SAIL WE MUST: WHY ICSID PROCEEDINGS SHOULD NOT LIE AT ANCHOR FOR ARBITRATOR CHALLENGES

Natalie Pita*

[W]e must sail sometimes with the wind and sometimes against it — but we must sail, and not drift, not lie at anchor.
– Oliver Wendell Holmes

This Article shows that the International Centre for Settlement of Investment Disputes’ (ICSID) current rules for arbitration, which automatically suspend the arbitration proceeds, are direct contributors to the high costs and long proceedings in ICSID. The Articles also argue that failing to eliminate the automatic suspension of proceedings is simply putting off a change that will inevitably need to be made. Following complaints that investment arbitrations were too costly and too lengthy, ICSID finally began addressing the issue of arbitrator disqualifications by initiating a round of amendments in October 2016. ICSID has proposed two different remedies to this problem, which could replace the original rule: the first proposal would provide a much-needed increase in ICSID’s efficiency, but the second proposal is little more than an entrenchment of the status quo. ICSID should adopt a slightly modified version of the first proposal to continue the proceedings in the face of arbitrator challenges.

I. INTRODUCTION ............................................................. 166
II. ICSID REFORM PROPOSAL .................................................. 168
   A. Original Rule ....................................................................... 169
   B. Need for Change .................................................................. 171
   C. Proposed New Rule: WP # 1 Rule 29 ..................................... 172
   D. Proposed New Rule: WP # 2 Article 21 ............................... 173
   E. What Makes ICSID’s Arbitrator Challenge Process Different? .... 174
III. DO THE RULES CREATE AN UNDUE TIME-AND-COST BURDEN? .. 182

Copyright © 2019 Natalie Pita

* Candidate for Juris Doctorate and Master’s in International and Comparative Law at Duke University School of Law, expected 2020. Thank you to Professor Ralf Michaels, Professor Ryan Mellske, “Coach” Joan Magat, and James Murray for edits and suggestions.

I. INTRODUCTION

Though the International Centre for Settlement of Investment Disputes (ICSID), which has administered the majority of all international investment cases and has styled itself as the “the world’s leading institution devoted to international investment dispute settlement,” has amended its Convention Arbitration Rules four times, its rules on arbitrator disqualifications have merely drifted, batted about by various cross winds, until quite recently. Following complaints that investment arbitrations were too costly and too lengthy, ICSID finally began addressing the issue of arbitrator disqualifications by initiating a round of amendments in October 2016. After taking suggestions from Member States and the public on rule-amendment topics, the ICSID Secretariat produced an initial working paper (WP # 1) on August 2, 2018. Following a second round of written comments from Member States and the public, consultation meetings with Member States, and presentations, ICSID issued an updated working paper (WP # 2) on

4. Id.
March 15, 2019. ICSID intends for Member States to vote on the
amendments in October 2019.

The most recent round of amendments marks the fifth time ICSID has
altered its Regulations and Rules in its fifty-year history, the last time being
in 2006. In the thirteen years since the last round of amendments, thirteen
new Member States have joined the ICSID Convention (“the Convention”),
while Bolivia, Ecuador, and Venezuela each left the Convention. The
caseload has also increased: fifty-three cases were filed in 2018, more than
double the number filed in 2006. Yet this growth has not come without
challenges. ICSID Secretary-General Meg Kinnear views the amendments
not only as part of a periodic reconsideration of the rules, but as a direct
response to the criticisms that investor-state dispute settlement is not
sufficiently efficient and cost-effective and that it does not adequately
respect state sovereignty.

In this Article, I will show that the current rules for arbitrator
disqualifications, which automatically suspend the arbitration proceedings,
are direct contributors to the high costs and long proceedings in ICSID and
will argue that failing to eliminate the automatic suspension of proceedings
is simply putting off a change that will inevitably need to be made. The
average delay created by an arbitrator challenge is eighty-one days. With
individual cases seeing anywhere from one to nine arbitrator challenges, this
delay can quickly become unwieldy. ICSID has proposed two different
remedies to this problem that could replace the original rule: the WP # 1
proposal would provide a much-needed increase in ICSID’s efficiency, but
the WP # 2 proposal is little more than an entrenchment of the status quo.
ICSID should adopt the WP # 1 proposal to continue the proceedings in the
face of arbitrator challenges.

In Section II, I include the current rule in the Convention, outline
criticisms of the procedure currently in place, and present ICSID’s proposals
to update the rules on arbitrator challenges. I also detail four ways in which
ICSID takes a different approach than the rules of other arbitral systems: the
rules differ in whether arbitrator challenges are dealt with through an

5. Id.
6. Id.
8. Id.
1, 7.
10. Leventhal, supra note 7.
11. See infra Appendix 1.
12. Id.
automatic suspension of the proceedings under the rules, when challenges may be brought, who considers the challenges, and what standard is applied to the challenges.

Section III includes an assessment of whether arbitrator challenges create a problem in the form of increased cost and time by comparing the number of successful arbitrator challenges to unsuccessful challenges. Though some sources have compiled lists of all arbitrator challenges in ICSID cases, these compilations have become outdated. The argument in this Article adds to the scholarship by laying out the length of the delay each of these challenges has caused, a statistic no other article has analyzed. The data gathered show the percentage of cases with challenges, the total amount of delay through challenges, and the success rate through challenges.

In Section IV, I apply the data to the problems identified in Section III. There I argue that, because only five of the 146 arbitrator challenges that have been made public have been upheld, there is a need for change from the status quo. It also explains that Rule 29 is the appropriate change for four reasons: 1) Rule 29 would decrease the overall number of challenges and the number of arbitrators that resign after a party files an arbitrator challenge against them, 2) Rule 29 would make challenges that are still made less disruptive to the arbitral proceedings than under the current rule, 3) WP # 2’s term limits do not eliminate the need for Rule 29’s continuation of the proceedings, and 4) adopting Rule 29 would not call into question the legitimacy of the tribunal’s decisions. I conclude in Section V that WP # 1 is the right approach for ICSID to take.

II. ICSID REFORM PROPOSAL

The original rule for arbitrator disqualification stands in stark contrast to the proposed changes in their initial form, though the proposal eventually drifted back to the status quo. At present, the original rule provides a procedurally murky avenue for parties to delay proceedings: even though the actual disqualification process is unclear, it is accompanied by an automatic suspension of the arbitration until the conflict is resolved. The first set of proposed changes provided both procedural clarity and eliminated automatic suspension. These proposals drew the ire of select vocal opponents, who lobbied for a more tempered shift away from the status quo. The latest round


14. See infra Appendix 1.
of proposals, while offering some additional procedural clarity, continue automatic suspensions, as with the original rule. Each of these steps are addressed in turn below.

A. Original Rule

Article 57 of the Convention empowers a party to propose the disqualification of a member of the arbitral tribunal “on account of any fact indicating a manifest lack of qualities required by paragraph (1) of Article 14.”15 Although it never provides an explanation of these qualities, Article 14(1) of the Convention requires that arbitrators on ICSID tribunals be individuals who possess “high moral character” and “recognized competence in the fields of law, commerce, industry, or finance” and be capable of exercising “independent judgment.”16 Yet these characteristics receive no further definition or delineation.17 The Convention outlines no other requirements for members of the ICSID Panel of Arbitrators. The three main grounds for challenge ICSID has seen in cases with proposals for arbitrator disqualifications are nationality, lack of capacity, and lack of independence.18 Historically, lack of independence has been the most widely used of the three.19 Most disqualification proposals allege partiality of the challenged arbitrator based on various factual circumstances, which would purportedly affect his or her ability to exercise independent judgment.20

If a party does decide to pursue disqualification, Article 58 of the Convention lays out the relevant procedure.21 Pursuant to this article, a party first files a proposal for disqualification with the Secretary-General, then the Secretary-General transmits the proposal to the tribunal and the Chairman

16. Id. art. 14(1).
17. Id.
18. Meg Kinnear, Challenge of Arbitrators at ICSID—An Overview, 108 AM. SOC’Y OF INT’L L. 412, 414–15 (2014). The disqualification based on nationality is applicable when a sole arbitrator or the majority of arbitrators has the same nationality as either of the parties without an agreement by both parties. Id.
19. Id.
20. Id. at 415.
21. The Article reads:
The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where 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, the Chairman shall take that decision.
If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.
Convention, supra note 15, art. 58.
and notifies the other party of the proposal. In response, the accused arbitrator may submit explanations to the tribunal or Chairman. The other members of the tribunal make the first effort at deciding on the proposal, but the role of decision-maker passes to the Chairman if the remaining tribunal members are equally divided. If proposals for disqualification are filed against a majority of the arbitrators, the ability to decide on the matter passes directly to the Chairman.

ICSID does not provide a clear timeline outlining when parties to the arbitration may file a proposal for an arbitral disqualification. Rule 9 requires that proposals for disqualification be brought “promptly,” as measured relative to the date on which the filing party becomes aware of the circumstances on which the claim is based, and before the proceedings are closed. While the timeliness of the proposal is determined on a case-by-case basis, ICSID tribunals have decided that filing a challenge within ten days of discovering the underlying facts fulfilled the promptness requirement, whereas filing after fifty-three days did not.

The Convention is similarly vague when providing for arbitrator challenges. The Convention gives no express time constraint to the remaining members of the tribunal for deciding arbitrator challenges, although it does state that they “shall promptly consider and vote on the proposal [for arbitrator disqualification].” A recommended timeframe of thirty days is provided in the case that the proposal is sent to the Chairman, but the rule provides only that the Chairman will use his or her “best efforts” to make a decision on the proposal.

