DEVELOPMENT IN RESPONSES OF ARBITRAL TRIBUNALS TO THIRD-PARTY FUNDING IN INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

Concerns have been raised over the utilization of third-party funding in investor-State dispute settlement (ISDS). This paper aims to examine how the tribunals deal with the arguments raised by the respondents in the proceeding and evaluate whether the arbitral tribunals have sufficient tools at their disposal to deal with the concerns. Among the general concerns, jurisdiction and abuse of procedure, conflict of interests, access to confidential information, and security for costs are among the arguments raised by the respondents in the proceedings. There is no sign of obvious shortcomings in the tribunal's ability to deal with the concerns that have been raised in the proceedings.

KEYWORDS: *third-party funding, ISDS, investment arbitration*

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I. INTRODUCTION

In arbitral proceedings, third-party funders finance a legal claim or defense in which it has no pre-existing interest, and from which it receives a financial benefit.[1] Third-party funding can generally be defined as an agreement by an entity that is not a party to a dispute to provide funds or other material support to a disputing party who is usually the claimant or a law firm representing the claimant.[2] The key characteristic of third-party funding is that the third-party funder provides funds in return for a remuneration that is dependent on the outcome of the dispute.[3] The utilization of third-party funding in investor-State dispute settlement (hereinafter "ISDS") has been increasing,[4] and the third-party funding industry has developed both in terms of the number of funds and funders operating and the amount of capital available.[5]

The third-party funder has a strong influence on the arbitral proceeding it participates, and it has a profound impact on the arbitration generally. For ISDS, it is also an issue that generates controversy. On the one hand, the existence of third-party funding supports investors who do not have sufficient funding to seek recourse through ISDS, thereby ensuring access to justice. It could also be a tool for risk management purposes. On the other hand, there have been concerns that third-party funding may have negative impact on the cost and duration of ISDS proceedings, increasing likelihood of frivolous claims, and it may create conflicts of interest for arbitrators. Therefore, Working Group III of the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") has determined that reforms regarding third-party funding regarding ISDS are desirable.[6] Indeed, investment arbitral tribunals have been responding to the issues and concerns caused by third-party funding in the international investment arbitration, and this paper focuses on these responses.

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[1] Derric Yeoh, *Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?*, 33(1) J. INT'L ARB. 115, 116 (2016).
[2] U.N. Comm'n on Int'l Trade L. [hereinafter UNCITRAL] Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Third-party Funding*, ¶ 5, U.N. Doc. A/CN.9/W G.III/W P.157 (Jan. 24, 2019).
[3] *Id.* (noting that the common forms of the remuneration include a multiple of the funding, a percentage of the proceeds, a fixed amount, or a combination of the above).
[4] UNCITRAL, *Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session*, ¶ 89, U.N. Doc. A/CN.9/935 (May 14, 2018).
[5] UNCITRAL Working Grp. III, *supra* note 2, ¶ 7.
[6] UNCITRAL, *Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session*, ¶ 120, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

It has been argued that third-party funding may have negative impact on the cost and duration of ISDS proceedings. The relationship between the funder and the arbitrators may also create conflicts of interest issues. It has also been noted that third-party funding creates a structural imbalance in the ISDS regime as respondent States generally do not have access to third-party funding.[7] Frivolous claims have also been noted as one of the possible outcomes for some cases with third-party funding. Some of the concerns may not be fully warranted, however, and not all cases with third-party funding have these issues. The common concerns regarding third-party funding are listed below.

1. *Conflicts of Interest.* The relationship between third-party funders and arbitrators may be a cause of concern for issue of conflicts of interest. This may affect integrity of the arbitral process, and, in more serious cases, may cause enforceability issues for arbitral awards.[8] This issue may arise, for example, when a funder has repeatedly appointed the same arbitrator in various arbitral cases.
2. *Third-party Control and Influence.* As the funder may have strong influence or even control over the management of the arbitral proceedings based on the terms of the funding agreements, concerns have been raised over whether it may create negative impact on the proceedings. For example, arguments have been raised in arbitral proceedings that the control could create jurisdictional issue or abuse of procedure. In addition, when the funder can influence the settlement negotiations, whether it could prevent settlement from being reached in some cases may become a concern. In addition, whether the existence of third-party funding could increase costs of the arbitral proceedings has also been raised.
3. *Frivolous Claims.* Concerns have also been raised that the existence of third-party funding could generate more frivolous claims. It has been argued that third-party funding leads to an overall increase in the number of ISDS claims, as well as claims that are riskier and more uncertain.[9] However, it should be noted that third-party funder may have an incentive to review carefully the merit of cases, and the concerns for frivolous claims may be over-stated in some cases.
4. *Costs and Security for Costs.* Even though it is not a concern per se, the existence of third-party funding creates issues for arbitrators in terms of costs and security of costs. Whether the costs of legal representation and other legal costs that have been paid by a third-party funder could be part

[7] UNCITRAL Working Grp. III, *supra* note 2, ¶ 36.
[8] *Id.* ¶ 17.
[9] *Id.* ¶ 34.

of the adverse costs order becomes an issue for arbitrators. In addition, whether a third-party funder should be ordered to pay adverse costs when the claim does not succeed is also a controversial issue. Furthermore, whether the existence of third-party funding would have an impact on security for costs has also been discussed.

