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การระดมทุนของบุคคลภายนอกสัญญาภายใต้กระบวนการอนุญาโตตุลาการระหว่างรัฐและผู้ลงทุน: ความเสี่ยงของรัฐผู้ถูกร้องและการพัฒนาในปัจจุบันของกลุ่มประเทศอาเซียนและฮ่องกง

Third Party Funding under Investor-State Arbitration: Respondent State's Risks and Recent Developments in ASEAN and Hong Kong

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การระดมทุนของบุคคลภายนอกสัญญา (TPF) ในกระบวนการอนุญาโตตุลาการระหว่างรัฐและนักลงทุนเอกชน สามารถแก้ไขปัญหาทางการเงินของผู้ลงทุนได้ ทั้งในส่วนของความเท่าเทียมกับรัฐผู้ถูกร้อง และโอกาสในการเข้าถึงกระบวนการยุติธรรม การที่กระบวนการอนุญาโตตุลาการระหว่างประเทศไม่มีหลักการเกี่ยวกับข้อตกลงเงินทุนของบุคคลภายนอกสัญญา เนื่องจากข้อตกลงดังกล่าวไม่อยู่ภายใต้สัญญาอนุญาโตตุลาการ อันนำมาสู่ปัญหาในกระบวนการอนุญาโตตุลาการของรัฐและผู้ลงทุนได้ โดยอาจทำให้เกิดความเสี่ยงที่สำคัญเกี่ยวกับรัฐผู้ถูกร้อง เช่น ความอิสระและความเป็นธรรมของผู้ที่ทำหน้าที่อนุญาโตตุลาการ ความมั่นคงของค่าใช้จ่ายและการจัดสรรเงินทุนต่าง ๆ ดังนั้นการสนับสนุนและการพัฒนาให้มีการระดมทุนของบุคคลภายนอกสัญญาโดยใช้ประโยชน์จากข้อดี และการหลีกเลี่ยงความไม่แน่นอนและข้อเสียต่าง ๆ จึงมีความสำคัญเป็นอย่างยิ่ง ดังจะเห็นได้จากในปัจจุบันกลุ่มประเทศอาเซียนและฮ่องกง ได้เริ่มมีการปฏิรูปเกี่ยวกับหลักการดังกล่าวแล้ว ตัวอย่างเช่น การแก้ไขกฎหมาย การแก้ไขหลักการอนุญาโตตุลาการ และการปรับข้อตกลงการค้าเสรี เพื่อให้กฎระเบียบเกี่ยวกับการระดมทุนของบุคคลภายนอกสัญญาครอบคลุมและมีประสิทธิภาพมากยิ่งขึ้น แต่ด้วยเหตุที่แต่ละประเทศมีเขตอำนาจและสถาบันอนุญาโตตุลาการที่แตกต่างกัน ตลอดจนกลยุทธ์ของรัฐผู้ถูกร้องก็อาจแตกต่างกันออกไป จึงอาจส่งผลกระทบต่อการลดความเสี่ยงที่อาจเกิดขึ้นจากการระดมทุนของบุคคลภายนอกสัญญาได้

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Abstract

The existence of Third Party Funding (“TPF”) in investor-state arbitration could resolve the financial concern for investors, which provides them a more equivalent position with respect to respondent states and a chance to access to justice. International arbitral tribunals have in principle no competence to address TPF agreement because such agreement is disconnected from arbitration agreement. Due to this disconnection, the involvement of TPF in investor-state arbitration could bring vital risks to respondent states, such as the risk on independence and impartiality of arbitrators, the risk on security for costs, and the risk on allocation of cost. It is important to support the development of TPF and take advantage of its benefits, while at the same time regulate what is necessary to avoid uncertainties and limit its dangers. Recently, ASEAN countries and Hong Kong have started aseries of reforms, for instance, modification of the current laws, reversion of the arbitration rules, as well as adaptation the new generation Free Trade Agreement, to tackle the need for a more comprehensive and effective regulation of TPF in arbitrations. But due to the different approaches chosen by different jurisdictions and arbitration institutions, strategies adopted by respondent states might have a great impact to mitigate these potential risks brought by the involvement of TPF.

คำสำคัญ: การระดมทุนของบุคคลภายนอกสัญญา, ความอิสระและความเป็นธรรมของผู้ที่ทำหน้าที่อนุญาโตตุลาการ, ความมั่นคงของค่าใช้จ่าย

Keywords: Third party funding, Independence and impartiality of arbitrators, Allocation of cost security for costs

1. Introduction

The last six years have witnessed a tremendous increase in Third Party Funding ("TPF") participation under investor-state arbitration. TPF is defined as "any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration" under the recent Task Force conducted by the ICCA along with Queen Mary College at the University of London.[1] According to the recent studies, there are at least three main reasons contributing to the increase of TPF involvement in investor-state arbitration. Firstly, investors might not be able to pursue claims against states due to the heavy costs associated with the investor-state arbitration mechanism, so the existence of TPF resolves the financial concern for the investors, which provides them a more equivalent position with respect to the respondent states and a chance to access to justice.[2] In addition, potential damage award rendering in favor of investors will be substantial under investment arbitration, so making an investment in arbitrations is a potentially lucrative investment for TPF funders.[3] Last but not least, foreign award enforcement regimes, such as the regime[4] under the Convention of International Centre for Settlement of Investment Dispute ("ICSID"), equip a winning investor with the right to enforce a damage award if the respondent

[1]William W. Park, Catherine A. Rogers, "Third-Party Funding in International Arbitration: the ICCA Queen-Mary Task Force" (2015) ("Task Force") Austrian Yearbook on International Arbitration.

[2]Eric De Brabandere, Julia Lepeltak, "Third Party Funding in International Investment Arbitration" Grotius Centre Working Paper No 2012/1, 7.

[3]Ibid, p. 9.

[4]Convention on the Settlement of Investment Disputes Between States and National (entered into force 14 October 1966) ("ICSID Convention") art. 54 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.")

state is a Contracting State to the Convention, and there are currently 153 Contracting states to the Convention,[5] thus the TPF funder's potential benefits will be secured.