Even with the recommended timeframe, Chairman-led determinations still predominately fail to adhere to the timeline. Additionally, there are no safeguards in place to move proceedings forward when the Chairman does

---

22. Id.
25. Id.
26. Arbitration Rules, supra note 23, at rule 9(6); see also Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 23 (Oct. 22, 2007) (“Prof. Christoph Schreuer specifically addresses the question of the meaning of ‘promptly’ with respect to challenges to disqualify an arbitrator . . . ‘Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification.’”)
exceed the thirty-day period.\textsuperscript{29} Of the 110 arbitrator challenges that have reached a decision, fifty-seven of them were decided by the Chairman and forty-six of them were decided by the remaining co-arbitrators. The identity of the decision-maker was not made public in the remaining seven cases. The Chairman decided on the proposal within the thirty-day recommendation period only seven times, or in twelve percent of proposals that came before him or her. The Chairman has made decisions in as few as eleven days, but he or she has also needed as long as 231 days to consider a proposal, which is almost eight times the recommended timeframe.

Notably, arbitral proceedings are suspended until either the unchallenged arbitrators or the Chairman decide on the proposal for disqualification.\textsuperscript{30} This procedure has the effect of lengthening the adjudication process.\textsuperscript{31}

B. Need for Change

The aforementioned rules governing disqualification have been untouched since 1968, with only minor exceptions, but it appears that many Member States are unhappy with the rules as they are.\textsuperscript{32} After ICSID opened the discussion for potential member topics, multiple Member States and members of the public mentioned the need to reconsider the rules on the disqualification of arbitrators.\textsuperscript{33}

Specifically, in comments during the proposal process, multiple Member States were concerned with parties, and particularly states, launching arbitrator challenges as a “strategic tool” to buy additional time during the proceedings.\textsuperscript{34} Parties are increasingly using arbitrator challenges not as a method of ensuring the integrity and fairness of the proceedings, but rather as a technique of “procedural gamesmanship” to delay the proceedings or frustrate the opposing party.\textsuperscript{35} Frivolous arbitrator challenges have even been categorized as “guerilla tactics”—techniques used by a party incapable

\textsuperscript{29} Nora Ciancio, \textit{The Implications of Recent ICSID Arbitrator Disqualifications for Latin America}, 6 Y.B. ARB. & MEDIATION 440, 453 (2014).

\textsuperscript{30} \textit{Arbitration Rules}, supra note 23, at Rule 9(6).

\textsuperscript{31} See infra Appendix 1.

\textsuperscript{32} ICSID, 3 Proposals for Amendment of the ICSID Rules 154 (ICSID Working Paper #1, 2018) [hereinafter WP #1].

\textsuperscript{33} Id.


of presenting a strong case intended to avoid or delay confrontation by wearing down the other party or the members of the arbitral tribunal.\textsuperscript{36} One such example is the case of \textit{ConocoPhillips v. Venezuela}, in which Venezuela brought six challenges against a single arbitrator over the period of four years.\textsuperscript{37} All of the challenges were dismissed, but many onlookers questioned whether Venezuela was misusing arbitrator challenges.\textsuperscript{38}

ICSID has provided two different alternatives for upgrading the process for arbitrator disqualification: Rule 29 and Article 21.\textsuperscript{39} Article 21 is an updated version of Rule 29, but changes in other articles in the proposal created changes in the rule number.

C. Proposed New Rule: WP # 1 Rule 29

In its various working papers, ICSID has provided several drafts of rules modifying the arbitrator disqualification process. The original proposal in WP # 1 Rule 29 eliminates the current Convention’s policy of an automatic suspension in the case of a request that an arbitrator be disqualified.\textsuperscript{40} It instead specifies that the proceedings will continue, unless the parties agree to suspend the proceedings.\textsuperscript{41} If the member in question is disqualified, either party may request that the reconstituted tribunal reconsider any order or decision issued by the tribunal while the proposal is pending.\textsuperscript{42}

Rule 29 also lays out time restrictions missing in the current provision. Under this new rule, a proposal for disqualification would have to be filed after the constitution of the tribunal and within twenty days after the later of either the tribunal’s constitution or the date on which the party challenging the arbitrator “first knew or first should have known of the facts on which the proposal is based.”\textsuperscript{43}


\textsuperscript{38} Id.

\textsuperscript{39} WP # 1, supra note 32, art. 29. Rule 29 is ICSID’s original proposal, presented in WP # 1. Article 21 is a revised version of the proposal, which is presented in WP # 2.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.
D. Proposed New Rule: WP # 2 Article 21

The authors of the draft rules reversed course in Article 21 of WP # 2, replacing the language previously proposed in Rule 29. Article 21 reinstituted the automatic suspension in the draft rule: “The proceedings shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.”\(^44\) This alteration was made in light of comments submitted by Member States and the public both in favor of and against the proposal and reverses the default rule in WP # 1.\(^45\) Under WP # 1, the proceedings are continued unless the parties agree otherwise. In WP # 2, the proceedings are suspended unless the parties agree otherwise. As can readily be seen, the latter proposal would not prevent the use of an arbitrator challenge as a guerilla tactic, since the challenging party is unlikely to agree to carry on with the proceedings if the purpose of the challenge is to delay them.

Comments in favor of the proposal tend to focus on the potential increase in efficiency, while comments against the proposal generally question the legitimacy of decisions made by a tribunal in which an arbitrator is later disqualified.\(^46\) In order to resolve concerns about legitimacy, some comments suggest that the tribunal eliminate the automatic suspension but give either party the ability to request that the reconstituted tribunal reconsider any actions made by the challenged arbitrator if that arbitrator is disqualified.\(^47\) As elaborated upon in Section IV, some question the efficiency of such an alteration, since reconsidering actions made by the disqualified arbitrator would increase the time and cost of the proceeding.\(^48\)

The WP # 2 proposal seems to represent a middle ground for ICSID, since the proposal maintains the current state of affairs by upholding the automatic suspension of proceedings while granting the parties ability to agree not to suspend the arbitration, either in part or in whole. Though similar to the current rule in that the preferred response is a suspension of the arbitral proceedings, the WP # 2 proposal varies from the current rule by granting the parties the autonomy to derogate from this automatic suspension and agree to continue with the proceedings. ICSID believes that this proposal would “allow the parties to agree to continue with all or part of the case schedule,” but also “ensure that a challenge has minimal impact on the

---

\(^{44}\) WP # 2, supra note 3, art. 21.
\(^{45}\) Id. at 141.
\(^{46}\) Id.
\(^{47}\) Id.
\(^{48}\) ICSID, RULE AMENDMENT PROJECT, supra note 34, at 224–25 (comment received from Costa Rica).
overall time to complete the arbitration.**

WP # 2 Article 21, like the version proposed in WP # 1, lays out time restrictions that are missing in the current provision. However, this second proposal slightly lengths the period a party has to file an arbitrator disqualification.***

Table 1. Comparison of ICSID Rules on Proposals for Arbitrator Disqualification

<table>
<thead>
<tr>
<th></th>
<th>Current Rule: ICSID Convention Rule 9</th>
<th>WP # 1 Rule 29</th>
<th>WP # 2 Article 21</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Effect of proposal for disqualification on proceedings</strong></td>
<td>Suspension until a decision has been made*</td>
<td>Proceedings will continue, unless the parties agree to a suspension**</td>
<td>Suspension, unless the parties agree to continue***</td>
</tr>
<tr>
<td><strong>Time frame for filing an arbitrator disqualification</strong></td>
<td>Promptly and before the proceedings are declared closed*</td>
<td>Twenty days from the later of the tribunal’s constitution or the date on which the proposing party knew or should have known about the underlying facts**</td>
<td>Twenty-one days from the later of the tribunal’s constitution or the date on which the proposing party knew or should have known about the underlying facts***</td>
</tr>
</tbody>
</table>

* Arbitration Rules, supra note 23, art. 9(6).
** WP # 1, supra note 32, art. 29.
*** WP # 2, supra note 3, art. 21.

E. What Makes ICSID’s Arbitrator Challenge Process Different?

The ICSID standard and process for dealing with arbitrator challenges vary in significant ways from the standard and process usually applied in international commercial arbitration. The processes differ in four main ways:

---

49. WP # 2, supra note 3, at 142.
50. Id.
whether arbitrator challenges are dealt with an automatic suspension of the proceedings, when challenges may be brought, who considers the challenges, and what standard is applied to the challenges. Despite differences between the two systems, the international commercial arbitration system is still instructive because it also allows for *ad hoc* party appointments. This means that parties in both systems select the adjudicators of their disputes, generally without reference to a list of pre-approved arbitrators, a characteristic that is often touted in both systems because it supposedly guarantees that the parties are able to handpick adjudicators who have the legal knowledge and practical expertise most appropriate for the circumstances of each case. Furthermore, these similarities are not surprising, given that both arbitration systems are based on the same structural design.

Despite their similarities, the differences are perhaps more significant. The first major difference is that the vast majority of other major arbitration rules do not provide for the automatic suspension of proceedings following an arbitrator challenge, but rather provide only for the possibility of suspension. The American Arbitration Association-International Centre for Dispute Resolution (ICDR-AAA), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce (SCC) rules do not mention suspension at all. On the other hand, the China International Economic and Trade Arbitration Commission (CIETAC) Rules specify that those challenged shall continue to serve on the tribunal until the CIETAC Chairman has made a final decision on the proposal for disqualification. The Hong Kong International Arbitration Centre (HKIAC) Rules state that the proceeding may continue pending decision on the challenge.