This paper focuses on the responses of arbitral tribunals to the arguments raised by the host states in the arbitral proceedings. The arbitral tribunals have been dealing with issues of third-party funding in various cases. The main issues the arbitral tribunals had to face in principle correspond to many of the main concerns about third-party funding discussed above. This paper aims to examine how the tribunals deal with the arguments raised by the respondents in the proceeding and evaluate whether the arbitral tribunals have sufficient tools at their disposal to deal with the concerns. Among the general concerns, jurisdiction and abuse of procedure, conflict of interests, access to confidential information, and security for costs are among the arguments raised by the respondents in the proceedings. At the outset, it is worth mentioning that tribunals may not feel that third-party funding bring any impact on the proceeding at all. For example, in *Oxus Gold v. Republic of Uzbekistan* case, the claimant issued a press release disclosing recourse to third-party funding and revealing details of the funding agreement.[10] The tribunal noted that the fact that claimant is being assisted by a third-party funder has no impact on the proceeding.[11] It suggests that from the perspective of the tribunal, the third-party funding does not create an issue that the tribunal needs to deal with. Below, this paper examines the arguments raised by respondents related to the concerns about third-party funding in the arbitral proceedings.

II. JURISDICTION AND ABUSE OF PROCESS

In *RosInvestCo UK Ltd. v. The Russian Federation*, the respondent argued that in light of "Participation Agreements" entered into between the claimant and the third-party funder, the claimant was a mere nominal owner, but not an "investor" under the Bilateral Investment Treaty (hereinafter "BIT"), and the definition of "investment" under the BIT was therefore not met.[12] The tribunal rejected the contention, noting that it was inconsistent with the "plain meaning of the definition" of the term "investor" under the

[10] Nadia Darwazeh & Adrien Leleu, *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, 33(2) J. INT'L ARB. 125, 147 (2016).
[11] Oxus Gold v. Republic of Uzb., Final Award, ¶ 127 (Dec. 17, 2015).
[12] RosInvestCo UK Ltd. v. Russian Fed'n, SCC Case No. V079/2005, Final Award, ¶¶ 323, 381 (Sept. 12, 2010).

BIT.[13] The tribunal further noted that it was "prevented from imposing a stricter interpretation [of the definition] in light of its very wide drafting." [14] A similar rationale was applied by the tribunal with regard to the requirement of "investment" under the BIT.[15]

In the case *Quasar de Valores and others v. The Russian Federation*, the respondent argued that the existence of the third-party funder in the case prevented the claimants from being the true parties in interest. [16] The respondent argued that the claimants had no stake in the claim, and were not *domini litis* in terms of choosing counsel, experts, or other strategic alternatives in the prosecution of the claims. [17] To the respondent, this rendered the entire arbitration an abuse of process.[18] This argument was not accepted by the arbitral tribunal. The tribunal noted that the claimants were the parties to the dispute, and were entitled to pursue rights available to them under the BIT, and to accept the assistance of a third-party.[19] The tribunal also noted that the motives of the third-party funder was irrelevant as to the disputants in this case.[20]

Similarly, in the case *Ambiente Ufficio and others v. Argentine Republic*, the respondent argued that the funding arrangement allowed the third-party funder to control the proceeding to the level that the funder had become a real party in interest in the present case.[21] The respondent argued that this control was demonstrated in that it was the funder's decision to initiate the arbitration, and because of its ability to select and to instruct the lawyers in the proceeding, its full control of the arbitration, and its role of a sole beneficiary. The role of the third-party funder, according to the respondent, was determined by the funding agreement therefore created an impermissible barrier between claimants and their lawyers, therefore creating issues for the jurisdiction of the tribunal.

On this issue, even though the tribunal considered that the third-party funder did play a crucial role in financing the proceeding and in bringing claimants together and coordinating them to conduct the proceeding, the tribunal did not accept the respondent's contention that the funder was the driving force behind the arbitration and that it had full control over the

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[13] *Id.* ¶ 323.
[14] *Id.*
[15] *Id.* ¶¶ 382-83.
[16] Quasar de Valores SICAV S.A. v. Russian Fed'n, SCC Case No. 24/2007, Award, ¶ 31 (July 20, 2012).
[17] *Id.*
[18] *Id.*
[19] *Id.* ¶ 33.
[20] *Id.*
[21] Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 186 (Feb. 8, 2013).

arbitral proceeding.[22] The tribunal pointed out that the Power of Attorney indicated that the lawyers representing claimants were not bound by the funding agreement between the funder and the claimants.[23] Even though the funder had asked the claimants not to accept the respondent's settlement offer, it did not have binding effect on the behaviors of the claimants. The tribunal considered that the funder did not have external control of the arbitral proceedings, and the tribunal's proper exercise of jurisdiction was therefore not affected.

