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# Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?

By  
Thomas W. Walsh\*

On May 12, 2005, the Secretariat of the International Centre for the Settlement of Investment Disputes (ICSID or the "Centre") unceremoniously shelved its proposed Appeals Facility for further study,<sup>1</sup> announcing that "it was premature to attempt to establish such an ICSID mechanism."<sup>2</sup> The Appeals Facility would expand the scope of review of ICSID awards from the review of procedural legitimacy currently allowed under ICSID's annulment process to also include review of the substantive correctness of an award. Was this rebuff of appellate review surprising? An examination of ICSID arbitration, and the interests of its Contracting States and the investors that many of these States represent, indicate that it was not. Investors value the high degree of finality the current ICSID arbitration process provides parties in resolving disputes. The finality of awards is guaranteed in part by ICSID's disallowance of substantive review of decisions. The potential for inaccurate arbitral decisions to arise in this situation is obvious. Nonetheless, ICSID's continued efficacy as a system for the protection of investor rights provides incentive to the Contracting States, particularly capital-exporting States, to protect the finality of ICSID awards.

ICSID's Contracting States drafted the ICSID Convention<sup>3</sup> to enforce a re-

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1. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* Discussion Paper ¶ 23 (Oct. 22, 2004), <http://www.worldbank.org/icsid/highlights/improve-arb.pdf> [hereinafter ICSID Proposal].

2. ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat ¶ 4 (May 12, 2005), <http://www.worldbank.org/icsid/052405-sgmanual.pdf>.

3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965), 17 U.S.T. 1270, 575 U.N.T.S. 159, <http://www.worldbank.org/icsid/basicdoc/partA.htm> [hereinafter ICSID Convention].

game of investors' rights. The finality of ICSID awards is central to the Centre's purpose of acting as a neutral venue providing an effective remedy for investors. The Convention dictates that an ICSID award is "binding on the parties and shall not be subject to any appeal."<sup>4</sup> The Convention's focus on finality makes an amendment allowing substantive review of awards difficult. The Contracting States and the investors they represent must perceive a strong need for improving the accuracy of awards if substantive review is to be adopted.

Investor opinions are particularly important. Investors do not have the authority to alter the ICSID Convention, but the Contracting States, which do, often advance the interests of investors.<sup>5</sup> Capital-exporting States do not generally conceive of themselves as potential defendants in investor-State disputes; they primarily adopt an offensive view of foreign investment law, promoting the rights of their investors. In contrast, capital-importing States are aware that they may appear as defendants to an ICSID dispute. However, they too promote investors' interests with the hope of boosting foreign investment flows. Even if capital-importing States do not choose to support investors' interests, they cannot amend the Convention without the support of the capital-exporting States.

As the usual winners in ICSID disputes,<sup>6</sup> investors have a strong interest in maintaining the finality of ICSID awards. They are undoubtedly aware of alleged incorrect arbitral decisions, including the now infamous *Czech Republic* cases,<sup>7</sup> and the ICSID case *SGS v. Pakistan*.<sup>8</sup> However, these cases are still uncommon. It is not until investors begin to lose more disputes, and in particular lose disputes that they perceive to have been decided incorrectly, that investors and Contracting States will widely embrace substantive review of ICSID awards.

The one wrinkle in this analysis is the position of the United States. The advent of the United States as a defendant in NAFTA Chapter 11 investor-State disputes has caused the United States to become the first capital-exporting State to break with investors' interests.<sup>9</sup> The United States now evaluates foreign in-

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4. *Id.* art. 53(1).

5. Omar E. Garcia-Bolivar, *The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements*, 6 J. WORLD INVESTMENT & TRADE 751, 751 (2005).

6. See the outcomes of the cases concluded under ICSID, available at <http://www.worldbank.org/icsid/cases/conclude.htm>.

7. In 2003, the *Czech*, or *Lauder*, arbitrations gained notoriety when two arbitral tribunals came to two different decisions over essentially the same dispute. A London tribunal found that the Czech Republic discriminated against a United States investor in violation of the United States-Czech Republic BIT. Ten days later, a Stockholm tribunal applied the same facts to find that the Czech Republic had gone beyond discrimination and had breached its obligations to a Dutch subsidiary of the United States investor under the Netherlands-Czech Republic BIT. Franck, *infra* note 79, at 1559-69.

8. For further discussion of these cases, see *infra* Part II.

9. Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV.—FILJ 344, 348 (2004); see Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L L. 32-36 (2005).

vestment law in both an offensive and defensive light. The United States Congress's decision in the United States Trade Act of 2002<sup>10</sup> to allow substantive, as well as procedural, review of awards from disputes arising under future trade agreements—which now include the Central American Free Trade Agreement (CAFTA),<sup>11</sup> and the Chile and Singapore Free Trade Agreements (FTAs)<sup>12</sup>—reflected Congress' fear that the United States was on the cusp of losing one or more NAFTA disputes.<sup>13</sup> However, now that the United States State Department's team of NAFTA litigators has built an undefeated record, the United States' interests in the finality of awards are again aligned with investors' interests; the United States has little incentive to compromise the finality of awards that are in its favor. Much like investors, the United States is unlikely to support the substantive review of investor-State awards in ICSID until it is subjected to losses from arbitral awards.

The following analysis explores the significance of opening ICSID awards to appellate review, concluding that, although accuracy is a valid factor motivating the promotion of appeal, investors continue to prefer finality and so there is insufficient interest to compel the adoption of the Appeals Facility. Part I distinguishes appeals from the current standards of review available to international arbitration awards in ICSID and other jurisdictions. I begin by briefly defining the various levels of appellate review, differentiating between review of the legitimacy of the process of a decision and the review of the substantive correctness of a decision, and address the tension each form of review creates between the accuracy and finality of awards. The majority of this section is then spent applying these definitions of review to compare the Appeals Facility to other forms of arbitral review. The purpose of Part I is to convey the extent to which the adoption of the Appeals Facility would compromise currently accepted levels of finality of international arbitration awards.