Due to the *inter partes*[6] effect of contractual agreements, investor-state arbitral tribunals have in principle no competence to address TPF agreement since such agreement normally contains its own choice of law and dispute resolution mechanism clauses, thus even if an investor is funded by a TPF agreement, the tribunal members are only limited to address the investment dispute. Due to this limitation, respondent states face several potential risks if a TPF agreement gets involved in arbitral proceedings, especially where the TPF agreement is not disclosed to the respondent state due to the confidentiality term under the agreement. Compulsory disclosure of TPF agreements is essential because respondent states might gain access to evaluate the interests of arbitrators if there is a financial or other means of bond between the arbitrators and the funder.[7] Also the respondent states shall recover their costs from the funders if the funded investors are impecunious and unable to meet the obligations to pay the respondent states' costs if the funders are revealed.[8] In order tomitigate these potential risks concerning TPF involvement in investment arbitration and toencourage respondent states to choose the seats in Asia, ASEAN, such as Singapore[9] and Vietnam[10], and Hong Kong Special Administrative of the People's

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[5]Date Base of ICSID Member State, ICSID. [Online], available URL: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab= AtoE&rdo=CSO> accessed 1 September 2016.

[6]B.A. Garner, Black's Law Dictionary (Thomson Reuters, 2009), 943. ("Latin Between Parties")

[7]Ashurst Quickguides, "Third Party Funding in International Arbitration" (Ashurst, May 2015) [Online], available URL: https://www.ashurst.com/publication-item.aspx?id_Content=6449>accessed 2 September 2016.

[8]Brabandere (n 2) 5.

[9]Civil Law (Amendment) Bill of Singapore (2016) ("2016 Bill") [Online], available URL: https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/TPF%20-%20Annex%20A.pdf>

Republic of China ("Hong Kong")[11] have started there form in terms of TPF in investment arbitration. The reform shall take in three forms,[12] namely TPF reform of domestic law, TPF reform of international arbitral rules,[13] and TPF reform under the new generation Free Trade Agreement ("FTA").

In this Article, Section II aims to provide an overview of TPF under investment arbitration, with focus on the benefits served and the potential risks brought by the involvement of TPF. Section III reviews the recent developments of TPF reform in ASEAN countries and Hong Kong and highlights the different approaches adopted to mitigate the potential risks for the respondent states. Section IV, based on the recent developments of TPF in ASEAN and Hong Kong, suggests several key strategies for the respondent states to cope with TPF involvement in investment arbitration. And the final section will provide a short conclusion to the issues examined in this Article.

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accessed 3 September 2016. Also Civil Law (Third-Party Funding) Regulation 2016 of Singapore ("2016 Regulation"), para 2-3. [Online], available URL: https:// www.mlaw. gov.sg/content/ dam/minlaw/corp/News/TPF%20-%20Annex%20B. pdf> accessed 2 September 2016.

[10]EU-Vietnam Free Trade Agreement (published on 1 February 2016, have not came into force), Chapter II sec 3 art 11. [Online], available URL: http://trade. ec.europa.eu/doclib/docs/ 2016/ february/tradoc_154210.pdf> accessed 2 September 2016.

[11]Consultation Paper on Third Party Funding for Arbitration (2015) ("Consultation Paper"), this Consultation Paper has been prepared by the Third Party Funding Sub-committee of the Law Reform Commission of Hong Kong. [Online], available URL: http://www.hkreform.gov. hk/en/docs/tpf_e.pdf>accessed 2 September 2016. Also China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, Guidelines for Third Party Funding in Arbitration ("HK Guideline"), art 2.

[12]Marius Nicolae Lliescu, "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact" (Kluwer Arbitration Blog, 2 May 2016) [Online], available URL: http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/>accessed2 September 2016.

[13]Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Draft") (came into force on 1 August 2016) [Online], available URL: http://siac.org.sg/images/stories/articles/ rules/SIAC%202016%20Rules_6th%20Edition.pdf> accessed 2 September 2016.

2. Overview of TPF under Investor-State Arbitration

Definitions to describe TPF under investor-state arbitration are far from universally accepted. For instance, the EU-Vietnam FTA adopts the following definition: TPF means any funding provided by a natural or juridical person who is not a party to the dispute but enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.[14] While under the Consultation Paper on Third Party Funding for Arbitration (2015) released by the Law Reform Commission of Hong Kong, TPF has been described as "the funding of claims by commercial bodies in return for a share of the proceeds. It involves a third person to the Proceedings providing financial assistance or support to a party to the Proceedings."[15] Singapore, without giving a specific definition of the TPF, provides that a TPF Agreement is a contract by a party or potential party to dispute resolution proceedings with a third party funder for the funding of the costs of the proceedings.[16] According to these definitions, TPF funders are normally motivated by potential returns of their investments in arbitration, and funded parties are motivatedmainly because they lack financial resources to pursue their claims. Respondent states rarely rely on TPF because they have adequate resources and other financing options to conduct their responses as well as counterclaims in arbitrations.[17] Even the main goal of TPF aims to fund investors who are unable to access to justice, but where an investor with the finance to arbitrate its claim may want to lay off some risks associated with costly arbitration,[18]

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[14]EU-Vietnam FTA (n 10) art 2.

[15]Consultation Paper (n 11) para 1.9.

[16]Civil Law (Amendment) Bill of Singapore, para 2.5B. (10) [Online], available URL: https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/TPF%20-%20Annex%20A.pdf> accessed 3 September 2016.

[17]Consultation Paper (n 11) para 1.12, 3.25.

[18]Ashurst (n 7) 2.

it might voluntarily approach TPF. For instance, a funded investor might be obliged to pay the respondent state's cost order if the claim fails, which could impact the financial viability and stability of the investor in the future, then approaching TPF shall shift the potential liability to the funder.

2.1 Access to Justice through Due Diligence Investigation

As aforementioned, investors might not be able to pursue their claims against states due to the heavy costs associated with the investor-state arbitration mechanism, so the existence of TPF resolves the financial concerns for the investors, which provides them a more equivalent position with respect to the respondent states and a chance to access to justice.[19] In parallel, the respondent states might raise concern that TPF could encourage frivolous claims due to the involvement of the funder who is not connected with the merits of the investment dispute.[20] This section will identify, due to the due diligence investigation conducted by TPF funders, TPF does not encourage frivolous claims against states but could facilitate investors with limited financial resources to pursue meritorious claims.

TPF funders, before effectively deciding to engage their finances in investment arbitration, should routinely carry out a comprehensive due diligence investigation. Funders desire to invest in high value arbitrations with high chances of success, so the due diligence carried out by the investment advisers or the suitably qualified legal professionals selected by the funders should consider a number of factors including, but not limited to: (a) likelihood of the claim being successful through appraising the merits, evidence, witness of the claim; (b)quantum and the potential return of the claim; (c)timing of the arbitral proceedings; (d) costs for pursing the claim; (e)likely costs for adverse cost order; (f)complexity concerning

[19]Brabandere (n 2) 7.

