

ARTICLES

EVIDENT PARTIALITY AND THE JUDICIAL REVIEW OF INVESTOR-STATE DISPUTE SETTLEMENT AWARDS: AN ARGUMENT FOR ISDS REFORM

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ABSTRACT

International investment law, and particularly investor state dispute settlement (ISDS), is currently the subject of many heated debates. This Article examines national judicial review of international investment arbitral awards in the context of U.S. domestic law, focusing on evident partiality and the appropriate standard of deference to be applied to such awards, particularly in the case where challenges to arbitrator integrity were denied at the arbitration stage. National courts are not the ideal fora for adjudicating challenges to ISDS awards, as evidenced by differing standards of deference across jurisdictions and the lack of familiarity with international treaties and international rules of arbitration. Addressing the problem at its root, namely through amending international rules of arbitration or by creating additional levels of international review, would be more effective. The problem of arbitrator partiality in ISDS is reflective of systemic problems.

*This Article argues that the issues of interpretation arising from review of ISDS awards before domestic courts suggest that reform of the ISDS system would be a more effective means of safeguarding party interests from arbitrator conflicts of interest or corruption. This Article builds on the standard of deference established by the U.S. Supreme Court in *BG Group*, focusing on the *Argentina v. AWG Group* case that was decided by the U.S. Court of Appeals for the District of Columbia Circuit in July 2018. In reviewing the *Argentina v. AWG Group* case, the Article highlights some of the challenges in having domestic courts review ISDS awards. At the same time, the Article argues that while a high level of deference to international arbitration awards is usually desirable, the standard of review with respect to ISDS claims should be clarified by U.S. courts, as deference is not always the correct standard. Where the integrity*

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of the arbitral tribunal itself is in question, that deference should be set aside in favor of closer review. Conflicts of interest that might elsewhere be viewed as significant enough to disqualify arbitrators from participating in arbitrations are viewed as commonplace in international investment arbitration and considered an inherent part of the system. This should not be the case.

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I. INTRODUCTION

International investment law, and particularly investor state dispute settlement (ISDS), is currently the subject of many heated debates, from the fairness of bilateral investment treaties (BITs)¹ to the lack of precedent in ISDS² and the impartiality of arbitrators.³ BITs between states form the legal basis for ISDS. Although not without controversy,

1. See George Kahale III, *Rethinking ISDS*, 15 TRANSNAT'L DISP. MGMT. 5 (2018).

2. See *id.* at 15.

3. See *id.* at 7-8; see also Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 364-67 (2018).

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arbitral awards issued by international investment tribunals are recognized as enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴ As the number of investment arbitrations grow, so do the challenges to awards.⁵ This Article examines national judicial review of international investment arbitral awards in the context of U.S. domestic law, focusing on challenges to arbitrator impartiality using the “evident partiality” standard under the Federal Arbitration Act (FAA)⁶ and the appropriate standard of deference to be applied to arbitral awards, particularly where challenges to arbitrator integrity were denied at the arbitration stage.

National courts are not the ideal fora for adjudicating challenges to ISDS awards, because there are widely differing standards of deference across jurisdictions. Moreover, many judges lack familiarity with international treaties and international rules of arbitration.⁷ Domestic and international rules conceptualize arbitrator bias and partiality somewhat differently, which could lead to domestic courts misunderstanding how these principles are applied in the international investment context. Furthermore, the issue of arbitrator partiality in ISDS reflects systemic problems. The success of ISDS requires that arbitrators be perceived as impartial.⁸ Current challenges to the legitimacy of the system indicate that arbitrators are not perceived as such.⁹ Addressing the problem at its root, whether through amending international rules of arbitration or by creating additional levels of international review, would be more effective than national judicial review.

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 303 U.N.T.S. 38 [hereinafter New York Convention].

5. For data on ISDS cases, including challenges to awards, see U.N. Conference on Trade and Development (UNCTAD), INV. POLICY HUB, <https://investmentpolicyhub.unctad.org/ISDS/> (last visited Jan. 18, 2018).

6. 9 U.S.C. § 10(a)(2) (2012).