---

52. Id. at 108–09.
56. Id. at 51.
The rules also differ in when arbitrator challenges may be brought. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 2013 allow challenges to be brought whenever there are “justifiable doubts as to the arbitrator’s impartiality or independence.” 57 These challenges are assessed by the Appointing Authority, who is an individual either designated by parties in their agreement or the Secretary-General of the Permanent Court of Arbitration. 58 Past decisions on disqualifications have determined that the essential inquiry was into whether the specific circumstances could create a reasonable perception of a lack of impartiality or independence, not whether the Appointing Authority actually believed that the arbitrator is impartial or biased. Similarly, the SCC Rules allow for challenges in the same situation of justifiable doubts or when an arbitrator fails to meet any requirements the parties have agreed upon. 59 Furthermore, the Rules explicitly state that “every arbitrator must be impartial and independent.” 60 Likewise, the LCIA Rules require that arbitrators be impartial and independent, and allow parties bring a challenge against an arbitrator “if circumstances exist which give rise to justifiable doubts as to his impartiality or independence.” 61 Meanwhile, the words “impartial” and independent” never appear in the ICSID Convention. Just like the UNCITRAL Rules, the SCC and LCIA Rules use an objective third-person standard and do not require proof of the arbitrator’s actual independence or bias. 62

Unlike disqualification requests in other systems, those for ICSID are decided, or at least first considered, by the unchallenged members of the tribunal, which has had the subsequent effect of elevating the threshold that successful challenges must meet. 63 This is a highly atypical approach in international arbitration, since most other international arbitration rules specify that the challenge decision will be made by either the arbitral institution or the appointing authority, which instead imitates the approach taken in the Statute of the International Court of Justice. 64 The Kompetenz-Kompetenz principle authorizes the tribunal to consider issues of its own

57. UNCITRAL Arbitration Rules, art. 12, para. 1. (Dec. 16, 2013).
58. Id. at art. 13, para. 4; art. 6, para. 1.
60. Id. at art. 18(1).
61. THE LONDON COURT OF INTERNATIONAL ARBITRATION, ARBITRATION RULES art. 10.1 (2014) (stating that “[a]n arbitrator may . . . be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”).
62. CLEIS, supra note 51, at 143, n.781.
63. Id. at 85.
64. DAELE, supra note 13, 170.
competence, and this principle serves as the foundation of the practice of having the co-arbitrators decide arbitrator challenges.\(^{65}\) Even though a party to an ICSID dispute first filed an arbitrator challenge in 1982, the unchallenged arbitrators of the ICSID tribunal did not uphold a challenge against one of their peers until 2013.\(^{66}\) Having the remaining arbitrators decide against one of their peers is a difficult and uneasy position for those arbitrators, regardless of the case’s specific merits.\(^{67}\) The position is made even more difficult by the fact that most arbitrators know each other and have longstanding professional relationships with each other.\(^{68}\) Furthermore, since arbitrators are generally selected from a small group of qualified individuals, it is highly likely that many of the arbitrators who are asked to adjudicate a challenge have faced a challenge themselves.\(^{69}\) As of 2012, forty-three arbitrators had voted on challenges, and fourteen of them, or \(32.5\%\) of them, had faced one themselves.\(^{70}\) This system of judgment by peers thereby raises the possibility that considerations extraneous to the case’s merits could affect the decision. It also increases the likelihood that arbitrators may raise the threshold required for upholding an arbitrator challenge because they do not want to disqualify a peer or because they fear being held to a higher standard if they are ever put in the same situation.\(^{71}\)

In *Amco Asia v. Indonesia*, the tribunal held that “[t]he challenging party must prove not only facts indicating the lack of independence, but also that the lack is ‘manifest’ or ‘highly probable,’ not just ‘possible’ or ‘quasi-certain.’” In its decision, the tribunal cited a comment by scholar Christoph Scheuer about the “relatively heavy burden of proof” the term “manifest” places on the party attempting to disqualify an arbitrator.\(^{72}\) An ICSID tribunal specifically rejected the “reasonable doubt” test in *OPIC Karimum v. Venezuela*, holding that “it is not sufficient show an appearance of a lack

\(^{65}\) *Id.*


\(^{68}\) *Id.*


\(^{70}\) DAELE, *supra* note 13, at 173.


\(^{72}\) Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 34, 41 (Oct. 22, 2007).
of impartiality or independence.”73 This “manifest” standard is an objective standard, which must be based on reasonable evaluation by a third party.74

Finally, different arbitral systems apply different standards to proposals for arbitrator disqualification. Although this is a discussion that is largely outside the scope of this paper, given that any change in the standard for disqualification was purposefully excluded from consideration in this amendment process, this notoriously high standard is a contributing factor to the low number of sustained challenges under ICSID Rules.75 The ICSID challenge process seems to take a more narrow and conservative approach than many other systems involved in investment-treaty dispute settlement, and there remains a perception that an arbitrator challenge is successful only if the disqualification proposal reveals something “rather shocking.”76 The ICSID standard for arbitrator disqualification has even been referred to as “notoriously” or “impossibly” high.77

Such disqualifying conduct is in line with the original, Article 57, standard empowering a party to propose the disqualification of a member of the arbitral tribunal “on account of any fact indicating a manifest lack of qualities required by paragraph (1) of Article 14.”78 The original draft of the ICSID Convention produced by the General Counsel of the World Bank in June 1962 prescribed a much lower standard, expressed in Section 6(1) of Article VII of the document. This draft stated that a party could enter a proposal for an arbitrator disqualification “on the ground that he has an interest in the subject matter of the dispute or that he had, prior to his appointment, dealt with the dispute in any capacity whatever.”79 After many rounds of drafts and meetings, the staff of the World Bank issued a working paper in the fall of 1964 that became known as the “First Draft” of the Convention. The phrase “manifest lack of the qualities required by Article 14(1),” currently used in Article 57, first appeared in Article 60 of this draft.80

73. OPIC Karimum Corp. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 45 (May 5, 2011).
76. Kalderimis, supra note 69, at 571.
77. Id. at 570.
78. Convention, supra note 15, art. 57.
80. Id.
The meaning of this phrase was never explicitly discussed during the drafting process, but the five challenges that have been upheld shed light on the standard. The first challenge upheld was filed in 2005 in the case *Pey Casado v. Chile*. Although not instructive otherwise, the case did demonstrate that successful challenges were possible under this standard. On August 24, 2005, the Respondent filed a request for the disqualification of the entire tribunal. In response, one of the arbitrators, Galo Leoro Franco, resigned two days later. The respondent based its complaint on the fact that the tribunal had not made an arbitral award and did not seem to be close to making an award, even though the case had been filed six years earlier. Following a request from the Chairman of the ICSID Administrative Council, Tjaco van den Hout, the Secretary-General of the Permanent Court of Arbitration, recommended that the Chairman reject the proposal to disqualify Professor Pierre Lalive, but accept the proposal to disqualify Minister Mohammed Bedjaoui. The Chairman followed this advice exactly but did not provide any reasoning behind the decision.

The next arbitrator challenge to be upheld called into question the standard that had been applied in previous arbitrator challenges. The arbitrator challenge in *Blue Bank v. Venezuela* was filed in August 2013. The respondent challenged arbitrator José María Alonso, who, at the time, was a managing partner of the litigation-and-arbitration department in the Madrid office of Baker & McKenzie, a member of the Steering Committee of the global-arbitration practice group, and a member of the Steering

---

81. See id. (containing no explanation of the meaning of “manifest lack of qualities”).
83. See generally Letter from Galo Leoro Franco, Arbitrator, to Monsieur Roberto Danino, Secretary General, ICSID (Aug. 26, 2005) (on file with ICSID Case No. ARB/98/2).
84. See Victor Pey Casado, Respondent’s Request for the Disqualification of the Three Members of the Tribunal (stating that the arbitral claim was filed more than seven years ago, marking the longest time an ICSID case has been pending without an arbitral award or a judicial decision, although there is no reason to believe that a conclusion is imminent).
85. Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Recommendation of the PCA Secretary-General as to the Proposal for the Disqualification of Prof. Lalive and Judge Bedjaoui (Feb. 17, 2006).
86. Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision of the Chairman of the ICSID Administrative Council on the Disqualification of Prof. Lalive and Judge Bedjaoui (Feb. 21, 2006).
Committee of the Baker & McKenzie International European Dispute Practice Group. Longreef Investments A.V.V. (Longreef) was a client of Baker & McKenzie at the time of the arbitration proceeding and was involved in a case against Venezuela. The respondent questioned Alonso’s independence and impartiality based on the fact that Baker & McKenzie, which has a global legal practice, represented Longreef in a different office, alleging that different offices cannot be considered separate for the purposes of an arbitrator challenge. It specifically argued that since Alonso was a member of global committees within the firm, part of his remuneration depended on the firm’s global profit, even if the remuneration from Longreef was minimal.

Alonso countered that the Baker & McKenzie offices were separate legal entities and that his remuneration as a partner would have changed either insignificantly or not at all based on the profit Baker & McKenzie New York and Caracas received from the Longreef v. Venezuela case. In assessing this challenge, the Chairman applied what was a lower threshold than in the majority of previous ICSID cases. The Chairman, Dr. Jim Yong Kim, stated that “Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.” Additionally, he defined the applicable standard as objective and “based on a reasonable evaluation of the evidence by a third party.” In applying the standard, the Chairman found that “a third party would find an evident or obvious appearance of lack of impartiality” in Alonso’s case.