[20]Susanna Khouri, Kate Hurford and Clive Bowman, "Third Party Funding in International Commercial and Treaty Arbitration: a Panacea or Plague? A discussion of the Risks and Benefits of Third Party Funding" (2011) TDM 4. [Online], available URL: https://www.transnational-dispute-management. com/article.asp?key=1747> accessed 2 September 2016.

award enforcement; and (g)possibility of the respondent state's counterclaims.[21] Pursuant to the factors listed above, the comprehensive investigation can be considered "an extra examination of the success rate of the future proceeding."[22] Therefore, scholars have counter-argued that TPF funders cannot afford the consequences of engaging their finances to manifestly unmeritorious claims. Since only meritorious claims will be selected and funded by TPF, the likelihood of having frivolous claims can be decreased. A recent figure also proves that only a few claims examined by the leading funders have been successfully funded.[23]

2.2 Negative Impacts to Funded Investors

As noted in the previous section, one of the main benefits served by TPF is to enable investors without sufficient resources to pursue their meritorious claims against states, which could facilitate access to justice. But besides the potential benefit, TPF also brings numerous negative impacts to investors seeking for funding, such as increasinginvestors' costs, allowing funder's control over arbitral proceedings, imposing threat to attorney's duty of confidentiality towards investors and attorney-client privilege.

A TPF agreement normally requires the funded investor to pay a significant proportion of the potential recoveries to the funder because the funder has to spend substantial sums in legal fees and other outlays during the arbitral proceedings, also if the tribunal holds that the reasonable costs paid by the respondent state shall be shifted to the investor, then the funder will be bound to pay such costs on behalf of the investor if the TPF agreement requires.[24] In addition, in cooperation with the due diligence investigation, the investor shall package its

[21]Consultation Paper (n 11) para 3.28. B.M. Cremades Jr, "Third party Litigation Funding: Investing in Arbitration" (2011) 8 Transnational Dispute Management, 15 [Online], available URL: http://www.curtis. com/siteFiles/Publications/TDM.pdf> accessed 3 September 2016.

[22]Brabandere (n 2) 7.

[23]Cremades (n 21) 13-5.

[24]Ashurst (n 7) 2.

claim to the funder for assessment. If the assessment fails, the costs incurred for packaging the claim will be wasted. Even if the funder accepts to fund the claim, the costs incurred for the package and the TPF agreement negotiation will not be recovered by the respondent state.[25] Last but not least, the funded investor faces potential risks concerning the insufficient capital adequacy of the funder and the termination of TPF agreement by the funder, so if the funder goes into bankruptcy or terminates the TPF agreement based on legal reasons, the funded investor shall be strictly bound to pay the rest of the costs and the adverse cost order if the claim fails, subsequently the investor might go into insolvency since adverse cost order sarebasically substantial in most investor-state arbitrations.[26]

Given the financial risks involved in and the costs associated with investor-state arbitration, it is reasonable for funders to "gain a degree of economic control in the relationship with the funded claimant and in relation to the outcome of the dispute",[27] whether overall or day to day control is based on the terms of the TPF agreement to the extent permitted by the applicable law.[28] Thus due to the economic powers owned by the funders, the funded investors might be compelled to enter into unfair terms, such as unreasonable returns or reservation on the right of approval of the settlement. Furthermore, since the funders are purely interested in financial gains, they might prefer earlier settlements that are not in the best interest of the funded investors.

Attorneys of a funded investor in principle have no reporting obligation to the funder because they are not parties to the TPF agreements. But again, due to the pure financial interest of the funder in the proceedings, the investor's attorneys might be unduly influenced because the funder presents itself as an efficient

[25]Ibid.

[26]Khouri (n 20) 7.

[27]Ibid., 6.

[28]Consultation Paper (n 11) 121 (For instance, "while the applicable Australian law appears to permit quite a high degree of control of the conduct of a funded case by a Third Party Funder, the English courts have made it clear that the Funded Party should retain control").

administrator, and might impose a monitor regime to secure its potential interests and keep a strict control on attorneys' work and fees.[29] In addition, if the attorneys have financial ties with the funder, such as constantly funding the attorneys' law firm, it gives rise to a new source of conflict of interest. Under such acircumstance, potential conflicts between "the professional duties that a law firm owes to its clients and the economic reliance that law firm has on the Third Party Funder."[30] Lastly, the investor's attorneys might be chosen based on the TPF agreement due to the control of the funder, so where there is a disagreement on settlement between the funder and the investor if the funder aims to an early and cheap settlement for improving its cash flow, such control might influence the attorneys to "advise the claimant to accept the settlement even where the settlement may not in the claimant's best interest."[31]

The necessity to disclose all relevant information regarding a claim to funders has been addressed in the previous sections, but there is a possibility that the information, under the confidentiality provision of TPF agreements, shall not be disclosed to any third party if both the disputing parties have not agreed. Pursuant to the confidentiality provision, the investor faces the following conflict of interests: if the investor, in order to secure the funding, gives up its duty to maintain the confidentiality of the information, which shall breach its obligation of the confidentiality provision. Or if the investor fails to disclose the confidential information that is important for the due diligence investigation, he might lose the funding opportunity for pursuing the claim.[32] In addition, there is another risk arising out from the relationship between the legal privilege in documents prepared by the investor's attorney and the due diligence investigation conducted by the funder. In

[29] Ignacio Torterola, "Third Party Funding in International Investment Arbitration" [Online], available URL: http://investmentpolicyhub.unctad.org/Upload/Documents/ Torterola_ Third%20Party%20Funding% 20in%20Arbitration.pdf> accessed 3 September 2016.

[30] Ibid., 126.

[31] Khouri (n 20) 7.

[32] Consultation Paper (n 11) 125.

order to carry out a comprehensive due diligence analysis in terms of the likelihood of the claim being successful, obtaining all information held by both the funded investor and its attorneys is essential for the funder. Due to this consideration, the legal privilege of the communications, which was made to the investor by its attorneys, but was subsequently communicated to the funder by the investor, might be waived in the jurisdictions that do not recognize a common interest form of privilege. Therefore, the risk "of such advice being subject to a disclosure application brought by the other side on the basis that legal professional privilege was waived, has led to a consensus amongst certain Third Party Funders that due diligence on a claim should focus on facts available, rather than legal opinions being transferred."[33]

3. Potential Risks Concerning TPF Involvement for State Parties

As indicated above, international arbitral tribunals have in principle no competence to address TPF agreement because such agreement is disconnected from arbitration agreement. When a third impartial tribunal reviews sovereign state's behaviours under investor-state arbitration, public interests concern will arise because the damage award issued against the respondent state will have a negative impact to the state's government and citizens. So this section, in order to protect those public interests, aims to address how the involvement of TPF in arbitration would bring vital risks to respondent states, namely the risk on confidentiality of the TPF agreement, the risk on security for costs, and the risk on allocation of cost.