In *Teinver and others v. Argentina*, the respondent asserted that the third-party funder was the real party in interest in this arbitration. This argument is based on its claim that the funder held a "common legal interest" with the claimants in this proceeding, and the funder was the only party that would seem to potentially benefit in the case.[24] Since the funder did not meet the basic jurisdictional requirements under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), it should not be allowed to benefit from the case.[25] The respondent's argument was partly based on the fact that claimants had transferred their rights to a third-party funder after initiating the arbitration.[26] The tribunal held that the argument had no impact on jurisdiction. It recalled the principle that jurisdiction is normally to be assessed as of the date of filing of the arbitration, and subsequent events would not affect the jurisdiction of the tribunal.[27] As all events invoked by the respondent occurred after the tribunal had established jurisdiction, the tribunal rejected the jurisdiction argument of the respondent. This point was further supported by the Decision on Annulment.[28] The Annulment Committee also stipulated that the funding agreement did not provide for any assignment in favor of the third-party funder of the interests in dispute or of the proceeds of the Award, and another arrangement between the claimant and the funder regarding the payment of a portion of the proceeds of the Award did not mean a transfer of a rights in dispute and did not affect the claimant's standing in the arbitration.[29]

These cases show that some of the responding States have been arguing that the third-party funder supporting the claims is the real party in interests,

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[22] *Id.* ¶ 277.
[23] *Id.*
[24] Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶ 245 (Dec. 21, 2012).
[25] *Id.* ¶ 246.
[26] *Id.* ¶ 256.
[27] *Id.*
[28] Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, ¶ 92 (May 29, 2019).
[29] *Id.* ¶¶ 92, 189.

which undermined the tribunal's jurisdiction or the integrity of the arbitral proceedings. This line of argument, however, has not been accepted by tribunals. After all, the arrangements between the claimant and the funder do not seem to affect the role of the claimant in the arbitral proceeding. For the arbitral tribunals, the existence of funding and the resulting influence of the funder in the arbitral procedure does not create legal obstacles to the tribunal's jurisdiction.

III. DISCLOSURE FOR CHALLENGES OF ARBITRATORS AND SECURITY FOR COSTS

The request for the disclosure regarding third-party funding mainly has two purposes. The first purpose for the disclosure request is to determine whether there exist any conflicts of interest between the funder and the arbitrators. The second purpose is related to the potential application of security for costs due to the existence of the third-party funding.

For the first purpose regarding conflicts of interest, there have been several cases in which the tribunal dealt with such request for disclosure. In the *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* case, the respondent, Turkmenistan, asked the tribunal to order claimants to disclose (i) whether third-party funding is utilized in this proceeding; (ii) if so, the terms of the funding arrangements; and (iii) the existence of contingency fee arrangements with either claimants' counsel or third-party funders.[30] The respondent, in making this request, relied on the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (hereinafter "IBA Rules"). General Standard 6(b) of the IBA Rules provides that a "legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party." The Explanation to this provision further clarifies that "third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such, may be considered to be the equivalent of that party."

Here, the tribunal noted that the basis of its decision in reviewing this request was its inherent powers to make orders necessary to preserve the rights of the parties and the integrity of the process.[31] The tribunal considered that the following factors could be considered in making the decision: a. To

[30] Muhammet Çap. v. Turkm., ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction Under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, ¶ 49 (Feb. 13, 2015).
[31] *Id.* ¶ 50.

avoid a conflict of interest for the arbitrator as a result of the third-party funder; b. For transparency and to identify the true party to the case; c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration; d. If there is an application for security for costs if requested; and e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.[32] In other words, these are the reasons, if present, for the tribunal to grant such request.

The tribunal declined the respondent's request, as the tribunal considered that the respondent had failed to show that third-party funding was likely, or that it was relevant for the tribunal's determinations of the issues under consideration. In addition, the tribunal noted that the respondent had not provided reasons as to why this information was relevant and why the respondent wanted this information. Furthermore, the tribunal noted that there was no suggestion that there was any issue of conflicts of interest due to third-party funding, and, at this stage, there were no any other considerations that could justify an order for disclosure as requested by the respondent.[33]

At the later stage, when the respondent again requested the disclosure with regard to the third-party funding, the tribunal determined that claimants should disclose whether their claims in this arbitration were being funded by a third-party/parties, and, if so, the names and details of the third-party funder(s) and the terms of that funding.[34] The decision was based on the following factors: First, the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators were affected by the existence of a third-party funder. Second, the indication that the respondent would make an application for security for costs. The claimants did not deny that there was a third-party funder supporting their claims in this arbitration. In addition, in a different case (the *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* case[35]) against the same respondent Turkmenistan, the claimants there (Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi) failed to pay the order for costs in favour of the respondent made by a different arbitral tribunal, even though the claimant had funded the annulment proceedings.[36] The legal counsel in that case was later also representing the claimants for the present case. The

[32] *Id.*
[33] *Id.*
[34] Muhammet Çap. v. Turkm., ICSID Case No. ARB/12/6, Procedural Order No. 3, ¶ 13 (June 12, 2015) [hereinafter *Muhammet Çap v. Turkmenistan*].
[35] *See generally* Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkm., ICSID Case No. ARB/10/1.
[36] *Muhammet Çap v. Turkmenistan*, *supra* note 34, ¶ 11.

respondent's struggle in getting paid in a different case allowed the tribunal to be sympathetic toward the respondent's position. Based on these factors, the tribunal sided with the respondent's concern that if there was a cost award against claimants, claimants would be unable to meet these costs and the third-party funder could soon disappear as it was not a party to this arbitration.[37] Accordingly, the tribunal ordered that claimants were to confirm to the respondent whether their claims in this arbitration were being funded by a third-party funder, and, if so, were to advise the 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 would share in any successes that claimants might achieve in this arbitration.[38]

The tribunal's decision to order disclosure of the identity of the funder may be warranted as transparency is required to determine whether there is any conflict of interest between the funder and the arbitrators. It is more controversial with regard to the order to disclose the terms of the funding agreement, as a funding is itself a confidential document, and the disclosure of its terms could create a strategic imbalance between the parties with regard to the arbitral procedure.

