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Achieving a Faster ICSID
by A. Raviv

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Achieving a Faster ICSID

By Adam Raviv[*]

"If I'm not back in five minutes…just wait longer!"

--Ace Ventura, Pet Detective

Investment arbitration is not for the impatient. The length of investor-state arbitrations is by now conventional wisdom among attorneys, arbitrators, investors, and scholars.[1] As one commentator recently observed, "it is an indisputably slow process, with many arbitrations taking 4-5 years or longer before a decision is delivered."[2]

Since its launch in 1966, the International Centre for Settlement of Investment Disputes (ICSID) has been the predominant public forum for resolution of international investment disputes.[3] Accordingly, ICSID is a frequent target of complaints about the length of disputes,[4] even as its leadership has engaged in concerted efforts to improve its processes.[5]

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[*] Counsel, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC. The views expressed in this article are the author's alone and do not necessarily reflect the views of the author's employer. The author thanks Steven P. Finizio, Susan D. Franck, Rachael D. Kent, Meg Kinnear, Danielle Morris, Catherine A. Rogers, and Claudio D. Salas for their very helpful insights.

[1] *See, e.g.*, M. Stevens & B. Love, *Investor-State Mediation: Observations on the Role of Institutions*, in CONTEMPORARY ISSUES IN INT'L ARBITRATION AND MEDIATION - THE FORDHAM PAPERS 2009 ("Investors complain about the cost and slow pace of the process"); N.A. Welsh & A.K. Schneider, *Becoming "Investor-State Mediation"*, 1 PENN ST. J. L. & INT'L AFF. 86, 86 (2012) ("The parties decry the expense, delays, and political challenges associated with relying exclusively on a rights-based arbitral process."); M.T. Parish, et al., *Awarding Moral Damages to Respondent States in Investment Arbitration*, 29 BERKELEY J. INT'L LAW 225, 243 (2011) ("the already expensive and slow process of investment arbitration"); Corporate Europe Observatory, Legal Vultures: Law Firms Driving Demand for Investment Arbitration ("[Investment] Cases are incredibly long" (quoting L. Markert & G. Lutz) (Nov. 27, 2012), *available at* http://corporateeurope.org/trade/2012/11/chapter-3-legal-vultures-law-firms-driving-demand-investment-arbitration; Herbert Smith LLP, *Successful ICC Conference "Investment Treaty Arbitration: a 'BIT' of a problem?"* (Apr. 20, 2012) ("investment treaty arbitration proceedings tend to be slower and more expensive than commercial international arbitrations" (summarizing comments of Isabelle Michou)), *available at* http://hsf-arbitrationnotes.com/2012/04/20/successful-icc-conference-investment-treaty-arbitration-a-bit-of-a-problem/; E. De Brandabere & J. Lepeltak, *Third Party Funding in Investment Arbitration*, 27 ICSID REV. 379, 379 (2012) (referring to the "lengthy and costly proceedings" of investment arbitration); Y. Halbron, *The Fourth Global ICC YAF Conference Hosted by NYU's Center for Transnational Litigation and Commercial Law: A Participant's View*, NYU Center for Transnational Litigation and Commercial Law (July 16, 2013) ("we had to stop thinking about investment arbitration as a quick dispute resolution system" (citing remarks of Sophie Nappert)), *available at* http://blogs.law.nyu.edu/transnational/2013/07/the-fourth-global-icc-yaf-conference-hosted-by-nyu%E2%80%99s-center-for-transnational-litigation-and-commercial-law-a-participant%E2%80%99s-view/.

[2] T. Cole, *Repsol May Never Get Paid for YPF*, NEW STATESMAN (Apr. 24, 2012).

[3] *See generally* A.R. PARRA, THE HISTORY OF ICSID (2012); C.H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY (2d Ed. 2009); L. REED ET AL., GUIDE TO ICSID ARBITRATION (2010); *see also* S.D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 40 (2007) (finding that nearly three quarters of publicly disclosed investment disputes were resolved by ICSID).

[4] *See, e,g.*, T. Moore, *ICSID Caught in Conflict*, COMMERCIAL DISPUTE RESOLUTION (June 4, 2013) ("Arbitration is supposed to be time-efficient, and while it is not as time-efficient as it is supposed to [be], ICSID is unbelievably

This article examines the length of ICSID arbitrations as they are currently practiced and analyzes why they take as long as they do. It reviews each stage of an ICSID proceeding and offers a variety of suggestions for how to speed them up. If you don't appreciate the irony of a very long article that decries very long cases, here is a summary of the recommendations:

1) Require the ICSID Secretariat to automatically register properly submitted requests for arbitration that are not rejected within a set deadline after receipt.
2) End the redundancy of lengthy case registration and Rule 41(5) jurisdictional objections.
3) Require a request for arbitration to include a proposal for constituting the tribunal.
4) Require arbitrator nominations at the outset of a case.
5) Mandate institutional appointments where the parties delay in selecting arbitrators.
6) Place a strict time limit on requesting disqualification of an arbitrator.
7) Limit the time for deciding on requests to disqualify an arbitrator.
8) Require immediate cost-shifting for unsuccessful efforts to disqualify arbitrators.
9) Ease the standard for successfully asserting preliminary objections under Rule 41(5) by deleting the word "manifestly" from the rule.
10) Take seriously the 60-day deadline for a constituted tribunal to hold its first session.
11) Do not let parties control the schedule of written memorials.
12) Impose deadlines on written memorials that reflect the parties' opportunity to investigate facts and begin drafting memorials before the tribunal issues a schedule.
13) Set a higher standard (i.e. a standard) for granting extensions of time.
14) Require parties seeking an extension of time to offer something in return.
15) Limit post-hearing memorials to one round of focused responses to tribunal questions.
16) Place a higher burden on parties seeking bifurcation of a case.

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slow." (quoting David Goldberg, White & Case LLP)); L.E. Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, AM. LAW. (June 25, 2009) ("Investors already complain that ICSID arbitrations can grind on for years."); PARRA, *supra* note 3, at 187 ("an ICSID case could become an endless succession of arbitration and annulment proceedings"); *Court to Convene Total Tribunal*, BUSINESS NEWS AMERICAS (Jan. 28, 2004) (noting that ICSID proceedings "often drag out for several years"); *An Interview with Meg Kinnear, Secretary-General of ICSID*, PRI Newsletter (Dec. 2009) (noting that the arbitral process "appears to grow more protracted and cumbersome over time"); V.J. Kapoor, *Wearing Hats and Walking the Line: How Arbitrators Reconcile Outside Activities and Judicial Duties*, 24 GEO. J. LEGAL ETHICS 625, 626 n.14 (2011) (ICSID "proceedings can become very lengthy, costly, and uncertain"); R.C. Gera, *Investment Arbitration: The End of the Boom?*, THE CHAMBERS MAGAZINE, no. 22 (2007) (noting complaints about "the slow and expensive progress of the Argentine disputes" before ICSID); J.J. Coe, Jr., *Toward A Complementary Use of Conciliation in Investor-State Disputes-A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 9 (2005) (citing a corporate CEO as stating that an ICSID case was "too slow, too costly, and too indeterminate"); *see generally* A. Sinclair et al., *ICSID Arbitration: How Long Does It Take?*, GLOBAL ARBITRATION REV., vol. 4, no. 5 (2009).

[5] *See, e.g.*, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear*, ASIL PROCEEDINGS, 2010, at 420-421 (comments of ICSID Secretary-General Meg Kinnear).

17) Require cost shifting when a jurisdictional objection fails, regardless of the ultimate outcome of the case.

18) Consider limits on the number of appointments an arbitrator may accept.

19) Mandate that tribunals deliberate in person after a hearing is over.

20) Place a fee ceiling on deliberation time for tribunals.

21) Consider a hard time limit for issuing an award.

22) Amend Rule 38(1) to require tribunals to declare the proceeding closed when the last written or oral submission is complete.

23) Do not delay appointing an *ad hoc* annulment committee.

24) Toughen the standard for staying enforcement of an award pending annulment, accounting for the applicant's chance of achieving annulment.

25) Tie the deadline for submitting an annulment memorial to the date of the award.

26) Drastically shorten the time for written submissions at the annulment stage.

27) Make cost and fee shifting the default result for unsuccessful annulment applications.

28) Apply recommendations 18-21 above to *ad hoc* annulment committees.

29) Do not accept the fact that the respondent is a government as an excuse for foot-dragging.

Although this article advocates for changes in the ICSID Arbitration Rules—which were last amended in 2006—it does not contemplate amending the ICSID Convention itself, which took effect more than forty years ago. Rather, this article offers ideas for modifying ICSID's rules and institutional practices within the existing Convention framework.

That said, many of the factors that contribute to lengthy ICSID proceedings are by no means unique to that institution. Extended schedules, drawn-out tribunal appointments and challenges, and protracted deliberations can equally afflict non-ICSID investment arbitrations, and for that matter commercial arbitrations. Although this article focuses on ICSID, many of the reforms it advocates are potentially applicable to other arbitral fora.

Debates over the length of ICSID proceedings take place against the backdrop of other objectives and critiques of ICSID and investor-state arbitration generally. Ensuring that parties enjoy due process[6]; promoting party autonomy[7]; safeguarding the legitimacy of proceedings and awards[8];

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[6] *See, e.g.*, C.B. Lamm, *et al.*, *Consent and Due Process in Multiparty Investor-State Arbitrations*, in INT'L INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (C. Binder *et al.* eds., 2009); Int'l Bar Ass'n, 12th Int'l Arbitration Day, Due Process in Int'l Arbitration, Transcripts, *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=0ABF4D05-65B8-4ECC-BD13-82BF767BF21F.

[7] *See, e.g.*, K.-H. Böckstiegel, *Party Autonomy and Case Management—Experiences and Suggestions of an Arbitrator*, Address at the Conference of the German Institution of Arbitration (Oct. 24-25, 2012), *available at* http://www.arbitration-icca.org/media/1/13644850393080/bckstiegel_party_autonomy.pdf; C. Chatterjee, *The Reality of The Party Autonomy Rule in Int'l Arbitration*, 20 J. INT'L ARBITRATION 539 (2003).

[8] *See, e.g.*, S.D. Franck, *The Legitimacy Crisis in Investment Arbitration: Privatizing Public Int'l Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); S.W. Schill, *Enhancing Int'l Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57

and helping tribunals reach the "correct" result[9] are all goals that must be measured against the desire for expediency and efficiency. In discussing ways to shorten ICSID proceedings, this article considers the pros and cons inherent in such changes, including the risks that due process and institutional legitimacy may be sacrificed.

Part I of this article examines the overall length of recent ICSID arbitrations. Parts II through IX focus on the rules and practices of various stages of the ICSID arbitral process, including case registration, arbitrator appointment, arbitrator challenges, preliminary objections, written memorials, decisions whether to bifurcate, award deliberations, and annulment applications. Part X addresses the common argument that the presence of a state respondent makes lengthy investment proceedings a fact of life. Part XI presents a model timetable for an accelerated arbitration that incorporates the reforms recommended in this article. Part XII offers concluding thoughts on the benefits of quicker resolution of ICSID arbitrations.

I. How Long Are ICSID Arbitrations? Long and Getting Longer

A review of recent ICSID arbitrations shows that they almost invariably take years to resolve.[10] The nineteen ICSID Convention awards issued in 2012 provide a helpful snapshot of the current speed of ICSID proceedings.[11] The chart below lists each case in which an award was issued in 2012, the date the case began, the date the award was issued, and the length of the proceeding.[12]

(2011).

[9] *See, e.g.*, W.W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25 (2010).

[10] The analysis in this section and throughout this article relies heavily on public information on ICSID proceedings. Pursuant to ICSID Administrative and Financial Regulation 22, the ICSID Secretariat publishes the procedural history of all of its pending and concluded cases, which are available on its web site. *See* List of ICSID Cases, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=-Cases_Home. The majority of ICSID awards and many other tribunal decisions are also eventually made public, and are available either on ICSID's web site or on the web site Investment Treaty Arbitration, at italaw.com.

[11] In addition to Convention cases, ICSID also administers arbitrations through its Additional Facility. Additional Facility cases are not considered in the analysis below, though they follow similar procedures as Convention cases.

[12] In addition to the nineteen cases listed below, in 2012 a tribunal also issued an "award" in *Millicom Int'l Operations B.V. v. Senegal*, ICSID Case No. ARB/08/20. This award was not on the merits, but rather embodied a settlement between the parties as permitted by ICSID Arbitration Rule 43(2). Because the *Millicom* award was not contested, it is not included in the analysis here.

ICSID Convention Awards Issued in 2012			
Case	Date Commenced[13]	Date of Award	Length of Original Proceeding
Alapli Elektrik B.V. v. Turkey[14]	Aug. 27, 2008	July 16, 2012	47 months
Bosh International, Inc. v. Ukraine[15]	Dec. 3, 2007	Oct. 25, 2012	58 months
Caratube International Oil Co. LLP v. Kazakhstan[16]	June 16, 2008	June 5, 2012	48 months
Daimler Financial Services AG v. Argentina[17]	Aug. 2, 2004	Aug. 22, 2012	97 months
Deutsche Bank AG v. Sri Lanka[18]	Feb. 17, 2009	Oct. 31, 2012	44 months
EDF International S.A. v. Argentina[19]	June 16, 2003	June 11, 2012	108 months
Elsamex, S.A. v. Honduras[20]	Mar. 17, 2009	Nov. 16, 2012	44 months
Antoine Goetz v. Burundi[21]	Dec. 5, 2000	June 21, 2012	138 months
Iberdrola Energía, S.A. v. Guatemala[22]	Apr. 17, 2009	Aug. 17, 2012	40 months
Inmaris Perestroika Sailing Maritime Services v. Ukraine[23]	May 28, 2008	March 1, 2012	47 months
Karmer Marble Tourism Construction Industry v. Georgia[24]	Dec. 31, 2008	Aug. 9, 2012	43 months
Occidental Petroleum Corp. v. Ecuador[25]	May 17, 2006	Oct. 5, 2012	77 months
Railroad Development Corp. v. Guatemala[26]	June 14, 2007	June 29, 2012	60 months
SGS Société Générale v. Paraguay[27]	Oct. 16, 2007	Feb. 10, 2012	52 months
Swisslion DOO Skopje v. Macedonia[28]	July 9, 2009	July 6, 2012	36 months
Toto Costruzioni Generali S.p.A. v. Lebanon[29]	Mar. 19, 2007	June 7, 2012	63 months
Standard Chartered Bank v. Tanzania[30]	May 7, 2010	Nov. 2, 2012	30 months
Marion Unglaube v. Costa Rica[31]	Jan. 25, 2008	May 16, 2012	52 months
Reinhard Hans Unglaube v. Costa Rica[32]	Nov. 11, 2009	May 16, 2012	30 months

[13] Sixteen of the cases in the chart are treated as having commenced on the date ICSID received the claimant's request for arbitration. For the remaining three cases—*Alapli*, *Iberdrola*, and *Karmer*—that date is not publicly available so the date ICSID registered the case is used instead.
[14] ICSID Case No. ARB/08/13.
[15] ICSID Case No. ARB/08/11.
[16] ICSID Case No. ARB/08/12.
[17] ICSID Case No. ARB/05/1.
[18] ICSID Case No. ARB/09/2.
[19] ICSID Case No. ARB/03/23.
[20] ICSID Case No. ARB/09/4.
[21] ICSID Case No. ARB/01/2.
[22] ICSID Case No. ARB/09/5.
[23] ICSID Case No. ARB/08/8.
[24] ICSID Case No. ARB/08/19.
[25] ICSID Case No. ARB/06/11.
[26] ICSID Case No. ARB/07/23.
[27] ICSID Case No. ARB/07/29.
[28] ICSID Case No. ARB/09/16.
[29] ICSID Case No. ARB/07/12.
[30] ICSID Case No. ARB/10/12.
[31] ICSID Case No. ARB/08/1.
[32] ICSID Case No. ARB/09/20.

Within this group, the average case took 59 months and the median case took 48 months to reach an award. Moreover, the awards did not mean the end of most of these cases, because of the annulment and rectification proceedings that followed thirteen of the nineteen.[33]

The fastest 2012 awards came in *Reinhard Hans Unglaube* and *Standard Chartered*, both of which took two and a half years. *Reinhard Hans Unglaube* was related to the *Marion Unglaube* proceeding, which had been filed nearly two years earlier, and piggybacked on the older case toward a consolidated award. The *Standard Chartered* case was dismissed for lack of jurisdiction after the parties agreed on an initial jurisdictional phase of the case before reaching the merits.

The length of the "class of 2012" cases is not unusually out of whack with other recent years. The twelve awards issued in 2011 took an average of 53 months.[34] The fourteen Convention awards issued in the first ten months of 2013 came after a somewhat brisker average of 38 months of proceedings.[35]

These cases at least reached an award (though not all were finally resolved). As of October 2013, ICSID had fourteen active cases that had been registered at least ten years earlier and another twenty-seven that were at least five years old. The most extreme example is *Víctor Pey Casado v. Chile*,[36] which was registered in April 1998. It has gone through numerous stages including revision, annulment, and supplementary revision proceedings.

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[33] *See infra* Part IX.

[34] *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15 (101 months); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 (91 months); *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8 (66 months); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (55 months); *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14 (54 months); *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6 (57 months); *M. Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10 (49 months); *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17 (48 months); *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3 (42 months); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16 (29 months); *Malicorp Ltd. v. Egypt*, ICSID Case No. ARB/08/18 (28 months); *Commerce Group Corp. v. El Salvador*, ICSID Case No. ARB/09/17 (20 months). *RSM* and *Impreglio* are treated as having commenced on the date the case was registered, the rest on the date ICSID received the request for arbitration.

