

Research on Regulations of Third-Party Funding in IIA

Yifei Zhao

School of Law, Xiamen University Tan Kah Kee College, 363105, Zhangzhou, China

LAW20025@stu.xujc.com

Abstract. In recent years, third-party funding (TPF) in international investment arbitration (IIA) has made a significant impact both in theory and practice. Nowadays, a Chinese law firm (the "PRC law firm") acted as the sole agent in the international investment arbitration case *AsiaPhos v. China* and the Chinese party won the lawsuit. One of the petitioners in the suit, AsiaPhos (Asiahua Group), claimed that its board of directors and its subsidiaries had entered into a formal financial aid agreement with a US-based fund, namely TPF. The financial support offers an opportunity to approach justice to applicants in economic distress or intending to share arbitration risks and also produces deterrence to the host state from any improper behaviors harming the interests of investors. However, on the one hand, due to commercial litigation, the arbitrators and investors will have a conflict of interest, on the other hand, third parties and investors usually live abroad, where governments lack the relevant information and competence that require international cooperation. In addition, the host country, especially the developing country, will also face the high cost of investment arbitration, and solving the problem must be needed for relevant mechanisms. This article discusses the application and development of TPF in IIA and analyzes the negative impact of TPF based on some legal issues, and then proposes the relevant rules and policy. On this basis, the study also provides suggestions for the practice of TPF from the perspective of the Chinese party to promote the development of TPF and puts forward advice for international investment rule-making balance in China.

Keywords: Third-Party Funding, International investment arbitration, Legal regulation, Disclosure.

1. Introduction

AsiaPhos v. China is the fourth international investment arbitration case to date in which the Chinese government is the defendant. The case involved mining investments in China's Sichuan Province by a Singaporean company, Asiahua Group, and its wholly-owned enterprise, Norwest Chemicals Pte Ltd. On 16 February 2023, the arbitral tribunal ruled on the case under the Singapore-China BIT, affirming China's view on major issues such as jurisdiction and rejecting the claimant's claim. During this period, it was discovered that the Asiahua Group had entered into a contract with a US company for "third-party funding", which is also an issue of general international concern. TPF in the modern commercial sense first appeared in Australia and has been developed in the USA, UK, and Singapore. In recent years, several professional and sophisticated legal aid organizations have emerged in developed countries such as Europe and the United States, and their services have been extended from civil litigation to international arbitration, particularly in IIA. TPF in IIA has its advantages and disadvantages and the key is to regulate it in a way that avoids the disadvantages.

2. Application of TPF in IIA

2.1. TPF under IIA

TPF generally refers to the provision of material support or legal services by a natural or legal person who has no direct interest in the parties to a dispute and who receives a financial contribution in return for the funding provided for in the funding agreement in the event of success, and who is not required to return the funding costs to the funder in the event of a loss [1]. IIA is a form of arbitration arising from international investment disputes between host countries and foreign investors and is particularly preferred by TPF agencies because it differs from domestic litigation and

international commercial arbitration in some ways. Because of the confidential nature of arbitration, its practitioners estimate that globally, over 40% of IIA are funded by third parties.

Firstly, TPF in IIA is highly secretive. Most institutions operate behind the scenes, do not disclose relevant information to the outside world, and are required to keep most TPF agreements secret. In reality, some organizations even take extraordinary measures to sever their ties with the receiver, such as by creating special vehicles with a specific function to speed up the agreement's execution, or by providing the money directly to the law firm acting on their behalf rather than to the recipient [2]. This further increases the secrecy of the TPF relationship.

Secondly, TPF has become an industrialized and specialized industry. At its core is the term "investment", which means that third parties expect to win their cases while taking the risk that they will not necessarily get their investment back. As it is an investment, it includes the traditional investment industry such as insurance companies and investment banks, in addition to specialist third-party investment institutions. The involvement of venture funds in particular has led to the "commercialization" of investment arbitration claims, with third-party institutions being able to assess and "shop" for arbitration claims that may exist or already exist and that they feel are favorable [3]. As a result, some representatives of venture funds say that TPF has become a booming industry in the field of IIA.

