courts.⁵ Yet, with nearly half of states deliberating TPLF legislation this year and strong public support for regulation of TPLF,⁶ now is the right time for federal involvement.⁷ Since Congress has not acted, President Trump should use the speed and power of the International Economic Emergency Powers Act ("IEEPA") to address this threat. Under IEEPA's broad authority, President Trump should declare a national emergency to gather information

1. See Christian Brause & Andy Lau, *U.S. Senate Draft of the Reconciliation Bill Introduces New Punitive Excise Tax Regime for Litigation Financing*, SIDLEY AUSTIN, LLP (June 20, 2025), <https://perma.cc/WF48-KRQH>.

2. Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025).

3. The Litigation Funding Transparency Act of 2024 ("LFTA") would have required TPLF disclosure in both multidistrict litigation proceedings and federal class action lawsuits. Litigation Funding Transparency Act of 2024, H.R. 9922, 118th Cong. (2024). Yet, neither the LFTA of 2024 nor 2021 ever advanced beyond the committee stages. Litigation Funding Transparency Act of 2021, H.R. 2025, 117th Cong. (2021). Additionally, in September 2023, a bipartisan group of senators and representatives introduced the Protecting Our Courts from Foreign Manipulation Act ("FMA"), S. 2805, 118th Cong. (2023). This legislation, which was referred to and stalled in both the House and Senate Committee on the Judiciary, would have required disclosure from foreign funders *and* prohibited foreign governments from investing in U.S. litigation, including through sovereign wealth funds. It was therefore distinguishable from the LFTA which only aimed at disclosure, not regulation. The bill was reintroduced in 2025, and the House Judiciary Committee voted 15-11 in November to recommend the bill. H.R. 2675, 119th Cong. (2025).

4. The provision is better than the current status quo of no action, but it is also overinclusive, confusing, and insufficient. It is overinclusive because, although shielding U.S. courts from foreign funders is an important aim, the provision does not distinguish between U.S. and non-U.S. persons in the definition of "covered party." Therefore, U.S. funders pay the same tax as adversarial foreign actors. It is also confusing because, although one of the aims is to target frivolous litigation, the Act aims its punishment at winnings; needless to say, there will be no winnings in frivolous cases. Lastly, it is insufficient because adversarial foreign entities are the most likely funders of non-meritorious litigation to access sensitive data, drain the resources of key U.S. sectors, and advance their ideology. Therefore, the provision will not deter these foreign not-for-profit funders, even though it is ostensibly targeted at foreign funders.

5. David Thomas, *Litigation Funders Get a Boost in Budget Bill Drama, Court Wins*, REUTERS (July 3, 2025), <https://perma.cc/5X4A-AT2U>.

6. Jeff Elkins, *New Oklahoma Laws Aim to Prevent Foreign Litigation Funding*, J. REC. (June 5, 2025), <https://perma.cc/687Z-5RFS>.

7. See *What You Need to Know About Third-Party Litigation Funding*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (June 7, 2024), <https://perma.cc/RDS8-A5GA> (finding that general disclosure standards are popular with "69 percent of [U.S.] voters, including strong majorities of Republicans, Democrats, and Independents").

through investigation and required disclosures. Guided by the gathered information, executive agencies can use discretion, similar to that employed by the Committee on Foreign Investment in the United States (“CFIUS”), to prohibit, through the threat of sanctions, certain foreign litigation funding that threatens the national security of the United States. This Note proposes a draft executive order (“EO”) in Appendix I that does just that.

I. THE BASICS OF TPLF AND WHETHER IT IS A NET POSITIVE

At its core, TPLF is both a derivative bet for funders and a way to dilute risk for litigants. Funders, who are not parties directly connected to the proceedings, can pay legal fees for a case or portfolio of cases, monetize a portion of a projected award, or purchase claims outright. Litigants, who can be both individuals and corporations, receive immediate liquidity to hire better legal representation, cover expenses, or to use for other business needs. Funders use non-recourse funding; if the party they fund loses, they recover nothing, but if the case succeeds, they take, before the litigant, an arranged percentage of the damages, a multiple of their initial investment, or a hybrid of the two. The negotiated return varies depending on risk, leverage, timeline, and potential quantum, but it is usually a significant percentage or multiple of the damages.⁸

In the past, the common law doctrines of maintenance and champerty generally prohibited non-parties from financing litigation for a stake in the return. The doctrines originated in feudal England to prevent wealthy lords from agreeing to defend their subjects from hostile land takeovers only in return for a piece of the land defended.⁹ This was essentially a form of non-recourse funding, and the power imbalances were apparent. But these doctrines have loosened since the second half of the twentieth century, and in the jurisdictions that maintain them, they are little more than parchment barriers.¹⁰ In 2010, the practice of TPLF was introduced in the United States.¹¹ Since then, the industry has ballooned, with one intermediary who connects law firms and funders “estimat[ing] more than half of ‘high-stakes’ claims receive funding.”¹² Another source estimates funders deployed \$3.2 billion in 2022, representing a 16% increase from 2021.¹³

Beyond litigation in U.S. courts, ISDS is also uniquely attractive to funders.¹⁴ By 2021, the average claim sought in ISDS was \$1.16 billion and the average

8. *See id.* (finding that the percentage usually ranges from “20-40% of the proceeds of the case, or even more”); *see also* Lesley Stahl, *A Multibillion-Dollar Industry for Investments in Lawsuits with Little Oversight*, CBS NEWS (Dec. 18, 2022), <https://perma.cc/7TL2-3VLL> (“Are there cases where you actually walked away with more money than the plaintiff’ . . . [CEO of Burford Capital] ‘It certainly can happen.’”).

9. *See What You Need to Know About Third-Party Litigation Funding*, *supra* note 7.

10. U.S. GOV’T ACCOUNTABILITY OFF., *THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS* 4 (2022), <https://perma.cc/WWT5-U9PS>.

11. *Id.* at 2.

12. Katie Surma & Nicholas Kusnetz, *How to Buy a Piece of a Lawsuit and Impoverish a Country*, INSIDE CLIMATE NEWS (Dec. 8, 2024), <https://perma.cc/M67F-CBWU>.

13. Sara Merken, *Litigation Funders Deployed \$3.2 Bln in U.S. Investments Last Year - Report*, REUTERS (Feb. 16, 2023), <https://perma.cc/V4MM-5GGB>.

14. *See* Surma & Kusnetz, *supra* note 12.

amount states paid was \$437 million, i.e., “high-stakes.”¹⁵ One reason for the high damages is that investors can seek, during the quantum stage, lost future profits through discounted-cash-flow models.¹⁶ Moreover, ISDS offers unique perks to claimants, such as minimal opportunities for counterclaims available to the respondent, discussed in depth later. Indeed, over the last decade, reform efforts by Working Group III of the United Nations Commission on International Trade Law (“WGIII”) targeted the respondent-claimant power disparity and the prevalence of third-party funding in ISDS.¹⁷ Some investor-state research tools, such as Investor-State LawGuide, even boast TPLF trackers to monitor the vast funding in ISDS.

This Note focuses on the facets of TPLF that have the potential to affect U.S. national security, but other TPLF critiques are worth briefly noting. The fundamental issue is that third parties with no stake in the substance of the case can involve themselves without the counterparty being aware.¹⁸ Funding can also disincentivize settlements, extend litigation, and increase costs.¹⁹ Rather than choosing fair settlements, litigants may feel the need to push for higher awards to cover the substantial percentages of the award apportioned, often while under duress, to funders,²⁰ and funders often push for the same to make sufficient profits.²¹ Moreover, though proponents argue that TPLF, like contingency fees, ensures that indigent parties can access justice,²² a rising number of companies use TPLF to free up cash-flow, manage risk, and shift legal costs off their books, which undermines the access to justice arguments.²³

15. See COLUM. CTR. ON SUSTAINABLE INV., PRIMER ON INTERNATIONAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT 8 (2021), <https://perma.cc/2HU3-RSEQ>.

16. *The ‘Modern’ DCF Valuation Approach: Theory Versus Practice*, FTI CONSULTING (Dec. 5, 2024), <https://perma.cc/YGU2-4EHU> (referencing the \$4.1 billion dollar award in *Tethyan v. Pakistan*).