With regard to the request for disclosure of the terms of the funding agreement, in the *South American Silver v. Bolivia* case, the respondent requested that the tribunal order the claimant to disclose the identity of the funder of this arbitration, as well as the terms of the funding agreement.[39] The respondent argued that the request for disclosure of the identity was necessary in order to ensure that there were no conflicts of interests between the funder and the arbitrators.[40] The tribunal agreed that the disclosure of the name of the funder was necessary for the purpose of transparency.[41] However, the tribunal rejected the request concerning the disclosure of the terms of the financing agreement. The purpose for such disclosure would be to determine whether the third-party funder would assume an eventual costs award in favor of the respondent, but as the tribunal in this case had rejected the respondent's request for security for costs, the terms of the third-party financing were therefore not relevant.[42]

In *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, the respondent requested the production of the funding agreement

[37] *Id.* ¶ 12.
[38] *Id.* ¶ 13.
[39] South American Silver Ltd. v. Plurinational State of Bol., PCA Case No. 2013-15, Procedural Order No. 10, ¶ 13 (Jan. 11, 2016) [hereinafter *South American Silver v. Bolivia*].
[40] *Id.* ¶ 70.
[41] *Id.* ¶ 79.
[42] *Id.* ¶ 81.

and further documentation between claimants and the third-party funder.[43] The purpose for such request is two-fold. First, the information was a basis for the decision whether to request an order for security for costs. The respondent considered that if the funder did not agree to bear the costs of a possible award of costs against the claimants, the respondent would consider requesting an order for security for costs. Second, the information was the basis to confirm whether the conflict of interest existed for the present arbitration.[44] As the identity of the third-party funder had been known to the respondent through other means, the respondent did not require the claimant to disclose the identity of the funder.

On the request to disclose the funding agreement, the arbitral tribunal rejected the request.[45] The tribunal noted that the funding agreement itself did not create conflicts of interest.[46] What was relevant for the conflict of interest purpose was the identity of the funder, while the tribunal was able to declare that there was no conflict of interest issue here, since the identity of the funder was known.[47] In addition, the applicable provisions governing conflicts of interest, i.e., Articles 11 to 13 of the UNCITRAL Arbitration Rules, foresee disclosure by the arbitrators upon becoming aware of circumstances that could create a conflict of interest, not document production by the parties.[48]

In the *EuroGas v. Slovak Republic* case, the respondent requested the disclosure of the identity of their third-party funder for the purposes of determining whether there was any conflict of interest.[49] The tribunal ordered the claimant to disclose the identity of the third-party funder.[50]

In *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, it has been reported that it is only the second case, after *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, where the tribunal has ordered the claimant to disclose the details of the third-party funding arrangement, and not simply the identity of the funder.[51] After gaining the

[43] Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bol., PCA Case No. 2011-17, Procedural Order No. 13, ¶ 2 (Feb. 21, 2013) [hereinafter *Guaracachi America v. Bolivia*].
[44] *Id.* ¶ 6.
[45] *Id.* ¶ 8.
[46] *Id.*
[47] *Id.* ¶ 9.
[48] *Id.* ¶ 8.
[49] EuroGas Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Award, ¶ 105 (Aug. 18, 2017) [hereinafter *EuroGas Inc. v. Slovak*].
[50] *Id.* ¶ 108.
[51] Lisa Bohmer, Arbitrators Rule That Investors Backed by a Prominent Litigation Funder Must Post $1.5 Million Security in Order to Prosecute Investment Treaty Arbitration, IA REP. (July 11, 2018), https://www.iareporter.com/articles/arbitrators-rule-that-investors-backed-by-a-prominent-litigation-funder-must-post-1-5-million-security-in-order-to-prosecute-investment-treaty-arbitration/.

access to the funding agreement, the respondent submitted a request for security for costs.

With regard to the request for disclosure, the arbitral tribunals generally would require disclosure for the purpose of determining conflicts of interest between the funder and arbitrators. For this purpose, the disclosure of the funder's identity is considered sufficient. Indeed, this is consistent with the relevant provision in the IBA Rules. With regard to the disclosure of the terms of the funding agreement, however, the tribunals are generally more reluctant.

In *Tennant Energy v. Canada*,[52] the respondent submitted the motion for disclosure of the existence of any third-party funding agreement and details of the third-party funder, and the nature of the arrangements between the claimant and the funder, "including whether and to what extent [the funder] will share in any successes that [the claimant] may achieve in this arbitration, or pay an adverse costs order against [the claimant]." [53] The tribunal considered that it had the authority to order the disclosure requested "if doing so would preserve the integrity of the arbitral process." [54] As the claimant agreed to make such disclosure to address any concerns of the tribunal might have regarding a conflict of interest,[55] the tribunal accordingly requested that the claimant to disclose the identity of any third-party funder and any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the claimant in this arbitration.[56] The Tribunal's decision not only emphasized that the identity of the funder is important for the conflict of interest determination,[57] it further agreed that the existence of third-party funding agreements can be relevant to the Tribunal's assessment of applications for security for costs and can warrant an order of disclosure.[58] This case demonstrates that the tribunal has the authority, and did exercise such authority, to request the disclosure of relevant terms in the funding arrangement for the purpose of the determination of security for costs.