Finally, TPF in IIA only assists the investor and is not generally available to the host State against which the action is brought. In theory, third-party financing can provide funds to both the arbitrator and the respondent, but in practice, it is not common for third-party financing to be provided to the respondent, and there has not been a single case to date in IIA involving a sued host state receiving third-party financing [4]. In the ICSID case *Philip Morris and others v Uruguay* (India Investment of Island India Investment), it was suggested that there was TPF that was done without the purpose of making a profit. Third-party funding is classified in the OECD report as either commercial or non-profit. It is noted that cases involving international investment disputes that include a public interest also attract non-commercial TPF. Additionally, it is feasible for individuals or organizations to fund arbitration for investors for political purposes. However, in the above-mentioned case, such an arrangement was more like free legal assistance, where the funder only provided funds and did not seek to recover the investment winnings from it, and therefore it was seen as a donation rather than a grant [5]. Such cases are very rare, even if they can be considered TPF, they represent a very small percentage of all cases.

2.2. Gradual Development in International Economic Dispute Settlement

As economic interactions between countries become closer and disputes become more complex, countries are looking for more ways to resolve disputes and arbitration is becoming more and more important. Yet the high cost of dispute resolution hinders the willingness of disputing parties, especially those in financial difficulty, to choose arbitration. There has been a gradual change in attitude towards TPF to seek opportunities for just relief. A growing number of IIA cases have involved TPF and some have become known to the outside world, the following are four influential cases.

In the *Yukos* arbitration, the former shareholders of *Yukos Oil* were funded by a third party to bring an arbitration against the Russian Federation and were awarded the highest arbitration award in history, totaling over US \$fifty billion [6].

In *S&T Oil v Romania*, *Juridical*, a third-party funder, funded *S&T Oil*'s request for arbitration and requested that *S&T Oil* grant it the right to be given access to all information relevant to the case, which *Juridical* later stopped funding because *S&T Oil* had withheld important evidence [7]. This caused the investor was not able to pay the arbitration costs and the case was eventually dismissed by ICSID.

In *RSM Production Corporation v. Saint Lucia*, the Tribunal, at the request of the claimant in *Saint Lucia*, directed the claimant, which had received funding from a third party, to guarantee any costs

incurred by the defendant in connection with the arbitration proceedings [8]. This order was the first in the history of the ICSID to require a claimant to provide security for arbitration costs.

For *Muhammet Cap & Sehil Insaat Endustri Ve Ticaret Ltd. Sti v. Turkmenistan*, the arbitral tribunal required the investor to indicate whether there was funding from a third party, and if it was funded by a third party, the name of the TPF agency should be disclosed to the arbitral tribunal. Information on the funding agreement between an investor and the TPF agency should also be disclosed, including the distribution of the investor's profits in light of the receipt of the arbitral award in its favor [9]. The order is the first in the history of ICSID to require parties to disclose TPF.

These cases have not only become known to the outside world but have also attracted considerable attention in both theoretical and practical circles, leading to a heated debate on third-party financing in IIA. The Queen Mary University of London's 2018 study shows that TPF cases account for 70% of IIA [10], of which the above is only a small proportion. The above are just a few of the cases that have given us insight into the application and practice of TPF in IIA.

3. Legal Issues of TPF

Making TPF function as it should in IIA requires an evaluation and analysis of the application of the rules. Consideration should be given to which aspects of the TPF would add value to the IIA and which aspects should be restricted.

TPF as a special presence, this investment method has made a significant contribution to the field of IIA. First and foremost, it enhances access to justice for parties who are unable to make worthy claims and helps to broaden access to justice. Second, to reduce meaningless claims, third-party funders often begin by conducting preliminary research on the claims to evaluate their merits. A third-party investor has a team of lawyers, investors, and risk managers to assess whether a claim is viable and what it is worth. Therefore, with such professional and complex due diligence, not many cases can be successfully supported by TPF. This may help reduce unnecessary requests to arbitral tribunals, in the sense that a third-party-funded due diligence review is similar to a pre-procedure for starting an arbitration. It will screen out many cases with a low success rate, save arbitration resources for arbitral institutions, ease the workload of arbitral tribunals, and divert their business, reducing the waste of arbitration resources due to meaningless cases. Next, it is useful for the parties to enjoy an equal right to confrontation. It can be maximized through TPF for the assisted parties. Finally, the study of different types of dispute-resolution mechanisms can effectively ease the pressure on our judicial system and make it work better [11].

However, there are also obvious problems with the TPF that could compromise the independence of the IIA system. If unregulated, this practice will affect public trust in international investment.