17. See, e.g., UNCITRAL WGIII, INITIAL DRAFT ON THE REGULATION OF THIRD-PARTY FUNDING – COMPILATION OF COMMENTS (2021), <https://perma.cc/V6NT-SB67>.

18. Dalal Alhouti, *Disclosing Third-Party Funding in International Arbitration: Where Are We Now?*, CHARLES RUSSELL SPEECHLYS (Nov. 29, 2022), <https://perma.cc/8CEJ-VUM6> (noting that the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration state that “given [funders’] direct economic interest in the final award a third-party funder should, for the purposes of conflict checking, be considered as equivalent to a party in the dispute.”).

19. Ernest Yang, Valerie Li & Eva Yao, *Reshaping the Landscape for Third-Party Funding in China — New CIETAC Arbitration Rules on TPF Came into Effect on 1 January 2024*, DLA PIPER (Jan. 10, 2024), <https://perma.cc/EC9H-LQRP> (quoting Shanghai No. 2 Intermediate People’s Court, who stated that “the use of TPF in litigation is contrary to public policy because it would encourage parties to litigate at low costs instead of choosing other dispute resolution mechanisms.”).

20. The popular program *Mr. Bates vs. The Post Office*, which told the story of British postmasters falsely accused of theft, demonstrated this unhappy ending when funders and plaintiffs’ lawyers took more than 80% of the postmasters’ settlement. See *What You Need to Know About Third-Party Litigation Funding*, *supra* note 7.

21. See generally *In re Broiler Chicken Antitrust Litig.*, No. 16-cv-08637, 2020 WL 3469166 (N.D. Ill. June 25, 2020) (providing an example of funder pushing for higher awards to ensure high profits).

22. See generally Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, 49 RUTGERS L. REC. 118 (2022); see also *The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities: Hearing before the Subcomm. on Courts, IP, and the Internet of the H. Comm. on the Judiciary*, 118th Cong. 2–6 (2024) (statement of Rep. Hank Johnson).

23. See Victoria Sahani, *Third-Party Funding in Investment Arbitration*, in HANDBOOK ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 137 (Nikolaus Pitkowicz ed., 2d. ed. 2025).

II. FOREIGN FUNDERS CAN USE TPLF TO THREATEN U.S. NATIONAL SECURITY

TPLF has the potential to threaten U.S. national and economic security. This section highlights the dangers of TPLF funders accessing commercially sensitive materials, exerting influence through control clauses, and funding strategic, often not-for-profit cases that advance the funders' goals. Although most instances of TPLF are not driven by malign motives, this section aims to illustrate how TPLF can be an enticing tool for foreign adversaries to creatively undermine U.S. interests; that adversaries will leave no stone unturned in their pursuit to weaken U.S. hegemony; and that viewing TPLF concerns through the widening lens of national security illuminates an exposure to risk that is at least on par with other serious national and economic security threats identified by the U.S. government.²⁴

A. Foreign Funders Can Fund Cases to Access Sensitive Data of Parties

U.S. adversaries and competitive foreign companies, sometimes owned by those adversarial governments, can use TPLF to access sensitive data over the duration of a case. Before even agreeing to fund the case, correspondence between the litigant and funder “necessarily require the sharing of confidential, privileged and, on occasion, highly sensitive information with the funder.”²⁵ Then, during the dispute, further information is communicated to the funder through reporting and monitoring requirements that are commonplace in funding agreements.²⁶ Since funders are not bound by lawyers' code of ethics, they can reveal any sensitive information to third-parties,²⁷ which can include sovereign wealth fund (“SWF”) backers.²⁸ For example, a recent cryptocurrency crowdfunding scheme to fund litigation was actually a front to “obtain[] privileged information on

24. See Charlie Dunlap, *If Everything Is a “National Security” Priority, Nothing Will Be*, LAWFIRE (May 12, 2021), <https://perma.cc/P6RG-2D85> (“Here’s a litany of some of the things that have been stuffed under the aegis of ‘national security’: obesity (as well as universal health care), racism, the environment, political corruption, global poverty, policing, illicit drugs, the K-12 education system, infrastructure, street gangs, UFOs, religious freedom, transnational crime, higher education curriculum, the economy, gun control, abortion, international trade, social media, protectionism, immigration, hunger, homelessness, solar storms, clothing, unusual behavior, and more.”).

25. See Maximilian Albert Müller, *Approaches to Defining Third-Party Funding*, in HANDBOOK ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 22 (Nikolaus Pitkowitz ed., 2d ed. 2025).

26. Before the summary judgement stage, parties share information through discovery, so unmeritorious or frivolous cases can still yield valuable information before being dismissed. See *id.*

27. See *id.*

28. SWFs already make up “almost 3% of the U.S. stock market” and back litigation funders. Justin D. Weitz, Ayman A. Khaleq & Sandra Moser, *Sovereign Wealth Funds and the FCPA: The Importance of Targeted Due Diligence*, MORGAN LEWIS (June 15, 2023), <https://perma.cc/P645-T4WH>. Burford Capital, a publicly traded funder, stated that an “[a]rrangement with sovereign wealth fund (BOF-C) [is] a key driver of Burford-only asset management income, producing more than 80% of YTD24 asset management income . . .” BURFORD CAPITAL, INVESTOR PRESENTATION (Oct. 2024) (emphasis added) (available at <https://perma.cc/PVP8-Z54U>). Similarly, in 2019, Therium launched a \$430 million fund sourced from three global institutional investors, including a sovereign wealth fund. *Therium Launches New \$430 Million Global Fund to Finance Litigation and Arbitration*, BUS. WIRE (Mar. 25, 2019) (available at <https://perma.cc/KSF9-KFHE>).

rivals,”²⁹ demonstrating the key role TPLF can play in the cutthroat race for artificial intelligence, quantum computing, and semiconductors.

In practice, a non-disclosure agreement covering confidential materials litigants share with funders can mitigate that concern, but funders can exploit power and information disparities to circumvent such agreements.³⁰ For example, funders have negotiated equity in the funded party,³¹ which allows them to “access privileged information as a shareholder of the disputing party with reduced concerns about confidentiality or privilege.”³² And since there is no requirement to disclose the *terms* of funding agreements, if counterparties are even aware a funder is involved when they share information during discovery, they do not know what confidentiality structure exists between the funder and funded party.

To access this sensitive data, foreign funders could target U.S. companies in defense, technology, and energy sectors.³³ Indeed, funders already disproportionately target intellectual property, financing almost a quarter of U.S. patent cases with little oversight.³⁴ Yet this financialization of the legal field through the proliferation of TPLF does not attract even close to the same kind of investment scrutiny,³⁵ as conducted by CFIUS, that is applied to physical investments or corporate acquisitions.³⁶

China, with its long-term strategy to acquire key U.S. technologies and seize economic power, could access sensitive data through TPLF as another route for their theft of intellectual property.³⁷ Indeed, accusations over intellectual property

29. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, A NEW THREAT: THE NATIONAL SECURITY RISK OF THIRD PARTY LITIGATION FUNDING 5 (Nov. 2022), <https://perma.cc/BHS3-5CX7>; see also Stahl, *supra* note 8 (explaining that Peter Thiel, motivated by a personal vendetta, secretly funded a lawsuit that drove Gawker out of business).

30. See Mick Smith & Jeffery Commission, *Case Selection and Commercial Terms of Funding Agreements*, in HANDBOOK ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 168 (Nikolaus Pitkowitz ed., 2d ed. 2025).

31. This serves as another control mechanism. See *infra* Appendix I, Section I.C.

32. See Müller, *supra* note 25, at 7; see also *Persona Digital Telephony Ltd. v. Minister for Public Enter.* [2017] IESC 27, ¶ 17(vi).

33. See U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 29, at 13 (noting that the United States has “numerous, robust controls—including commercial and military export controls and the vetting of foreign investment in the United States—to limit the access of foreign adversaries to critical U.S. technology and information. Yet, foreign governments or companies could use litigation funding to circumvent these controls to gain access to sensitive or otherwise unavailable information.”).

34. See *id.*; see also Victoria Shannon Sahani, *Third-Party Funding: Balancing Transparency, National Security, and Access to Justice*, 49 SEATTLE U. L. REV. 569, 613–17 (2026) (explaining various transaction structures for third-party funding arrangements in patent litigation, including where the foreign funder obtains significant control).

