FINALITY, FAIRNESS, AND CONSISTENCY: STRIKING A BALANCE IN ICSID ANNULMENT PROCEEDINGS CONCERNING ARBITRATOR BIAS

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A unique feature of the ICSID framework is the built-in control mechanism that allows parties to seek annulment of an otherwise final award via Article 52 of the Convention. Unlike arbitration in other contexts, this mechanism is the exclusive means for review of an ICSID award. While scholars and practitioners regard this as one of the most innovative features of the ICSID regime, many of the grounds for annulment remain underdeveloped. In particular, annulment committees have applied the "serious departure from a fundamental rule of procedure" ground inconsistently.

Especially because challenges to arbitrators can occur during the appointment phase, during the arbitration itself, or during annulment proceedings, the proper standard for determining bias remains convoluted. Accordingly, this Note examines how different approaches to assessing arbitrator bias unfold in annulment proceedings applying the "fundamental rule of procedure" ground. It argues that these differences have contributed to a greater number of unpredictable outcomes, undermining a central purpose of ICSID. Two recent decisions—the Azurix and EDF annulments—highlight the divergent approaches ad hoc committees have taken in addressing

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allegations of bias. This Note concludes by identifying the EDF approach as the most appropriate standard of review and discusses possible routes for resolving differences in ICSID annulment decisions.

I. INTRODUCTION

Since its creation more than fifty years ago,[1] the International Centre for Settlement of Investment Disputes ("ICSID") has grown from the brainchild of a group of World Bank economists to the dominant institution for investor-state arbitration.[2] Claims before ICSID tribunals frequently involve high-profile corporations and billions of dollars in damages.[3] Such claims typically arise when an investor alleges a state breached a contract or violated an applicable investment treaty, often by expropriating assets or failing to treat an investor fairly and equitably.[4] A unique feature of the ICSID framework is the built-in control mechanism that allows parties to seek annulment of an otherwise final award via Article 52 of the Convention.[5] While drafters of the relevant provision

[1] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

[2] *See* ANTONIO R. PARRA, THE HISTORY OF ICSID 267 (2d ed. 2017); *see also* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 27 (2007).

[3] *See, e.g.*, TransCanada Corp. v. United States, ICSID Case No. ARB/16/21, Request for Arbitration, ¶¶ 1, 91 (June 24, 2016) (seeking damages of more than $15 billion after the United States refused to approve TransCanada's application for the Keystone XL pipeline); Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶¶ 585–86, 590 (Nov. 2, 2015) (partially annulling an award of more than $2 billion).

[4] *See* LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 74–75, 88–89 (2d ed. 2010); Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1112 (2012) (noting that investment arbitration disputes, as opposed to disputes in commercial arbitration, "involve claims against state party respondents concerning their interference with investments made by foreign investors").

[5] Hi-Taek Shin, *Annulment*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 699, 699 (Meg Kinnear et al. eds., 2016).

viewed inclusion of this mechanism as essential to reconciling finality with a need to prevent flagrant cases of injustice,[6] the mechanism has proved controversial since its inception. Conflicts over the annulment mechanism became especially pronounced after an ad hoc committee nullified an award for the first time in the 1980s.[7]

One ground for annulment, the "serious departure from a fundamental rule of [arbitral] procedure,"[8] is generally understudied. While scholars have vigorously debated the appropriate level of annulment review more broadly, and specifically the scope of merits review during annulment,[9] the question of how "serious" a departure must be to warrant annulment has received less attention. This is particularly so with respect to annulment sought on the basis of an impermissible level of arbitrator bias. In the past thirty years, ad hoc committees have not developed a consistent approach to interpreting Article 52.[10] These differences in interpretation have contributed to unpredictable outcomes which have generated significant controversy, undermining a central purpose of ICSID.[11] Future committees should take note of these emerging inconsistencies and seek to provide a greater degree of certainty. Indeed, some have suggested that ad hoc committees themselves are best situated to adjust standards of review, change interpretations over time, and provide a greater degree of certainty

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[6] Silvia M. Marchili & Sara McBrearty, *Annulment of ICSID Awards: Recent Trends*, *in* ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 427, 427 (Crina Baltag ed., 2017).

[7] *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 DUKE L.J. 739, 760–61 (1989); Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. 321, 321 (1991); Christoph Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope*, 10 LAW & PRAC. INT'L CTS. & TRIBUNALS 211, 212–13, 215–17 (2011); R. DOAK BISHOP & SILVIA M. MARCHILI, ANNULMENT UNDER THE ICSID CONVENTION ¶¶ 4.15–4.18 (2012).

[8] ICSID Convention, *supra* note 1, art. 52.

[9] *See* Schreuer, *supra* note 7, at 215–21.

[10] Nikolaos Tsolakidis, *ICSID Annulment Standards: Who Has Finally Won the Reisman v. Broches Debate of Two Decades Ago?*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYS.: JOURNEYS FOR THE 21ST CENTURY 828, 849 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

[11] *See* Reisman, *supra* note 7, at 749–50.

for parties.[12] By doing so, ad hoc committees can promote stability in the way awards are assessed and provide a greater level of reliability to states and investors.

This Note proceeds in five parts. Part II of this Note examines the steps parties must take to initiate ICSID review proceedings and discusses the grounds for annulment, including a "serious departure from a fundamental rule of [arbitral] procedure," as listed in Article 52 of the ICSID Convention.[13] Part III contextualizes the open questions relating to the appropriate ICSID standard of review in decades-old debates, and discusses several distinct approaches to determining what constitutes a "serious departure" with respect to arbitrator bias.[14] Part IV argues inconsistent standards of review undermine predictability and stability in investment arbitration and analyzes possible mechanisms for resolving the differences between the standards. Finally, Part V offers concluding thoughts.

II. ARBITRATION & ANNULMENT UNDER THE ICSID CONVENTION

This Section begins by reviewing the origins and purposes of the ICSID Convention. It next briefly traces the procedural mechanisms by which arbitration and annulment take place when conducted pursuant to ICSID rules. It then outlines the limited bases for annulling an arbitral award and details the unique features of arbitration conducted under ICSID auspices.

[12] *See* Tsolakidis, *supra* note 10, at 851.

[13] ICSID Convention, *supra* note 1, art. 52.

[14] Although there are many procedural elements of arbitration for which these questions are relevant, this Note focuses only on arbitrator bias.

A. The ICSID Convention & Arbitral Procedure

1. The Creation and Purpose of ICSID

In 1965, World Bank staff completed work on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Convention"), which created ICSID.[15] By October of the following year, twenty nation-states had ratified the Convention and it entered into force.[16] Today, more than 150 states are members of ICSID,[17] now a cornerstone of international investment arbitration and described as "the premier international investment arbitration facility in the world."[18] In large part, the creators of ICSID sought to establish an independent and neutral mechanism for resolving competing legal claims in investment disputes.[19]

The ICSID Convention is the most common framework for investor-state arbitration.[20] More than 60% of all such

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[15] INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, 1 HISTORY OF THE ICSID CONVENTION 2, 8–10 (1970).

[16] *Id.* at 10.

[17] *See Database of ICSID Member States*, INT'L CTR. FOR SETTLEMENT INV. DISP. (Nov. 12, 2019), https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx [https://perma.cc/8S8Q-PTPT]. Nine states have signed but not ratified the Convention. *Id.*

[18] PARRA, *supra* note 2, at 267 (internal quotation marks omitted) (footnote omitted).

[19] Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223, 226 (2013); Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 29, 31 (Michael Waibel et al. eds., 2010); MARIA NICOLE CLEIS, THE INDEPENDENCE AND IMPARTIALITY OF ICSID ARBITRATORS: CURRENT CASE LAW, ALTERNATIVE APPROACHES, AND IMPROVEMENT SUGGESTIONS 3 (2017).

[20] *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.143, ¶ 1 (2017), http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/143-e.pdf [https://perma.cc/C3MQ-34EB] (noting the percentage may be as high as seventy percent); *Investment Dispute Settlement Navigator*, UNITED NATIONS CONF. TRADE & DEV. (UNCTAD) INV. POL'Y HUB (Apr. 22, 2019), https://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution

arbitrations take place under ICSID auspices,[21] while the next most frequently used set of rules, the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, are used only about half as often.[22] The Permanent Court of Arbitration (the "PCA") and Stockholm Chamber of Commerce (the "SCC") are active in arbitration generally, but do not administer nearly as many investor-state disputes as ICSID.[23]

By its very nature, ICSID offers an attractive forum for investors and states alike. For one, ICSID is a specialized facility tailored to investment disputes.[24] ICSID provides the efficiency and finality private entities seek when taking recourse to arbitration, with the added benefit of possessing a self-contained control mechanism.[25] Since domestic courts cannot annul or otherwise review ICSID awards,[26] parties to ICSID

[https://perma.cc/VBS7-T438] (indicating, as of April 2020, that more than 600 of about 1,000 arbitrations—slightly more than sixty percent of investor-state arbitrations—took place pursuant to ICSID or ICSID Additional Facility rules).

[21] Of the roughly 850 known Investor-State Dispute Settlement cases, more than 500 have been registered under ICSID. *Compare* UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017 2, 2 fig.1 (2018), *with* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (ICSID), UPDATED BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID ¶ 31 (2016) [hereinafter UPDATED BACKGROUND PAPER].

[22] *See Investment Dispute Settlement Navigator*, *supra* note 20 (indicating roughly 310 of about 980 arbitrations—or about thirty percent—take place using UNCITRAL rules).

[23] *See id.* (indicating roughly 50 of about 980 arbitrations—or about five percent—take place using PCA and SCC rules).

[24] Crina Baltag, *The ICSID Convention: A Successful Story – The Origins and History of the ICSID*, *in* ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 1, 22–23 (Crina Baltag ed., 2017).

[25] Reisman, *supra* note 7, at 750–55.

[26] Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID REV. 263, 283–84 (2014). Although the *Micula* case has recently generated controversy with respect to the enforcement of awards in the European Unions, such issues are outside the scope of this Note. *See generally* Christian Tietje & Clemens Wackernagel, *Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the* Micula *Arbitration*, 16 J. WORLD INV. & TRADE 205 (2015).

arbitration have a greater degree of certainty regarding a tribunal's decision. Particularly for investors, the fact that the Convention contains no requirement to exhaust local remedies sets the framework apart from alternatives.[27] Additionally, the Convention allows parties to enforce awards in any Contracting State,[28] providing an even greater degree of finality and efficiency than might be expected in commercial arbitration.[29] Practically speaking, the increasing reliance on ICSID is also due to a greater number of bilateral investment treaties explicitly providing for arbitration administered by ICSID.[30]

2. Procedure for Initiating Arbitration and Annulment Proceedings

Of course, annulment cannot take place without an award to nullify. Accordingly, it is necessary to recount the basic steps in undertaking arbitration in the ICSID framework.[31] Arbitration begins when either a state or a national of a contracting state requests to institute proceedings, the Secretary-General of ICSID duly registers the request, and a tribunal (usually consisting of three members) is constituted.[32] Proceedings before the tribunal usually include two rounds of written pleadings followed by a round of oral proceedings.[33]

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[27] Helnan Int'l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the *Ad Hoc Committee*, ¶ 9 (June 14, 2010) ("An ICSID tribunal may not decline to make a finding of breach of treaty on the ground that the investor ought to have pursued local remedies . . . .").