3.1 Risk on Confidentiality of TPF Agreement

TPF agreements normally contain a confidentiality provision which prohibits parties from disclosing relevant information to outsiders. Indeed, investors might voluntarily disclose their funding agreements either during the phase of negotiation or during the course of arbitration because "knowledge of the existence

[33]Khouri (n 20) 9.

of a funding agreement may significantly affect the other side's willingness to settle the claim"[34] Whether to maintain the confidentiality of a TPF agreement to outsiders, especially to the respondent state, will be a strategic and tactical consideration for the funder and the investor. Thus due to such strategic and tactical consideration, the funded investor might avoid releasing its TPF agreement to the public, especially to the tribunal and the respondent state.

The Task Force conducted by the ICCA has reached the consensus that there are real and important concerns about potential conflicts of interest as between funders and arbitrators.[35] Firstly, conflicts of interest might bearisen if an arbitrator was appointed by an investor with financial support of a funder in a previous arbitration, and subsequently, the arbitrator is appointed by another investor in another arbitration but with the financial support of the same funder. In this scenario, even the previous appointment is not necessarily a basis for disqualification of the arbitrator, but the involvement of the funder might give rise to the concern of repeated appointment of arbitrator. Thus if the TPF agreement in the subsequent arbitration is not disclosed to the respondent state, the state might lose the right to challenge the appointment of the arbitrator on the basis of "a lack of impartiality owing to repeat appointments by the same third party funder."[36]

In addition, the involvement of a funder might disqualify an arbitrator in the following scenario. Where a presiding arbitrator is appointed under the mutual agreement of the disputing parties to an investment dispute mainly based on the selection of the funder. Subsequently, the arbitrator gets involved in any financial relationship with the funder. For instance, the arbitrator is selected as the attorney of another investor with the financial assistance of the same funder in a subsequent arbitration. Since the arbitrator in first arbitration will be paid as the attorney representing the latter claim by the funder, which shall be deemed as non-impartial arbitrator because of the significant contact with the funder for the purpose of

[34]Consultation Paper (n 11).

[35]Task Force (n 1) 6.

[36]Consultation Paper (n 11) para 5.50.

representation. As to this scenario, without disclosing the TPF agreement to the tribunal and the respondent state in the first arbitration, the respondent state might be facing a significant risk since the presiding arbitrator's impartiality and independence have already been questioned due to the representation in the subsequent arbitration.[37]

3.2 Risk on Allocation of Costs

In order to well answer whether costs of respondent states incurred during arbitral proceedings can be allocated to TPF funders, there is a need to examine the cost allocation principles under the prominent international arbitration rules in the first place, especially the general principles under the ICSID Convention and the ICSID Arbitration Rules. There is no general system or method existing with respect to allocation of costs worldwide, but arbitral tribunals, based on their discretionary power, often have a large discretion on this matter. The ICSID Convention, as one of the most advanced instruments governing investor-state arbitral proceedings, provides limited rules on the allocation of costs. Article 61 (2) of the Convention provides:

"In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."[38]

Pursuant to the Article, the ICSID tribunals are given a very wide discretion in terms of the allocation of costs between the parties. Presently, there are three main cost allocation schemes that are widely used under investor-state arbitrations, namely the "lose-pays" approach (English Rule), the "pay your own" approach (American Rule), and the "factor-dependent" approach (Welamson Rule). The English Rule, in order to avoid frivolous claims, requires a losing party to bear

[37]Task Force (n 1) 7.

[38]ICSID Convention.

the costs of a winning party. The American Rule, on the contrary, requires the tribunal not to shift the cost of a party to another party regardless of the outcome of the arbitration, so both of the parties are respectively responsible for their own costs during the proceedings. The Welamson Rule implies that investors and states are liable for the costs in accordance with the level of success in the arbitration,[39] and this approach thus uses a "sliding scale" to assess how the costs should be divided between the two parties.[40] In *EDF v. Romania*, the claimant lost the claim, but at the same time, the respondent state has failed on the issue of attribution. The tribunal reasoned:

"in the instant case, and generally, the Tribunal's preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration. That is, there should be an allocation of costs that reflects in some measure the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party."[41]

And based on the findings, the claimant was ordered to pay one-third of the respondent state's total costs.[42]Based on the case studied above, the ICSID tribunals, in recent years, seem to be "moving away from the applicability of the "American Rule" towards the "loser-pays" principle, by adopting a "middle road" approach taking into consideration the specific facts of the case."[43]

As noted above, the ICSID Convention confers on tribunals broad discretion on the allocation of costs, but because the *inter partes* effect of TPF agreements stands, the ICSID tribunals have established the consistent practice that

[39]S.D. Franck, "Rationalizing Costs in Investment Treaty Arbitration," (2011) 88 Washington University Law Review, 791-2.

[40]Brabandere (n 2) 12.

[41]EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, para 327. [Online], available URL: http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> accessed 5 September 2016.

[42]Ibid., para 329.

[43]Brabandere (n 2) 12.

not to address TPF agreement while making the determination on costs allocation. In *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*,[44] Claimant Ioannis contended that its costs, including legal representation, experts' fees, etc. should be recovered by the respondent state because it prevailed on jurisdiction as well as liability. On the contrary, the respondent state counter-argued that since the claim was funded by TPF, therefore, any costs of Ioannis incurred during the proceedings should not be awarded. The tribunal, for the first time in ICSID history, provided that:

"The Tribunal knows of no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs...It is difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery."[45]

In *RSM production Corporation v. Grenada*,[46] RSM, during the annulment proceedings, raised the argument that it was funded by TPF, thus did not have to pay the reasonable costs of the respondent. But the ICSID annulment committee, referring to the reasoning made in *Ioannis*, confirmed that TPF agreement should not be taken into account in determining the amount of recovery, therefore ordered RSM to pay the respondent state's claim costs.[47] Based on the principles indicated in the previous cases, the ICSID tribunals normally lack competence to issue cost order against TPF funder because the funder is not a party to the arbitration and is not involved in the underlying dispute between the two parties in the arbitration.[48] But as analyzed above, the existence of TPF under investor-state arbitration, through providing funding to impecunious investors, will undoubtedly lead to an increase in the number of claims against states. With this fact in mind, states and

[44]Ioannis Kardassopoulos v Republic of Georgia, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award.