[35] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (89 months); *KT Asia Investment Group B.V. v. Kazakhstan*, ICSID Case No. ARB/09/8 (53 months); *Cambodia Power Co. v. Cambodia*, ICSID Case No. ARB/09/18 (45 months); *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3 (44 months); *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 (42 months); *Convial Callao S.A. v. Peru*, ICSID Case No. ARB/10/2 (40 months); *Opic Karimun Corp. v. Venezuela*, ICSID Case No. ARB/10/14 (35 months); *Ömer Dede v. Romania* , ICSID Case No. ARB/10/22 (34 months); *Highbury Int'l AVV v. Venezuela*, ICSID Case No. ARB/11/1 (33 months); *Caravelí Cotaruse Transmisora de Energía S.A.C. v. Peru*, ICSID Case No. ARB/11/9 (24 months); *AHS Niger v. Niger*, ICSID Case No. ARB/11/11 (27 months); *Rafat Ali Rizvi v. Indonesia*, ICSID Case No. ARB/11/13 (26 months); *Burimi SRL v. Albania*, ICSID Case No. ARB/11/18 (23 months); *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23 (20 months). Six of these cases are treated as having commenced on the date of registration, the rest on the date ICSID received the request for arbitration.

[36] ICSID Case No. ARB/98/2.

II. Case Registration: A Rubber Stamp?

The first stage of an ICSID arbitration is also the first opportunity for delay. Before a case can proceed, a claimant's request for arbitration must be registered by the ICSID Secretariat. According to a 2009 Allen & Overy study, the time between the Secretariat's receipt of a request for arbitration and registration of a case historically averaged 83 days.[37] Moreover, the average encompassed a huge range of time for individual cases: some cases took three days to register, while others took as long as 767 days.[38]

In recent years, the registration process has sped up, as the ICSID Secretariat instituted a service standard that aimed to register cases within 27 days.[39] ICSID Secretary-General Meg Kinnear has explained that "we've been doing a lot of work in-house to make sure that our systems are not what's holding up the process."[40]

The Secretariat doubtless has to perform *some* screening function, if for no other reason than to determine whether a request has been submitted at all and if it includes the proper paperwork. However, when the registration process drags on for months or years, this suggests that there are contested questions that should at least go to a tribunal.[41]

The main reason for registration delays is that the ICSID Secretariat scrutinizes requests for arbitration to determine if ICSID manifestly lacks jurisdiction over the dispute. Specifically, Article 36(3) of the ICSID Convention provides: "The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre."

A 2011 article by ICSID Senior Counsel Martina Polasek explained the rationale for the Secretariat's jurisdictional scrutiny:

> The purpose of the power was primarily to avoid a requesting party's misuse of the Centre's facility as a means to embarrass or pressure a respondent, especially a state, which did not consent to submitting the dispute to ICSID. There was also the general consideration of providing a safeguard against the waste of time, effort and money that would result from setting the machinery of the Centre in motion if it was obvious that jurisdiction was lacking. The Secretary-General's review thus helps to ensure bona fide use of the Centre's facility and provide

[37] Sinclair et al., *supra* note 4, at 2.
[38] *Id.*
[39] Email from M. Kinnear to A. Raviv (Aug. 25, 2013) (on file with author).
[40] *ICSID in the Twenty-First Century: An Interview with Meg Kinnear*, *supra* note 5, at 421.
[41] There is also disagreement over how "easy" registration really is. Notwithstanding its profession to serve only as a light screening mechanism, ICSID has been criticized for making it "more difficult to persuade the Secretary-General to register a request for arbitration than it is to persuade an arbitral tribunal to exercise jurisdiction over a claim." S. Puig & C.W. Brown, *The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention*, ICSID REV. - FOREIGN INVESTMENT L.J. (forthcoming), at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045645 2.

> safeguards to all concerned. At the same time, the review limits the exercise of the Centre's power so as to eliminate any risk of a denial of justice.[42]

Although the Secretariat's initial inquiry may in theory serve as an early filter of cases that are clearly outside ICSID's jurisdiction, the result is a frequently drawn-out registration process with very few cases actually screened out.

The 767-day registration mentioned above, though an extreme case, shows some of the potential delays in the process. In *Phoenix Action v. Czech Republic*,[43] the claimant filed its Request for Arbitration in February 2004. More than two years of back and forth followed, as the ICSID Secretariat and the would-be claimant corresponded on whether Phoenix Action as a corporate entity had the standing to bring its claims.[44] During this process, Phoenix Action changed its stated ground for having the right to sue.[45] In the end, ICSID registered the case and allowed a tribunal to be constituted. The respondent then contested jurisdiction. In its award in April 2009, the tribunal agreed with the Czech Republic that "[t]he dispute brought by Claimant before the Centre is not within the jurisdiction of the Centre and the competence of the Tribunal."[46]

The ultimate result in *Phoenix Action* raises the question of what purpose there was to the lengthy registration process in the case, which involved 27 months of jurisdictional wrangling only to have the tribunal later throw out the case on jurisdictional grounds after all.

Moreover, the Secretariat screen is particularly questionable in light of the arbitral tribunal's own authority to assess jurisdiction at the outset of a case under a virtually identical standard. ICSID Arbitration Rule 41(5) allows tribunals to determine whether a claim "is manifestly without legal merit," including whether the Centre and the tribunal manifestly lack jurisdiction over the claim. Allowing both the Secretariat and the tribunal to make the same preliminary determination, under the same legal standard, creates an unnecessary redundancy in the process. As discussed in Part V below, there is a case for changing Rule 41(5) to broaden the range of claims and cases subject to dismissal under the rule. Doing so would eliminate the redundancy between the registration screen and Rule 41(5).

Furthermore, if scrutinizing cases for lack of jurisdiction is really a useful function of the Secretariat, an obvious question is how many cases are actually screened out by ICSID's registration process. Notwithstanding an internal regulation that appears to require it to maintain a public register of all requests, ICSID does not publish information on requests that are filed with it that the Secretariat declines to register.[47] But a leading commentary on ICSID proceedings says that "[i]n practice, requests are seldom so deficient as to warrant refusal of

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[42] M. Polasek, *The Threshold for Registration of a Request for Arbitration Under the ICSID Convention*, 5 DISP. RESOL. INT'L 177, at 178-179 (2011) (footnotes omitted).
[43] ICSID Case No. ARB/06/5.
[44] *Phoenix Action v. Czech Republic*, Final Award, ¶¶ 3-9 (2009).
[45] *Id.* ¶ 8.
[46] *Id.* at 60.
[47] *See* ICSID Administrative and Financial Regulation 23(1) ("The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration."); *Id.* Regulation 23(2) ("The Registers shall be open for inspection by any person."); *see also* Puig & Brown, *supra* note 41, at 3 n.7 (criticizing ICSID's apparent failure to maintain such a register).

registration."[48] In her November 2011 article, Ms. Polasek of ICSID reported that in its history, "ICSID has refused registration of 13 requests."[49] By this count, less than three percent of requests have been denied registration. Although eliminating the Secretariat screen may encourage more frivolous filings, it is nonetheless questionable whether keeping this small number of cases from moving forward adequately justifies the registration delays that have befallen many other cases.

A simple way to limit delays in registration would be to require the Secretariat to make a registration decision within a specific deadline. If this is not administratively feasible, the rules could instead automatically register cases that the Secretariat does not reject within a specific timeframe. Although the ICSID Convention provides that "[t]he Secretary-General shall register the request unless he finds … that the dispute is manifestly outside the jurisdiction of the Centre,"[50] the Convention does not literally mandate that the Secretariat *must* substantively scrutinize and approve all requests before registering them.

It would not technically violate the Convention if the Secretariat—either through a formal rule or an institutional practice—simply *deemed* a properly submitted request as not manifestly lacking jurisdiction if it is not rejected within, say, thirty days of its receipt by ICSID. Thus, if the Secretariat neither registers nor rejects a request after thirty days, the request will be registered. Such a practice would not undermine a respondent's ability to object to jurisdiction, and would also not nullify the Secretariat's authority—which is different from a responsibility—to screen out cases where jurisdiction is manifestly lacking.

But if the initial Secretariat review is eliminated or curtailed, what about cases that are so obviously and facially invalid that constituting a tribunal would be a waste of time and effort? Fee-shifting might be part of the solution. If a case or claim is dismissed as manifestly outside the jurisdiction of the tribunal, the tribunal should—as a matter of course—order the claimant to pay the respondent's legal fees and costs. An additional required deposit accompanying the request for arbitration could provide security for the potential fee-shifting.

III. Constitution of the Tribunal

Once ICSID registers a request for arbitration, the next procedural step is normally to appoint the members of the arbitral tribunal. Of thirty-four Convention cases registered in 2012 for which a tribunal was constituted, the average time between registration and constitution was 211 days, or nearly seven months.[51] The fastest constitution was 91 days[52] and the slowest took 470 days.[53] The 211-day average does not include three cases registered in 2012 whose tribunal still had not been constituted by the end of October 2013.[54] The 2012 numbers track historical figures;

[48] REED ET AL., *supra* note 3, at 126.
[49] Polasek, *supra* note 42, at 187.
[50] ICSID Convention Art. 36(1).
[51] List of cases and tribunal constitution times on file with author.
[52] *Marco Gavazzi v. Romania*, ICSID Case No. ARB/12/25.
[53] *RSM Production Corp. v. St. Lucia*, ICSID Case No. ARB/12/10.
[54] *Transban Investments Corp. v. Venezuela*, ICSID Case No. ARB/12/24 (registered Aug. 27, 2012); *Gelsenwasser AG v. Algeria*, ICSID Case No. ARB/12/32 (registered Oct. 9, 2012); *Tullow Uganda Operations PTY LTD v. Uganda*, ICSID Case No. ARB/12/34 (registered Oct. 31, 2012). It is possible that in these cases, constitution was delayed as the parties engaged in settlement discussions.

through mid-2009, the average ICSID tribunal took 180 days to constitute.[55] The extended tribunal constitution process sharply contrasts with most national courts, which can assign a judge within days or hours after a case is filed.

A lengthier process is the price the parties pay for the perceived benefit of being able to select the decision makers. Whereas a judge assigned to a litigation (and, where applicable, the jury) is a product of the luck of the draw, many parties and practitioners will name the ability to select an arbitrator as one of the key attractions of arbitration. Many countries that are parties to the ICSID Convention would likely not respond kindly to proposals to eliminate their hand in appointing arbitrators. But the desire for party autonomy does not mean that constitution of a tribunal has to take as long as it frequently does.

ICSID's rules aim to prevent the constitution process from becoming too drawn out. Article 38 of the ICSID Convention and ICSID Arbitration Rule 4(1) provide that if the tribunal has not been constituted within 90 days after the case is registered (or another period of time agreed by the parties), a party may ask ICSID to appoint an arbitrator from a neutral country to fill the missing slot(s) in the tribunal. When such a request is made, Rule 4(4) then requires ICSID to use its "best efforts" to make the necessary appointments within 30 days.

Thus, ICSID's rules contemplate that even in cases where a tribunal is not constituted in an orderly manner, the process still should not take a total of more than four months. Nonetheless, in practice, the *average* ICSID case takes far longer than that.

Part of the problem may lie with ICSID's default method of determining how to constitute the tribunal. ICSID Rule 2 sets up a multi-step process for determining the makeup of the tribunal. If the parties cannot agree on a process for arbitrator selection, Rule 2(3) purports to break the logjam. It provides that if there is no agreement on the selection procedure within 60 days after registration, either party can request that the tribunal be constituted under Convention Article 37(2)(b), and the Secretariat will automatically mandate that method. Article 37(2)(b) provides for the standard constitution of three arbitrators, with one party selecting each and the president of the tribunal selected by agreement between the parties.

ICSID Rule 3 then governs the appointment process under Article 37(2)(b). Notably, it contains no time limits. Rather, it simply provides that each party should propose its party-appointed arbitrator and the president of the tribunal, the other party should respond "promptly" on the proposed president, and then should receive a "prompt[]" response.

But constitution of a tribunal often takes a long time even if the parties agree on the shape of the table. Once the method of constitution has been determined, the parties (or ICSID in the case of institutional appointments) still have to find arbitrators to appoint. Coming up with lists of names, contacting candidates, determining availability, and resolving potential conflicts is an art, and choosy counsel will take as long as they are allowed.

There are, then, several speed bumps that can delay the constitution process. One way to minimize these delays is to institute a *mandatory* institutional appointment rule rather than the current optional version. Arbitration Rule 4(1) now provides that after 90 days, "either party

[55] Sinclair et al., *supra* note 4, at 3.

may … address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed." But in practice the parties often engage in discussions for much longer than that before resorting to institutional appointment. A rule change might prompt parties to either agree, or agree to disagree, much more quickly. Rule 41(1) could be amended to provide that if a tribunal has not been constituted after 90 days, the "Chairman of the Administrative Council *shall appoint* the arbitrator or arbitrators not yet appointed."

This rule change would not necessarily undermine party autonomy; it would simply provide for party autonomy on a shorter fuse. In fact, some nations, including the signatories to CAFTA-DR, the Dominican Republic-Central America-United States Free Trade Agreement, have written such a provision into the treaty itself.[56] Parties in a "use it or lose it" situation will have every incentive to move fast on appointment or see their right to select a decision maker disappear.

Another way to speed up the constitution process would be to begin it as soon as a request for arbitration is submitted, rather than waiting until after the case is registered. The ICSID Rules could require the claimant to include, as part of its request for arbitration, a proposed tribunal structure and method of appointment. And the respondent, once notified of the request, could be given the same twenty days to respond allowed under the current Rule 2(1)(b).

The only theoretical downside of concurrent registration and tribunal constitution is that where a case is eventually screened out by the Secretariat, the respondent will end up bearing the costs of going through the constitution process for a case that did not even go forward. But as discussed above, cases are rarely denied registration.

Moreover, if a claimant's constitution proposal provides for party appointed arbitrators—as they nearly always do—the rules could also require the claimant to nominate its party appointed arbitrator, and the president if contemplated under the proposal, in the same submission. Some claimants already do include a nomination in their request for arbitration, but making the practice mandatory can further streamline the process, allowing appointment to happen at the same time as the structural proposal. It can also allow any arbitrator challenges to take place sooner rather than later.

IV. Arbitrator Challenges

Alas, constitution of a tribunal does not mean the end of appointment-related delays. After an arbitrator is appointed, a party may request disqualification of the arbitrator under Article 57 of the ICSID Convention.[57] Such challenges will stop an arbitration in its tracks, because Arbitration Rule 9(6) provides that "[t]he proceeding shall be suspended until a decision has been taken on the proposal [to disqualify]."

Although they are rejected most of the time,[58] arbitrator challenges are a necessary component of investment arbitration. The right to request disqualification of an unsuitable arbitrator

[56] Dom.Rep.-Cent.Am.-U.S. Free Trade Agreement, art. 20.9.1(b), (d) (Aug. 5, 2004).
[57] *See generally* SCHREUER ET AL., *supra* note 3, at 1197-1213.
[58] Through January 2010, parties had challenged arbitrators in 26 registered ICSID cases. REED ET AL., *supra* note

safeguards the integrity and legitimacy of the arbitral process. For the same reasons, perhaps it is also necessary for a challenge to suspend the rest of the proceeding until the disqualification request is decided. But because these requests bring the arbitration to a halt, they should be resolved expediently. And they often are not.

ICSID Arbitration Rule 9(1) provides that a party seeking to disqualify an arbitrator "shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General." This rule applies whether the ground for challenge is discovered at the time of the arbitrator's appointment or at a later stage in the case. Thus, it is left to the arbitrators and the institution to decide whether a challenge is adequately "prompt." In his commentary, Prof. Schreuer argues that Rule 9(1) means the "the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification."[59]

Tribunals have not always paid more than lip service to the promptness requirement. In the consolidated *Suez* proceeding against Argentina, the two arbitrators not subject to challenge decided that Argentina had waited too long after purportedly discovering the basis for disqualifying the claimants' appointed arbitrator.[60] However, the arbitrators did not simply refuse to consider the merits of the proposal due to its lack of timeliness. Rather, despite finding the proposal untimely, they still went on to consider the proposal on the merits.[61] And they ultimately rejected Argentina's challenge "because it was not filed in a timely manner *and* because it failed to prove any fact indicating a manifest of lack of independence or impartiality."[62] The arbitrators left unsaid whether an untimely but meritorious challenge would have succeeded. Nor did they qualify their merits consideration by saying that it was ultimately unnecessary in light of Argentina's failure to assert it promptly.

Another instructive case is *Alpha Projektholding GmbH v. Ukraine*.[63] In December 2009—nearly nine months after the merits hearing and more than six months after the final round of post-hearing submissions—Ukraine requested disqualification of the claimant's appointed arbitrator, based on supposed social relations between the arbitrator and claimant's counsel.[64] Timeliness was an obvious issue because the tribunal had been constituted years earlier, the case was nearly over, and the supposed basis for disqualifying the arbitrator—the overlapping time at Harvard Law School he shared with claimant's counsel—was easily discoverable much earlier through due diligence.[65] But in their decision, the arbitrators *began* by considering the merits of the challenge, and then, as something of an afterthought, discussed the threshold issue of timeliness.[66] Their decision "rel[ied] … upon their analysis of the merits of Respondent's

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3, at 133. Out of those 26 challenges, 17 were rejected outright. In the majority of the remaining nine challenges, the arbitrator resigned before an official decision was rendered. *Id.* at 405-408.

[59] SCHREUER ET AL., *supra* note 3, at 1200.

[60] *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17 & ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 13, 26 (Oct. 22, 2007).

[61] *Id.* ¶¶ 27-42. The *Suez* tribunal's aggravation with the lateness of Argentina's proposal, coupled with the flimsy substantive basis for the challenge, is evident in the decision. Moreover, the decision pointed out that the tribunal had functioned for four years without objection from Argentina. *Id.* ¶ 33.

[62] *Id.* ¶ 43 (emphasis added).

[63] ICSID Case No. ARB/07/16.

[64] *Alpha Projektholding*, Decision on Proposal for Disqualification of an Arbitrator ¶ 10 (Mar. 19, 2010).

[65] *Id.* ¶ 80.

[66] *Id.* ¶¶ 38-82.