[28] A Contracting State is a State that has ratified the ICSID Convention. *See* ICSID Convention, *supra* note 1, preamble.

[29] *See* Baltag, *supra* note 24, at 22.

[30] Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 886 (2007).

[31] For a thorough account of instituting and completing an arbitration under ICSID rules, see REED ET AL., *supra* note 4, at 123–57.

[32] *See* ICSID Convention, *supra* note 1, arts. 36–40.

[33] *Written Procedure — ICSID Convention Arbitration*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/en/Pages/process/Written-Procedure-Convention-Arbitration.aspx [https://perma.cc/RJ7M-ALKY]; *Oral Procedure — ICSID Convention*

Hearings officially end when the tribunal declares a formal closure, though in many cases parties submit post-hearing briefs to elaborate on relevant arguments.[34] After deliberations, the tribunal reaches its decision by majority vote and renders a final, non-appealable award.[35]

Though the ICSID Convention precludes appealing an award, some recourse is available through annulment proceedings; this form of relief, however, is often characterized as an exceptional remedy.[36] As professor and arbitral expert Christoph Schreuer put it, annulment "is fundamentally different from appeal . . . [in that it is] not concerned with its substantive correctness" and instead is "based on a limited number of fundamental standards."[37] Either party may seek this remedy by submitting an application for annulment.[38] Notably, parties may not request annulment of any aspect of the award, including decisions on jurisdiction or arbitrator disqualification requests, until the tribunal issues the final award.[39] With one exception, the party requesting annulment must file an application with the ICSID Secretary-General

Arbitration, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/en/Pages/process/Oral-Procedure-Convention-Arbitration.aspx [https://perma.cc/G3FK-VG4S].

[34] Joongi Kim, *Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 718, 724–25 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

[35] ICSID Convention, *supra* note 1, arts. 48, 53; INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (ICSID), ICSID CONVENTION, REGULATIONS, AND RULES, 99, 127, ICSID Doc. ICSID/15 (2006) [hereinafter ARBITRATION RULES].

[36] *See* AES Summit Generation Ltd. v. Republic of Hung., ICSID Case No. ARB/07/22, Decision of the *Ad Hoc* Committee on the Application for Annulment, ¶ 17 (June 29, 2012) ("[A]nnulment is an exhaustive, exceptional and narrowly circumscribed remedy and not an appeal."); Sundra Rajoo, *Annulment of Investment Arbitration Awards*, *in* INVESTMENT TREATY ARBITRATION REVIEW 211, 211 (Barton Legum ed., 2d ed. 2017).

[37] Schreuer, *supra* note 7, at 212.

[38] ICSID Convention, *supra* note 1, art. 52.

[39] UPDATED BACKGROUND PAPER, *supra* note 21, ¶ 30; Aron Broches, *Observations on the Finality of ICSID Awards*, *in* SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 295, 302 (1995).

within 120 days of the date of the relevant award.[40] Parties must "state in detail" the grounds of an application, with reference to Article 52 of the Convention.[41] The singular exception to this procedure applies when a party invokes corruption as a ground for annulment, as explained in more detail below.[42]

Once either party successfully registers an application, the Chairman of the Administrative Council will appoint a three-member ad hoc committee from the ICSID Panel of Arbitrators.[43] Once annulment proceedings commence, the ad hoc committee operates under the same rules as the preceding arbitration, with the ICSID Arbitration Rules applied *mutatis mutandis*.[44] Typically, annulment procedures mirror those of the initial arbitration, with preliminary discussions of procedural matters, filing of memorials and counter-memorials, oral hearings, and a subsequent decision by the committee.[45] Once rendered, an annulment decision is final and binding, and no party may appeal the decision or seek further annulment proceedings.[46] Importantly, state courts cannot intervene in proceedings under ICSID auspices or set aside ICSID awards—the ad hoc committee possesses exclusive authority to annul an award.[47]

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[40] *See* ICSID Convention, *supra* note 1, art. 52(2).

[41] ARBITRATION RULES, *supra* note 35, at 124.

[42] *See infra* Section II.B.2.ii.

[43] ICSID Convention, *supra* note 1, art. 52(3). For details as to who may be appointed to the Panel of Arbitrators, and how long they may serve *see id.* arts. 12–16. The Administrative Council is the governing body of ICSID and the Panel of Arbitrators is a limited group of arbitrators determined to possess the necessary qualifications for serving on tribunals and ad hoc Committees. *Id.* arts. 3–7, 12–14.

[44] ARBITRATION RULES, *supra* note 35, at 126. In other words, the same procedural rules generally apply in arbitration proceedings and annulment proceedings, taking into account necessary adjustments.

[45] UPDATED BACKGROUND PAPER, *supra* note 21, ¶¶ 50–51, 59–62.

[46] *See* ICSID Convention, *supra* note 1, art. 53.

[47] *See id.* arts. 53–54. For background on this prohibition on state court intervention, see Reisman, *supra* note 7, at 750–51 (noting one of the driving forces of the ICSID regime was avoiding national court systems).

3. Ad hoc Committee Sources of Law & Precedent

In formulating decisions, ad hoc committees must consider whether the arbitral tribunal ran afoul of any grounds in Article 52 of the Convention. To do so requires answering complicated legal questions and in turn, often requires committees to evaluate vague terms like "serious" and "fundamental."[48] While national courts in common law jurisdictions may be required to abide by precedent, no such restriction exists for either ICSID arbitration tribunals or ad hoc committees.[49]

However, ICSID ad hoc committees reference "judicial decisions" to determine applicable rules of law, just as the International Court of Justice (the "ICJ") does pursuant to Article 38(1)(d) of its statute.[50] In an implicit reference to the ICJ's statute, the ICSID Convention calls upon tribunals (and ad hoc committees, *mutatis mutandis*) to apply "rules of international law" in the absence of agreement by the parties.[51] In many instances, tribunals and ad hoc committees have called for the consistent application of case law and convergence of investment case law.[52] Some arbitral tribunals have even explicitly made decisions to stay in line with important precedents of previous ICSID tribunals.[53] As one scholar noted, "core legal concepts of international investment law . . . only

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[48] *See* ICSID Convention, *supra* note 1, art. 52(1)(d).

[49] Alain Pellet, *2013 Lalive Lecture: The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 227 (2013).

[50] *Id.*; Statute of the International Court of Justice, art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

[51] ICSID Convention, *supra* note 1, art. 42(1); Pellet, *supra* note 49, at 227.

[52] Saipem SpA v. People's Republic of Bangl., ICSID Case No. ARB/05/07, Award, ¶ 90 (June 30, 2009); Quiborax S.A. v. Plurinational State of Bol., ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 46 (Sept. 27, 2012).

[53] *See* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1016 (2007); *see also* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 82 (Apr. 27, 2006); Pan American Energy LLC v. Argentine Republic, Decision on Preliminary Objections, ICSID Case No. ARB/04/8, ¶ 110 (July 27, 2006).

assume a more concretized meaning over time because of the interpretations [of] investment treaty tribunals."[54]

Nonetheless, as the tribunal in *SGS Société Générale de Surveillance SA v. Republic of the Philippines* pointed out, even with an eye toward consistency, different bilateral or multilateral investment treaties will determine the applicable law for different tribunals, and accordingly, each tribunal must make its own independent determinations.[55] As the same tribunal went on to note, "there is no doctrine of precedent in international law . . . There is no hierarchy of international tribunals, and . . . there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."[56]

B. Scope of Review and Grounds for Annulment Under the ICSID Convention

As of May 2016, a party sought annulment of an award, either in whole or in part, in ninety instances, or nearly 40% of cases.[57] However, only fifteen awards—or roughly 6.5%—have been annulled either in full or in part in ICSID's fifty year history.[58] Since May 2016, ad hoc committees have rendered annulment decisions in roughly twenty cases, only a fraction of ICSID's overall caseload.[59]

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[54] Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1092 (2011).

[55] SGS Société Générale de Surveillance SA v. Republic of the Phil. (*SGS Philippines*), ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 97 (Jan. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf [https://perma.cc/PD6C-ASKF].

[56] *Id.*

[57] *See* UPDATED BACKGROUND PAPER, *supra* note 21, ¶ 31.

[58] *Id.* ¶ 111. Five awards have been annulled in full and ten have been partially annulled. *Id.*

[59] *Compare id.*, *with Decisions on Annulment*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (Jan. 23, 2019), https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Annulment.aspx [https://perma.cc/P6YJ-QDHX].

1. Scope of Review

Article 51 of the Convention allows parties to request revision of an award, but only when a party discovers previously unknown facts that would decisively affect the award.[60] By implication, annulment is not meant to correct factual inaccuracies that may have affected the award; rather, annulment is meant to cure problems related to the underlying fairness of the proceedings.

Importantly, seeking annulment is not tantamount to seeking an appeal, as in the domestic courts of many states. As one recent ad hoc committee noted in its annulment decision, a committee's mandate "is strictly circumscribed by the five grounds for annulment listed under the ICSID Convention and it may not . . . reverse an award on the merits."[61] Some ad hoc committees have even found that annulment does not function as a cure for an "incorrect" decision, and that Article 52 does not provide a mechanism to annul an award based on the merits.[62] In the wake of the earliest ad hoc committee annulment decisions, scholars such as Michael Reisman noted Article 52 should not provide a "hair-trigger" for annulment, requiring an ad hoc committee to automatically annul a defective award "without regard to the magnitude of the defect."[63] The notion that a committee has discretion to decline to annul an award even if it finds one of the Article 52 grounds satisfied is now regarded as settled law.[64]

The inclusion of a mechanism explicitly created to seek annulment of an award for a potential substantive or procedural defect—as opposed to simple typographical or unintentional errors—sets the ICSID framework apart.[65] While the UNCITRAL Arbitration Rules provide a comprehensive set of

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[60] ICSID Convention, *supra* note 1, art. 51(1).

[61] TECO Guat. Holdings, LLC v. Republic of Guat., ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 73 (Apr. 5, 2016).

[62] Maritime Int'l Nominees Establishment v. Republic of Guinea (*MINE*), ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.08 (Dec. 14, 1989), 5 ICSID REV. 95 (1990).

[63] Reisman, *supra* note 7, at 762.

[64] Tsolakidis, *supra* note 10, at 847–48.