[45]Ibid., para 691.

[46]RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award.

[47]Ibid., para 68-9.

[48]ICCA-QMUL Task Force on TPF in International Arbitration Subcommittee on Security for Costs and Costs, Draft Report ("Draft Report") (1 November 2015).

scholars strongly argue that funder should be accountable for respondent state's costs incurred during arbitral proceedings in the event that the claim brought by the funded investor is unsuccessful.[49] In addition, if the funder did actually influence heavily or delay the proceedings and cases, is it necessary for the tribunal to "focus on the consequences of the interference of third party funders and their possible negative influence on the proceedings"[50] and take into account the funder's role while deciding the costs allocation.

3.3 Risk on Security for Costs

Previous section has examined the current practices concerning allocation of costs under investor-state arbitration. Since a funded investor might to be ordered to pay state's reasonable costs incurred during arbitral proceedings, so it is the tribunal duty to consider whether the costs paid by the state can be fully recovered by the investor if the claim is unsuccessful, especially under the circumstance where the funded investor is impecunious. Thus there is a need to explore whether states can demand tribunals to take TPF into account when accessing application on security for costs. Presently, modern arbitral laws or rules have started the practice to provideexplicit provision in terms of the tribunal's power to order security payment,[51] but the circumstances or conditions upon which tribunal shall make the order are normally not provided, which gives the tribunal a broad discretion on this issue. While no uniform practice has developed, one common understanding has been widely accepted among different tribunals, which requires respondent state seeking security to provide "sufficient evidence to assume

[49]Ashurst (n 7) 5.

[50]Brabandere (n 2) 15.

[51]Hong Kong Arbitration Ordinance (2011), Section 56 (1) (a), ("unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may make an order—(a) requiring a claimant to give security for the costs of the arbitration."); Hong Kong International Arbitration CenterAdministrative Arbitration Rules (2013), Art 24. ("the arbitral tribunal may make an order requiring a party to provide security for the costs of the arbitration.")

that the current financial circumstances of the claimant are such that it will not be able to pay the respondent's costs at the end of the proceedings."[52]

With respect to the security for costs, the ICSID tribunals have constantly required evidence of exceptional circumstances before security can be ordered. In *EuroGas Inc v. Slovak Republic*,[53] the tribunal has reiterated the principle that "security for costs may only be granted in exceptional circumstances, "for example where abuse or serious misconduct has been evidenced.""[54]The tribunal found that: "financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs."[55] Pursuant to the reasoning made by the Euro Gas tribunal, merely financial difficulties of investor and TPF involvement together cannot constitute exceptional circumstances justifying that tribunal should grant security for costs order in favor of respondent state. In *RSM Production Corporation v. Saint Lucia*,[56] the tribunal held that the funded investor should be ordered to post security for costs under the following exceptional circumstance:

"the proven history where Claimant did not comply with cost orders and awards due to its inability or unwillingness, the fact that it admittedly does not have sufficient financial resources itself and the (also admitted) fact that it is funded by an unknown third party which, as the Tribunal sees reasons to believe, might not warrant compliance with a possible costs award rendered in favor of Respondent."[57]

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[52]Draft Report (n 48) 13.

[53]EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3 Decision on the Parties' Request for Provisional Measures.

[54]Ibid., para 121.

[55]Ibid., para 123.

[56]RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons. [Online], available URL: http://www. italaw.com/sites/default/files/case-documents/italaw3318.pdf > accessed 7 September 2016.

[57]Ibid., para 86.

In RSM, even the tribunal has ordered the security for costs against the funded investor for the first time in ICSID history, but pursuant to reasoning of the tribunal, the order is made mainly based on the investor's proven history of not honoring costs awards, also the TPF could not alleviate the concern that the funded investor will again default on payment.

Pursuant to the cases studied above, nothing in the decision supports the ideas of ordering security payment whenever third funding is present.[58] It is true that more and more large and solvent investors are relying on TPF as a way to offset risk if their claims are not successful, also more and more impecunious investors are voluntarily disclosing that a solvent funder will be liable for a potential costs order if their claims fail, then granting security for costs order under these circumstances is unreasonable. But if an funded investor is impecunious and unable to pay state's reasonable costs, also the TPF agreement is not disclosed to the respondent state because the funder is not obliged to pay the potential adverse costs award under the agreement, so failing to take the arrangement between the funder and the funded investor into account by the tribunal, which could affect the state to fully recover its costs at the end of the proceedings. Even the ICSID tribunal, in *Muhammet v. Turkmenistan*, has confirmed that the TPF agreement must be unveiled to the respondent state due to the consideration of security for costs,[59] but such practice has not been universal accepted. Pursuant to the scenario, a respondent state might face the risk on recovering its costs if a security for costs order will not be granted.

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[58]Task Force (n 1) 15.

[59]Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No.3. para 13. ("Claimants shall confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and, if so, shall advise Respondent and the Tribunal of the name or names and details of the third-party funder (s), and the nature of the arrangements concluded with the third-party funder (s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.")

4. Recent Developments of TPF under Investor-state Arbitration in ASEAN and Hong Kong

TPF has gained its popularity in investor-state arbitration in the United Kingdom, the United States, and Australia for the past few years.[60] Also the European Union recently has released its new generation Free Trade Agreement, which contains TPF provisions aiming to mitigate the risks brought by the growing market of TPF in investment arbitration.[61] As to the TPF in Asia, especially in developing countries and in undeveloped countries, appears to be unheard of or extreme rare. Accordingly, it is important to support the development of TPF and take advantage of its benefits, while at the same time regulate what is necessary to avoid uncertainties and limit its dangers.[62] So this section will review the recent developments of TPF under investor-state arbitration in ASEAN, especially Singapore, Vietnam, as well as Hong Kong.

4.1 Law Proposals Permitting TPF under International Arbitration Proceedings

As the number of TPF involvement under investment arbitration increases, so regulation on such issue is becoming a more critical factor in choosing the seat of arbitration. In order to promote Singapore and Hong Kong's continued growth as the top arbitration seats in the world, The Hong Kong Law Reform Commission published a Consultation Paper proposing that TPF should be legalized for arbitrations in Hong Kong on 19 October 2015.[63] Also the Singapore Ministry of Law, on 30 June 2016, has launched its public consultation on the Draft Civil Law (Amendment) Bill 2016 ('2016 Bill') and Civil Law (Third Party Funding) Regulation

[60]Consultation Paper (n 11) 49-51.