35. See Elkins, *supra* note 6 (“Our courts aren’t casinos. It’s not a place where you go to make 40% on your investment.”).

36. See Letter from John Kennedy, U.S. Senate, to Hon. Merrick Garland, Att’y Gen., U.S. Dep’t of Just., and John Roberts, Chair, Jud. Conf. of the United States (Jan. 6, 2023), <https://perma.cc/N6SM-EAKM> (“[F]oreign entities could also access sensitive technologies and information by circumventing existing controls embedded in federal law, like those enforced by the Committee on Foreign Investment in the United States, that exist to protect [U.S.] security interests.”).

37. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105727, ENFORCEMENT AGENCIES SHOULD BETTER LEVERAGE INFORMATION TO TARGET EFFORTS INVOLVING U.S. UNIVERSITIES 6 (2022) (documenting the laundry list of how China conducts intellectual property theft); FED. BUREAU OF INVESTIGATION, CHINA: THE RISK TO ACADEMIA 1–2 (2019), <https://perma.cc/48YF-8ZL6> (estimating that the annual cost to the U.S.

theft and forced technology transfers served as a major impetus for the U.S.-China trade war in the first Trump administration.³⁸ In 2018, the Office of the U.S. Trade Representative concluded that Chinese policies “related to technology transfer, intellectual property, and innovation covered in the [Section 301] investigation are unreasonable or discriminatory and burden or restrict U.S. commerce.”³⁹ As China pursues all avenues to obtain United States technology,⁴⁰ a funder’s ability to access sensitive data of counterparties, without that counterparty being aware, represents another tool to steal intellectual property.

B. Control Clauses Are a Mechanism to Prioritize Foreign Funders’ Interests

Funding agreements can contain control clauses that give funders undue influence over case direction, which can be a major tool to advance their strategic priorities.⁴¹ Control clauses “range from requiring funder consent for the hiring of counsel and experts to provisions giving the funders the right to attend strategy meetings and participate in settlement negotiations.”⁴² Additionally, funding agreements not containing control clauses still apply pressure through monitoring rights and certain conditional rights to terminate funding.⁴³ And while not explored in this Note, funders can also purchase entire claims, in which case litigants “may choose to contractually waive or assign the right to decide whether to settle.”⁴⁴

Although industry secrecy means most funding arrangements remain hidden, recent evidence indicates that funders seek control. For example, Sysco’s dispute with Burford Capital,⁴⁵ a large litigation funder, arose after Burford provided funding of over \$140 million in Sysco’s antitrust claims.⁴⁶ The funding agreement had a control clause giving Burford “the authority to approve or disapprove of settlements.”⁴⁷ When Sysco decided to settle some of the claims, Burford, feeling the profit margin was insufficient, did not allow Sysco to settle.⁴⁸ An arbitral tribunal affirmed that Burford controls Sysco’s ability to make a settlement decision.⁴⁹

economy of counterfeit goods, pirated software, and theft of trade secrets is \$225 to \$600 billion, and stating that “China is the world’s principal infringer of intellectual property”).

38. See OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 SPECIAL 301 REPORT 5 (2018), <https://perma.cc/D7P9-6F7F>.

39. *Id.* at 35.

40. See, e.g., Tim Fist, Jordan Schneider & Lennart Heim, *Chinese Firms Are Evading Chip Controls*, CTR. FOR A NEW AM. SEC. (June 21, 2023), <https://perma.cc/67YK-ZYQF>.

41. See *infra* Appendix I, Section I.C.

42. See U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 29, at 2.

43. See Müller, *supra* note 25, at 22–23.

44. See Smith & Commission, *supra* note 30, at 168.

45. See *In re Pork Antitrust Litig.*, No. 18-cv-1776, 2024 WL 511890, at *3–4 (D. Minn. Feb. 9, 2024), *aff’d*, No. 18-cv-1776, 2024 WL 2819438 (D. Minn. June 3, 2024).

46. Hailey Konnath, *Burford, Sysco Agree to Drop Litigation Funding Suits*, LAW360 (June 28, 2023), <https://perma.cc/HTS4-9CW7>.

47. *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1.

48. See Konnath, *supra* note 46.

49. *Glaz LLC v. Sysco Corp.*, LCIA Case No. 225609, ¶ 230 (Mar. 10, 2023), <https://perma.cc/FX93-4JVN> (“Until the Tribunal adjudicates Claimants’ claim for a permanent injunction or unless otherwise permitted by the Tribunal or unless consented to in writing by Claimants, Respondent shall not enter into the two Proposed Settlements.”).

The parties eventually settled out of court, but the takeaway is that these control clauses allow funders to step into the role of litigants while prioritizing their own interests.⁵⁰ Burford even admits in its regulatory filings that they “consult on litigation strategy, participate in choosing arbitrators and expert witnesses, comment on draft pleadings, assist in the creation of the damages theory and consult on potential settlement, management of spending and performance against budget.”⁵¹ The funding is not passive. As one law firm explains, “there will inevitably be some loss of autonomy [for litigants] since the funder will need some degree of control over its investment.”⁵²

The Sysco dispute is not an isolated incident.⁵³ While in Sysco’s case, the funder’s interest was enhanced profit, in the case of adversarial foreign funders, those interests may converge in a manner that undermines the United States and its strategic companies.⁵⁴ Control clauses can therefore serve as a tool to advance the strategic aims of adversarial countries and competitive foreign companies, some of which are owned by adversarial countries.⁵⁵ The next section covers some of these strategic aims and the potential for funding to advance them.

C. TPLF Can Be a Mechanism to Advance Strategic Rather than Monetary Aims

The emerging consensus is that foreign funders may have strategic aims that do not always or solely include profit.⁵⁶ Funders obviously disagree, arguing that if the case is meritorious, it would receive funding regardless, and if it is non-meritorious, it would be kicked out through summary proceedings.

50. *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1 (showing that Sysco later fired their legal counsel for purportedly “provid[ing] legal advice to Burford that was contrary to Sysco’s interests during the dispute between Sysco and Burford over settlement authority”).

51. See Surma & Kusnetz, *supra* note 12.

52. See Alhouti, *supra* note 18.

53. In *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 (Apr. 4, 2016), the funding agreement gave the funder the right to appoint members to the litigant’s board of directors and, therefore, the right to influence strategy. See Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1192 (2015) (“The Senior Secured Credit Agreement gave control rights to the funder through two vehicles: issuance of a special class of stock that empowered the funder to nominate directors of the company, and contractual requirements to get the assent of the funders’ directors to certain steps within the litigation.”); Re *Crystallex Int’l Corp.*, [2012] O.N.S.C. 6812 (Can. Ont.) (available at CanLII, <https://perma.cc/S7VC-6Z2J>). Similarly, in *Boling v. Prospect Funding Holdings, LLC*, 771 F. App’x 562, 579 (6th Cir. 2019), the court found the funding agreement “effectively g[a]ve [the funder] substantial control over the litigation.”

54. See *infra* Appendix I, Section I.C.

55. See U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 29, at 1. *Contra* Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs*, 39 MISS. COLL. L. REV. 102, 109 (2020) (pointing out that the Chamber of Commerce lobbies for big business, and litigation funding arguably “offers a chance to rebalance the scales in favor of the little guy”).

56. See Sahani, *supra* note 23, at 124 (“States are increasingly concerned about politically motivated, not-for-profit funders as well.”); Donald J. Kochan, *Keep Foreign Cash Out of U.S. Courts*, WALL ST. J. (Nov. 24, 2022), <https://perma.cc/QQ8U-SPGF> (noting that foreign entities “can fund frivolous litigation to overwhelm U.S. courts, target lawsuits to weaken critical industries, or obtain confidential materials through the discovery process”).

