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ICSID Annulment: Legal Triumph or Political Galumph?

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Abstract
The establishment of the International Centre for Settlement of Investment Disputes (ICSID) was driven by the objective of enabling an arbitration process characterized by complete autonomy, self-containment, and independence. One of the significant features of the ICSID system is the capacity to request the annulment of arbitral awards made under its auspices. The annulment process is governed by Article 52(1) of the ICSID Convention and is limited to the grounds set out there in without examining the merits or legal facts. Under Article 52(1)(a) of the ICSID Convention, either party may submit a written application seeking annulment on the grounds of the improper constitution of the tribunal. This ground is rarely invoked, and an award was only annulled for the first time in 2020. There is no consensus on the conditions under which this ground may be invoked. This research aims to discuss the applicable standard of the ICSID annulment grounds concerning the improper constitution of the Tribunal. A normative legal method focusing on the statute and case approaches is applied to achieve this objective. After reviewing previous legal cases, the annulment standard regarding the tribunal's improper constitution is quite uncertain within the ICSID framework. To improve the awards, scholars have proposed various proposals for reforming the ICSID annulment system, such as establishing a doctrine of "precedent," a single appellate body, and precise requirements for arbitrators to be impartial.

Keywords: International Centre for Settlement of Investment Disputes; Annulment; Improper Constitution of the Tribunal

A. Introduction

Established in 1996, the International Centre for Settlement of Investment Disputes (ICSID) holds the distinguished position of being the preeminent institution solely committed to resolving disputes related to international investments. Its mandate, as stipulated in Article 1(2) of the ICSID Convention, is to facilitate the settlement of disputes, including conciliation, mediation, arbitration, or fact-finding, between foreign investors and host states.[1] The ICSID

[1] "About ICSID," ICSID, accessed April 12, 2023, https://icsid.worldbank.org/About/ICSID.

plays an active role in this regard and is widely recognized for its contributions to the field. Over the years, the ICSID caseload has witnessed a substantial and steady increase owing to its handling of a significant proportion of prominent international investment disputes.[2] The establishment of ICSID was aimed at conducting an arbitration process that is self-sufficient, entirely independent, and free from any national legal systems, including those applicable to arbitration conducted under the Convention.[3] There is only one award in an ICSID case, and the Tribunal's final decision disposes of the entire case. ICSID award is final, binding, enforceable in any ICSID contracting state, and the ICSID actively ensures their recognition.[4]

Article 53 of the ICSID Convention explicitly establishes the mandatory character of ICSID awards and prohibits their submission to any remedies other than those prescribed by the ICSID Convention. They could be subject to supplementation and rectification[5], interpretation[6], revision[7], and annulment[8]. The ICSID mechanism capacity to request an annulment of arbitration awards issued under the aegis of the ICSID Convention is one of its essential aspects.[9] Any consenting party may dispute an award by the Convention's primary mechanism by requesting an annulment of the award through the ICSID system.[10] Annulment is not unexpected, it is exceptional.[11] It restricts such relief to particular, limited grounds.[12]

A distinguishing feature of the ICSID system, the annulment mechanism replaces the option of judicial review by national courts with a mechanism of deliberation by *Ad Hoc* annulment committees constituted by the ICSID Secretariat, providing ICSID with an edge

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[2] International Centre for Settlement of Investment Dispute, *The ICSID Case Load - Statistics Issue 2021-I*. (Washington: ICSID World Bank, 2022).
[3] Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2011), ii.
[4] Article 53 the International Centre for Settlement of Investment Dispute Convention (ICSID Convention).
[5] Article 49 of the *ICSID Convention.*
[6] Article 50 of the *ICSID Convention.*
[7] Article 51 of the *ICSID Convention.*
[8] Article 52 of the *ICSID Convention.*
[9] Christopher Moore, Laurie Achtouk-Spivak and Zeïneb Bouraoui, "ICSID Awards," in *Global Arbitration Review: The Guide to Challenging and Enforcing Arbitration Awards,* 2021, (London: Law Business Research Ltd, 2021), 152.
[10] Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide* (Leiden: Brill, 2014), 83.
[11] E-mail message to Gavan Griffith KC (President of the *Ad Hoc* Annulment Committees in Azurix v Argentina), April 2, 2023.
[12] Gabriel Bottini, "Present and Future of ICSID Annulment: The Path to an Appellate Body?," *ICSID Review - Foreign Investment Law Journal* 31, no. 3 (2016): 712–727, https://doi.org/10.1093/icsidreview/siw025.

over other investor-state arbitration forums.[13] Article 53 of the ICSID Convention clearly establishes that the annulment procedure should not be perceived as an appeal. Awards made under ICSID ought to be final, enforceable by the parties, and immune from review or any other remedial actions that the Convention does not explicitly sanction.[14] The ad hoc annulment committees constituted by the ICSID Secretariat are bound by the limitations prescribed in Article 52(1) of the ICSID Convention, which strictly delineates the permissible grounds for annulment. It does not involve an examination of the merits or legal facts.[15] In the event of a material violation, the party will request an annulment. The Tribunal has described annulment as an "extraordinary remedy with a high threshold[16] and exceptional remedy[17] as "a limited and extraordinary remedy.[18] Under the ICSID Convention system, this body does not have the authority to revise awards. The authority to revise an award lies solely with ICSID in case of its annulment. In such a scenario, a fresh arbitral tribunal is constituted to render a new award.[19] The main distinction between an annulment and an appeal, according to Christoph Schrerur, wherein the former pertains exclusively to the legitimacy of the process of decision, is and does not address its substantive correctness, while the latter is concerned with both aspects.[20]

Nearly half of all ICSID awards have been filed for annulment. With an estimation of 355 awards to this date, 156 have been or are currently being annulled, making up more than 40% of the total ICSID decisions. Over the past ten years, this number has considerably climbed. Since 2009, 75 percent of annulment cases have been filed. Interestingly, this rise has outpaced the actual number of ICSID arbitral proceedings.[21] As of 2023**,** *Ad Hoc* committees

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[13] Dohyun Kim, "The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away From an Annulment-Based System," New York University Law Review 86, no. 1 (2011): 250, https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-86-1-Kim.pdf.

[14] Article 53(1) the *ICSID Convention.*

[15] Decision of the ad hoc Committee on the Application for Annulment, Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4), 22 December 1989, para. 405.

[16] Decision of the ad hoc Committee on the Application for Annulment, Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8), 29 September 2016, para. 127.