[61]EU-Vietnam FTA (n 10)

[62]Francisco Blavi, "It's About Time to Regulate Third Party Funding" (Kluwer Arbitration Blog, 17 December, 2015) [Online], available URL: http://kluwerarbitrationblog.com/2015/12/17/its-about-time-to-regulate-third-party-funding/> accessed 10 September 2016.

[63]Consultation Paper (n 11).

2016 (“2016 Regulation”)[64] to legalize TPF.

As to the Consultation Paper, four recommendations have been given to regulate TPF in arbitration taking place in Hong Kong.[65]In order to meet the current purpose of this article, the section will only highlight the recommendationsaiming to reduce the risks facing by respondent states. Firstly, the Paper, under Recommendation 3, proposed that TPF agreement should be subjected to mandatory disclosure to tribunal and other party to the arbitration.[66] In addition, the Commission raised the concern that funders “should be permitted to enjoy the proceeds of a successful claim, but not be liable for costs if they have funded an unmeritorious claim or breached ethical and financial standards.”[67] Thus the Sub-Committee proposed whether the current Arbitration Ordinance should be amended to allow adverse costs orders against TPF funder and how such liability could be imposed. Thirdly, even the Commission did not consider the need to provide tribunal’s power to order funder to provide security for costs, but invited submissions on whether tribunal shall issue security order against funder and the basis for such power.[68] Even the draft legislation is not yet available but the proposal, indeed, has improved the public understanding of the widely debated issue.

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[64]2016 Bill and 2016 Regulation (n 9).

[65]Consultation Paper (n 11) chapter 6. (Firstly, the Arbitration Ordinance should be amended to acknowledge the legal status of TPF; secondly, clear ethical and financial standards for TPF funder should be developed; thirdly, whether a statutory or governmental body, or a self-regulatory body shall conduct the development and supervision of the applicable ethical and financial standards; and whether the funder should be directly liable for adverse costs orders and how such liability should be imposed, and whether the tribunals have power to order the funder to provide security for costs and the basis for such power.)

[66]Ibid., para 6.11.

[67]Ibid., para 6.13.

[68]Ibid., papa 6.12-14.

With respect to the recent law reform on TPF in Singapore, the Ministry of Law released the public consultation concerning its proposal for enactment of a legislative framework for TPF in 2016. Traditionally, Singapore laws regardmaintenance and champerty as torts under common law. Maintenance is defined as an "improper assistance in prosecution or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case or meddling in someone else's litigation."[69] Champerty, which is an aggravated form of maintenance, is "an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds."[70] Under the doctrine of maintenance and champerty, an affected party to the arbitration could sue the funded party in tort if the affected party has suffered special damages as a result of the TPF agreement.[71] In addition, Singapore laws treat this doctrine as opposite to the public policy, so if a party is funded by TPF, the affected party could raise the public policy concern to object enforcement in Singapore.[72] Pursuant to the new Section 5(A) of the 2016 Bill, the common law tort of champerty and maintenance is abolished.[73] In addition, Section 5(B) (2) provides that in certain prescribed categories in accordance with Paragraph 3 of the 2016 Regulation,[74] TPF agreements are not contrary to public policy or

[69]B.A. Garner, Black's Law Dictionary (Thomson Reuters, 2009), 1097.

[70]Ibid., 279.

[71]Kabir Singh, Sam Luttrell and Elan Krishna, "Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific" (Kluwer Arbitration Blog, 14 July 2016) [Online], available URL: http://kluwerarbitrationblog.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the-asia-pacific/> accessed 10 September 2016.

[72]Ibid.

[73]2016 Bill (n 9) Sec 5(A).

[74]2016 Regulation (n 9) para 3, ("For the purposes of section 5B (1) of the Act, the following classes of proceedings are prescribed dispute resolution proceedings: (a) international arbitration proceedings; (b) court proceedings arising from or out of the international arbitration proceedings; (c) mediation proceedings arising out of or in connection with international arbitration proceedings; (d) application for a stay of proceedings referred to in section 6 of the

illegal.[75] Even the 2016 Bill and the 2016 Regulation have proposed to legalize TPF under international arbitration proceedings, but with respect to mandatory disclosure of TPF agreement, cost allocation, as well as security for costs have not been addressed in the proposal.

4.2 Arbitration Rules Allowing Tribunals to Consider TPF under International Arbitration

As reviewed in the previous sections, modern arbitration rules, such as ICSID Arbitration Rules, lack the provision to address TPF due to the *inter partes* effect of TPF agreements. Recently, Singapore Arbitration Center ("SICA") and Hong Kong Arbitration Center of China International Economic and Trade Arbitration Commission ("CIETAC HKAC") have released public consultation on the Draft SIAC Investment Arbitration Rules ("SIAC Draft") and the Guidelines for Third Party Funding in Arbitration ("HK Guidelines") on 1 February 2016 and on 23 May 2016 respectively, in order to provide their tribunals specific guidelines if TPF is involved in arbitral proceedings.

Pursuant to Rule 23(l) of the SIAC Draft, for the first time in history, permits the tribunal to "order the disclosure of the existence and details of a party's third party funding arrangement, including details of the identity of the funder, the funder's interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability."[76] In addition, based on Rule 32.1 and 34, the tribunal may take into account the TPF agreement in apportioning the costs of the arbitration, and shall make adverse costs order against the funder where appropriate.[77] Therefore, where the tribunal considers that there is a need to allocate the state's costs to the funder, such funder is strictly bound to

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International Arbitration Act; (e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act.").

[75] 2016 Bill (n 9) Sec 5 (B) (2).

[76] SIAC Draft (n 13) Rule 23 (l).

[77] Ibid., rule 32 and 34.

pay the adverse order. The adverse cost consequences may also deter the funding of frivolous claims.[78] As to security for costs, the drafts only allow the tribunal to order either party to provide security for costs in any manner the tribunal thinks fit,[79] so whether the funder can be ordered to provide security for costs is still unresolved under the Draft. The express provisions under the Draft overcome the risk on conflicts of interest of arbitrators by granting the tribunal the power and flexibility to require disclosure to the extent appropriation in arbitration, also the advance rule concerning allocation of costs under the Draft aims to reduce the risk of exposing successful respondents states to a costs bill that they cannot recover.