Proposal rather than upon an analysis of the proposal's timing," even though the timing was questionable.[67]

Another problem with challenges is that, once brought, they are not always resolved quickly. In cases where the tribunal is already constituted, ICSID Rule 9(4) requires the non-challenged members of the tribunal (as long as they constitute a majority of it) to "promptly consider and vote on the proposal in the absence of the arbitrator concerned." When the putative arbitrator is challenged before the tribunal is constituted, under Rule 9(5) the institution is called on to use its "best efforts" to "take that decision within 30 days after [it] has received the proposal."

But neither rule is followed consistently. In *Urbaser S.A. v. Argentina*,[68] for example, the claimants requested disqualification of Argentina's appointed arbitrator. After multiple rounds of written submissions, it took nearly five months for the other two members of the tribunal to consider—and reject—the request.[69] And in *Universal Compression International Holdings, S.L.U. v. Bolivarian Venezuela*,[70] the Secretariat's decision on a double challenge came more than six months after the claimant's request, more than eight months after the respondent's request, and more than three months after all argument on the challenges was completed.[71]

How to speed up challenges? One way is to mandate a specific time limit for bringing a challenge, rather than the current vague requirement that requests be submitted "promptly." Indeed, ICSID is an outlier among arbitral institutions for lacking such a deadline; the ICC's Arbitration Rules require challenges within thirty days,[72] while the LCIA, UNCITRAL, ICDR, HKIAC, CIETAC, and SCC rules give parties just fifteen days to challenge an arbitrator.[73] In an emergency situation like a disqualification request, a bright-line deadline of no more than thirty days should be sufficient once a party learns or should have learned of the basis for disqualification.

Such a rule would provide clear guidance to parties and arbitrators, would obviate any tendency to give the benefit of the doubt to a party belatedly seeking disqualification, and would eliminate the need for the parties and decision makers to consider whether a challenge is adequately "prompt." Current jurisprudence is far from clear on when a challenge becomes untimely; in *Suez* the tribunal found that 53 days was too long, while the disqualification recommendation in *Abaclat v. Argentina* saw no problem with a challenge raised 42 days after the respondent learned the facts giving rise to the challenge.[74]

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[67] *Id.* ¶ 82.
[68] ICSID Case No. ARB/07/26.
[69] *Urbaser*, Decision on Claimants' Proposal to Disqualify an Arbitrator (Aug. 12, 2010).
[70] ICSID Case No. ARB/10/9.
[71] *Universal Compression Int'l Holdings, S.L.U. v. Venezuela*, Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal ¶¶ 11-19 (May 20, 2011).
[72] ICC Rules of Arbitration, Art. 14(2).
[73] LCIA Arbitration Rules, Art. 10.3; UNCITRAL Arbitration Rules, Art. 13(1); ICDR Int'l Arbitration Rules, Art. 8(1); HKIAC Administered Arbitration Rules, Art. 11.7; CIETAC Arbitration Rules, Art. 30(3); SCC Arbitration Rules, Art. 15(2).
[74] *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier & Prof. Albert Jan van den Berg, ¶¶ 68-69 (Dec. 19, 2011).

If an arbitrator challenge is not brought within the proper timeframe, it should be rejected on that basis alone. Although the decision makers in such a case might also address the merits of the challenge to safeguard the legitimacy of the decision, they can also make clear that tardiness is by itself sufficient grounds for rejection. Or, as in *CEMEX v. Venezuela*,[75] they can simply find that the party seeking disqualification waited too long to bring its challenge—in that case, five months—and dismiss the challenge without reaching the merits.[76]

Another way to speed resolution of challenges is to make the 30-day time limit for disqualification decisions under Rule 9(5) mandatory rather than hortatory, and to have the rule apply to both tribunals (who usually rule on challenges) as well as the institution. Tribunals should treat proposals to disqualify as emergency motions, because the case cannot go forward until they are resolved. An arbitrator who is too busy to expediently address such an emergency motion may reconsider whether to accept the appointment in the first place.

Cost-shifting is another potential safeguard against meritless arbitrator challenges (though if the stakes are high enough a party might still mount a challenge likely to fail). A party that asserts an unsuccessful challenge should be immediately required to pay the other side's costs of responding to the challenge. This result should be ordered as a matter of course after unsuccessful challenges, regardless of the outcome of the proceeding as a whole. And payment should be ordered promptly after the decision on the proposal, rather than awaiting the final award. Having the prospect of immediate payment being due if a challenge is unsuccessful—as most are—would focus the requestor's mind more than the possibility of these fees being a small part of a final award that may be years away.

V. Make Rule 41(5) Work Harder

First adopted in April 2006, ICSID Arbitration Rule 41(5) provides that "a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit." Rule 41(5) was designed to "make it clear … that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits."[77]

Although Rule 41(5) is a welcome addition to the rules for anyone who wants to speed up the ICSID process, it nonetheless can be improved to become a more robust tool for early resolution of claims or cases. First, the standard for dismissing a claim under the rule should be eased to make early dismissal more attainable. Second, the use of the rule as a vehicle for jurisdictional objections creates unnecessary redundancies.

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[75] ICSID Case No. ARB/08/15.
[76] *CEMEX*, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal ¶¶ 44-45 (Nov. 6, 2009).
[77] Working Paper of the ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations (May 12, 2005), at 7. *See also* A. Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 Foreign Inv. L.J. 427, 439 (2006); Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INT'L ARBITRATION CONFERENCE 516−517 (A.J. van den Berg ed., 2009).

A. A Short History of Rule 41(5)

For the first couple of years of its existence, Rule 41(5) was used little in ICSID proceedings. The first published decision on a Rule 41(5) objection came in May 2008 in *Trans-Global Petroleum Inc v. Jordan*.[78] The tribunal rejected the respondent's objection to two of the claimant's three claims.[79] But the tribunal found that the third claim—which alleged breach of Article VIII of the United States-Jordan bilateral investment treaty—was manifestly without legal merit.[80] This ruling came after claimant's counsel, during the tribunal's first session, *acknowledged* that, "on reflection," this claim was "manifestly without legal basis."[81] Counsel agreed to withdraw the claim, and thus the tribunal treated the claim as "formally and finally withdrawn" rather than dismissing it on the merits.[82]

The next Rule 41(5) objection in an ICSID proceeding was less successful. In early 2009, in *Brandes Investment Partners, LP v. Venezuela*,[83] the tribunal rejected the respondent's objection in its entirety.[84]

But at the end of 2010, two tribunals applied Rule 41(5) in dramatic fashion. On December 1, in *Global Trading Resource Corp. v. Ukraine*, for the first time an ICSID tribunal ordered dismissal of all claims pursuant to a Rule 41(5) objection and issued an award on that basis.[85] Specifically, the tribunal concluded that the commercial transactions that gave rise to the claims were not "'investments' within the meaning of Article 25 of the ICSID Convention" and that the tribunal therefore lacked jurisdiction to hear the case.[86]

Then, just nine days after the *Global Trading* award, *another* ICSID tribunal resolved an action following a Rule 41(5) objection. In *RSM Production Corp. v. Grenada*, the tribunal held that all of the claimants' claims had effectively been resolved by the decision of a prior ICSID tribunal in a proceeding that had arisen out of essentially the same facts.[87] The tribunal thus dismissed all of the claimants' claims.[88]

The one-two punch of *Global Trading* and *RSM* turned out to be a coincidence rather than a foreshadowing of widespread Rule 41(5) dismissals. Since 2009 no ICSID tribunal has dismissed a case on a Rule 41(5) objection, and few have been asked even to consider such objections.

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[78] ICSID Case No. ARB/07/25.
[79] *Trans-Global Petroleum Inc. v. Jordan*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules ¶¶ 108-117 (May 12, 2008).
[80] *Id.* ¶ 119.
[81] *Id.* One imagines that this was a highly strategic concession, and perhaps one that resulted from highly skeptical questioning by the tribunal.
[82] *Id.* ¶ 120.
[83] ICSID Case No. ARB/08/3.
[84] *Brandes Investment Partners, LP v. Venezuela*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules ¶ 73 (Feb. 2, 2009).
[85] ICSID Case No. ARB/09/11, Award ¶ 58 (Dec. 1, 2010).
[86] *Id.* ¶ 57.
[87] ICSID Case No. ARB/10/6, Award § 7.2 (Dec. 10, 2010).
[88] *Id.* § 9.1(a).

In January 2013, in *Accession Mezzanine Capital L.P. v. Hungary*, the tribunal granted in part and denied in part Hungary's Rule 41(5) objection.[89] The tribunal held that only expropriation claims fell within ICSID's jurisdiction under the applicable bilateral investment treaty (BIT) between Hungary and the United Kingdom.[90] However, the decision had little practical effect because the claimants had already conceded that Hungary had not consented to non-expropriation claims.[91]

Two months later, a similar result happened in a related action against Hungary. In *Emmis International Holding B.V. v. Hungary*, the tribunal narrowed the claims but did not dismiss the case entirely.[92] The tribunal again held that the claimants' non-expropriation claims were outside its jurisdiction, but that their expropriation claim would go forward.[93]

Most recently, two other tribunals have issued Rule 41(5) decisions. In April 2013, in *Pan American Energy LLC v. Bolivia*,[94] the tribunal issued a decision on the respondent's Rule 41(5) objections. In July 2013, the tribunal in *Vattenfall AB v. Germany*[95] did the same. As of October 2013 neither decision had been made public, but proceedings continued after the decisions, indicating that the decisions did not dispose of either case.[96]

B. Does Rule 41(5) "Manifestly" Set Too High a Bar?

Of the hundreds of claims to come before ICSID tribunals since 2006,[97] exactly one has been found to manifestly lack legal merit: the Article VIII claim in *Trans-Global*. The few other partial or complete Rule 41(5) dismissals were based on either lack of jurisdiction or (as in *RSM*) preclusion.

The dearth of merits dismissals calls into question whether the rule is working as former ICSID Deputy Secretary-General Antonio Parra says it was intended: to provide "for the early dismissal by arbitral tribunals of patently unmeritorious claims."[98] Whatever esteem one might hold for the restraint of ICSID claimants and their counsel, it is hard to imagine that only one legal claim worthy of early dismissal has been brought before ICSID since Rule 41(5) was adopted.

To understand how tribunals have treated Rule 41(5), it is useful to go back to the first application of the rule. The *Trans-Global* tribunal observed that it was in uncharted waters as the first panel to be called upon to consider an objection under the rule.[99] The tribunal closely

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[89] ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5) ¶ 78 (Jan. 16, 2013).
[90] *Id.* ¶ 77.
[91] *Id.* ¶ 64.
[92] ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) ¶ 85 (Mar. 11, 2013).
[93] *Id.*
[94] ICSID Case No. ARB/10/8.
[95] ICSID Case No. ARB/12/12.
[96] In each case, the claimants submitted their memorials on the merits in September 2013.
[97] *See* The ICSID Caseload—Statistics, No. 2013-2, at 7.
[98] A. Parra, *The Development of the Regulations and Rules of the Int'l Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 56 (2007).
[99] *Trans-Global*, Decision on the Respondent's Objection under Rule 41(5) ¶ 72.

examined the use of the words "manifestly" and "without legal merit" in Rule 41(5).[100] Regarding the word "manifestly," the tribunal observed:

> [T]he ordinary meaning of the word requires the respondent to establish its objection *clearly and obviously, with relative ease and despatch*. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognizes that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but *it should never be difficult*.[101]

The tribunal concluded that "the rule is directed only at clear and obvious cases."[102]

Thus, the *Trans-Global* decision set quite a high bar. To meet the "manifest" standard defined in the rule, the tribunal required the respondent not only to show that a claim is meritless, but that it do so easily. Subsequent tribunals that considered Rule 41(5) objections have adopted the *Trans-Global* tribunal's reasoning that only easy objections can succeed under the rule.[103]

Perhaps this is the correct reading of the current wording of Rule 41(5), but does it render the rule nearly toothless? Should Rule 41(5) merits dismissals be achievable only where a claim is so weak that—as in *Trans-Global*—even the claimant's own lawyer admits that it should be dismissed? Did the drafters of Rule 41(5)—who were addressing a perceived problem with meritless claims—really expect just one merits dismissal in seven years?

Tribunals' current treatment of merits-based objections under Rule 41(5) may be the worst of both worlds—both cumbersome and usually inconsequential. After an objection is filed under the rule, we get "successive rounds of written and oral submissions by the parties"[104] that can last several months, followed by possibly extended deliberations.[105] But at the end of that process, the tribunal will only dismiss a claim on the merits if it can do so with "relative ease and dispatch." Respondents know that a Rule 41(5) objection is hard to win, and may refrain from objecting even to claims that they believe will ultimately prove meritless.[106]

A solution is simply to eliminate the word "manifestly" in Rule 41(5). If a claim is legally deficient, it should not survive early dismissal simply because it merely is "without legal merit" but not "manifestly" so. It is one thing if a case presents significant factual questions that can only be resolved after evidentiary exchanges and witness testimony. But if a tribunal has a purely legal question in front of it, or one that hinges on undisputed facts, should it not try to

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[100] *Id.* ¶¶ 83-104.
[101] *Id.* ¶ 88 (emphasis added).
[102] *Id.* ¶ 90; *see also id.* ¶ 105 ("[A]s regards the word 'manifestly', the Tribunal requires the Respondent's Objection to meet the test of clarity, certainty and obviousness discussed above.").
[103] *See Brandes*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules ¶¶ 63-64; *Global Trading*, Award ¶ 35; *RSM Production Corp.*, Award §§ 6.1.1-2.
[104] *Trans-Global*, Decision on the Respondent's Objection under Rule 41(5) ¶ 88.
[105] To its great credit, the *Trans-Global* tribunal took less than three weeks to render its Rule 41(5) decision after hearing oral argument. *Id.* ¶ 22.
[106] They also may refrain in part because Rule 41(5) does not have an equivalent in other major arbitral rules, thus rendering practitioners unfamiliar with its potential.

resolve that question sooner rather than later? Written exchanges and an oral hearing on the legal question at the Rule 41(5) stage is just as likely to lead to a proper answer as argument much further along in the process.

If the standard for asserting a successful Rule 41(5) objection is lowered, there is some risk that parties will start to bring these objections as a matter of course, making ICSID proceedings even longer and more costly. But the rare Rule 41(5) dismissals have allowed for very fast disposition of cases. Making it easier to succeed on a Rule 41(5) objection will logically lead to more dismissals under the rule. On balance, that will dramatically shorten these proceedings, even if there are some cases that get stretched out by meritless Rule 41(5) objections. Moreover, to ensure that a Rule 41(5) objection does not delay up the process, ideally a tribunal's first session will double as the oral argument on the objection.

C. Rule 41(5), Registration, and Jurisdictional Objections: Too Many Belts and Suspenders

Of the few Rule 41(5) objections that have succeeded at all, the majority were due to a lack of jurisdiction. Jurisdiction was the basis for the *Global Trading* award and the partial dismissals in *Accession* and *Emmis*. The emphasis on jurisdiction in Rule 41(5) objections and awards highlights another flaw in the rule. Using Rule 41(5) primarily to weed out claims that "manifestly" lack jurisdiction renders the Secretariat's pre-registration scrutiny redundant, while failing to allow for a tribunal's robust consideration of jurisdiction early in a case.

Treating Rule 41(5) primarily as a filter for obvious jurisdictional deficiencies also runs counter to the original intent of the rule. As discussed, ICSID's 2005 Working Paper on proposed changes to the Arbitration Rules stated that the rule was being added so "that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim *on the merits*."[107] In 2007, Antonio Parra observed:

> In accordance with Article 36 of the ICSID Convention, the power of the Secretariat to refuse registration of arbitration requests is limited to those that disclose a manifest lack of jurisdiction. The Secretariat is powerless to prevent the initiation of proceedings that *clear this jurisdictional threshold, but are frivolous as to the merits*. This had been a source of recurring complaints from some respondent governments. One of the amendments to the ICSID Arbitration Rules made in 2006 was to introduce a procedure, in Rule 41, for the early dismissal by arbitral tribunals of patently unmeritorious claims.[108]

Thus, according to both the Working Paper and Mr. Parra, Rule 41(5) was designed to focus on claims that are manifestly deficient on the merits. Claims that manifestly lack jurisdiction were supposed to be screened by the Secretariat during the registration process.

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[107] Working Paper of the ICSID Secretariat, *supra* note 77, at 7 (emphasis added).
[108] Parra, *supra* note 98, at 56 (emphasis added); *see also Trans-Global*, Decision on the Respondent's Objection under Rule 41(5) ¶ 78 (citing article).

There is, nonetheless, some basis for allowing Rule 41(5) objections based on lack of jurisdiction. In an article on the 2006 amendments, ICSID Legal Counsel Aurelia Antonietti explained:

> The Discussion and the Working Papers did not necessarily encompass expedited objections to jurisdiction. However, in light of the discussions which followed the Working Paper and given the comments received, it has appeared that expedited objections on jurisdiction could not be ruled out of the scope of Rule 41(5). Accordingly, Rule 41(5) does include expedited objections to jurisdiction although it was primarily designed to dismiss frivolous claims on the merit.[109]

But is allowing jurisdictional Rule 41(5) objections an exception that swallows the rule? And does it cause more work and aggravation than it saves?