[65] *See* Reisman, *supra* note 7, at 753–54.

procedural rules, they contain no provisions analogous to the ICSID Convention's Article 52. Instead, the UNCITRAL rules allow parties to seek annulment in the seat of arbitration.[66] Notably, the UNCITRAL Model Law, which serves as a guide for states implementing rules for international commercial arbitration, includes provisions more specific than ICSID's Article 52.[67] The UNCITRAL Model Law's provision most analogous to ICSID's Article 52(1)(d) indicates an award may be set aside if "arbitral procedure was not in accordance with the agreement of the parties."[68] Like the UNCITRAL Arbitration Rules, the rules of other major international arbitration centers lack language similar to ICSID's Article 52.[69]

2. Grounds for Annulment

The Convention allows for five grounds on which parties can seek annulment of an award: (a) the tribunal was improperly constituted; (b) the tribunal manifestly exceeded its powers; (c) there was corruption on the part of a member of the tribunal; (d) there was a serious departure from a fundamental rule of procedure; or (e) the tribunal failed to state the reasons for its award.[70] These grounds comprise the exhaustive

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[66] G.A. Res. 31/98, art. 36 (Dec. 15, 1976).

[67] *Compare* U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 34(2), U.N. Sales No. E.08.V.4 (2008), *with* ICSID Convention, *supra* note 1, art. 52(1).

[68] ICSID Convention, *supra* note 1, art. 34(2)(a)(iv).

[69] *See, e.g.*, PERMANENT COURT OF ARBITRATION, ARBITRATION RULES 2012, art. 38 (2012), https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf [https://perma.cc/AC3K-CDA7]; ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, 2010 ARBITRATION RULES, art. 41 (2010), https://sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf [https://perma.cc/9Q63-Y8HR]; INT'L CHAMBER OF COMMERCE, ARBITRATION RULES & MEDIATION RULES, art. 36 (2019), https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf [https://perma.cc/2RCQ-J5GQ].

[70] ICSID Convention, *supra* note 1, art. 52(1).

list of permissible grounds for annulment.[71] In practice, parties seeking annulment often invoke multiple grounds in a single annulment request.[72] Specifically in alleging a serious departure from a fundamental rule of arbitral procedure, a party aware of such a violation must react promptly by raising an objection to the practice; failing to do so will waive the party's right to raise such a claim in later annulment proceedings.[73]

While initial drafts of the Convention contained no such provisions, later versions drew on the 1953 draft of what would become the International Law Commission's (the "ILC") Model Rules for Arbitral Procedure.[74] In part, this history of Article 52 helps explain why ICSID ad hoc committees have frequently looked to the jurisprudence of the ICJ, other international courts, and the ILC when determining how best to resolve procedural questions in annulment proceedings.[75]

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[71] CEAC Holdings Ltd. v. Montenegro, ICSID Case No. ARB/14/08, Decision on Annulment, ¶ 83 (May 1, 2018); *see also* Markus Burgstaller & Charles B. Rosenberg, *Challenging International Arbitral Awards: To ICSID or Not to ICSID?*, 27 ARB. INT'L 91, 93 (2011).

[72] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 933 (2d ed. 2009) ("One of the most widely accepted strategic principles of litigation is to seek a remedy not by a single shot method but by a shrapnel tactic whereby a multitude of arguments is fired off simultaneously in the hope that at least one of them will score a hit. Although one of the grounds listed in Art. 52(1) [of the ICSID Convention] would be sufficient to cause the award's annulment, the applicants typically list several of them.").

[73] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 283–84 (2008); Klöckner v. Republic of Cameroon (*Klöckner I*), ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, ¶ 88 (May 3, 1985), 1 ICSID REV. 89 (1986).

[74] U.N. INT'L LAW COMM'N, DOCUMENTS OF THE FIFTH SESSION INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY, at 211, U.N. Doc. A/CN.4/SER.A/1953/Add.1, U.N. Sales No. 59.V.4.Vol.II (1959). Various drafts of the ICSID Convention also drew on debate of the ILC Model Rules and the accompanying commentary. *See* UPDATED BACKGROUND PAPER, *supra* note 21, ¶¶ 7–9.

[75] *See* Pellet, *supra* note 49, at 230. *See, e.g.*, *Klöckner I*, ICSID Case No. ARB/81/2, ¶ 61 (referring to arguments made before the International Court of Justice in Arbitral Award Made by the King of Spain on 23 December 1906 (Hond./Nicar.), Judgment, 1960 I.C.J. REP. 192 (Nov. 18)).

For instance, decisions of interstate arbitral bodies, such as the high profile 2016 Croatia-Slovenia arbitration and its ruling on jurisdictional challenges in the wake of a scandal related to arbitrator impartiality,[76] have greatly influenced the thinking of international arbitrators.[77]

i. Independence and Impartiality of Arbitrators as a Fundamental Rule

While considerable attention has been devoted to the "excess of powers" ground for annulment in Article 52(1)(b), the "serious departure from a fundamental rule of procedure" ground in Article 52(1)(d) has attracted less discussion, at least in the context of impermissible arbitrator bias.[78] Though "fundamental rules" are slippery concepts, multiple ad hoc committees have dealt with the term and indicated fundamental rules are those that relate to the "essential fairness" of arbitration.[79] As one committee described them, "[f]undamental rules of procedure are procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID tribunals."[80] ICSID tribunals and ad hoc committees have described the equal treatment of the parties, the right to be heard, the right to rebuttal, the deliberation of tribunal

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[76] *See* The Republic of Croat. v. The Republic of Slovn. (Croat. v. Slovn.), PCA Case No. 2012-04, Partial Award on Jurisdiction (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/1787 [https://perma.cc/5HVY-8WW5].

[77] Judith Levine, *Ethical Dimensions of Arbitrator Resignations: General Duties, Specific Quandaries, and Sanctions for Suspect Withdrawals*, 18 LAW & PRAC. INT'L CTS. & TRIBUNALS 55, 69 (2019) (noting one commentator's praise of the *Croatia-Slovenia* tribunal for the steps it took to salvage its legitimacy).

[78] *See supra* notes 5–11 and accompanying text.

[79] CDC Group plc v. Republic of Sey. (*CDC*), ICSID Case No. ARB/02/14, Annulment Decision, ¶ 49 (June 29, 2005); *see also* Daimler Fin. Servs. A.G. v. Republic of Arg., ICSID Case No. ARB/05/1, Decision on Annulment, ¶ 265 (Jan. 7, 2015) (noting fundamental rules are principles of natural justice).

[80] *Victor Pey Casado*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 73 (Dec. 18, 2012).

members, and the proper handling of evidence, among others, as fundamental rules of procedure.[81]

The right to impartial and independent adjudicators is unquestionably a fundamental rule of arbitral procedure that has arisen before ICSID ad hoc committees and other international arbitral tribunals.[82] This principle is partially reflected in Article 14 of the ICSID Convention, which sets out standards for arbitrator qualifications.[83] Scholars generally define "independence" as the absence of an actual, identifiable relationship with one of the disputing parties.[84] "Impartiality," as a distinct concept, requires arbitrators to lack any subjective predisposition toward one party or its argument.[85] While some decisions interpret the two concepts as functionally "equivalent,"[86] the consensus is that the two are distinct.[87]

Historically, there was some expectation that party-appointed arbitrators would serve as advocates for the relevant

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[81] *See, e.g.*, Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Annulment, ¶¶ 309, 314 (Feb. 1, 2016); Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, ¶ 36 (July 3, 2013); Tulip Real Estate & Dev. Neth. B.V. v. Republic of Turk., ICSID Case No. ARB/11/28, Decision on Annulment, ¶¶ 80, 145 (Dec. 30, 2015).

[82] *See* Wena Hotels Ltd. v. Arab Republic of Egypt (*Wena Hotels*), ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 57 (Feb. 5, 2002), 41 I.L.M. 934 (2002); *Victor Pey Casado*, ICSID Case No. ARB/98/2, ¶ 333.

[83] ICSID Convention, *supra* note 1, art. 14.

[84] *See* Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 CONTEMP. ASIA ARB. J. 237, 243 (2010); Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, *in* INVESTMENT & COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 153, 155 (Christina Knahr et al. eds., 2010).

[85] CLEIS, *supra* note 19, at 21.

[86] *See, e.g.*, Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 38 (Aug. 12, 2010).

[87] *See, e.g.*, OPIC Karimum Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 44 (May 5, 2011); Suez v. Argentine Republic (*Suez I*), ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 29 (Oct. 22, 2007).

appointing party.[88] However, in both the investor-state and commercial contexts, that view lost support by the second half of the twentieth century.[89] Accordingly, an elaborate set of procedures has evolved for assessing potential arbitrator bias, with the possibility of challenging and disqualifying a potential tribunal member if a party can present sufficient evidence.[90] Even so, there remains uncertainty in how "serious" a departure related to the independence or impartiality of an arbitrator must be to warrant annulment. Some ad hoc committees have interpreted the requirement that arbitrators be impartial as guarding only against misconduct that caused the tribunal to reach a substantially different result,[91] while other ad hoc committees have indicated impartiality requires avoiding even the appearance of bias.[92] In other cases, ad hoc committees have found a tribunal could cure defects related to arbitrator bias on its own.[93]

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[88] W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 478–79 (1971).

[89] *See* Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 396, 405–06 (1998); REISMAN, *supra* note 88, at 479 ("[T]he presence of an 'interested party' on an international tribunal is in conflict with widely held notions about the judicial process.").

[90] *See* ICSID Convention, *supra* note 1, arts. 56–58.

[91] *See Wena Hotels*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002), 41 I.L.M. 934 (2002).

[92] EDF International S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 111 (Feb. 5, 2016) (discussing and adopting an "appearance of bias" standard).

[93] *Victor Pey Casado*, ICSID Case No. ARB/98/2, Decision on Annulment, ¶¶ 333–37 (Dec. 18, 2012) (deciding that when an arbitrator impermissibly shared tribunal materials with one party, the defects in procedure were sufficiently cured once the tribunal dismissed the arbitrator and disclosed the relevant materials to the other party); *see also* The Republic of Croat. v. The Republic of Slovn. (Croat. v. Slovn.), PCA Case No. 2012-04, Partial Award on Jurisdiction, ¶¶ 192–95 (Perm. Ct. Arb. 2016) (detailing steps the tribunal took to cleanse itself of bias once arbitrators who engaged in improper behavior had resigned).

ii. Lack of Independence or Impartiality Distinct from Corruption

Finally, it is necessary to point out that whether corruption tainted a tribunal and whether a breach of a fundamental rule occurred due to bias are separate inquiries.[94] This is so despite the fact that scholars and practitioners often use "corruption" as shorthand to refer to both conflicts of interest and failures to make appropriate disclosures.[95] This difference may seem counterintuitive given the corruption ground for annulment specifically references tribunal members while the fundamental rule ground does not, but no ad hoc committee has ever dealt with corruption as a possible ground for annulment.[96] In one instance the corruption of arbitrators was so apparent the tribunal disbanded before rendering an award.[97] However, that instance is the exception, not the norm.

Importantly, and only for the ground of corruption, the Convention allows a party to apply for annulment up to 120 days after the discovery of the corruption, provided this is no longer than three years after the tribunal rendered the final award.[98] However, no party has yet invoked corruption as a ground for annulment in proceedings before an ad hoc committee.[99]

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[94] *See* ICSID Convention, *supra* note 1, arts. 52(1)(c)–(d).