Regardless, the potential for harm is extensive: even in cases that will be dismissed, not-for-profit funders can access sensitive data since discovery often precedes summary judgement; they can fund counterparties of U.S. companies, which increases litigation defense budgets and loss rates for U.S. companies, providing key competitive advantages for foreign competitors; they can backlog U.S. courts; they can refuse reasonable settlements to burn resources of the government and key companies; they can increase the number of claims to slow government regulation⁵⁷ or company innovation⁵⁸; even in meritorious cases, funders may have a primary motivation of accessing sensitive data or dragging out litigation to increase companies' costs and a secondary motivation of profit; they can accept high-risk or marginal cases, which other funders with robust due diligence would decline, when the cases align with their strategic aims, namely undermining U.S. hegemony; and they can use these cases to signal that the United States and its allies are rulebreakers on the international stage.⁵⁹ Domestic funders with no foreign backing that are funding meritorious cases should have no reason to fear disclosure and oversight.⁶⁰

Foreign adversaries can use strategic funding to gain competitive advantages over critical U.S. companies and industries. Although most strategic U.S. companies are massive, adversarial litigation can still have meaningful impacts.⁶¹ For example, fourteen state attorneys general recently wrote that “costly litigation aimed at sabotaging major energy sectors that are vital to our economy poses a direct threat to our economic security interests and global independence.”⁶² And in *RSM Production Corporation v. Grenada*, a 2010 ISDS case, an oil company, looking to gain a competitive advantage, funded a respondent state that was

57. See U.N. Comm'n on Int'l Trade L. Working Grp. III, 46th Sess., *Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Procedural and Cross-Cutting Issues*, A/CN.9/WG.III/WP.231, at 10 (Oct. 2023) (proposing that a tribunal may limit funding when “the number of cases that the third-party funder funds against the respondent Contracting Party with regard to the same measure exceeds a reasonable number”).

58. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 29, at 13 (“A recent study showed that companies that lose abusive patent cases end up reducing R&D investment by an average of more than \$160 million over the following two years as compared to companies that won such cases.”).

59. Although not discussed in this note, there is also an opportunity for sanctioned persons to circumvent sanctions through TPLF. See Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, BLOOMBERG L. (Mar. 28, 2024), <https://perma.cc/SH5E-2AN4> (“A1, a subsidiary of Russian financial giant Alfa Group, has backed lawsuits in New York and London, both before and after three of its billionaire founders were sanctioned following the 2022 invasion of Ukraine The cases show how A1 was able to continue its funding even as people and companies connected to it were sanctioned.”).

60. See *The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities: Hearing before the Subcomm. on Courts, IP, and the Internet of the H. Comm. on the Judiciary*, *supra* note 22 (statement of Darrell Issa, Chairman, S. Comm. on Courts, IP, and the Internet).

61. *Id.* (statement of Bob Goodlatte) (explaining that foreign funding increasingly supports “patent trolls” that drain the resources of key U.S. companies).

62. Letter from Christopher Carr, Georgia Att’y Gen., et al. to Att’y Gen. Merrick Garland (Dec. 22, 2022), <https://perma.cc/SY8H-6YCD> [hereinafter Letter on Threats Posed by Third-Party Litigation Funding].

defending itself against the oil company's competitor.⁶³ It would be foolhardy to believe foreign adversaries and their companies are not taking such opportunities to encroach on U.S. economic exceptionalism. It would be even worse to forego investigating the extent to which it is already happening.

Similarly, funders can strategically fund cases that align with their ideologies. For example, Bloomberg Foundation's Campaign for Tobacco-Free Kids provided finances and technical assistance to Uruguay when Phillip Morris challenged Uruguay's tobacco packaging regulations in ISDS.⁶⁴ The Foundation then established "the Anti-Tobacco Trade Litigation Fund to help low- and middle-income countries finance their defenses against tobacco companies' claims under investment treaties."⁶⁵ Although this instance of strategic funding is a net positive, it highlights the underlying concern: is the lack of TPLF disclosure concealing other strategic funding, namely adversarial foreign actors using similar mechanisms to advance their interests and undermine the United States?

Foreign companies and states can also fund or create lawsuits meant to induce regulatory chill.⁶⁶ If U.S. companies feel they will be subject to a bevy of well-funded lawsuits, they may hesitate to take risks and innovate, impacting economic exceptionalism.⁶⁷ This is especially impactful in the United States where new administrations aim to quickly implement regulatory shifts. A U.S. president may be reticent to regulate if each regulatory shift would induce a bevy of funded lawsuits in both civil actions and ISDS.⁶⁸

Regarding regulatory chill from funding in ISDS, concerns over a state's sovereignty and right to regulate are a common thread in most economic treaty negotiations and contribute to the United States' recent reticence to join international treaties.⁶⁹ The use of TPLF in ISDS could limit strategic regulation by the United

63. RSM Production Corporation v Grenada, ICSID Case No. ARB/10/6 (2010). Although funders almost exclusively fund claimants in ISDS, the company strategically funded the respondent state to gain a competitive advantage over their competitor. See Sahani, *supra* note 23, at 128 (explaining how funding respondents is not a viable path to profits given their inability to counterclaim). Therefore, even though the United States is rarely a respondent in ISDS, foreign funders, on behalf of foreign competitor companies, could still impact U.S. interests through TPLF in ISDS by funding respondent states when U.S. companies are claimants.

64. Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, <https://perma.cc/WDQ6-QMJX>.

65. See Sahani, *supra* note 23, at 132.

66. Indirect funding models also exist, such as funders owning or investing in a law firm representing a party.

67. Beyond regulatory chill, foreign persons can also fund cases aimed at creating legal precedents that serve their strategic interests and handcuff the U.S. government.

68. It is easily analogizable to the spate of regulatory actions against Spain for pulling incentives tied to renewable projects. See, e.g., Graham Keeley, *Spain Faces €8 Billion in Renewable Legal Claims Over Past Solar Boom*, EURONEWS (Dec. 27, 2022), <https://perma.cc/75ZN-3RGK> (noting the "51 claims totaling €8 billion that Spain" faces from switching a regulatory incentive for clean energy).

69. See Tarald Berge & Axel Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 J. INT'L DISP. SETTLEMENT 1, 1–2 (Apr. 30, 2021), <https://perma.cc/7HF2-43J5> ("This concern was crucial in the opposition civil society groups raised with regard to the Comprehensive Economic and Trade

States and its allies and further undermine U.S. participation in the so-called rules-based international economic order.

Regarding regulatory chill from funding in domestic courts, if foreign funders aim resources at obtaining injunctions or setting strategic precedents in the United States, it amplifies concerns of chilling presidents' right to regulate.⁷⁰ Although the Supreme Court in 2025 struck down the controversial use of universal injunctions,⁷¹ in which a lower court binds the federal government broadly in its relations with non-parties to the case, the Court acknowledged that the need to grant the plaintiff "complete relief" can still result in a broad ban on a specific government action in certain cases.⁷² Additionally, as the state attorneys general wrote, cases may be funded "simply to further backlog our courts at the expense of the American taxpayers," which would decrease legal efficiency and certainty.⁷³

If a new president undertook any strategic initiative that shifted the regulatory scheme, foreign funders could support lawsuits to hinder enactment, hurting the United States' role as an innovator and leader. Funding arrayed against environmental policy demonstrates just one example of funders pursuing cases that can hinder a state's right to regulate. Burford attributes part of the rise in Latin American arbitrations to the "\$1.7 trillion of investment in energy, mining and construction connected to the global energy transition."⁷⁴ Indeed, 15% of ISDS cases are those challenging states' environmental measures.⁷⁵ And where there are high-stakes claims, there are also funders. In 2022, Harbour Litigation Funding funded Rockhopper Exploration's ISDS claim concerning the Italian government's denial of an application for offshore drilling.⁷⁶ The resulting award was \$190 million, and when Italy delayed payment, Harbour sold its stake to another, undisclosed, funder.⁷⁷

Even if foreign TPLF does not chill state regulation, states still must spend more resources to defend funded cases, regardless of their merit, which diverts needed resources. This is especially prevalent in ISDS where "respondent-side funding ... is nearly nonexistent"⁷⁸ because respondent's opportunities for

Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP), and it is central in the reform discussions about ISDS going on under the auspices of the [UNCITRAL].").

70. See Rachel Reed, *Do Universal Injunctions Lead to National Rule by One Judge*, HARV. L. TODAY (Feb. 08, 2024), <https://perma.cc/WBG6-2ZEA> ("[U]niversal injunctions have been applied to both Democrat and Republican executives alike — halting key initiatives by the Obama, Trump, and Biden administrations.").