A look at Rule 41(5) objections that have addressed jurisdiction bears this out. In *Brandes*, the tribunal acknowledged that a jurisdictional challenge under Rule 41(5) was redundant—not only to the consideration of jurisdiction that is supposed to happen at the registration stage, but also to the tribunal's ability to consider jurisdictional challenges under Rule 41(1).[110] Nonetheless, the tribunal found that lack of jurisdiction was an appropriate basis for a Rule 41(5) challenge[111] (though it went on to reject the challenge).[112]

Brandes raises the question of what the point was of allowing Rule 41(5) to provide yet another avenue for a jurisdictional objection. After the initial request for arbitration was submitted to ICSID, the Secretariat took over six weeks to register the case.[113] During that time, the Secretariat was supposedly charged with performing essentially the same task that the tribunal was later asked to do: determine whether Brandes Investment Partners' claims manifestly lacked jurisdiction. And two and a half years after rejecting Venezuela's Rule 41(5) jurisdictional objection, the tribunal's award dismissed all claims based on lack of jurisdiction after all.[114]

The January 2013 decision in *Accession Mezzanine Capital* also shows the problem of redundancy. Registration of the case took nearly three months, as Hungary objected to registration and the claimants eventually amended their request for arbitration.[115] The respondent nonetheless raised another jurisdictional objection through Rule 41(5), and the tribunal denied it except with respect to non-expropriation claims that the claimants had already disclaimed.[116] One again wonders what the point was of the tribunal going through a similar jurisdictional exercise to the one that the Secretariat had done earlier, particularly where the registration process had been a robust and contested one.

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[109] Aurelia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. 439-440 (2006).
[110] *Brandes*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules ¶ 46.
[111] *Id.* ¶ 54.
[112] *Id.* ¶ 73.
[113] *Id.* ¶¶ 1-2.
[114] *Brandes*, Award ¶ 121 (Aug. 2, 2011).
[115] *Accession Mezzanine Capital*, Decision on Respondent's Objection under Arbitration Rule 41(5) ¶¶ 7-11.
[116] *Id.* ¶¶ 65, 77.

Finally, in *Emmis*, the registration of the case grew out of the same drawn-out process that gave rise to *Accession*.[117] But unlike the relatively quick Rule 41(5) process in *Accession*, in *Emmis* it took more than six months between the objection and the ruling—only to have the tribunal allow the claimants' expropriation claims to go forward. Hungary then raised another jurisdictional objection to the remaining claims, and in June 2013, the tribunal agreed to bifurcate the case, suspend all proceedings related to the merits, and hold a "preliminary" hearing on Hungary's challenge to jurisdiction.[118] Thus, the respondent was allowed three bites at the jurisdictional apple, with any consideration of the merits of the case years down the road.[119]

A solution to the registration-Rule 41(5) redundancy is, again, to delete the word "manifestly" from the Rule. This change would allow a tribunal to fully consider whether it has jurisdiction at an early stage, while preserving the Secretariat's screening function for cases that are manifestly outside ICSID's jurisdiction.[120]

D. Whither Rule 41(5)?

Despite its shortcomings, does Rule 41(5) work at all in its current form? If its purpose is to dispose of certain cases with relative dispatch, absolutely. As discussed, only two cases to date have been resolved via Rule 41(5) objections. But those two cases were closed with remarkable speed by ICSID standards: the *Global Trading* award came just over seventeen months after the request was filed and the *RSM* award took only eleven months.[121] These were by far the two fastest awards in 2010—the next fastest 2010 award came twenty-eight months after the request[122]—and indeed were two of the fastest awards in the history of ICSID.

Moreover, decisions under ICSID Rule 41(5), even if they do not dispose of a case entirely, can narrow and refine the issues before the tribunal. That way, patently deficient claims do not have to proceed all the way through a merits hearing—a common problem in international commercial arbitration.[123] The partial rulings in the respondents' favor in *Trans-Global*, *Emmis*, and

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[117] *Emmis*, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) ¶¶ 7-11. The *Emmis* and *Accession* claimants initially brought their claims in a single action, but later separated into two groups with separate Requests after the Secretariat admonished them that Hungary had not consented to a consolidated action. *Id.* ¶¶ 9-10.

[118] *Emmis*, Decision on Respondent's Application for Bifurcation ¶ 57 (June 13, 2013).

[119] A respondent's multiple chances to oppose jurisdiction—where any, if successful, will end the proceeding—arguably also put claimants at an unfair disadvantage. This is particularly so where the grounds for annulment are so narrow. Although the ICSID Secretariat does not ask putative respondents for jurisdictional submissions at the registration stage, respondents may nonetheless submit comments on their own initiative. *See* Polasek, *supra* note 42, at 180. Polasek nonetheless argues that "ICSID has never refused to register a request on the basis of an objection from a respondent." *Id.* at 181.

[120] Amending Rule 41(5) in this way might render Arbitration Rule 41(1) partially obsolete, but this would be a good thing. Rule 41(1) allows a party to object to jurisdiction "no later than the expiration of the time limit fixed for the filing of the countermemorial." But under Rule 41(5), a party could object to jurisdiction even earlier. However, there would still be a place for jurisdictional objections under Rule 41(1), in cases where a jurisdictional determination requires consideration of contested evidence that cannot be resolved under Rule 41(5).

[121] *Global Trading* Award, ¶ 4 (request for arbitration filed on May 21, 2009; award issued Dec. 1, 2010); *RSM* Award § 1.1.1 (request for arbitration filed Jan. 15, 2010; award issued Dec. 10, 2010).

[122] *See ATA Construction, Industrial & Trading Co. v. Jordan*, ICSID Case No. ARB/08/2 (request for arbitration received Jan. 8, 2008; award issued May 18, 2010).

[123] *See* A. Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in Int'l Arbitration*, 48

Accession may have allowed the parties and the tribunal to focus only on the strongest legal claims. In *Trans-Global*, the parties reached a settlement about ten months after the Rule 41(5) decision, which may have sufficiently forecast the path the rest of the case would take that it brought the parties to the bargaining table.[124] It is less clear, however, whether these early refinements of the issues before the tribunal truly do have the effect of lowering the parties' costs and shortening the time before the case as a whole is disposed of.

E. Treaty Alternatives to Rule 41(5)

The ICSID Rules are not the final word on how a party may seek early disposition of a case. An investment treaty that forms the basis for an arbitration can provide an alternate route to early resolution. In particular, the current U.S. Model BIT includes a rough equivalent to a robust motion to dismiss. Article 28(4) of the Model BIT provides:

> [A] tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made ….[125]

The model provision requires an objection to be "submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial."[126] But the provision also encourages quick resolution of preliminary objections. If an objection is raised within 45 days after constitution of the tribunal, the tribunal is required to render a decision within 150 days (or 180 days if a hearing is requested).[127] The provision allows the tribunal extra time to decide objections "on a showing of extraordinary cause," but limits such extensions to 30 days.[128] So at most, a preliminary objection must be briefed, argued, and resolved within 210 days.

Many recent treaties have adopted the U.S. model language.[129] And the provision has been used to resolve at least one ICSID case.[130] In *Commerce Group Corp. v. El Salvador*, a case brought under CAFTA-DR, the respondent raised a preliminary objection under Article 10.20 of the Agreement shortly after the tribunal's first session.[131] After expedited briefing and a one-day hearing, the tribunal credited El Salvador's objection and issued an award dismissing the claims as outside its jurisdiction.[132] The award came exactly 210 days after the objection had been

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ARBITRATION INT'L 487, 487-488 (2012).

[124] *Trans-Global*, Award of the Tribunal Embodying the Parties' Settlement Agreement ¶ 9 (Apr. 8, 2009).

[125] 2012 U.S. Model Bilateral Investment Treaty, Art. 28(4), *available at* http://www.state.gov/documents/organization/188371.pdf.

[126] *Id.* Art. 28(4)(a).

[127] *Id.* Art. 28(5).

[128] *Id.* Less helpfully, the model BIT sets a high bar for cost shifting in these preliminary objections. It provides that "[i]n determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous." *Id.* Art. 28(6).

[129] *See, e.g.*, Rwanda-U.S. BIT Art. 28(4)-(5) (2008); Panama-U.S. Trade Promotion Agreement Art. 10.20(4)-(5) (2007); U.S.-Uruguay BIT Art. 28(4)-(5) (2005).

[130] In another case, the respondent raised an objection under the CAFTA-DR provision that was rejected. Decision on Objection to Jurisdiction, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23 (Nov. 17, 2008).

[131] ICSID Case No. ARB/09/17, Award ¶ 33 (Mar. 14, 2011).

[132] *Id.* ¶¶ 35-47, 140.

submitted.[133] The case as a whole took twenty months from its inception to the award, which is by far the fastest ICSID award since the two Rule 41(5) dismissals in 2010. The relatively speedy award in *Commerce Group* shows how a treaty provision can provide an alternative avenue to early resolution of a case.

VI. Take Control of the Schedule for Written Memorials

The period between the constitution of a tribunal and the merits hearing is the heart of an ICSID arbitration, in which the primary written arguments and exchanges of evidence take place. Of the thirty-one cases in which awards were issued in 2011 and 2012, the average case took 979 days, or 32 months, from the constitution of the tribunal to the start date of the hearing (or the final hearing in cases with more than one).[134] Because of a few outliers that skewed the average, the median time was somewhat shorter, at 780 days or 26 months. This is still substantially more time than the already lengthy historical average, which was 637 days according to the 2009 Allen & Overy study.[135] And it is dramatically longer than, for example, WTO disputes, which normally take no more than six months from the constitution of the panel to the issuance of its final report, and can never take more than nine months, including all the written submissions, hearings, and deliberations in between.[136]

Why does this stage of an ICSID case take as long as it does?

A. First Session Delays

ICSID's rules provide that a tribunal should hold its first session within sixty days after it is constituted, "or such other period as the parties may agree."[137] This wiggle room in the rule creates the first potential delay. If the members of a tribunal do not want to meet until more than 60 days after they are constituted, few parties will be so bold as to refuse to agree. Moreover, a party whose counsel announce they cannot attend a hearing within sixty days will also likely be accommodated. The result is that the sixty-day limit is, to cite Hamlet, as honored in the breach as in the observance—of the nineteen cases in which awards were issued in 2012, ten took more than sixty days between the constitution of the tribunal and the first session.[138] This common delay seems especially inexplicable where tribunals are increasingly holding their first sessions telephonically.

B. Memorials and Countermemorials

But by far the biggest cause of post-constitution delays in ICSID arbitrations is the lengthy process for written submissions. The main reason for the drawn-out period is not the number of

[133] The award did not explain what "extraordinary cause" justified issuing the decision 210 days after the objection rather than 180 days.
[134] List of cases on file with author.
[135] Sinclair et al., *supra* note 4, at 5.
[136] World Trade Organization, Uruguay Round Report, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 12, §§ 8-9.
[137] ICSID Arbitration Rule 13(1).
[138] List of cases on file with author.

written memorials—normally two per side unless the proceeding is bifurcated, or other particular issues come up[139]—but rather the length of time that parties are given between submissions.

As we know, arbitral submissions tend to be gargantuan in length and often take a long time to prepare. The magnitude of these submissions is a kind of trade-off with the motions practice typical in litigation in some countries, where the parties exchange numerous, but shorter, papers over the course of the dispute. But the overall process still tends to take longer in investment arbitration than in court. And it is certainly longer than is typical in even highly complex commercial arbitrations.

Although many parties complain about the length of ICSID proceedings, the schedule of written memorials is one area where the parties themselves are largely responsible for how long it takes.[140] While the tribunal may initially propose a schedule after it is constituted, the parties will typically offer input before the tribunal issues a final scheduling order.

This practice is reinforced by the ICSID Rules, which encourage the parties to take the driver's seat on the schedule. Arbitration Rule 20 provides that the tribunal president "shall endeavor to ascertain the views of the parties regarding questions of procedure," including "the number and sequence of the pleadings and the time limits within which they are to be filed."[141] Although the ICSID Secretariat typically sends the parties a draft agenda in advance of the first session,[142] in practice the tribunal will tend to "adopt the procedural sequence and schedule agreed by the parties."[143]

From a party autonomy perspective there is nothing wrong with party input into the timetable for written submissions. But the result can be a drawn-out schedule. Moreover, a long process, even if agreed to by the parties, may be primarily driven by one party. The other side may prefer a faster proceeding but may be hesitant to bring a scheduling dispute to the tribunal, preferring to pick its battles.

One solution is to have the tribunal issue a tentative scheduling order before it gets input from the parties, and make clear from the outset that it will not respond kindly to party proposals that deviate significantly from that schedule. The tribunal's proposal will provide an anchor, and a heavy one—a party that asks to significantly lengthen the tribunal's desired schedule will be risking its ire early in the proceeding.

A more aggressive solution is to modify the ICSID Arbitration Rules to provide a default schedule—perhaps 60 or 90 days for the memorial and countermemorial, and 30 or 45 days for the reply and rejoinder. Though tribunals may depart from this schedule at their discretion, having these numbers set forth in the rules may help establish new norms.

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[139] ICSID Arbitration Rule 31(1).
[140] *See, e.g.*, J. Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 29 ARBITRATION INT'L 452, 452 (2013) (arguing that "it is the parties themselves and their attorneys who are responsible for" excessively lengthy and expensive arbitrations").
[141] ICSID Arbitration Rule 20(1)(c).
[142] *See* REED ET AL., *supra* note 3, at 137.
[143] *Id.* at 138.

Requiring quicker turnaround for written submissions will probably not have a significant impact on the quality of those submissions. Most lawyers—like most people—fill up whatever time they are given. If they have a month to file a paper, they complete it on the last day of the month. If they have a year to do it, the submission is finished on day 365, probably at 11:58 PM. If you give parties a stricter time limit to complete their work, they will get it done in the time they need to. True, the submission may be 5% less polished or comprehensive than it would have been had they more time, but diminishing marginal returns are a fact of life in legal writing.

A proponent of generous scheduling may argue that arbitral memorials are a major undertaking not simply because of the substantial drafting required, but also because of the fact investigation necessary for a party to put on a case or defense. Factual investigation is indeed often a major task in an arbitration, as it is in any legal dispute—whether arbitration or litigation, or for that matter whether civil or criminal. But again, this does not explain why the evidence gathering process in investment arbitrations has to longer than in other types of disputes.[144]

Moreover, once an investment dispute arises, many months often pass before the parties *begin* writing their memorials, thanks to the earlier stages of the arbitration as well as the time that can elapse before the arbitration even commences. For example, in *Swisslion v. Macedonia*, which was one of the fastest awards of 2012, the claimant submitted its memorial nearly sixteen months after its request for arbitration.[145]

Accordingly, schedules should reflect the parties' opportunity to investigate facts and even start drafting memorials well before the tribunal issues its first scheduling order. Parties can—and those with competent counsel almost invariably will—gather the bulk of their facts well before the tribunal issues a scheduling order for the submission of memorials and countermemorials. If, as is common, months have passed since the request for arbitration, a tribunal issuing its first scheduling order need not give the claimant another 90 days to submit its memorial. If this expectation becomes a norm of practice, claimants will have less ground to complain when they are given a tight schedule after numerous idle months between the request and the tribunal's first session. If the preliminary stages of a proceeding have taken months, a claimant should be prepared to submit its memorial not long after the tribunal has been constituted.

Notably, this is how the process already works with respect to interim measures. When a party applies for interim relief at the outset of an ICSID case, the Secretariat sets a briefing schedule so that the tribunal can make a decision shortly after it is constituted. If a claimant is capable of briefing interim measures before constitution of the tribunal, it is equally capable of beginning to draft its memorial from the start of a case.

There are other potential ways to shorten the written memorial process. In the context of commercial arbitration, Joerg Risse recommends limiting parties' *total* written submissions to 100 pages.[146] Though quite tempting, it is unclear how realistic this is for investment arbitrations given their frequently enormous complexity and the jurisdictional questions that often arise. More importantly, limiting the size of submissions will not, by itself, necessarily reduce the time

[144] The fact that a state is a party in investment arbitration is often held up as a reason for needing to allow for great time for evidence gathering. This argument is discussed in section X.C below.
[145] ICSID Case No. ARB/09/16, Award ¶¶ 1, 9 (July 6, 2012).
[146] Risse, *supra* note 140, at 455.

devoted to writing them. Risse himself cites the oft-quoted remark—which Risse credits to Goethe, but has also been attributed to Blaise Pascal, Mark Twain, Voltaire, and numerous others—"I have made this letter longer than usual because I have not had time to make it shorter."[147]

At the same time, however, limiting the length of memorials might well improve their *quality*, as it will require the parties to focus their arguments. Even if limited memorials do not take the parties less time to produce, they might provide clearer and narrower guidance to the tribunal, enabling it to issue an award more quickly. Moreover, there is a particularly good case for limiting the size of submissions in annulment proceedings, as discussed in section IX.D below.

Joerg Risse also suggests dispensing with written witness statements, instead allowing parties to "'offer' a witness by specifying who the witness is and to which (concrete) facts the witness can testify" orally.[148] Apart from handicapping parties whose cases rely heavily on personal recollections, this change might not save much time and effort. Counsel, though freed from the burden of preparing witness statements, would likely have to take a comparable amount of time drafting a list of facts about which a witness may testify.[149] Such a change would also lengthen the oral hearings themselves.

C. Set a Higher Standard for Extensions

A related problem in the written leading process is the routine granting of extensions. Often, an initially reasonable schedule is departed from as both parties request extensions. As Brigitte Stern has explained, "most of the delays" in arbitration "are the result of time extensions requested by the parties."[150] And when one party gets an extension the other side will usually get the same extension, doubling the delay.[151]

To preserve the integrity of a case schedule, tribunals should not grant extensions as a matter of course. The current ICSID Arbitration Rules set no standard for whether to grant an extension. They simply provide that "[t]he Tribunal may extend any time limit that it has fixed."[152] In practice, requests are granted where the request is "well-grounded."[153] Perhaps the rules should be modified to set a specific standard, such as allowing an extension only "on a showing of extraordinary cause," to borrow a phrase from the U.S. Model BIT.

A creative tribunal could also require parties seeking an extension to offer something in return to "reimburse" the other side and the tribunal for their inconvenience. The party might offer to take less time than originally scheduled for a subsequent filing, or give up several hours to present its

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[147] *Id.*
[148] *Id.* at 457.
[149] However, there *is* a strong case for dispensing with witness statements as a *separate* submission stage, which some tribunals include in procedural timetables. Rather, witness statements should be submitted with primary written memorials, and be subject to the same deadlines as the memorials themselves.
[150] *See, e.g.*, Quinn Emanuel Urquhart & Sullivan LLP, *An Interview with the Honorable Charles N. Brower and Professor Brigitte Stern*, Arbitration Trends (Winter 2013).
[151] SCHREUER ET AL., *supra* note 3, at 696.
[152] ICSID Arbitration Rule 26(2).
[153] SCHREUER ET AL., *supra* note 3, at 696.

case at the hearing, or even offer some monetary incentive. This requirement could be laid out in the tribunal's initial scheduling order, so that no party can complain it is being surprised.

