



Security for Costs

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Abbreviations and Acronyms

BIT	bilateral investment treaties
FTA	free trade agreement
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ISDS	investor-state dispute settlement
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law



1.0 Introduction

Security for costs is an issue attracting more and more attention in investor-state dispute settlement (ISDS), as states look for ways to manage the very high costs to their taxpayers of responding to ISDS cases. Security for costs is an order made by the tribunal requiring the investor bringing the claim to pay a deposit to cover the state's expected costs in defending itself against the claim. Security for costs is increasingly in the spotlight, in part because tribunals have moved away from the traditional default approach of "pay your own way." This is when both parties bear their own costs of the proceedings, regardless of the outcome. The more common approach now is that the losing party is ordered to pay the costs of the winning party.¹ Another reason for the increasing attention given to the issue of security for costs is the growing use of third-party funding in ISDS. Third-party funding is where an investor's legal fees and costs in bringing a case are paid for by a company that has a stake in the final award.² Because a third-party funder is not a party to the arbitration, they cannot be ordered to pay the state's costs.

1.1 Why Would States Want Security for Costs?

States may wish to seek security for costs from an investor because:

- The costs of defending an ISDS claim are very high, so the state may want a guarantee that the taxpayer funds they spend to defend an unmeritorious claim can be covered. The average estimated cost to defend a claim is USD 8 million,³ but it sometimes greatly exceeds that. For example, the Philippines spent USD 58 million to defend two cases brought by a German investor,⁴ and Australia spent USD 39 million defending a case brought by tobacco company Philip Morris.⁵
- The state may wish to use security for costs to filter out a claim that is speculative or marginal. The thinking behind this is that an investor that is disingenuously pursuing a weak case just for the settlement value will not want to post security for costs and will instead choose to abandon the claim.
- The state wants comfort that the investor will not declare bankruptcy or abscond from the jurisdiction before satisfying an order for costs made against it. This would help rebalance the scales in favour of the state, which cannot bring an ISDS claim against an investor, but also cannot declare bankruptcy, divest itself of assets or abscond in the same way an investor can.

¹ A 2017 study by law firm Allen & Overy found that successful parties were able to recover costs in 72 per cent of United Nations Commission on International Trade Law (UNCITRAL) claims and 61 per cent of International Centre for Settlement of Investment Disputes (ICSID) cases. Allen & Overy. (2017, December 14). Investment treaty arbitration: Cost, duration and size of claims all show steady increase. Retrieved from <http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx>

² The broader issues related to third-party funding are not addressed here.

³ Organisation for Economic Co-operation and Development. (2012) Investor-state dispute settlement. Public Consultation: 16 May–23 July 2012, p. 19.

⁴ Olivet, C., & Eberhardt, P. (2012). *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Brussels: Transnational Institute, p. 27.

⁵ Hutchens, G. & Knaus, C. (2018, July 1). Revealed: \$39m cost of defending Australia's tobacco plain packaging laws. *The Guardian Australia*. Retrieved from <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>



- If a claim is brought with third-party funding, the state may be additionally concerned that the case is speculative or marginal⁶ or that an investor needing outside funding will not be in a financial position to repay a costs order. This is particularly so where the funder funds the claim but does not commit to paying an adverse costs order against the investor—a situation described as “arbitral hit and run.”⁷

1.2 What Challenges do States Have in Seeking Security for Costs?

Despite the compelling reasons that states have for requesting security for costs, it has, in practice, been rarely sought by states and has only been granted in two known cases. This is due to the limited guidance on the issue of security for costs in arbitral rules and treaties, with the consequence that tribunals have been free to establish a very high threshold for granting it.

2.0 Security for Costs Under Arbitral Rules

It is broadly accepted that a tribunal’s power to order security for costs is implied under the arbitral rules applicable to ISDS, including under the ICSID, UNCITRAL and International Chamber of Commerce (ICC) Rules.⁸ These allow a tribunal to take conservatory, interim or provisional measures to preserve the parties’ rights.⁹ In addition, the arbitral rules of both the London and Singapore international arbitration centres¹⁰ expressly permit the tribunal to order security for costs. However, none of these rules provides any guidance on what principles the tribunal must apply and what factors it must take into account when considering a request for security for costs.¹¹ There are no arbitral rules that address whether the existence of a third-party funder is relevant in hearing an application for security for costs.¹²

⁶ Some consider that the asymmetric structure of the investment treaty regime, lack of system of precedent in ISDS and the resulting inconsistency and unpredictability of arbitral outcomes lend themselves to third-party funding in speculative or marginal claims. See for example Garcia, F. (2018, July 30). The case against third party funding in investment arbitration. *IISD Investment Treaty News*; International Council for Commercial Arbitration & Queen Mary Task Force. (2017, October 17). *Third-Party funding in investor-state dispute settlement*. Draft report for public discussion. Round Table Discussion of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration.