71. See generally *Trump v. CASA, Inc.*, 606 U.S. 831 (2025); see also Courtney Bubl , *House Approves Bill to Restrict Nationwide Injunctions*, LAW360 (Apr. 9, 2025), <https://perma.cc/ZLAG-9Q3J> ("The No Rogue Rulings Act ... would limit the ability of federal district court judges to issue injunctions that would apply broadly, beyond the party before the court.").

72. *Supreme Court Ends Use of Universal Injunctions*, MCGUIRE WOODS (June 30, 2025), <https://perma.cc/5D38-X9BT>.

73. Letter on Threats Posed by Third-Party Litigation Funding, *supra* note 62.

74. See Surma & Kusnetz, *supra* note 12.

75. Berge & Berger, *supra* note 69, at 3.

76. See Surma & Kusnetz, *supra* note 12.

77. *Id.*

78. See Sahani, *supra* note 23, at 128.

counterclaims are minimal.⁷⁹ For respondents, success therefore equates to losing less, not winning, meaning any case diverts taxpayer dollars.⁸⁰ In 2021, the mean cost of a respondent defense, regardless of a win or loss, was \$4.7 million.⁸¹ Additionally, funders can employ control clauses to increase defense expenses by prohibiting litigants settling for reasonable sums, as demonstrated by the Sysco dispute.⁸²

Although these substantial defense costs may be a small dent in the U.S. budget, foreign adversaries will pursue any comparative advantage possible, and other U.S. allies with smaller budgets may feel a larger impact. For example, a government lawyer representing Greenland in ISDS initially brought a team of three to the proceeding.⁸³ However, the claimant had fee funding.⁸⁴ As a result, claimant's side showed up with twelve lawyers.⁸⁵ The government lawyer then had to expend significant resources bolstering his team to fend off barrages of motions.⁸⁶

If foreign funders located in command economies, namely China, fund cases which undermine the interests of the United States or its allies, the U.S. government must consider and investigate the possibility that the states are pulling the strings as one facet of asymmetric warfare.⁸⁷ For example, PurpleVine IP, a Chinese funder, “financed multiple intellectual property lawsuits in U.S. courts against Samsung and a subsidiary.”⁸⁸ PurpleVine's CEO, Victor Yang, is vice president for TCL Corp., a Chinese electronics company that competes with

79. In fact, UNCITRAL Working Group III is working on reforms to increase the opportunity for respondent-state counterclaims to equalize the playing field for respondents. See, e.g., Li Yi, *Reassessing Consent in Counterclaims: Rebalancing Investment Protection and Public Interest Under the UNCITRAL ISDS Reform*, EJIL:TALK! (Nov. 27, 2025), <https://perma.cc/C9FX-4QY2> (“One of the most notable proposals identifies an investor's initiation of arbitration as implied consent to a tribunal's jurisdiction over counterclaims. Counterclaims have increasingly been seen as a potential tool for host States to raise public interest concerns deriving from foreign investment.”).

80. See COLUM. CTR. ON SUSTAINABLE INV., *supra* note 15 (“In *TCC v. Pakistan*, for example, Pakistan's legal fees were nearly \$25.5 million.”).

81. MATTHEW HODGSON, YARIK KRYVOI & DANIEL HRCKA, BIICL-ALLEN & OVERY 2021 EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION 5 (2021), <https://perma.cc/G9MU-98EX> (However, “successful respondent States recover at least some costs in 53% of cases”).

82. See Stahl, *supra* note 8 (finding that litigation funders are “reshaping every aspect of the litigation process – which cases get brought, how long they are pursued, when they are settled”).

83. See Surma & Kusnetz, *supra* note 12.

84. *Id.*

85. *Id.*

86. *Id.*

87. See OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 13–14 (2024), <https://perma.cc/UL3U-27QZ> (finding China “aims to sow doubts about U.S. leadership, undermine democracy, and extend Beijing's influence,” and “Moscow will continue to employ all applicable sources of national power to advance its interests and try to undermine the United States and its allies”); see also Sahani, *supra* note 23, at 133 (“[R]ounding out the types of ideological funders is the rare state or state-owned entity funding someone else's arbitration or litigation”).

88. *What You Need to Know About Third-Party Litigation Funding*, *supra* note 7; see generally, *Staton Techiya v. Harman International Industries*, 734 F. Supp. 3d 354 (D. Del. 2024) (one of the IP cases funded by PurpleVine).

Samsung.⁸⁹ Although Samsung is a South Korean company, U.S. companies such as Nvidia and Meta could easily be targeted in a like manner. In fact, they may already be, as Chief Judge Connolly's disclosure requirement in the U.S. District Court for the District of Delaware—one of the only judges with such a requirement in his court⁹⁰—then prompted the plaintiff to disclose that PurpleVine is funding three similar suits in Texas federal court.⁹¹ In most U.S. courts, judges do not enforce any disclosure requirement, meaning such subversive uses of TPLF remain hidden.

If foreign funders controlled or directed by the Chinese government fund litigation against U.S. companies, especially those in defense and technology, this implicates economic security, foreign policy, and national security.⁹² China is the primary concern because, as the former acting director of the U.S. Patent and Trademark office said, “[a]nything China does is concerning because nothing there is really independent.”⁹³ China has long “work[ed] to give Chinese companies a competitive advantage, sometimes using its intelligence agencies to steal intellectual property and trade secrets from foreign companies.”⁹⁴ The United States' *National Counterintelligence Strategy* emphasizes China's use of asymmetric warfare “as it targets key technology sectors and proprietary commercial and military technology from U.S. and allied companies.”⁹⁵ The state attorneys general understand the threat and argue that China and Russia may use “TPLF to fuel targeted lawsuits designed to weaken U.S. national defense companies in the business of protecting our national security interests.”⁹⁶

In summary, TPLF is a new, dynamic mechanism that offers unique benefits to foreign countries and companies, including exerting control, accessing sensitive data, funding counterparties of competitors, inducing regulatory chill, and providing states plausible deniability for strategic actions. Although the lack of disclosure requirements limits empirical evidence, the examples and theories advanced above, coupled with the broad national security definition, make a compelling case that TPLF is, or at the very least could be, a national security threat. The U.S. government previously regulated *potential* foreign interference in U.S. elections through IEEPA,⁹⁷ so it should feel comfortable regulating or, at the least, investigating this shrouded threat.

89. Emily Siegel, *China Firm Funds U.S. Suits Amid Push to Disclose Foreign Ties*, BLOOMBERG L. (Nov. 6, 2023).

90. See *Standing Order Regarding Disclosure Statements Required by Federal Rule of Civil Procedure 7.1* (D. Del. Apr. 18, 2022), <https://perma.cc/DQM2-3UN7>.

91. Siegel, *supra* note 89.

92. See Memorandum on America First Investment Policy, 2025 DAILY COMP. PRES. DOC. 292 (Feb. 21, 2025) (“Economic security is national security.”).

93. *Id.*

94. FED. BUREAU OF INVESTIGATION, EXECUTIVE SUMMARY, CHINA: THE RISK TO CORPORATE AMERICA 1–2 (2019).

95. NAT'L COUNTERINTELLIGENCE & SEC. CTR., NATIONAL COUNTERINTELLIGENCE STRATEGY 15 (2024).

96. Letter on Threats Posed by Third-Party Litigation Funding, *supra* note 62.

97. See Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018).

III. USING IEPPA TO IMPOSE SANCTIONS ON CERTAIN FUNDERS

Given Congress's failure to follow-through on regulating TPLF,⁹⁸ this Note proposes an EO, found in Appendix I, that uses IEPPA's speed and breadth to reveal and regulate, through sanctions, TPLF's national security impacts.⁹⁹ This proposed order takes inspiration from EO 13848, "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election."¹⁰⁰ Like EO 13848 seeks to protect U.S. elections, this proposed EO also aims to preempt foreign interference in a key U.S. democratic institution.¹⁰¹ Additionally, in EO 13848, President Trump declared that the threat of foreign interference was a national emergency while conceding "there has been *no evidence* of a foreign power altering the outcome or vote tabulation in any United States election."¹⁰² Thus, although the secrecy of the TPLF industry limits empirical evidence of foreign intervention, the potential threat discussed in Section I merits a preemptive national emergency designation, as done in EO 13848.

