

Sir Frank Berman seeks to recuse himself from deciding challenge to fellow arbitrator – [UPDATED] and then Pey Casado claimants challenge him again

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In the latest development in the long-running Pey Casado v. Chile case at ICSID, an arbitrator has proposed to ICSID that a new challenge directed against a fellow tribunal member should be adjudicated by the Chairman of the ICSID's Administrative Council, rather than by the two remaining members of the tribunal.

The development comes in relation to a new challenge directed against arbitrator V.V. Veeder swiftly on the heels of an unsuccessful dual challenge made by the same parties against Mr. Veeder and Berman. (We discussed the rejection of the challenge to Mr. Veeder and Mr. Berman [here](#), as well as the immediate filing by the claimants of a second challenge to Mr. Veeder. The third member of the tribunal is Alexis Moure.)

The developments come during the rectification phase of the Pey Casado v. Chile case, where the tribunal is tasked with hearing the claimant's request to rectify an award that [was issued](#) in September 2016, and which had awarded no compensation to the claimants.

Berman seeks to recuse himself, and contends that ICSID can adjudicate the challenge

In a letter dated March 1, 2017, [and published today](#), arbitrator Franklin Berman wrote to the ICSID Secretary General to indicate that if he were to rule on the pending challenge to his colleague Mr. Veeder "... any ruling I proceeded to make on the challenge would lay itself open to an accusation that I lacked the necessary objectivity and impartiality, either because I had just myself been under challenge by the same Parties, or because both the old and the new challenges implicate directly the relationship between members of the same Barristers' Chambers, as is the case with Mr Veeder and myself."

Mr. Berman also observed that the new challenge to Mr. Veeder appears based on the same grounds as the previous challenge mounted unsuccessfully against himself and Mr. Veeder. Thus, Mr. Berman noted that the latest challenge, where he is called upon to co-adjudicate, "... is not dissimilar to an appeal against the rejection of the latter."

Hence, Mr. Berman expressed the view that it "... would be more conducive to the health of the arbitration system under the Convention and the Rules if the new challenge, like the old, were to be heard and decided by the Chairman of the Administrative Council."

On his view, this would not be "... in any sense incompatible with the provisions of the Convention and the Rules, taken in their entirety."

It appears that Mr. Berman's letter may have been in the process of being drafted prior to the filing by the claimants of a lengthy February 28, 2017 request that Mr. Berman be recused from being involved in adjudicating the new challenge to Mr. Veeder.

Mr. Berman notes in his now-public March 1st letter, that he has seen a recent communication from the claimants and, while rejecting its contention of "objective conflict of interests", adds that this letter

reinforces his view that the only acceptable course is for ICSID itself to shoulder the task of deciding the latest challenge to Mr. Veeder.*

Will ICSID acquiesce and decide the challenge, as the Centre did in an earlier case where a pair of arbitrators sidestepped deciding an earlier challenge to their colleague?

It remains to be seen what posture ICSID will adopt in response to Mr. Berman's desire to recuse himself from being involved in the adjudication of the challenge to Mr. Veeder. However, the development – if blessed by ICSID – could point to another pathway whereby ICSID arbitrators could sidestep one of the more thankless tasks in investment treaty arbitration: judging challenges directed at fellow arbitrators who may be friends and/or frequent professional collaborators.

At first glance, we cannot recall an earlier instance of self-recusal by an *individual* ICSID arbitrator from this particular type of adjudicative role.

However, [we have written about a different](#) scenario where a pair of co-arbitrators in the Koch v. Venezuela case had – “for reasons unrelated to (a challenge's) merits or demerits” – sidestepped deciding a challenge directed against the third member of the tribunal, and declared themselves “equally divided” on that challenge within the meaning of Article 58 of the ICSID Convention. In that latter situation, where the co-arbitrators were “equally divided”, ICSID stepped in and adjudicated the challenge in that case.

UPDATE: Claimants move to remove Berman (again)

After this article was published, the claimants lodged a letter on March 4, 2017 – [published here](#) – also seeking the disqualification of Mr. Berman (again) in the case.

*(Although Mr. Berman's letter refers to a February 24, 2017 letter from the claimants, this may be a reference to [this February 28, 2017 letter](#) wherein the claimants argue that Mr. Berman should not decide the challenge to his colleague Mr. Veeder. The claimants have also called in that letter for the challenge to Mr. Veeder to be decided by an outside body: the Permanent Court of Arbitration.)

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