⁷ E.g., *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order no. 14, March 11, 2013, para. 3.

⁸ ICSID: general power under Article 47 of the ICSID Convention read with Rule 39 – Provisional Measures. UNCITRAL – general power under Article 26 – Interim Measures. ICC – Rule 28 – Conservatory and Interim Measures.

⁹ ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2017, October 17). *Third-party funding in Investor-state dispute settlement*. Retrieved from <http://ccsi.columbia.edu/files/2017/11/Third-Party-Funding-in-ISDS-Roundtable-Outcome-Document-FINAL-2.pdf>, p. 169. (“The Queen Mary Report”).

¹⁰ Rules 25.2 and 27(j) respectively. See rules at: <http://www.siac.org.sg/our-rules/rules/siac-rules-2016>

¹¹ Parker, C., Wong, E., Satryani, G., & Kantor, E. (2017, February 1). A global perspective on availability of security for costs and claim in international arbitration: Mirage or oasis? *Herbert Smith Freehills*. Retrieved from <https://www.herbertsmithfreehills.com/latest-thinking/a-global-perspective-on-availability-of-security-for-costs-and-claim-in>

¹² The Queen Mary Report.



3.0 Security for Costs Under Treaties

More recently, states have been concluding bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters that explicitly affirm the power of the tribunal to order security for costs. Some of this treaty language guides the tribunal on grounds for granting a request for security for costs. For example, under the investment chapter of the EU-Vietnam FTA, it provides that the tribunal may order an investor to post security for costs “if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant.”¹³

The BIT between Iran and Slovakia provides that “a tribunal may order security for costs if it considers that there is a reasonable doubt that claimant would be not [sic] capable of satisfying a costs award or consider it necessary from other reasons.”¹⁴ The EU’s proposed language for the Transatlantic Trade and Investment Partnership (TTIP) states that the tribunal may order costs “if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.”¹⁵

The Czech model BIT adopted in 2016 provides the greatest amount of guidance, stating that “the arbitral tribunal shall especially consider ordering security for costs when there is a reason to believe:

- (a) that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or
- (b) that the investor has divested assets to avoid the consequences of the arbitral proceedings.”¹⁶

Both the Czech model BIT and the EU’s TTIP language guide the tribunal on what to do if the investor fails to pay security for costs as ordered; the EU language provides that the tribunal may terminate the proceedings, and the Czech model provides that it *shall* terminate them. None of this treaty language addresses the issue of third-party funding in relation to security for costs.

The recent examples of specific guidance on security of costs have not yet been applied in an arbitration. Jurisprudence is therefore based on investment treaties that are silent on the issue of security for costs. Because of this lack of guidance, both from the arbitral rules and the treaties, arbitral tribunals have been largely free to develop their own tests for determining the circumstances in which security for costs should be ordered. This has resulted in inconsistency, uncertainty and, in many cases, the application of a very high threshold for the ordering of security for costs.

¹³ Article 22 of the EU-Vietnam FTA available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3563>

¹⁴ *Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3601>

¹⁵ Article 21 of the European Union’s proposal for Chapter II (Investment) of the Transatlantic Trade and Investment Partnership available at http://www.europarl.europa.eu/cmsdata/92123/TTIP_investment.pdf

¹⁶ Czech Model Bilateral Investment Treaty 2016 available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5407>



4.0 Security for Costs Jurisprudence

Arbitral jurisprudence relating to security for costs to date relates to treaties and arbitral rules that are generally silent on the issue. In using their arbitral powers, arbitral tribunals have typically been very reluctant to order security for costs. Some tribunals refute that such orders can even be made as a provisional measure. Most apply a very stringent test to the circumstances that would warrant a security for costs order and do not consider the investor's financial position and use of third-party funding to be relevant. Four of the main themes of tribunal reasoning on security for costs are summarized below.

4.1 The Lack of a “Right” to Cost Reimbursement

The first known security for costs case came in 1999 in the case of *Maffezini v. Spain*.¹⁷ In that case, Spain filed an application for provisional measures, asking the tribunal to order the claimant to post security for Spain's costs. The tribunal held that security for costs could not be ordered under the ICSID rules as a provisional measure. It reasoned that provisional measures are used to preserve a party's right, but that the state had no right to reimbursement of costs. Because cost reimbursement would only come into play if (i) the investor lost and (ii) the tribunal ordered costs against the investor, it was too hypothetical to be considered a “right.” Some tribunals¹⁸ have supported this reasoning, while others have found that provisional measures can protect contingent rights such as a right to cost reimbursement.¹⁹

4.2 “Extreme” or “Exceptional” Circumstances

Even where the tribunal found that a right to reimbursement of costs was a right capable of being protected by a preliminary measure, they have still declined to order security for costs where they considered the circumstances did not warrant it. Tribunals have consistently set a very high threshold for the circumstances necessitating security for costs, finding that:

- A case warranting a security for costs order must be an “extreme” case in which an “essential interest” risked “irreparable damage.”²⁰
- Security for costs is an “extraordinary remedy which ought not to be granted lightly”²¹ and “remains a very rare and exceptional measure.”²²
- It would take “extreme circumstances, for example, where abuse or serious misconduct has been evidenced” or conduct that “threatens the integrity of the proceedings” or that amounts to bad faith.²³

¹⁷ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7.