3.1. Increased Investor Abuse Claims

Investment arbitration is expensive and time-consuming. When choosing to resolve an investment dispute through arbitration, the parties carefully consider the time, money, and manpower costs involved. Nevertheless, in the case of arbitrage financed by a third party for international investments, the parties are not responsible for the costs even if they lose the matter. Consequently, the risk that they would have to bear when they start arbitration is passed on to the funding party, which can easily lead to the problem of parties abusing or even pursuing litigation, resulting in a waste of judicial resources [12]. In addition, the compensation or damages received by the party will be shared with the financier on a pro-rata basis after winning the case. To obtain a higher return, the party may either on its initiative or at the behest of the financier, demand excessive prices when applying for compensation. The host country, which is a developing country, may be forced to accept excessive demands from the applicant to attract foreign investment and develop its economy because of the country's credit rating. This is contrary to the purpose of the ICSID mechanism, namely to "protect the legal rights of vulnerable investors".

3.2. Caused the Host Country to Win the Case and Not Get Compensation

In IIA, only the investor can bring an arbitration claim and the host country receives no financial compensation. As a result, there are virtually no third parties to fund the host country. If the funder decides to withdraw its funding, the claimant who does not have enough money has to suspend the arbitration and the host country cannot recover the huge costs it has paid in the case. This causes a great strain on the host country's finances and inevitably adds to the burden on people and is not beneficial to the host country's economic development. Despite the existence of awards requiring the unsuccessful claimant to bear a portion of the costs of the arbitration in the host country, such awards have not been complied with. The successful claimant, having successfully initiated investment arbitration with the financial support of a third party, is not required to pay back the costs to the funder and is not held liable, while the successful host country incurs substantial costs in terms of money and time, and continues to expend effort in seeking enforcement of the successful award. This no doubt causes a great deal of pressure on some developing countries [13].

3.3. Influencing the Justice of IIA Arbitral Awards

TPF's participation may create conflicts of interest and influence the independence and impartiality of arbitrators. There is a motto in international arbitration that "arbitration is only as good as its referees" [14]. Independence and impartiality are principles that must be observed by arbitrators from the time they are appointed until the end of the proceedings. In reality, the many forms and complexity of the relationships that can emerge between third-party investment companies and arbitrators make it difficult to implement the principle effectively. Many arbitrators also engage as lawyers in large international law firms or are called upon to act as advisors to third-party financiers, making it hard to avoid the appearance of a particular conflict of interest. Although arbitrators are generally appointed by the parties voluntarily, this does not prevent third-party investors from putting pressure on the parties to choose an arbitrator with whom they have a close relationship. The lack of compulsory disclosure of such information in the existing arbitration rules creates a significant challenge to independence and impartiality.

4. Current Regulations of TPF

The investment model of TPF of arbitration has already been a commercial reality, recognized in practice by many countries. The focus of the international discussion is not whether TPF needs to be accepted, but whether it needs to be regulated. However, trying to regulate it is not an easy task, and the most important reason is that it is not recognized and regulated in the same way in all countries and regions. It was proposed that given the international and global nature of international arbitration, there was a need for a set of third-party-funded arbitration rules to reduce the differences in practice between countries. In the author's view, whether or not there is a uniform regulation, it should be set out in the domestic law of each country or region.

4.1. Global Experience in Regulations

4.1.1 The "Soft Law" Aspect

(1) IBA Guidelines on Conflicts of Interest in International Arbitration

The purpose of the IBA Guidelines is to establish a framework for international arbitration that guarantees fairness. An insurer has a direct financial interest in an arbitration award and a third-party funder of the case may be regarded as belonging to the same entity, according to the Explanation to General Standard 6 [15]. Unlike the other rules, it requires disclosure of the relationship between the arbitrator and the outsider rather than the funding relationship of the parties. It is an indirect way of explaining the disclosure rules concerning the issues described in this article, by placing the new concept in the context of the original rules. It is also stated that the disclosure of third-party funds should not be excessive so as not to affect the confidence of the parties in the arbitration process, thus making the disclosure of third-party funds better. On balance, they are not legally binding on the

investing parties and arbitrators, although they are merely a guidance document. However, the author believes that it fills a gap in the rules on the disclosure of information on TPF in IIA and serves as a guide. The disclosure rules have been characteristically optimized by indirect or straightforward means.

