

**Date:** 27 December 2018

**To:** ICSID

**From:** Mr. Peng HOU, Third-Party Funding for China (®TPF China)

**®TPF CHINA**

Beijing, China

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**Re: Comments to Rule 21 of proposed ICSID Arbitration Rules**

Dear Madams and Sirs,

As a non-profit academic organization focusing on the research of third-party funding in mainland China, we, ®TPF China<sup>1</sup>, draw this comment explicitly focusing on the financing issues under the proposed ICSID Arbitration Rules (AR). As the Rule 21 hereunder expressly governs the parties of ICSID arbitration on the disclosure matters concerning third-party funding, it is quoted as below (emphasis added).

*Rule 21 Disclosure of Third-party Funding*

- (1) *“Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by **a natural or juridical person that is not a party** to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:*
  - (a) *through a donation or grant; or*
  - (b) *in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.*
- (2) *A party shall file a written notice disclosing that it has third-party funding and **the name of the third-party funder**. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.*
- (3) *Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.*

Based on our experience as legal practitioners in China, a civil law jurisdiction, we would particularly point out two following queries for the ICSID’s further consideration.

1. Should the representative (lawyers) of the parties be recognized as **“a natural or juridical person that is not a party”**?

From the Chinese perspective, no legislation under the P.R.C. laws restricts an attorney to invest capital or any kind of material support to the funded party. In fact, several local entities in the form of foundation or other financing organizations, have emerged in mainland China. Among them, more than one third are constituted and funded by domestic law firms or individual lawyers. Under

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<sup>1</sup> ®TPF China is a non-profit academic organization based in Beijing, established by a group of Chinese scholars and lawyers, aiming at researching and educating practitioners in mainland China in the field of China-related third-party funding in arbitration and litigation. Taking the privilege of practicing in dispute resolution area and studying specifically on the funding industry in both China and the United States, ®TPF China benefits from its continuing research and filled with the hope of promoting the application as well as enhancing regulation of third-party funding for arbitration.

China's Attorney Law, lawyers are only qualified to provide legal services but not to finance cases. However, no existent regulation prohibits lawyers from investing a funding entity, and representing the funded party in the same case financially supported by the entity. In such scenario, the billing standard applied to the lawyers' contingent fees is no longer applicable to the financing agreement, leaving no restriction in the cap of contingent fees.

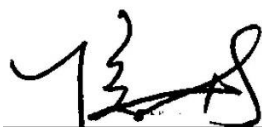
Therefore, we would kindly invite the ICSID to clarify the scope of the non-parties, especially including or excluding legal professionals as third-party funders concerning the aforementioned issue.

2. If a funder funds a case through a special purpose vehicle (SPV), is it sufficient to disclose merely **"the name of the third-party funder"**?

We have also been aware of that the proposed rule only requires the party to file a written notice disclosing the name of the third-party funder, leaving the question untouched whether the relationships between the funder and other case-relevant companies should be mentioned simultaneously. According to our past observations and experience, almost no funder directly gets involved into the disputes or the funded cases. In most cases, a SPV is established as an independent channel or agent to manage the financing project. In such scenario, the disclosure requirement under the proposed Rule 21 could be nominal. Thus, we recommend that the ICSID should redefine the disclosing requirement accordingly.

Standing in a neutral and objective ground among funders, funded parties and arbitration tribunal, we expect the funding instrument will facilitate the parties' access to justice and flourish the investment arbitration as a proper ADR mechanism to solve investment dispute between the Chinese investors and the related host countries.

Sincerely,



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