Granted, a tribunal cannot go too far in setting and enforcing a schedule that is anathema to the parties. In theory, Article 44 of the ICSID Convention allows the parties to agree to depart from the Arbitration Rules.[154] But most parties will be loath to anger a tribunal by demanding major departures from the existing rules. And even fewer parties will be able and willing to unite with the other side to mandate such a departure.

D. Limit Post-Hearing Submissions to Narrow Issues

Tribunals vary in how they handle post-hearing submissions. Some tribunals ask for focused briefing that addresses particular questions, while in other cases the parties make massive submissions that recap every issue in the case. The latter practice is unnecessary and time-consuming; by the time a hearing is over the parties have already had ample opportunity to present their cases in writing and orally. The tribunal does not need yet another doorstop that rehashes what came before. Likewise, multiple rounds of post-hearing submissions are rarely necessary,[155] other than to provide psychic satisfaction to counsel who insist on always getting the last word.[156]

Accordingly, allowing the parties a single, simultaneous round of short, focused post-hearing memorials that addresses only specific, unresolved questions posed by the tribunal is the best way to save time and money. Moreover, requiring post-hearing memorials only on narrow issues will allow the tribunal to focus on the rest of the case, and perhaps begin drafting an award, upon conclusion of the hearing.

VII. Bifurcation: Cutting Up a Case with a Double-Edged Sword

Many ICSID proceedings are bi- or trifurcated—some between jurisdictional and merits stages, others between merits and quantum stages.[157] In theory, bifurcation allows the tribunal to address threshold issues before expending effort on matters that may not be relevant to the ultimate outcome of the case. In practice, "when ICSID tribunals deal with jurisdictional objections as preliminary questions, this may add a year or more to the duration of an ICSID arbitration."[158]

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[154] ICSID Convention Art. 44 ("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." (emphasis added)); *see also* SCHREUER ET AL., *supra* note 3, at 676-682 (discussing parties' freedom to agree to depart from the rules and limitations on that freedom).

[155] A narrow exception might be cost submissions, a discrete subject that can only realistically be raised at the end of a case, is normally unrelated to the merits of the dispute, and in which each party is typically given the opportunity to respond to the other side.

[156] The author pleads entirely guilty to this affliction.

[157] *See generally* M.V. Benedettelli, *To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question*, 29 ARBITRATION INT'L 492 (2013); L. Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. INT'L ARBITRATION 105, 107 (2011); B.J. Vasani, *Bi-Trifurcation of Investment Disputes*, in ARBITRATION UNDER INT'L INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES 121-127 (K. Yannaca-Small ed., 2010); I. Uchkunova, *Bifurcation Of Proceedings In ICSID Arbitration: Where Do We Stand?*, Kluwer Arbitration Blog (Aug. 15, 2013).

[158] REED ET AL., *supra* note 3, at 143.

The ICSID Convention requires a tribunal to consider jurisdictional objections, but gives the tribunal the discretion to "determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."[159] Likewise, ICSID Arbitration Rule 41(3) provides that "[u]pon the formal raising of an objection relating to the dispute, the Tribunal *may* decide to suspend the proceeding on the merits."[160]

A. Bifurcation Is More Likely to Lengthen than Shorten a Case

If a tribunal dismisses a case for lack of jurisdiction before reaching the merits, this can certainly shorten the proceeding. But does the quick resolution of some cases justify the lengthening of others? Although jurisdictional objections in investment proceedings are ubiquitous,[161] less than a quarter of ICSID cases are dismissed for lack of jurisdiction.[162] And when a case is bifurcated and the tribunal eventually decides it does have jurisdiction, the predicted "year or more" added to the case is actually a very optimistic assessment. Out of fourteen cases initiated since 2003 in which the tribunal issued separate publicly available jurisdictional decisions and final awards, on average it took 38 months between the jurisdictional finding and the award, and no case took less than 23 months.[163] The trade-off may not be worth it: a 2011 study of ICSID cases found that bifurcated cases took, on average, more than half a year longer to resolve than non-bifurcated cases.[164] Although that finding does not necessarily prove causation—cases that tribunals

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[159] ICSID Convention Art. 41(2).

[160] ICSID Arbitration Rule 41(3) (emphasis added). Before the 2006 amendments to the ICSID Arbitration Rules, Rule 41(3) required tribunals to bifurcate proceedings to deal with jurisdiction before addressing the merits.

[161] *See* SCHREUER ET AL., *supra* note 3, at 524-525.

[162] The ICSID Caseload—Statistics, No. 2013-2, at 14. ICSID does not publish the "success rate" of jurisdictional objections, or the number of cases where a respondent opposed jurisdiction. But a 2007 empirical study of ICSID and other investment arbitrations found that of 87 published decisions that addressed jurisdiction, only ten tribunals found that they entirely lacked jurisdiction and dismissed all claims on that basis. Franck, *supra* note 3, at 52. And a 2007 survey of more than 200 investment treaty awards found that only 16% of jurisdictional challenges were successful. R.E. Walck, Current Statistics on Investment Treaty Arbitration, at 7 (May 2, 2007), *available at* http://www.gfa-llc.com/images/Current_Statistics_on_Investment_Treaty_Arbitration_-_No_Notes__Compatibility_____Mode_.pdf.

[163] *See Millicom Int'l Operations B.V. v. Senegal*, ICSID Case No. ARB/08/20 (Decision on Jurisdiction July 16, 2010, Award November 27, 2012); *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*, ICSID Case No. ARB/08/8 (Decision on Jurisdiction Mar. 8, 2010, Award Mar. 1, 2012); *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15 (Decision on Jurisdiction July 6, 2007, Award Mar. 3, 2010); *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12 (Decision on Jurisdiction Sept. 11, 2009, Award June 7, 2012); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Decision on Jurisdiction Apr. 18, 2008, Award May 6, 2013); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 (Decision on Jurisdiction July 6, 2007, Award Mar. 3, 2010); *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7 (Decision on Jurisdiction Mar. 21, 2007, Award June 30, 2009); *LESI, S.p.A. v. Algeria*, ICSID Case No. ARB/05/3 (Decision on Jurisdiction July 12, 2006, Award Nov. 12, 2008); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction Nov. 14, 2005, Award Aug. 27, 2009); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction Feb. 8, 2005, Award Aug. 27, 2008); *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15 (Decision on Jurisdiction Apr. 27, 2006, Award Oct. 31, 2011); *EDF*; *Occidental*; *SGS*.

This list does not include numerous cases in which a decision on jurisdiction had been issued but an award had not been rendered as of this writing. These include the two *Suez* cases, *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17, and *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/19. The tribunal in each case issued a decision on jurisdiction in mid-2006, but the cases were still pending in October 2013.

[164] Greenwood, *supra* note 157, at 107 (finding that forty-five bifurcated ICSID cases took an average of 3.62 years

bifurcate may be more complex—it does further suggest that bifurcation should not be allowed without careful consideration.

Some recent cases illustrate the risks of splitting up a case. *EDF International v. Argentina*,[165] which was initiated in 2003, proceeded in separate jurisdictional and merits stages. The tribunal allowed two rounds of memorials on jurisdiction, and a jurisdictional hearing was held in March 2006, about three years after the case had been initiated.[166] Post-hearing submissions followed, and in August 2008, nearly two and a half years after the hearing, the tribunal decided that it did indeed have jurisdiction.[167] The parties then exchanged two rounds of merits briefs and a merits hearing took place in late 2009, followed by two rounds of post-hearing submissions.[168] Six months after the last round, the tribunal asked the parties for expert submissions and counsel comments on quantum.[169] A hearing on quantum took place in February 2011 and was followed by more post-hearing submissions.[170] The tribunal issued its award in June 2012, nine years after the case began. Argentina then applied for annulment.

Does anyone think splitting the *EDF* case into jurisdictional, merits, and quantum phases improved the efficiency of the process?

In slight contrast, *SGS Société Générale de Surveillance v. Paraguay*[171] shows the *best*-case scenario for a bifurcated proceeding, and it was nonetheless quite a drawn-out affair. The case was initiated in October 2007 and the tribunal was constituted seven months later.[172] Paraguay objected to the tribunal's jurisdiction and the tribunal agreed to suspend the proceeding on the merits until the jurisdictional objections were resolved.[173] The tribunal held a hearing on jurisdiction in April 2009.[174] Ten months later, in March 2010, the tribunal decided it had jurisdiction and allowed the case to proceed on the merits.[175] After two rounds of merits submissions, the tribunal held a merits hearing the following spring, in May 2011.[176] The tribunal dispensed with post-hearing submissions (other than cost submissions) and issued its award nine months later, in February 2012. Paraguay then applied for annulment.

These cases show how dividing up an ICSID proceeding into multiple stages can draw it out for years. If a case is bifurcated and the case proceeds beyond the first stage, the result is almost inevitably a very long case. Even with truncated written submissions, the *SGS* case took well over four years to reach an award.

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while non-bifurcated cases which took 3.04 years to conclude).

[165] ICSID Case No. ARB/03/23,

[166] *EDF*, Award ¶¶ 23-24 (June 11, 2012).

[167] *Id.* ¶ 30.

[168] *Id.* ¶¶ 32-33, 36.

[169] *Id.* ¶ 37.

[170] *Id.* ¶ 42.

[171] ICSID Case No. ARB/07/29

[172] *SGS* Award ¶¶ 1, 7 (Feb. 10, 2012). After the parties could not agree on the president of the tribunal, the ICSID Administrative Council took three months to make an appointment. *Id.* ¶¶ 5-6.

[173] *Id.* ¶ 10.

[174] *Id.* ¶ 11.

[175] *Id.* ¶ 15.

[176] *Id.* ¶ 20.

B. Tighten the Standard for Bifurcation

To be sure, in some cases where a potential lack of jurisdiction is immediately evident, it would be entirely appropriate for a tribunal to consider a jurisdictional objection before moving on to the merits and quantum. The key is to perform some initial triage to focus on preliminary objections that have a strong chance of being successful.

As discussed, under the current ICSID Rules tribunals have considerable discretion as to how to respond to jurisdictional objections. Given the history of extremely long bifurcated proceedings, and the fact that the majority of ICSID cases are not dismissed for lack of jurisdiction, the presumption should be *against* suspending the merits stage of a proceeding. If a respondent seeks preliminary determination of a jurisdictional objection, it should bear the burden of making an initial showing in its submission that its objection has a strong chance of prevailing.

This requirement would reverse the standard that tribunals currently apply. The tribunal's June 2013 ruling on bifurcation in *Emmis*[177] exemplifies the prevailing practice. After the tribunal rejected in part its Rule 41(5) objection,[178] Hungary then asked to bifurcate the case and suspend the proceeding on the merits until its remaining jurisdictional objections were resolved.[179] In deciding this question, the tribunal said it would consider: "(a) Whether the request is substantial or frivolous; (b) Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage; (c) Whether bifurcation is impractical in the sense that the issues are too intertwined with the merits."[180]

Applying these factors, the tribunal found that Hungary's objection was not "frivolous"[181] and gave great weight to the fact that, "if the Respondent were successful in its jurisdictional challenge, it would dispose of the entire case."[182] The tribunal also acknowledged that "in the event that Respondent is unsuccessful in its jurisdictional challenge," a bifurcation order would "inevitably lead to a significant delay in any merits hearing."[183]

Notably, there was little indication in *Emmis* that bifurcation would significantly shorten the case, *even if the case was dismissed at the jurisdictional stage*. The parties had already agreed to alternative schedules depending on the outcome of the bifurcation request: if the request was granted there would be a hearing on jurisdiction in December 2013, whereas if it was denied there would be a hearing on both jurisdiction and the merits just two months later, in February 2014.[184] Thus, if the case were bifurcated, this would mean, at best, a slight shortening of time to resolution of the case. But if the tribunal found it had jurisdiction, it would almost certainly lengthen the proceeding by years. Nonetheless, the tribunal still apparently found that this largely one-sided trade-off did not weigh against bifurcation.

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[177] ICSID Case No. ARB/12/2.
[178] *See supra* section V.A.
[179] *Emmis*, Decision on Respondent's Application for Bifurcation ¶ 5 (June 13, 2013).
[180] *Id.* ¶ 37.
[181] *Id.* ¶ 47.
[182] *Id.* ¶ 49.
[183] *Id.* ¶ 48.
[184] *Id.*

The *Emmis* decision on bifurcation hinged on the tribunal's finding that the jurisdictional objection was not frivolous—a very easy bar to meet, and one that Hungary did meet despite Hungary's previous, and largely unsuccessful, Rule 41(5) objection. In practice, tribunals typically only refuse requests to bifurcate when they find that the jurisdictional objections are intertwined with merits considerations.[185]

This easy bifurcation standard does not promote expedient resolution of cases. Although there is much to be said for early consideration of dispositive or threshold issues, this calculus changes when splitting up a case is at least as likely to lengthen it as shorten it. Tribunals should thus consider taking a tougher stance on bifurcation requests. A tribunal should reject a request not merely when it is "frivolous," but also when the party seeking it does not make a strong initial showing that the case is *likely* to be resolved in the earlier stage. Otherwise, the odds are that dividing up the case will stretch it out for years.

A couple of other reforms would also limit the drawbacks of bifurcation. First, removing the "manifestly" requirement in Rule 41(5), as advocated in Part V above, can help tribunals determine whether bifurcation is appropriate. If a respondent cannot win on a Rule 41(5) objection by showing as a preliminary matter that the tribunal lacks jurisdiction—as opposed to the much tougher showing required under the current rule that it "manifestly" lacks jurisdiction—then the respondent likely cannot justify bifurcating the case into jurisdictional and merits phases.[186]

Moreover, costs should be shifted as a rule when a respondent unsuccessfully objects to jurisdiction in a bifurcated case, *regardless of the outcome of the proceeding on the merits*. The respondent has advanced a losing position in a distinct stage of the case, and its insistence on having a separate stage to advance this losing position has delayed the resolution of the case as a whole.

The bifurcated *SGS* case shows the risks of leniency on costs. The tribunal not only found it had jurisdiction but also observed that Paraguay was delinquent in paying its share of the advance on costs.[187] Nonetheless, the tribunal "decided to reserve its determination on costs until the conclusion of the proceedings."[188] Two years later, the tribunal found Paraguay liable and awarded SGS more than US $39 million, the entire amount sought, plus interest.[189] Despite this one-sided result, the tribunal only awarded costs equal to Paraguay's share of the ICSID costs, which Paraguay still had not advanced.[190] The tribunal reasoned that "both sides have presented their positions ably and in good faith, and neither has caused undue delay or expense in the proceeding."[191] So despite Paraguay's refusal to pay *anything* to support the institutional

[185] *See, e.g.*, *Burimi SRL v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 1 and Decision on Bifurcation ¶ 13.2 (Apr. 18, 2012).
[186] This presumption may be rebuttable if the jurisdictional determination requires factual development that is not possible in a Rule 41(5) objection.
[187] *SGS*, Decision on Jurisdiction ¶ 187 (Feb. 12, 2010).
[188] *Id.* ¶ 188.
[189] *SGS*, Award ¶ 197.
[190] *SGS*, Award ¶ 192.
[191] *Id.*

expense of the proceeding, and its complete loss at every stage of the case, Paraguay still did not have to pay any net costs or fees.[192]

Similarly, in *Railroad Development Corp. v. Guatemala*,[193] Guatemala raised two separate jurisdictional objections that, the tribunal observed in its award, "were twice rejected in an unusually protracted process."[194] Despite its evident annoyance with the respondent, the tribunal awarded the claimant only the tribunal's own fees and administrative expenses related to the jurisdictional phases. Each side bore its own—likely much larger—legal fees and expenses.

This precedent will not discourage parties from asserting meritless claims and defenses. Tribunals are reluctant to find that a party and its counsel have acted other than "ably and in good faith," to use the phrasing of the *SGS* tribunal. If that is the standard for shifting costs, it will rarely happen.

VIII. Speeding Up Deliberations

Once the written memorials and hearing are complete, the next major delay that can befall an investment arbitration is in the tribunal's deliberation over the award.[195] Even though the ICSID Secretariat sometimes prods tribunals to speed things up,[196] the nineteen awards issued in 2012 came on average thirteen months after the hearing (or the last hearing in cases with more than one).[197] These included the award in *Daimler Financial Services AG v. Argentina*, which was rendered more than 32 months after the hearing and nearly two years after the last written submissions.[198] The fastest award came five and a half months after the hearing.