7. See, e.g., James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 55 (2004). Gaitis writes that “[t]o further complicate matters generally for parties who are aggrieved by substantive errors in the reasoning of an arbitral award, the fact that the New York Convention does not specify the controlling grounds for vacating a non-domestic award would tend to suggest that there exists a dramatic lack of uniformity in the standards national courts apply when determining whether to vacate such an award.” *Id.*

8. Nathalie Bernasconi-Osterwalder, Lise Johnson & Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel*, IV Annual Forum for Developing Country Investment Negotiators Background Papers 1, INT'L INST. FOR SUSTAINABLE DEV. (2011).

9. *Id.*; see also Kahale, *supra* note 1, at 8.

Short of repealing and replacing the ISDS system as George Kahale has argued for,¹⁰ domestic legal systems may provide an additional level of review, despite the risk that different national approaches to such legal questions may result in a diversity of approaches. This Article argues that the issues of interpretation that have arisen in reviewing ISDS awards before domestic U.S. courts suggest that reform of the ISDS system, whether through the elimination of party-appointed arbitrators or, more drastically, through the creation of a multilateral investment court with an appellate body to replace ISDS, would be a more effective means of safeguarding party interests from arbitrator conflicts of interest or corruption than relying on national court systems to review arbitral decisions.

When the Supreme Court ruled in *BG Group v. Argentina*¹¹ in 2014, the first review of an ISDS claim by the Court, it provided clarification on the standard of review to be used by U.S. courts in examining questions relating to international arbitration awards. The majority accorded deference to the arbitral tribunal in the interpretation of a local litigation requirement.¹² While deference was arguably the appropriate outcome in that case, the reasoning used to reach that outcome was flawed, as convincingly argued by both the dissent and the concurrence.¹³ The opinion was arguably motivated by pragmatism. As some commentators have noted, the faulty reasoning of the majority opens the door to potentially troubling outcomes if this opinion is considered by other jurisdictions outside the United States, particularly where the domestic legal regime is more likely to diverge from internationally recognized standards.¹⁴ Even though the case did not address evident partiality, as one of the few Supreme Court cases to address international investment law and the only one to address ISDS, the decision has significant precedential value, which makes its flawed logic particularly disconcerting.

This Article builds on the standard of deference established by the Supreme Court in *BG Group*, focusing on the *Argentina v. AWG Group* case that was decided by the U.S. Court of Appeals for the District of

10. Kahale, *supra* note 1, at 10.

11. *BG Grp. v. Argentina*, 572 U.S. 25 (2014) [hereinafter *BG Group III*].

12. *Id.* at 29.

13. *See id.* at 46-48.

14. *See, e.g.*, Konstanze von Papp, *Biting the Bullet or Redefining 'Consent' in Investor-State Arbitration? Pre-Arbitration Requirements After BG Group v. Argentina*, 16 J. WORLD INV. & TRADE 695 (2015); Fabio G. Santacroce, *Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration*, *ARB. INT'L L.* 1, 1-32 (2017).

Columbia Circuit (D.C. Circuit) in July 2018.¹⁵ During the international arbitral proceeding, constituted under United Nations Commission on International Trade Law (UNCITRAL) rules and pursuant to the U.K.-Argentina BIT, Argentina sought to disqualify one of the arbitrators, Gabrielle Kaufmann-Kohler, on the basis that she lacked impartiality.¹⁶ The challenge was rejected.¹⁷ Once the final award was issued, Argentina filed to vacate it before the U.S. District Court for the District of Columbia (District Court), under section 10(a)(2) of the FAA, which provides that awards may be vacated where “there was evident partiality or corruption in the arbitrators.”¹⁸ In 2016, the District Court rejected the request after reviewing the circumstances concerning the allegations of impropriety, with the judge according deference to the decision by Kaufmann-Kohler’s co-arbitrators, while at the same time seemingly conducting *de novo* review of the matter.¹⁹ The D.C. Circuit upheld the ruling without addressing the unique nature of ISDS as compared to ordinary commercial arbitration and leaving the question of the appropriate standard of review unanswered.²⁰

In analyzing *Argentina v. AWG Group* and other cases, this Article highlights the challenges in having domestic courts review ISDS awards. At the same time, this Article argues that while a high level of deference to international arbitration awards is usually desirable (as in the case of *BG Group*), the standard of review with respect to ISDS claims should be clarified to permit closer review where the integrity of the arbitral tribunal itself is in question.

