

# MEMORANDUM

Date: June 10, 2019

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

From: Natalie Pita, Law Student, Duke University School of Law

Re: Commentary on the Proposed Amendment of the ICSID Arbitration Rules

## Introduction

This commentary is an excerpt of a forthcoming student note in Volume 30, Issue 1 of the Duke Journal of Comparative and International Law. It shows that the current rules for arbitrator disqualifications, which automatically suspend the arbitration proceedings, are a direct contributor to the high costs and long proceedings in ICSID and argues 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.<sup>1</sup> With individual cases seeing anywhere from one to nine arbitrator challenges, this delay can quickly become unwieldy.<sup>2</sup> However, ICSID has proposed two different remedies to this problem, which could replace the original rule: the WP # 1 proposal would provide a much-needed contribution to increasing ICSID's efficiency, but the WP # 2 proposal is a little more than an entrenchment of the status quo. As explained below, ICSID should adopt the WP # 1 proposal to continue the proceedings in the face of arbitrator challenges.

## I. ICSID Reform Proposal

The original rule for arbitrator disqualification stands in stark contrast to the proposed changes in their initial form. However, the proposal eventually drifts back to the status quo. The procedural status quo – still using the original rule – provides a 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 successfully lobbied for a more tempered shift away from the status quo. The latest round of proposals, while offering some additional procedural clarity, therefore continue automatic suspensions.

In comments during the proposal process, multiple Member States expressed concern with parties, and particularly States, launching arbitrator challenges as a “strategic tool” to buy

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<sup>1</sup> Natalie Pita, *Sail We Must: Why ICSID Proceedings Should Not Lie at Anchor for Arbitrator Challenges*, 30 DUKE J. OF COMP. & INT'L L. (forthcoming 2019).

<sup>2</sup> *Id.*

additional time during the proceedings.<sup>3</sup> 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.<sup>4</sup>

ICSID has provided two distinct alternatives for upgrading the process for arbitrator disqualification and, in particular, working to mitigate what ICSID referred to in WP # 1 as the “disruptive effect” that they have on the proceedings: Rule 29 and Article 21.<sup>5</sup> Article 21 is an updated version of Rule 29, but changes in other articles in the proposal created changes in the rule number.

#### *Proposed New Rule: WP # 1 Rule 29*

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.<sup>6</sup> It instead specifies that the proceedings will continue, unless the parties agree to suspend the proceedings.<sup>7</sup> In the case that 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 was pending.<sup>8</sup>

Rule 29 also lays out time restrictions missing in the current provision. Under this new rule, a proposal for disqualification must be filed after the constitution of the tribunal and within twenty days after the later of 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.”<sup>9</sup>

#### *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 reinstated the automatic suspension in the draft rule.<sup>10</sup> This alteration was made in light of comments submitted by Member States and the

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<sup>3</sup> Canada, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 224 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf); Spain, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 229 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

<sup>4</sup> William T. O’Brien & Sandeep N. Nandivada, *Arbitrator Challenges: Warranted or Abuse?*, 29-10 MEASLEY’S INT’L ARB. REP. 29, 1 (2014).

<sup>5</sup> ICSID, 3 PROPOSALS FOR AMENDMENT OF THE ICSID RULES WORKING PAPER # 1, at art. 29 (Aug. 2018) [hereinafter WP # 1]. 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.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> ICSID, 1 PROPOSALS FOR AMENDMENT OF THE ICSID RULES WORKING PAPER # 2, at art. 21 (Mar. 2019) [hereinafter WP # 2]. (“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.”).

public both in favor of and against the proposal.<sup>11</sup> This reverses the default rule in WP # 1. Under that proposal, the proceedings are continued unless the parties agree otherwise. In WP # 2, the proceedings are suspended unless the parties agree otherwise. The latter proposal would do nothing to prevent the use of an arbitrator challenge as a guerilla tactic, as a party using such a challenge merely to delay proceedings would never agree to carry on regardless.

