A CRITICAL LOOK AT THE MECHANISM FOR CHALLENGE OF ARBITRATORS UNDER ICSID CONVENTION AND ARBITRATION RULES*

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Abstract

Administered arbitrations under ICSID are amongst the most-utilized means to resolve investor-state disputes. Part of why it is so is because the ICSID as an institution is heavily affiliated with the World Bank. This affiliation serves as a double-edged sword in ICSID's hands: while on one side such affiliation lends ICSID the credibility any successful arbitral institutions need, on the other side ties between the two institutions are proving to become too close for comfort. This paper explores what could go and has gone wrong in the past within the current ICSID arbitration system with regards to the mechanism for challenging arbitrator(s), and whether such mechanism allows ICSID to effectively deliver what it is expected to provide.

Intisari

Proses arbitrase di hadapan ICSID adalah salah satu cara penyelesaian sengketa negara-penanam modal yang paling sering digunakan. Sebagian alasannya ialah karena ICSID sebagai sebuah institusi berafiliasi erat dengan Bank Dunia. Afiliasi ini menjadi pedang bermata dua di tangan ICSID: di satu sisi hal tersebut memberikan ICSID kredibilitas yang dibutuhkan institusi arbitrase sukses manapun, di sisi lain keterikatan antara kedua institusi tersebut terlihat terlalu erat dari sewajarnya. Artikel ini menelusuri apa yang dapat dan telah menjadi masalah di masa lampau dalam sistem arbitrase ICSID sehubungan dengan mekanisme penentangan arbiter, dan apakah mekanisme tersebut mengizinkan ICSID untuk secara efektif memberikan apa yang diharapkan darinya.

Keywords: ICSID, investor-state, World Bank, arbitration, challenge, arbitrator, conflict of interest

Kata Kunci: ICSID, negara-penanam modal, Bank Dunia, arbitrase, penentangan, arbiter, konflik kepentingan

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A. Introduction

It is not an exaggeration to say that international commercial arbitration is rapidly gaining traction in the past decades. One of the many reasons why arbitration is such a popular dispute resolution mechanism is because of its flexibility. What makes arbitrations appealing is the opportunity for the parties to determine the rules of the proceedings, depending on the strategy the parties wish to take. For example, a party could make life harder for its counterpart by prolonging the proceedings, to deplete the financial resource of their opponent. To quote Gary Born, a prominent jurist in such field, "Dispute resolution mechanisms must fulfill difficult, often thankless, tasks, particularly in international disputes: parties [who] are often bent upon (mis)using every available procedural and other opportunity to disadvantage one another…" (Born, 2014, p. 68).

An essential part of arbitration procedures that parties are "often bent upon (mis)using" is the mechanism of arbitral challenges. The process of challenging an arbitrator is an important safeguard in maintaining the integrity of the tribunal and the confidence of the parties in the tribunal. Furthermore, the composition of the tribunal is also important by extension to the enforceability of an arbitral award; although infrequent, it is possible to render an award unenforceable due to procedural issues under the 1958 New York Convention, which is the international instrument responsible for ensuring the enforceability of an arbitral award. Therefore, it is all the more important to ensure the correctness the ability to challenge the appointment of an arbitrator.

An interesting yet unresolved issue on the topic of arbitral challenge mechanism is about the allegations that such mechanism is still lacking under the International Centre for Settlement of Investment Disputes ("**ICSID**") Convention. As the leading arbitral institution in the field of investment disputes, ICSID is an institution under which a great number of disputes with far-reaching impacts are resolved. However, despite its achievements, ICSID has also seen major setbacks, such as the withdrawal of Bolivia's, Ecuador's, and Venezuela's memberships within 8 years; this is especially upsetting considering that such withdrawals are rare and are strong indicators for lack of faith in the institution (Grant, 2015, pp. 20-22). Such setback arises out of alleged issues in the system.