¹⁸ E.g., Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6), Procedural Order No. 11, June 28, 2018; Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18.

¹⁹ E.g., Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2, Award, December 22, 2017; EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14; Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada, ICSID Case No. ARB/10/6, Tribunal's decision on respondent's application for security for costs, October 14, 2010.

²⁰ Ibid, para 57.

²¹ Grynberg v Grenada, para 5.17.

²² Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Procedural Order no. 14, March 11, 2013, para. 6.

²³ Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, September 20, 2012.



4.3 Investor's Impecuniosity

In contrast to the treaty language from the EU-Vietnam FTA, Slovakia-Iran BIT and others cited above, which emphasizes an investor's inability to pay costs as a key consideration, many tribunals have found the investor's financial standing of limited relevance to determining whether to grant a request for security for costs. For example, tribunals have held:

- "It is doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order...more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award."²⁴
- The fact that the investor is a shell company or has no assets is an insufficient reason to order security for costs, since many investments are made through an investment vehicle.²⁵
- "The lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs."²⁶

4.4 The Relevance of Third-Party Funding

Tribunals have considered the relevance of third-party funding to a request for security for costs through the lens of the high threshold mentioned above. This has meant asking whether the third-party funding constitutes prima facie evidence of bad faith or abusive conduct and therefore extreme or exceptional circumstances. As argued by one respondent state, third-party funding is "bad faith" insofar as it enables an "arbitral hit and run."²⁷ The consistent response from tribunals to this question is that third-party funding is not itself sufficiently exceptional circumstances to ground granting security for costs.²⁸ Indeed, the tribunal in one case stated that "third party funding – which has become a common practice – do[es] not necessarily constitute per se exceptional circumstances."²⁹ This may imply that, as third-party funding in ISDS increases, it will be less and less likely to be seen as a relevant factor in considering security for costs.

4.5 Cases Where Security for Costs Was Granted

*RSM v. St Lucia*³⁰ was the first known case in which security for costs was ordered. The cumulative combination of the claimant's proven history of non-payments in ICSID cases, its admitted lack of financial resources and the presence of an unknown third-party funder who was presumed to not be liable for an adverse costs order swayed two out of three of the arbitrators. Subsequent tribunals³¹ have distinguished *RSM v. St Lucia* and denied security for costs by zeroing in on the exceptional circumstances of the investor's previous non-payment of ICSID cost orders. It seems that the direction of the jurisprudence remains that the current financial status of investors remains of little relevance, while their previous non-compliance with investment tribunal cost orders is very persuasive. This is a very limited test since many claims will be brought by first-time users of the investment arbitration system with no history in relation to cost orders.

²⁴ Grynberg v. Grenada, 5.19 & 5.20.

²⁵ Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, para. 59.

²⁶ South American Silver Limited v. Bolivia, UNCITRAL, PCA Case No. 2013-15, Procedural Order no.10, January 11, 2016, para. 63.

²⁷ Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia.

²⁸ The Queen Mary Report, p. 177.

²⁹ EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order No. 3, June 23, 2015.

³⁰ RSM Production Corporation v. Saint Lucia ICSID Case No. ARB/12/10.

³¹ E.g., Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste; Lao Holdings N.V. v. Lao People's Democratic Republic, EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic.



The second known order for security for costs was published in July 2018.³² In that case, the tribunal found it to be “exceptional circumstances” that there was a third-party funding arrangement in which the funder denied liability for an adverse costs. Crucially, the tribunal had ordered the investor to disclose the funding agreement to the tribunal. Given the newness of this case, this reasoning has not been tested by any subsequent tribunals. However, it is unlikely that future tribunals will require disclosure of a funding agreement in the first place, given the lack of treaty or arbitral rule-based guidance on the issue.