Conflicts of interest that might elsewhere be viewed as significant enough to disqualify arbitrators from participating in arbitrations are viewed as commonplace in international investment arbitration and considered an inherent part of the system.²¹ This should not be the case. Given the current nature of the international investment arbitration community, as well as the particular criticisms it faces, external review by national courts of claims of partiality, corruption, or fraud on the part of arbitrators is appropriate to ensure that parties to arbitration are afforded fair treatment. Arbitral tribunals face little oversight, and

15. *Argentina v. AWG Grp. Ltd.*, 894 F.3d 327 (D.C. Cir. 2018) [hereinafter AWG II].

16. *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 9 (May 12, 2008).

17. *Id.* at Conclusion, ¶ 1.

18. 9 U.S.C. § 10(a)(2).

19. *Argentina v. AWG Grp. Ltd.*, 211 F. Supp. 3d 335 (D.D.C. 2016) [hereinafter AWG I].

20. AWG II, 894 F.3d at 339.

21. Kahale, *supra* note 1, at 10.

may themselves be tasked with determining their own integrity.²² Even where tribunals have an appointing authority that is available to address challenges to arbitrator impartiality, this is insufficient to properly address questions regarding the legitimacy and impartiality of these tribunals.²³ Empirical studies demonstrate that challenges to arbitrators almost never succeed, whether those challenges are reviewed by third parties or by the arbitrators themselves.²⁴

Section II of this Article lays out some of the major concerns in international investment law relating to the independence and impartiality of arbitrators and their awards, highlighting systemic issues and demonstrating why determination of the appropriate standard of review is so important. Section III sets out domestic law standards for vacating arbitral awards, providing an overview of U.S. case law. Section IV briefly discusses the *BG Group* case and the rationale used by the Supreme Court in that case for applying a high standard of deference to questions of arbitrability. It then turns to the *AWG Group* case, focusing on the inconsistencies within the District Court ruling and the most recent D.C. Circuit decision, and contending that the District Court was incorrect in applying the same standard of deference as that applied in *BG Group*. Finally, Section V proposes an alternative standard of deference, arguing that questions involving claims of arbitrator partiality arising out of ISDS arbitration should be subject to *de novo* review by domestic courts, as this approach will ensure greater consistency and provide some oversight of the arbitral process without infringing on the jurisdiction of the tribunals. The section also provides an argument for reform of ISDS, drawing on the inadequacies of the domestic legal system in addressing claims for review of ISDS arbitral awards.

22. Under ICSID rules, in the event of a proposal by a party to disqualify an arbitrator, the other arbitrators will rule on the challenge. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 58, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

23. UNCITRAL Arbitration Rules, for instance, provide a process for designating and appointing authorities. UNCITRAL Arbitration Rules (as revised in 2013), G.A. Res. 68/109, art. 6 (Dec. 16, 2013).

24. *See, e.g.*, MARIA NICOLE CLEIS, THE INDEPENDENCE AND IMPARTIALITY OF ICSID ARBITRATORS: CURRENT CASE LAW, ALTERNATIVE APPROACHES, AND IMPROVEMENT SUGGESTIONS 51–53 (2017). In discussing ICSID requests for arbitrator disqualification, Cleis notes the inconsistency in the threshold for disqualification applied, stating that “[t]he focus of challenge decisions on this threshold, despite its apparent irrelevance for the outcome of disqualification proposals, may therefore give the impression that there are other, undisclosed reasons for the predominant dismissal of arbitrator challenges.” *Id.*

II. CRITICISMS OF INTERNATIONAL INVESTMENT LAW AND WHY THE STANDARD OF REVIEW IS SO IMPORTANT

International investment law and ISDS face criticism from both isolationists concerned with sovereign rights and internationalists concerned with the transparency and accountability failures in the dispute settlement process.²⁵ To some, the ISDS system is

a network of secret or “shadow” courts dominated by a clique of elite arbitrators motivated not by justice but by personal wealth acquisition, a system where multinational corporations unleash blue chip law firms on some of the poorest countries in the world, forcing multimillion dollar settlements or winning awards that are even larger, sometimes more than an impoverished nation’s entire annual budget for health, education, and public security.²⁶

It is within this critical framework that this Article approaches the issues of arbitrator impartiality.