There are two alleged issues that this paper would particularly focus on: first, the perceived conflicts of interest of the ICSID Chair, who plays many significant roles in arbitration proceedings under the Convention and Rules, and second, how this conflict of interests affect ICSID's mechanism for challenged arbitrators. To find out where did the ICSID system go wrong in these alleged issues, the questions should be answered step-by-step: (i) *what* is generally expected from ICSID as an arbitral institution, (ii) *what* are the perceived conflicts of interests of the ICSID Chair, and (iii) *how* do these conflicts of interests affect ICSID's mechanism for challenged arbitrators, and what can be done about it? These questions will be the topic of each of the following sections in that respective order.

This paper will apply a more "internally-focused" legal methodology, to borrow the term used by Morris and Murphy (2011, pp. 30-31). This means that the research will mainly remain in the context of the legal field without giving too much consideration to the approach of other disciplines, if not at all. The analysis will employ a more comparative legal approach by taking into account other relevant rules concerning the same subject-matter, i.e., arbitrator challenge mechanism.

B. ICSID administered arbitration: what am I getting and what's the catch?

It is widely known that there are, in principle, two distinct forms of international commercial arbitration: institutional and *ad hoc*. According to Schroeter (2017, p. 185), the general distinction between the two distinguishes institutional arbitration as an arbitration in which the parties have

delegated to an arbitral institution "the power to make binding decisions on certain procedural matters", while any other arbitration that falls out of this definition should be classified as an *ad hoc* arbitration. With regard to "the power to make binding decisions on certain procedural matters", Schroeter noted that it is not the administrative services delivered by the arbitral institution that is determinative of whether an arbitration is institutional or *ad hoc*, but rather, the institution's decision-making power, or its "gatekeeper function". The question to be answered in determining an arbitration as an institutional or an *ad hoc* one is therefore not *which* administrative services the arbitral institution provides, but rather *how* an arbitral institution administers to the proceedings; while in both *ad hoc* and institutional arbitrations parties are obliged to respect the mandatory rules of the *lex arbitri*, institutional arbitrations goes a step further by obliging parties to respect the mandatory rules provided by the institution. Without question, the wider limitation of party autonomy through mandatory institutional rules in institutional arbitrations is an essential feature that distinguishes institutional from *ad hoc* arbitrations.

Why would then a party choose an arbitration which limits their autonomy, which presumably has always been a key reason of why a party chooses arbitration over other dispute resolution mechanism (Born, 2014, pp. 70-93)?

Institutional arbitrations are often regarded as having fewer risks of procedural breakdowns (such as impasses on the appointment of arbitrators or, as will be discussed further later, on a challenge of arbitrators), thanks to the involvement of professional staff. Institutional arbitrations also often contain more set provisions that provide for reliable and expeditious arbitral proceedings (Born, 2014, p. 171). Another less direct yet practical advantage of institutional arbitrations is also the degree of credibility it gives to the award that allows for more reassurance with regard to the enforcement of the arbitral awards; although it has been noted that it is not the institutional nature of the arbitration itself that lends this reassurance, but rather the reputation of the arbitral institution (Lew, Mistelis, and Kroll, 2003, pp. 36-37). Reasonably, the two are inextricably linked. The reputation of an arbitral institution of course largely depends on how good such institution is in doing their job; particularly, how reliable and expedient are they in administering a proceeding?

Having established what distinguish institutional arbitration from an *ad hoc* one and some key reasons why a party would choose the former over the latter, the trade-off is now clearer to see: in giving up a larger share of autonomy, parties expect to be less bothered by procedural matters and the enforceability of the award; the former is the price, and the latter is the goods.

So, what did parties 'pay' for when they chose arbitration under ICSID? Firstly, one must identify the mandatory rules that distinguishes ICSID's arbitrations as institutional.