[95] *See, e.g.*, Lawrence W. Newman & David Zaslowsky, *When Arbitrators Stray: Ex Parte Communications; International Dispute Resolution*, N.Y. L.J. ONLINE (Sept. 25, 2015), https://www.law.com/newyorklawjournal/almID/1202738088991/When-Arbitrators-Stray-Ex-Parte-Communications/ [https://perma.cc/LU6G-9BJ6].

[96] *See* ICSID Convention, *supra* note 1, arts. 52(1)(c)–(d); UPDATED BACKGROUND PAPER, *supra* note 21, ¶¶ 95–97.

[97] J. B. Kelly, *The Buraimi Oasis Dispute*, 32 INT'L AFF. 318, 320 (1956).

[98] ICSID Convention, *supra* note 1, art. 52(2).

[99] UPDATED BACKGROUND PAPER, *supra* note 21, ¶¶ 96–98.

III. CONFLICTING STANDARDS FOR ASSESSING ARBITRATOR BIAS

This Section proceeds in three steps. First, it discusses the basic standards for challenging arbitrators for bias (i.e., a lack of independence or impartiality) and how those standards influence annulment proceedings. Next, it analyzes the conflicting standards ad hoc committees have applied when determining whether a departure from a fundamental rule is sufficiently serious to justify annulling an award. Third, it considers these standards and conflicting committee approaches in determining the appropriate standard of review in the context of whether an arbitrator lacked independence and impartiality.

A. Challenging and Disqualifying Arbitrators

Parties seeking to enforce the requirements of independence and impartiality can do so during the appointment stage, during the actual proceedings, or via annulment proceedings after the arbitration has ended.[100] Though this Note focuses on independence and impartiality at the annulment phase, the standards used during the appointment stage and actual arbitration proceedings merit some discussion given that they present the first opportunity to enforce arbitrator obligations of independence and impartiality and can affect which Article 52 grounds are available as a basis for annulment.[101] In contrast, annulment proceedings are a "last resort" and

[100] ICSID Convention, *supra* note 1, arts. 52, 57; CLEIS, *supra* note 19, at 15.

[101] CLEIS, *supra* note 19, at 15–16. In particular, the standards applied at the appointment stage and during the arbitration can affect whether a party is later able to seek annulment based on improper constitution of the tribunal, an excess of authority, failure to possess the requisite independence and impartiality, or some combination of those grounds. For an illustrative example, see EDF International S.A. v. Argentine Republic (*EDF*), ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 45–47, 86 (Feb. 5, 2016).

accordingly are subject to stricter requirements than initial challenge proceedings.[102]

1. Challenging an Arbitrator under the ICSID Rules

Article 14(1) of the ICSID Convention requires that arbitrators possess "high moral character" and "be relied upon to exercise independent judgment."[103] Article 57, which governs arbitrator challenges, allows a party to challenge an arbitrator's appointment "on account of any fact indicating a manifest lack of the qualities required" by Article 14(1).[104] In other words, Article 14 establishes standards arbitrators must meet and Article 57 provides the mechanism to challenge an arbitrator who allegedly lacks the requisite qualities. Once a party has initiated a challenge,[105] the other arbitrators on the tribunal decide whether to disqualify the challenged member.[106] If the remaining members are equally divided or if the proposal concerns either a sole arbitrator or a majority of the tribunal, the Chairman of the ICSID Administrative Council resolves the matter.[107] Rule 9 of the ICSID Arbitration Rules additionally requires any party challenging an arbitrator to do so "promptly" and at the very least "before the proceeding is declared closed."[108]

The requirement for a "manifest lack" of independence or impartiality is unique among arbitral body rules.[109] As one set of unchallenged arbitrators dealing with a disqualification

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[102] CLEIS, *supra* note 19, at 16. In this context, it is especially important to keep in mind that challenge proceedings and annulment proceedings operate with different standards. *See* ICSID Convention, *supra* note 1, arts. 52(1), 57.

[103] ICSID Convention, *supra* note 1, art. 14(1).

[104] *Id.* art. 57.

[105] The terms "challenge," "challenge proposal," and "disqualification proposal" are used interchangeably throughout this Note.

[106] ICSID Convention, *supra* note 1, art. 58.

[107] *Id.*

[108] ARBITRATION RULES, *supra* note 35, at 107.

[109] SAMUEL ROSS LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 247 (2009).

proposal noted in 2010, Article 57 standard is distinct from (and more forgiving than) the "justifiable doubts" standard adopted in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.[110] Though there was some debate concerning the interpretation of the word "manifest," the modern consensus is that it concerns the ease of perceiving an alleged lack of independence or impartiality, not the actual failure to possess those qualities.[111]

2. Competing Standards for Resolving Arbitrator Challenges

In the past thirty-five years, the standard for challenging and disqualifying arbitrators has undergone considerable change.[112] The first challenge to an arbitrator took place in *Amco Asia Corp. v. Republic of Indonesia* ("*Amco Asia*"), with the decision on disqualification issued in 1982.[113] In those proceedings, the deciding arbitrators determined the "mere appearance" of partiality constituted insufficient grounds for

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[110] Tidewater Inv. v. Bolivarian Republic of Venez. (*Tidewater*), ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 43 (Dec. 23, 2010). The IBA Guidelines have since been updated, though not with respect to the provisions considered in *Tidewater*. *See* INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2014).

[111] Blue Bank Int'l & Trust (Barb.) Ltd. v. Bolivarian Republic of Venez. (*Blue Bank*), ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 61 (Nov. 12, 2013); *see also* SCHREUER ET AL., *supra* note 72, at 938–39 (discussing conflicting interpretations of the word "manifest" in Article 52(1)(b) ground for annulment).

[112] *See* Baiju S. Vasani & Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, 30 ICSID REV. 194, 197 (2015) ("[T]ribunals have had considerable difficulty developing a single standard of disqualification . . . .").

[113] *See* Amco Asia Corp. v. Republic of Indon. (*Amco Asia I*), ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unreported). Though the actual decision on disqualification was unpublished, W. Michael Tupman subsequently detailed the relevant facts and the decision's analysis. *See* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26, 44–45 (1989).

disqualification.[114] The tribunal members concluded an arbitrator's lack of independence or impartiality must be "manifest," which they defined as "highly probable, not just possible or quasi-certain."[115]

The *Amco Asia* decision drew significant criticism.[116] Indeed, the next time an arbitrator challenge arose the tribunal members making the decision took a different approach.[117] That occurred in annulment proceedings of *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* ("*Vivendi I*"), where ad hoc committee members dismissed a challenge to the committee president.[118] The committee members viewed Article 57 as requiring the challenging party to establish facts raising "some reasonable doubt as to the impartiality of the arbitrator or [ad hoc committee] member."[119] Though the committee members determined a challenge could not be upheld based on "mere speculation or inference[,]" they did not adopt a standard of proof requiring a challenger to demonstrate the actual bias of an arbitrator or ad hoc committee member.[120] Similarly, in *SGS Société Générale S.A. v. Islamic Republic of Pakistan* ("*SGS Pakistan*"), the tribunal members concluded that a challenging party was required to establish facts that "reasonably . . . give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment."[121] That is, an Article 57 challenge would fail if it

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[114] Tupman, *supra* note 113, at 45.

[115] *Id.* (citing *Amco Asia I*, ICSID Case No. ARB/81/1) (internal quotation marks omitted).

[116] Tupman, *supra* note 113, at 50–51.

[117] LUTTRELL, *supra* note 109, at 250.

[118] Compañía de Aguas del Aconquija S.A. v. Argentine Republic (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 28 (Oct. 3, 2001). In that instance, the Respondent challenged an arbitrator after he disclosed that a partner in his law firm had previously advised the Claimant on a question of tax, even though the work was unrelated to the instant case and the arbitrator in question had no involvement in the work. *Id.* ¶¶ 14–15.

[119] *Id.* ¶ 25.

[120] *Id.*

[121] SGS Société Générale S.A. v. Islamic Republic of Pak. (*SGS Pakistan*), ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, ¶ 20 (Dec. 19, 2002), 8 ICSID REP. 398. In that case,

were "a result of inferences which themselves rest merely on other inferences."[122]

In the years since the disqualification decisions in *Vivendi I* and *SGS Pakistan*, challenge decisions have adopted standards inconsistently, in some instances applying the stricter test of *Amco Asia,* in others applying the standard of *Vivendi I* and *SGS Pakistan*, and in certain cases referencing both standards but dismissing challenges.[123] These differences have contributed to further inconsistency when annulment committees are called upon to determine whether any serious departures from fundamental rules of procedure occurred in tribunal proceedings.

Of particular note is the 2013 *Blue Bank International & Trust v. Bolivarian Republic of Venezuela* ("*Blue Bank*") decision, in which the ICSID Chairman determined for annulment it would be sufficient to only establish the *appearance* of bias or dependence.[124] However, the Chairman noted arbitrators or ad hoc committee members making these determinations should use an objective test.[125] In the view of the Chairman, the relevant decision maker should base such an objective test on "a reasonable evaluation of the evidence by a third party."[126] Under this test, it would be inadequate that the challenging party alone perceived a lack of independence and

Pakistan had appointed J. Christopher Thomas as an arbitrator. *Id.* ¶ 1. When he was appointed, Thomas disclosed that his firm was on retainer with Mexico and had represented it in several arbitrations before the ICSID Additional Facility. *Id.* ¶ 6. As the case proceeded, developing facts in an unrelated case made it necessary for the tribunal to resolve the challenge to Thomas' appointment. *See id.* ¶¶ 9–10. Specifically, Thomas disclosed that his firm would appear as counsel before a tribunal that included Jan Paulsson as an arbitrator. *Id.* Because Paulsson also represented Pakistan as counsel in the instant case, SGS challenged the appointment of Thomas. *Id.* The tribunal concluded the established facts were not "of such a nature as reasonably to give rise to the inference" necessary to disqualify Thomas as an arbitrator. *Id.* ¶ 25.

[122] *Id.* ¶ 20.

[123] CLEIS, *supra* note 19, at 35–52.

[124] *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 59 (Nov. 12, 2013).

[125] *Id.* ¶ 60.

[126] *Id.*

impartiality; a reasonable third party would need to agree with the challenging party.[127] That position is consistent with the *Vivendi I* decision and other previous challenge decisions.[128]

Beginning with *Blue Bank*, a series of eight Article 57 challenges indicated tribunals considering questions of bias were increasingly coalescing around the reasonable doubts standard first articulated in *Vivendi I*.[129] In addition to *Blue Bank*, two more of these eight decisions resulted in the actual disqualification of arbitrators due to an impermissible appearance of bias.[130] This trend was perhaps in part due to the fact that the ICSID Chairman wrote six of those opinions, clearly applying the same standard and using highly similar language.[131] Subsequent challenge decisions, beginning with the 2015 decision in the *Total S.A. v. Argentine Republic* annulment proceedings,[132] have gravitated toward making disqualification more difficult and have emphasized that the standard of review under Article 57 is relatively high.[133] However, a majority of the challenge decisions since 2015 have involved the same arbitrator and the same arguments for the existence of bias,[134] so it is unclear whether the most recent decisions are aberrational or truly represent a trend.