The application of the “reasonable-third-party standard” continued in an arbitrator challenge filed that same year in Burlington Res. v. Republic of Ecuador. In this case, Ecuador filed the proposal for arbitrator disqualification against arbitrator Francisco Orrego Vicuña. Although

---

88. Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, ¶ 23 (Nov. 12, 2013).
89. Id. at ¶ 22.
90. Id. at ¶¶ 25–26.
91. Id.
92. Id. at ¶¶ 39–40.
94. Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, ¶ 59 (Nov. 12, 2013).
95. Id. at ¶ 60.
96. Id. at ¶ 69.
97. See generally Burlington Res., Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5,
Ecuador had asked Orrego Vicuña to disclose all cases that he had accepted as arbitrator in which Freshfields was counsel, he did not disclose any such appointments since 2008, though he had been appointed in eight cases between 2007 and 2013.98 After discovering that Orrego Vicuña had, in fact, since been repeatedly appointed by Freshfields, Ecuador brought a proposal for disqualification arguing that the arbitrator had been appointed by Freshfields in an “unacceptably high number of cases,” that he had breached his obligation to disclose circumstances that could call his independence into question, and that he had exhibited “a blatant lack of impartiality to the detriment of Ecuador.”99 Freshfields had appointed Orrego Vicuña as an arbitrator in eight ICSID cases between 2007 and 2013, but Orrego Vicuña did not disclose his appointments in any of these cases.100 After applying the applicable legal standard of an “objective standard based on a reasonable evaluation of the evidence by a third party,” the Chairman found that a reasonable third party would find that Orrego Vicuña exhibited an appearance of a lack of impartiality.101

The next case, Caratube v. Kazakhstan, marked the first time the two unchallenged arbitrators disqualified the third.102 In this case, the claimants challenged Bruno Boesch’s appointment, arguing that he “manifestly [could not] be independent and impartial” because he was serving as an arbitrator appointed by Kazakhstan in another related case, which relied on essentially the same factual allegations.103 After applying the same reasonable-third-party standard used in Blue Bank, the remaining members of the tribunal found that they could not reasonably ask Boesch to “maintain a ‘Chinese wall’ in his own mind,” meaning that his understanding of the arbitration may be influenced by information he learned in the other arbitration.104

The final case in which an arbitrator challenge has been upheld is Big Sky Energy Corp. v. Republic of Kazakhstan, but information about this challenge has not been made public. ICSID publishes all awards issued by an Arbitral tribunal with consent of the parties.105 Although the parties to this
III. DO THE RULES CREATE AN UNDUE TIME-AND-COST BURDEN?

A. Does the Suspension of Proceedings Increase the Length and Cost of the Proceeding?

The proposals regarding the process of arbitrator challenges aim at addressing the concern that ICSID arbitration is not sufficiently time nor cost effective. This mirrors similar concerns in the field. A survey compiled by the International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration revealed that ninety-five percent of survey respondents were concerned about the duration of arbitration proceedings and the availability of arbitrator. Furthermore, a clear majority of respondents saw at least some concern with fees associated with attorneys, experts, and arbitrators.

Whether this is an issue warranting an amendment to the ICSID rules on arbitrator disqualifications merits asking a further question: whether such proposals for arbitrator disqualification as WP # 1 and WP # 2 add so much of a burden to the proceedings in terms of cost and time as to justify eliminating the automatic suspension now in effect under Rule 9. To determine the impact of arbitrator challenges, I compiled statistical tables, which are available in Appendices 1 and 2 of this Article. In doing so, I was able to determine the percentage of cases with challenges, the total amount of delay through challenge, and the success rate through challenges. ICSID provides procedural details on all cases that have been made public. After examining these cases, I made a list of every case in which an arbitrator had been challenged, the date the challenge was filed, and the date the challenge was resolved, either because the tribunal decided on the challenge,


106. Id.


110. WP # 1, supra note 32.
the challenging party withdrew the proposal for disqualification, the proceeding was discontinued, or the challenged arbitrator resigned. In doing so, I counted a challenge to multiple members of the tribunal or the entire tribunal in order to identify the total number of challenges separately. I calculated the time between these dates to determine the total amount of time the arbitrator challenge delayed the proceedings. These statistics are compiled in Appendix 1 of this Article.

In the calculus resulting in Appendix 1, I had counted a challenge to multiple members of the tribunal or the entire tribunal in order to identify the total number of challenges separately. But because the total time delay did not increase and therefore did not add any additional time burden if the challenges overlapped, I compiled a list in Appendix 2 simply calculating the total amount of delay, without regard to the number of separate challenges.

ICSID had registered 735 cases under the ICSID Convention and Additional Facility Rules as of April 26, 2019, and eighty-five of those cases have had at least one arbitrator challenge. Some of these cases have had multiple challenges, resulting in a total of 146 arbitrator challenges. The fact that 11.6% of the total cases have been slowed down by arbitrator challenges supports the idea that incentives for raising the complaint are high for parties who simply want to delay the challenge, because a challenge at an advanced stage in the arbitration involves significant disruption and prejudice. An estimated sixty-eight percent of these challenges have been made to one member of the tribunal, but the number of challenges to most or all of the tribunal and multiple challenges in a single case, sometimes with respect to the same arbitrator, is increasing.

This trend mirrors the increase in the number of cases overall. By using data provided by the ICSID Secretary-General, made publicly available on the ICSID website, and published in an annual ICSID report on caseload, the below graph compares the number of challenges per year to the total number of cases filed with ICSID each year.

---

111. ICSID, supra note 9.
112. Daele, supra note 13, at 103. This disruption comes from the fact that highly in-demand arbitrators may not be able to reschedule the time-consuming hearing on short notice and from the fact that, if an arbitrator resigns or is disqualified, some parts of the hearing may need to be repeated for the newly-constituted tribunal. The arbitrators may be prejudiced against one party due to frustration created by the disruption and delay. Id. at 104.
113. Kinnear, supra note 18, at 412. Neither of these challenges for arbitrator disqualification were made public.
The first arbitrator challenge was filed in *Amco v. Indonesia* in 1982, but the next challenge was not filed until sixteen years later in *Pey Casado v. Chile*.\(^{115}\) When *Amco* was decided upon, parties had filed only two cases with ICSID.\(^{116}\) By the time *Pey Casado* was adjudicated, ICSID had about ten new cases being filed each year, but arbitrator challenges were still few and far between.\(^{117}\)

The increase in arbitrator challenges is a result of the increasing complexity of international arbitration and parties using challenges as a strategy to disrupt the arbitration.\(^{118}\) The fact situations and legal questions presented in arbitrations continue to increase in both complexity and number.\(^{119}\) Again, parties are increasingly using arbitrator challenges to delay the proceedings or frustrate the opposing party.\(^{120}\) We cannot do much about the increasing complexity, but we can reduce the incentives or avenues

---

116.  See *supra* Table 2.
117.  *Id.*
for parties to pursue disruptive tactics. Accordingly, the scope of this Article is not about the increasing complexity, but this complexity almost certainly does have an effect on the total number of changes.

Additionally, more potential conflicts have arisen as the overall number of arbitrators has increased. This increase in conflicts comes in part from the fact that the available pool of arbitrators has not grown at the same rate as the overall number of arbitrations, generally leading parties to nominate arbitrators from the same small pool of qualified individuals. The small community of investment arbitration professionals and the dual roles of arbitrators, with arbitrators acting simultaneously as counsel, arbitrator, or expert witness in other investment cases, have become characteristic features of the ICSID system. A potential arbitrator’s previous familiarity with a party or counsel, the subject matter of the case, or the legal issues in that case are often factors that the nominating party considers, and can even weigh in favor of that arbitrator’s selection. These characteristics increase the number of conflicts that can potentially be raised in ICSID arbitrations. But, the fact that an arbitrator has faced similar legal or factual issues in other cases is not sufficient to prove bias.

Although proposals for arbitrator disqualification have been as brief as only one day, as seen in *Olguín v. Paraguay*, this is usually the exception— the typical delay is much longer. The range of delay extends to a high of 260 days in *Carnegie Minerals (Gambia) Ltd. v. Republic of The Gambia*. A proposal for disqualification of an arbitrator takes eighty-one days, or

122. Id., supra note 51, at 86.
123. Id.
124. Universal Compression Int’l Holdings, S.L.U. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Atern and Prof. Guido Santiago Tawil, Arbitrators, ¶ 83 (May 10, 2011) (“The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations.”).
125. See Señor Eudoro Armando Olguín v. República del Paraguay, ICSID Case No. ARB/98/5, Award (July 26, 2001). This case had such a brief delay because the arbitrator immediately resigned following the filing of the proposal for arbitration disqualification.
almost three months, on average. Because twenty-five cases with a proposal for disqualification actually involved multiple arbitrator challenges, a case that involves at least one proposal for disqualification is delayed for an average of 103 days, or almost three and half months.127 These delays are added onto proceedings that are already lengthy. Data from between 2013 and 2017 indicates that an average investment arbitration case involving a challenge lasts 4.3 years.128

Even before arbitrator challenges arise, the cost involved in the investment arbitration process has already increased.129 According to a survey conducted by attorneys at Allen & Overy, mean claimant-party costs were 4.4 million U.S. dollars, and mean-respondent party costs were 4.6 million U.S. dollars at the end of 2012.130 The attorneys conducted the survey again in 2017, employing the same methodology to determine the costs of arbitration post-2013, and determined that costs had increased by sixty-eight percent for claimants and thirteen percent for respondents, resulting in mean party costs of 7.4 million U.S. dollars and 5.2 million U.S. dollars respectively.131

127. See infra Appendix 2.
128. Id.
129. See infra Table 2.
131. Id.
Table 3. Average Party Costs Pre-2013 and Post-2013\textsuperscript{132}

<table>
<thead>
<tr>
<th></th>
<th>Claimant (Pre-2013)</th>
<th>Respondent (Pre-2013)</th>
<th>Claimant (Post-2013)</th>
<th>Respondent (Post-2013)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Average Party Costs in USD</strong></td>
<td>$4,437,000</td>
<td>$4,559,000</td>
<td>$6,019,000</td>
<td>$4,855,000</td>
</tr>
<tr>
<td><strong>Average ICSID Tribunal Costs in USD</strong></td>
<td>$746,000</td>
<td>$920,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* The estimate for average party costs refers to the fees and expenses of counsel, experts, and witnesses.
** The estimate for average tribunal costs refers to the fees and expenses of arbitrators and ICSID institutional charges.