IV. ACCESS TO CONFIDENTIAL INFORMATION

In the *EuroGas v. Slovak Republic* case, the respondent sought to include a provision in the procedural order stating that any third-party funder would

[52] Tennant Energy, LLC v. Gov't of Can., PCA Case No. 2018-54, Procedural Order No. 4 (Feb. 27, 2020) [hereinafter *Tennant Energy, LLC v. Canada*]
[53] *Id.* ¶ 94.
[54] *Id.* ¶ 104.
[55] *Id.* ¶ 105.
[56] *Id.* ¶ 106.
[57] *Id.* ¶ 110.
[58] *Id.* ¶ 109.

not be granted access to confidential information.[59] The tribunal determined that the third-party funder would have the normal obligations of confidentiality to maintain the confidentiality interests of the respondent.[60]

This attempt shows the concern of the host states for the involvement of the third-party funders in the proceeding in general and the frustration regarding the access to the confidential information in particular. The decision of the tribunal demonstrates the tribunal's attitude towards this issue. It seems that the frustration is not mutually shared by the tribunal.

V. COSTS

The existence of third-party funding creates issues for arbitrators in terms of costs. A point of contention in arbitral proceedings is whether the costs of legal representation and other legal costs that have been paid by a third-party funder could be part of the adverse costs order. In *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*,[61] regarding the tribunal's costs awards, the respondent questioned the recoverability of the claimant's costs to the extent that was borne by a third-party investor.[62] The tribunal compared a third-party financing arrangement to an insurance contract under which compensation or an indemnity is provided. The tribunal noted that under the Georgia–Greece and Georgia–Israel BITs,[63] such an insurance contract does not affect the calculation of damage. Therefore, the tribunal held that the third-party financing arrangement should not be taken into consideration in determining the amount of recovery by the claimants of their costs.[64]

In the annulment proceeding of *RSM Production Corporation v. Grenada*,[65] RSM alleged that Grenada's legal fees were paid by an undisclosed third-party, and "it would be improper for the Tribunal 'to award

[59] *EuroGas Inc. v. Slovak*, *supra* note 49, ¶ 105.
[60] *Id.* ¶ 108.
[61] Ioannis Kardassopoulos v. Republic of Geor., ICSID Case Nos. ARB/05/18 & ARB/07/15, Award (Mar. 3, 2010) [hereinafter *Ioannis Kardassopoulos v. Georgia*].
[62] *Id.* ¶ 686.
[63] Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments, Geor.-Greece, art. 9(5), Nov. 9, 1994, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1658/georgia---greece-bit-1994-; Agreement Between the Government of the State of Israel and the Government of the Republic of Georgia for the Promotion and Reciprocal Protection of Investments, Geor.-Isr., art. 8(3), June 19, 1995, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1660/georgia---israel-bit-1995-.
[64] *Ioannis Kardassopoulos v. Georgia.*, *supra* note 61, ¶ 691.
[65] *See generally* RSM Production Corp. v. Gren., ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs (Apr. 28, 2011) [hereinafter *RSM Production Corporation v. Grenada*].

payment to . . . an undisclosed party,'"[66] as these costs were not actually paid by Grenada with reimbursement from other sources.[67] Citing *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, the Ad Hoc Committee rejected RSM's argument.[68] The above cases show that, generally, arbitral tribunals do not consider that the existence of third-party funding affect the allocation of costs.

VI. SECURITY FOR COSTS

As discussed previously, the potential application of security for costs could be a reason to order disclosure by some tribunals. In *Gustav Hamester v. Ghana*,[69] the tribunal ruled that there was a serious risk that an order for security for costs would stifle the claimant's claims and that, in any event, it had not been shown that the measures requested were necessary and urgent.[70] In addition, the tribunal held that an order for security for costs would not serve its purpose without cancelling or postponing the hearing, which was neither requested nor practicable at that stage of the proceeding.[71]

In another earlier case, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, the respondent requested the production of the funding agreement and further documentation between claimants and the third-party funder.[72] As discussed previously, the purpose for such request by the respondent is that the information is needed in order to confirm that the funding agreement would not cover the payment of a possible award on costs against the claimants, which is important in the respondent's potential decision to request an order for security for costs. The tribunal did not order the disclosure of the funding agreement, but noted that the claimants had neither denied this, nor produced the funding agreement or any other document contradicting this assertion.[73] The tribunal thus noted that, based on the IBA Guidelines on the Taking of Evidence in International Arbitration (in particular Article 9 thereof), the tribunal will take the foregoing into account, and can draw such inferences as it deems appropriate when deciding on the respondent's request for security for costs.[74] The basis for the tribunal to grant security for costs in this case is Article 26(3) of the

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[66] *Id.* ¶ 52.
[67] *Id.* ¶ 51.
[68] *Id.* ¶ 68.
[69] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010) [hereinafter *Gustav Hamester v. Ghana*].
[70] *Id.* ¶ 17.
[71] *Id.*
[72] *Guaracachi America v. Bolivia*, *supra* note 43, ¶ 2.
[73] *Id.* ¶ 10.
[74] *Id.*