The 2012 awards closely track historical averages. The 2009 Allen & Overy study found an average of 1.2 years between the merits hearing on a case and issuance of the award.[199] The

[192] As discussed in Part IX.C below, Paraguay's luck ran out in the annulment proceeding that followed.
[193] ICSID Case No. ARB/07/23.
[194] *Railroad Development Corp.*, Award ¶ 282 (June 29, 2012).
[195] *See, e.g.*, Interview with P. Di Rosa & J. Kalicki, *Prêt-à-Porter*, GLOBAL ARBITRATION REV. (May 16, 2013) (lamenting "a small circle of extremely busy arbitrators taking much too long to render awards").
[196] *See ICSID in the Twenty-First Century*, *supra* note 5, at 421 (comments of Meg Kinnear) ("When an award is more than a year outstanding from the last pleading or hearing, I've started to make sure that I phone the arbitrators and say, 'Is there anything we can do to help?'").
[197] *See Antoine Goetz v. Burundi*, ICSID Case No. ARB/01/2 (7 months); *EDF Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/23 (16 months); *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1 (32 months); *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11 (6 months); *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12 (6 months); *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23 (6 months); *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29 (9 months); *Marion Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1 (15 months); *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*, ICSID Case No. ARB/08/8 (9 months); *Bosh Int'l, Inc. v. Ukraine*, ICSID Case No. ARB/08/11 (11 months); *Caratube Int'l Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/08/12 (16 months); *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13 (17 months); *Karmer Marble Tourism Construction Industry v. Georgia*, ICSID Case No. ARB/08/19 (16 months); *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2 (14 months); *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4 (17 months); *Iberdrola Energía, S.A. v. Guatemala*, ICSID Case No. ARB/09/5 (13 months); *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16 (7 months); *Reinhard Hans Unglaube v. Costa Rica*, ICSID Case No. ARB/09/20 (15 months); *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12 (11 months).
[198] ICSID Case No. ARB/05/1, Award ¶¶ 27, 32 (Aug. 22, 2012).
[199] Sinclair et al., *supra* note 4, at 5.

longest deliberation took 5.1 years; several other cases took two years or more.[200] In its entire history, only three ICSID awards were rendered less than 120 days after the merits hearing.[201]

The length of time between the hearing and the award may not be an entirely fair representation of tribunal speed, because hearings are typically followed by further written submissions—sometimes comprehensive, sometimes targeted. However, it would be a rare arbitrator who does not have ideas of the outcome of the case by the end of the merits hearing, particularly where the tribunal members deliberate among themselves during the hearing or shortly afterward. Moreover, as discussed in section VI.D, lengthy post-hearing memorials may be part of the problem. Not only are they a task to read and analyze, they also give arbitrators an "excuse" to hold off on drafting an award until the last submission is filed, even if those submissions add little new material or argument.

The ICSID Arbitration Rules impose no deadline on the tribunal for issuing its award. Rule 38(1) states that "[w]hen the presentation of the case by the parties is completed, the proceeding shall be declared closed," and Rule 36 provides that the award "shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may extend this period by a further 60 days if it would otherwise be unable to draw up the award." However, these time limits are essentially meaningless because the rules do not require the tribunal to close the proceeding at any point, such as upon the last written or oral submission. The result is that "[a]n unfortunate practice has arisen of tribunals waiting to close proceedings until the award is drafted, which in some cases has taken as long as three years."[202] Simply put, the ICSID Rules put no pressure on tribunals to complete their work.

Granted, writing an ICSID award is a substantial endeavor. Cases are complex, awards are almost always lengthy, and the ICSID Convention requires an award to "deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[203] In its 2012 award in *Occidental Petroleum Corp. v. Ecuador*, which came after more than six years of proceedings, the tribunal observed that it had been "required to address numerous procedural requests and applications, all of which were extensively and diligently briefed by the parties, resulting in literally thousands of pages of submissions and exhibits."[204]

But even an award that is hundreds of pages long does not take three experienced lawyers more than a year, working full time, to produce. Awards take a long time not only because they are hard work, but because arbitrators do not devote all their time to a single award. This is not to say that arbitrators should serve on only one case at a time, but it does indicate that some arbitrators may be overstretched.

Is there a way to speed up tribunal deliberations? The Allen & Overy study notes that "[p]erhaps market awareness of individuals' track record would encourage some to produce swifter results in order to distinguish themselves. That said, the services of the best and brightest will no doubt

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[200] *Id.* at 3.
[201] *Id.* at 4.
[202] REED ET AL., *supra* note 3, at 147-148. Reed and friends note hopefully that "[t]his is an area where clarification is needed and can be expected." To date, there has been no such clarification.
[203] ICSID Convention Art. 48(3); *see also* SCHREUER ET AL., *supra* note 3, at 815-825.
[204] ICSID Case No. ARB/06/11Award ¶ 102 (Oct. 5, 2012).

still be in demand however long their cases take."[205] However, "market awareness" does not seem to have done the trick, as tribunals continue to take a long time to issue their awards despite the public availability of ICSID procedural histories and tribunal memberships.

In any event, some parties—respondents in particular—may have strategic reasons for *not* wanting speedy resolution of a case. A state that would like to delay an award for as long as possible will have every incentive to select a slow arbitrator.

To date no one has published a systematic report on how long various arbitrators have taken to deliberate before issuing awards and other decisions. Perhaps this is because whoever performs such a service risks annoying the arbitrators placed at the bottom of the speed rankings. In the small world of investment arbitration, this is not the best way to endear oneself to the people who may be deciding one's cases.

Logically, one would expect the number of an arbitrator's appointments (ICSID and otherwise) to correlate—however roughly and imperfectly—with the speed of deliberations by tribunals on which the arbitrator sits. If so, there may be a case for institutional limits on the number of appointments the arbitrator may accept in simultaneously pending cases. Such limits would obviously clear the arbitrator's plate of too many cases (though there is certainly a danger that other types of work will fill the arbitrator's freed-up time). Moreover, if there are limits on the number of appointments an arbitrator may accept at any one time, an arbitrator anxious to take on new cases might feel more urgency to issue an award with dispatch.

Another solution might be to bring alternative fee arrangements—in particular a ceiling on fees for a particular matter—to the world of investment arbitrators. Under the current ICSID fees schedule, adjudicators are paid $3,000 for each "day of meetings or other work performed in connection with the proceedings."[206] Although the daily rate is not at all excessive in the context of high-end legal practice, being paid by the day might unconsciously encourage arbitrators to devote a large number of days to their work on a case.[207] (This is of course the same criticism that innumerable critics of the legal profession have levied against the billable hour generally.) One hopes and expects that it would be the rare arbitrator who drags out deliberations simply to bill more time to the parties. But an arbitrator who hits the limit and knows that further work on an award will be pro bono may feel an urge to finalize things and move on to other cases.

A more drastic remedy would impose a hard time limit—say, six months—on issuing an award, perhaps beginning the clock at the end of the merits hearing, or the submission of the last post-hearing memorial. Though similar time limits such as that imposed by the ICC Rules[208] are

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[205] Sinclair et al. *supra* note 4, at 5.

[206] ICSID Schedule of Fees, ¶ 3 (effective Jan. 1, 2013).

[207] On the other hand, the relatively modest rate of payment might lead to the same conclusion but for the opposite reason. A rate of $3,000 a day comes out to $375 per hour for an eight-hour day, less if the day is longer. Many if not most ICSID arbitrators and committee members are prominent practitioners who are not short on other legal work, much of which pays considerably more rate than $375 per hour. Lawyers who can charge $800, $900, or $1000 per hour for non-ICSID work might give short shrift to the ICSID cases before them. This might cause them to dispose of ICSID matters quickly, or conversely it might lead them to put ICSID matters on the back burner and turn to them only when there is not more lucrative and urgent work to be done.

[208] *See* ICC Rules of Arbitration, Art. 30(1) ("The time limit within which the arbitral tribunal must render its final award is six months.").

regularly flouted, an enforced deadline would likely have *some* impact on speed of awards. We can debate how to "punish" a tribunal that fails to issue its award within the prescribed time, but a mandatory rule might help create new norms and deter too-busy arbitrators from accepting appointments.

A softer solution is to do more to encourage personal interaction between arbitrators on a panel. Members of an ICSID panel typically live far apart from one another, and may have language or cultural barriers than hinder their communications and their ability to reach consensus. Physical proximity is often a good way to mitigate these differences. Although panels often currently do this anyway, a rule mandating at least a day of in-person deliberations after a hearing ends may help arbitrators reach consensus in real time.

Finally, Arbitration Rule 38(1) could be less of a paper tiger than it is now. Rather than leaving the closing date entirely within the tribunal's discretion, the rule could mandate that the proceeding is closed when the last written or oral submission is completed, and begin the clock as of that date. Granted, such a rule change could invite further mischief—such as successive tribunal requests for additional post-hearing briefing in order to restart the closure clock—though one hopes such behavior would be minimal.

IX. Annulment: When the Sequel Is as Long as the Original

By no means does a tribunal's award always mean the end of an ICSID arbitration. An award is often, to quote Churchill, merely the end of the beginning.

Annulment under Article 52 of the Convention is the primary—and often for all intents and purposes the only—way for a disappointed party to overturn a tribunal award.[209] Historically, more than one third of ICSID awards have been followed by applications for annulment.[210] But recently, applying for annulment has become the rule rather than the exception. Of the thirty-one ICSID awards issued in 2011 and 2012, twenty were followed by applications for annulment.[211]

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[209] *See generally* R.D. BISHOP & S.M. MARCHILI, ANNULMENT UNDER THE ICSID CONVENTION (2012); SCHREUER ET AL., *supra* note 3, at 890-1095; ANNULMENT OF ICSID AWARDS (E. Gaillard & Y. Banifatemi eds., 2004). A party can also seek four other types of review: rectification, revision, interpretation, and a supplementary decision. ICSID Convention Art. 49-51. However, annulment is the most frequently sought and broad-ranging form of review. The other types of review are subject to many of the same delays as annulment proceedings.

[210] Specifically, through June 2012, 150 ICSID Convention awards had been rendered, and annulment proceedings were initiated in 50 of them. In three cases, annulments proceedings were initiated twice. ICSID Secretariat, *Background Paper on Annulment for the Administrative Council of ICSID*, 27 ICSID REV. 443, ¶ 36 (2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11.

[211] *See El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15; *EDF Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/23; *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1; *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14; *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8 *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18; *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17; *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29; *Caratube Int'l Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/08/12; *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13; *Malicorp Ltd. v. Egypt*, ICSID Case No. ARB/08/18; *Karmer Marble Tourism Construction Industry v. Georgia*, ICSID Case No. ARB/08/19; *Deutsche*

One might expect that the limited grounds on which an award may be annulled under Article 52 would mean that annulment applications are disposed of relatively quickly. One would be incorrect. An application for annulment will typically add years to the proceeding. According to ICSID, in the five years through mid-2012, the average annulment proceeding that resulted in a decision on the merits took 26 months from the registration to the issuance of the decision.[212] A leading commentary on ICSID annulment observes that in recent years, the length of annulment proceedings has doubled.[213] And a 2005 study found that "[n]o case in which annulment review has been requested has ever lasted less than six years, and most cases take substantially longer."[214]

The annulment proceeding in the seemingly never-ending case of *Víctor Pey Casado*[215] shows how delays can happen at multiple stages of the annulment process. The original tribunal issued its award in May 2008 and Chile applied for annulment four months later.[216] The claimants first argued that Chile's application for annulment should not be admitted because it was written in the wrong language and not signed by the properly authorized agents.[217] In July 2009, the Secretariat decided to register the application but noted that the *ad hoc* committee could also decide whether the application was admissible—thus allowing the annulment proceeding to go forward fourteen months after the award, without resolution of the controversy that had held it up.[218] The *ad hoc* committee was constituted five months after that, in December 2009, and held its first session the following month.[219] The four rounds of written submissions that followed took another year.[220] The parties filed pre-hearing skeletons on May 27, 2011, and the hearing was held in June.[221] The *ad hoc* committee released its decision on annulment six months later—three and a half years after the award.

Though *Víctor Pey Casado* may be an especially Dickensian case, the ICSID annulment process tends to be substantially longer than, for instance, the appellate process in U.S. courts, which are themselves rarely accused of excessive speed. A 2011 U.S. Department of Justice study of approximately 4,000 civil appeals in state courts found that the average disposition time for appeals decided on the merits was 14 months.[222] Ninety-five percent of these appeals were

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Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2; *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4; *Iberdrola Energía, S.A. v. Guatemala*, ICSID Case No. ARB/09/5; *Commerce Group Corp. v. El Salvador*, ICSID Case No. ARB/09/17; *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12.

In another case, the claimant requested supplementation and rectification of the award. *See Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23.

[212] *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 62. Including annulment proceedings that were discontinued for one reason or another, the average length in FY 2010 was 24 months, 25 months in FY 2011, and 17 months in FY 2012. *Id.*

[213] BISHOP & MARCHILI, *supra* note 209, § 11.53.

[214] J. Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 206 (2005) (footnote omitted).

[215] ICSID Case No. ARB/98/2.

[216] *Víctor Pey Casado*, Decision on Annulment ¶ 1 (Dec. 18, 2012).

[217] *Id.* ¶ 3.

[218] *Id.* ¶ 4.

[219] *Id.* ¶¶ 8-9.

[220] *Id.* ¶ 13.

[221] *Id.* ¶¶ 16-17.

[222] D.J. Farole, Jr. & T.H. Cohen, Bureau of Justice Statistics, U.S. Dep't of Justice, *Appeals of Civil Trials Concluded in 2005*, at 4 (Oct. 2011), *available at* http://www.bjs.gov/content/pub/pdf/actc05.pdf.

resolved within 24 months.[223] Although comparisons between U.S. appellate courts and ICSID annulment applications may be inapt for a variety of reasons, the contrast is nonetheless stark.

Moreover, ICSID annulment does not fare much better in comparison with other international judicial bodies. WTO appeals, for example, typically take three to four months.[224]

Whatever its flaws—and they have been subject to voluminous commentary[225]—annulment in some form is here to stay. The ICSID Convention would not have been enacted had annulment not been part of the arbitration process and the odds that the Convention's signatories will agree to eliminate it are next to zero. The question is how to speed annulment proceedings without sacrificing due process, and how to deter meritless annulment applications in the first place.

A. Delayed Applications for Annulment

The first potential delay caused by annulment happens before the proceeding even begins. Once a tribunal issues its award, Article 52 of the ICSID Convention gives a party 120 days to submit an application for annulment.[226] Not surprisingly, parties tend to wait nearly the full 120 days before submitting applications for annulment. For example, in *Malicorp Ltd. v. Egypt*, the disappointed claimant took 114 days,[227] and in *AES Summit Generation Ltd. v. Hungary*, the claimant waited 119 days.[228]

In addition to delaying ultimate resolution of cases where annulment is sought, the 120-day time limit also delays the finality of *any* ICSID award. A successful party to a primary ICSID proceeding has to wait four months before knowing if the result is truly a final one. This can draw out the uncertainty of the process and undermine efforts to enforce an award.

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[223] *Id.* Some individual U.S. court data are also available. In the United States Court of Appeals for the Federal Circuit, over the past decade the time between docketing and disposition of an appeal on the merits has averaged between nine and ten months. U.S. Court of Appeals for the Federal Circuit, Median Disposition Time for Cases Decided by Merits Panels FY 2003-2012, *available at* http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Median_Disposition_Time_Chart_2003-2012.pdf. In the United States Court of Appeals for the Fifth Circuit, the time from docketing of an appeal to oral argument (if there is oral argument) is about 12 months. U.S. Court of Appeals for the Fifth Circuit, Clerk's Office Most Frequently Asked Questions, at 1, 8, *available at* http://www.ca5.uscourts.gov/clerk/docs/Faqs.pdf. In Pennsylvania state appellate courts, the median time for appeals resolved by filed decision is just under ten months. Pennsylvania Bar Association, Timeline—How Long Does the Average Appeal Take?, *available at* http://www.pabar.org/public/committees/appellat/timeline/longappealtaketmore.asp.

[224] World Trade Organization, How Long to Settle a Dispute?, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[225] *See generally, e.g.*, BISHOP & MARCHILI, *supra* note 209; LAIRD & WEILER, *supra* note 304, pt. IV; SCHREUER ET AL., *supra* note 3; REED ET AL., *supra* note 3, ch. 5; C. Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope*, 10 THE LAW & PRACTICE OF INT'L COURTS & TRIBUNALS 211 (2011); T. Cheng, *The Role of Justice in Annulling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L L. 236 (2013).

[226] ICSID Convention Art. 52(1)-(2). If the party seeking annulment does so on the basis of corruption of an arbitrator, the annulment application must be filed within 120 days of discovery of the alleged corruption and also within three years of the award. *Id.* Art. 52(2). The Preliminary Draft of the ICSID Convention provided for a 60-day time limit. SCHREUER ET AL., *supra* note 3, at 1023.

[227] ICSID Case No. ARB/08/18, Decision on Annulment ¶ 1 (July 03, 2013).

[228] ICSID Case No. ARB/07/22, Decision on Annulment ¶ 1 (June 29, 2012).

The 120-day annulment deadline is considerably longer than the time limit for appeals in national courts. Parties in the United Kingdom normally have 21 days to notice an appeal.[229] Litigants in U.S. federal courts typically have 30 days to appeal after entry of judgment by the trial court, or 60 days if the United States is a party to the litigation.[230] For that matter, the WTO appeal process must be initiated within 60 days of circulation of a decision.[231]

The 120 day deadline for submitting an annulment application, like annulment itself, is here to stay as it is written into the ICSID Convention. But as discussed below, there are still ways to minimize the effects of this delay on the ultimate resolution of an annulment application.

B. Appointment of the Ad Hoc *Committee*

After an annulment application is filed and registered,[232] the Chairman of the Administrative Tribunal appoints an *ad hoc* committee of three to adjudicate the matter.[233] This differs from the primary stage of an ICSID arbitration, in which the parties have the opportunity to appoint the arbitrator(s). The *ad hoc* committee members are drawn from the designated ICSID Panel of Arbitrators.[234]

Particularly in the last few years, the institutional appointment method has allowed for faster constitution of a tribunal than the party-driven constitution process at the earlier stage of the arbitration. Constitution typically takes approximately three months or less, and often less than a month.[235] Although this is certainly longer than it takes a court to assign a judge to a case, and also longer than the 45 days it takes the WTO to appoint a panel,[236] it is still an improvement on the seven-month average constitution time for the original proceeding.