The WP # 2 proposal seems to represent some sort of middle ground for ICSID, which believes that the proposed WP # 2 rule 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 overall time to complete the arbitration.”<sup>12</sup>

## **II. The current rules create an undue time and cost burden on the parties involved in an investment arbitration.**

*An automatic suspension of proceedings in the case of an arbitrator challenges increases the time and cost of an investment arbitration proceeding.*

The proposals regarding the process of arbitrator challenges aim at addressing the concern that ICSID arbitration is not sufficiently time nor cost effective.<sup>13</sup> 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. This works out to 11.6% of all cases seeing an arbitrator challenge – and the accompanying automatic suspension. Some of these cases have had multiple challenges, resulting in a total of 146 arbitrator challenges.<sup>14</sup> An estimated sixty-eight percent of these challenges have been made to one member of the Tribunal, but there is an increasing number of challenges to the majority of or all of the Tribunal and in multiple challenges in a single case, sometimes with respect to the same arbitrator.<sup>15</sup> This trend mirrors the increase in the number of cases overall.<sup>16</sup>

The incentives for raising the complaint are high for parties that simply want to delay the challenge, as a challenge at an advanced stage in the arbitration involves significant disruption and prejudice.<sup>17</sup> Although proposals for arbitrator disqualification have been as brief as only one day, as seen in *Olguín v. Paraguay*, a case in which the arbitrator immediately resigned

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<sup>11</sup> *Id.* at 141.

<sup>12</sup> WP # 2, *supra* note 10, at 142.

<sup>13</sup> American Society of International Law, *Unfolding the Working Paper on ICSID Rules Amendment: Interview with Meg Kinnear*, YOUTUBE (Sept. 7, 2018) <https://www.asil.org/resources/video/asil-events/>.

<sup>14</sup> World Bank Group, 2019 THE ICSID CASELOAD – STATISTICS, no. 1, 2019, at 7.

<sup>15</sup> Meg Kinnear, *Challenge of Arbitrators at ICSID—An Overview*, 108 AM. SOC’Y OF INT’L L. 412, 412 (2014). Neither of these challenges for arbitrator disqualification were made public.

<sup>16</sup> Pita, *supra* note 1; see The ICSID Caseload — Statistics, *supra* note 14, at 7; see Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., 2014); see *Cases Database*, ICSID (last accessed May 3, 2019) <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

<sup>17</sup> KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 103 (2012). 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.

following the filing the proposal for arbitrator disqualification, the typical delay is much longer. The range of delay extends up to a high 260 days in *Carnegie Minerals (Gambia) Ltd. v. Rep. of The Gambia*.<sup>18</sup> A proposal for disqualification of an arbitrator takes, on average, eighty-one days, or almost three months. 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.<sup>19</sup> These delays are added onto proceedings that are already lengthy.<sup>20</sup>

*The extra time and cost that arbitrator challenges create are unreasonable because they rarely 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 impact on the Tribunal's constitution, as these proposals for disqualification are rarely successful. Of the 146 arbitrator challenges that have been made public, one is currently pending, two were never decided upon because the proceedings were discontinued, and only five have been upheld.<sup>21</sup> In 106 of the remaining cases, the arbitrator challenge was declined, leaving only a delayed proceeding and an increased total cost for the parties.<sup>22</sup> While 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 one of the parties.<sup>23</sup>

This stands in stark contrast to other major international arbitral systems. Many of these institutions do not publish their challenge decisions, but some general trends are still known.<sup>24</sup> At the United Nations Commission on International Trade Law (UNCITRAL), thirty to forty

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<sup>18</sup> See Señor Eudoro Armando Olguín v. República del Paraguay, ICSID Case No. ARB/98/5, Award ¶ 16–17 (July 26, 2001) (“El 16 de marzo de 1999 el Centro recibió una comunicación . . . en la que Paraguay recusaba al Profesor Dale Beck Furnish . . . Con fecha 17 de marzo de 1999, el Profesor Furnish presentó su renuncia como árbitro en este caso.”); see *Case Details: Carnegie Minerals (Gambia) Limited v. Republic of The Gambia (ICSID Case No. ARB/09/19)*, WORLD BANK GROUP (last accessed May 17, 2019), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f09%2f19>. The delay in *Utsch M.O.V.E.R.S. Int'l v. Arab Rep. of Egypt* was technically longer, at 851 days, but the parties agreed to suspend the proceedings during the midst of this arbitrator challenge, making this case an unusual scenario. See *Case Details: Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Helmut Jungbluth v. Arab Republic of Egypt (ICSID Case No. ARB/13/37)*, WORLD BANK GROUP (last accessed May 17, 2019), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f13%2f37>.