UNCITRAL Rules. Here, the tribunal did not permit the respondent's request for security for costs. The tribunal noted that security for costs is an extraordinary measure, and the respondent was not able to meet its burden of proof for the request.[75] The tribunal required the respondent to prove that the claimants would not be able to pay an eventual award of costs rendered against them, and the mere existence of third-party funding, regardless of whether the funder is liable for costs or not, does not provide sufficient evidence to establish that.[76]

Whether the existence of a third-party funder affects the order for security for costs themselves has been the central issue that tribunals need to deal with. Several decisions of investment tribunals have indicated that the existence of a third-party funder would not, by itself, determine the outcome of such order.[77]

In *RSM Production Corporation v. Saint Lucia*,[78] the tribunal considered third-party funding in its decision on security for costs. After determining that the claimant had demonstrated a "material and serious risk" of non-compliance with an eventual costs order against it,[79] the majority opinion further considered that the presence of a third-party funder increased its concern that the claimant would not pay a costs order.[80] As for the urgency of the request, the tribunal highlighted three reasons to issue an order for security at that stage of the proceeding: the claimant's proven history of its non-payments in previous cases, its admitted lack of financial resources, and the procedure being funded by a third-party funder.[81] A later tribunal considered that the decisive factor for its decision was the fact that the claimant "had a proven history of not complying with costs awards rendered against it."[82] In this case, therefore, third-party funding is not the only factor that supports the tribunal's decision to order security for costs. The material and serious risk that a cost award will not be complied with is the fundamental reason for the security for costs order.

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[75] Guaracachi America, Inc. v. Plurinational State of Bol., PCA Case No. 2011-17, Procedural Order No. 14, ¶ 7 (Mar. 11, 2013).
[76] *Id.*
[77] *Ioannis Kardassopoulos v. Georgia*, *supra* note 61, ¶ 691; *RSM Production Corporation v. Grenada*, *supra* note 65, ¶ 68. Cited in *South American Silver v. Bolivia*, *supra* note 39, ¶ 74.
[78] *See generally* RSM Production Corp. v. St. Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014).
[79] *Id.* ¶¶ 77-82.
[80] *Id.* ¶ 83.
[81] *Id.* ¶ 86.
[82] *Tennant Energy, LLC v. Canada*, *supra* note 52, ¶ 175.

In a later case, *EuroGas v. Slovak Republic*, the tribunal stated that the mere existence of a third-party funder is not an exceptional situation justifying security for costs.[83]

In the *South America Silver v. Bolivia* case, the respondent argued that when there was evidence of the existence of a third-party funder, there could be a presumption in favor of ordering security for costs. [84] The respondent argued that the existence of a third-party financing in the arbitration was an indication that the claimant did not have sufficient economic resources to bear the cost and expenses of the arbitration, and there was no evidence that the third-party funder had assumed the obligation to reimburse the respondent's costs and expenses in the arbitration.[85]

Here, this tribunal considered that while the existence of a third-party funder may be an element to be taken into consideration in deciding on a request for security for costs, this element alone may not lead to the adoption of the measure.[86] The tribunal pointed out that the existence of the third-party funder alone does not evidence the impossibility of payment or insolvency, as there are other reasons to obtain financing, and the fact of having financing alone does not imply risk of non-payment. [87] Otherwise, as the tribunal pointed out, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.[88]

The tribunal's inquiry on whether to order security for costs focused on the claimant, i.e., whether it does not want to pay, or that it has breached its obligations, or that it has carried out acts from which the tribunal may clearly and sufficiently conclude that it does not have the means to comply with an eventual award on costs, and the utilization of financing does not satisfy these requirements.[89] Before these requirements are satisfied, whether the third-party funder is willing to pay for the costs order is considered irrelevant.

In *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, it has been reported that it is the second case after *RSM v. St. Lucia* case in which the investment arbitral tribunal has agreed to order security for costs.[90] The tribunal took into account the existence of financing agreement in its

[83] EuroGas Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3—Decision on Requests for Provisional Measures, ¶ 123 (June 23, 2015).
[84] *South American Silver v. Bolivia*, *supra* note 39, ¶ 69.
[85] *Id.* ¶ 69.
[86] *Id.* ¶ 75.
[87] *Id.* ¶ 76.
[88] *Id.* ¶ 77, citing *Gustav Hamester v. Ghana*, *supra* note 69, ¶ 15.
[89] *Id.* ¶ 83.
[90] Bohmer, *supra* note 51.

determination. In making this decision, the tribunal applied the standard provided under Article 26(3) of the revised 2010 UNCITRAL Arbitration Rules as guidance.

The tribunal considered that it could grant the respondent's request for the security for cost if (i) prima facie, there was a reasonable possibility that the respondent would prevail, (ii) it was likely that the respondent would suffer harm not adequately reparable by an award of damages, (iii) the respondent's potential harm substantially outweighed the harm that was likely to be incurred by the claimants and (iv) the condition of urgency was met.[91] The tribunal considered that these tests had been met in granting the order for security for costs here. On the harm that the respondent would suffer, the tribunal noted that the claimants did not provide sufficient proof that they were solvent, and that the third-party financing agreement explicitly provided that the funder would not pay for any adverse costs, which supported the tribunal's finding that the reimbursement of the respondent's arbitration cost would be uncertain.[92] On the balance of hardship test, the tribunal noted that the claimants had alleged that they were solvent, that the harm could easily have been prevented if the third-party funder had agreed to cover adverse arbitration costs, and that the tribunal would only order a security for costs for a reasonable amount.[93]