As to the HK Guideline, one of the most important developments is the tribunal's discretionary power to invite, or in certain cases direct, any funded investor to disclose its funding, including the fact that the investor is funded, the name and address of the funder, and any other information required by applicable laws or rules or which the tribunal otherwise considers necessary.[80] As the article presented earlier, potential conflicts of interest as between funders and arbitrators might arise from TPF agreements, and under the Guideline, the tribunal, upon receiving the information of the existence of TPF, shall positively consider its own independence and impartiality and take any such steps as are required under applicable laws or rules.[81]With respect to security for costs, the Guideline provides the tribunal the right to consider the nature and extent of the party's funding as a relevant factor to the extent permitted by applicable laws or rules.[82] Even the introduction of the Guideline makes it clear that they are to be voluntary, thus "parties and arbitrators shall not be deemed to have adopted all or any part of the

[78]Jonathan Lim and Dharshini Prasad, "A Brief Overview of the Draft SIAC Investment Arbitration Rules 2016" (Kluwer Arbitration Blog, 14 July 2016) [Online], available URL: http://kluwerarbitrationblog.com/2016/03/12/a-brief-overview-of-the-draft-siac-investment-arbitration-rules-2016/>accessed10 September 2016.

[79]SIAC Draft (n 13) Rule 23 (j).

[80]HK Guideline (n 11) para 3.1-3.2.

[81]Ibid., para 3.3.

[82]Ibid., para 3.4.

Guideline simply because of their participation in arbitration proceedings in which there is an element of Funding."[83] But once the legality of TPF is confirmed, the Guidelines will surely provide a useful reference point for parties, especially for respondent states to CIETAC arbitrations.

4.3 New Generation Free Trade Agreementregulating TPF Participation

The detailed analysis on the recent developments in Singapore and Hong Kong points towards a clear trend to regulate the interaction of TPF with international arbitration. TPF reform also has been carrying out thorough mandatory provisions of the new generation Free Trade Agreement in ASEAN, one of the most groundbreaking developments is the text of the recently agreed EU-Vietnam FTA. Under Article 11 of Section 3 (Resolution of Investment Dispute), the funded investor, at the time of submission of the claim, is strictly bound to notify the existence and nature of the funding arrangement, including the name and address of the funder to the respondent state and the division of the tribunal. Where the division is not established, the notification shall be made to the President of the tribunal.[84] Where the TPF agreement is "concluded or the donation or grant is made after the submission of a claim, without delay as soon as possible the agreement concluded or the donation or grant is made."[85] Pursuant to the provisions, the funded investor is only obliged to disclose the existence and nature of the funding arrangement, and the name and address of the funder, but the terms of the TPF agreement does not fall into the scope of mandatory disclosure. In addition, the investor is bound to disclose any donation or grant made from a third party to the tribunal and the respondent state. When deciding on the issues of security for costs and allocation of cost, the tribunal shall take into account whether there is a TPF involved in the proceedings.[86] Even the FTA has expressly granted the tribunal

[83]Ibid., para 1.4.

[84]EU-Vietnam FTA (n 10) sec 3, art 11 (1)-(2).

[85]Ibid., sec 3, art 11 (2).

[86]Ibid., sec 3, art 11 (3).

power to take the TPF into consideration, but the circumstances or conditions upon which the tribunal shall make the order are not provided. So it leaves the tribunal a great discretionary power to decide whether to grant the security order or adverse cost order to the funded party or even to the funder. ASEAN has launched a region-to-region FTA with the EU in 2007, even the negotiation was paused to give way to bilateral FTAs negotiations of ASEAN countries, but it is likely that the ASEAN and EU FTA will the same practice of EU FTA.

5. Strategies for Respondent States

Due to the increasing trend of TPF participation in arbitration, ASEAN countries, such as Singapore, Vietnam, and Hong Kong have started a series of reforms, for instance, modification of the current laws, reversion of the arbitration rules, as well as adaptation the of new generation FTA providing specific TPF provision, to tackle the need for a more comprehensive and effective regulation of TPF in international arbitrations. Indeed, these recent developments have a great impact to unveil TPF masks, also grant tribunals discretionary power to decide whether the respondent's costs should be shifted to the funder as well as whether security for costs order shall be granted to the respondent state through considering the nature and extent of the party's funding as a relevant factor, but due to the different approach choosing by different jurisdiction and arbitration institution, so there is a need to provide some useful strategies for respondent states where TPF is involved in arbitral proceedings.

5.1 Checking the Legality of TPF Pursuant to the Law of the Seat

The law of the seat unusually provides basic rules for the conduct of arbitration as well as governs the relationship between arbitral tribunal and local courts.[87] To be more specific, if TPF is not deemed as a legal creation pursuant to the law of the seat, the opposite partymight sue the funded party in tort in

[87]Singh (n 71).

accordance with the common law doctrine of champerty and maintenance. In addition, if the funded party's claim is successful, the opposite party can seek to set-aside the award in the competent court of the country where the award is rendered on the basis that the TPF is against to public policy of the country.[88] For instance, as noted above, before releasing the public consultation on abolishing the doctrine of champerty and maintenance, Singapore was in the position that the "principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for the resolution of a claim,"[89] Therefore, if the respondent state is notified the fact that the investor is funded by a third party during the arbitral proceedings, then the notified state shall seek to injunct the arbitration because the TPF is an abuse of process, or file a lawsuit against the funded investor in tort if the state has suffered damage as the result of the tortious TPF agreement. Where the state finds out the existence of the TPF agreement after the award is rendered in favor of the funded investor, the state may file an application to set-aside the award on the ground that the award is contrary to public policy in Singapore.

5.2 Ascertaining the Approach of TPF Adopted by Relevant FTA and Rules

As noted above, states and several arbitration institutions have started TPF reform through amending or revising the traditional FTA and arbitration rules. With respect to the recent developments of TPF in arbitration, it is essential for respondent states to ensure the approach adopted by the law or the arbitration rules. For instance, funded parties are obliged to fully disclose their TPF agreements at the time of submitting their claims under the EU-Vietnam FTA, but the SIAC Draft provides the tribunal discretionary power to order disclosure of TPF agreement where it considers appropriate. In addition, SIAC Draft expressly allows tribunals to take into account TPF agreement in apportioning the costs of the arbitration, but

[88]Ibid.

[89]Ibid.

other arbitration rules lack provision on adverse cost order. If respondent states get familiar with the approach chosen by the FTA as well as the arbitration rules, they will arrange the response or counterclaim better when confronting with the risks brought by the participation of the third party funder.