There are two main bodies of rules in ICSID that should be consulted when it comes to arbitrations: the ICSID Convention and the ICSID Arbitration Rules. According to Article 44 of the Convention, mandatory rules are to be found under the Convention, while the nature of the Arbitration Rules is nonmandatory; parties are free to exclude and/or modify some or all of the Rules (Schreuer, Malintoppi, Reinisch, and Sinclair, 2009, pp. 676-677). Parties' discretion with regards to the Arbitration Rules is however limited if it comes to restatements of mandatory provisions of the Convention (Schreuer et al., 2009, p. 679). For instance, Rule 7 of the Arbitration Rules states that each party may replace any arbitrator appointed by it before the Tribunal is constituted; this corresponds with Article 56 of the Convention, which states that after "a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged…".

There are numbers of other mandatory provisions within the Convention. For instance, mandatory

provisions regarding the procedural matter would include Article 48, 49, 50, 51, 56, 57, and 58 (Schreuer et al., 2009, p. 676). Provisions in the Arbitration Rules that corresponds to these articles are therefore non-derogable.

As indicated in the title of this paper, it is in this essay's interest to pinpoint the mandatory provision relevant to the procedure of challenging an arbitrator (or more). That mandatory provision would be Article 58 of the Convention, which describes the decision-making procedure of an arbitral challenge. What this means for parties choosing ICSID administered arbitrations is that, by extension, parties *choose* to give up their autonomy in deciding how to resolve an arbitral challenge and entrusts ICSID with the task to resolve such issue in a reliable and expedited manner. Although it is now clear what is it that parties specifically expect from an ICSID administered arbitration in terms of the mechanism of the challenge of arbitrators and what they have to give up for it, the question of whether the parties receive what they are promised is yet to be discussed in the upcoming sections.

C. Institutional Conflicts of Interest

Numerous papers have been written on the topic of institutional conflicts of interest arising from the relationship between ICSID and the World Bank. For example, Julien Fouret opened his essay by quoting Shakespeare: "*The voice of parents is the voice of gods, for to their children they are heaven's lieutenants*" (Fouret, 2007, p. 121). Indeed, the Bretton Woods institution has been generally perceived as being the 'parent' of ICSID (Fouret, 2007, p. 121; Kantor, 2006, p. 213), which is unsurprising considering the fact that it was established by the World Bank (Blackaby, Partasides, Redfern, and Hunter, 2015, p. 54). And it still shares the same office building with the World Bank. This relationship is a double-edged sword: on the one hand, it does credit for ICSID to be closely affiliated with such an established institution (Tuck, 2007, p. 190). However, such affiliation may be too close for comfort for some and thus may end up diminishing the credibility of ICSID, which would prevent ICSID from providing an optimal service towards disputing parties (see the previous section). Although there are numbers of aspects of this issue that can be explored, this section will scrutinize the overlapping office of the ICSID Chair and the World Bank President, and the result of such towards the impartiality and independence of the ICSID.

On the matter of Article 5 of the ICSID Convention, it is clear from the outset that, as a rule, the President of the World Bank should be the ICSID Chair (i.e., Chair of the Administrative Council) *ex officio*. This alone is sufficient to give rise to doubts towards the impartiality of the ICSID Chair, especially in cases where for instance, the ICSID Chair, an advocate of certain restructuring policies in his/her position as the World Bank President, is involved as a conciliator in a dispute that concerns economic reforms (Fouret, 2007, p. 126). Furthermore, aside from being the ICSID Chair, the President of the World Bank is also the President of the International Financial Corporation (IFC), which functions to assist the progression of the private sector in developing countries through investments; Fouret (2007, p. 127) noted that this "interesting nebula of offices" may pose as a major issue should a company in which the IFC has invested in be engaged in an investment dispute against a government. In the working papers of the ICSID Convention, Pieter Lieftinck [1] expressed a similar concern by posing the same hypothetical case, which he regards as a case that "might certainly" happen (Origin and Formulation of the Convention, 1968, para. 68).