It has been reported that the tribunal also noted that the claimants had refused to offer any reasonable explanation as to why they had chosen third-party funding, and the third-party funding agreement explicitly provided that the third-party would not cover any adverse arbitration costs, and therefore the tribunal concluded that the burden of proof should be shifted to the claimants, who were in control of all relevant elements of evidence, and who bore a duty to cooperate in good faith during the arbitral proceedings. The tribunal also noted even though it granted the request, it did not consider that a third-party funding arrangement, *per se*, constitutes proof of insolvency.[94]

In *Tennant Energy v. Canada*,[95] the tribunal rejected the respondent's request for security for costs. While discussing the requirements of an order for security, the tribunal noted that "exceptional circumstances" were required.[96] In rejecting the request, the tribunal noted that the respondent had not established a reasonable basis that the claimant was impecunious at the first place, therefore the requirement of the respondent should be at risk of

[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Tennant Energy, LLC v. Canada*, *supra* note 52.
[96] *Id.* ¶ 173.

serious or irreparable harm was not established.[97] The tribunal also agreed that the existence of a funding agreement alone was not sufficient for the order.[98]

It can be a difficult question for the arbitral tribunal when the claimant is unable to provide the security requested by a security for costs order. In *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, adopting the exceptional circumstances standard, the tribunal granted the respondent's request for security for costs based on a majority opinion.[99] The tribunal considered that the exceptional circumstances are present under a combination of the claimant's impecunity, reliance on third-party funding, and the explicit non-liability of the third-party funder for a costs award adverse to its funded party.[100] The tribunal, however, left it open for the claimant to apply for reconsideration if new facts would demonstrate "insurmountable obstacles" in obtaining the required security.[101] After several attempts to secure such security, it was clear to the tribunal that the claimant cannot provide required security for costs.[102] The tribunal unanimously considered that the claimant has "seriously and diligently tried, but failed, to procure adequate security for costs."[103] This is the result of the insolvency of claimant and the policy of the funder not to provide the funding for such security at appropriate terms.[104] Taking into account the allegations that the insolvency of the claimant was due to the wrongful actions of the respondent, the majority of the tribunal considered that to deny the claimant the opportunity to proceed to the merits would be a denial of access to justice and rescinded the order of security for costs.[105] Notably, the majority of the tribunal stressed the third-party funder's policies on additional funding to be beyond the tribunal's mandate.[106]

The minority of the tribunal criticized the majority's decision and argued that such approach would encourage the approach of the funder not to provide funding for adverse costs against the party it funded.[107] The minority

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[97] *Id.* ¶ 178.
[98] *Id.* ¶ 179.
[99] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkm., ICSID Case No. ARB/18/35, Decision on the Respondent Request for Security for Costs and the Claimant Request for Security for Claim, ¶¶ 50, 84 (Jan. 27, 2020).
[100] *Id.* ¶¶ 54-57.
[101] *Id.* ¶ 65.
[102] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkm., ICSID Case No. ARB/18/35, Decision and Procedure Order No. 5, ¶ 20 (June 9, 2020).
[103] *Id.* ¶ 21.
[104] *Id.* ¶ 22.
[105] *Id.*
[106] *Id.* ¶ 23.
[107] *Id.* ¶ 30.

also emphasized the problem associated with the tribunal's lack of power to make a costs order against a third-party funder.[108] The minority argued that this should be remedied by the adoption of new rules which could make reliance on third-party funding dependent on the Tribunal being granted such a power.[109] While this controversial case does not necessarily demonstrate a lack of tool for the tribunal to deal with concerns of third-party funding, it does indicate that the security for costs can be too blunt an instrument in some situations.

As the arbitral cases show, whether to order security for costs is a controversial issue and is allowed only in exceptional cases. As security for costs could have a serious negative impact on the investor access to arbitral proceedings, there may be a need for tribunals to develop some other means to prevent frivolous claims and to ensure the respondent could get paid in the situation of an adverse costs awards against the claimant. The arbitral tribunals have shown their ability to determine the need for granting such requests in specific cases where the security for costs is needed. However, tribunals could face difficult decisions if the funded party is not able to secure the required security.

VII. CONCLUDING REMARKS: DEVELOPING APPROPRIATE REGULATIONS IN LIGHT OF THE RESPONSES IN THE PROCEEDING

Concerns have been raised over the utilization of third-party funding in ISDS. Various responses have been developed and proposals have been raised in the discussion of ISDS reforms. One of the most extreme responses is a sweeping prohibition of third-party funding. The Argentina–United Arab Emirates Agreement for the Reciprocal Promotion and Protection of Investments adopts this model.[110] Various proposals have been raised in the UNCITRAL's Working Group III for ISDS reform. Countries such as South Africa and Morocco have proposed that third-party funding should be prohibited in ISDS.[111] In the initial Draft provisions on third-party funding

[108] *Id.* ¶ 31.
[109] *Id.*
[110] Agreement for the Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the United Arab Emirates, Arg.-U.A.E., art. 24, Apr. 16, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3819/argentina---united-arab-emirates-bit-2018- ("Third-party funding is not permitted.").
[111] UNCITRAL Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of South Africa*, at 11, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019) (arguing that "[t]hird-party funding should be banned."). *See generally* UNCITRAL Working Grp. III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Morocco*, U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 4, 2019) (arguing for the prohibition of third-party funding unless international rules governing such funding are adopted).