In response to domestic frustrations with ISDS, some states are withdrawing from BITs and renegotiating them without ISDS clauses.²⁷ Other states have sought to modify ISDS provisions or expand exceptions provisions to allow them more regulatory autonomy.²⁸ For those countries still navigating the challenges of traditional ISDS, determining the appropriate standard of deference for national judicial review of arbitral awards is necessary to balance national and international concerns. The future of ISDS depends on how it is perceived by states, private companies, domestic courts, and concerned citizens.

25. See, e.g., Kahale, *supra* note 1 (providing an internationalist critique); *Brady-Lighthizer ISDS Exchange*, INT’L ECON. LAW & POLICY BLOG (Mar. 22, 2018), <http://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html> (U.S. Trade Representative Robert Lighthizer commenting on concerns relating to sovereign rights before the House Ways and Means Committee).

26. Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework* 1, (IILJ, Working Paper 2017/1, MegaReg Series).

27. Countries that have announced their withdrawal from existing BITs include South Africa, Ecuador, Indonesia and India. See Kate Cervantes-Knox & Elinor Thomas, *Ecuador terminates 12 BITs – a growing trend of reconsideration of traditional investment treaties?*, DLA PIPER (May 15, 2017), <https://www.dlapiper.com/en/us/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/>.

28. India, for instance, has included a robust exceptions provision in its 2015 model BIT that in many ways mirrors Article XX of the GATT. See India Model BIT, art. 32.1.

This section lays out some of the salient issues with ISDS, providing necessary background for the subsequent discussion regarding challenges to arbitrator impartiality. This is not meant to be a complete overview of the many problems facing international investment law, but rather to focus on the profound systemic issues arising from the limited oversight provided by international investment arbitration rules over arbitrators, their conduct, and their decisions.

A. *Lack of Accountability for Arbitrators*

While arbitrators in domestic commercial arbitration and in international arbitration share certain common features, ISDS arbitrators perform quasi-judicial functions in a way that domestic commercial arbitrators do not. Unlike in commercial arbitration, where both parties are private actors, the parties to ISDS are private investors, on the one hand, and host states on the other hand—countries that have given up a degree of sovereign immunity to subject themselves to arbitration.²⁹ As Chief Justice Roberts opined in his dissent to *BG Group*, “[i]t is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly.”³⁰ Significantly, in ISDS, the host states are always the respondents and are thus always the targets of claims against them by private parties.³¹ The system does not allow host states to bring complaints against investors.³² This one-sided nature makes ISDS fundamentally different from commercial arbitration. The lack of accountability for international arbitrators is, therefore, of particular concern.

Arbitrators have been accused of acting as arbitrator, legal counsel, expert witness, and tribunal secretary, whether sequentially or even concurrently, a practice known as double-hatting.³³ A recent empirical study by Malcolm Langford, Daniel Behn, and Runar Hilleren Lie focusing on the so-called “revolving door” in international investment arbitration indicates that certain prominent individuals in the community do in fact play multiple roles in the process.³⁴ The study further demonstrates that the practice of double-hatting has not significantly

29. Kahale, *supra* note 1, at 7.

30. *BG Group III*, 572 U.S. 25, 57 (2014) (Roberts, J., dissenting).

31. Kahale, *supra* note 1, at 5.

32. *Id.*

33. Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 301 (2017); *see also* Bernasconi-Osterwalder et al., *supra* note 8.

34. Langford et al., *supra* note 33, at 26.

decreased over time, although it is not widespread and is limited to a small number of influential actors.³⁵ This practice undermines the neutrality of the arbitration process and gives rise to questions regarding the impartiality of arbitrators.