There are several cases that could illustrate these hypothetical risks. The first one is *Aguas del Tunari S.A. v. Bolivia*

[1] Pieter Lieftinck was an ICSID Executive Director serving from 1955-1971 and was a Professor of Political Economy at the Netherlands School of Economics in Rotterdam before the Second World War. He was also the Minister of Finance of the Netherlands immediately after the Second World War, see A Parra, *The History of ICSID* (OUP 2012), p. 38.

(2005). In that case, *Aguas del Tunari* is a consortium owned by, *inter alia*, International Water Ltd. In 1999, *Aguas del Tunari* successfully acquired a concession on the water and sewage services in Cochabamba, which is the third largest city in Bolivia, as part of the government's attempt to privatize the sector. This essentially makes *Aguas del Tunari*, a consortium controlled by a foreign party, in the position to manage the whole water system of the city for forty years. The conclusion of this contract greatly concerns many parties, including locals and NGOs, especially at the prospect of a private foreign party managing the city's water system for their own financial benefit while disregarding public service. At the beginning of 2000, riots were incited in the city against *Aguas del Tunari*'s attempt to raise the water rates. The disapproval of the public towards the consortium came to the point where the government terminated the concession contract. Thus began a heated case between a private investor and the local public.

In the ensuing arbitration, administered by ICSID, the parties failed to agree on the appointment of the President of the Tribunal, allowing *Aguas del Tunari* to request the ICSID Chair to designate an arbitrator as the President of the Tribunal in accordance with Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. At this point, it is important to note that there is room here for an abuse of power; the ICSID Chair, i.e., the World Bank President, could for instance, appoint an arbitrator that favors World Bank policies or favors the protection of the interest of the investors. Fortunately, in this case, the ICSID Chair appointed an established scholar, Professor David Caron, as the President of the Tribunal. However, this reassurance is provided mostly by the reputation preceding the person chosen by the ICSID Chair. The concern for possible abuse of power due to the Convention and Rules still lingers. Although the *Aguas* case ended with a settlement between the parties, numbers of cases with similar stakes remain. For instance, there are six cases on the matter of privatization of fresh water systems in Argentina as a result of the World Bank's policy to promote the privatization of the sector (Fouret, 2007, p. 134).

Another case that illustrates the conflict of interests *in concreto* is the *Generation Ukraine v. Ukraine* (2003). On 21 July 2000, an investment dispute between a U.S. company, Generation Ukraine, and Ukraine began. The crux of the issue arose when the Claimant filed a request for disqualification of Dr. Jürgen Voss, the arbitrator nominated by Respondent. In attempting to decide whether Dr. Voss should or should not be disqualified, the tribunal reached a deadlock. As such, following the ICSID Convention and Rules, the ICSID Chair is called upon to decide.

The problem in the fact that it falls to the ICSID Chair to decide is that Dr. Voss has had extensive involvement with the World Bank; at one point, he was the Deputy General Counsel at MIGA, a member of the World Bank Group. Thus, a conflict of interests emerges. The ICSID Chair at the time acknowledged this, and wisely decided that the decision should not fall upon his office. Instead, the Chair delegated the question of Dr. Voss's disqualification to the PCA Secretary-General. Again, the positive outcome of this case is not due to the existing system under the ICSID Convention and Rules, but instead, due to the exceptional character of the ICSID Chair at the time. In *Siemens v. Argentina* (2007), similar circumstances arose in which the two remaining arbitrators submitted separate opinions and was solved with the same solution of delegating the decision to the PCA Secretary-General.

Therefore, there is still room for a case to arise; and if it does unfortunately arise, the parties will be unable to rely on the ICSID Convention and Rules, but rather on the character of the Chair.