Part II outlines the normative arguments for and against substantive review of ICSID awards, focusing on the benefit of substantive accuracy and the compromise of finality. I conclude that greater substantive accuracy is the primary benefit of appeal, more so than uniformity of law. Correction of an inaccurate award provides a direct benefit to disputing parties, while the benefits of uniformity of law accrue to the investment community.

In Part III, I evaluate whether the Appeals Facility's benefit of increased accuracy is sufficient to motivate the Contracting States to adopt it. My mes-

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10. Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(G)(iv) (2002). For discussion of the appellate provisions of the Trade Act of 2002, see *infra* Part I.

11. The Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, 19 U.S.C.A. § 4001, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTADR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTADR_Final_Texts/Section_Index.html).

12. Free Trade Agreement, U.S.-Chile, June 6, 2003, 117 Stat. 909, 19 U.S.C. 3805, available at <http://www.ustr.gov/fta/chile.htm>; Free Trade Agreement, U.S.-Sing., May 6, 2003, 117 Stat. 948, 19 U.S.C. 3805, available at <http://www.ustr.gov/fta/singapore.htm>.

13. Daniel M. Price, *US Trade Promotion Legislation*, 2 TRANSNAT'L DISP. MGMT. 47, 48 (2005).

sage is threefold: (1) adoption of the Appeals Facility requires a significant change in the ICSID Convention and a compromise of ICSID's underlying principal of finality; (2) the change will only be made if investors and the Contracting States that represent them within ICSID come to value the substantive accuracy of awards more than the current level of finality of awards; and (3) capital-exporting States and their investors have not suffered significant enough losses or been subjected to enough inaccurate awards to want to compromise the finality of ICSID awards in return for the potential for greater accuracy.

# I.

## DISTINGUISHING THE APPEALS FACILITY ON THE FINALITY—ACCURACY SPECTRUM

Before comparing systems of arbitral review, it may be worthwhile to define what is meant by appellate review. Legal systems vary in the breadth of review, but appeals generally review awards in two ways: for the legitimacy of the process of the decision, and for the substantive correctness of the decision.<sup>14</sup> Legitimacy of process refers to the framework in which the decision is made, including the powers and composition of the tribunal, as well as the fundamental rules of procedure.<sup>15</sup> The substantive correctness of an award refers to review of the content of a decision—whether the decision reflects an accurate determination of the facts of the dispute and application of the law to those facts.<sup>16</sup> Understanding the two forms of review embedded in appeal—legitimacy of process and substantive accuracy—is important to understanding how review of arbitral decisions affects the finality and accuracy of awards.

Review of the process of an award is a narrower standard of evaluation that allows the parties to sacrifice a limited amount of finality for increased integrity and fairness in the decision-making process. Review of the substantive accuracy of an award opens the decision to a higher level of scrutiny in exchange for greater accuracy in the legal reasoning. Arbitral systems choose to review only process, or both process and accuracy, depending on the respective value they place on the finality and accuracy of awards.

The general policy in international arbitration is to recognize the finality of awards;<sup>17</sup> review and appeal procedures are limited. The purpose of this section

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14. David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.—FILJ 21, 24 (1992) (distinguishing between what aspects of an award are subject to review under appeal and in the ICSID annulment process); Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 247, 251 (Ernst-Ulrich Petersmann ed., 1997) (discussing the types and functions of international and domestic review systems).

15. Caron, *supra* note 14, at 24 (“A legitimate process of decision involves, for example, a body with authority to decide the dispute in question. Legitimacy of process might also require that the deciding body be properly constituted, not be corrupt, and observe fundamental rules of procedure.”).

16. *Id.*

17. Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral*

is to illustrate the extent to which the Appeal Facility's proposed substantive review would depart from this practice.

### *A. Review Under Public International Law*

With only a few exceptions, review of awards under public international law is limited to requests for interpretation of the decision, rectification of minor errors, or revision on the ground of discovery of a new fact. Of these three options, only revision due to new facts may result in reversal of an award. The standard of review for new facts is strict. For example, Article 61(1) of the Statute of Rules of the International Court of Justice provides that:

[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.<sup>18</sup>

Similar standards can be found in Article 44 of the Statute of the European Court of Justice, Rule 80(1) of the European Court of Human Rights, Article 55 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, and Article 83 of the 1907 Hague Convention, as well as Article 38(1) of the International Law Commission's Model Rules on Arbitral Procedure.<sup>19</sup> This standard provides a minimal level of review. Its impact on finality is limited by its scope and the low likelihood that review could result in a reversal of the original decision.

The current exceptions to this standard of review are the World Trade Organization's Appellate Body<sup>20</sup> and the little-used appeal process in the Convention on International Civil Aviation.<sup>21</sup> These two instruments are the only ap-

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*Awards*, 2 ICSID REV.—FILJ 85, 85 (1987). The views of appeal in domestic and international tribunals are distinct. In United States courts, for example, the right of appeal is "sacrosanct." Dalton, *infra* note 72, at 62. In fact, "[a]ppeal is considered so fundamental in states' legal systems that it has been made a basic human right in criminal matters. According to Article 14.5 of the U.N. International Covenant on Civil and Political Rights of 1966 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'" Sacerdoti, *supra* note 14, at 247. In contrast, the WTO's Appellate Body is the only significant international tribunal that engages in appellate review.

18. Statute of the International Court of Justice art. 61(1), May 25, 1993, 32 I.L.M. 1192, available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicetext/ibasicstatute.htm#CHAPTER\\_III](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicetext/ibasicstatute.htm#CHAPTER_III).

19. European Court of Justice, Statute of the Court of Justice, art. 44, <http://www.curia.eu.int/en/instit/txtsenvigueur/statut.pdf>; European Court of Human Rights, Rules of Court, art. 80(1), [http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E987E65AC8864\\_BE4F0/RulesOfCourt.pdf](http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E987E65AC8864_BE4F0/RulesOfCourt.pdf); Permanent Court of Arbitration, 1899 Convention for the Pacific Settlement of International Disputes, art. 55, <http://pca-cpa.org/ENGLISH/BD/BDEN/1899ENG.pdf>; Permanent Court of Arbitration, 1907 Convention for the Pacific Settlement of International Disputes, art. 83, <http://pca-cpa.org/ENGLISH/BD/BDEN/1907ENG.pdf>; International Law Commission, Model Rules on Arbitral Procedure, art. 38(1), [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/10\\_1\\_1958.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/10_1_1958.pdf).