Double-hatting is the most egregious version of the revolving door practice, since questions of impartiality become much graver when the same individuals cycle through various roles. A very small number of individuals have outsized influence and take on many roles in ISDS.³⁶ Amongst the most prominent individuals in international investment arbitrations are Gabrielle Kaufmann-Kohler, L. Yves Fortier, and Brigitte Stern.³⁷ While they are not among the most frequent double haters, they are part of the revolving door practice as the key power brokers in international investment law, acting in different roles at different times.³⁸ With such a small community of arbitrators, it is particularly troubling where arbitration rules provide for other members of the same arbitral tribunal to review conflict of interest and lack of impartiality claims, as in the case of the International Centre for the Settlement of Investment Disputes (ICSID) Convention.³⁹ It is likely that any given trio of arbitrators will have previously encountered each other, and may in fact have worked together in varying capacities in previous disputes. This gives rise, as Phillipe Sands has stated, “to situations in which you might find yourself deliberating with your fellow arbitrators in the knowledge that one or more of them is actually litigating the very point that you are seeking to write an award on. That is unacceptable.”⁴⁰ While these types of relationships may exist in most arbitrations, the fundamental difference between ISDS and commercial arbitration, wherein states have agreed to subject themselves to the judgment of an arbitral tribunal, thus giving up some of their sovereign immunity, means that concerns regarding impartiality in ISDS should be viewed even more seriously than in commercial arbitration.

Other claims of arbitrator misconduct beyond those strictly relating to impartiality have included the purported ghost-writing of the award in the Yukos arbitration by the assistant to Yves Fortier, a practice that is

35. *Id.*

36. *Id.* at 1, 10; see also Stephan W. Schill, *Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649, 655 (2017).

37. Langford et al., *supra* note 33, at 20 tbl.6.

38. *Id.* at 19.

39. ICSID Convention, *supra* note 22, art. 58.

40. Phillipe Sands, Dir., Ctr. on Int'l Courts and Tribunals, Univ. Coll. London, *Developments in Geopolitics – The End(s) of Judicialization?*, Closing Speech at the 2015 ESIL Conference (Sept. 12, 2015).

generally held to be impermissible in the context of arbitration.⁴¹ This is separate from, but not entirely unrelated to, arbitrator impartiality challenges. Arbitrator misconduct in a small community that often interacts with each other on multiple levels occasions additional concerns regarding arbitrator impartiality. In the *Victor Pey Casado and the Allende Foundation* case, Casado's request for disqualification of two of the arbitrators because of their law chambers' connection to the Chilean government was denied, on the justification that chambers are unlike law firms and instead made up of self-employed barristers.⁴² The court found that, in any case, Casado should have known that the chambers were representing Chile and that, as such, the challenge was not filed in a timely fashion.⁴³ These are just two examples of types of challenges that arise in ISDS.

The appointment process for arbitrators, whether under ICSID or UNCITRAL rules, fails to prevent the cliquishness that ISDS is known for. Arbitrators overwhelmingly come from the Global North, from a small number of countries, and form a tight-knit community with close ties amongst each other.⁴⁴ Arbitrators are well remunerated, with arbitrators in ICSID proceedings earning on average \$200,000 per case.⁴⁵ Unlike in ICSID proceedings where arbitrators have a \$3,000 per day cap on their fees, UNCITRAL does not contain similar limitations; but it appears clear that arbitrators in UNCITRAL arbitrations are similarly well compensated.⁴⁶ The mere fact that, within the ISDS community, the practice of arbitrators acting as both judges and counsel in different

41. See Dmytro Galagan, *The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandate?*, KLUWER ARB. BLOG (Feb. 27, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/>; Robert Howse, *The Fourth Man: An Intriguing Sub-Plot in the Yukos Arbitration*, INT'L ECON. L. & POL'Y BLOG (Mar. 29, 2017), <https://worldtradelaw.typepad.com/ielpblog/2017/03/the-fourth-man-an-intriguing-sub-plot-in-the-yukos-arbitration-.html>.

42. *Victor Pey Casado & Foundation "Presidente Allende" v. The Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC, ¶ 93 (Feb. 21, 2017); see also Robert Howse, *What ICSID Does When a Human Rights Victim Tries to Get Justice There: Victor Pey Casado and the Allende Foundation v Chile*, INT'L ECON. L. AND POL'Y BLOG (March 24, 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/03/what-icsid-does-when-a-human-rights-victim-tries-to-get-justice-there-victor-pey-casado-and-the-alle.html>.

43. *Victor Pey Casado and Foundation "Presidente Allende" v. The Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Proposal to Disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC, ¶¶ 93-94 (Feb. 21, 2017); see also Howse, *supra* note 42.

44. Langford et al., *supra* note 33, at 2.

45. Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 398 (2014).