(2) ICSID Arbitration Rules Amendment

The latest version of the ICSID Arbitration Rules Amendments (hereinafter "Amendments") came into force on 1 July 2022. This round of amendments is the most significant change to the ICSID Arbitration Rules since their establishment. The Amendments take into account important issues encountered in recent arbitration practice and modify most of the provisions in response to practical needs. This includes substantial improvements on issues such as efficiency, time of arbitration, transparency, allocation of costs, disclosure, and recusal [16].

4.1.2 IIA Perspective

(1) EU-Vietnam Investment Protection Agreement (EVIPA)

The EU has concluded numerous international economic treaties to foster an impressive increase in foreign trade and business collaboration. EVIPA was among the first landmark treaties to have specific TPF regulations. Article 3.28 sets out the definition of TPF and Article 3.37 sets out the disclosure requirements for TPF in three respects while Article 3.37 also provides that the tribunal should also consider the existence of TPF when applying security for costs [17]. The EU IIA has taken a lead role in focusing on TPFs. Increasingly, BITs are focusing on and regulating provisions relating to TPF.

(2) Transatlantic Trade and Investment Partnership (TTIP)

The draft TTIP investment chapter specifically provides for a mandatory disclosure obligation on the part of the financier. That is when filing a request for arbitration or entering into a funding agreement, it must disclose the third-party funder to the opposing party and arbitral panel. [18]. Although TTIP is currently at a halt, the EU's approach reflects the attitude of the larger economies in the world today toward the disclosure of third-party funding.

4.1.3 Arbitration Rules Level

In recent years, Singapore and Hong Kong, the two major arbitration venues in the Asia-Pacific region have broken through the common law prohibition of "contribution to litigation and profit-sharing" and established their own TPF systems in different ways. It is the rapid transformation of the two countries under the growing IIA that demonstrates their determination to become a "world arbitration center".

(1) SIAC Investment Arbitration Rules

The Singapore International Arbitration Centre (SIAC) has produced a new version that came into operation on 1 January 2017. The Rules give the arbitral tribunal the power to order the aided party to disclose the fact of the existence of TPF and the identity of the third-party funder. In certain cases, the tribunal may also order the parties to reveal information about the benefits available to the third-party funder if the lawsuit is successful, as well as if the third-party funder has agreed to cover the costs of losing the case [19].

(2) HKIAC Administered Arbitration Rules

The arbitration rules set out the TPF's disclosure obligations and paragraph 2 of the rules also set out what is to be disclosed by the funded party and also to whom it is to be disclosed, providing more granularity to the disclosure requirements [20].

4.2. Dilemmas of Regulation

Disclosure of TPF is essential for the proper functioning of the IIA mechanism, but there are still many problems with the existing rules on the disclosure of TPF.

Firstly, the range of application of the disclosure rules on TPF is ambiguous and leaves much space for avoidance. The current definition of TPF has not yet been agreed upon in the various rule texts,

resulting in an unclear and rigid range of application of the disclosure rules, which does not leave enough space for the possibility of avoidance and the development of new types of TPF.

Secondly, the disclosure rules are single and lack compulsory regulation. Most of the current international disclosure rules do not respond to the authority of the tribunal to order disclosure and the specific terms of the TPF contracts, making it difficult for them to address the deep-rooted issues of costs awards, security for costs, and abuse of process fairly and equitably, and failing to effectively regulate TPF. Most of the rules also do not pay attention to the formulation of provisions on liability for the consequences of non-disclosure, most of which are single liability and have no clear corresponding circumstances, making it difficult to enforce liability for the consequences and limiting the enforceability of the disclosure rules.

Thirdly, there are still gaps in important provisions relating to post-disclosure review obligations and rules on continuing disclosure obligations. Currently, the recipient is only obliged to disclose the existence and status of TPF to the tribunal promptly. The lack of specific guidance on many important issues makes it difficult to ensure the implementation of the disclosure obligation and does not contribute to the integrity and effectiveness of a disclosure rule [21].

5. China's Practice of TPF under IIA

Nowadays, China is a major investor in both the export and import of capital, and the number of cases brought by Chinese investors on their initiative and those in which China is a passive host country is increasing. It is just that the role of TPF has not yet been recognized in China. In the context of the widespread use of TPF in IIA, China should respond to TPF on time so that it can better contribute to the " Belt and Road Initiative" construction.