20. Understanding on the Rules and Procedures Governing the Settlement of Disputes, art. 17, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) [hereinafter DSU].

21. Convention on International Civil Aviation, Dec. 7, 1944, <http://www.icao.int/icaonet>

peals mechanisms in the international system reviewing both the legitimacy of process of an award and its substantive correctness.<sup>22</sup> Over time, the appeals mechanisms being negotiated under CAFTA and the United States FTAs with Chile and Singapore, as well as the appeals mechanisms resulting from any future United States FTAs, as mandated by the United States Trade Act of 2002,<sup>23</sup> will also be available for disputes arising under those treaties.

The WTO Appellate Body emerged during the Uruguay Round as a balancing factor to the proposal to make adoption of panel reports automatic.<sup>24</sup> Its jurisdiction is limited to issues of law covered in panel reports and the panels' legal interpretations—issues of fact are not reviewed.<sup>25</sup> The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panels. However, regardless of the action taken, the decision of the Appellate Body is final, and the cases are not remanded. Without the risk of remand, parties are assured that their dispute will not be subject to a cycle of endless remands and appeals. Finality is also supported by the requirements that an appeal be filed before the adoption of the panel report by the Dispute Settlement Body,<sup>26</sup> and the limitation of the Appellate Body proceedings to ninety days. Nonetheless, the finality of panel awards is compromised by appeal in sixty-eight percent of the disputes, and the appeal delays the decision by an average of 129 days.<sup>27</sup>

Again, the uniqueness of the Appellate Body in international arbitration should not be overlooked. The Appellate Body's review of both the legitimacy of process and substantive accuracy of an award is a departure from the general adherence to the finality of awards and is unmatched in international arbitration. The Appellate Body is a valuable comparative tool because it is the closest in scope to the standard of review that would be allowed under the proposed ICSID Appeals Facility. It may be worthwhile to note that one of the primary criticisms of the Appellate Body is its deleterious affect on the finality of awards.<sup>28</sup>

### B. Review Under Private International Law

International arbitration for the settlement of commercial or investment disputes, whether in accordance with the rules of arbitral institutions, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration

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22. Marc Lynedjian, *Reform of the WTO Appeal Process*, 6 J. WORLD INVESTMENT & TRADE 809, 814 (2005).

23. 19 U.S.C. § 3802(b)(3)(G)(iv) (requiring that the United States government: "seek[] to improve mechanisms used to resolve disputes between an investor and a government through— . . . (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.").

24. Sacerdoti, *supra* note 14, at 272.

25. *Id.* at 273.

26. The Dispute Settlement Body must adopt a panel report between the twentieth and sixtieth day after the circulation of the report. DSU, *supra* note 20, arts. 16(1), 16(4).

27. Lynedjian, *supra* note 22, at 816 (noting the delay in decisions and that the WTO appeal rate is high in comparison to appeal rates in domestic courts).

28. *See generally id.*

Rules, or other *ad hoc* arrangements, is generally subject to limited scope of review. Parties can include provisions in their arbitration agreements limiting or prohibiting judicial review of arbitral awards. In addition, most institutional arbitration rules contain express or implied limitations on judicial review of arbitral awards. For example, the International Chamber of Commerce (ICC) Rules of Arbitration, London Court of International Arbitration (LCIA) Arbitration Rules, and the American Arbitration Association (AAA) Commercial Arbitration Rules each limit review to the rectification of minor errors, and in the case of the ICC, the award may be interpreted by the original tribunal.<sup>29</sup> In all cases, the finality of the decision's process and substance is protected.

In the absence of institutional or contractual limitations, review of awards is possible in two different jurisdictions: (1) in the courts of the State in which the arbitration took place or under whose law the decision was rendered; or (2) in the courts of the State in which recognition and enforcement of the award is sought. Review is provided to protect the basic procedural and substantive rights of the parties. However, appeal on the merits, even when limited to narrow legal questions, is generally excluded.

### *1. Place or Law of Arbitration*

Review in the courts of the place or law of arbitration is limited by the State's arbitration statute. Domestic arbitration statutes distinguish international commercial arbitration from purely domestic arbitration as a prerequisite for limiting judicial review of arbitral procedures and awards.<sup>30</sup> On occasion, jurisdictions allow for complete finality—removal of any form of review of an award—of international arbitral awards. For example, subject to certain conditions, the laws of Switzerland and England allow transnational awards rendered in their territories to be excluded by agreement of the parties from the judicial control of their courts.<sup>31</sup> Belgium has even gone so far as to statutorily bar its courts from exercising any form of review over arbitral awards rendered in Belgium when none of the parties is connected with Belgium.<sup>32</sup> However, such complete finality is unusual.

In most jurisdictions, international awards may be reviewed for issues of legitimacy of process, including validity of the arbitration agreement, respect for due process, the competence of the arbitrators, and proper composition of the

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29. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, arts. 28(6), 29(2), [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf); LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, arts. 26.9, 27.1, <http://www.lcia-arbitration.com/>; AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, art. 46, <http://www.adr.org/sp.asp?id=22440#R46>.

30. Sacerdoti, *supra* note 14, at 266.

31. Georges R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 *ARB. INT'L* 21, 29 (1989) (discussing the New Swiss Law on International Arbitration of 1989, and the English Arbitration Act of 1979).

32. *Id.*



tribunal.<sup>33</sup> The substantive correctness of an award may not be reviewed. Due to these limited grounds for review, arbitration statutes are generally thought to protect the finality of the substantive decision.<sup>34</sup>

## 2. Place of Recognition and Enforcement

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") allows for judicial review of international awards by domestic courts in the place where a party seeks to enforce an award. The Convention's scope of review of arbitral awards is similar to most other international arbitral statutes' scopes of review. Article V of the Convention authorizes courts to review awards for incapacity of the parties; invalidity of the arbitral agreement; basic defects as to due process; appointment of arbitrators; proper notice of the proceedings; possibility to present one's case; a tribunal exceeding its powers; and whether the award has been set aside by the competent authority of the country in which the arbitration was conducted or under whose law the award was made.<sup>35</sup> Each of these grounds falls within review of legitimacy of process. Again, the substantive accuracy of an award is not subject to review.