[17] Decision of the ad hoc Committee on the Application for Annulment, Cube Infrastructure Fund SICAV and others v. Kingdom of Spain (ICSID Case No. ARB/15/20), 28 March 2022, para. 92.

[18] Decision of the ad hoc Committee on the Application for Annulment, DS)2, S.A., Peter de Sutter and Kristof De Sutter v Republic of Madagascar (II), (ICSID Case No ARB/17/18), 14 Oktober 2022, para.103.

[19] Philippe Pinsolle, "The Annulment of ICSID Arbitral Awards," *The Journal of World Investment & Trade* 1, no.1 (2000): 243-257, https://doi.org/10.1163/221190000X00087.

[20] Gabriel Bottini, "Present and Future of ICSID Annulment: The Path to an Appellate Body?," *ICSID Review - Foreign Investment Law Journal* 31, no. 3 (2016): 260, https://doi.org/10.1093/icsidreview/siw025.

[21] Yarik Kryvoi, Johannes Koepp and Jack Biggs, *Empirical Study: Annulment in ICSID Arbitration* (London: BIICL & Baker Botts, 2021), 5.

have dismissed applications for 97 annulment, 21 decisions of *ad hoc* committees annulled the award (15 partially and 6 in full), and 40 annulment proceedings were abandoned.[22] The success rate witnessed a significant decline compared to the preceding decade, primarily due to 21 decisions that annulled the award either partially or entirely.

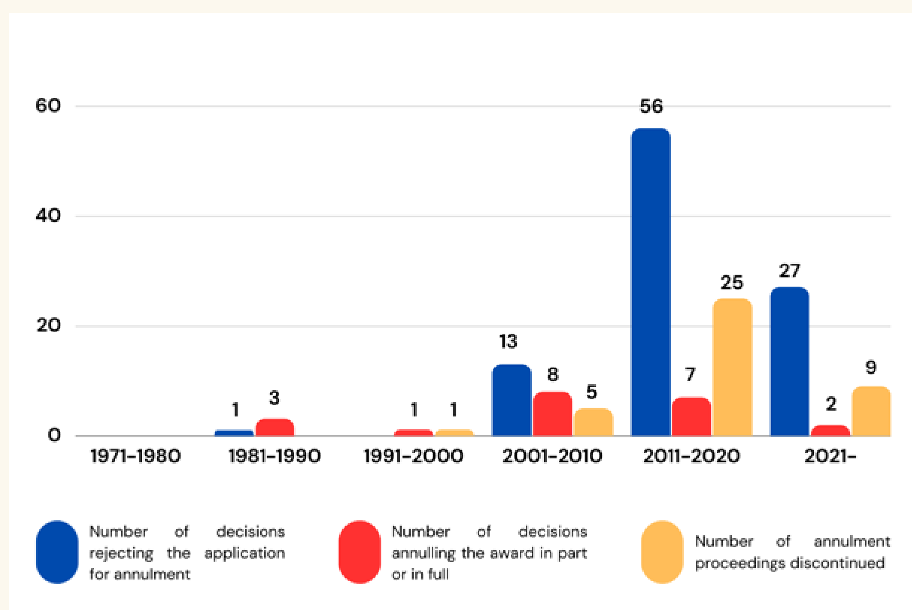

Table 1. Annulment in ICSID, by Decade (Source: The ICSID Caseload - Statistics Issue 2023-II (Edited)).

The grounds for annulment in treaty and contract arbitrations are: [23]

1. The Tribunal was not properly constituted.
2. The Tribunal has manifestly exceeded its powers.
3. There was corruption on the part of a member of the Tribunal.
4. A serious departure from a fundamental rule of procedure.
5. The award has failed to state the reasons on which it is based.

Article 52 of the ICSID Convention stipulates that the Administrative Council Chairman will chair an ad hoc committee of three individuals that will be constituted to

[22] International Centre for Settlement of Investment Dispute, *The ICSID Case Load - Statistics Issue 2023-II* (Washington: ICSID World Bank, 2023).
[23] Christoph Schreuer, et. al., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2009), 929.

examine the request for annulment. An annulment of an award, either in its entirety or partially, is contingent on the specific grounds invoked or the awards in question. Therefore, a party requesting an annulment of an award will often rely on several grounds stipulated above. However, the outcome of such a requets is dependent on the specific award or ground of annulment invoked. Thus, when a party requests an annulment of an award to the Secretary-General, it will often resort to invoking multiple grounds enumerated in Article 52 of the ICSID Convention while submitting an application.[24]

According to Article 52(1) (a) of the ICSID Convention, a party has the right to request the annulment of an ICSID award by submitting a written application to the Secretary-General on several grounds, which include the situation where the tribunal was not properly constituted. Given that the ICSID Secretariat is involved in all arbitral proceedings, ground one is used less frequently compared to other grounds.[25] This ground pertains specifically to the constitution of the Tribunal [26] and addresses issues such as deviation from the agreement between parties concerning the Tribunal constitution, non-fulfilment of nationality requirements by an arbitrator, or non-satisfaction of additional conditions for becoming a member of the Tribunal.[27]

The interpretation of the conditions that warrant the invocation of Article 52(1)(a) of the ICSID Convention, the factors that the ad hoc committee should consider while examining such cases, and the applicability of the challenge procedure to arbitrators during the hearing are subject to varying viewpoints and, thus, lack consensus. Additionally, there is no proper distinction between the various grounds for annulment. There are various ways to view this ground for annulment. This frequently results in an ineffectual theoretical and practical grounds of ICSID Convention.

At present, the ground of improper constitution has been invoked in thirteen annulment proceedings[28] An award was annulled for the first time on the grounds of an improper

[24] Decision of the ad hoc Committee on the Application for Annulment, Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35), 17 September 2022, para. 123.
[25] Yarik Kryvoi, Johannes Koepp and Jack Biggs, *Empirical Study: Annulment in ICSID Arbitration*, 15.
[26] Georges Delaume, "The Finality of Arbitration Involving States: Recent Developments," *Arbitration International* 5, no. 1 (1989): 30, https://doi.org/10.1093/arbitration/5.1.21.
[27] ICSID Secretariat, *Background Paper on Annulment For the Administrative Council of ICSID* (Washington: ICSID World Bank, 2012).
[28] "Decisions on Annulment," ICSID, accessed on April 21, 2023, https://icsid.worldbank.org/cases/content/tables-of-decisions/annulment.

constitution. This is probably because most arbitral tribunals take the precaution at the beginning of proceedings to obtain confirmation from parties of the legitimacy of the tribunal's constitution.[29] Regarding the Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v the Kingdom of Spain ("Eiser v Spain") , the award was annulled by an ad hoc Committee on the grounds that an arbitrator may have had a conflict of interest. The ad hoc Committee opined that the award's outcome might have been impacted by the arbitrator's failure to declare such a potential conflict of interest. Hence, the ad hoc Committee was of the view that the award was liable to be annulled.