B. Does the Extra Time and Cost Pay Off in the Form of Successful Challenges?

Although the arbitrator challenges often create extensive delays and cost increases, this typically does not have any effect on the tribunal’s constitution, as these proposals for disqualification are rarely successful. Of the 146 arbitrator challenges that have been made public, only five have been upheld.\textsuperscript{133} In 106 cases, the arbitrator challenge was declined, leaving only a delayed proceeding and an increased total cost for the parties.\textsuperscript{134} Though some of these challenges may have been an attempt on the part of one of the parties to ensure the independence and impartiality of the tribunal, with only 3.4% of arbitrator challenges actually being upheld, there is a concern that many of these proposals for disqualification are merely frivolous challenges intended to exhaust or frustrate counterparties.\textsuperscript{135}

The low success rate of challenges in the ICSID stands in stark contrast to the success rate in other major international arbitral systems. Many of these institutions do not publish their challenge decisions, but some general trends are still known.\textsuperscript{136} At UNCITRAL, thirty to forty percent of arbitrator

\textsuperscript{132} Id.
\textsuperscript{133} See infra Appendix 1.
\textsuperscript{134} Id. Of the other cases, one arbitrator challenge is currently pending and two arbitrator challenges were never decided upon because the proceedings were discontinued.
\textsuperscript{135} Id.
\textsuperscript{136} CLEIS, supra note 51, at 111.
challenges have been successful. The LCIA has published some anonymized summaries of arbitrator challenges decided by the court between 1996 and 2017, which show that challenges were made in less than two percent of the cases before the court and were successful, either in whole or in part, in only about twenty-three percent of those cases. This shows that ICSID challenges are less likely to succeed than challenges under the rules of most other international arbitration institutions. From 2013 to 2015, the SCC made thirteen decisions on arbitrator challenges, excluding decisions made in still-ongoing arbitrations, and upheld four of them, or thirty-one percent. It is not clear how many cases have come before the SCC because arbitrations before the institution are confidential. Furthermore, the ICC allows for the examination of an individual’s independence and impartiality both when they are appointed for a position as an arbitrator and then during the proceeding if they are challenged by one of the parties. The majority of challenges raised at the time of the appointment result in non-confirmation.

IV. DOES THE PROPOSED RULE SOLVE THE PROBLEM?

Adopting Rule 29 proposed in WP # 1 would be a substantial step towards increasing the efficiency of ICSID arbitrations and decreasing the length of ICSID arbitrations by weeks or even months. Not only will the number of challenges decrease, but the challenges that are brought will be less disruptive. Despite what some commentators have argued, the current time limits—and those proposed in WP # 2—are not sufficient to prevent extensive delays. Additionally, the negative impact of adopting WP # 1 would be minimal, and it would not call into question the legitimacy of decisions made by the tribunal as much as some critics believe.

A. Rule 29 Would Decrease the Overall Number of Challenges.

Under this rule, an average delay of eighty-one days for every arbitrator challenge would be a concern of the past, a notable improvement considering

137. Id.
139. Baker & Greenwood, supra note 121, at 110.
141. LEIS, supra note 51, 125.
142. Id. at 132–33.
143. Id. at 136.
that even the current ICSID Secretary-General anticipates that the number of arbitrator challenges will only continue to rise.\footnote{Kinnear, \textit{supra} note 18, at 416.} Adopting this proposal will eliminate the incentives that parties have to bring challenges simply to delay the proceeding, thereby decreasing the overall number of challenges.

Such delaying tactics, brought to frustrate the opposing party and delay the proceedings, account for the high number of arbitrator challenges and the resulting low—3.4 percent—success rate. With such a low success rate, many parties must file proposals for disqualification knowing they have a slim chance of winning. However, the delay and frustration to the other party created by the challenge may be worth the increase in cost. Eliminating the automatic suspension of the proceedings would erase this incentive, leading to fewer overall challenges.

\subsection*{B. Rule 29 Would Reduce the Number of Arbitrators That Resign After a Party Files an Arbitrator Challenge Against Them.}

An ancillary benefit of the decreasing number of challenges is a subsequent decrease in the number of resignations: the 3.4\% of unsuccessful challenges does not tell the entire story of arbitrator challenges. In twenty-eight of these cases, or nineteen percent of total arbitrator challenges, the challenged arbitrator resigned after the proposal for disqualification was filed.\footnote{Id.} A challenge that casts doubts on an arbitrator’s impartiality and independence can have significant negative impacts on an arbitrator’s reputation, even if the challenge is ultimately rejected.\footnote{Pfister, \textit{supra} note 66, at 166.} In contrast, there are also some situations in which an arbitrator appears to collude with a party to resign in bad faith.\footnote{Judith Levine, “Late-in-the Game” Arbitrator Challenges and Resignations, 108 AM. SOC’Y INT’L L. PROC. 419, 423 (2014).} Charles Brower, an individual who has served as an arbitrator in a multitude of cases and has been challenged six times, has been asked to resign because a party did not want to finance challenge proceedings.\footnote{Charles N. Brower, \textit{Remarks by Charles N. Brower}, 108 AM. SOC’Y INT’L L. PROC. 423, 427 (2014).} He states that it is important for arbitrators to speak with the party that appointed them and offer to resign.\footnote{Id.} Brower has also resigned before, at the appointing party’s request, so that the party that appointed him could adhere to other agreements and to ensure that no future award could be challenged on the grounds that the tribunal was not properly constituted.\footnote{Id. at 426.} Although there seems to be a connection between the
resignations and the proposals for arbitrator disqualifications, it is unclear how much of this related to the merits of the proposal instead of a conciliatory attitude of the challenged arbitrator.151

With a lower number of challenges altogether, there will be fewer opportunities for arbitrators to resign. Nineteen percent of challenges currently cause an arbitrator to resign. This is an unfavorable outcome, since it is unclear how many of these arbitrators would actually be disqualified if the tribunal had an opportunity to decide on the disqualification proposal. Having its first-choice arbitrator resign without sufficient concerns with their independence and impartiality deprives a party of its autonomy, which is one of the biggest reasons that parties enter into investment arbitration.


Furthermore, the challenges that are still brought would not be nearly as disruptive, since the enormous delay that many proposals for disqualification create will be eliminated with the deletion of the automatic-suspension provision. Many Member States recognized this potential for increased efficiency in their public written comments and therefore supported the WP # 1 proposal, with or without a slight modification.152 Both Australia and Austria, for example, explicitly expressed the opinion that the elimination of the automatic suspension of proceedings would minimize “the disruptive effects” that the current rules create.153 The European Union also saw “merit” in ICSID’s efforts to speed up procedures by eliminating the automatic suspension.154

D. WP # 2’s Term Limits Do Not Eliminate the Need for Rule 29’s Continuation of the Proceedings.

In a public comment, Guglielmino Derecho Internacional, a law firm located in Argentina, argues that eliminating the automatic suspension of proceedings is unnecessary when the new rule also establishes fixed and short terms to make suspension during the qualification decision insignificant.155 However, WP # 2’s new time limits narrowing the window in which a party can file a proposal for arbitrator disqualification are not

151. DAELE, supra note 13, at 105.
152. ICSID, RULE AMENDMENT PROJECT, supra note 34, at 224, 226, 229 (comments from Canada, the European Union, and Singapore).
153. Id. at 221–23 (comments from Australia and Austria).
154. Id. at 226 (comment from the European Union).
155. Id. at 232 (comment from Guglielmino).
sufficient for combatting the extensive delay arbitrator challenges create. Even with these limitations, a delay can last weeks or months while the remaining arbitrators—or, if necessary, the Chairman—decides on the arbitrator proposal. Additionally, with many cases now involving multiple challenges to arbitrators, adhering to these fixed and short terms can add weeks or months to the time of the proceeding. For example, Conoco Phillips v. Argentina had eight different arbitrator challenges.\footnote{See infra Appendix 1.} This resulted in a total delay of 403 days, or just over thirteen months.\footnote{See infra Appendix 2.} Pey Casado v. Chile saw the most proposals for disqualification with nine arbitrator challenges, although not all separate, which were made over a span of nineteen years.\footnote{See infra Appendix 1.} The proceedings were suspended for 351 days because of arbitrator challenges, and this number does not include the first two challenges, the time frames of which were not made public.\footnote{See infra Appendix 2.}

E. Adopting Rule 29 Would Not Call into Question the Legitimacy of the Tribunal’s Decisions.

Finally, Member States, including Canada, Costa Rica, and Mexico, and public commentators, such as Guglielmino, have expressed concern that adopting WP # 1 might impact the legitimacy of the tribunal, since arbitrators would still be able to discuss jurisdiction and merits of the case while the proposal for disqualification is still pending.\footnote{ICSID, RULE AMENDMENT PROJECT, supra note 34, at 231–32 (comment from Guglielmino). See id. at 224 (“Canada . . . is concerned that [eliminating the automatic suspension] could affect the perceived legitimacy of the tribunal in the period in question.”); id. at 225 (comment from Costa Rica) (“[T]he continuation of the process could affect its legitimacy.”); id. at 228 (comment from Mexico) (stating that although it is desirable to decrease the number of arbitrator challenges intending to delay the arbitral proceedings, it is also important to guarantee the integrity of the proceedings in the case where arbitrator challenges are appropriate).} For example, Argentina called it “highly inappropriate” to allow the proceeding to continue pending a decision on an arbitrator challenge.\footnote{Id. at 221 (comment from the Argentine Republic).} However, this concern should not prevent ICSID from adopting WP # 1’s proposal for three main reasons: 1) WP # 1 would still increase efficiency overall, 2) ICSID has not experienced questions of legitimacy in proceedings that have continued, and 3) other arbitral institutions have not experienced problems with legitimacy.

Although the legitimacy of the tribunal may be a concern in those cases in which the arbitrator challenge is upheld, those cases are so few as to be negligible: only 3.5% of those challenges are successful. These concerns
could be completely alleviated by a slight modification to WP # 1, as recommended by Canada, which would allow either party to ask the tribunal to review any decisions in which a disqualified arbitrator was involved. As Colombia and Guatemala recognize, this would require an increased delay in those cases where the proposal for disqualification was upheld. However, the increase in delay would be significantly outweighed by the decrease in delay seen in the vast majority of cases in which the proposal for arbitrator disqualification is declined. Again, only 3.5% of challenges are successful; still others would be relatively minor and not material to the case, so those, too, would not need to be reconsidered. This leaves few instances in which any decisions would have to be reconsidered, with a resulting delay. On the other hand, under WP # 1 the vast majority of cases would see a significant improvement in efficiency. Singapore recognized the disparity between the number of successful arbitrator challenges and the number of total challenges and noted the proposed elimination of the automatic suspension “is more likely than not to increase the efficiency of the disqualification process.” Even the delay in the cases where an arbitrator was disqualified could be minimized if the parties agreed to suspend the proceedings, which may happen when both parties realize that there could be an issue with an arbitrator’s impartiality and independence.