D. Conflict of interests and challenging an arbitrator

In the previous section, the case *Generation Ukraine v. Ukraine* was briefly

discussed to illustrate the issue with the office of the ICSID Chair. It is imperative to note as well that the situation in that case would not have existed in the first place had the ICSID Convention and Arbitration Rules not left the question of an arbitral challenge to be answered by the remaining arbitrators; as is apparent in *Generation*, the deadlock between the remaining arbitrators due to the fact that there are two of them results in a prolonging of the procedure, which would not do ICSID credit. To discuss this issue, a three-member tribunal – which is a common sight (Born, 2014, p. 9; Lew et al., 2003, p. 229) – will be presumed.

The risk of deadlock in an ICSID arbitral challenge situation mainly arises from the general principle of *nemo iudex in causa sua*, or 'no one should judge in his own cause'. In a tribunal of three arbitrators, if one of them is challenged due to alleged partiality or dependence, this would mean that the challenged arbitrator should not by himself judge the accusations against him (Koch, 2003, p.333), as there is a perceived risk that the challenged arbitrator would be partial towards his own cause. Article 58 of the ICSID Convention and Rule 9(4) of the Arbitration Rules adhere to this principle, stating that the decision towards the challenge should be left to the remaining two arbitrators. Two-member tribunals are, however, generally perceived as being problematic as it gives room for the risk of unresolvable disagreement between two arbitrators (Waincymer, 2012, p. 273; Blackaby et al., 2015, p. 238). Such risk is great enough to prompt several countries to ban two-member tribunals (Dutch Code of Civil Procedure, art. 1026 (1); Belgian Judicial Code, art. 1681) or at least disallow it by default (English Arbitration Act 1996, s. 15(2)).

Fairness aside, the *Generation Ukraine* case has displayed the significant role of the ICSID Chair should the risk of deadlock materialize in deciding an arbitrator's challenge; such role also extends to situations where two arbitrators, or even the whole tribunal, are challenged at the same time. This is the case in *Sempra v. Argentina* (2007) and *Pey Casado v. Chile*, where the Respondents in both cases proposed to disqualify the whole tribunal and therefore it fell to the ICSID Chair to make the decision on the challenges; while in *Sempra* the ICSID Chair did take that decision and rejected all of the challenges, in *Pey Casado* the ICSID Chair once again delegated the decision to the PCA Secretary-General.

The risk of deadlock in the current system of challenging arbitrators is therefore supposed to be answered by the ICSID Chair, an official with many conflicts of interests as elaborated in the previous chapter. This is the problem; what is then the solution?

A comparative insight is in order. In the UNCITRAL Model Law,[2] the challenged arbitrator(s) is involved despite several objections (Yearbook of the UNCITRAL Vol. XVI, 1985, p. 433; Report of Secretary-General, 1985, p. 10), although as a safety measure it also provides that a party can appeal the decision to a national court after the conclusion of the proceedings.[3] The working papers of the UNCITRAL Model Law did not specify the reasoning behind this choice aside from implying that it is for the sake of effectiveness and efficacy (Yearbook of the UNCITRAL Vol. XIV, 1983, p. 53). On efficacy, it is certainly reasonable to have a three-member tribunal that will arrive sooner at an answer towards the challenge by mitigating the risk of a deadlock; however, it will not be as effective as a two-member tribunal in eliminating risks of partiality and could therefore, result in

[2] 2006 UNCITRAL Model Law is a set of arbitration procedures designed to assist States in implementing (in their national legislations) arbitration rules that are deemed to be required for the purposes of international arbitration. Thus far, 80 States have adopted national arbitration rules based on the Model Law, and therefore should be considered as one of the most authoritative arbitration rules. See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

[3] This would however be unfavorable in general for both parties, as participants of arbitrations often tries to keep the publicity of their case as low as possible, if not to eliminate it entirely.

more controversy. Furthermore, a three-member tribunal does not remove the risk of a deadlock; in *Srpska v. Bosna & Herzegovina* and ICC Case no. 1703/1971, the tribunal reached a deadlock on deciding a challenge against an arbitrator. Although they are exceptional cases, another set of arbitration rules – the UNCITRAL Arbitration Rules – apparently deemed that this risk of deadlock in a three-member tribunal is significant enough to justify a revision in the revised UNCITRAL Arbitration Rules, which allows the presiding arbitrator to decide alone if there is no majority (Paulsson & Petrochilos, 2006, p. 128). Allowing the challenged arbitrator to participate in deciding the challenge is therefore a possibility, but with its own drawbacks on violating the principle of *nemo iudex* and still allowing a, albeit smaller, degree of deadlock risk.