This research critically examines the Annulment of ICSID awards specifically on the grounds of an improperly constituted tribunal. It also analyzes Article 52(1)(a) ICSID Convention and the interpretation from the ICSID Ad Hoc committee. Furthermore, it will deeply analyze the applicable standard in the process of annulment on the grounds of improperly constituted Tribunal on annulment decisions. This writing aims to understand the proceeding of challenging the constitution of the arbitral Tribunal as a ground for annulling the ICSID Awards.

There are several studies related to the annulment of ICSID awards. One of the detrimental research projects in understanding the grounds of ICSID awards annulment is written by Nikolay Popov, Master Programme Thesis in Investment Treaty Arbitration, entitled "The Effectiveness of the Grounds for the Annulment of ICSID Awards" (2020).[30] It broadens the theoretical definition and practical use of the annulment grounds. Popov can draw the conclusion that because the grounds are insufficient, revisions to the ICSID annulment mechanism are required. Saar A. Pauker and Benny Winston conducted a previous study titled "Eiser v Spain - Unprecedented Annulment of an ICSID Award for Improper Tribunal Formation" in 2021.[31] This study discusses applying the Tribunal's improper constitution on the decisions of annulment of Eiser v Spain. It commented on the decisions that contain doctrinal findings and how the annulment seems unreasonable and inefficient.

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[29] George A Bermann, "Understanding ICSID Article 54," *ICSID Review - Foreign Investment Law Journal* 35, Issue 1-2 (2020): 243, https://doi.org/10.1093/icsidreview/siaa020.

[30] Nikolay Popov, "The Effectiveness of the Grounds for the Annulment of ICSID Awards" (Master's Thesis, Uppsala Universitet, Uppsala, 2020).

[31] Saar Pauker and Benny Winston, "Eiser v Spain – Unprecedented Annulment of an ICSID Award for Improper Constitution of the Tribunal," *The Journal of World Investment & Trade* 22, no. 2 (2021): 313-328, https://doi/org/10.1163/22119000-12340205.

This research aims to delve deeper into the standard of applicability of the ICSID annulment grounds concerning the improper constitution of the Tribunal, with a specific focus on selected cases. Therefore, there are inherent differences in the discussion that this journal intends to put forth compared to the two studies mentioned earlier. It should be noted that this research is not redundant or repetitive of the previous studies but rather seeks to offer a unique perspective on the subject matter.

This research employs a normative legal methodology that focuses on the statute and case approaches to analyse the collected legal materials. The legal materials encompass primary legal materials, such as the ICSID Convention, ICSID Arbitration Rules, and decisions on the annulment of several cases, as well as secondary legal materials like books, law dictionaries, journal articles, and commentaries relevant to the topic.[32] The data collection method utilizes a documentary study of the aforementioned legal materials. Subsequently, the data analysis involves qualitative analysis that entails grouping similar information into categories. Such an approach ensures a comprehensive and rigorous analysis of the research questions.

B. Discussion

B. 1. Interpretation of 52(1)(a) of the ICSID Convention

Analysing the circumstances under which Article 52(1)(a) of the ICSID Convention may be invoked, the factors that the Ad Hoc Committee should take into account in this regard, whether the arbitrator should be challenged during the proceedings or after, and the absence of a clear distinction between this ground and other grounds of annulment listed in Article 52(1) of the ICSID Convention, examples of such grounds include exceeding authority, arbitrator corruption, or violation of a fundamental procedural rule. The lack of clarity and agreement on these issues underscores the need for a more comprehensive and nuanced understanding of the application of ICSID Convention, as per Article 52(1)(a).

The Vienna Convention, as the customary rules of interpretation, prescribes that Article 52(1)(a) of the ICSID Convention ought to be interpreted through four principles, which are:

1. Text;

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[32] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2003), 33.

2. Context;
3. Object and purpose; and
4. In light of any relevant international law provisions that may be applicable to the relationships between the parties.

Ensuring proper compliance with the provisions of the ICSID Convention and the ICSID Arbitration Rules relies heavily on these principles. The provisions relating to the constitution of the Tribunal are enshrined in Section 2 of Chapter IV (Articles 37 to 40) of the ICSID Convention, while the regulations on the replacement and disqualification of conciliators and arbitrators are outlined in Chapter V (Articles 56 to 58) of the ICSID Convention.

B.1.1. Text of Article 52 (1)(a) of the ICSID Convention

Article 52 (1)(a) of the ICSID Convention:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) That the Tribunal was not properly constituted;
(b) ….

Constitute is defined as to be a part of a whole; give legal or constitutional form to (an institution); institutes through legal means [33] Properly is described as "correctly or satisfactorily."[34] The words "was" and "constituted" emphasize the desire to see a person or object carry out an action. This indicates that an annulment is brought up after the pertinent grounds that were relied upon have arisen. Referring to the text in Spanish and French of the ICSID Convention, the expression "properly constituted" is not limited to the original establishment of a particular entity.[35] To conclude, the proper context is that the Tribunal must be properly formed and essentially remain throughout its existence.

B.1.2. Context of Article 52 (1)(a) of the ICSID Convention

Regarding Article 52(1)(a), it should be noted that the term "properly constituted" encompasses more than just the initial establishment of the Tribunal. Additionally, Article

[33] Oxford Dictionary, accessed August 30, 2023, https://www.oed.com/dictionary/constitute_adj?tab=factsheet#8392696properly.
[34] Oxford Dictionary, accessed August 30, 2023, https://www.oed.com/dictionary/properly_adv?tab=factsheet#28230856.
[35] Decision of the ad hoc Committee on the Application for Annulment, OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25), 6 December 2018, para. 96.

51(1)(a) pertains to past acts, and should be viewed in the circumstances in the ICSID Convention, which is detailed in Chapter IV (Articles 37 to 40). "The Tribunal was not properly constituted" is one of the grounds cited by the parties in their request for an award annulment under Article 52(1)(a).