Some parties have decided to continue with proceedings even under the current rule, and none of these cases has experienced major concerns with legitimacy. This is permissible under Article 44 of the Convention, which allows parties to agree to deviate from ICSID Rules. In Salini v. Jordan, the parties continued with the previously scheduled session of the arbitration proceeding even after one of the parties filed an arbitrator challenge. They met informally during this session to agree on procedural issues such as bifurcation of the proceeding and the schedule for the submission of written proceedings. After the challenged arbitrator resigned, the reconstituted Tribunal was presented with and adopted the procedural agreements that had

162. Id. at 224 (stating that the fact that the tribunal may continue during arbitral challenges could affect the proceeding’s efficiency if one of the parties asked for review of the proceedings and the decision was made while the arbitrator challenge was being assessed); id. at 226 (listing Guatemala’s comment that the possibility that the parties could ask the tribunal to consider anything resolved by a disqualified arbitrator does not make continuing proceedings during arbitrator challenges more efficient).
163. Id. at 229 (comment from Singapore).
164. See Convention, supra note 15, art. 44. The Article reads:
Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to the arbitration.
165. DAELE, supra note 13, at 102–03.
166. Id.
already been reached.\textsuperscript{167} In \textit{Carnegie v. Gambia}, the party filing the challenge to the arbitrator stated that it did not want the proposal for disqualification to interrupt the proceedings.\textsuperscript{168} Accordingly, both parties filed briefs on the merits of the case, which meant that no changes were made to the timetable to which the parties had originally agreed.\textsuperscript{169} The fact that these cases were able to successfully continue with proceedings despite an arbitrator challenge suggests that eliminating the automatic suspension will not affect the tribunal’s legitimacy—in the interim, parties can successfully take care of both procedural and substantive matters. Part of the reason for this is that arbitrator challenges typically occur early in the proceedings.\textsuperscript{170} Facing these challenges earlier in the proceedings makes it even less likely that a challenged arbitrator who is later disqualified will take part in deciding on a matter that will call into question the tribunal’s legitimacy.

Finally, as previously mentioned, the vast majority of other major arbitral institution do not provide for an automatic suspension of the proceedings.\textsuperscript{171} None of these other arbitral institutions have faced major legitimacy problems; therefore, ICSID should not prioritize these unsubstantiated concerns over the efficiency problems it is currently facing.

\section*{IV. CONCLUSION}

In light of these considerations, ICSID should adopt a slightly modified version of the WP # 1 proposal. ICSID should eliminate the automatic suspension of the proceedings, but it should add to the provision a clause that requires the newly constituted tribunal to reevaluate any decisions in which a disqualified arbitrator was involved, if the arbitrator challenge is successful, in order to minimize concerns with legitimacy.

ICSID has rightly decided to address the concerns with efficiency that many Member States have started to express. The data in this Article show that arbitrator challenges are a notable source of inefficiency within the rules. The rules for arbitrator challenges have remained largely untouched for fifty-one years. ICSID has the opportunity to promulgate rules that will make a tangible impact on the efficiency of ICSID proceedings.

\begin{itemize}
\item \textsuperscript{167} \textit{Id}.
\item \textsuperscript{168} \textit{Id.} at 103.
\item \textsuperscript{169} \textit{Id}.
\item \textsuperscript{170} See Kinnear & Frauke Nitschke, \textit{supra} note 13.
\item \textsuperscript{171} Kryvoi, \textit{supra} note 54, at 4.
\end{itemize}
V. APPENDIX 1: ICSID PROPOSALS FOR DISQUALIFICATION OF AN ARBITRATOR\textsuperscript{172} ORGANIZED BY LENGTH OF DELAY\textsuperscript{173}

<table>
<thead>
<tr>
<th>Case</th>
<th>Date of Challenge</th>
<th>Date Proceeding Resumed</th>
<th>Decision</th>
<th>Days of Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olguin v. Paraguay</td>
<td>Mar. 16, 1999</td>
<td>Mar. 17, 1999</td>
<td>Resigned</td>
<td>1</td>
</tr>
<tr>
<td>Pey Casado v. Chile (3)</td>
<td>Aug. 23, 2005</td>
<td>Aug. 26, 2005</td>
<td>Resigned</td>
<td>3</td>
</tr>
<tr>
<td>Nations Energy, Inc. and Others v. Republic of Panama (1)</td>
<td>May 14, 2011</td>
<td>May 18, 2011</td>
<td>Resigned</td>
<td>4</td>
</tr>
<tr>
<td>ConocoPhillips v. Venezuela (7)</td>
<td>July 22, 2016</td>
<td>July 26, 2016</td>
<td>Declined</td>
<td>4</td>
</tr>
<tr>
<td>African Holding v. Congo</td>
<td>May 11, 2006</td>
<td>May 17, 2016</td>
<td>Resigned</td>
<td>6</td>
</tr>
<tr>
<td>Pey Casado v. Chile (6)*</td>
<td>Jan. 6, 2014</td>
<td>Jan. 13, 2014</td>
<td>Resigned</td>
<td>7</td>
</tr>
</tbody>
</table>

\textsuperscript{172} Each proposal for disqualification of an arbitrator is listed separately. If a party filed proposals for disqualification of multiple or all members of the tribunal at the same time and the proposals were dealt with in the same time frame, the proposals are still listed separately.