5.0 Conclusion and Recommendations

5.1 The Need for Stronger Treaty Language on Security for Costs

From the perspective of a state, which is always respondent and has little control over who the claimant will be, strong and clear treaty language is needed on the issue of security for costs to ensure tribunals make decisions weighing all of the relevant circumstances fairly. The first reason for this is that some ICSID tribunals continue to question or deny the ability to even order security for costs as a preliminary measure.³³ A second reason is the clear disconnect between what little treaty language there is on security for costs and the way in which tribunals have approached the issue. Treaty language, such as the EU-Vietnam FTA, the Slovakia-Iran BIT and the Czech model cited above, focuses on the investor’s ability to pay. By contrast, tribunals focus on extreme, exceptional circumstances or bad faith. From the state’s perspective, the inability to recover awarded costs is harmful and creates a liability for its taxpayers regardless of the investor’s bad faith or the “extremity” of the situation.³⁴

Finally, strong and clear treaty language is needed to correct the lack of a consistent approach by tribunals to third-party funding in connection with security for costs applications. As explained above, to grant an order for security for costs, tribunals have considered that there needs to be exceptional circumstances amounting to bad faith or evidence of the investor’s impecuniousness. Tribunals have been inconsistent in applying these tests to cases of third-party funding. Some tribunals consider that third-party funding is not evidence of the investor’s impecuniousness or bad faith. Others see third-party funding as “exceptional circumstances” where the funder denies liability for adverse costs. There is a need for modern BIT drafting to try and reconcile these positions and rebalance the approach to security for costs in the interests of the citizens whose taxes fund states’ ISDS defences.

Both security for costs and third-party funding are among the issues being considered in an update of the ICSID rules and the UNCITRAL working group on ISDS reform. While it is hoped that these reform activities will result in strong and clear arbitral rules on these issues, there is no reason why states cannot start to address them now in their treaty making.

³² Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela, UNCITRAL, Caso CPA No. 2013-3.

³³ E.g., the 2018 decision in *Lao Holdings N.V. v. Lao People’s Democratic Republic*.

³⁴ As noted in *The Queen Mary Report*, p. 174: “it is questionable whether such a high threshold is warranted. It can reasonably be argued that, if the respondent state was subject to an unsuccessful claim, it should be able to recover costs at the end of the arbitration regardless of whether the claimant is acting in bad faith or not.”



5.2 Proposed Treaty Language on Security for Costs

The proposed treaty language on security for costs is inspired by the Czech model and is intended to:

- i) Reaffirm the power of the tribunal to order security for costs
- ii) Clearly set out the circumstances in which security for costs must be ordered
- iii) Establish the relevance of third-party funding to security for costs but limit it to “arbitral hit and run” situations where the funder has forsworn liability for an adverse costs order³⁵
- iv) Require the proceedings to be terminated if security for costs is not paid where it has been ordered

This language should be supported by a provision that requires the tribunal to order costs in the case of an unsuccessful claim, to firmly rebut the “pay your own way” approach of the recent past.³⁶ It should also be accompanied by a provision that states that the treaty’s provisions regarding ISDS procedure prevail over the applicable arbitral rules where there is inconsistency.³⁷ Finally, this language should also be supported by a provision on third-party funding, provided below.

Security for Costs

- (1) The arbitral tribunal may order security for costs at a proposal of the Contracting Party which is the party to the dispute.
- (2) The arbitral tribunal shall order security for costs where:
 - (a) there is a reason to believe that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or
 - (b) there is a reason to believe that the investor has structured the enterprise or divested assets to avoid the consequences of the arbitral proceedings; or
 - (c) in accordance with Article X(4) – Third-Party Funding, the investor has disclosed the existence of a third-party funding arrangement in which the third-party funder has not committed to irrevocably³⁸ undertake adverse costs liability.
- (3) Should the investor fail to pay the security for costs ordered by the arbitral tribunal, the arbitral tribunal shall terminate the arbitral proceedings.

³⁵ The impact of this may well be that more third-party funders start agreeing to cover adverse costs and/or security for costs, limiting the potential access to justice concerns raised by opponents of security for costs in ISDS.

³⁶ See for instance, article 8.39(5) of Comprehensive Economic & Trade Agreement between Canada and the EU: “The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party” (<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng>).

³⁷ See for instance, 29.4(f) of the SADC Model BIT: “For the avoidance of doubt, the provisions in this Agreement relating to arbitration procedures shall prevail over those in the arbitration rules selected to govern the arbitration in the event of any inconsistency” (<https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>).

³⁸ This word is critical, as it is intended to ensure that a funder’s promise to pay an adverse award of costs endures even if the investor breaches the funding agreement or the agreement is otherwise terminated.



Third-Party Funding

- (1) Where there is third-party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third-party funder.
- (2) The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.
- (3) The arbitrators shall, in accordance with Article X (Avoidance of conflict of interest of arbitrators), determine whether the information disclosed may, in the eyes of a reasonable third person, give rise to doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence.
- (4) Where there is third-party funding, the disputing party benefiting from the third-party funding shall disclose to the other disputing party and to the Tribunal whether or not the third-party funder has irrevocably committed to undertake adverse costs liability.

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