The New York Convention and the arbitration statutes of the places and law of arbitration mentioned above afford a high level of finality to international commercial arbitration awards. Recourse to national courts is not uncommon under both avenues of review.<sup>36</sup> However, in the majority of national jurisdictions, parties can be confident that the finality of the merits of their awards will be upheld.<sup>37</sup>

## C. ICSID Annulment Process

The ICSID Convention, in contrast to other rules of international arbitration, does not allow review in municipal courts.<sup>38</sup> The Convention requires Contracting States to enforce the finality of ICSID awards; awards may not be subjected to "appeal or to any other remedy except for those provided for in th[e] Convention."<sup>39</sup> Review under ICSID is conducted internally. Parties may

33. Sacerdoti, *supra* note 14, at 266.

34. *Id.* (citing Article 1501 of the French decree 81-500 of 1981; Article 190 of the Swiss Law of 1987; Article 838 of the Italian Law of 1994; Article 34 of the UNCITRAL Model Law).

35. Convention on the Enforcement and Recognition of Foreign Arbitral Awards (June 10, 1985) (New York Convention), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

36. Sacerdoti, *supra* note 14, at 266.

37. The United States, for example, has a strong public policy to enforce awards. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding that the arbitration clause is to be respected and enforced by federal courts in accord with the explicit provisions of the United States Arbitration Act, and that an arbitration agreement, such as is involved here, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract") (citing 9 U.S.C. §§ 1, 2).

38. ICSID Convention, *supra* note 3, art. 53(1).

39. *Id.*

petition to have an award interpreted, revised in light of a new fact, or annulled. Much like the ICJ, revision due to new facts is contingent on the decisiveness of the fact and the requirement that the petitioning party's ignorance of the fact was not due to its own negligence.<sup>40</sup> The original tribunal generally conducts interpretations and revisions in light of new facts. The subject matter of annulment review requires that new *ad hoc* tribunals be convened for proceedings.<sup>41</sup>

Annulment is the only significant threat to the finality of an ICSID award. Nonetheless, annulment is a narrow scope of review.<sup>42</sup> Article 52(1) contains five grounds for annulment:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

The second, fourth, and fifth grounds are typically the subjects of annulment proceedings. The first and third grounds have never been claimed.

As of May 2004, for the approximately forty ICSID awards made since the Convention entered into force in 1966, there had been thirteen applications for annulment. Of the thirteen applications, seven have lead to proceedings, and only five cases have resulted in decisions. These five cases: *Klockner v. Cameroon*;<sup>43</sup> *Amco v. Indonesia*;<sup>44</sup> *MINE v. Guinea*;<sup>45</sup> *Vivendi v. Argentina*;<sup>46</sup> and *Wena Hotels v. Egypt*,<sup>47</sup> form the body of annulment jurisprudence. *Klockner* and *Amco*, were subject to two annulment proceedings each. However, the decisions in *Klockner II* and *Amco II* remain unpublished.

The annulment jurisprudence can be analyzed in three generations. The first two annulment cases, *Klockner I* and *Amco I*, provoked concern in the ICSID Community. The respective *ad hoc* Committees were criticized for "re-examining the merits of the two cases and for improperly crossing the line be-

40. *Id.* art. 51(1).

41. *See id.* art. 52(3).

42. *See Caron, supra* note 14, at 34 ("The ICSID annulment process, like the prototypical annulment process, provides a quite limited remedy.").

43. *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Scoiete Camerounaise des Engrais*, Decision annulling the award, May 3, 1985, 2 ICSID REP. 95 (1994); *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Scoiete Camerounaise des Engrais*, Decision rejecting the parties' applications for annulment, May 17, 1990 (unpublished).

44. *Amco Asia Corporation and others v. Republic of Indonesia*, Decision annulling the award, May 16, 1986, 1 ICSID REP. 509 (1993); *Amco Asia Corporation and others v. Republic of Indonesia*, Decision rejecting the parties' applications for annulment of the Award and annulling the Decision on supplemental decisions and rectification, Dec. 17, 1992 (unpublished).

45. *Maritime International Nominees Establishment v. Republic of Guinea*, Decision partially annulling the award, Dec. 22, 1989, 4 ICSID REP. 79 (1997).

46. *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on application for annulment, July 3, 2002, 41 I.L.M. 1135 (2002).

47. *Wena Hotels Limited v. Arab Republic of Egypt*, Decision on application for annulment, Feb. 5, 2002, 41 I.L.M. 933 (2002).

tween annulment and appeal.”<sup>48</sup> The second generation of cases, exemplified by *MINE v. Guinea*, quelled these concerns, reestablishing the divide between annulment and appeal.<sup>49</sup> Over ten years later, the divide between annulment and appeal was reinforced by the third generation of decisions in *Vivendi v. Argentina* and *Wena v. Egypt*.<sup>50</sup>

The first interpretations of Article 52(1)(e), in the *Klockner I* and *Amco I*, raised concerns that annulment could effectively result in a review of the adequacy of a decision’s reasoning.<sup>51</sup> However, *MINE v. Guinea*<sup>52</sup> and the subsequent decisions in *Vivendi v. Argentina* and *Wena v. Egypt* interpreted review of whether “an award has failed to state the reasons on which it is based” to be limited to scrutiny of the legitimacy of the process of decision.<sup>53</sup>

Examination of the other grounds of annulment reveals equally limited scopes for annulment.<sup>54</sup> “Manifest excess of power” in Article 52(1)(b) has been interpreted to mean that an *ad hoc* Committee may annul an award if the tribunal clearly exceeded its powers, as they are defined by the parties’ arbitration agreement.<sup>55</sup> Thus, Article 52(1)(b) “does not provide a sanction for every excess of its powers but requires that the excess be manifest which necessarily limits an *ad hoc* Committee’s freedom of appreciation as to whether the tribunal has exceeded its powers.”<sup>56</sup> Likewise, Article 52(1)(d), “serious departure from a fundamental rule of procedure,” has been defined narrowly.<sup>57</sup> The *MINE* Committee interpreted the adjective “serious” to “require that the departure from a fundamental rule of procedure ‘be substantial and be such to deprive a party of the benefit or protection which the rule was intended to provide.’”<sup>58</sup> The narrow interpretation of the grounds for annulment helps to maintain the finality of ICSID arbitral awards.