The proposal first has President Trump declare that foreign TPLF, including from domestic funders with foreign control, is a national emergency when in U.S. courts or aimed at U.S. interests in arbitration or ISDS.¹⁰³ Ideally, the declaration of a TPLF national emergency, before even imposing regulations under the EO, would coalesce information garnered from state disclosure requirements, increase pushes to amend the Federal Rule of Civil Procedure 26,¹⁰⁴ kickstart action on bills like the Protecting Our Courts from Foreign Manipulation Act ("FMA") that more adequately address TPLF than the tax in the Predatory Litigation Funding Act,¹⁰⁵ bolster disclosure rules in arbitration institutions, and break impasses in international institutions addressing the issue.¹⁰⁶ But if not, the investigation and

98. See Sahani, *supra* note 34, at 595 ("[R]ecent attempts to explicitly and directly regulate third-party funding at the federal level have not resulted in any enacted federal regulation or practical changes to the third-party funding industry's practices. This underscores the complexity of regulating the third-party funding industry.")

99. The proposed order adopts some of the standard provisions and formatting of orders utilizing IEPPA to apply sanctions, including section 6's prohibition on sanctioned persons entering the United States, section 8's prohibition on humanitarian donations to sanctioned persons, and the definition section's location at the end of the order.

100. Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018).

101. Alongside EO 13848, Appendix I draws on language from Exec. Order No. 14,059, 86 Fed. Reg. 71549 (Dec. 15, 2021); Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 15, 2019); Exec. Order No. 13,959, 85 Fed. Reg. 73185 (Nov. 12, 2020); Exec. Order No. 14,046, 86 Fed. Reg. 52389 (Sep. 17, 2021).

102. Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018) (emphasis added).

103. 50 U.S.C. § 1701(b); *see also* Proclamation No. 10886, 90 Fed. Reg. 8327 (Jan. 20, 2025).

104. See Sahani, *supra* note 34, at 593 ("Several proposals to revise the Civil Rules to address funding have been submitted to the Civil Rules Advisory Committee over multiple years. The committee thoroughly examined each proposal, and members of the committee attended a conference convened by the George Washington University School of Law in 2018 to examine the issue of requiring the disclosure of third-party funding.")

105. See *supra* note 4.

106. Since funders almost exclusively fund claimants, states as respondents have lobbied WGIII to develop rules covering TPLF in ISDS. In 2019, WGIII released a note on proposed solutions for regulation of TPLF. In 2021, WGIII released the compilation of comments to a proposed 2021 draft,

disclosure mandated by sections one and two of the proposed order can still reveal, in large part, the severity of the issue.

Given the TPLF industry's secrecy, the investigation and disclosure required by sections one and two are key to defining the scope of the issue. By making this an interagency endeavor, agencies can use complementary information to better outline the issue's contours, as done in EO 13848.¹⁰⁷ This will then help ensure that no foreign funders can continue to operate in U.S. courts or against U.S. interests in arbitration or investor-state disputes without the U.S. government's knowledge of their involvement.

Armed with information from the investigation and disclosures, the EO would then give the Secretary of the Treasury the discretion to impose sanctions on foreign funders to limit their effectiveness.¹⁰⁸ These sanctions would be on foreign funders and domestic funders with foreign control using TPLF in U.S. courts or in proceedings aimed at U.S. interests in arbitration or ISDS.¹⁰⁹ The sanctions would also target those who indirectly control or support these persons to avoid corporate structure loopholes, like the Office of Foreign Asset Control's ("OFAC") 50% Rule and the Bureau of Industry and Security's ("BIS") delayed Affiliates Rule.

Importantly, the Secretary of the Treasury's discretion includes the ability to exempt certain entities from otherwise sanctionable conduct through OFAC licenses, decisions normally "guided by U.S. foreign policy and national security concerns."¹¹⁰ Discretion provides needed flexibility to permit benign foreign funding from allied states, continue to allow domestic funders to receive backing from foreign sources that raise no national security concerns, and determine on a case-by-case basis what constitutes a U.S. interest.¹¹¹ With a flexible definition of

which contained country and funder proposals. These proposals included increased transparency, discretion to tribunals for disclosure and regulation, and an outright ban. There was a general consensus for disclosure of the existence of TPLF and the identity of the funder, with suggestions for disclosure of any "ultimate beneficial owner of the funder" as well. UNCITRAL WGIII, *Report of Working Group III on the Work of Its Thirty-Eighth Session*, A/CN.9/1004, 17 (July 6–17, 2020). However, discussions since the 2021 proposals have stalled and positions remain far apart as developing countries advocate for strict oversight and developed countries, such as the United Kingdom, advocate for limited disclosure mirroring the ICSID reforms. See Brooke Guven, Lise Johnson, Suzy Nikièma & Daniel Uribe, *From Transparency to Prohibition: UNCITRAL WGIII Considers Options to Regulate Third-Party Funding*, IISD (Sep. 14, 2021), <https://perma.cc/TJZ2-997V>.

107. Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018).

108. See ANDREW BOYLE, BRENNAN CTR. FOR JUST., CHECKING THE PRESIDENT'S SANCTIONS POWERS 3 (2021) (showing that even if evidence remains limited, sanctions provide the best path, because when a sanctioned person challenges the designation, "courts base their decision solely on the record the government has assembled which may include almost any kind of material, including hearsay — and they must give 'extreme deference' to the government's decision to designate").

109. Control is defined in section 8 of the proposed order as the control standard that CFIUS employs. As President Trump's "America First Investment Policy" memorandum stated, CFIUS can survey adversaries, such as China, more closely, and since the Secretary of the Treasury has discretion to impose sanctions on those perpetuating foreign TPLF in U.S. courts or against the United States, he should do the same. See Memorandum on America First Investment Policy, 2025 DAILY COMP. PRES. DOC. 292 (Feb. 21, 2025).

110. See BOYLE, *supra* note 108, at 16.

111. It would also give exempted foreign funders and U.S. funders a substantial competitive advantage over foreign funders that are hit with sanctions. See *id.*

“U.S. interest,” found in the definition section of Appendix I, the government has discretion to distinguish between permissible for-profit funding and funding with ulterior motives. For example, a British funder without any red flags in their ownership structure or perceived ulterior motives could apply for a license, and likely be granted it, to fund a plaintiff in a U.S. court. Conversely, a Chinese funder wanting to fund cases against NVIDIA would know that, even if a party would accept their money and risk this EO’s secondary sanctions, the funding agreement would be disclosed, and they would be sanctioned. Deterrence would be immediate.

This sanctions regime is meant to prophylactically prevent adversarial foreign funding, with the disclosure and investigation stipulations ensuring that courts become aware of any foreign interests, the threat of sanctions deterring foreign funders, and licensing discretion prioritizing relationships with allies and keeping benign funders in business.¹¹² Such discretion would have considerable correlations with the administration of CFIUS and export controls. In that way, unlike the Predatory Litigation Funding Act, the proposed EO does not aim to upend the entire TPLF industry, focusing rather on funding that could undermine U.S. national security.

For the sake of thoroughness and brevity, this Note combines the investigation, disclosure, and sanctions stage into one EO. However, if congressional action or a wait-and-learn approach is desired, there is another viable two-tiered structure where a separate memorandum outlining the investigation and disclosure stages could precede an EO authorizing sanctions.¹¹³ This would be like President Trump’s memorandum on “Reciprocal Trade and Tariffs,” which required investigation of trade practices to set the foundations for later tariffs through IEEPA.¹¹⁴ A limited initial scope might result in better decision-making in any subsequent regulation, such as more targeted sanctions. If those stages unearthed foreign adversaries or companies wielding TPLF in U.S. courts or against U.S. interests, it may obviate the need for sanctions through executive action by creating political momentum in Congress, such as passing the FMA.