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[127] *Id.*

[128] *See Vivendi I*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 25 (Oct. 3, 2001); Suez v. Argentine Republic (*Suez I*), ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 40–41 (Oct. 22, 2007).

[129] CLEIS, *supra* note 19, at 49–50.

[130] *See* Burlington Res., Inc. v. Republic of Ecuador (*Burlington*), ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 80 (Dec. 13, 2013); Caratube Int'l Oil Co. LLP v. Republic of Kaz. (*Caratube*), ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶¶ 110–11 (Mar. 20, 2014).

[131] CLEIS, *supra* note 19, at 49–50.

[132] *See id.* at 47–48 (discussing Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, ¶ 105 (Aug. 26, 2015)).

[133] *See id.*

[134] *Id.* at 50 n.247.

Accordingly, the appropriate threshold for assessing the independence and impartiality of arbitrators remains unclear. Parties opting for ICSID arbitration face significant uncertainty when anticipating what standard—or even combination of standards—unchallenged arbitrators may apply to adjudicate disqualification proposals. A possible exception may be those cases in which parties select repeat arbitrators for their tribunals. That is, instances in which parties appoint arbitrators who have previously issued decisions (usually either in challenge proceedings or annulment proceedings) touching on the appropriate standard. However, such a consideration seems unlikely to be a primary concern for a party considering the composition of a high-stakes tribunal. While some scholars have criticized repeat appointments, [135] they typically do not focus on determining the appropriate standard for assessing bias. Even so, selecting an arbitrator specifically because of past decisions on disqualification standards would only fuel already pronounced concerns with repeat appointments and the relatively small size of the pool of potential arbitrators.[136]

B. How Serious is "Serious?"

In any case, parties seeking annulment in instances involving a biased arbitrator face even more uncertainty. While committees in recent years have demonstrated restraint in

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[135] *See, e.g.*, Carly Coleman, *How International is International Investment Dispute Resolution? Exploring Party Incentives to Expand ICSID Arbitrator Demograaphics*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 121, 129–30 (2016); Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 458 (2013).

[136] Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 49–50 (2010). *But see* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 77 (2007) (presenting evidence to rebut the claim that repeat appointments make arbitration a "mafia"). In any case, recent challenges to arbitrators based on repeat appointments have been rejected. See *e.g.*, Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, ¶¶ 77, 107 (May 20, 2011).

annulling awards,[137] a lack of clarity remains. When a challenge has been previously considered and rejected, ad hoc committees must determine how much deference, if any, to give the unchallenged arbitrator's determinations and whether the standard used in any challenge decision affects that determination. In instances when the facts relating to an arbitrator's independence or impartiality either were unknown or did not exist when proceedings closed, ad hoc committees must determine whether to review the relevant concerns de novo, and if so, which of the competing Article 57 standards to apply.

As noted above,[138] to annul an award on Article 52(1)(d) grounds, a party must show: (1) that there was a departure from a *fundamental* rule and (2) that the departure was *serious*.[139] Ad hoc committees and scholars have consistently interpreted the language of Article 52 to impose this "double limitation."[140] Though the ICSID Convention's drafting history includes some discussion of what constitutes a fundamental rule of procedure, the delegates were silent on what might constitute a "serious" departure.[141] The fact that a departure must be serious to warrant annulment necessarily implies that not every departure will justify annulling an award, further complicating the line-drawing exercise for determining just how serious a departure must be.

Ad hoc committees have two distinct lines of precedent bearing on how serious a departure must be to annul an award.[142] Though both approaches necessarily agree that any departure must be "more than minimal" and at least "substantial," they differ with respect to whether the departure must have caused the tribunal to reach a different result from what

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[137] NIGEL BLACKABY & CONSTANTINE PARTASIDES ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 649–50 (6th ed. 2015).

[138] *See supra* Section II.B.2.

[139] *See* ICSID Convention, *supra* note 1, art. 52(1)(d). Note that the meaning of "serious" in this context is different from the meaning of the word "manifest" discussed *supra* in Section III.A.1.

[140] Broches, *supra* note 39, at 329.

[141] *Id.* at 329–30.

[142] *Victor Pey Casado*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 76 (Dec. 18, 2012).

it would have otherwise.[143] One approach, beginning with the 1988 *Maritime Int'l Nominees Establishment v. Republic of Guinea* ("*MINE*") annulment decision, requires the party seeking annulment to demonstrate the departure was "such as to deprive a party of the benefit . . . the rule was intended to provide."[144] The contrasting approach imposes a higher bar, requiring the relevant rule to relate to an outcome-determinative issue, the violation of which must have "caused" the tribunal to reach a substantially different result.[145] In some sense, the language of the *Klöckner v. Republic of Cameroon* ("*Klöckner I*") committee could be interpreted as a third, even lower standard. There, the committee noted "any sign of partiality" in the tribunal would constitute grounds for annulment.[146] However, that decision was widely criticized and ad hoc committees typically refrain from applying its significantly lower bar.[147]

To some extent, the application of these standards has also coincided with what have been termed the different "generations" or "waves" of ICSID annulment jurisprudence.[148] The *Klöckner I* and *Asia Amco* annulment decisions represent

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143 *Id.* ¶¶ 76–77.

144 *MINE*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.05 (Dec. 14, 1989), 5 ICSID REV. 95 (1990).

145 *Wena Hotels*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002), 41 I.L.M. 934 (2002); Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, ¶ 81 (Jan. 8, 2007).

146 *Klöckner I*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, ¶ 95 (May 3, 1985), 1 ICSID REV. 89 (1986).

147 KATHARINA DIEL-GLIGOR, TOWARDS CONSISTENCY IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A PRELIMINARY RULING SYSTEM FOR ICSID ARBITRATION 252–53 (2017).

148 Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, *in* ANNULMENT OF ICSID AWARDS 17, 17–19 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); DIEL-GLIGOR, *supra* note 147, at 251–52. *But see* Benjamin M. Aronson, *A New Framework for ICSID Annulment Jurisprudence: Rethinking the 'Three Generations'*, 6 VIENNA J. INT'L CONST. L. 3, 30–39 (2012) (arguing the divergent methodologies of ad hoc committees necessitates re-conceptualizing the "generations" framework).

the first wave in which ad hoc committees elicited significant backlash for taking overly interventionist approaches.[149] The *MINE* and *Wena Hotels Ltd. v. Arab Republic of Egypt* ("*Wena Hotels*") decisions, respectively, represent the second and third waves in which ad hoc committees took more moderate approaches, albeit with some differences in the appropriate level of review.[150] Since the early 2000s, many annulment decisions seemed to adopt more consistent approaches as to the appropriate level of review.[151] In 2006, however, the *Patrick Mitchell v. Democratic Republic of the Congo* ("*Patrick Mitchell*") decision sparked an outcry that the ad hoc committee had overstepped its authority in annulling the award.[152] Similarly, a string of decisions in 2010 caused many in the investment arbitration community to question whether reviewing norms had truly solidified.[153] Since then, most ad hoc committees have applied the more rigorous standards for seriousness developed in *MINE* and *Wena Hotels*.[154] In one instance, the *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* ("*Vivendi II*") ad hoc committee indicated that a unanimous

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[149] DIEL-GLIGOR, *supra* note 147, at 252–56.

[150] *Id.* at 256–58. Diel-Gligor includes the *Vivendi I* annulment decision as part of the third generation. *Id.* at 257–58.

[151] *See* PARRA, *supra* note 2, at 266–67 (noting a low rate of annulment from 2000–2010).

[152] *See* BLACKABY & PARTASIDES ET AL., *supra* note 137, at 649 n.206 (noting the widespread criticism of Patrick Mitchell v. Dem. Rep. Congo, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (Nov. 1, 2006)).

[153] *See* Int'l Ctr. for Settlement of Inv. Disputes, *Background Paper on Annulment for the Administrative Council of ICSID*, 27 ICSID REV. 443, 445–446 (2012) (discussing Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil. (*Fraport I*), ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010) as the catalyst to study ICSID annulment decisions more broadly).

[154] DIEL-GLIGOR, *supra* note 147, at 271–74 (discussing Duke Energy Int'l Peru Investments No. 1 Ltd v. Republic of Peru, ICSID Case No. ARB/03/28, Decision of the Ad hoc Committee on Annulment (Mar. 1, 2011)), Togo Electricité v. Republic of Togo, ICSID Case No. ARB/06/7, Decision of the Ad hoc Committee on Annulment (Sept. 6, 2011), and *Victor Pey Casado*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (Dec. 18, 2012)).

tribunal decision might sufficiently mitigate the potential impact a biased arbitrator may have on an award,[155] but no ad hoc committee has subsequently adopted that position. This move toward the *MINE* and *Wena Hotels* approaches, to some extent, allays concerns about activist ad hoc committees. Nonetheless, it remains to be seen whether the 2010 decisions were merely aberrational or indicative of a return to more wide-ranging review like that observed in *Patrick Mitchell*.[156]

C. Three Approaches to Reviewing Disqualification Decisions

In the past ten years, ad hoc committees have developed divergent approaches to reviewing disqualification decisions. This should come as no surprise given that continued uncertainty exists regarding the appropriate standards for determining whether an arbitrator is impermissibly biased in tribunal proceedings, and whether a departure from a fundamental rule was sufficiently serious to justify annulment. Especially as the number of arbitrator challenges increases,[157] opportunities for parties to invoke potential errors in challenge decisions in annulment proceedings can only become more likely. This possibility is much more than theoretical, as seeking annulment has "become a routine step for losing parties."[158]

The *Azurix Corp. v. Argentine Republic* ("*Azurix*")[159] and *EDF International S.A. v. Argentine Republic* ("*EDF*")[160]

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[155] *See* Compañía de Aguas del Aconquija S.A. v. Argentine Republic (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, ¶ 235 (Aug. 10, 2010).

[156] *See Patrick Mitchell*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov. 1, 2006).

[157] Sam Luttrell, *Testing the ICSID Framework for Arbitrator Challenges*, 31 ICSID REV. 597, 603 (2016).

[158] Schreuer, *supra* note 7, at 213.

[159] Azurix Corp. v. Argentine Republic (*Azurix*), ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (Sept. 1, 2009).