The second section of the fourth chapter of the ICSID Convention covers four articles. Starting with Article 37 concerning the arbitral tribunal and the specific number of arbitrators promptly after the registration of the request for arbitration. Article 38 sets out the schedule for appointing the arbitrators, the producers in the case one or more arbitrators are appointed, and rules regarding nationality. For instance, an arbitrator appointed by the ICSID shall not be a citizen of a disputing contracting state.[36] Additionally, Article 39 accommodates restrictions on the nationality of the arbitrator, which an agreement between disputing parties may waive (See also ICSID Arbitration Rule 1(3)). Last, Article 40 provides for cases where arbitrators are designated from outside of the Panel of Arbitrators.

However, it is clarified that arbitrators fulfilled the qualities under the first paragraph of Article 14, which requires a person to have high moral character, acknowledge by their expertise in the disciplines of law, business, industry, or finance, and be trustworthy to implement an independent judgment. Therefore, the qualifications apply equally to Panels of Arbitrators and also to arbitrators that are appointed from outside of the Panels. According to his analysis of the ICSID Convention, Professor Schreur asserts that possessing certain qualities is imperative for arbitrators, including those designated from a source other than the Panel of Arbitrators. Failure in appointing an arbitrator who demonstrates these qualities may result in annulment of the decision.[37]

In light of the above, conforming to the stipulations laid down in Articles 37 to 40 is of paramount significance. Failure to do so may result in an improper constitution. Arbiters, irrespective of whether they are designated on the Panel of Arbitrators or appointed outside of it, are under a critical obligation to preserve impartiality throughout the arbitration proceedings and exercise their independent judgment.

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[36] Audley Sheppard, "Arbitrator Independence in ICSID Arbitration," in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press 2009), 147-148.
[37] Christoph H. Schreuer, *Schreuer's Commentary on the ICSID Convention, Second Edition,* 936.

An arbitral tribunal's formal establishment entails more than appointing arbitrators within the appropriate time frame. It is an ongoing requirement that starts with the constitution until the proceedings conclude with a decision, award, or *functus officio.* Throughout this process, arbitrators must maintain impartiality and exercise independent judgment. Noncompliance with this requirement can have serious consequences, including compromising the proper constitution of the tribunal and potentially leading to annulment under Article 52(1)(a).

B.1.3. The Objectives and Aims of of Article 52 (1)(a) of the ICSID Convention

In relation to the subject matter and purpose of this text, factors such as the conclusive nature of arbitral awards, the absence of appeals, and the extraordinary character of remedies for invalidity may impact the role of the annulment committees. When it comes to annulment committees, their primary responsibility is to ensure the correctness of procedures, the legitimacy of the award and the preservation of the integrity of both the proceedings and the award. The absence of impartiality and independence by arbitrator/s is regarded as one of the most noteworthy menaces to ensure the legitimacy and integrity of both the legal proceedings and awards.

In the Suez v. Argentina Annulment Decision, the Ad Hoc Committee concurred with the Respondent that arbitrators' independence and impartiality are paramount to maintaining the credibility of the arbitration process. Therefore, the essentiality of the characteristics specified under Article 14(1) cannot be overstated, and their non-existence could be considered as a basis for annulment in accordance with Article 52(1)(a).[38]

B.1.4. Construing in compliance with the applicable rules of international law that are associated with the connection between the involved parties

According to the ICSID Convention, having access to an independent and impartial tribunal is guaranteed under Article 52(1)(a), ensuring parties' right to such a tribunal from the initial stage of its creation until the closing of the proceedings. In line with Article 31(3)(c) of

[38] Decision of the ad hoc Committee on the Application for Annulment, Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic (ICSID Case No. ARB/03/17), 17 April 2003, para. 77.

the Vienna Convention, every pertinent regulation of international law, which applies to the parties' connection, should be considered concerning this matter. The principle of an independent and impartial tribunal has been extensively acknowledged as a rule of law.[39]

B.1.5. Approaches in Interpretation

Despite the fact that this ground is rarely relied upon, numerous Committees have conducted in-depth analyses of the ICSID Convention's Article 52(1)(a). However, A number of these Committees have construed this provision as if it were a novel concept, disregarding earlier annulment decisions and opposing perspectives.

B.1.5.1. Schroryer's Interpretation

According to Professor Schroryer's interpretation, Article 52(1)(a) ICSID Convention pertains to the disqualification issue (Article 14(1) of the ICSID Convention), only allowing for the use of this ground in when the annulment request under Article 57 of the ICSID Convention has been unsuccessful. Therefore, initiating proceedings to challenge an arbitrator during the arbitration is obligatory for the acceptability of citing the basis for annulment. [40] The CDC v The Republic of The Seychelles ad hoc committee concurred with this interpretation and adopted a comparable stance.[41]

The approach in question is perceived as appropriate since it mandates that a party must initiate the challenge of an arbitrator during the proceedings, exhausting all feasible remedies. Only after a failed objection, a party raises this ground for annulment; if not, it could be seen as a *mala fide objection*. Rule 27 of the ICSID Arbitration Rules serves as the basis for this approach. However, it may only be implemented if circumstances arise, indicating that the arbitrator fails to meet the requirements specified outlined in Article 14 (1) of the ICSID Convention. It is required to note that this is only valid if the relevant circumstances are brought to the party's attention before the award is made. Oddly, the ICSID Convention fails to address

[39] Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals" in British Contributions to International Law, 1915-2015 (Leiden: BRILL, 2021), 289.
[40] Christoph H. Schreuer, *Schreuer's Commentary on the ICSID Convention,* 935-936.
[41] Decision of the ad hoc Committee on the Application for Annulment, CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14), 29 June 2005, para. 53.

this matter, providing no specific regulations on the time limit to file an application for annulment.

B.1.5.2. The case of Azurix v. Argentina

The case of Azurix v. Argentina case has been subjected to different interpretations by the Ad Hoc committee. According to the committee's findings, it emphasized that the ground for annulment should not be related to the absence of qualities in Article 14(1) of the ICSID Convention. Instead, the committee has underscored the process of forming the Tribunal, as outlined in Chapter IV, Section 2 of the ICSID Convention. This procedure includes the process of challenging arbitrators based on Article 14(1).[42] It is important to note that this clause only permits a review of Adherence to the procedures for such a challenge in Rule 9 of the ICSID Arbitration Rules, Article 57 - 58 of the ICSID Convention, and does not allow for a *de novo* challenge. Therefore, if a party seeking annulment due to an improperly constituted Tribunal hasn't contested the arbitrator, they are prevented using this reason as a basis. ||||Additionally, if the party becomes aware of the circumstances that led to the ground for annulment after the award has been rendered, as the Ad Hoc committee pointed out, revision would be a suitable course of action in such a scenario revision under Article 51 of the ICSID Convention rather than annulment.[43] On the other hand, in Vivendi v Argentina II, the annulment committee has taken the view that the time at which the applicant became aware of the circumstances is immaterial. [44]