5.3 Addressing Inherent Discretionary Power of Tribunal

Even several states have launched public consultation on the proposal for enactment of a legislative framework for TPF, also leading arbitration institutions have started to make TPF more transparent by reversing their traditional arbitration rules. But not every jurisdiction or arbitration institution has its own regulations or rules governing TPF participation. Also only the newly EU FTA started the practice to take TPF into account. Thus, in the absence of explicit TPF regulation, the respondent state shall focus on the inherent discretionary power of the tribunal to regulate procedural issues, such as disclosing TPF agreement, and granting security for costs order and adverse costs order, when there is a third funder participating in arbitral proceedings.

To begin with, arbitrators might find that ordering funded investor to disclose its TPF agreement should be an essential factor to ensure their own independence and impartiality. Where a state raises an application on disclosure of TPF agreement according to the concern of repeated appointment, then in order to prove that the arbitrators are independent and impartial to the disputing parties, the tribunal might order the funded investor to disclose the existence of the TPF as well as the information of the funder. In addition, if there is any evidence showing that the investor is unable to pay adverse cost order when its claim fails, pursuant to the previous practice of ICSID,[90] the respondent state could raise the importance of disclosing the TPF agreement, especially disclosing the term of whether the funder is bound to pay the adverse order on behalf of the funded investor, because such disclosure will gain the state's confidence in recovering its reasonable costs.

[90]Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (n 59).

Furthermore, even the SIAC Draft has granted its tribunals power to order third party funder to pay state's costs where appropriate, but this practice has not been well accepted in most arbitration institutions. Several scholars have raised the concern that tribunals should distinguish cases in which funder "actually heavily influence or delay the proceeding and cases where the existence of a third party funding agreement had none or only limited influence on the proceedings."[91] Thus the respondent state, in order to collect costs recovery from the influential funder, shall make a persuasive argument focusing on the negative consequences and influences brought by the funder's involvement in the proceedings. Even the tribunal lacks power to address the TPF agreement itself, but where the arbitral proceedings are unduly influenced by the funder, the tribunal might take a further step to order the funder to pay the state's costs.

As to the security for costs, ICSID tribunals have taken the view that merely financial difficulty of investor and TPF involvement in investment arbitration do not necessarily constitute per se exceptional circumstances justifying that state be granted an order of security for costs. Even nothing in previous ICSID decisions supports the idea of ordering security payment whenever third funding is present, but security for costs may be granted in exceptional circumstances, for instance, the funded investor's abuse or serious misconduct. Thus the respondent state should put its best efforts to establish that the arbitral proceedings are unduly burdened by the abuse or serious misconduct of the funded investor. In addition, pursuant to the assenting opinion of arbitrator Griffith in *RSM Production Corporation v. Saint Lucia*, the respondent state shall demand the tribunal to order the funded investor to disclose all relevant factors and to make a case why security for costs order should not be made in the case. If the tribunal acknowledged that it is the funded investor's obligation to make a case why security for costs order should not be made, then the state, based on the arguments, could raise its counter arguments.

[91]Brabandere (n 2) 15.

6. Conclusion

TPF in investor-state arbitration is a fast growingindustry and will undoubtedly play a large role in the future. Besides the advantages severed by TPF for investors and funders, TPF'S interaction with investor-state arbitration may bring several potential risks. Recent developments of TPF in ASEAN and Hong Kong have established a series of rules governing TPF issues, such as the mandatory disclosure of TPF agreement, the tribunal power to take the TPF agreement into account before granting security for costs order and rendering funder to pay adverse costs order. Indeed, having the existing substantive and binding or voluntary provisions available in arbitration would help respondent states to reduce the risks where TPF is involved in arbitration, but not every jurisdiction and arbitration institution has started the reform on TPF yet. Thus the strategies provided to respondent states, for instance, checking the legality of TPF in accordance with the law of the seat, ascertaining the approach adopted by relevant provisions, and focusing on the inherent power of tribunal to address procedural issues, which would help them to mitigate their legal risks when the TPF is involved in the arbitral proceedings.

บรรณานุกรม

Ashurst. **Quickguides: Third Party Funding in International Arbitration** [Online]. Available URL: https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/,2015 (May).

Blavi, Francisco. **It's About Time to Regulate Third Party Funding** [Online]. Available URL:http://kluwerarbitrationblog.com/2015/12/17/its-about-time-to-regulate-third-party-funding/, 2017 (April, 17).

Brabandere, Eric De and Julia Lepeltak,. "Third-Party Funding in International Investment Arbitration." **ICSID Review - Foreign Investment Law Journal** 27, 2 (December 2012): 379-398.

Cremades Jr, B.M. "Third party Litigation Funding: Investing in Arbitration." **Transnational Dispute Management** 8, 4 (October 2011): 15.

Franck, S.D. "Rationalizing Costs in Investment Treaty Arbitration" **Washington University Law Review** 88, 4 (2011).

Khouri, Susanna, Kate Hurford and Clive Bowman, "Third Party Funding in International Commercial and Treaty Arbitration: a Panacea or Plague? A discussion of the Risks and Benefits of Third Party Funding." **Transnational Dispute Management** 8, 4 (October 2011): 15.

Lim, Jonathan and Dharshini Prasad. **A Brief Overview of the Draft SIAC Investment Arbitration Rules 2016** [Online]. Available URL: http://kluwerarbitrationblog.com/2016/03/12/a-brief-overview-of-the-draft-siac-investment-arbitration-rules-2016/, 2017 (April, 17).

Lliescu, Marius Nicolae. **A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact** [Online]. Available URL: http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact, 2017 (April, 17).

Park, William W. and Rogers, Catherine A. “The Arbitration Agreement and Arbitrability, Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force.” In **Austrian Yearbook on International Arbitration**, 2015. ed. Christian Klausegger and et al., pp. 113-123.

Singh, Kabir, Sam Luttrell and Elan Krishna, **Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific** [Online]. Available URL: http://kluwerarbitrationblog.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the-asia-pacific/, 2017 (April, 17).

Sub-Committees on Costs and Security for Costs, **The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration Draft Report**, [Online]. Available URL: http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf, 2015 (November, 1).

Third Party Funing for Arbitration Sub-Committee. **The Law Reform Commission of Hong Kong Consultation Paper: Third Party Funing for Arbitration** [Online]. Available URL: http://www.hkreform.gov.hk/en/docs/tpf_e.DOC, 2017 (April, 17).

Torterola, Ignacio. **Third Party Funding in International Investment Arbitration** [Online]. Available URL: http://investmentpolicyhub.unctad.org/Upload/Documents/Torterola_Third%20Party%20Funding%20in%20Arbitration.pdf, 2017 (April, 17).