Although the Supreme Court recently struck down the use of IEEPA for tariffs,¹¹⁵ regulating TPLF through IEEPA is distinguishable from tariffs and will not face similar challenges. First, the issue clearly meets the requirements to invoke IEEPA: (i) TPLF is an “unusual and extraordinary threat”¹¹⁶ due to funders accessing sensitive data of the United States and its companies, inserting control clauses to steer litigation, and using funded cases as facets of geopolitical strategy; (ii) given the broad, expanding definition of national security, TPLF is a threat “to the national security of the United States;”¹¹⁷ additionally, its use to

112. This is similar to Exec. Order No. 13,848, 83 Fed. Reg. 46843 (Sep. 12, 2018) concerning foreign election interference. Rather than trying to implement a broad prohibition, the EO promises sanctions on any entity that engages in the defined conduct.

113. See Sahani, *supra* note 34, at 597 (“[W]hen federal lawmakers decide to regulate, it is reasonable to assume they will start by implementing a mandatory disclosure rule.”).

114. Memorandum Concerning Reciprocal Trade and Tariffs, 90 Fed. Reg. 9837 (Feb. 13, 2025).

115. See *generally* Learning Resources, Inc. v. Trump, 607 U.S. ____ (2026).

116. 50 U.S.C. § 1701(a).

117. *Id.*

gain competitive advantage in the private sector and the potential to undermine the United States and its allies on the international stage makes it a threat to the “foreign policy, or economy of the United States;”¹¹⁸ and (iii) the threat originates “in substantial part outside the United States;”¹¹⁹ the threat is from overseas funders and foreign backers of domestic funders, such as foreign countries, companies, and SWFs.¹²⁰ In sum, the use of foreign TPLF “puts the judicial system on par with the New York Stock Exchange and the U.S. dollar as things that we need to start thinking carefully about how to deny access to,”¹²¹ and IEEPA is the best option to do so.

Second, the proposed EO falls within IEEPA’s historic use and its language. As discussed, the President historically used IEEPA for sanctions until recently broadening its use. Although the sanctions proposed in the draft EO are relatively broad in granting discretion to the Secretary of the Treasury, sanctions are generally considered precise mechanisms without wide-ranging economic or political impacts, especially compared with tariffs, so they would face little difficulty from a major questions doctrine challenge. And unlike the Predatory Litigation Funding Act, this EO targets only foreign funders and domestic funders controlled by foreign funders, so it operates as a scalpel rather than a blunt instrument that would de facto destroy the TPLF industry.

Third, unlike tariffs, which are a tax, the proposed EO falls within the powers delegated to the President in IEEPA. “Regulate . . . prevent or prohibit . . . transactions involving, any property in which any foreign country or a national thereof has any interest . . .” is a sufficiently clear delegation for preventing foreign involvement in U.S. courts, through the threat of sanctions, when that foreign entity is not party to the action but transacts to fund it.¹²²

A problem that emerges with the proposed EO is that foreign funders not operating in U.S. courts but operating against U.S. interests in arbitration or ISDS may largely ignore primary sanctions. On one hand, imposition of sanctions under IEEPA is oft referred to as a “financial death sentence” given the U.S. dollar’s ubiquity and significance to the international banking system.¹²³ If the funders transact in U.S. dollars or have sufficient contacts in the United States, “OFAC may determine that they are subject to U.S. jurisdiction for purposes of sanctions.”¹²⁴ Moreover, even if the sanctioned persons do not fund cases in U.S.

118. *Id.*

119. *Id.*

120. Emily Siegel, *Investors Lament ‘Anti-Foreign’ Litigation Funder Push*, BLOOMBERG L. (Jan. 23, 2026), <https://perma.cc/EE43-29WJ> (discussing a new bill by Rep. Ben Cline that aims to ban sovereign wealth funds from backing U.S. litigation and require disclosure of foreign funding in U.S. lawsuits).

121. Emily Siegel & John Holland, *Putin’s Billionaires Dodge Sanctions by Financing Lawsuits*, BLOOMBERG L. (Mar. 28, 2024), <https://perma.cc/3GTP-6RU5>.

122. This is unlike tariffs, where there are arguments that regulating “importation and exportation” transactions does not include the power to impose taxes, *i.e.*, tariffs.

123. See BOYLE, *supra* note 108, at 3.

124. *Id.* at 8.

courts, the indirect effects of losing all other transactions with U.S. entities, U.S. persons, and entities with sufficient contacts to the United States may deter a large swath of foreign funding aimed at U.S. interests. On the other hand, the main goal for foreign funders, especially government-directed funders, may not be profit.¹²⁵ As a result, sanctions, and therefore the inability to transact with U.S. entities, may not be sufficient deterrence because the entity is solely a vehicle for strategic funding against U.S. interests in arbitration or ISDS and its expectation was to lose money.

One mechanism to fill these gaps is to apply secondary sanctions. Most EOs imposing IEEPA sanctions also provide for secondary sanctions to broaden their reach, so this proposed EO mimics that language to address third parties in sections three, five, and, in part, seven. Secondary sanctions extend criminal provisions to U.S. corporate and real persons that transact with third parties (e.g., foreign banks, businesses, or governments) who continue to do business with sanctioned persons.¹²⁶ As a result, litigants would not seek or accept funding from sanctioned funders and their backers to protect their U.S. business relationships.¹²⁷ These strategic funders would therefore have trouble finding clients even when not operating in U.S. courts.

In sum, IEEPA provides a rapid path for a discretionary scheme threatening sanctions on violators coupled with disclosure and investigation stages. The effects of primary and secondary sanctions can reach across the globe, isolate foreign funders from potential litigants, harm their backers' business interests, and make domestic funders pivot from foreign backing. Sanctions regimes always have gaps, but given IEEPA's ability to quickly create a comprehensive regulatory scheme and use secondary sanctions, those gaps will be minimal. As such, President Trump should consider using the draft EO, attached as Appendix I, as a model to protect the national security of the United States through TPLF investigation, disclosure, and regulation.

125. See *infra* Appendix I, Section I.C.

126. See generally JOHN J. FORRER, ATL. COUNCIL GLOB. BUS. & ECON. PROGRAM, SECONDARY ECONOMIC SANCTIONS: EFFECTIVE POLICY OR RISKY BUSINESS (2018), <https://perma.cc/MS5E-VTN9>.

127. Secondary sanctions are controversial because countries claim their extraterritorial reach violates international law, and as a result they have often strained diplomatic relations. See Patrick Wintour, *US Faces European Backlash Against Iran Sanctions*, GUARDIAN (May 11, 2018), <https://perma.cc/TNY5-CR8H>.

APPENDIX I

IMPOSING SANCTIONS ON FOREIGN PERSONS FUNDING THE
WEAPONIZATION OF LEGAL CLAIMS AGAINST THE UNITED STATES
AND ITS COMPANIES

EXECUTIVE ORDER

May 25, 2026

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that the ability of persons located, in whole or in substantial part, outside the United States to fund suits in United States courts and against United States interests in arbitrations and investor-state disputes constitutes an unusual and extraordinary threat to the national security, economic security, and foreign policy of the United States. Although the third-party litigation funding (“TPLF”) industry is very secretive, we know it is rapidly expanding in the United States, and evidence suggests that foreign powers can use, and may already be using, TPLF to undermine the United States and its key industries and companies. Maintaining an open investment climate and allowing access to justice for all continues to be important for the overall growth of the United States and our core ideals. However, such openness must be balanced by the need to protect our country against critical national security threats. TPLF’s lack of disclosure, and therefore oversight, may lead to adversarial foreign actors accessing sensitive data of our government or companies; foreign actors gaining control of lawsuits meant to induce regulatory chill in the United States; funders causing diversion of taxpayer dollars to the defense of a flood of well-funded lawsuits that eschew settlement and drag out litigation; and foreign states and their companies using lawsuits as strategic vehicles to gain competitive advantages. I hereby declare a national emergency to deal with this threat.

Accordingly, I hereby order:

Section 1. (a) Not later than 90 days after the publishing of this executive order, the Attorney General, in consultation with the Secretary of the Treasury, the Secretary of State, and the heads of any other appropriate executive departments and agencies, shall assess any information indicating that foreign TPLF exists in United States courts or is aimed at United States interests in arbitrations or investor-state disputes. The assessment shall identify, to the maximum extent ascertainable, the nature of foreign TPLF, the funding methods used, the persons involved, and any foreign governments that authorized, directed, sponsored, or supported it, including foreign control or influence of domestic funders by foreign states or sovereign wealth funds.