When it comes to agreeing with the crux of the statement that the ad hoc committee lacks the authority to review the accuracy of a disqualification request, it may be pertinent to note, given the perspective issues raised above, that ICSID annulment now permits some degree of scrutiny into the correctness of such decisions. Otherwise, there is a risk of violating the arbitrator's requirement (e.g., nationality requirement (Article 39 ICSID Convention)), unless the disqualification procedure has been meticulously followed and the arbitrator has not been disqualified. If there is a material error in this regard, the parties have no recourse. This

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[42] Decision of the ad hoc Committee on the Application for Annulment, Azurix v. The Argentine Republic (ICSID Case ARB/01/12), 1 September 2009, para. 279.
[43] *Ibid*, para. 280-282.
[44] Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), 5 May 2017, para. 232.

approach could be considered acceptable only if the annulment system undergoes a comprehensive reform.

Regarding the option of revision, its effectiveness as a remedy in this case is uncertain, as newly discovered facts must have a decisive effect on the information that led to the ground for annulment was not available to the Tribunal or the claimant at the time the award was issued, as stated in Article 51(1) of the ICSID Convention. Demonstrating how a non-compliance with the stipulated requirements would have a decisive impact on the award would be a significantly challenging task. Additionally, at least the Tribunal member who did not adhere to the requirements was aware of it when the award was issued, although it is possible that "the Tribunal" referred to all members of the Tribunal collectively in the above-mentioned provision. If only one arbitrator existed, the applicant would have no chance of success.

B.1.5.3. Prior to or Subsequent To The Issuance of the Award

With regards to the timing of the facts, the appropriate course of action would depend on whether they occurred either prior to or subsequent to the issuance of the award. If they transpired before or during the proceedings, an application for disqualification would be appropriate. Whereas, if they happened after the award had been issued, it could be considered as a basis for annulment. The objective criterion is deemed as the foundation, instead of the subjective one, of when a party became cognizant of the fact. Nevertheless, this understanding may unreasonably limit the scope of applying this ground for annulment. The ICSID Convention does not provide any backing for this approach, as it was only proposed by a delegate for Israel during the drafting stage. Additionally, the Ad Hoc committee in EDF v Argentina has observed that alterations in an arbitrator's circumstances can lead to a tribunal, which was properly constituted at the outset, no longer being so during the proceedings.

The relationship between annulment and revision is a complex matter. Upon reviewing the ICSID Convention, it is evident that certain situations arise where determining the appropriate remedy is difficult. As per Article 52(1)(a), an Ad Hoc committee is limited to examining whether the constitution of the tribunal was appropriate by examining both parties' factual and legal arguments. In the case of proper constitution challenges, parties often present evidence during the annulment proceedings that was not previously addible during the arbitration proceedings. It is essential to distinguish between annulment and revision. In

revision, arbitrators make decisions based on evidence that was not available at the time of the award. Revision often pertains to matters such as fraud or disloyalty of a party that was discovered by the other party post-award. In annulment, on the other hand, the focus is on examining circumstances or situations of an arbitrator that were not disclosed during the proceedings, with the utmost importance placed on independence and impartiality.[45]

The conclusion that the is empowered to scrutinize the matter of its proper constitution, considering the provisions, context, objective, and aim of Article 52(1)(a) of the ICSID Convention, is a logical deduction. The members of the Tribunal were perceived to remain impartial and independent throughout the entirety of the proceedings. The ad hoc committee bears the responsibility of ensuring that the integrity of the process and the legitimacy of the award are not compromised. Consequently, the impartiality and independence of the arbitrators, which are fundamental prerequisites for a valid and legal arbitration award, may be assessed during the annulment proceedings.

B. 2. The Applicable Standard

Out of a total of 13 completed proceedings, the grounds of improper constitution of the Tribunal were invoked on only a few occasions, making it the second least invoked ground. Among these 13 instances, ground one has been successful only once in Eiser v. Spain. This section will provide a summary of the primary jurisprudential trends and ad hoc committee decisions regarding the Improper Constitution of the Tribunal grounds, as set out in Article 52(1)(a) of the ICSID Convention. Challenges based on the improper constitution of the Tribunal under Article 52(1)(a) of the ICSID Convention typically address questions such as:

a. Whether the Tribunal handled a challenge to disqualify an arbitrator correctly;[46]

[45] Discussion with Dominique T. Hascher (Member of *ad hoc* committee in Eiser v. Spain), May 24, 2023.

[46] Decision of the ad hoc Committee on the Application for Annulment, Carnegie Minerals (Gambia) Limited v. Republic of the Gambia (ICSID Case No. ARB/09/19), 7 July 2020, para. 129, Decision of the ad hoc Committee on the Application for Annulment, Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), 18 December 2012, para. 167 - 168, Decision of the ad hoc Committee on the Application for Annulment, EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23), 5 February 2016, para.124, and Decision of the ad hoc Committee on the Application for Annulment, Azurix v. The Argentine Republic (ICSID Case No. ARB/01/12), 1 September 2009, para. 279-280.

b. Whether the provisions of the ICSID Convention concerning the nationality of the arbitrators were complied with;[47]
c. Whether an arbitrator did not possess a quality which is required to serve on the Panel of Arbitrators according to Article 14 of the ICSID Convention, the stipulation of the arbitrator independence and impartiality included therein.[48]

B. 2. 1. Applicable Standard in Case of a Prior Decision on Challenge

Ad hoc Committees frequently assert that they can only examine cases where the applicant had already challenged the constitution of the Tribunal during the arbitration proceedings. In Azurix v. Argentina, the ad hoc committee asserted that its mandate was limited to examine whether the "procedure for constituting the tribunal, including the procedure for challenging arbitrators based on a clear absence of the characteristics … have been properly complied with".[49]

Subsequent ad hoc Committees have maintained that they are not limited to procedural aspects of the decision but also have the mandate to assess the substance of the request