46. David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement* 28 (OECD Working Paper on Int'l Inv. No. 05, 2017).

ISDS disputes is not viewed as giving rise to conflicts of interest does not mean that the practice should be normalized. As Robert Howse has argued, there is a need for tribunals to have “legitimacy equal to or greater than a court deciding administrative law type disputes that concern the treatment by the state of private actors.”⁴⁷ Instead, “the pool of adjudicators is a small, self-referential, mutual backscratching clique, more often moved by the prospect of substantial material gains from the justice process than duty or public service.”⁴⁸ Faced with this lack of transparency and impartiality, and particularly the potential for the appearance of impropriety and impartiality that arises from having such a small community of arbitrators, challenges based on alleged arbitrator partiality become increasingly significant.

B. *Lack of Appellate Mechanism*

With apparent issues concerning the impartiality of arbitrators entrenched in the existing ISDS system, the lack of an appellate mechanism in international investment is particularly troubling. While the EU has proposed a multilateral investment court, which has received a lot of interest from both academics and practitioners, there is considerable skepticism regarding such a model from parties concerned with national sovereignty.⁴⁹ It is hard to imagine the United States, for instance, acceding to compulsory jurisdiction by a multilateral court. And for countries already concerned with the infringement by the ISDS system on their sovereignty, it is unlikely that a multilateral court will alleviate those concerns. The proposed system would consist of a permanent international institution whose judges would be permanent members of the institution, appointed by member states but subject to stringent criteria concerning ethics and impartiality.⁵⁰ One particular criticism has been that this proposal does not address the problems arising from the substantive treaty provisions themselves, which some have argued are what really require reform, as they lie at the core of the

47. Howse, *supra* note 26, at 63.

48. *Id.* at 64.

49. For overviews of the critiques of ISDS and the proposals for reform, including the EU multilateral investment courts, see, for example, Stephan W. Schill, *Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649 (2017); Puig & Shaffer, *supra* note 3, at 361; Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018).

50. *Commission Recommendation for a Decision of the Council to Authorise the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes 2*, COM (2017) 493 final (Sept. 9, 2017).

unfairness and illegitimacy of the international investment system and restrict the regulatory space of national governments.⁵¹

Nevertheless, the judicialization of ISDS contemplated by the EU and incorporated into its new agreements with trading partners, including Canada and Vietnam, provides a radical new way of conceptualizing life after ad hoc ISDS and is a remarkable step towards multilateralization of a fragmented process.⁵² Whatever its ultimate success, as Howse has noted, the rejection of ISDS by the EU “has conferred unprecedented political legitimacy on the critics of the existing system of ISDS.”⁵³

In the absence of an appellate mechanism, issues arising from inconsistencies in both substantive and procedural decisions by arbitral tribunals are difficult to reconcile, given the limited avenues available to challenge such findings.⁵⁴ These inconsistencies cannot be appealed to domestic courts, which correctly extend a high standard of deference to the substantive holdings of arbitral tribunals.⁵⁵ While international arbitration may not be identical to domestic commercial arbitration, at a minimum, the same standard of deference should apply to international arbitral awards as to domestic ones. Given that ISDS involves states surrendering a degree of their sovereign immunity, an even higher standard of deference should arguably be extended to international arbitral awards, particularly in relation to substantive findings. A low standard of deference vis-à-vis substantive findings might otherwise open the door to intrusive reviews by other countries’ judiciaries of the host state’s sovereign regulatory choices. With procedural appeals, however, the standard of deference may be lower, depending on the nature of the procedural challenge. Particularly where the challenge is to issues relating to the constitution of the tribunal, a lower standard of deference on the part of domestic courts may be necessary to ensure

51. CTR. FOR INT’L ENVTL LAW, *Position Paper on the EU Proposal for a Multilateral Reform of Investment Dispute Resolution* 2-3 (Mar. 15, 2017), https://www.ciel.org/wp-content/uploads/2017/06/CIEL_Position_Paper_on_the_EU_proposal_for_MIC_march_15.pdf.

52. Howse, *supra* note 26, at 4.

53. *Id.* at 3.

54. For the classic example of inconsistencies between arbitral tribunal findings on nearly identical facts, compare *CME Czech Republic B.V. (Neth.) v. Czech*, Case No. 403/VERMERK/2001/CME, Partial Award 0709/spe (UNCITRAL Sept. 13, 2001), <https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf>, with *Lauder v. Czech*, Final Award (UNCITRAL Sept. 3, 2001), <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>, where two tribunals addressing the same facts came to opposite conclusions.

55. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) (citing *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002)).

that there is an appropriate avenue for review. Absent an application of a lower standard of deference, there may be instances where there is effectively no adequate review of challenges to the formation of tribunals.

Without a substantive review mechanism, such as the World Trade Organization's Appellate Body, there is a heightened possibility of confusion regarding how similar provisions across BITs should be interpreted.⁵⁶ Such confusion undermines the effectiveness of the international arbitral system and, taken together with accountability deficits for arbitrators, drives movement away from ISDS and towards exhaustion of domestic remedies.⁵⁷ For substantive findings by arbitral tribunals, an appellate mechanism would provide a better review mechanism than *de novo* review by domestic courts at the seat of arbitration, which would be wholly inappropriate. The use of precedent in investment arbitration is a controversial topic,⁵⁸ but parties' desire to keep BITs open to changing interpretation, thus leaving them malleable, is overridden by the problematic lack of uniformity in interpretation of similar provisions across BITs or even within the same BIT.⁵⁹ If investment law is to be law and not purely arbitration, consistency in interpretation across BITs is necessary.

It is not the place of this Article, however, to argue for an appellate mechanism, which has been ably discussed by other scholars and practitioners in recent pieces.⁶⁰ In light of the current system and existing flaws, this Article simply proposes that to the extent that domestic courts must review ISDS awards, an appropriate *de novo* standard of review would provide a limited avenue for reviewing certain narrow classes of challenges to arbitral awards, operating within the existing system. This suggestion is not meant to serve as a viable alternative to a proper avenue for appeals. An appellate level of review, operating

56. Commission Concept Paper on "Investment in TTIP and Beyond – The Path for Reform" 8 (May 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

57. Kahale, *supra* note 1, at 16.

58. See Patrick M. Norton, *The Role of Precedent in the Development of International Investment Law*, 33 ICSID REV. 280 (2018), for an overview of how precedent has been viewed both theoretically and in practice in the context of international investment law.

59. See Kahale, *supra* note 1, at 16 (discussing the conflicting judgments in the *CME* and *Lauder* cases as well as in the *Mobil v. Venezuela* and *ConocoPhillips v. Venezuela* cases).

60. See, e.g., Howse, *supra* note 26; Roberts, *supra* note 49, at 421 (arguing that the appellate body proposal will not succeed until it grows beyond the EU, otherwise there is risk of an even more fragmented system); Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID REV. 673 (2017); Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, 32 ICSID REV. 503 (2017).

within the framework of public international law, would provide far greater predictability and legitimacy to the international investment law framework. In contrast, domestic judicial review is constrained by a legal system better suited to domestic commercial arbitration than to reviewing challenges based on the unusual structure of BITs and the adjudication of disputes arising from such treaties.

C. Disqualification of Arbitrators: A Nearly Impossible Challenge

The ICSID Convention allows parties to propose the disqualification of any arbitrator “on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”⁶¹ Article 14(1) is broad in its scope, establishing that arbitrators “shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”⁶² While impartiality is not directly mentioned in the English text of the ICSID Convention, it is mentioned in the equally authentic Spanish version.⁶³ Article 57 allows a party to propose disqualification of any arbitrator “on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”⁶⁴

Under the ICSID Convention, the decision concerning a proposal by a party to disqualify an arbitrator will normally be taken by the other members of the arbitral tribunal. If the members are divided in their opinion, however, the Chairman of ICSID’s Administrative Council will make the decision.⁶⁵ The ICSID Arbitration Rules provide further clarification, requiring that, prior to the commencement of the proceedings, arbitrators sign statements attesting that to their knowledge there is no reason why they should not serve on the tribunal.⁶⁶ If a party requests the disqualification of an arbitrator, the other arbitrators on the tribunal “shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.”⁶⁷ The ICSID Convention standard for arbitrator qualification hinges on the moral character of the arbitrators.⁶⁸ Concerns arising from perceived conflicts of interest would clearly implicate the arbitrators’ moral character.

61. ICSID Convention, *supra* note 22, art. 57.

62. *Id.*, art. 14(1).

63. CLEIS, *supra* note 24, at 12.

64. ICSID Convention, *supra* note 22, art. 57.

65. *Id.* art. 58.

