

# MEMORANDUM

Date: January 26, 2019

To: Meg Kinnear, Secretary General, International Center For Settlement of Investment Disputes

From: Chiara Giorgetti, Professor of Law, Richmond Law School

Re: **Commentary Of The Proposed Amendment Of The ICSID Arbitration Rules**

I am writing in support of the proposed amendments to the ICSID Arbitration Rules pertaining to the disqualification of arbitrators.

In the last few years, I studied and authored several pieces of scholarship on challenges of arbitrators and judges in International Courts and Tribunals.<sup>1</sup> I have developed an expertise and understanding of these rules, and of their importance to guarantee a fair and legitimate process supported by all parties. I believe that changes in the ICSID Arbitration Rules on disqualifications are both warranted and timely. They also align the ICSID Rules to the institutional rules applicable in other and similar international arbitrations.

The proposed amendments relate to Arbitration Rules (AR) 29 and 30, and Additional Facility Arbitration Rules (AF-AR) 39 and 40.<sup>2</sup> The proposal calls for three kinds of changes: first, it adds clarity by introducing specific time limits; second, it reduces the time and impact of challenges procedures on the arbitration process by introducing an expedite schedule for parties to file a challenge and, third - and most importantly - it addresses the anomaly that exists in the decision-making process relating to challenges by permitting the remaining co-arbitrators deciding on the challenge to send the challenge to the Chairman (Chairperson) if they are unable to decide the challenge for any reason. This is a most welcomed and necessary change, it

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<sup>1</sup> For example, see C. GIORGETTI (ed.) CHALLENGES AND RECUSAL OF ARBITRATORS AND JUDGES IN INTERNATIONAL COURTS AND TRIBUNALS (Brill Nijhoff Publisher, 2015), C. Giorgetti, *Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals*, 49 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 101 (2016), C. Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES (C. Giorgetti ed.) (Nijhoff/Brill Publisher, 2014), C. Giorgetti, *Challenges of International Investment Arbitrators – How it Works, and Does it Work?*, WORLD ARBITRATION & MEDIATION REVIEW (2013).

<sup>2</sup> For a summary of the amendment proposal, see *Volume 1: Proposals for Amendment of the ICSID Rules – Synopsis*, available at: [https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis\\_English.pdf](https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis_English.pdf)

addresses a recognized weakness of the existing Rules and it bring the ICSID Rules more in line with other existing international arbitrational rules.

Specifically, the proposal calls for the following changes:

- It introduces a time limit of 20 days for filing a disqualification motion after the basis for the challenges arises. This replaces the requirement that the motion is filed “promptly” which has given pause to several Tribunals. It adds clarity, possibly reduces the time of challenges, and aligns ICSID Rules to other arbitration rules which also adopt a specific time limit.
- It adds a more expedited schedule for parties filing a challenge, which includes strict filing times. In the proposed amendment, a challenge proposal must include all submissions and supporting documents, the reply must be filed within seven days, the observation by the arbitrator must filed within an additional five days and the parties file their final observations simultaneously within seven days. Decisions on challenges will have to be made within 30 days. In addition, the new proposal will eliminate the automatic suspension of the arbitral proceeding upon filing of a challenge. Proceedings are suspended only when both parties agree to suspend any part of the case. This timed schedule and the continuation of the underlying arbitration proceedings will allow a speedier resolution of disqualification requests and would likely also dissuade spurious challenges filed to prolong proceedings.
- The most important and relevant proposed change is found in AR 30 and addresses the decision-making process in challenges. Article 58 of the ICSID Convention requires the two non-challenged co-arbitrators to decide a challenge to a single member of a three-person Tribunal. Only when “those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators,” it is for the Chairman (Chairperson) to make the decision on the challenge/s. The requirement that the two co-arbitrators decide on the challenge of the other member of the Tribunal is particularly questionable and out of step with all other existing arbitration rules. It creates the possibility of tensions within members of the Tribunal and the appearance of an unfair process for the parties.<sup>3</sup> Case-law also suggests that it is very rarely successful, which appears to reinforce these views.<sup>4</sup> The proposed new AR 30 would allow the deciding co-arbitrators to send the challenge to the Chairperson if they are unable to decide the challenge for any reason. In addition, if a second proposal is filed while a first is pending, both can be sent to the Chairperson for decision. The new proposed Rule 30 states:

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<sup>3</sup> On this point, see Giorgetti, *Between Legitimacy and Control*, supra note 1, p. 245-6.

<sup>4</sup> For statistics, see ICSID, *Decisions on Disqualification*, available at: <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx>.

### **Rule 30 - Decision on the Proposal for Disqualification**

(1) The decision on a proposal shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention:

(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).<sup>5</sup>

The new proposed AR 30 provides an interpretation of Article 58 that will allow the two co-arbitrators to request the Chairperson to decide for any reason, and will free them from having to decide on the fate of a member of the same tribunal. In fact, I have argued in the past in favor of adopting a similar reading of Article 58, and I support this amendment.<sup>6</sup> It is a much welcomed and necessary change.

In the future, it would be desirable to undertake an amendment of Article 58 itself, however, given the constraints created by the ICSID Convention and the difficulty of amending the Convention,<sup>7</sup> the solution proposed by the Secretariat and incorporated in AR 30, is a positive and desirable one.

I would also like to take this opportunity to congratulate the ICSID Secretariat for undertaking such an important and comprehensive rules amendment project. I am thankful for the opportunity to comment on the proposal, and I remain at your disposal should you have any questions.

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<sup>5</sup> The text of the new rule, together with the consolidated new text is found in *Proposals for Amendment of the ICSID Rules — Consolidated Draft Rules Amendment*, available at: [https://icsid.worldbank.org/en/Documents/Amendments\\_Vol\\_Two.pdf](https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf).

<sup>6</sup> See Giorgetti, *Between Legitimacy and Control*, supra note 1, p. 246 (stating “Instead, it would be more desirable if the two remaining, unchallenged arbitrators declined to decide, and as a matter of course sent the decision to the chairman of the Administrative Council. This course of action could be an acceptable reading of the ICSID Convention, which provides that if the “members are equally divided,” the decision is taken by the chairman. Indeed, it is possible to envisage that arbitrators can remain divided and thus request the chairman to decide on each case.”

<sup>7</sup> Articles 65 and 66 ICSID Convention create a particularly hard threshold for amendment to the Convention.



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