[47] Decision of the ad hoc Committee on the Application for Annulment, Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), 8 January 2020, 8 January 2020, para. 189, para. 190, para.191and Decision of the ad hoc Committee on the Application for Annulment, Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (ICSID Case No. ARB/04/5), 11 May 2010, para. 130.
[48] Decision of the ad hoc Committee on the Application for Annulment, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36), 11 June 2020, para. 167-168, Decision of the ad hoc Committee on the Application for Annulment, Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), 8 January 2020, para. 189, 190, and 191, Decision of the ad hoc Committee on the Application for Annulment, Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/04/16), 8 May 2019, para. 46, Decision of the ad hoc Committee on the Application for Annulment, RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10), 29 April 2019, para. 167, para. 168, para. 169, Decision of the ad hoc Committee on the Application for Annulment, OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25), 6 December 2018., para. 267, para. 268, Decision of the ad hoc Committee on the Application for Annulment, Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe (ICSID Case No ARB/10/25), 21 November 2018, para. 267, para. 268., Decision of the ad hoc Committee on the Application for Annulment, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), 5 May 2017, para. 77-79, and Decision of the ad hoc Committee on the Application for Annulment, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), 10 Agustus 2010, para. 235-237.
[49] Azurix v. The Argentine Republic (ICSID Case No. ARB/01/12) Decision of the ad hoc Committee on the Application for Annulment 1 September 2009, para. 279.

restrictively.[50] However, it should be noted that the same ad hoc Committees also emphasized that they would not operate as an appeal mechanism and could only decide whether the decisions made by the tribunals were a decision that is so irrational that a reasonable adjudicator could not arrive at such a conclusion.[51]

B. 2. 2. Applicable Standard in Absence of a Prior Challenge

In situations where a party becomes aware of facts pertaining to the improper constitution of the arbitral Tribunal after the arbitral proceedings were closed, an ad hoc Committee cannot logically owe any deference to a prior decision on a challenge. As of now, it is left to the ad hoc Committee to determine whether the arbitrators were impartial and independent. This was demonstrated by the EDF v Argentina ad hoc Committee, which stated that the party who seeks annulment is not obligated to demonstrate that the absence of impartiality or independence had a significant impact on the award. Instead, the party was obligated to establish that it could have had such an effect. In essence, the award will only be annulled if it could have been different due to possible irregularities.

The case of Vivendi v Argentina II is another example of this approach. Despite the Arbitral Tribunal not being properly constituted due to doubts regarding the impartiality of one of the arbitrators, the ad hoc Committee held that such doubts did not significantly impact the award, as the concerned arbitrator was not aware of the facts that might have caused partiality. In both OI v. Venezuela and Eiser v. Spain, the ad hoc committees adopted a similar approach. In EDF v. Argentina, the committee responsible for annulment established a standard for annulment based on improper constitution. When an application for annulment is made under Article 52(1)(a) and (d) due to doubts about the independence or impartiality of an arbitrator, and no disqualification proposal was made before the proceedings closed, the applicable

[50] Decision of the ad hoc Committee on the Application for Annulment, EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic (ICSID Case No. ARB/03/23), 5 February 2016, para. 160-161, Vivendi v. Argentine Republic (II), 5 May 2017, para. 91-94, Decision of the ad hoc Committee on the Application for Annulment, Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/04/16), 8 May 2019, para. 44.

[51] Decision of the ad hoc Committee on the Application for Annulment, EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic (ICSID Case No. ARB/03/23), 5 February 2016, para. 141, Decision of the ad hoc Committee on the Application for Annulment, Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic (ICSID Case No. ARB/03/17), 17 April 2003, para. 160-161 & 163-164, and Decision of the ad hoc Committee on the Application for Annulment, Vivendi v. Argentina (II), 5 May 2017, para. 82-87, 91-94, 189 & 206.

standard is known as the "EDF standard". In such cases, the EDF committee applied a three-step test and used a *de novo* approach to decide whether an annulment should be granted.

a) Can the concerned party be considered to forfeited their right to raise this matter due to a lack of promptness?
b) If promptness cannot be used to argue that the concerned party waived their right to raise the issue, then the question becomes whether the party seeking annulment has met the Blue Bank standard. In other words, has it been demonstrated that a reasonable third party would perceive a clear lack of independence or impartiality on the part of an arbitrator?
c) And if that is indeed the case, could the lack of impartiality or independence of the arbitrator have significantly influenced the final award?

B. 3. Elements of Ground 1

B.3.1. Independence and Impartiality

Arbitral proceedings often face challenges under Ground 1, which primarily relate to an arbitrator's alleged failure to comply with the requirements of independence and impartiality stipulated in Article 14(1) of the fundamental rules of procedure. The right to have impartial and independent adjudicators is a fundamental rule of arbitral procedure that has been raised in front of several international arbitral tribunals and ICSID ad hoc committees, and is not subject to debate.[52] These allegations usually involve claims that arbitrators have failed to disclose information that could indicate a possible conflict of interest, as stipulated in Rule 6 of the ICSID Arbitration Rules.

The concepts of independence and impartiality are universally recognized in arbitration, with no specific criteria laid out in ICSID Arbitration. However, ICSID has specific provisions pertaining to the annulment mechanism and the constitution of the tribunal, which are not explicitly mentioned in Article 52 of the ICSID Convention. Nonetheless, the interpretation of this provision suggests a connection between the grounds for annulment and the concepts of independence and impartiality.[53]

[52] Andrew T. Connery, "Fairness, and Consistency: Striking a Balance in ICSID Annulment Proceedings Concerning Arbitrator Bias," *Columbia Business Law Review,* no. 1 (2020): 303, https://doi.org/10.52214/cblr.v2020i1.7160.
[53] Hascher, interview.

According to Rule 6(2) of the ICSID Arbitration Rules, arbitrators are required to execute a declaration that discloses any past or present professional, business, or other relationships they have with the parties, along with any other circumstances that may cause any party to question the arbitrator's ability to exercise impartial judgments. This disclosure requirement is a continuing obligation throughout the arbitration. Rule 6(2) of the ICSID Arbitration Rules does not offer any specific direction or list of circumstances or relationships that should be disclosed, and the term "any other circumstance" is particularly vague and could potentially encompass a wide range of situations.[54]

In the Vivendi case, Argentina contended that Gabrielle Kaufmann-Kohler, one of the arbitrators, did not meet the independence and impartiality standards mandated by the ICSID Convention. Argentina contended that Kaufmann-Kohler's dual role as an arbitrator in the case and a member of the board of UBS, which was Vivendi's largest shareholder, rendered her unable to meet the required standards of independence and impartiality. Moreover, Argentina claimed that Kaufmann-Kohler should have been disqualified, but failed to disclose the necessary information for Argentina to challenge her selection.