Another possibility is to entirely delegate the decision of a challenge to a third party. The weighing of the *nemo iudex* principle and the risk of deadlock only occurs in arbitration rules that require the appointed tribunal to decide on the challenge; such arbitration rules are part of the minority: ICSID and UNCITRAL Model Law are the two prominent few, while ICC, LCIA, SCC, SIAC, PCA, and UNCITRAL Arbitration Rules all delegate the decision to a third party (Waincymer, 2012, pp. 321-323).[4] There is, therefore an established practice of letting a third party decide the challenge(s). The ICSID Chair plays the role of such third party in the current system, with the condition that the tribunal must first try to decide on the challenge. However, what could be done differently then, is to delegate the decision on the challenge to the third party right from the start, and designate a third party that does not, or at least possess a minimal degree of, conflict of interests.

Earlier, it was made clear that the ICSID Chair has in several cases come up with the solution of delegating the decision to the PCA Secretary-General. This is undesirable in terms of reputation, as it gives the impression that ICSID is dependent on the office of another institution. What ICSID can do, instead of sporadically delegating functions such as the mechanism of the challenge of arbitrators to other institutions, is to form entirely separate management from the World Bank, one that is exclusively committed to ICSID. By doing this, the issue of conflict of interests will be significantly solved, and the procedures of an arbitral challenge will be more predictable and therefore reliable. Scholars and practitioners have supported this (Fouret, 2007, p. 143; Tuck, 2007, pp. 910-911), especially considering that there is a growing necessity for a reliable arbitration system that possesses a minimum level of risk of impasses and procedural breakdowns, if none at all. It is time for ICSID to stop playing the sidekick; and on that note, perhaps the first step would be to move out of the World Bank's office and find their own place.

E. Conclusion

The previous sections set out to analyze whether the ICSID mechanism for the challenge of arbitrators sufficiently fulfills what is expected from it. To begin, the link between ICSID and the World Bank, and especially the overlapping offices of ICSID Chair and World Bank President, was scrutinized. Although being affiliated with the World Bank gives a degree of credibility, ICSID ultimately suffers in this regard; where the ICSID Chair is involved, the political interests of the World Bank president will be perceived. The *Generation* case serves as an important reminder for this. The *Generation* case is also where the inefficiency of the ICSID arbitral challenge mechanism is exhibited; a silver bullet was avoided not by virtue of the office, but the fortunately good character of the person in office. This not only highlights the unresolved issue of room for abuse of

[4] Abbreviations stands for (in order): International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce, Singapore International Arbitration Centre, Permanent Court of Arbitration, and UNCITRAL Arbitration Rules.

power, but this also means a lengthier process; instead of a month at most, it took at least three months.

The final section discussed the effect of the ICSID Chair's conflict of interests on ICSID's mechanism for challenge of arbitrators. The conclusion that the current system is problematic due to the problem with the ICSID Chair's office and that allowing the challenged arbitrators to take part in the decision is a solution not without considerable compromise and drawbacks of its own, has led to the third alternative of having an administration that is structurally independent from the World Bank. Cutting off structural ties with the World Bank may take away a certain degree of reputation away from ICSID, however it will allow the institution to grow more. In the words of Kahlil Gibran: "[Parents] are the bows from which [the] children as living arrows are sent forth;" indeed the World Bank as a bow must 'send forth' ICSID as an independent, 'living', institution of its own.

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