[160] EDF International S.A. v. Argentine Republic (*EDF*), ICSID Case No. ARB/03/23, Decision on Annulment (Feb. 5, 2016).

annulment decisions exemplify the conflict between varying approaches to ad hoc Committee review of challenge decisions. In *Azurix*, the ad hoc committee considered allegations that one member of the arbitral tribunal lacked the requisite independence and impartiality.[161] Specifically, Argentina alleged conflicts of interest existed for one member of the arbitral tribunal such that there had been a serious departure from a fundamental rule of procedure.[162] Argentina maintained this position despite the fact that unchallenged members of the tribunal previously rejected its challenge to the arbitrator in question, Dr. Rigo Sureda.[163] During the initial proceedings, Argentina alleged the appointment of Dr. Sureda should be disqualified both because of his actual bias and because his appointment gave rise to the appearance of bias. The tribunal rejected both arguments.[164] At the annulment stage, Argentina advanced arguments that the tribunal had incorrectly assessed the independence and impartiality of Dr. Sureda,[165] who subsequently issued procedural orders that allegedly worked to Argentina's detriment.[166]

The ad hoc committee rejected Argentina's arguments.[167] The committee noted first that Article 52 does not include "any fact indicating a manifest lack of the qualities required by . . . Article 14" may serve as grounds for annulment.[168]

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[161] *See Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 286–87, 293.

[162] *Id.* ¶ 293. Specifically, Argentina contended that the tribunal was not properly constituted and in doing so, invoked Article 52(1)(a), which it considered a specific instance of a serious departure from a fundamental rule of procedure under Article 52(1)(d). *Id.* ¶¶ 249–53. Accordingly, the ad hoc Committee conducted most of its analysis regarding whether a serious departure had occurred under Article 52(1)(d) in conjunction with Article 52(1)(a). *See id.* ¶¶ 274–84, 286–92.

[163] *Id.* ¶ 35 (citing Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, ¶¶ 7–8 (Feb. 25, 2005)).

[164] *Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 260.

[165] *Id.* ¶¶ 249, 272.

[166] *Id.* ¶ 267.

[167] *Id.* ¶¶ 292–93.

[168] *Id.* ¶ 279 (citing ICSID Convention, *supra* note 1, art. 57).

Accordingly, the committee reasoned that Article 52 did not provide parties with a mechanism to bring a de novo challenge to members of the tribunal under the guise of annulment.[169] Thus, the ad hoc committee determined that it was limited to annulling an award in instances when "there had been a failure to comply properly with the procedure for challenging members of the tribunal."[170] In even stronger language, the committee noted that reconsidering a challenge decision at the annulment level, to any extent, would be "tantamount to an appeal" and therefore beyond the scope of an ad hoc committee's power.[171] However, the committee did leave the door open for challenges, at least through some mechanism, when new evidence comes to light after a tribunal issued a challenge decision.[172]

Six years later in *EDF*, the ad hoc committee considered an arbitral award with a similar set of facts.[173] The claimant, who had received a favorable award from the tribunal, attempted to advance the approach of the *Azurix* ad hoc committee when the respondent alleged a serious departure from a fundamental rule of procedure had occurred.[174] In the initial proceedings, the respondent Argentina challenged EDF's party-appointed arbitrator.[175] However, in rejecting the challenge, the unchallenged arbitrators essentially adopted the standard of review for arbitrator challenges used in *Vivendi I*, as discussed above.[176] After the final award was rendered in

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169 *Id.* ¶ 280.

170 *Id.*

171 *Id.* ¶ 282.

172 *Id.* ¶ 281. The Committee identified revision, via Article 51, as the appropriate mechanism. *Id.* Though the *EDF* Committee disagreed, that particular point is beyond the present discussion. *EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 118, 125 (Feb. 5, 2016).

173 *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 18–24.

174 *See id.* ¶ 98.

175 *EDF*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufman-Kohler, ¶ 1 (June 25, 2008).

176 *See supra* Section III.A.2.

favor of the claimants, the respondents sought annulment on several grounds.[177]

Relying on the annulment decision in *Azurix*, the *EDF* claimants initially argued that when an arbitrator challenge has been made and rejected, an award could be annulled only if the *process* for assessing arbitrator bias were defective.[178] This approach would, as in *Azurix*, limit the grounds on which a committee could annul an award such that considering anew an arbitrator's independence or impartiality would exceed the permissible scope of a committee's power. Additionally, the claimant contended the respondent would need to demonstrate that any lack of independence or impartiality had "a material effect on the outcome of the [arbitral] proceedings."[179]

The *EDF* ad hoc committee rejected that approach.[180] Even the claimant, perhaps under pressure or questioning from members of the ad hoc committee, eventually altered its argument in oral proceedings such that the committee's ultimate determinations were consistent with the claimant's position.[181] The ad hoc committee believed it must have some role in adjudicating questions of whether an arbitrator had been impermissibly biased.[182] It reasoned that ad hoc committees, generally, are "the guardian[s] of the integrity of the arbitral procedure" and that the independence and impartiality of arbitrators "go[] to the very heart" of that issue.[183] The committee also considered the importance of the finality of awards and noted that annulment proceedings do not—and should not—operate as an appeal.[184]

Accordingly, the committee adopted a "no reasonable decision-maker" standard for reviewing the challenge decisions of

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[177] *EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 43–44.

[178] *Id.* ¶ 96.

[179] *Id.* ¶ 97.

[180] *Id.*¶ 134.

[181] *Id.* ¶¶ 97, 141.

[182] *See id.* ¶¶ 144–45.

[183] *Id.* ¶ 140.

[184] *Id.* ¶ 143.

arbitral tribunals.[185] Thus, the ad hoc committee concluded it would have a role in ensuring that the challenge decision was reasonable, or at the very least that *some* reasonable decision-maker could come to the same conclusion.[186] After examining the analysis of the challenge question and comparing the challenge decision to similar decisions by other ad hoc committees, the *EDF* committee concluded the tribunal's original conclusion was not unreasonable.[187]

In addition to the views the *Azurix* and *EDF* committees adopted, a third approach would enable ad hoc committees to review challenge decisions de novo. The respondent in the *EDF* annulment proceedings unsuccessfully argued for this standard.[188] However, as the *EDF* ad hoc committee considered, this approach would effectively render Articles 57 and 58 moot, and would be inconsistent with the Convention's stated purpose of giving parties to an arbitration a sense of finality after an award has been rendered.[189] This approach is not widely held and has never been adopted by an ad hoc committee.

Ultimately, the *Azurix* and *EDF* ad hoc committees took different approaches to assessing the appropriate balance between assuring finality of awards and guaranteeing a completely fair arbitral process. For its part, the *Azurix* committee took a more absolutist approach to Article 52(1),[190] maintaining its view of the ad hoc committee's role in annulment proceedings would provide parties with clear expectations concerning review of challenge decisions. The *EDF* committee was more explicitly concerned with balancing the competing aims of annulment proceedings—preserving the integrity of

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[185] *Id.* ¶ 145. In resolving a separate question in the same annulment proceeding, the *EDF* Committee noted a *de novo* standard of review would be appropriate when new facts came to light, either after a tribunal issued a challenge decision or after the close of the tribunal's proceedings. *See id.* ¶ 130.

[186] *Id.* ¶ 145.

[187] *Id.* ¶ 164.

[188] *Id.* ¶ 88.

[189] *Id.* ¶¶ 142–43.

[190] *See Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 280–82 (Sept. 1, 2009).

the arbitration while ensuring the finality of awards.[191] The *EDF* committee was more willing to look beyond the precise text of the ICSID Convention and introduced a new standard of review for considering the competing interests of the overall ICSID system.[192]

The difference in approaches also reflects differing views on the level of deference ad hoc committees should afford tribunal decisions. While the *Azurix* committee was more willing to completely defer to the arbitrators, the *EDF* committee sought to establish at least some level of oversight over the tribunal's procedural decisions. Interestingly, neither committee considered the implications of any particular standard in instances when parties disagree regarding the correct standard for assessing bias under Articles 57 and 58.[193] Though the *EDF* committee devoted considerable space to assessing the challenge decision's approach to determining independence and impartiality, it gave scant attention to the challenge decision's determination regarding which standard for bias to apply.[194] For instance, it did not consider the implications of its standard of review in circumstances when the ad hoc committee disagrees with the tribunal on the correct standard for evaluating the independence and impartiality requirements of Article 14(1).[195] That future committees may approach this question differently fell outside the scope of the *EDF* committee's analysis.[196]

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191 *See id.* ¶¶ 139–43.

192 *See id.* ¶¶ 139–41, 145–46.

193 *See Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic; *EDF*, ICSID Case No. ARB/03/23, Decision on Annulment. In *EDF*, the parties generally agreed appearance of bias could be a relevant factor for assessing independence and impartiality. *Id.* ¶¶ 110–11. However, the Claimant indicated this was not an entirely settled point, especially with regard to the approaches tribunals have taken after the *Blue Bank* decision. *Id.* ¶ 111.

194 *See id.* ¶¶ 112–145.

195 *See id.*

196 *See id.*

IV. RESOLVING THE ANNULMENT COMMITTEE APPROACHES

Though neither the *Azurix* approach nor the *EDF* approach represents an untenable standard for review of arbitrator challenges, neither approach is without its problems. This Section begins by discussing the need for ad hoc committees to consistently apply a single standard for reviewing arbitrator challenge decisions. It then considers the potential benefits and drawbacks of the *Azurix* and *EDF* standards, concludes that a version of the *EDF* standard—if strictly applied—represents the best approach for future ad hoc committees, and analyzes how ad hoc committees can bring about a greater degree of consistency in ICSID annulment proceedings.

A. The Need for Consistency

As the ICSID caseload continues to grow,[197] maintaining consistency across tribunals and ad hoc committees has become more difficult.[198] As a recent report to the U.N. General Assembly reveals, inconsistent results at either the initial arbitration phase or the annulment phase undermine a core purpose of the system.[199] ICSID arbitration is desirable because of the predictability and finality it provides parties,[200] though inconsistent results risk eroding that predictability and finality. This is particularly so at the annulment phase, when

[197] In the past five years, ICSID has registered dozens of new cases each year and has more than 200 cases pending at any given time, a caseload that vastly outnumbers what ICSID saw at the turn of the century. *See* Julien Fouret & Dany Khayat, *International Centre for Settlement of Investment Disputes (ICSID) Case Law Review*, 15 LAW & PRAC. INT'L CTS. & TRIBUNALS 555, 556, 556 n.2 (2016).

[198] Daniel Kalderimis, *The Future of the ICSID Convention: Bigger, Better, Faster?*, *in* ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES 553, 577 (Crina Baltag ed., 2017).

[199] U.N. Comm'n on Int'l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, U.N. Doc. A/CN.9/WG.III/WP.150, ¶ 5 (2018).

[200] *See* Reisman, *supra* note 7, at 750. *See generally supra* Section II.A.1.

committee members must make their own procedural determinations and evaluate the decisions of the initial tribunal members.[201]

Consistency concerns are even more pronounced in the context of arbitrator bias since ad hoc committees reviewing challenge decisions must determine both the appropriate standard for applying Article 57 and whether any alleged departure from a fundamental rule was sufficiently serious. In the first place, whether tribunals should use an "appearance of bias" standard or an "actual bias" standard remains an open question.[202] This complicates an ad hoc committee's task when reviewing any of the tribunal's determinations on arbitrator challenges. To the extent an ad hoc committee regards one standard or the other as the "proper law," any reconsideration of a tribunal's challenge decision could amount to a full appeal.[203] Accordingly, the consistent application of a single standard of review by ad hoc committees is necessary to ensure a greater degree of certainty for both tribunal members and parties to arbitration.