prepared by the Secretariat of UNCITRAL Working Group III, both prohibition models and restriction models are included for consideration.[112] Under prohibition models, no third-party funding is allowed under ISDS.[113] Under restriction models, only certain types of third-party funding are allowed (e.g., allowed only when funding is necessary for the claimant to bring its claim, called the access to justice model, or when investment is in compliance with sustainable development requirements, called the sustainable development model), or only certain types of specified third-party funding are prohibited (the restriction list model, e.g., speculative funding, excessive amount of expected return for the funder).[114] In the Draft provisions, disclosure requirements are also included.[115]

The complexity and controversy of the issue is demonstrated by various comments received by the Secretariat. For example, Canada, European Union and its Member States, Singapore, and the United States generally oppose the prohibition models and restrictive models while supporting the disclosure obligation of third-party funding for conflicts of interest or security for costs purposes.[116] On the other side of the spectrum, Morocco supported the prohibition modules and the access to justice model,[117] and Vietnam opposed the restricted list model due to its basis on the general principle of allowing third-party funding and potential for omission.[118]

This paper argues that proposed solutions to the third-party funding concerns should be evaluated based on actual problems faced by the parties and arbitral tribunals. To the extent that the issues can be addressed by arbitral tribunals with the tools currently available to them, the adoption of stringent limitations on third-party funding should be cautious. Accordingly, this paper aims to examine how the tribunals deal with the arguments raised by the respondents in the proceeding and evaluate whether the arbitral tribunals have sufficient tools at their disposal to deal with the concerns. Among the general concerns, jurisdiction and abuse of procedure, conflict of interests, access to confidential information, and security for costs are among

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[112] UNCITRAL Working Grp. III, *Draft Provisions on Third-Party Funding*, UNCITRAL, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210506tpfinitialdraftforcomments.docx (last visited May 22, 2022).
[113] *Id.* at 4-5.
[114] *Id.* at 5-7.
[115] *Id.* at 8-11.
[116] Submission from the Government of Canada and Comments submitted by the European Union and its Member States, Comments submitted by Singapore, and Comments submitted by the United States. *See generally* UNCITRAL Working Grp. III, *Initial Draft on the Regulation of Third-Party Funding, Compilation of Comments* 1-3, 8-25, 34-50, 58-63, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_tpf_1.pdf (last visited May 22, 2022).
[117] *Id.* at 32-33 (Comments submitted by Morocco).
[118] *Id.* at 64-67 (Comments submitted by Viet Nam).

the arguments raised by the respondents in the proceedings. There is no sign of obvious shortcomings in the tribunals' ability to deal with the concerns that have been raised in the proceedings. This does not mean that these are the only concerns associated with the third-party funding. However, the arguments raised in the proceedings should be the priority that should be evaluated.

As discussed, ISDS arbitral tribunals have been dealing with concerns and challenges regarding jurisdiction and abuse of procedure in cases with third-party funding. While the tribunals do not lack tools to deal with issues of jurisdiction or abuse of procedure, they have been rejecting arguments that the funder, with its control over the proceeding, is the real party to the dispute, which prevents jurisdiction of the tribunals or causes abuse of procedure.

With regard to the request for disclosure, the arbitral tribunals generally would require disclosure for the purpose of determining conflicts of interest between the funder and arbitrators. For this purpose, the disclosure of the funder's identity is considered sufficient.[119] Indeed, this is consistent with the relevant provision in the IBA Rules, and transparency in this regard is necessary and tribunals have demonstrated consistency on this point.

With regard to disclosure of the terms of the funding agreement, the tribunals are generally more reluctant. A funding agreement is itself a confidential document, and the disclosure of its terms could create a strategic imbalance between the parties with regard to the arbitral procedure. However, when the situation warrants it, a tribunal has required disclosure of the relevant parts of the funding arrangement for the purpose of the determination of the order for security. This method developed by the tribunal is appropriate as only a specific and limited part of the agreement would be relevant to the determination, which would cause limited concern over confidentiality. In addition to the disclosure, where the purpose of such disclosure is for the application of security for costs, the goal of which is to ensure the respondents could get paid in the event of an adverse costs awards in favor of it, some other solutions could be developed. Tribunals could consider means to require the funder to take on more responsibility with regard to the arbitral proceeding. Even though third-party funders are not themselves parties to the dispute, their involvement and influence over the arbitral procedure cannot be ignored and they should be responsible for respondents' costs that are caused by the funder's actions. Tribunals and institutions should develop procedures to require the funder to undertake the responsibility for the potential adverse costs when warranted. Security for

[119] *See* GIAN MARCO SOLAS, THIRD PARTY FUNDING: LAW, ECONOMICS AND POLICY 309 (2019).

costs remains an exceptional case to be applied when the requirement for the order is satisfied.

Third-party funding is an important development in ISDS, and arbitral tribunals have been responding to the issues and concerns created by the third-party funding. While debating appropriate regulations needed to address the issues of the third-party funding, it would be useful to consider the tools tribunals have been utilizing. This paper argues that a balanced and narrowly targeted approach could be further developed to better tackle the challenges posed by third-party funding in ISDS, and discretion should be provided to tribunals to deal with the concerns regarding third-party funding in a case-by-case basis.

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