Importantly, annulment does not necessarily affect an award in its entirety.

48. Christopher Schreuer, *Three Generations of ICSID Annulment*, in ANNULMENT OF ICSID AWARDS 17, 18 (Emmanuel Gaillard & Yas Banifetami eds., 2004).

49. *Id.* Schreuer includes *Klockner II* and *Amco II* in the second generation of annulment decisions. Unfortunately, this author is not privy to those unpublished decisions, and therefore refrains from including them in the analysis above.

50. *Id.* at 18-20.

51. Caron, *supra* note 14, at 43 (“The *Klockner* Committee asked, ‘is it possible to liken *inadequacy* of reasons to failure to state reasons?’”) (citing *Klockner v. Cameroon*, *supra* note 43, para. 117) (emphasis in original).

52. *Guinea v. Maritime International Nominees Establishment (MINE)* (ICSID Case No. ARB/84/4). “A Committee might be tempted to annul an award because th[e] examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.” *Id.* paras. 5.08-5.09.

53. Caron, *supra* note 14, at 38-46; Schreuer, *supra* note 48, at 33-38; Emanuel Gaillard, *Comment*, 2 TRANSNAT’L DISP. MGMT. 38, 38 (2005) (noting that the recent generation of annulment cases has limited annulment to the integrity of the process).

54. For a more detailed discussion of the annulment jurisprudence, see Schreuer, *supra* note 48, at 20-38.

55. Caron, *supra* note 14, at 38, 40.

56. *Id.* at 38 (quoting *MINE v. Guinea*, *supra* note 46, para. 4.06).

57. *Id.* at 41-42.

58. *Id.* at 41 (quoting *MINE v. Guinea*, *supra* note 46, para. 5.05).

The party seeking review may request the partial annulment of the award, and an *ad hoc* Committee has “the authority to annul the award in its entirety or any part thereof.”<sup>59</sup>

The finality of awards is also supported by a number of procedural requirements that act to deter frivolous annulment proceedings. The request for annulment of a proceeding must be timely.<sup>60</sup> If the tribunal so decides, the party requesting annulment can be held responsible for the fees and expenses of the *ad hoc* tribunal and other direct costs of the annulment, and be required to provide a bank guarantee for the amount of the award.<sup>61</sup> In addition, interlocutory awards cannot be annulled; the Secretary-General will not register interlocutory decisions for annulment proceedings on the ground that they are not a true “award” as stated in Article 52(1).<sup>62</sup> Finally, the annulment jurisprudence has determined that even in the event that grounds for annulment exist, *ad hoc* committees have a measure of discretion as to whether to annul the award.<sup>63</sup> The *MINE* Committee found that annulment need not be granted, “where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.”<sup>64</sup> The *Wena* and *Vivendi* annulment decisions “contain further confirmation of this cautious attitude.”<sup>65</sup> In *Vivendi*, for example, the *ad hoc* Committee concluded that it “must guard against the annulment of awards for trivial cause.”<sup>66</sup>

Evaluating Article 52(1)’s grounds for annulment and the procedural rules governing annulment reveals a narrow scope for annulment proceedings, as well as procedural safeguards protecting the finality of an award.

#### *D. The Appeals Facility*

The primary distinction between ICSID’s proposed Appeals Facility and the annulment process is the Facility’s broader scope of review of an award.<sup>67</sup> The Facility’s procedural safeguards are similar to those in annulment. However, the Facility would combine the annulment process’s review of the legitimacy of the process of decision with review of the substantive correctness of the

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59. ICSID Convention, *supra* note 3, art. 52(3).

60. *Id.* art. 52(2). The application for annulment must be made within 120 days of the date that the award was rendered. In the case of corruption, the application must be made within 120 days of discovering the offense, but within no more than three years from the date the award was rendered.

61. *Id.* art. 61(2).

62. Caron, *supra* note 14, at 37 (citing *Southern Pacific Properties v. Egypt*, 32 I.L.M. 933 (1993)). In that case, the Secretary-General determined that he did not have the authority to register Egypt’s annulment application because the decision on jurisdiction, which Egypt wished to annul, was not an “award.” *Id.*

63. *Id.* at 46.

64. *Id.* at 46 (quoting *MINE v. Guinea*, *supra* note 46, para. 4.10).

65. Schreuer, *supra* note 48, at 19.

66. *Vivendi v. Argentina*, *supra* note 46, para. 63.

67. See Schreuer, *supra* note 48, at 23-24.

decision.<sup>68</sup> Substantively, the Facility would review awards for “clear error[s] of law” and possibly “serious errors of fact.”<sup>69</sup>

The scope of each prong of review would depend on the interpretations of “clear” and “serious.” Regardless, it is apparent that the Facility’s intent was to allow a restricted review of law and possibly fact. This type of restricted review of errors of law, requiring “clear” error, would be unique for arbitration awards. The WTO’s Appellate Body allows review of “issues of law covered in the panel report[s] and legal interpretations developed by the panel[s].”<sup>70</sup> A restricted standard of review for errors of law was proposed for the Appellate Body; however, the WTO adopted the broader standard of review of any “issues of law.”<sup>71</sup> Therefore, it appears that the Appeals Facility’s review of law would not provide as much latitude as the Appellate Body to compromise the finality of awards.

Review of “serious errors of fact” would also be unique to the Appeals Facility. The Appeals Body does not provide for review of fact.<sup>72</sup> The ICSID Secretariat indicated that “serious error of fact . . . would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal.”<sup>73</sup> Nonetheless, the narrow review of fact is an unparalleled encroachment on the finality of arbitral awards.