In practice, consistent application of either the *EDF* standard or the *Azurix* standard would alleviate this problem. In the first instance, both approaches decrease the incentive for parties to delay or otherwise derail proceedings because annulment remains relatively difficult under either approach.[204] Already, parties have an incentive to challenge arbitrators so they can preserve a lack of independence or impartiality as a possible basis for annulment.[205] If parties know they can seek annulment on the basis of a challenge decision in the event of

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[201] Kalderimis, *supra* note 198, at 577.

[202] *See supra* Section III.A.2.

[203] *See* Schreuer, *supra* note 7, at 225.

[204] *See Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 280–81 (Sept. 1, 2009); *EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 145 (Feb. 5, 2016). *See generally supra* Section III.C.

[205] *See* LUTTRELL, *supra* note 109, at 4–7 (noting "the Black Art of bias challenge[s]" as a tactical maneuver); Stephan Wilske, *Crisis? What Crisis?—The Development of International Arbitration in Tougher Times*, 2 CONTEMP. ASIA ARB. J. 187, 204 (2009) (noting unmeritorious challenges have emerged as a standard tactic in international arbitration).

an unfavorable award, they could be more likely to raise strategic challenges without serious bases. The limited approaches of both the *Azurix* and *EDF* committees thus directly address this worry and circumscribe potential harm.

However, the *Azurix* approach, which allows for minimal review, may indicate to tribunal members that their challenge decisions are virtually immune from review. In the other direction, the standard proffered by the *EDF* committee may prove difficult to apply in practice. In its analysis alone, the *EDF* committee spent nearly twenty paragraphs considering the tribunal's analysis and comparing it to that of other ad hoc committees and tribunals considering questions of challenges.[206] Future ad hoc committees could easily purport to take a similar approach while in reality engaging in a substantive review of the tribunal's decision on challenge. However, were a future committee to do so, it would exceed its authority and ignore the finality that even the *EDF* committee considered important.[207] Likewise, such action would run counter to the very purposes of ICSID and its annulment mechanism.[208]

Accordingly, choosing which approach best balances competing goals is no easy task. The *Azurix* approach, which allows for maximal deference, would enable ad hoc committees to avoid dodging questions of which standard a tribunal properly should have applied.[209] Despite this, there could still be concern that the *Azurix* view would unduly limit an ad hoc committee's review. At least on its surface, the *EDF* committee would allow for deference to either bias standard tribunals apply.[210] Nonetheless, the "no reasonable decision-maker" standard may in practice operate more like an appeal system than the committee truly intended.

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[206] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 147–64.

[207] *See id.* ¶ 144.

[208] *See* Schreuer, *supra* note 7, 212–13.

[209] *See Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶¶ 280, 282.

[210] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 145.

B. Reconciling the Conflicting Approaches

Despite the appeal of the clear, rules-like approach of the *Azurix* committee, that standard would be overly demanding and risk leaving justified concerns unaddressed. As the *EDF* committee pointed out, the *Azurix* approach would apply only rarely, and would disallow annulment even when a party provided facts demonstrating an arbitrator lacked the requisite qualities of independence and impartiality.[211] In contrast, the *EDF* standard offers a more balanced approach enabling some level of ad hoc committee review. However, adopting a loose interpretation of the *EDF* approach could lead future committees to depart from the text of the ICSID Convention itself and exacerbate uncertainty regarding the finality of awards. Especially since many legal systems allow limited court review for abuse of discretion or irrational reasoning,[212] the idea that an arbitral tribunal *appeared* to lack the requisite qualities can seem to strike an appropriate balance. However, arbitral tribunals, and particularly those taking place under the auspices of the self-contained ICSID system, do not function like domestic courts. Given the dangers of both the *Azurix* and *EDF* approaches, future ad hoc committees should adopt the *EDF* approach when reviewing challenge decisions, but do so in a strictly limited manner that looks to signs of procedural departures more serious than an appearance of bias.

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[211] *Id.* ¶ 118. The *Azurix* approach would also be inappropriate when new evidence came to light after the challenge or after the close of proceedings, but before the tribunal renders an award. *See id.* ¶¶ 130–31. In *EDF*, Argentina challenged one of the arbitrators on precisely this basis and the ad hoc committee reviewed bias concerns for that arbitrator de novo. *Id.* ¶ 132.

[212] *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2018); *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–6 (Austl.). *See also* Maciej Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275, 291–92 (2016) (discussing review standards in the U.K. and the requirements that the European Court of Human Rights imposes on countries subject to its jurisdiction).

1. The *Azurix* Approach is Overly Restrictive

Under the *Azurix* view, annulment committees would operate with essentially no possibility of review. The *Azurix* committee approach shifts the relevant analysis from an inquiry regarding the bias of a challenged arbitrator to an inquiry regarding the sufficiency of process for challenging that arbitrator. But these are distinct questions and ad hoc committees addressing similar questions in the future should regard them as such. While the *Azurix* standard would provide the greatest assurance of finality, this cannot be the only metric in selecting the appropriate standard for ad hoc committee review.[213]

That the annulment committee must have regard for both finality and procedural fairness is well-settled and goes to the core of an ad hoc committee's purpose.[214] In effect, the *Azurix* committee approach would leave no role for an ad hoc committee discretion in considering annulment. This near-complete lack of discretion is inconsistent with the role of the ad hoc committee as the "guardian" of fairness and arbitral procedure.[215] Even assuming an ad hoc committee placed an especially high premium on the finality of the award, the *Azurix* approach would leave it with insufficient discretion to review potentially problematic tribunal procedures.

Additionally, there is some point at which failing to review a challenge decision would draw significant criticism. That is, an annulment committee may have to deal with a situation involving a "grossly aberrant decision" by a tribunal.[216] How

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[213] *See* Hussein Nuaman Soufraki v. The United Arab States (*Soufraki*), ICSID Case No. ARB/02/7, Decision of the Ad hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 24 (June 5, 2007) ("An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process . . . .").

[214] *See* UPDATED BACKGROUND PAPER, *supra* note 21, ¶ 98; Alapli Elektrik B.V. v. Republic of Turk., ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 32 (July 10, 2014).

[215] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 140.

[216] David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV. 21, 54 (1992). To date, no ad hoc committee has explicitly

could it approach making a decision if limited by the *Azurix* framework? One answer is that if the decision making process for the challenge decision itself truly were biased, such bias in the decision would constitute grounds for annulment, so long as it constituted a serious departure by materially affecting the award.[217] After all, the *Azurix* committee explicitly left open this avenue of challenge.[218] Though the possibility of such a circumstance is slight, it may arise if a proper challenge was never decided before the tribunal issued an award, if a person or body other than the one prescribed by Article 58 made the disqualification decision, or if arbitrators engaged in the decision making process for their own challenges.[219] However, this level of oversight would not correct any potential injustice caused by the presence of an impermissibly biased arbitrator in the absence of other procedural defects. It would also leave a committee with little leeway to look to the actual circumstances of a particular arbitration, unduly limiting the committee's role as a guardian of integrity.

A second potential response is that the ad hoc committee has bases for annulment available other than the Article 52(1)(d) ground of a serious departure from a fundamental rule. If the circumstances warrant doing so, the committee could draw on the grounds of corruption, manifest excess of powers, or even failure to state reasons.[220] In instances where these grounds overlap based on the same arbitrator's conduct, the committee could still consider the relevant conduct, though through the lens of the particular standards or methodologies that exist for each of the different annulment grounds. However, resorting to alternative grounds of annulment for addressing arbitrator bias would essentially render the ground of serious departure pointless in this context. If the

described relevant conduct that led to annulment as "grossly aberrant." *See generally* UPDATED BACKGROUND PAPER, *supra* note 21.

[217] And it necessarily would, given that the lack of that bias would have tainted the challenge decision, and every subsequent decision, of the tribunal.

[218] *Azurix*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 284.

[219] *Id.* ¶ 282 (noting the first two examples).

[220] *See* ICSID Convention, *supra* note 1, art. 52(1).

serious departure ground is to have any force in its own right, a more flexible approach than the *Azurix* committee's is necessary.

2. The *EDF* Approach Best Balances Annulment Committee Goals

Despite the need for more flexibility than the *Azurix* approach offers, annulment is still an "exceptional" remedy that "implies a severe censure of the tribunal."[221] While *EDF*'s more malleable standard provides ad hoc committees a greater degree of discretion, its approach carries with it the risk that future committees will stray from the Convention's mandate and create a greater level of uncertainty in annulment jurisprudence. On balance, however, the *EDF* approach best reconciles the competing goals of finality and procedural fairness. Identifying and applying the best standard necessarily involves accounting for a totality of factors.[222] Accordingly, future ad hoc committees should apply *EDF*'s "no reasonable decision-maker" standard, but do so judiciously with a strong presumption against annulment.

i. Consistency with the ICSID Convention's Mandates

Perhaps most importantly, ad hoc committee decisions must operate differently from the decisions of tribunals themselves. What may be an appropriate decision during arbitral proceedings—when opportunities still exist for replacing arbitrators or remedying any wrongdoing[223]—may not be appropriate during annulment proceedings. Especially given the significant level of time and resources that parties devote to

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221 Schreuer, *supra* note 7, at 212.

222 Caroline Henckels, *The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration*, *in* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 113, 120 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

223 *See* The Republic of Croat. v. The Republic of Slovn. (Croat. v. Slovn.), Case No. 2012-04, Partial Award on Jurisdiction, ¶ 194 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/1787 [https://perma.cc/2HJQ-RU8A].

arbitration, the balance of interests at stake shifts once a tribunal renders a final award.[224] Article 52 reflects this principle. The text of the article itself narrowly circumscribes the grounds for annulment, employing language such as "manifest[]" and "serious."[225] Additionally, the limited timeframe for parties to apply for annulment—120 days after the award is rendered[226]—indicates the Convention places a premium on preserving the finality of the award. Even for annulment sought on the basis of corruption, the Convention places a maximum timeframe of three years, even if evidence of corruption isn't discovered until that timeframe has passed.[227]

Moreover, the Convention already provides a means to remove arbitrators if parties have valid concerns about the independence or impartiality of an arbitrator. That mechanism is a challenge pursuant to Articles 57 and 58.[228] That the Convention imposes requirements such as promptness for challenges further indicates that any remedy for arbitrator partiality or dependence must be limited.[229] Though removing a requirement for prompt challenges might, on balance, provide an additional assurance of fairness, it risks undermining procedural efficiency and finality, a sacrifice the Convention drafters were evidently unwilling to make.[230] Aware of this tradeoff, the *EDF* committee considered the importance of the fact that other members of the tribunal are the designated decision makers for resolving challenges.[231] However, the *EDF* approach still leaves the door open for future ad hoc committees to second-guess the decisions of tribunal members.[232] Regardless of how thorough the tribunal was in considering a

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[224] *See* Cate, *supra* note 4, at 1203–04 (discussing the relationship between the balance of party interests and appeal in the arbitration context).