5.1. Clarify Requirements of Disclosure of TPF

Most of our current arbitration systems impose disclosure obligations on arbitrators requiring them to disclose to them promptly if they become aware of a situation that may affect their independence and impartiality. Due to the secretive nature of the engagement of third-party funders, the interests between the arbitrator and the third-party funder are known to the outside world or even unknown to the arbitrator, making it difficult to judge them and leading to challenges to the arbitration process in terms of legitimacy. The CIETAC Hong Kong Arbitration Centre Guidelines on Third-Party Funded Arbitration guide the financial position, responsibilities, and disclosure of information of third-party funders in China [22]. The International Investment Arbitration Rules clarify that the arbitral tribunal may take TPF into account when deciding on the costs of the arbitration. If the funder does not undertake the funder's liability for adverse costs in the funding agreement or if the funder fails to comply with its disclosure obligations on time, the tribunal requires the grantee to give a guarantee of costs when necessary [23]. In addition, relevant provisions are addressed in the ICSID investment arbitration regime and the UNCITRAL reform. China also actively participates in the development of international rules and is in tune with them.

5.2. Enhancing The Transparency of The Arbitration Process

The issue of transparency in the field of IIA has become a growing concern in recent years. Fairness and transparency in investment arbitration processes can help investors and third-party funders to evaluate investment arbitration processes in their entirety. It helps investors to choose a dispute resolution institution or method that is both economical and reasonable and to focus their evidence on the issues at stake to enable early resolution of disputes. Changing Chinese views on transparency in China-Canada BIT, China, Japan, Korea, and other investment agreements, incorporating transparency provisions in agreements to ensure transparency in investment arbitration [24]. The government's proposals for possible changes to the dispute settlement mechanism between investors and the state also mention that the engagement of third-party funders may lead to a potential conflict of interest between them and the adjudicator, so to avoid conflicts of interest, it is important

to strengthen the transparency constraints on TPF rules and to disclose the existence of TPF. Any party who fails to inform the truthfulness will be liable for the corresponding legal responsibility. This is the first time that China has made clear provisions on TPF and the transparency of the arbitration process, providing some policy guidance on how to use TPF in practice in the future.

5.3. Improving the International Competitiveness of China's Arbitration

As the global multilateral dispute settlement regime tends to ossify, more and more foreign investment is pouring into Asia, and the intense negotiations on transatlantic trade and the RCEP as well as the entry into force of the CPTPP all mark a regional shift in dispute settlement. The pressure on domestic Chinese institutions to arbitrate has increased since leading foreign arbitral institutions have been allowed to set up operations and conduct them in China. For this reason, domestic arbitral institutions have included the hearing of investment disputes within their jurisdiction when accepting cases. The changes in the arbitration system have of course had a beneficial effect on the quality of arbitrators [25]. There are already several experts and scholars who are qualified to become arbitrators in international arbitration institutions and a good arbitrator is very important for the adjudication of a case.

In the background of the "revolving door" of international arbitration, access to this "elite" of arbitral institutions will be of great help in the resolution of our future investment disputes. China should create more opportunities for local arbitrators to work in international dispute resolution institutions. On the one hand, we export our advanced dispute resolution experience to the outside world, such as mediation with its rich connotation of "peace is precious", to provide the international community with an "Eastern model" to learn from and minimize losses to both parties in disputes; on the other hand, there is a market demand for TPF in China, which offers great commercial prospects and demand for arbitration. If China develops highly qualified arbitrators, it will not only help investors along the Belt and Road to actively use third-party funding to access justice but also increase the utilization and international reputation of the Belt and Road investment dispute resolution mechanism.

6. Summary

The rise of TPF in IIA has grown in the last two to three decades. Yet it has had a powerful impact on parties to IIA, particularly host countries. As a new phenomenon in IIA, TPF is an "access to justice" for investors combining financial and risk transfer functions. Due to its rapid development and the failure of the relevant legal rules to respond appropriately, TPF can have many negative effects when intervening in IIA. To prevent TPF from unscrupulously eroding the interests of all parties, there is a need to improve the rules in various areas and regulate the TPF regime systematically and comprehensively. By appropriately regulating the TPF system, it will be able to bring its proper value to bear without disturbing the balance of interests between the investor and the host country. In China, although the regulations on TPF are not perfect in mainland China, Hong Kong has already shown its intention to permit TPF. To enhance the competitiveness of our arbitration institutions and gain experience in regulating TPF in China, the arbitration rules could be further modified to regulate TPF arrangements in IIA. With the joint efforts of the international community and the Chinese parties, these issues will eventually be successfully resolved and TPF will serve the IIA field in a better way.

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