The potential impact of appellate review on the finality of ICSID awards would also be affected by the procedural restraints placed on the use of the Facility. Like the annulment process and the Appellate Body, applications to the Appeals Facility would have to be made in a timely manner.<sup>74</sup> The Secretariat has indicated that the annulment process’ time period of 120 days or the WTO’s period of 60 days should be considered as models.<sup>75</sup> To promote the resolution of the appeal, the Appeals Facility would likely have time limits for the parties to file pleadings, and for the tribunal to render its decision.<sup>76</sup> The Secretariat also proposed that, as in annulment proceedings, the applicant may be responsible for advances to ICSID for the fees and expenses of the appeal, and may be required to provide a bank guarantee for the value of the award.<sup>77</sup> Finally, the Secretary-General would act, as in the Additional Facility, as a gatekeeper.<sup>78</sup> Access to the Appeals Facility would be subject to the Secretary-General’s ap-

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68. ICSID Proposal, *supra* note 1, annex, para 7.

69. *Id.*

70. DSU, *supra* note 20, art. 17(6).

71. Iynedjian, *supra* note 22, at 814. It was proposed that appeal be limited to “exceptional cases” where the panel “committed fundamental interpretive errors.” *Id.*

72. DSU, *supra* note 20, art. 17.

73. ICSID Proposal, *supra* note 1, annex, para. 7.

74. *Id.* para. 11.

75. *Id.* n. 8.

76. *Id.* para. 12.

77. *Id.* para. 10.

78. Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (Additional Facility Rules), art. 4, <http://www.worldbank.org/icsid/facility/partA-article.htm#a04>.

proval and would be contingent on compliance with the aforementioned timing requirement and whether the request is within the scope of the Appeals Facility rules.

This review of the Appeals Facility indicates that the Secretariat envisioned a limited appeal mechanism. Restricting appeals to “clear” errors of law would result in a narrower scope of review than in the Appellate Body. However, the Facility’s scope of review would be widened if issues of fact were subject to review. Regardless, the Facility’s proposed timeliness requirement and the time limits on the appeals process would help to minimize the costs of legitimate appeals. In addition, frivolous appeals should be deterred by the fee arrangement and bond requirement, and occasionally prevented by the Secretary-General’s supervision of applications. All of these restraints on the review of awards should mitigate the impact of the Appeals Facility on the finality of ICSID awards. Nonetheless, broadening the scope of review of awards from annulment to include, at a minimum, “clear error[s] of law,” and possibly “serious errors of fact,” marks a significant departure from principles of finality in the ICSID system, and throughout international arbitration.

Having assessed the significance of the Appeals Facility in terms of its potential impact on the finality of awards, I will next address the motivation for such change.

## II. MOTIVATION FOR THE APPEALS FACILITY

The purpose of this section is three-fold. First, I will review the two primary motivations for appealing ICSID awards: (1) the systemic interest in maintaining the consistency of the ICSID jurisprudence across all disputes; and (2) the localized interest of parties—primarily investors—in assuring the accuracy of awards in individual disputes. Second, I will argue that investors’ interest in the accuracy of awards is a more significant motivation than the community’s desire for uniformity of law. Finally, I will briefly flesh out the primary argument against the appeal of ICSID awards: the localized, rather than systemic, concern of parties, particularly winning parties, that the finality of their individual disputes will be compromised by appeal.

A. The Case for Appeal<sup>79</sup>

Two often-enunciated benefits of municipal court appeal are the provision of uniform rules of law across cases and the correction of errors in individual cases.<sup>80</sup> Allowing a centralized review of the decisions of first-instance authorities improves the uniformity of law because the law is interpreted, shaped, and articulated consistently.<sup>81</sup> Uniformity of law is desirable mainly because it allows parties to predict with some degree of certainty how the law will be applied, allowing them to act accordingly.<sup>82</sup> Centralized review may also improve the accuracy of awards by allowing correction of substantive errors arising from first-instance authorities. Greater accuracy is desirable because it helps ensure that the parties to a dispute receive a fair decision.

Valuing uniformity of law assumes that appellate review is more than simply a device for ensuring the accuracy of particular decisions. The goal of accuracy assumes that dispute resolution is not a sufficient end unto itself; no matter how much value is placed upon the finality of an award, the parties prefer an ac-

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79. The normative arguments for appeal rely on the assumption that the Appeals Facility will prevent inconsistencies and inaccuracies in ICSID awards. It is important to note that both of these rationales for appeal of investor-State arbitrations are not without their critics. Review of the Appeals Facility leaves questions as to whether it would in fact create uniformity of law or correct inaccuracies in decisions. The Appeals Facility would in all cases only be applicable if both parties consent to a dispute, so arbitrations could in some cases be subject to the Facility and in other cases not. This suggests that, rather than unifying the ICSID jurisprudence, the Facility could further fragment the ICSID arbitral regimes, or at best, have no impact on the uniformity of law. ICSID Proposal, *supra* note 1, paras. 21-23.

The structure of the Appeals Facility also indicates that it may do little to ensure the accuracy of decisions. The current practice of having three arbitrators in most tribunals is one of the simplest guards against errant decisions. GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING 78 (1999) (noting that, in the absence of appeal, arbitration agreements provide for three-person arbitral tribunals in cases of any significant magnitude in order to protect against eccentric or incorrect decisions). But is there a reason to think that a second tribunal of three arbitrators will be better than the first? Caron, *supra* note 14, at 54. Appellate courts are often thought to be capable of correcting errors of first-instance adjudicators because they make decisions in groups of three or more, have greater expertise, and face lesser time pressures than the lower courts. Iynedjian, *supra* note 22, at 822. The ICSID appeals tribunals would have none of these advantages. As discussed, both arbitration and appeals tribunals are composed of three arbitrators, and there is no reason to think the members of an appeal tribunal will have greater expertise or reduced time pressure compared to an arbitral tribunal.

80. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 56 (1981); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 600 (6th ed. 2003); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381 (1995). Additional benefits of appeal include improvement of institutional legitimacy, and the supervision of first-instance adjudicators. SHAPIRO, *supra*, at 49-56.