<sup>19</sup> Pita, *supra* note 1.

<sup>20</sup> Data collected between 2013 and 2017 indicates that an average investment arbitration case lasts 4.3 years. Matthew Hodgson & Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, GLOBAL ARB. REV. (Dec. 14, 2017), <http://www.allenoverly.com/SiteCollectionDocuments/141217Damagesandcostsininvestmenttreatyarbitrationrevisited.pdf>.

<sup>21</sup> Pita, *supra* note 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> MARIA NICOLE CLEIS, THE INDEPENDENCE AND IMPARTIALITY OF ICSID ARBITRATORS 111 (2017).

percent of arbitrator challenges have been successful.<sup>25</sup> The London Court of International Arbitration (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 only successful, either in whole or in part, in about twenty-three percent of those cases.<sup>26</sup> This shows that ICSID challenges are more unlikely to succeed than challenges under the rules of most other international arbitration institutions.<sup>27</sup> From 2013 to 2015, the Stockholm Chamber of Commerce (SCC) made thirteen decisions on arbitrator challenges, excluding decisions made in still-ongoing arbitrations, and upheld four of them, or thirty-one percent.<sup>28</sup> It is not clear how many cases have come before the SCC, and arbitrations before the institution are confidential.<sup>29</sup> Furthermore, the International Chamber of Commerce (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.<sup>30</sup> The confirmation of the arbitrator is denied in the majority of these challenges that occur at the time of appointment.<sup>31</sup>

*The process of automatic suspension that creates the extra time and cost of investment arbitration proceedings is unusual.*

No other major arbitration rules provide for the automatic suspension of proceedings following an arbitrator challenge, but rather provide only for the possibility of suspension.<sup>32</sup> The American Arbitration Association-International Centre for Dispute Resolution, ICC, LCIA, Singapore International Arbitration Centre (SIAC) and SCC rules do not mention suspension at all.<sup>33</sup> On the other hand, the China International Economic and Trade Arbitration Commission (CIETAC) Rules specify that who has been challenged shall continue to serve on the Tribunal until the CIETAC Chairman has made a final decision on the proposal for disqualification, and the Hong Kong International Arbitration Centre (HKIAC) Rules state that the proceeding may continue pending decision on the challenge.<sup>34</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> Philip Clifford, Hanna Roos & Eleanor Scogings, *Arbitrator Challenges: The Long View*, NEW LAW JOURNAL 15 (2018).

<sup>27</sup> C. Mark Baker & Lucy Greenwood, *Are Challenges Overused in International Arbitration?*, 30 J. OF INT'L ARB. 101, 125.

<sup>28</sup> Anja Havedal, *SCC Practice Note: SCC Board Decisions on Challenges to Arbitrators 2013-2015*, STOCKHOLM CHAMBER OF COMMERCE INST. (2016), <https://sccinstitute.com/media/176447/scc-decisions-on-challenges-to-arbitrators-2013-2015.pdf>

<sup>29</sup> Baker & Greenwood, *supra* note 27, at 110.

<sup>30</sup> *Id.* at 132–33.

<sup>31</sup> *Id.* at 136.

<sup>32</sup> Yarik Kryvoi, *ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them*, BRITISH INST. OF INT'L AND COMP. L. 4 (Nov. 8, 2018).

<sup>33</sup> Arif H. Ali et al., *The Arbitral Tribunal*, in THE INTERNATIONAL ARBITRATION RULEBOOK: A GUIDE TO ARBITRAL REGIMES 49–54 (forthcoming 2019) (on file with author).