There are still exceptions to this relatively speedy appointment process, however. For example, in *Víctor Pey Casado*, the *ad hoc* committee was not constituted until more than five months

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[229] U.K. Civ. P. Rule 52.4(2)(b).
[230] U.S. Fed. R. App. P. 4(a)(1).
[231] Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 16(4).
[232] Registration of an ICSID annulment application is even more automatic than registration at the initial stage of an ICSID case. *See* BISHOP & MARCHILI, *supra* note 209, § 11.22. Unlike the initial registration stage, the Secretariat has no authority to screen out annulment applications for "manifestly" lacking a legal basis.
[233] ICSID Arbitration Rule 52(1); ICSID Convention Article 52(3); *see also* BISHOP & MARCHILI, *supra* note 209, §§ 11.32-11.51 (discussing constitution of *ad hoc* committees and disqualification of committee members).
[234] ICSID Convention Art. 12-16.
[235] *See, e.g.*, *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/15 (annulment proceeding registered Mar. 22, 2012, *ad hoc* committee constituted May 7, 2012); *EDF Int'l S.A., SAUR Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/23 (annulment proceeding registered Oct. 11, 2012, *ad hoc* committee constituted Jan. 2, 2013); *Caratube Int'l Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/08/12 (annulment proceeding registered Oct. 5, 2012, *ad hoc* committee constituted Nov. 12, 2012); *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13 (annulment proceeding registered Nov. 16, 2012, *ad hoc* committee constituted Dec. 12, 2012); *Togo Electricité v. Togo*, ICSID Case No. ARB/06/7 (annulment proceeding registered Nov. 4, 2010, *ad hoc* committee constituted Nov. 22, 2010); *see also ICSID Background Paper on Annulment*, *supra* note 210, ¶ 47 (explaining that historically it has taken an average of ten weeks to constitute an *ad hoc* committee, but in recent years the average has dropped to six and a half weeks).
[236] World Trade Organization, How Are Disputes Settled?, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

after the annulment proceeding was registered.[237] In *Sempra Energy International v. Argentina*, constitution took seven and a half months.[238]

There appears to be little reason for these occasional delays other than slow communications between the Secretariat and potential committee members, and possibly party intransigence. Speeding up what should be a straightforward appointment process should be a priority of both the institution and of the individuals who agree to be on countries' designated panels.

C. Staying Enforcement: If Not a Rubber Stamp, a Very Springy One

Perhaps part of why so many losing parties apply for annulment is because they can use it to delay enforcement of an award. The ICSID Convention allows a stay of enforcement while an annulment application is pending.[239] If an application for annulment includes a request for a stay, ICSID's rules provide that the stay is automatically granted as a provisional matter.[240] Then, after the *ad hoc* committee is constituted, a party can request that the committee rule on whether the stay should continue.[241] ICSID Rule 54 provides that the committee "shall" determine whether to continue the stay within thirty days after the committee is constituted.[242] In practice, this speedy determination does not always happen.[243]

Although *ad hoc* committees have considered various factors in determining whether to continue a stay of enforcement,[244] one constant is that the standard is an easy one.[245] Through the end of 2012, twenty-three *ad hoc* committees had issued public decisions on whether to continue stays of enforcement.[246] They continued the stay *every time*.[247] In granting a stay in *Azurix Corp. v.*

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[237] ICSID Case No. ARB/98/2 (annulment proceeding registered July 6, 2009, *ad hoc* committee constituted Dec. 22, 2009).
[238] ICSID Case No. ARB/02/16 (annulment proceeding registered Jan. 30, 2008, *ad hoc* committee constituted Sept. 15, 2008).
[239] ICSID Convention Art. 52(5); ICSID Arbitration Rule 54(1); *see also* BISHOP & MARCHILI, *supra* note 209, § 12; Sven-Michael Volkmer, *Stay of Enforcement Decisions in ICSID Annulment Proceedings: Taking Stock*, 29 JOURNAL OF INT'L ARBITRATION 671 (2012); SCHREUER ET AL., *supra* note 3, at 1062-1083; J. Fouret, *Stay(ing) on Track or Falling off the Edge: The Absence of Legal Security in the Ad Hoc Committees' Decisions Under Article 52(5) of the ICSID Convention*, 27 ICSID REV. 305 (2012).
[240] ICSID Arbitration Rule 54(2).
[241] *Id.*
[242] *Id.*
[243] *See* BISHOP & MARCHILI, *supra* note 209, § 12.08 n.20.
[244] *See, e.g.*, *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award ¶ 41 (May 7, 2012) ("The factors taken into account by *ad hoc* annulment committees when deciding on stay of enforcement vary considerably, which may be explained by lack of guidance in the relevant provisions of the ICSID Convention and the Arbitration Rules and the particular circumstances of each request.").
[245] *See, e.g.*, Fouret, *supra* note 239, at 305 ("it is largely accepted by *ad hoc* Committees that there is a presumption of continuing the automatic stay of enforcement ").
[246] *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 59; Fouret, *supra* note 239, at 328-334. In addition, in *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, the parties agreed to a stay. In 13 of the 23 cases, the stay was conditioned on the posting of security (eight times) or a written undertaking (five times). *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 59. In four of those 13 cases, the stay was lifted when the applicant failed to satisfy the committee's condition. *Id.* Several other recent stay decisions are not public. In May 2013, in *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2, Sri Lanka requested continuation of the stay, but withdrew that request less than a month later.
[247] *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 59. In four cases, the stay was terminated where the

Argentina, the committee observed that while "there may be very exceptional circumstances where a stay ought not be ordered, that is not the situation here."[248]

Another constant in stay decisions is that *ad hoc* committees have expressly declined to consider the merits of an annulment application in deciding whether to continue the stay.[249] In *CDC Group v. Seychelles*, for example, the committee "d[id] not believe it is appropriate to indulge at this preliminary juncture in any consideration whatsoever of the merits of the Application."[250] In *Sempra*, the committee observed that "[p]revious *ad hoc* committees have consistently rejected the proposition that a preliminary assessment of the prospects of the application for annulment should be a factor influencing the Committee's decision whether a stay should be granted or not."[251]

Christoph Schreuer suggests that the thirty-day time limit for deciding whether to continue a stay precludes a preliminary consideration of the merits.[252] However, national courts are commonly asked on an emergency basis to grant preliminary injunctions, temporary restraining orders, or stays of enforcement pending an appeal, and they nonetheless consider the moving party's likelihood of success on the merits.[253] For example, in July 2013, a federal court in Florida was asked to grant a temporary restraining order. *The next day*, the court issued a ruling on the motion which considered, among other factors, the movants' chances of succeeding on the merits.[254]

Even *ad hoc* committees that have been disinclined to continue the stay automatically have nonetheless shied away from denying it. In *Libananco Holdings v. Turkey*, the *ad hoc* committee insisted that "the granting of a stay of enforcement or its continuation should in no way be regarded as automatic," and disagreed with other committees that had thought otherwise.[255] But the committee—like every committee before it—nonetheless granted the request to continue the stay, and imposed no conditions. The committee concluded that "Applicant's interest in a continued stay of enforcement pending the outcome of the annulment proceeding should be given more weight than Respondent's interest in immediate enforcement."[256]

Is there a positive selection effect where a stay is sought, i.e. do parties tend to seek a stay of enforcement only in cases where their application for annulment is likely to succeed? History does not bear this out. Of the 21 cases in which a stay was continued that eventually resulted in

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applicant failed to satisfy the conditions required for continuing the stay. *Id.*

[248] ICSID Case No. ARB/01/12, Decision on the Continued Stay of Enforcement of the Award ¶ 22 (Dec. 28, 2007).

[249] *See* BISHOP & MARCHILI, *supra* note 209, § 12.15 (collecting cases); *but see* Fouret, *supra* note 239, at 310 (noting that in *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7 , the *ad hoc* committee, in deciding whether to continue the stay, considered whether the annulment application was "dilatory").

[250] ICSID Case No. ARB/02/14, Decision on Whether to Continue Stay and Order ¶ 13 (July 14, 2004).

[251] ICSID Case No. ARB/02/16, Decision on the Argentina's Request for a Continued Stay of Enforcement of the Award ¶ 25 (Mar. 5, 2009)

[252] SCHREUER ET AL., *supra* note 3, at 1072.

[253] *See, e.g.*, *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012); *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225–56 (11th Cir. 2005).

[254] *Hammer v. Bank of America*, 2013 WL 3866532 (M.D. Fla., July 25, 2013).

[255] ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award ¶ 43 (May 7, 2012).

[256] *Id.* ¶ 54.

a committee decision on annulment,[257] fourteen of the applications were rejected in their entirety.[258] Only three cases fully annulled the tribunal's award.[259]

But recently, one *ad hoc* annulment committee bucked the historical trend. In March 2013, in *SGS v. Paraguay*,[260] for the first time ever an *ad hoc* committee rejected a request for a continuing stay of enforcement. Reviewing the award against Paraguay, the committee concluded that "awards must be enforced and only in very specific cases where the circumstances so require, may enforcement be stayed by the corresponding committee."[261] The committee observed that "to order a continued stay of enforcement of the award, the Committee must be certain that the circumstances of the particular case so require. It is for the interested party to show that such circumstances exist, and thus, the stay of enforcement of the award should be continued."[262] The *SGS* committee rejected all of Paraguay's arguments against immediate enforcement and noted Paraguay's history of failing to pay amounts it was ordered to pay, both in earlier stages of the *SGS* case and in other proceedings.[263]

The *SGS* committee's award may be a promising sign of tougher consideration of stay applications. However, the pendulum swung back in September 2013, when the *ad hoc* committee in *Occidental Petroleum* unconditionally stayed a US $2.3 billion award against Ecuador.[264]

Setting a higher bar for staying enforcement of an award will make it harder for disappointed parties to use annulment to delay enforcement of an award. Accordingly, a reconsideration of the "common law" that has developed on stay decisions is in order. A stay of enforcement should be the exception, not the rule. Tribunals should seriously consider denying stays even

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[257] Two cases settled after the continuation of the stay of enforcement but before the annulment decision. *See Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18.

[258] *See Amco Asia Corp. v. Indonesia* , ICSID Case No. ARB/81/1 (decision in second annulment proceeding); *Compañía de Aguas del Aconquija S.A. v. Argentina*, ICSID Case No. ARB/97/3; *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4; *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12; *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14; *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9; *Duke Energy Int'l Peru Investments No. 1 Ltd. v. Peru*, ICSID Case No. ARB/03/28; *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabon*, ICSID Case No. ARB/04/5; *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16; *Togo Electricité v. Togo*, ICSID Case No. ARB/06/7; *Libananco Holdings Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18.

[259] *See Amco Asia Corp. v. Indonesia* , ICSID Case No. ARB/81/1 (decision in first annulment proceeding); *Patrick Mitchell v. Congo*, ICSID Case No. ARB/99/7; *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16. The remaining four annulment applications were granted in part. *See Maritime Int'l Nominees Establishment v. Guinea*, ICSID Case No. ARB/84/4; *Víctor Pey Casado v. Chile*, ICSID Case No. ARB/98/2; *Enron Creditors Recovery Corp. (formerly Enron Corp.) v. Argentina*, ICSID Case No. ARB/01/3; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8.

[260] ICSID Case No. ARB/07/29.

[261] *SGS*, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award ¶ 85 (Mar. 22, 2013).

[262] *Id.* ¶ 88.

[263] *Id.* ¶¶ 95-100.

[264] *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award (Sept. 30, 2013).

where the application is not frivolous, and take into account an applicant's likelihood of prevailing in the annulment application.

D. Written Submissions and Hearing: Isn't It Supposed To Be a Limited Review?

ICSID Arbitration Rule 53 provides that the rest of the Rules "shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award."[265] One of the effects of this rule is that annulment proceedings closely match the proceedings of the original arbitration, with multiple rounds of lengthy written submissions followed by a hearing.[266] All of the same delays that can happen during the initial arbitration may recur in annulment.

Much ink has been spilled on the fact that an annulment application under the ICSID Convention is not a general appeal.[267] Rather, an annulment application must be based on one of the five grounds for annulment listed in Article 52(1). But despite its limited theoretical scope, the written submissions and hearing in an ICSID annulment proceeding can be as long as those in the original proceeding—both in time spent and in words put on paper.

The annulment proceeding in *Malicorp Ltd. v. Egypt*[268] is a typical example of how drawn out the annulment process is even when there *aren't* serious delays or extensions. The *ad hoc* committee held its first session in December 2011.[269] The parties then each took three months to submit their memorial and countermemorial, and two months for the reply and rejoinder, for a total of ten months of submissions.[270]

By contrast, while an appeal before a national court or other body can address a far greater range of issues than an ICSID annulment application, an appellate *proceeding* is typically much more limited than the original one. For example, U.S. appellate courts normally allow three briefs: one by the appellant, one by the appellee, and a shorter reply by the appellant.[271] These briefs must be submitted within modest time periods mandated under court rules. The U.S. federal appellate rules require the appellant to serve and file its principal brief within 40 days after the record is filed with the court of appeals, the appellee to file its response 30 days later, and the appellant to file its reply 14 days after that[272]—so the full briefing process takes no more than 74 days. Briefs also typically have strict word limits,[273] and courts are willing to expand those limits "only for extraordinarily compelling reasons."[274] Oral argument on an appeal will normally total in the neighborhood of 20 minutes (10 minutes per side), with especially complex

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[265] ICSID Arbitration Rule 53.
[266] *See* SCHREUER ET AL., *supra* note 3, at 1059.
[267] *See, e.g.*, BISHOP & MARCHILI, *supra* note 209, §§ 3.16-3.19; SCHREUER ET AL., *supra* note 3, at 901; C. Stockford, *Appeal Versus Annulment: Is the ICSID Annulment Mechanism Working or Is It Now Time for an Appellate Mechanism?*, in LAIRD & WEILER, *supra* note 304, at 308-313; K. Yannaca-Small, *Annulment of ICSID Awards: Limited Scope But Is There Potential?*, in ARBITRATION UNDER INT'L INVESTMENT AGREEMENTS, *supra* note 157, at 608-610.
[268] ICSID Case No. ARB/08/18.
[269] *Malicorp* Decision on Annulment ¶ 9 (July 3, 2013).
[270] *Id.* ¶¶ 11-15.
[271] U.S. Fed. R. App. P. 28(a)-(c).
[272] *See, e.g.*, U.S. Fed. R. App. P. 31(a)(1).
[273] *See, e.g.*, U.S. Fed. R. App. P. 32(a)(7)(B) (allowing 14,000 words for each side's principal brief and 7,000 words for the appellant's reply).
[274] U.S. Court of Appeals for the D.C. Circuit Handbook of Practice and Internal Procedures at 40.

cases perhaps getting double that.[275] This is the standard practice regardless of the stakes of the case.[276]

Few litigators are up in arms about the short time limits and word limits on appellate briefing. And one would be hard-pressed to find a judge who thinks the appellate process would benefit from longer schedules and larger written submissions. Nonetheless, common practice and institutional inertia continue to conduct ICSID annulment proceedings that mirror the original proceedings, despite the supposedly narrow range of issues that can be raised in annulment.

Regardless of where one comes out on the proper scope of ICSID review, it is difficult to see why annulment proceedings have to be so expansive. Do parties like those in *Malicorp* really need three months for their initial memorial and two months for their second one—which is often the same schedule as in the initial arbitration? Particularly where the issues they should be addressing on annulment are supposedly so limited in scope? If the time limits were halved (to 45 and 30 days), or even cut by two thirds, does anyone really think the quality of the submissions would be substantially diminished (unless word count is a proxy for quality)?

Indeed, the extended time allowed for annulment submissions may also indirectly, and detrimentally, expand the scope of issues raised in the proceeding. Allowing many months for the drafting of memorials, and placing no limits at all on their length, encourages parties to take a "kitchen sink" approach to the annulment process. This complicates the committee's task and may lengthen the time it takes to write a decision.

Moreover, long deadlines are particularly unnecessary where—thanks to the 120-day time limit for submitting an annulment application, the committee constitution process, and the need to schedule a first session—there is nearly always a great deal of time between the underlying award and the start of the written submissions process. In *Malicorp*, for example, the *ad hoc* committee held its first session ten months after the award.[277] Perhaps the party seeking annulment could have spent some of that time preparing its memorial, so that it would not need another three months after the first session.

As discussed above, the ICSID Arbitration Rules could include express guidelines for the time to file written submissions. This applies even more so for annulment proceedings, where the *ad hoc* committee is supposed be considering a focused set of issues rather than the case as a whole.

But one way to really move the annulment process along would be to start the submissions clock on the date of the award. For example, the rules could provide that, as a default matter, the party seeking annulment must submit its initial memorial within 150 days of the award—regardless of when the annulment application is submitted or registered or when the *ad hoc* committee is constituted or holds its first session. Such a time limit would provide parties with an incentive to move quickly on their submissions. It would also mitigate the delays caused by the Convention's 120 day window for applying for annulment.

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[275] *See, e.g.*, U.S. Court of Appeals for the Ninth Circuit Court Structure and Procedures § E.7; *see also* U.S. Court of Appeals for the D.C. Circuit Handbook of Practice and Internal Procedures at 49 ("There is no standard length of oral argument time, although the allotment of 15 minutes per side is perhaps the most common.").
[276] In fairness, many U.S. appellate courts grant extensions of time with the same generosity as arbitral tribunals.
[277] *Malicorp*, Decision on Annulment ¶ 9.

E. Annulment Deliberations

Despite the limited scope of annulment review, annulment decisions still take a good deal of time to reach. According to ICSID, in the five years through mid-2012, *ad hoc* committee deliberations took an average of six months.[278] By contrast, judges on the United States Court of Appeals for the Fifth Circuit—who, like ICSID *ad hoc* committees, sit in panels of three—aim to issue their decisions within 60 days after argument.[279] As discussed in Part VIII with respect to initial tribunal awards, there is a case for (1) placing hard time limits on issuing a decision, (2) limiting the number of appointments an arbitrator can accept, and (3) placing a fee ceiling to discourage overly drawn out deliberations. Even if a strict time limit is not advisable, an aspirational time limit in the ICSID rules would likely encourage committees to issue their decisions in a reasonable timeframe, and perhaps set a default norm that committees would be reluctant to depart from.