\textsuperscript{173} Data compiled using records made public by ICSID. Cases whose procedural details were not made public are not included in this table, even if the case included an arbitrator challenge. The length of delay was measured from the time the proposal of disqualification was filed to the time the tribunal decided on the case or the challenged arbitrator announced his or her resignation.
<table>
<thead>
<tr>
<th>Case Description</th>
<th>Decision Date 1</th>
<th>Decision Date 2</th>
<th>Outcome</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentine Republic (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania</td>
<td>June 29, 2016</td>
<td>July 7, 2016</td>
<td>Resigned</td>
<td>8</td>
</tr>
<tr>
<td>EDF v. Argentina (1)</td>
<td>June 22, 2006</td>
<td>July 7, 2006</td>
<td>Resigned</td>
<td>15</td>
</tr>
<tr>
<td>S&amp;T Oil Equip. &amp; Mach. Ltd. v. Romania</td>
<td>Apr. 9, 2009</td>
<td>Apr. 24, 2009</td>
<td>Resigned</td>
<td>15</td>
</tr>
<tr>
<td>AS PNB Banka v. Republic of Latvia</td>
<td>Sept. 12, 2018</td>
<td>Sept. 29, 2018</td>
<td>Resigned</td>
<td>17</td>
</tr>
<tr>
<td>Case Name</td>
<td>Date Filing Requested</td>
<td>Date Decision Announced</td>
<td>Outcome</td>
<td>Decision Date</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>-----------------------</td>
<td>--------------------------</td>
<td>-----------</td>
<td>---------------</td>
</tr>
<tr>
<td>STEAG GmbH v. Kingdom of Spain</td>
<td>Aug. 19, 2018</td>
<td>Sept. 11, 2018</td>
<td>Declined</td>
<td>22</td>
</tr>
<tr>
<td>Case Description</td>
<td>Decision Date</td>
<td>Result Date</td>
<td>Decision Status</td>
<td>Date</td>
</tr>
<tr>
<td>------------------</td>
<td>---------------</td>
<td>-------------</td>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>The Loewen Group, Inc. v. United States</td>
<td>Aug. 9, 2001</td>
<td>Sept. 10, 2001</td>
<td>Resigned</td>
<td>32</td>
</tr>
<tr>
<td>Alpiq AG v. Romania</td>
<td>Apr. 24, 2017</td>
<td>June 1, 2017</td>
<td>Declined</td>
<td>38</td>
</tr>
<tr>
<td>Gran Colombia Gold Corp. v. Republic of Colombia</td>
<td>Nov. 26, 2018</td>
<td>Feb. 5, 2019</td>
<td>Resigned</td>
<td>40</td>
</tr>
<tr>
<td>City-State N.V. v. Ukraine</td>
<td>Aug. 6, 2015</td>
<td>Sept. 18, 2015</td>
<td>Resigned</td>
<td>43</td>
</tr>
<tr>
<td>Saba Fakes v. Republic of Turkey</td>
<td>Mar. 14, 2008</td>
<td>Apr. 26, 2008</td>
<td>Declined</td>
<td>43</td>
</tr>
<tr>
<td>Case Description</td>
<td>Date Filing</td>
<td>Date Decision</td>
<td>Outcome</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
<td>-------------</td>
<td>---------------</td>
<td>---------</td>
<td>------</td>
</tr>
<tr>
<td>Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia</td>
<td>Mar. 15, 2018</td>
<td>Apr. 28, 2018</td>
<td>Declined</td>
<td>44</td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic Republic of Pakistan (1)</td>
<td>July 23, 2012</td>
<td>Sept. 7, 2012</td>
<td>Resigned</td>
<td>46</td>
</tr>
<tr>
<td>Pey Casado v. Chile (8)**</td>
<td>Feb. 23, 2017</td>
<td>Apr. 13, 2017</td>
<td>Declined</td>
<td>49</td>
</tr>
<tr>
<td>Mobil Exploration and Mobile Argentina v. Argentine Republic (1)</td>
<td>Apr. 15, 2015</td>
<td>June 4, 2015</td>
<td>Declined</td>
<td>50</td>
</tr>
<tr>
<td>Case Description</td>
<td>Date</td>
<td>Decision Date</td>
<td>Outcome</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
<td>---------</td>
<td>---------------</td>
<td>-----------</td>
<td>------</td>
</tr>
<tr>
<td>Mobil Exploration and Mobile Argentina v. Argentina Republic (2)</td>
<td>Apr. 15, 2015</td>
<td>June 4, 2015</td>
<td>Declined</td>
<td>50</td>
</tr>
<tr>
<td>Mobil Exploration and Mobile Argentina v. Argentine Republic (3)</td>
<td>Apr. 15, 2015</td>
<td>June 4, 2015</td>
<td>Declined</td>
<td>50</td>
</tr>
<tr>
<td>CEAC Holdings v. Montenegro</td>
<td>Apr. 22, 2015</td>
<td>June 12, 2015</td>
<td>Declined</td>
<td>51</td>
</tr>
<tr>
<td>BSG Res. Ltd. v. Republic of Guinea (1)</td>
<td>Nov. 4, 2016</td>
<td>Dec. 28, 2016</td>
<td>Declined</td>
<td>54</td>
</tr>
<tr>
<td>BSG Res. Ltd. v. Republic of Guinea (2)</td>
<td>Nov. 4, 2016</td>
<td>Dec. 28, 2016</td>
<td>Declined</td>
<td>54</td>
</tr>
<tr>
<td>BSG Res. Ltd. v. Republic of Guinea (3)</td>
<td>Nov. 4, 2016</td>
<td>Dec. 28, 2016</td>
<td>Declined</td>
<td>54</td>
</tr>
<tr>
<td>Case</td>
<td>Decision Date</td>
<td>Jurisdiction Date</td>
<td>Decision</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>---------------</td>
<td>-------------------</td>
<td>----------</td>
<td></td>
</tr>
<tr>
<td>Ickale Insaat Ltd. Sirketi v. Turkmenistan</td>
<td>May 16, 2014</td>
<td>July 11, 2014</td>
<td>Declined</td>
<td></td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic Republic of Pakistan (2)</td>
<td>July 7, 2017</td>
<td>Sept. 5, 2017</td>
<td>Declined</td>
<td></td>
</tr>
<tr>
<td>Elitech v. Republic of Croatia</td>
<td>Feb. 16, 2018</td>
<td>Apr. 23, 2018</td>
<td>Declined</td>
<td></td>
</tr>
<tr>
<td>Champion Holding Co. v. Arab Republic of Egypt</td>
<td>Nov. 11, 2016</td>
<td>Jan. 18, 2017</td>
<td>Declined</td>
<td></td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic</td>
<td>Nov. 25, 2017</td>
<td>Feb. 5, 2018</td>
<td>Declined</td>
<td></td>
</tr>
<tr>
<td>Case Description</td>
<td>DateFiled</td>
<td>DateDecided</td>
<td>Decision</td>
<td></td>
</tr>
<tr>
<td>------------------</td>
<td>-----------</td>
<td>-------------</td>
<td>----------</td>
<td></td>
</tr>
<tr>
<td>Republic of Pakistan (3)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic Republic of Pakistan (4)</td>
<td>Nov. 25, 2017</td>
<td>Feb. 5, 2018</td>
<td>Declined 73</td>
<td></td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic Republic of Pakistan (5)</td>
<td>Nov. 25, 2017</td>
<td>Feb. 5, 2018</td>
<td>Declined 73</td>
<td></td>
</tr>
<tr>
<td>Case Name</td>
<td>Date Filed</td>
<td>Date Ruled</td>
<td>Decision</td>
<td>Code</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>--------------</td>
<td>------------</td>
<td>-----------</td>
<td>------</td>
</tr>
<tr>
<td>Aktau Petrol v. Republic of Kazakhstan</td>
<td>July 17, 2015</td>
<td>Nov. 9, 2015</td>
<td>Declined</td>
<td>84</td>
</tr>
<tr>
<td>Case Description</td>
<td>Date Filed</td>
<td>Date Determined</td>
<td>Result</td>
<td>Citation</td>
</tr>
<tr>
<td>------------------</td>
<td>------------</td>
<td>-----------------</td>
<td>--------</td>
<td>----------</td>
</tr>
<tr>
<td>Blue Bank v. Argentina (2)</td>
<td>Aug. 16, 2013</td>
<td>Nov. 12, 2013</td>
<td>Upheld</td>
<td>88</td>
</tr>
<tr>
<td>EDF v. Argentina (3)**</td>
<td>Aug. 6, 2015</td>
<td>Nov. 20, 2015</td>
<td>Declined</td>
<td>106</td>
</tr>
<tr>
<td>Participaciones Inversiones Portuarias SARL v.</td>
<td>July 25, 2009</td>
<td>Nov. 12, 2009</td>
<td>Declined</td>
<td>110</td>
</tr>
<tr>
<td>Case Description</td>
<td>Date Filing</td>
<td>Date Argument</td>
<td>Decision</td>
<td></td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>-----------------------</td>
<td>---------------</td>
<td>-------------</td>
<td></td>
</tr>
<tr>
<td>Gabonese Republic</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pey Casado v. Chile (7)**</td>
<td>Nov. 22, 2016</td>
<td>Feb. 21, 2017</td>
<td>Declined   113</td>
<td></td>
</tr>
<tr>
<td>Muhammet Cap v. Turkemistan</td>
<td>Nov. 19, 2017</td>
<td>Mar. 16, 2018</td>
<td>Declined   117</td>
<td></td>
</tr>
<tr>
<td>Generation Ukraine v. Ukraine</td>
<td>Mar. 9, 2001</td>
<td>July 5, 2001</td>
<td>Declined   118</td>
<td></td>
</tr>
<tr>
<td>Case</td>
<td>Filing Date</td>
<td>Decision Date</td>
<td>Outcome</td>
<td>Code</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>-------------</td>
<td>---------------</td>
<td>----------</td>
<td>------</td>
</tr>
<tr>
<td>ConocoPhillips v. Venezuela (4)</td>
<td>Feb. 6, 2015</td>
<td>July 1, 2015</td>
<td>Declined</td>
<td>145</td>
</tr>
<tr>
<td>Urbaser v. Argentina</td>
<td>Mar. 18, 2010</td>
<td>Aug. 12, 2010</td>
<td>Declined</td>
<td>147</td>
</tr>
<tr>
<td>Suez and Interagua v. Argentine Republic (2)</td>
<td>Nov. 29, 2007</td>
<td>May 12, 2008</td>
<td>Declined</td>
<td>164</td>
</tr>
<tr>
<td>Suez and Vivendi Universal v. Argentine Republic (2)</td>
<td>Nov. 29, 2007</td>
<td>May 12, 2008</td>
<td>Declined</td>
<td>164</td>
</tr>
<tr>
<td>Pey Casado v. Chile (4)</td>
<td>Aug. 24, 2005</td>
<td>Feb. 21, 2006</td>
<td>Declined</td>
<td>181</td>
</tr>
<tr>
<td>Pey Casado v. Chile (5)</td>
<td>Aug. 24, 2005</td>
<td>Feb. 21, 2006</td>
<td>Upheld</td>
<td>181</td>
</tr>
<tr>
<td>Universal Compression v. Venezuela (2)</td>
<td>Nov. 12, 2010</td>
<td>May 20, 2011</td>
<td>Declined</td>
<td>189</td>
</tr>
<tr>
<td>Asset Recovery Trust v. Argentine Republic</td>
<td>May 19, 2006</td>
<td>Nov. 27, 2006</td>
<td>Declined</td>
<td>192</td>
</tr>
<tr>
<td>Universal Compression v. Venezuela (1)</td>
<td>Nov. 4, 2010</td>
<td>May 20, 2011</td>
<td>Declined</td>
<td>197</td>
</tr>
<tr>
<td>EDF v. Argentina (2)</td>
<td>Nov. 29, 2007</td>
<td>June 25, 2008</td>
<td>Declined</td>
<td>209</td>
</tr>
<tr>
<td>Case Description</td>
<td>Date of Filing</td>
<td>Date of Conclusion</td>
<td>Status</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>----------------</td>
<td>--------------------</td>
<td>-----------------</td>
<td>------</td>
</tr>
<tr>
<td>Republic of Costa Rica (2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tanzania Elec. Supply Co. Ltd. v. Indep. Power Tanzania Ltd. (2)***</td>
<td>June 25, 2010</td>
<td>N/A</td>
<td>Proceeding discontinued</td>
<td>N/A</td>
</tr>
<tr>
<td>Mathias Kruck v. Kingdom of Spain (2)****</td>
<td>Apr. 16, 2019</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Elec. Argentina S.A. v. Argentine Republic (2)</td>
<td>Nov. 29, 2007</td>
<td>N/A</td>
<td>Proceeding discontinued</td>
<td>N/A</td>
</tr>
<tr>
<td>Amco v. Indonesia</td>
<td>Not public</td>
<td>June 24, 1982</td>
<td>Declined</td>
<td>Unknown</td>
</tr>
<tr>
<td>Zhinvali v. Georgia</td>
<td>Not public</td>
<td>Jan. 19, 2001</td>
<td>Declined</td>
<td>Unknown</td>
</tr>
<tr>
<td>Salini v. Jordan</td>
<td>Apr. 8, 2003</td>
<td>Not public</td>
<td>Resigned</td>
<td>Unknown</td>
</tr>
<tr>
<td>Pey Casado v. Chile (1)</td>
<td>Not public</td>
<td>Oct. 21, 1998</td>
<td>Resigned</td>
<td>Unknown</td>
</tr>
</tbody>
</table>
VI. APPENDIX 2: ICSID CASES INVOLVING A PROPOSAL FOR DISQUALIFICATION OF AN ARBITRATOR ORGANIZED BY LENGTH OF TOTAL DELAY TO CASE

<table>
<thead>
<tr>
<th>Case</th>
<th>Days of Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olguin v. Paraguay</td>
<td>1</td>
</tr>
<tr>
<td>African Holding v. Congo</td>
<td>6</td>
</tr>
<tr>
<td>ALAS Int’l Baustoffproduktions AG v. Bosnia and Herzegovina</td>
<td>7</td>
</tr>
<tr>
<td>Sociedad Aeroportuaria v. Republic of Peru</td>
<td>7</td>
</tr>
<tr>
<td>Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania</td>
<td>8</td>
</tr>
<tr>
<td>CEMEX v. Bolivarian Republic of Venezuela</td>
<td>11</td>
</tr>
<tr>
<td>Electricidad Argentina S.A. v. Argentine Republic</td>
<td>15*</td>
</tr>
<tr>
<td>S&amp;T Oil Equip. &amp; Mach. Ltd. v. Romania</td>
<td>15</td>
</tr>
<tr>
<td>AS PNB Banka v. Republic of Latvia</td>
<td>17</td>
</tr>
<tr>
<td>Raiffeisen Bank Int’l v. Republic of Croatia</td>
<td>17</td>
</tr>
<tr>
<td>RSM Prod. Corp. v. Central African Republic**</td>
<td>17</td>
</tr>
<tr>
<td>Total S.A. v. Argentine Republic</td>
<td>20</td>
</tr>
<tr>
<td>STEAG GmbH v. Kingdom of Spain</td>
<td>22</td>
</tr>
</tbody>
</table>

174. This chart reflects the total delay of any case with at least one proposal for disqualification of an arbitrator was filed. Proposals that the tribunal considered simultaneously did not count multiple times towards the total delay.