<sup>34</sup> *Id.*

### **III. Rule 29, as proposed in WP # 1 solves the problems of increased proceeding time and costs that arbitrator challenges, as well as creates ancillary benefits.**

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. Furthermore, not only will the number of challenges decrease, but the challenges that are brought will be less disruptive. Despite what some other commentators have argued, the current time limits, and even the time limits outlined in WP # 2, are not sufficient to prevent extensive delays, as discussed below. 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.

*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 that even the current ICSID Secretary-General anticipates that the number of arbitrator challenges will only continue to rise.<sup>35</sup> Adopting this proposal will eliminate incentives parties have to bring challenges simply to delay the proceeding, thereby decreasing the overall number of challenges.

As previously mentioned, many arbitrator challenges are brought simply to delay the proceeding and frustrate the opposing party, which is supported by the high number of arbitrator challenges compared to the 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.

*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.<sup>36</sup> 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.<sup>37</sup> In contrast, there are also some situations in which an arbitrator appears to collude with a party to resign, in bad faith.<sup>38</sup> Additionally, Charles Brower, an individual who has served

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<sup>35</sup> Kinnear, *supra* note 15, at 416.

<sup>36</sup> *Id.*

<sup>37</sup> Lukas Pfister, *Who Decides Arbitrator Challenges? — A Comparative Analysis of Institutional Approaches*, 15 GERMAN ARB. J. (SCHIEDSVZ) 164, 166 (2017).

<sup>38</sup> Judith Levine, "Late-in-the Game" Arbitrator Challenges and Resignations, 108 AM. SOC'Y OF INT'L L. 419, 423 (2014).

as an arbitrator in a multitude of cases and had been challenged six times, has been asked to resign because a party did not want to finance challenge proceedings, and states that is important for arbitrators to speak with the party that appointed them and offer to resign.<sup>39</sup> Brower has also resigned before, also 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.<sup>40</sup> While 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.<sup>41</sup>

With a lower number of challenges altogether, there will be fewer opportunities for arbitrators to resign as a result. 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.

*The challenges that Rule 29 would not eliminate would be less disruptive to the arbitral proceedings than under the current rule.*

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 suspension of the automatic suspension. 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.<sup>42</sup> For example, both Australia and Austria explicitly expressed the opinion that the elimination of the automatic suspension of proceedings would “the disruptive effects” that the current rules create.<sup>43</sup> The European Union also saw “merit” in ICSID’s efforts to speed up procedures by eliminating the automatic suspension.<sup>44</sup>

*WP # 2’s term limits do not eliminate the need for Rule 29’s continuation of the proceedings.*

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<sup>39</sup> Charles N. Brower, *Remarks by Charles N. Brower*, 108 AM. SOC’Y OF INT’L L. 423, 427 (2014).

<sup>40</sup> *Id.* at 426.

<sup>41</sup> DAELE, *supra* note 17, 105.

<sup>42</sup> Canada, *supra* note 3, at 224; EU, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 226 (Dec. 21, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf); Singapore, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 229 (Jan. 4, 2019) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

<sup>43</sup> Australia, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 221–22 (Jan. 22, 2019) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf); Austria, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 223 (Dec. 21, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

<sup>44</sup> EU, *supra* note 42, at 226.

Guglielmino’s comment argues that eliminating the automatic suspension of proceedings is unnecessary when the new rule also established fixed and short terms to make suspension during the qualification decision insignificant.<sup>45</sup> However, WP # 2’s new time limits narrowing the window in which a party can file a proposal for arbitrator disqualification are not sufficient for combatting the extensive delay arbitrator challenges create. Even with these limitations, there can still be a delay in the proceedings of weeks or even 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, even adhering to these fixed and short terms can add weeks or months to the time of the proceeding. For example, *ConocoPhillips v. Argentina* had eight different arbitrator challenges.<sup>46</sup> This resulted in a total delay of 403 days, or just over thirteen months.<sup>47</sup> *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.<sup>48</sup> 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.<sup>49</sup>

*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 individual commentators such as Guglielmino have expressed concern 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.<sup>50</sup> For example, Argentina called it “highly inappropriate” to allow the proceeding to continue pending a decision on an arbitrator challenge.<sup>51</sup> However, this concern should not prevent ICSID from adopting WP # 1’s proposal for three main reasons: WP # 1 would still increase efficiency overall, ICSID had not