F. Cost Shifting in Annulment Proceedings

An *ad hoc* committee has the authority to determine how to allocate the costs of the proceeding.[280] Historically, the majority of *ad hoc* committees have split costs between the parties, regardless of the outcome of the annulment proceeding.[281] In a 2007 decision, the *ad hoc* committee in *MTD Equity v. Chile*[282] explained that cost-shifting is the exception rather than the rule in annulment proceedings:

> In all but one of the concluded annulment proceedings, Committees have made no order for the parties' own costs and have held that ICSID's costs should be borne equally by the parties. They did so not only where the application for annulment succeeded in whole or part but also where it failed. In the latter cases, the party successful, at least in part before the Tribunal, and successful in any case before the committee had to pay half the costs resulting from the request for annulment.
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> [] This result might be thought anomalous. However, in the interest of consistency of ICSID jurisprudence and in the circumstances of the present case, the Committee proposes to follow the existing practice. It does so noting that this practice is not without flexibility and admits of exception.[283]

According to ICSID, out of thirty-five cost orders in annulment proceedings through mid-2012, twenty-seven committees ruled that each side would bear its own legal fees and twenty also split the costs of the proceeding between the parties.[284]

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[278] *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 62.
[279] U.S. Court of Appeals for the Fifth Circuit, Clerk's Office Most Frequently Asked Questions, at 1, 8, *available at* http://www.ca5.uscourts.gov/clerk/docs/Faqs.pdf.
[280] ICSID Convention Articles 52(4) & 61(2); Arbitration Rules 47(1)(j) & 53; Administrative and Financial Regulation 14(3)(e).
[281] *See* BISHOP & MARCHILI, *supra* note 209, § 11.68.
[282] ICSID Case No. ARB/01/7.
[283] *MTD*, Decision on Annulment ¶¶ 110-111 (Mar. 21, 2007) (footnote omitted).
[284] *ICSID Background Paper on Annulment*, *supra* note 210, ¶ 66.

More recently, *ad hoc* committees have been perhaps more inclined than before to require the losing party in an annulment proceeding to bear the costs of the proceeding, as several tribunals have awarded costs and/or fees to the winning side.[285] But shifting legal costs, which are typically a much larger burden than the arbitrators' fees and administrative expenses, is still not the default result. For example, in *Malicorp*, the committee rejected the application for annulment in its entirety and required the applicant to pay the costs, but provided that each side would bear its own legal fees.[286]

Opinions vary on whether applying cost-shifting, or "the cost follows the event," properly furthers ICSID's policy goals.[287] However, if one of those goals is to expeditiously reach final enforceable awards, cost shifting as the *default* outcome is a way to encourage it. Knowing that they will have to pay the other side's legal fees if annulment is denied—as it usually is—will discourage parties from pursuing long-shot annulment efforts.[288]

X. Resource Constraints and "Politics" Do Not Justify Delay by State Respondents

A frequent overriding explanation for the length of investment arbitrations is that the presence of a state as a party to the proceeding will inherently add complications and delays to a case that are absent from disputes that involve only private parties. However, none of the common justifications for state delay in ICSID proceedings are ultimately persuasive, or intractable.

A. State Decisionmaking in Investment Arbitration

Commentators have argued that the decisionmaking process for a state respondent in an investment arbitration is different than for private actors. Investment arbitrations may demand the attention of top officials and multiple agencies within a government, complicating a state's response. Karl-Heinz Böckstiegel observes that "State parties will often request longer periods for submitting their memorials and evidence, because the decision process between counsel and the various state agencies involved may be more complex and time consuming."[289] Likewise, the 2009 Allen & Overy study acknowledges that "the constituent organs of a state rarely function like corporations and are not usually able to react as cohesively as corporate entities might. Decision-making processes feature both the pragmatic and the political."[290]

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[285] *See, e.g.*, *AES Summit Generation Ltd. v. Hungary*, ICSID Case No. ARB/07/22, Decision on Annulment ¶ 182 (June 29, 2012); *Togo Electricité v. Togo*, ICSID Case No. ARB/06/7, Decision on Annulment ¶ 261 (Sept. 6, 2011); *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7, Decisión de Anulación ¶ 390 (Dec. 10, 2010); *see also* BISHOP & MARCHILI, *supra* note 209, § 11.70.

[286] ICSID Case No. ARB/08/18, Decision on Annulment ¶ 162 (July 3, 2013).

[287] *See, e.g.*, B.S. Vasani & A. Ugale, *Cost Allocation in Investment Arbitration: Back Toward Diversification*, Columbia FDI Perspectives, No. 100 (July 29, 2013) (arguing that "[i]n the context of ICSID, particularly, the [cost-shifting] approach is less likely to meet that forum's goals.").

[288] Former World Bank General Counsel Aron Broches argued that if a request for annulment is frivolous and abusive, the committee should award not only costs but also compensatory and punitive damages to the other side. *See* A. Broches, *Observations on the Finality of ICSID Awards*, 6(2) ICSID REV. 321, 328 (1991).

[289] K. Böckstiegel, *The Lalive Lecture 2012: Commercial and Investment Arbitration: How Different Are They Today?*, 28 ARBITRATION INT'L 577, 585 (2012).

[290] Sinclair et al., *supra* note 4, at 5; *see also* G. Kahale, III, *Is Investor-State Arbitration Broken?*, TRANSNATIONAL DISPUTE MANAGEMENT (2012) ("Anyone with even the slightest experience in representing states knows that it could take much more than 30 days for a request for arbitration to come to the attention of the right person or

These explanations offered for state delay in investment arbitration may prove too much. The fact that an ICSID case might require high-level input and interagency coordination hardly makes the case unique. People at senior levels of government play a role in numerous proceedings, from highly publicized criminal cases to regulatory actions to major civil suits brought by or against the state. Diplomats and political appointees might have to sign off on a state's strategy in an ICSID arbitration, but this does not make the case different from other important matters.

To be sure, national courts are different from international bodies like ICSID. A state party dealing with an international institution may have unique concerns that do not arise when operating within the country's own court system. Moreover, state parties have inherently "bought into" the legitimacy of their own courts, whereas an entity like ICSID is only as strong as its members' recognition of the arbitral process. However, this does not mean a multiyear process is inevitable for international disputes, or that states will refuse to recognize ICSID awards if they come quicker than they do now. For instance, as discussed above, the pleading and hearing stages of a WTO dispute typically takes a fraction of the time that ICSID proceedings do, even with states on *both* sides of the dispute.

At most, developed court systems and international bodies might give *some* leeway to a state organ,[291] but the average experienced judge will have little patience with government counsel who tries to bring a process to a halt on the ground that they need more time for sign-off by top officials. Likewise, if an arbitral tribunal indicates to a state respondent that it will not stand for political hold-up, more likely than not the tribunal will find that the bureaucratic gears speed up accordingly. Though intra-government practices may have to be streamlined, states are not incapable of moving with dispatch when they have to, pursuant to institutions and agreements that they have agreed to support.

B. Resource Constraints

Perhaps a more compelling defense of state delay is that states do not always have the same resources as many investor claimants. Sometimes, the claimant will be represented by a major international private firm while the state relies on its own attorney general's office or other government counsel. Government offices may lack the manpower and experience to follow a brisk schedule that includes major written submissions.

But again, this argument fails to persuade. Proceedings are often drawn out not simply because respondents take too long to make required submissions, but also because they make *too many* submissions that are not always meritorious. For example, in *EDF International v. Argentina*,[292] which was initiated in 2003 and still pending a decade later, Argentina's in-house Treasury counsel proved capable of submitting (unsuccessful) jurisdictional objections, an (unsuccessful) proposal to disqualify an arbitrator, which suspended the case for seven months, an application to annul the award, and a request to continue the stay of enforcement of the award.

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department in a government, and that is just the beginning of the process.").

[291] For example, the U.S. Federal Rules of Appellate Procedure give extra time to file an appeal in cases where the United States is a party. U.S. Fed. R. App. P. 4(a)(1)(A)-(B).

[292] ICSID Case No. ARB/03/23.

In any event, states that have signed on to BITs and the ICSID Convention have undertaken to arbitrate their disputes with investors. To make such a commitment but then fail to devote the legal resources necessary to actually participate in these proceedings does not evidence good faith compliance with treaty obligations. Hiring and training several government lawyers to focus on investment disputes is not an excessive burden even on less wealthy governments.

Moreover, investment arbitration is a fascinating and prestigious practice area and experienced outside counsel are often willing to represent state respondents at near-pro bono billing rates. Indeed, many of the poorest signatories to the ICSID Convention, including Senegal,[293] Tanzania,[294] Moldova,[295] Georgia,[296] Cambodia,[297] and Congo[298] have retained major international law firms to defend them in ICSID proceedings. No state can credibly argue that it cannot afford qualified counsel who will arbitrate on a reasonably expedient schedule. Moreover, Thomas Wälde has noted that it is sometimes the *claimants*, particularly small companies with little international experience, who have overmatched counsel in investment proceedings.[299]

C. Evidence Gathering

Problems with evidentiary gathering and disclosure are yet another explanation of state delay in investment proceedings. Barton Legum explains that "disclosure of evidence in investment treaty cases is often a messy affair that gives rise to frequent procedural disputes and delays."[300] In particular, "governments—even ones in developed countries—are not particularly good at record keeping."[301]

Though this contention is entirely plausible, and certainly a source of frustration to claimants, it is not a problem that is particular to state parties. Private corporate clients, particularly in developing countries, are also often less than exemplary in their record keeping. Though government functionaries may have "few internal incentives … to take time away from overwhelming existing duties to access what records there are,"[302] many a lawyer has experienced similar resistance when seeking documents from the files of a private institution—whether the lawyer's own client or an adversary. Ultimately, state and private parties are obliged to gather and disclose relevant evidence in good faith and in a timely manner. Tribunals are

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[293] *Millicom Int'l Operations B.V. v. Senegal*, ICSID Case No. ARB/08/20 (represented by King & Spalding LLP).
[294] *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (represented by Freshfields Bruckhaus Deringer LLP)
[295] *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23 (represented by DLA Piper).
[296] *Bidzina Ivanishvili v. Georgia*, ICSID Case No. ARB/12/27 (represented by Dechert LLP).
[297] *Cambodia Power Co. v. Cambodia*, ICSID Case No. ARB/09/18 (represented by Freshfields Bruckhaus Deringer LLP).
[298] *Int'l Quantum Resources Ltd., Frontier SPRL v. Congo*, ICSID Case No. ARB/10/21 (represented by Bredit Prat).
[299] T.W. Wälde, *"Equality of Arms" in Investment Arbitration: Procedural Challenges*, in ARBITRATION UNDER INT'L INVESTMENT AGREEMENTS, *supra* note 157, at 179.
[300] B. Legum, *An Overview of Procedure in an Investment Treaty Arbitration*, in ARBITRATION UNDER INT'L INVESTMENT AGREEMENTS, *supra* note 157, at 99.
[301] *Id.*
[302] *Id.*

likewise empowered to enforce these obligations and sanction the parties that fail to comply, including imposing monetary sanctions or adverse inferences when warranted.[303]

D. Legitimacy Concerns

Will more streamlined proceedings endanger the legitimacy of investment arbitration in the eyes of governments? Although legitimacy is a paramount concern in investment arbitration, there is little reason to believe speeding up cases will diminish states' recognition of ICSID awards. While empirical work on states' compliance with awards is sparse,[304] anecdotal evidence does not suggest a link between the length of an ICSID case and a state's willingness to recognize the award. On the contrary, the country most notorious for resisting enforcement of awards against it, Argentina,[305] has also been the respondent in many of ICSID's lengthiest cases.[306] Likewise, the fastest ICSID awards tend to be state victories, because they are resolved on jurisdictional objections or other preliminary procedural tactics like Rule 41(5).[307]

XI. A Sample Timetable for an 18-Month Arbitration

Although many critics have complained about the length of investment arbitrations, how long an ICSID arbitration "should" take is a judgment call. But how fast can an ICSID arbitration realistically take, from the request for arbitration through the award? Though experienced practitioners might laugh, eighteen months should be an achievable if aggressive goal. Taking into account the recommendations set forth in this article, here is a sample aspirational timetable for a case that begins at the start of 2014:

Request for Arbitration:	January 1, 2014
Completion of Simultaneous Registration and Constitution:	April 1, 2014
First Session:	June 1, 2014
Claimant's Memorial:	July 1, 2014
Respondent's Countermemorial:	September 1, 2014
Claimant's Reply:	October 15, 2014
Respondent's Rejoinder:	December 1, 2014
Hearing:	January 1-7, 2015
Simultaneous Post-hearing Memorials:	February 1, 2015

[303] *See* Wälde, *supra* note 299, at 175, 185-187.
[304] *See, e.g.*, A.S. Alexandroff & I.A. Laird, *Compliance and Enforcement*, at 1174, in THE OXFORD HANDBOOK OF INT'L INVESTMENT LAW (P. Muchlinski et al. eds., 2008) ("The more empirical question of whether state respondents ultimately comply with adverse awards … is one that has not been addressed in any substantive manner and is a matter that needs to be addressed, albeit in a future paper."); S. Tonova, *Compliance and Enforcement of Awards: Is There a Practical Difference Between ICSID and Non-ICSID Awards?*, in INVESTMENT TREATY ARBITRATION AND INT'L LAW, vol. 5, at 235 (I.A. Laird & T.J. Weiler eds., 2012) ("No official statistics exist regarding compliance rates with ICSID and non-ICSID awards.").
[305] *See, e.g.*, *id.* at 229-230 ("Certain states, notably Argentina, have resisted compliance with ICSID awards…."); T.-Y. Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5 CONTEMP. ASIA ARBITRATION J. 1 (2012).
[306] Argentina was the respondent in three of the four longest Convention cases in which awards were issued in 2011 and 2012.
[307] *See* Parts V and VII *supra*.

Award:	July 1, 2015
Total time for primary proceeding:	18 months

This timetable contemplates that the parties will begin finding and appointing arbitrators immediately after the request for arbitration is submitted. It assumes there are no preliminary objections or arbitrator challenges, and that the case is not bifurcated. It gives the claimant only a month to submit its memorial after the tribunal's first session, on the expectation that the claimant will have had ample time to begin preparing it before the first session. It likewise gives the respondent two months for its countermemorial. The schedule provides for a single, one-week hearing. It has post-hearing memorials due a month after the start of the hearing, on the assumption that they will address narrow questions specifically posed by the tribunal during the hearing or shortly afterward. And it gives the tribunal six months to deliberate after the hearing.

As for the annulment proceeding that often follows an initial award, it can ideally be completed within a year of the award, even where the applicant takes the full four months allowed under the ICSID Convention to submit its annulment application. Here is a sample schedule for an annulment proceeding that follows the case above:

Application for Annulment:	November 1, 2015
Constitution of *Ad Hoc* Committee:	December 1, 2015
Applicant's Memorial:	December 1, 2015 (150 days after underlying award)
Countermemorial:	January 15, 2015
Reply:	February 15, 2015
Hearing on Annulment:	March 15-16, 2015
Decision on Annulment:	July 1, 2015
Total time from underlying award to annulment decision:	12 months

There is no question that delays can happen at various steps of the primary and annulment proceedings. Maybe one or both parties cannot quickly find suitable arbitrators to appoint, or a party challenges an appointment. The respondent may unsuccessfully assert preliminary objections to jurisdiction or under Rule 41(5). Maybe disagreements over evidentiary exchange will hold up the process. Maybe the parties and tribunal cannot find a convenient early hearing date. Maybe deliberations are simply impossible to complete within six months of the hearing, or within three and a half months at the annulment stage. Maybe an annulment application requires new factual development.

But for the reasons discussed in this article, no single piece of the schedule above is unrealistic if certain rule changes and practice norms are followed. Eighteen months for an arbitration, and twelve months for an annulment proceeding, can serve as an best-practices goal for parties and arbitrators. Moreover, even if a case takes a full year longer than the schedule above, it will still be considerably faster than the average ICSID case.

XII. Conclusion: Who Benefits from a Faster ICSID?

Whatever the political or institutional obstacles, we should not be fatalistic regarding the length of investment arbitrations. Excessive delays are not an inevitable element of these proceedings, and can be minimized without sacrificing due process, the legitimacy of awards, party autonomy,

or other key values. Some straightforward modifications of ICSID's rules and practices can go a long way toward shortening arbitrations and incentivizing parties not to stretch things out.

Although the loudest complaints about the length of ICSID proceedings tend to come from investors and their representatives, by no means would they be the only beneficiaries if the ICSID arbitration process were shortened. State respondents would particularly enjoy the early resolution of cases through an expanded use of Rule 41(5) or treaty provisions allowing preliminary disposition. Moreover, if a state is ultimately held liable at the end of a dispute, the size of the pre-judgment interest on the award will be proportional to the length of the proceeding. And all parties will surely enjoy the lower legal fees made possible by shorter proceedings.

ICSID itself as an institution would also benefit from shorter proceedings, from both a competitive and legitimacy standpoint. Frustration with the length of proceedings may account for a move toward other fora for resolving investment disputes. Other institutions, in turn, have begun competing with ICSID in the "market" for investor-state arbitrations. For example, in recent years approximately ten percent of ICC arbitration have included state parties,[308] the 2012 amendments to the ICC Rules were intended, in part, to facilitate arbitration involving state entities, and many BITs now allow for the possibility of using the ICC Rules.[309]

In addition, quicker resolution might reduce the institutional strain on ICSID, which is overseeing more cases than ever before. Of the nearly 400 Convention arbitration cases that have been registered in the institutions four decades, more than three quarters have come since 2002.[310] In 2012 alone, more cases were registered than in ICSID's first 25 years.[311] Faster proceedings will mean that the ICSID staff has fewer cases to handle at a time.

More broadly, moving cases to a faster conclusion, rather than allowing them to languish for years or decades, may enhance ICSID's perceived legitimacy as a means of dispute resolution, encourage investor confidence in the process, and promote the goals for which the ICSID Convention was enacted. This will certainly redound to the institution's benefit.

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[308] ICC Statistics, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/.
[309] *See* ICC ARBITRATION COMMISSION REPORT ON ARBITRATION INVOLVING STATES AND STATE ENTITIES UNDER THE ICC RULES OF ARBITRATION (2012).
[310] The ICSID Caseload—Statistics, No. 2013-2, at 8.
[311] *Id.*