CHALLENGES OF ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTES: STANDARDS AND OUTCOMES

This panel was convened at 9:00 am, Saturday, April 12, by its moderator, Chiara Giorgetti of the University of Richmond, who introduced the panelists: Charles N. Brower of 20 Essex Street Chambers; Judith Levine of the Permanent Court of Arbitration; Meg Kinnear of the International Centre for Settlement of Investment Disputes; and Luke Sobota of Three Crowns LLP.

Introductory Remarks by Chiara Giorgetti*

The selection of international arbitrators is a fundamental part of the international arbitration process and should provide comfort and trust to users. However, the standards for arbitrators' independence and impartiality are often unclear and translate into difficult disqualification decisions. Do these threaten the legitimacy and effectiveness of international adjudication?

This panel, which includes a renowned arbitrator, a practitioner, and two institutional representatives, will discuss various aspects of challenges of arbitrators and the independence standards necessary under different international arbitration systems, assessing how, when, and if they work. Panelists will also address the impact of tactical challenges and discuss whether we are moving towards common challenge standards.

Over the last five years, we have witnessed a steady increase in the number of proposals to disqualify arbitrators, both for arbitrations conducted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) and for disputes administered by the Permanent Court of Arbitration (PCA). Indeed, reports of challenge proceedings are almost a weekly occurrence in the specialized press.[1]

The increasing number of challenges by itself raises important systemic questions. First, generally, are challenges becoming part of the regular arbitration proceedings? Are the parties using it as just another one of their tools in their international investment dispute toolbox? Second and more specifically, are challenges being used strategically by counsel to prolong proceedings, cause an arbitrator's departure, and antagonize the adversary? What, if anything, should be done about tactical or bad faith challenges?

Additionally, of late, we are also witnessing an increasing number of successful challenges.[2] This raises another set of interesting questions: What is the standard to challenge an arbitrator? Should there be a common standard among all the different systems? Who should decide the challenge? Should the decision be made by the remaining arbitrators, the appointing authority, the secretariat that administers the proceeding, or a neutral third party?

In our increasingly active but still rather small community, how should we deal with multiple appointments of the same arbitrators in different proceedings? And how should we respond when those appointments tend to come from the same client or counsel? As we know, arbitrators are often practitioners in international firms who have many diverse clients.

* Assistant Professor of Law, Richmond University Law School; co-founder and co-chair, International Courts and Tribunals Interest Group. This panel was organized by the ASIL's International Courts and Tribunals Interest Group, which I have had the privilege of co-chairing with Brooks Daly, Deputy Secretary General of the Permanent Court of Arbitration, since the group's creation four years ago.

[1] See, for example, the reports published by the *Global Arbitration Review* (http://globalarbitrationreview.com) and the *Investment Arbitration Reporter* (http://www.iareporter.com).

[2] See, for example, *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ICSID Case No. ARB/13/13 (Mar. 20, 2014) (upholding the challenge of Bruno Boesch caused by his participation as an arbitrator in a related case).

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Is it acceptable for them to act as both counsel and arbitrators in different cases? Generally, how should we approach the counsel/arbitrator relationship? Do we need stricter and more common ethics rules to guide arbitrators' behavior?

As a community, we value academic freedom and encourage the free exchange of views, so how should we approach the issue of conflicts and the issue of prior stated positions? Should they become reasons for challenges? If so, how can we continue to encourage public discourse while at the same time protecting the parties' legitimate concerns?

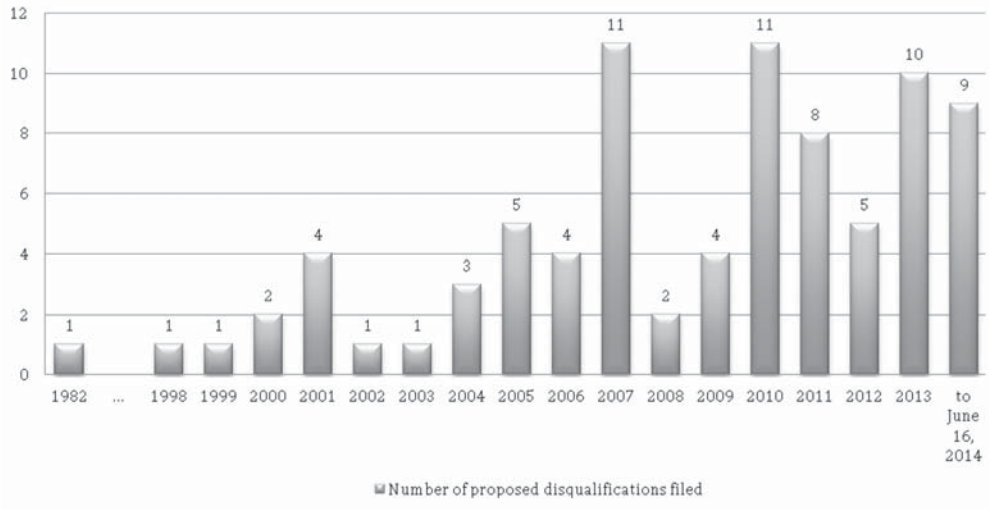
Challenge of Arbitrators at ICSID—An Overview

By Meg Kinnear[*]

In its almost 50 years of operation, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) has received 83 applications for the disqualification of arbitrators in 57 of the over 470 cases registered by the Centre.

Number of Applications Filed

The first challenge was filed in *Amco v. Indonesia* in 1982,[1] and it was not until 16 years later that the next one was filed.[2] In recent years the number of challenge applications filed has increased. Indeed, between 2010 and May 2014, forty-four arbitrator challenges were initiated at ICSID. The increased number of challenges is not limited to ICSID and has been seen generally in both investment and commercial arbitration. About 68% percent of the challenges at ICSID have been made to a single member of the tribunal, but we have been increasingly receiving challenges to the majority of the tribunal or to the full tribunal. There have also been cases in which more than one challenge was initiated—sometimes with respect to the same arbitrator.[3]



[*] Secretary-General, International Centre for Settlement of Investment Disputes (ICSID).

[1] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1.

[2] Víctor Pey Casado v. Republic of Chile, ICSID Case No. ARB/98/2.

[3] Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5; Koch Minerals Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/1.

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