175. Data compiled using records made public by ICSID. Cases whose procedural details were not made public are not included in this table, even if the case included an arbitrator challenge. The length of delay was measured from the time the proposal of disqualification was filed to the time the tribunal decided on the case or the challenged arbitrator announced his or her resignation. The length of delay does not include the time required to reconstitute the tribunal if the arbitrator resigned or was disqualified.
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rail World v. Estonia</td>
<td>24</td>
</tr>
<tr>
<td>Joseph C. Lemire v. Ukraine</td>
<td>25</td>
</tr>
<tr>
<td>SGS v. Pakistan</td>
<td>27</td>
</tr>
<tr>
<td>Crystalex Int’l Corp. v. Bolivarian Republic of Venezuela</td>
<td>31</td>
</tr>
<tr>
<td>Mathias Kruck v. Kingdom of Spain</td>
<td>31***</td>
</tr>
<tr>
<td>The Loewen Group, Inc. v. United States</td>
<td>32</td>
</tr>
<tr>
<td>RSM Prod. Corp. v. Saint Lucia</td>
<td>34</td>
</tr>
<tr>
<td>SolEs Badajoz GmbH v. Kingdom of Spain</td>
<td>36</td>
</tr>
<tr>
<td>Alpiq AG v. Romania</td>
<td>38</td>
</tr>
<tr>
<td>Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine</td>
<td>40</td>
</tr>
<tr>
<td>Colombia Gold Corp. v. Republic of Colombia</td>
<td>40</td>
</tr>
<tr>
<td>Alpha Projektholding v. Ukraine</td>
<td>42</td>
</tr>
<tr>
<td>City-State N.V. v. Ukraine</td>
<td>43</td>
</tr>
<tr>
<td>Saba Fakes v. Republic of Turkey</td>
<td>43</td>
</tr>
<tr>
<td>TECO Guatemala Holdings, LLC v. Republic of Guatemala</td>
<td>43</td>
</tr>
<tr>
<td>Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia</td>
<td>44</td>
</tr>
<tr>
<td>Interocian v. Nigeria</td>
<td>48</td>
</tr>
<tr>
<td>Tanzania Elec. Supply Co. Ltd. v. Indep. Power Tanzania Ltd.</td>
<td>49*</td>
</tr>
<tr>
<td>Mobil Exploration and Mobile Argentina v. Argentine Republic</td>
<td>50</td>
</tr>
<tr>
<td>Caratube and Hourani v. Kazakhstan</td>
<td>51</td>
</tr>
<tr>
<td>CEAC Holdings v. Montenegro</td>
<td>51</td>
</tr>
<tr>
<td>BSG Res. Ltd. v. Republic of Guinea</td>
<td>54</td>
</tr>
<tr>
<td>Tidewater v. Venezuela</td>
<td>55</td>
</tr>
<tr>
<td>Ickale Insaat Ltd. Sirketi v. Turkmenistan</td>
<td>56</td>
</tr>
<tr>
<td>Electrabel v. Hungary</td>
<td>66</td>
</tr>
<tr>
<td>Elitech v. Republic of Croatia</td>
<td>66</td>
</tr>
<tr>
<td>Champion Holding Co. v. Arab Republic of Egypt</td>
<td>68</td>
</tr>
<tr>
<td>Flughafen Zurich A.G. v. Bolivarian Republic of Venezuela**</td>
<td>68</td>
</tr>
<tr>
<td>Getma v. Guinea</td>
<td>74</td>
</tr>
<tr>
<td>Iskandar Safa and Akram Safa v. Hellenic Republic</td>
<td>74</td>
</tr>
<tr>
<td>Saipem v. People’s Republic of Bangladesh</td>
<td>74</td>
</tr>
<tr>
<td>KS Invest and TLS Invest v. Spain</td>
<td>75</td>
</tr>
<tr>
<td>Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela</td>
<td>78</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Rusoro Mining v. Bolivarian Republic of Venezuela</td>
<td>78</td>
</tr>
<tr>
<td>Sempra Energy Int'l v. Argentine Republic</td>
<td>78</td>
</tr>
<tr>
<td>Transban Investments v. Bolivarian Republic of Venezuela</td>
<td>78</td>
</tr>
<tr>
<td>Perenco v. Republic of Ecuador</td>
<td>80</td>
</tr>
<tr>
<td>Quiborax v. Plurinational State of Bolivia</td>
<td>80</td>
</tr>
<tr>
<td>Aktau Petrol v. Republic of Kazakhstan</td>
<td>84</td>
</tr>
<tr>
<td>OI European Group v. Venezuela</td>
<td>86</td>
</tr>
<tr>
<td>Big Sky Energy v. Republic of Kazakhstan</td>
<td>93</td>
</tr>
<tr>
<td>Azurix Corp. v. Argentine Republic</td>
<td>96</td>
</tr>
<tr>
<td>Nations Energy, Inc. and others v. Republic of Panama (2)</td>
<td>100</td>
</tr>
<tr>
<td>Opic Karimum Corp. v. Venezuela</td>
<td>108</td>
</tr>
<tr>
<td>Participaciones Inversiones Portuarias SARL v. Gabonese Republic</td>
<td>110</td>
</tr>
<tr>
<td>Abaclat v. Argentine Republic</td>
<td>113</td>
</tr>
<tr>
<td>Vattenfall AB v. Fed. Republic of Germany</td>
<td>114</td>
</tr>
<tr>
<td>Muhammet Cap v. Turkemistan</td>
<td>117</td>
</tr>
<tr>
<td>Generation Ukraine v. Ukraine</td>
<td>118</td>
</tr>
<tr>
<td>Saint-Gobain Plastics v. Venezuela</td>
<td>121</td>
</tr>
<tr>
<td>Siemens A.G. v. Argentine Republic</td>
<td>129</td>
</tr>
<tr>
<td>Blue Bank v. Argentina</td>
<td>141</td>
</tr>
<tr>
<td>Urbaser v. Argentina</td>
<td>147</td>
</tr>
<tr>
<td>Repsol v. Argentina</td>
<td>148</td>
</tr>
<tr>
<td>Suez and Interagua v. Argentine Republic</td>
<td>171</td>
</tr>
<tr>
<td>Suez and Vivendi Universal v. Argentine Republic</td>
<td>171</td>
</tr>
<tr>
<td>Tethyan Copper Co. v. Islamic Republic of Pakistan</td>
<td>179</td>
</tr>
<tr>
<td>Asset Recovery Trust v. Argentine Republic</td>
<td>192</td>
</tr>
<tr>
<td>Burlington Res. v. Ecuador</td>
<td>194</td>
</tr>
<tr>
<td>Supervision y Control S.A. v. Republic of Costa Rica</td>
<td>231</td>
</tr>
<tr>
<td>Carnegie Minerals (Gambia) Ltd. v. Republic of the Gambia</td>
<td>260</td>
</tr>
<tr>
<td>EDF v. Argentina</td>
<td>330</td>
</tr>
<tr>
<td>Pey Casado v. Chile</td>
<td>351</td>
</tr>
<tr>
<td>Fabrica de Vidrios and Owens-Illinois v. Bolivarian Republic of Venezuela</td>
<td>356</td>
</tr>
<tr>
<td>ConocoPhillips v. Venezuela</td>
<td>403</td>
</tr>
<tr>
<td>Universal Compression v. Venezuela</td>
<td>536</td>
</tr>
</tbody>
</table>
Utsch M.O.V.E.R.S International v. Arab Republic of Egypt

Amco v. Indonesia

Corn Products Int’l, Inc. v. United Mexican States

Salini v. Jordan

Zhinvali v. Georgia

<table>
<thead>
<tr>
<th>Case Information</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utsch M.O.V.E.R.S International v. Arab Republic of Egypt</td>
<td>851</td>
</tr>
<tr>
<td>Amco v. Indonesia</td>
<td>Unknown</td>
</tr>
<tr>
<td>Corn Products Int’l, Inc. v. United Mexican States</td>
<td>Unknown</td>
</tr>
<tr>
<td>Salini v. Jordan</td>
<td>Unknown</td>
</tr>
<tr>
<td>Zhinvali v. Georgia</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

* This number does not reflect the second proposal for disqualification that was filed, since the proceeding was discontinued before the proposal could be decided upon by the Tribunal.

** This challenge took place during an annulment proceeding of the original award.

*** This number does not reflect the delay caused by the second proposal for disqualification, which the Tribunal has not yet decided upon.

**** This challenge took place during an interpretation proceeding of the original award.

***** This number does not reflect the delay caused by the first two arbitrator challenges, the lengths of which are unknown.