[225] ICSID Convention, *supra* note 1, art. 52(1); Schreuer, *supra* note 7, at 215.

[226] ICSID Convention, *supra* note 1, art. 52(2).

[227] *Id.*

[228] *See id.* arts. 57–58.

[229] *See* ARBITRATION RULES, *supra* note 35, at 107.

[230] *See id.*; ICSID Convention, *supra* note 1, arts. 57–58.

[231] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 144.

[232] *See id.* ¶ 145. *See generally supra* Section III.C.

challenge, the ad hoc committee has the final say on any question a tribunal already fully considered in its challenge decision.[233] This type of review, though limited, resembles precisely the type of merits review that is meant to be unavailable under the ICSID framework.[234] Accordingly, future committees must take care not to exceed the ad hoc committee mandate by adjudicating anew a decision the tribunal has already rendered.

ii. Minimizing Unpredictability & Uncertainty

Additionally, one interpretation of the *EDF* committee's conclusions is that the committee essentially imported an "appearance of a departure from a fundamental rule of procedure" standard into the Article 52 "serious departure" standard. If widely applied, this interpretation would undermine the force of the word "serious" in the context of Article 52. In light of the continuing questions regarding whether the *MINE* and *Wena Hotels* standard has solidified,[235] an unduly broad version of the *EDF* approach could result in problematic applications. The *Vivendi II* committee indicated that any relationship indicating a lack of independence or impartiality must have had a "material effect on the final decision of the Tribunal" to justify annulment.[236] Loosely interpreted and applied, the *EDF* approach would effectively incorporate into Article 52 a lower standard than *Vivendi II*'s "material effect" standard, because under that version of the *EDF* standard, a committee need only find that a challenge decision erred in its assessment of the *appearance* of bias.[237] It is difficult to imagine how the appearance of bias, even from an objective third party viewpoint, could in fact have *any* effect on an award's

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[233] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶ 145. *See generally supra* Section III.C.

[234] INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 15, at 22.

[235] *See supra* Section III.B.

[236] *Vivendi II*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, ¶¶ 235, 238–42.

[237] *See EDF*, ICSID Case No. ARB/03/23, Decision on Annulment, ¶¶ 109, 145.

outcome, let alone a serious one. Though perhaps caused by similar underlying factors, whether an arbitrator *appeared* biased is a distinct question from whether an arbitrator was in fact biased and consequently improperly influenced the outcome of a tribunal's decision.

Additionally, such complexities could always arise as to whether the tribunal initially adopted the "correct" standard for assessing bias in the first place. That is, whether tribunal members used the appropriate standard could always have downstream effects on the rest of the award. Therefore, when unchallenged tribunal members adopt a more rigorous "actual bias" standard for challenge proceedings, there could always be a chance that the decision not to adopt a more lenient "appearance of bias" standard could have affected the award.

However, the *EDF* committee itself addressed the foregoing concerns. Since multiple reasonable tribunals have applied varying standards for arbitrator challenges, deciding to adopt one or the other could not be "so plainly unreasonable that no reasonable decision-maker could have come to such a decision."[238] Thus, properly applied, the *EDF* standard allows ad hoc committees to avoid passing judgment on which standard for arbitrator challenges is most appropriate. Additionally, this view of *EDF* is consistent with the "material effect" standard of *Vivendi II*, because annulling an award with the *EDF* standard would likely take clear evidence of actual arbitrator bias. Alternatively, exceedingly clear evidence of arbitrator bias that tribunal members ignored when resolving a challenge decision may also suffice for an ad hoc committee to annul an award.[239] In either instance, the annulment outcome would be the same regardless of the bias standard a tribunal applied. For example, the tribunal in *Caratube International Oil Co. v. Republic of Kazakhstan ("Caratube")* concluded a challenged arbitrator should be removed because his presence created an appearance of bias, even though no facts indicated

[238] *Id.* ¶ 145.

[239] *See id.* ¶¶ 144–45.

the arbitrator in fact lacked independence or impartiality.[240] Had the *Caratube* tribunal hypothetically decided differently, an ad hoc committee reviewing the decision under the *EDF* standard should not rehash the tribunal's decision, but instead determine whether *no* decision-maker could have come to the same conclusion. Such a result would very likely require evidence of *actual* bias, not just the appearance of bias, since reasonable tribunal members could more easily disagree about what constitutes a mere appearance of bias.

Similarly, future ad hoc committees must be cognizant of the fact that the *EDF* approach does not enable them to insert their own factual analysis into their review of the tribunal decisions. Even so, if future committees are less judicious than the *EDF* committee, there exists a risk that future decisions will take the form of those, such as *Patrick Mitchell* and *Klöckner I*, which drew heavy criticism.[241] Merits review for arbitral committee determinations do not operate with a "no reasonable decision-maker" standard.[242] However, given the fundamental importance of unbiased arbitrators, this highly tailored level of review would be appropriate for determining the impact of significant procedural decisions.

A final potential downside of the *EDF* approach is that it simply requires ad hoc committees to review a greater number of aspects of the tribunal's reasoning, which creates more opportunities for inconsistency. Admittedly, the *Azurix* approach would prevent much of this inconsistency from entering the annulment stage of proceedings, as ad hoc committees would apply a clear rule that forecloses any substantive review of challenges. Under the *Azurix* approach, there would be limited second-guessing by ad hoc committees, and parties

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[240] Caratube Int'l Oil Co. v. Republic of Kaz., ICSID Case No. ARB/13/13, Decision on the Disqualification of Mr. Bruno Boesch, ¶¶ 89–90 (Mar. 20, 2014).

[241] *See, e.g.*, Reisman, *supra* note 7, at 760–61 (criticizing the *Klöckner I* ad hoc committee's reasoning); BLACKABY & PARTASIDES ET AL., *supra* note 137, at 649 n.206 (noting the significant criticism of *Patrick Mitchell*).

[242] Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 454–55 (2006) (distinguishing the standard of review in annulment from standards of review in a theoretical ICSID Appeals Facility).

would have a lower incentive to seek annulment with the simple hope they get a second chance to persuade an ad hoc committee that an arbitrator is biased. Avoiding these scenarios would be especially important if there were an indication the ad hoc committee may apply a standard more favorable to the party seeking annulment, regarding either initial bias determinations or seriousness determinations at the review stage. Especially given longstanding concerns of the finality of arbitral awards,[243] committees applying the *EDF* standard should seek to emphasize that their review is limited and annulment remains an exceptional remedy. Future committees must refrain from engaging in substantive review of tribunal decisions on challenges and limit themselves to solely resolving whether *any* reasonable actor could have made the same decision. Properly applied, the *EDF* approach captures the benefits of the *Azurix* approach while providing a vital means to review instances of gross procedural departures. This balance is precisely what the Convention drafters had in mind when they sought to create a system that would provide finality but simultaneously check "flagrant cases" of injustice.[244]

C. Implementing a Consistent Approach

Given the lack of binding precedent for ad hoc committees,[245] adopting any particular standard of review—whether for procedural or substantive questions—is difficult. Amending the ICSID Convention itself is nearly impossible because of a requirement that "all Contracting States" agree to any changes.[246] Though formal amendment is in theory possible, crafting an agreement among the more than 150 parties would present significant challenges.[247] ICSID formally considered and adopted changes to the Arbitration Rules in 2006 and did not include substantive changes to the standard of

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[243] *See* Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV. 85, 86–87 (1987).

[244] Marchili & McBrearty, *supra* note 6, at 428.

[245] *See supra* Section II.A.3.

[246] ICSID Convention, *supra* note 1, art. 66(1).

[247] DIEL-GLIGOR, *supra* note 147, at 374.

review or related questions.[248] While there have been proposals to introduce an appeals mechanism,[249] primarily in response to concerns of inconsistency across awards, ICSID states have rejected such proposals.[250] More recently, the ICSID Secretariat circulated a new proposal for arbitration rule updates, though none of the proposed updates address concerns of arbitrator bias at the annulment stage in particular.[251]

Even so, changes in the arbitration rules themselves likely do not represent the proper mechanism for implementing changes to the standards of review ad hoc committees use to review challenges. Absent a major change in ICSID, the most realistic mechanism for adopting consistent approach for reviewing challenge decisions will be the decisions of ad hoc committees themselves. Though ICSID tribunals and ad hoc committees lack a formal system of precedent, arbitrators increasingly take previous decisions into account.[252] As noted above, arbitrators often attempt to maintain consistency over time and across different sets of decision makers.[253] Particularly if ad hoc committees take care to stay consistent with previous decisions and make conscious efforts to bring about "convergence," a move towards a more predictable set of standards is not out of reach.[254] That standard should closely

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[248] *See* ARBITRATION RULES, *supra* note 35. For a discussion of the amendments before they were adopted, see Int'l Ctr. for Settlement of Inv. Disputes Secretariat, Suggested Changes to the ICSID Rules and Regulations 4 (May 12, 2005) (unpublished working paper).

[249] *Id.*

[250] Anne van Aaken, *Control Mechanisms in International Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 409, 428 (Zachary Douglas et al. eds., 2014).

[251] Int'l Ctr. for Settlement of Inv. Disputes Secretariat, Proposals for Amendment of the ICSID Rules—Working Paper, 154–55 (Aug. 2, 2018) (unpublished working paper) (on file with author).

[252] Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 367–68 (2007).

[253] *See supra* Section II.A.3.

[254] For examples of arbitrators behaving in this way, see El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 82 (Apr. 27, 2006); Pan Am. Energy LLC v. Argentine

resemble the test announced in *EDF*, with future committees keeping in mind the critical need to avoid reviewing the merits of tribunal decisions. In this way, the ICSID system must continue to rely on future tribunals and ad hoc committees to give "concretized meaning" to the Convention by offering greater predictability in the applicable standard of review.[255]

V. CONCLUSION

Despite the aims of ICSID to provide parties with a greater degree of certainty, the current annulment system operates on the basis of tribunals and ad hoc committees that apply significantly different standards at multiple stages of proceedings. This lack of consistency, both for assessing bias challenges in arbitral proceedings and reviewing those challenges in annulment proceedings, undermines the predictability and consistency of ICSID proceedings. If ICSID is to remain the preeminent arbitral facility in the world, it must address this continued lack of certainty. Though completely solving questions of the right level of review may require a more extensive overhaul of either arbitral rules or the Convention itself, ad hoc committees have at least some power to affect the course of future proceedings.

Particularly as concerns emerge as to committees' review of challenges to arbitrators, ad hoc committees should take an approach that limits the possibility of unpredictable outcomes and preserves the finality of awards. Though ad hoc committees have taken divergent approaches to these questions in the past decade, future ad hoc committees should, first and foremost, adopt a consistent approach. In particular, ad hoc committees should seek to solidify the *EDF* approach to reviewing bias challenges.

Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 110 (July 27, 2006).

[255] *See* Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1092 (2011).