81. SHAPIRO, *supra* note 80, at 54, 56; Dalton, *supra* note 80, at 69; DELMAR KARLEN, CIVIL LITIGATION 118-19 (1978) ("The [United States] Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.'"). Cf. S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. & SOC'Y REV. 637 (1972).

82. Shavell, *supra* note 80, at 425; POSNER, *supra* note 80, at 600.

curate decision.<sup>83</sup>

Uniformity of law and accuracy of decisions are also both cited as reasons for establishing an appellate system for investor-State disputes. James Crawford suggests that the dramatic increase in the number of investor-State arbitrations taking place in ICSID<sup>84</sup> and its sister organizations may create a need for greater uniformity of law.<sup>85</sup> The increased number of arbitrations raises the probability of inconsistent decisions, both in terms of the arbitrators' reasoning and in terms of the outcomes.<sup>86</sup> To date, no major inconsistencies have emerged in the ICSID jurisprudence.<sup>87</sup> However, some are concerned that the conflicting holdings in the *Czech Republic*<sup>88</sup> arbitrations are examples of what could occur in ICSID.<sup>89</sup>

The desire for uniformity of law has been echoed elsewhere in the debate on the merits of appealing investor-State arbitral decisions.<sup>90</sup> Most notably, the ICSID Secretariat introduced the Appeals Facility as a tool for "foster[ing] coherence and consistency in the case law emerging under investment treaties."<sup>91</sup>

Greater accuracy of international arbitration awards is not as often vocalized as a rationale for appealing investor-State disputes. In fact, the Secretariat did not promote the Appeals Facility as a tool for correcting inaccuracies.<sup>92</sup> Nonetheless, some commentators have raised concerns about the promulgation of inaccurate decisions, pointing to *SGS v. Pakistan* in ICSID,<sup>93</sup> *Loewen v.*

83. Dalton, *supra* note 80, at 66.

84. Until the beginning of 2002, ICSID had registered ninety-five cases under the ICSID Convention and Additional Facility. By 2005, ICSID had registered an additional eighty-nine cases, bringing the total number of cases registered by the Centre since its inception to 184. See *supra* note 6.

85. James Crawford, *Is There a Need for an Appellate System?*, 2 TRANSNAT'L DISP. MGMT. 8, 8 (2005).

86. *Id.*

87. ICSID Proposal, *supra* note 1, para. 21. Nonetheless, the different outcomes in the *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (2003) and *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (2004), have been pointed to as an example of conflicting decisions within ICSID. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1569-74 (2005).

88. For an explanation of these cases, see *supra* note 7.

89. See generally Crawford, *supra* note 85.

90. Doak Bishop has said that he believes an appellate body "can provide the perception to Governments, NGO's and others of consistency of decisions, predictability of the law, [and] objectivity in making decisions as to the meaning of investment provisions." Doak Bishop, *The Case for an Appellate Panel and its Scope of Review*, 2 TRANSNAT'L DISP. MGMT. 8, 10 (2005). Similarly, Susan Franck champions an appellate body as a tool to "promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system . . . legitimate in the long term." Franck, *supra* note 79, at 1607.

91. ICSID Proposal, *supra* note 1, para. 21.

92. ICSID Proposal, *supra* note 1, paras. 20-23.

93. *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, *supra* note 87. In this case the tribunal decided in favor of Pakistan that the argued umbrella clause and the BIT did not accord broad rights to sue under the international instrument for contract violations. The Swiss Government responded on behalf of SGS in a letter to the ICSID Secretariat alleging that the award's restrictive interpretation of the umbrella clause was substantively incorrect. Mark W. Friedman, *Non-Party States' Efforts to Influence Ongoing Proceedings*, 2 TRANSNAT'L DISP. MGMT.



*United States* in NAFTA,<sup>94</sup> and the *Czech* cases as examples of tribunals that have arrived at inaccurate decisions.<sup>95</sup> Furthermore, one lesson of the WTO's Appellate Body is that appeal can be used to improve the accuracy of individual international arbitral awards.<sup>96</sup>

### *B. Accuracy as a Greater Motivator than Uniformity*

The question central to the support of the Appeals Facility is whether either uniformity of law or accuracy of decisions is a sufficient motivator for the Contracting States to adopt the Facility. Assuming, as this paper does, that the Contracting States' interests are aligned with the interests of their investors, I argue that the desire for accuracy of decisions, not uniformity of law, is the most significant incentive for the adoption of the Appeals Facility.

Uniformity of law and the predictability that it creates is a benefit that accrues to all potential parties to an ICSID dispute. However, it provides the greatest value to parties that engage in repeated ICSID arbitrations. Capital-importing States are the most common repeat parties to arbitration. Most investors are not repeat parties to ICSID arbitrations. They will not benefit from uniformity of law. Instead, investors derive value from procedures that enforce their rights in the immediate claim that they are arbitrating. Correction of an inaccurate award is a benefit that appeal can directly confer on any investor, regardless of the number of arbitrations in which they engage. In addition, even in the case of the group of investors that are party to multiple ICSID arbitrations, correction of an inaccurate award may provide a more direct benefit to the investor than uniformity of law.

Accordingly, the benefits of uniformity of law should have limited impact on whether the Appeals Facility is adopted. The capital-exporting States are not likely to compromise the finality of awards, against the interests of the investors, in favor of conferring the benefit of uniformity of law on the community. If the Contracting States adopt the Appeals Facility, it will be because investors perceive the opportunity to review the accuracy of awards as directly benefiting themselves.

### *C. The Case Against Appeal*

The push-back against the Appeals Facility arises from the uneasiness felt by investors regarding the potential impact of appellate review on the finality of ICSID awards. One of the primary benefits of arbitration is that it provides an official termination to a conflict.<sup>97</sup> The primary cost of appeal is to compromise this finality, delaying the final decision in the dispute while increasing the

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44, 46-47 (2005).