The committee strongly criticized Kaufmann-Kohler's decision not to investigate and reveal information related to the possible conflict of interest she may have had. The committee concurred with Argentina that the tribunal's constitution was deficient and that annulment under Article 52(1)(a) was warranted. The committee reasoned that since Kaufmann-Kohler's impartiality and independence were not compromised, depriving the claimants of the award would be unjust due to the arbitrator's shortcomings. Additionally, the committee believed that the lengthy proceedings, which began in 1997, ought to conclude. As a result, the committee chose not to annul the award.

During the Azurix case, Argentina argued that the tribunal was not properly constituted due to conflicts of interest surrounding its president, Andres Rigo Sured.[55] Argentina claimed that Sureda's law firm had appointed an arbitrator for Azurix in another dispute while also advising Azurix and the company that owns it. Additionally, Argentina accused Sureda of having not investigated or disclosed potential conflicts of interest, and that his partiality was

[54] Andrew T. Connery 2020. 132
[55] Azurix v. Argentina, ICSID, para. 250.

evident in some of the procedural directives. Despite Argentina's attempt to disqualify Sureda, the tribunal denied the challenge, which Argentina deemed as erroneous.

The Azurix committee's statements suggest that they may not have seen Kaufmann-Kohler's conduct as sufficient to support annulment, unlike the Vivendi committee. However, concerns about the implications of arbitrators failing to disclose necessary information could create uncertainty. The committee stated that discovering grounds for disqualification after the award may provide a basis for revising the decision, but not necessarily for annulment under Article 52(1)(a) of the ICSID Convention.[56]

While considering Argentina's arguments, the committee did not evaluate the validity of Argentina's contentions regarding Sureda's conflicts of interest or the correctness of the challenge decision. Instead, it focused on determining whether the ICSID Convention and ICSID Arbitration Rules were adhered to regarding arbitrator challenges. The committee did not examine whether the challenge decision was accurate, as it would be similar to an appeal against that decision. Instead, the ad hoc committee could only assess whether the regulations and processes were adhered to. [57] The committee determined that the relevant standards and protocols were followed while accepting and deciding on the challenge submission, which led to the dismissal of Argentina's Article 52(1)(a) basis for annulment.

The committee's decision in Azurix, which addressed Ground 1, based its decision on two factors: the fact that Article 14 was not cited in Article 52(1)(a), and the restricted scope of annulment under the Convention. The committee believed that annulment was solely appropriate if the technical process for determining an application had yet to be followed about a challenge before a tribunal under Articles 57 to 58. The committee did not see room for a review of the decision on its merits, as this would constitute an inadmissible challenge on the merits. Additionally, if a challenge was not raised or if the facts that could lead to a conflict were not disclosed before the proceedings ended, it would not be considered a violation of the procedure, and there would be no valid reason to cancel or annul the proceedings.[58]

Azurix has faced opposition from other committees. The EDF committee, for example, determined that failure to meet Article 14(1) during an arbitrator's tenure could be grounds for

[56] *Ibid*, para. 282.
[57] *Ibid*, para. 281.
[58] *Ibid*, para. 281.

annulment under Article 52(1)(a).[59] The *Ad Hoc* committee relied on Article 40 of the Convention, stipulating that arbitrators who are not appointed from the ICSID Panel of Arbitrators must comply with the Article 14(1) standard. The EDF committee concluded that this applies regardless if an Article 57 challenge was not initiated. In cases where such a challenge had been made and dismissed, the committee's role in annulment would be limited. For instance, in the EDF case, the impartiality of two arbitrators was questioned, but only one of them was subjected to an Article 57 challenge.

If a challenge under Article 57 had not been made, the EDF committee believed it had to determine independently whether or not the standard of independence and impartiality set out in Article 14(1) had been breached. To do this, the committee would first assess whether the applicant had waived their right to challenge the arbitrator under ICSID Rule 27. In case the objection was not prima facie evident, the committee would examine the relevant facts and legal aspects, with the burden of proof resting on the applicant. The committee interpreted the "manifest" standard of Article 57 as an "obvious" or "evident" lack of independence and impartiality. It concluded that demonstrating actual bias was not necessary, but rather the presentation of objective evidence, which indicated a bias or dependence on a reasonable evaluation. Additionally, the committee determined that the applicant did not have to prove that partiality had a significant impact on the award, but only that it could have influenced it.

On the other hand, if an Article 57 challenge was raised, the committees had to adhere to ICSID favors addressing bias challenges as they arise, rather than re-examining them from scratch.[60] The Tribunal's ruling on disqualification should be honored unless it's deemed unjustifiable.[61]

In Eiser v Spain case stands out as the sole instance where an ad hoc committee annul an award on Ground 1. The award in question is based on Spain's choice to eliminate economic benefits in the renewable energy industry. Spain argued that the arbitrator appointed by the investor had an undisclosed long-standing relationship with the investor's damages expert resulting in a "manifest appearance of bias".[62] The ad hoc committee applied a comparable strategy to the one used in EDF v Argentina (where no Article 57 request was made due to

[59] *Ibid*, para. 126-128.
[60] *Ibid*, para 137-139.
[61] *Ibid*, para. 145.
[62] Decision on Annulment, Eiser v Spain, 11 June 2020, para. 45.

undisclosed ties). The panel determined that the circumstances indeed created an unmistakable indication of partiality to an impartial observer, and that there existed a distinct potential for significant influence on the award.

B.3.2. Procedural Grounds

Out of the 13 Ground 1 claims, three were based on technical or procedural grounds for annulment.[63] In the case of Azurix v Argentina, the applicant claimed that apart from impartiality, the body that made the disqualification decision (the two other members of the Tribunal) was not the appropriate body as prescribed by Article 58.[64] However, the ad hoc committee did not delve further into the matter and concluded that there was no indication that the body that made the disqualification decision was not the proper one, as the unchallenged members of the Tribunal made the decision.

The case of Carnegie Minerals v Gambia centered on a dispute over the procedure used by ICSID in selecting an arbitrator when one of the parties failed to make an appointment within the agreed timeframe. Consequently, the applicant's challenge was dismissed by the ad hoc committee, which determined that the Tribunal had been formed in compliance with the terms of the licensing contract and, therefore, the challenge was unfound.[65]

The case of Pey Casado II involved an applicant who argued that one of the parties had lost their entitlement to designate an arbitrator after their first appointee resigned. The ad hoc committee ruled that it was not among the purview of their authority to declare that the resubmission tribunal was not properly formed since the applicant did not formally request the disqualification of the arbitrator.[66] Therefore, the application made by Applicants to annul the Resubmission Award on the ground of Article 52(1)(a) of the ICSID Convention was dismissed.