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<sup>45</sup> Guglielmino, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 231 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

<sup>46</sup> Pita, *supra* note 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Guglielmino, *supra* note 45, at 232; *see* Canada, *supra* note 3, 224 (“Canada . . . is concerned that [eliminating the automatic suspension] could affect the perceived legitimacy of the tribunal in the period in question.”); *see* Costa Rica, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 225 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf) (“[T]he continuation of the process could affect its legitimacy.”); *see* Mexico, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 228 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf) (“Si bien es deseable desalentar recusaciones que tengan por objeto dilator el procedimiento arbitral, también es important garantizar su integridad en casos donde las recusaciones puedan ser procedentes.”).

<sup>51</sup> The Argentine Rep., *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 221 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf)

experienced questions of legitimacy in proceedings that have continued, and other arbitral institutions have not experienced problems with legitimacy.

While the legitimacy of the Tribunal may be a concern in those cases in which the arbitrator challenge is upheld, it is important to note that 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, that would allow either party to ask the Tribunal to review any decisions a disqualified arbitrator was involved in. While, as Colombia and Guatemala recognize and express concern about, this would require an increased delay in those cases where the proposal for disqualification was upheld, this 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.<sup>52</sup> 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 us with few instances in which any decisions would have to be reconsidered, with a resulting delay. On the other hand, the vast majority of cases would see a significant improvement in efficiency under WP # 1. 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.”<sup>53</sup> Even the delay in the cases where an arbitrator was disqualified could be minimized if the parties agree 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 have experienced major concerns with legitimacy. This is permissible under Article 44 of the Convention, which allows parties to agree to deviate from ICSID Rules.<sup>54</sup> In *Salini v. Jordan*, the parties continued with the previously scheduled session of the arbitration proceeding even after one of the parties followed an arbitrator challenge.<sup>55</sup> They met informally

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<sup>52</sup> Colombia, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 224 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf) (“El hecho de que el Tribunal pueda continuar podría afectar la eficiencia del proceso, ya que puede darse el caso en el que una de las partes solicite la revisión del procedimiento y de aquellas decisiones que fueron emitidas mientras se resolvió la recusación.”); Guatemala, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 226 (Dec. 28, 2018) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf) (“[L]a posibilidad que las partes puedan solicitar al Tribunal reconsiderar lo que el árbitro recusado resolvió, no corresponde con la eficiencia que pretenden estas propuestas de enmienda.”).

<sup>53</sup> Singapore, *Member State & Public Comments on Working Paper # 1 of August 3, 2018*, RULE AMENDMENT PROJ. 229 (Jan. 4, 2019) [https://icsid.worldbank.org/en/Documents/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/en/Documents/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

<sup>54</sup> See ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 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.

<sup>55</sup> DAELE, *supra* note 17, at 102–03.

during this session to agree on procedural issues such as bifurcation of the proceeding and the schedule for the submission of written proceedings.<sup>56</sup> After the challenged arbitrator resigned, the reconstituted Tribunal was presented with and adopted the procedural agreements that had already been reached.<sup>57</sup> In *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.<sup>58</sup> Accordingly, both parties filed briefs on the merits of the case, which meant that no changes were made to the timetable that the parties had originally agreed to.<sup>59</sup>

The fact that these cases have been able to successfully continue with proceedings despite an arbitrator challenge suggests that eliminating the automatic suspension will not affect the tribunal's legitimacy, since parties have been able to successfully take care of both procedural and substantive matters in the above examples. Part of the reason for this is that arbitrator challenges typically occur early in the proceedings.<sup>60</sup> 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, no other major arbitral institution provides for an automatic suspension of the proceedings.<sup>61</sup> None of these other arbitral institutions have faced major legitimacy problems, and therefore ICSID should not prioritize these unsubstantiated concerns over the efficiency problems it is currently facing.

#### **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 empirics in this commentary 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. Now is the opportunity to make a change that will make a tangible impact on ICSID proceedings.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Kinnear & Nitschke, *supra* note 16.

<sup>61</sup> Kryvoi, *supra* note 32, at 4.