94. Rubins, *supra* note 9, at 1.

95. Franck, *supra* note 87, at 1568.

96. Crawford, *supra* note 85, at 8.

97. SHAPIRO, *supra* note 80, at 49.

monetary costs of arbitration. The scope of appeals, timeframe, and the power to remand can all extend a dispute.<sup>98</sup> Even in the quickest of appeals, a party may, rather than endure the costs and risks of appeal, settle with the appealing party for less than the tribunal awarded them.<sup>99</sup> At worst, a party may be mired in a cycle of appeals, unable to recover their losses as the unhappy losing party appeals without reason.<sup>100</sup>

The ICSID annulment process, as discussed in Part I, has an application rate of approximately twenty-eight percent, and approximately only eighteen percent of ICSID arbitrations have been subject to proceedings.<sup>101</sup> Nonetheless, these few annulment proceedings have ranged in length from thirteen to twenty-three months.<sup>102</sup> The WTO has an aggregate appeal rate of sixty-eight percent.<sup>103</sup> One explanation for the difference in the frequency of review in ICSID and the WTO is the scope of review. This suggests that the Appeals Facility's broadening of the scope of review of ICSID awards could significantly increase the frequency of review of ICSID awards. Increased frequency of review would inevitably increase costs and delays in ICSID arbitration.

This review of the arguments for and against appellate review highlights that the Appeals Facility sets in opposition the benefits of increased accuracy of awards and the burdens of decreased finality of awards. The following section addresses whether the perceived need for increased accuracy of ICSID awards is sufficient to compromise the established value of finality of awards.

### III.

#### IS THE DESIRE FOR ACCURACY SUFFICIENT TO COMPROMISE FINALITY?

The question of whether the Appeals Facility will be reconsidered in the future depends on whether investors and the United States will support the Facility. When the issue of appeal first emerged in ICSID, following the annulment proceedings in *Klockner v. Cameroon* and *Amco v. Indonesia*, expanding annulment to include the review of errors of law was widely regarded as an undesirable development.<sup>104</sup> This appears to still be true today. As noted in the in-

98. See Shavell, *supra* note 80, at 384-85.

99. Dalton, *supra* note 80, at 77. "[E]ven if appeal were cost-free and victory-assured, a perfectly rational winner of money damages would accept less than her due in order to avoid an appeal whenever (as is usually the case) the use value of having the money in hand exceeds the interest she could collect on the judgment." *Id.*

100. Appeal also strengthens a wealthy party's ability to outlast a poorer opponent. Thomas Wälde, *Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?*, 2 *TRANSNAT'L DISP. MGMT.* 71, 74 (2005).

101. As of May 2004, the forty decisions rendered under ICSID have resulted in thirteen annulment applications, and seven cases have been subject to proceedings. See *supra* note 6. *Klockner v. Cameroon* and *Amco v. Indonesia* resulted in two annulment proceedings apiece. I did not include the second round of annulments in my calculations.

102. Caron, *supra* note 14, at 51.

103. Ilyedjian, *supra* note 22, at 816.

104. Caron, *supra* note 14, at 22.

troduction, with the exception of the United States, the capital-exporting States' primary interests in ICSID are the interests of their investors; most capital-exporting States have not yet needed to think of themselves as parties to ICSID disputes.<sup>105</sup> Therefore, the capital-exporting Contracting States will support the Facility only if their investors perceive it to be in their best interests. As long as investors continue to win the majority of the investor-State arbitrations, their primary interest will be to maintain the finality of those awards, not the ability to appeal them.

For the United States, appeal also does not appear desirable. The inclusion of appeals provisions in the Trade Act of 2002, CAFTA, and the Chile and Singapore FTAs, suggests that the United States' interests would be served by appeal of arbitral awards. However, a closer look reveals otherwise. The United States Congress debated the Trade Act of 2002 at "a time of great ferment and fear about NAFTA Chapter 11."<sup>106</sup> The *Loewen* and *Methanex* cases were both pending against the United States.<sup>107</sup> Now that the United States has built a perfect record defending itself against investors, it too has little incentive to leave ICSID awards vulnerable to appeal.

The possibility of correcting an inaccurate adverse decision should at least be theoretically attractive to both investors and the United States. Investors and the United States often have millions of dollars at risk in ICSID arbitration, and it seems they would not want to risk those sums of money on one arbitration without recourse to appeal. However, again, both investors and the United States continue to win awards with high frequency. There is evidence outside of ICSID that some corporations are growing weary of the risk of arbitrating without appeal.<sup>108</sup> However, there is no evidence of this in ICSID. The Centre's docket continues to expand and one of the few cases that investors can point to as an example of an alleged error of law in an ICSID decision is the aforementioned *SGS v. Pakistan* award.

The bottom line is that both investors and the United States tend to win most ICSID disputes that they are party to. They have no incentive to review the accuracy of awards in their favor. Equally, they have no incentive to allow their opposing party the opportunity for review. Thus, we should only expect investors and the United States to support the adoption of the Appeals Facility if they begin to suffer or anticipate suffering adverse ICSID decisions, particularly adverse decisions that they perceive to be rooted in errors of law.

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105. See *supra* note 6. Outside of NAFTA cases, capital-exporting States are rarely the respondent in ICSID arbitrations.

106. Price, *supra* note 13, at 48.

107. *Id.*

108. William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 532 (2000).

#### IV.

##### CONCLUSION

The ICSID community should not be surprised by the Contracting States' decision against appeal. The proposal of the Appeals Facility was a bold step by the ICSID Secretariat. The ICSID Convention and much of international arbitration are founded on the assumption that awards are final. Adoption of the Appeals Facility would require a significant change in ICSID. The benefit of uniformity of law will not affect this change. ICSID was created to protect the rights of foreign investors. Uniformity of law does not augment investors' ability to enforce their rights. If the Appeals Facility is to be adopted it will be because investors seek to review the accuracy of ICSID awards. The opportunity to review the accuracy of awards is a direct tool by which investors can ensure the enforcement of their rights. Nonetheless, investors do not yet need further help to ensure their rights in ICSID. ICSID continues to fulfill its intended purpose of providing an effective remedy for investors. The Appeals Facility will remain on the shelf until investors perceive ICSID arbitral tribunals to be less likely than they are now to accurately enforce their rights.