(b) Within 45 days of conducting the assessment described in section 1(a) of this order, the Attorney General, the consulting agencies, and as appropriate, State and local officials shall deliver to the President, the Director of National Intelligence, the Secretary of Defense, the Secretary of Homeland Security, the United States Trade Representative, and any other agencies deemed relevant, a report evaluating, with respect to the assessment described in section 1(a):

(i) the extent to which any foreign TPLF aimed at the interests of the United States affected our national security, foreign policy, or economy; and

(ii) whether any foreign TPLF involved a nexus to foreign governments; confidentiality issues, especially access to or sharing of sensitive data; portfolio funding; control clauses; strategic aims, including garnering competitive advantages for the private sector, slowing state regulation, and wasting taxpayer dollars; or frivolous litigation aimed at the United States or its companies in key sectors, including but not limited to semiconductors, artificial intelligence, energy, national defense, communications, and technology.

The report shall also include updates and recommendations, when appropriate, regarding additional remedial actions to be taken by the United States Government, other than the sanctions described in sections 3 and 4 of this order.

(c) Heads of all relevant agencies shall transmit to the Attorney General any information relevant to the execution of their duties pursuant to this order, as appropriate and consistent with applicable law. If relevant information emerges after the submission of the report mandated by section 1(b) of this order, the Attorney General and consulting agencies shall amend the report required by section 1(b), as appropriate.

(d) Nothing in this order shall prevent the head of any agency or any other appropriate official from tendering to the President, at any time through an appropriate channel, any analysis, information, assessment, or evaluation of TPLF's impacts on the United States.

(e) Not later than 30 days following the date of this order, the Attorney General, the Secretary of the Treasury, the Secretary of State, the United States Trade Representative, the Director of National Intelligence, the Secretary of Homeland Security, and the Secretary of Defense shall develop a framework for the process that will be used to carry out their respective responsibilities pursuant to this order. The framework, which may be classified in whole or in part, shall focus on ensuring that agencies fulfill their responsibilities pursuant to this order in a manner that maintains methodological consistency; protects law enforcement or other sensitive information and intelligence sources and methods; maintains an appropriate separation between intelligence functions and policy and legal judgments; ensures continued judicial independence; and respects the principles of free speech and open debate.

Sec. 2. To aid in the gathering of information, in any civil action, each part of the counsel of record for the party shall:

(a) disclose in writing to the court, to all other named parties to the civil action, and to the Attorney General:

(i) the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of any foreign person, foreign state, or sovereign wealth fund, other than the named parties or counsel of record, that has a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise;

(ii) the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of any foreign person, foreign state, or sovereign wealth fund, other than the named parties or counsel of record, that has a right to receive any payment that is contingent in any respect on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel of record or affiliated counsel; and

(iii) if the party or the counsel of record for the party submits a certification described in subparagraph (c)(i), the name, the address, and, if applicable, the citizenship or the country of incorporation or registration of the foreign person, foreign state, or sovereign wealth fund that is the source of the money;

(b) produce to the court, to all other named parties to the civil action, and to the Attorney General, except as otherwise stipulated or ordered by the court, a copy of any agreement creating a contingent right described in subparagraph (a); and

(c) for a civil action involving an agreement creating a right to receive any payment by anyone, other than the named parties or counsel of record, that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise, or on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel or affiliated counsel, submit to the court a certification that—

(i) the money that has been or will be used to satisfy any term of the agreement has been or will be directly or indirectly sourced, in whole or in part, from a foreign person, foreign state, or sovereign wealth fund, including the monetary amounts that have been or will be used to satisfy the agreement; or

(ii) that the disclosure and certification criteria set forth in subparagraph (a)(iii) and clause (i) of this subparagraph do not apply to the civil action.

(d) The disclosure and certification required by paragraphs (a)-(c) shall be made not later than the later of—

(i) 30 days after execution of any agreement described in paragraphs (a)-(c); or

(ii) the date on which the civil action is filed.

(e) A party that enters into an agreement described in paragraphs (a)-(c) that is first served or joined after the date on which the civil action is filed shall make the disclosure and certification required not later than 30 days after being served or joined, unless a different time is set by stipulation or court order.

Sec. 3. Following the assessment mandated by section 1(a), the report mandated by section 1(b), and the disclosure mandated by section 2:

(a) The Secretary of the Treasury shall review the assessment mandated by section 1(a) and the report mandated by section 1(b), and, in consultation with the Secretary of State and the Attorney General, use discretion to impose all appropriate sanctions in section 4(a)-(b) of this order. In using discretion, the Secretary

of the Treasury, in consultation with the Secretary of State and the Attorney General, shall consider the guidelines provided in the Memorandum on America First Investment Policy to give deference to foreign funders in allied nations and foreign backing of domestic funders from allies and to increase scrutiny of foreign funders and foreign backing of domestic funders from adversarial states. Foreign funders operating in United States courts or aiming funding at United States interests in arbitrations or investor-state disputes that wish to be sure of avoiding sanctions should apply for a license with the Office of Foreign Assets Control. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, has discretion to impose sanctions on anyone they determine:

(i) to have directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign TPLF, including domestic funding controlled by foreign persons, used in United States courts or aimed at undermining United States interests in arbitrations or investor-state disputes;

(ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property or interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 4. (a) All recommended sanctions shall be appropriately calibrated to mitigate the foreign interference identified, should be appropriately adapted to information resulting from disclosures under section 2, and may include one or more of the following with respect to each targeted person:

(i) blocking and prohibiting all transactions in a person's property and interests in property subject to United States jurisdiction, now or in the future;

(ii) export license restrictions under any statute or regulation that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services;

(iii) prohibitions on United States financial institutions making loans or providing credit to a person;

(iv) restrictions on transactions in foreign exchange in which a person has any interest;

(v) prohibitions on transfers of credit or payments between financial institutions, or by, through, or to any financial institution, for the benefit of a person;

(vi) prohibitions on United States persons investing in or purchasing equity or debt of a person;

(vii) exclusion of a person's alien corporate officers from the United States;

(viii) imposition of any of the sanctions described in this section on a person's leader, official, senior executive officer, director, or persons with similar functions; or

(ix) any other measures authorized by law.

Sec. 5. The prohibitions in section 4 of this order include the following:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 6. I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens whose property and interests in property are blocked pursuant to this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Sec. 7. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 8. I hereby determine that the making of donations of the types of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by section 4(a) of this order.

Sec. 9. For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person (including a foreign person) in the United States;

(d) the term "foreign person" means any person or entity that is not a United States person;

(e) the term "third-party litigation funding (TPLF)" means funding provided to a party in a case that the funder is not a party to;

(f) the term "foreign TPLF" means any funding from a foreign person, whether considered a traditional funder or not, or from a domestic entity controlled by a foreign state or sovereign wealth fund. "Control" in this situation refers to the

definition used by the Committee on Foreign Investment in the United States, which requires the power to determine, direct, or decide important matters affecting a United States business. Control does not require a majority stake;

(g) the term “sovereign wealth fund” means an investment fund owned or controlled by a foreign state or an agency, agent, or instrumentality of a foreign state;

(h) the term “United States interests” refers to situations that the Secretary of the Treasury, in consultation with relevant agencies, determines to implicate the national security, foreign policy, or economic security of the United States, which can include the economic health of key industries and entities of the United States, including but not limited to semiconductors, artificial intelligence, energy, national defense, communications, and technology more broadly;

(i) the term “arbitrations” means both domestic and international arbitrations which include the United States as a party or target a United States interest;

(j) the term “investor-state dispute” means any forum where a state is a respondent and an investor is a claimant;

(k) the term “foreign government” means any national, state, provincial, or other governing authority, any political party, or any official of any governing authority or political party, in each case of a country other than the United States; and

(l) the term “State” means the several States or any of the territories, dependencies, or possessions of the United States.

Sec. 10. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 4 of this order.

Sec. 11. Nothing in this order shall prohibit transactions for the conduct of the official business of the United States Government by employees, grantees, or contractors thereof.

Sec. 12. The Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may re-delegate any of these functions to other officers within the Department of the Treasury consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 13. The Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order,

consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 14. This order shall be implemented consistent with 50 U.S.C. 1702(b)(1) and (3).

Sec. 15. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Donald J. Trump