[63] Azurix; Carnegie Minerals; Decision of the ad hoc Committee on the Application for Annulment, Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), 8 January 2020.
[64] *Ibid.*
[65] Decision of the ad hoc Committee on the Application for Annulment, Carnegie Minerals (Gambia) Limited v Republic of the Gambia (ICSID Case. No ARB/09/19), 7 July 2020, para. 171.
[66] Decision of the ad hoc Committee on the Application for Annulment, Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), 8 January 2020, para. 557 and 612.

B.3.3. Timing of Objections (Waiver)

Four claims were dismissed by committees because the applicant did not raise their concerns about a Ground 1 challenge at the appropriate time, despite knowing or having reason to know about the issue. Among the thirteen cases, seven challenges were raised during the arbitral proceedings, while the remaining six instances had no challenges. In the Eiser case, the challenge was initially brought up throughout the process of annulment. The ad hoc committee responsible for reviewing Eiser's annulment request, concluded that giving up a right that is fundamental to the appropriate establishment of the tribunal necessitates a clear and unambiguous waiver.[67]

B. 4. Legal Certainty of ICSID Annulment

After reviewing previous legal cases, it appears that the standard of annulment in regard to the improper constitution of the tribunal is quite uncertain within the ICSID framework. This lack of clarity contributes to issues of legal certainty. Unfortunately, due to the absence of a reviewing mechanism, it is very challenging for ICSID to find common ground in interpreting annulment rules and creating a consistent legal interpretation.

Despite past legal cases, the annulment threshold concerning the tribunal's improper constitution remains uncertain within the ICSID framework. This lack of clarity creates legal uncertainty as ICSID struggles to find common ground in interpreting annulment rules and establishing a consistent legal interpretation without a reviewing mechanism. This may pose challenges to parties opting for ICSID arbitration, as they need more certainty when anticipating the standards that may apply to adjudicate annulment. Despite criticism from some scholars regarding repeat appointments, ICSID has yet to focus on determining the appropriate standard. As the volume of requests for annulment continues to rise, the probability of parties invoking the grounds of improper constitution of the tribunal in annulment proceedings is also increasing. The pursuit of annulment has become a customary practice for unsuccessful parties, and this prospect is not a mere theoretical possibility.

The ICSID arbitration process differs considerably from commercial arbitration involving states and significantly greater amounts of money. As a result, it is considered an issue within the domain of public international law, directly affecting the populations of the

[67] Decision on Annulment, Eiser v Spain, 11 June 2020, para. 190.

countries involved. Due to the high stakes involved, an incorrect award can potentially bankrupt a state. ICSID awards carry considerable weight and can significantly impact a state's economy, affecting all aspects of the country's life. The principle of finality of awards is a crucial and favorable aspect of ICSID arbitration, as it confers certainty and predictability to the process, ensuring a faster resolution of disputes.

B. 5. Proposed Solution

Numerous legal scholars have proposed different methods to address the legal ambiguity arising from the structure of the current ICSID annulment system, such as the ad-hoc nature of the arbitral proceedings, the absence of a legally binding precedent and an appellate body to review the decision. These factors have contributed to issues with interpretation and application standards that must be resolved to ensure a fair and impartial resolution of disputes. The precise scope of its applicability is not entirely apparent, as both the drafting history and scholarly works have failed to clarify the situation. The interpretation of its content varies significantly among ad hoc committees and authors, and these differences have only added to the confusion instead of resolving it. Such uncertainty can undermine the effectiveness of a legal norm. Additionally, there appears to be no rationale for treating this ground separately, as it could be conveniently included within the boundaries of a serious violation of a fundamental procedural rule or a clear excess of authority in some cases. Furthermore, procedural violations are unlikely to occur during the formation of the Tribunal, given the thorough monitoring carried out by the ICSID Secretariat. Hence, it can be reasonably inferred that this basis for annulment does not protect the fairness of the arbitration process. It is an archaic idea and should be considered a breach of a crucial procedural rule.

B.5.1. Amending the ICSID Convention in Promoting Predictability of Legal Interpretation

In order to improve the uniformity and foreseeability of investor-state awards, scholars in the legal field have put forward various proposals for reforming the ICSID annulment system. These proposals include the establishment of a doctrine of "precedent", which would require future arbitrations to abide by the precedents set by prior cases, as well as the creation

of a single appellate body to review arbitral awards, in addition to procedural changes recommended by the ICSID Secretariat.[68]

A comparative analysis of past decisions is crucial to achieve uniformity and certainty in decision-making. Therefore, Ad Hoc committees should refer to decisions made by other committees and international bodies to strengthen their own rulings. In the interest of justice and independence, we must not limit ourselves to the confines of the ICSID Convention. The pursuit of international justice is a universal sentiment, and we must strive to meet universal requirements and answer to this quest. [69]

B.5.2. A Qualitative Reform of The Annulment Mechanism

Apart from the usual procedural rules, an interesting characteristic of the ICSID Convention is the lack of a clear mandate for arbitrators to be impartial. It is suggested that this be amended so that the Arbiters and members of ad hoc committees are explicitly required to be independent and unbiased. Additionally, the criteria for disqualification should be revised to eliminate the need for a manifest lack of independence and instead use the standard of "justifiable doubts as to independence and impartiality." A separate, independent challenge committee should be established to manage any challenges. Suspicion should be considered acceptable if a fair and reasonable observer would conclude that there is a genuine possibility that the tribunal is not impartial. Finally, there ought to be a definite 30-day timeframe from the arbitrator's statement or the discovery of the circumstance to initiate a challenge against the arbitrator. These proposed changes would enhance assurance of parties, investors, and states in the ICSID system.

C. Conclusion

In conclution, Ground 1, pertaining to the Tribunal's improper constitution under the ICSID Convention, has received insufficient attention compared to other annulment grounds. The lack of consesnsus among disputing parties on the implementation of Article 52(1)(a) has created ambiguity, exacerbated by conflict interpretions from Ad Hoc committees. The

[68] ICSID Secretariat, *Possible Improvement of the Framework for ICSID Arbitration*, Washington DC: International Centre for Settlement of Investment Dispute, 2004.
[69] Hascher, interview.

examination of improper constitution is relevant when challenged during or after arbitration proceedings, as established by the three-step test in EDF v. Argentina. This test involves determining waiver, proving an arbitrator's lack of impartiality or independence under the Blue Bank standard, and demonstrating the potential impact on the award. Two categoris of improper constitution claims- are crucial in arbitration and dispute rsolution, emphasizing the need for further research to clarify legal implication and provide clarity to all involved parties.

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