66. ICSID Arbitration Rules, Rule 6(2).

67. *Id.* Rule 9(4).

68. ICSID Convention, *supra* note 22, art. 14(1).

As under the ICSID Convention, arbitrators approached for appointment under UNCITRAL Arbitration Rules must disclose any conflict of interest before the constitution of the tribunal.⁶⁹ UNCITRAL Arbitration Rules are more specific on the grounds for disqualification, however, providing that “[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”⁷⁰ The process for disqualification requires the party to notify the arbitrators regarding the challenge and specify the grounds for the request for disqualification.⁷¹ The decision whether to disqualify the arbitrator will be made by the appointing authority.⁷² Since UNCITRAL does not provide institutional support, parties going to arbitration must either designate an appointing authority charged with administering the arbitration or proceed in an ad hoc fashion where arbitrators administer the arbitration.⁷³ By requiring that an appointing authority review claims of arbitrator partiality, UNCITRAL rules arguably provide for greater oversight of the arbitral tribunal, although, as we will see in our discussion of the *AWG* case, that may not always be the case.

Empirical studies of arbitrator challenges suggest that such challenges almost never succeed.⁷⁴ There are several factors that contribute to the difficulty of successfully challenging arbitrators. In relation to challenges under the ICSID Convention, it has been argued that the language of Article 57, in requiring a manifest lack of the qualities found in Article 14(1), which speaks to the high moral character of the arbitrators, requires a higher threshold than comparable provisions under other arbitration rules.⁷⁵ Further, and most evidently, since disqualification challenges are reviewed by co-arbitrators, the potential that these arbitrators will be sympathetic to their colleagues, especially given the close-knit nature of the arbitrator community, is significant.⁷⁶ Challenges to arbitrators under UNCITRAL rules have fared slightly

69. UNCITRAL Arbitration Rules, *supra* note 23, art. 11.

70. *Id.* art. 12.

71. *Id.* art. 13.

72. *Id.* art. 13, 6.

73. *Id.* art. 6, 6(1) (providing that parties may propose an appointing authority at any time during the proceeding. The UNCITRAL Arbitration Rules do not provide for any permanent body to administer arbitrations under those rules, unlike the ICSID Convention).

74. CLEIS, *supra* note 24, at 84.

75. *Id.* at 85.

76. *Id.*

better, but the same systemic issues relating to the close-knit community of arbitrators apply.⁷⁷

With both ICSID and UNCITRAL challenges, the predominant factor underlying the frequency with which arbitrator challenges are dismissed is the perception that the factual bases for these challenges “are perceived to be commonplace, inherent in the system, and inevitable in arbitration.”⁷⁸ Where the community of arbitrators is so small, conflicts of interest abound and become part of the system, such that the connections that arbitrators have with parties to disputes, with their legal counsel, or with the subject matter of the dispute are viewed as not giving rise to concern except in exceptional cases.⁷⁹

While some arbitrators have faced spurious disqualification challenges—sometimes repeatedly by the same country⁸⁰—the facile argument that all of these challenges must be unfounded, thus explaining their lack of success, has to be rejected. To draw a crude analogy, almost none of the legal challenges to shootings of unarmed African-American men by police across the United States have succeeded.⁸¹ This does not mean that the victims were deserving of this treatment, nor does it mean that the police officers in question were innocent; rather, it reflects the systemic injustice in the U.S. legal system that protects police officers in cases of shootings of unarmed African-American men. Similarly (although with much less severe repercussions), the inherent flaws in ISDS create systemic injustice that contributes to parties’ inability to succeed in their challenges to arbitrator impartiality. To the extent this is a question of perception of bias rather than actual bias, addressing this perception through reformation of ISDS rules in a way that prioritizes avoiding conflicts of interest would go a long way towards resolving these systemic critiques of the ISDS system.

77. Baiju Vasani & Shaun Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, ICSID REV. 2 (2014) (noting that a significantly larger proportion of challenges—30-40 percent—have been successful under UNCITRAL rules).

78. CLEIS, *supra* note 24, at 86.

79. *Id.*

80. *See* EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Applicable Standard, ¶ 13 (June 25, 2008) (Argentina challenging the impartiality of Gabrielle Kaufmann-Kohler on the same basis as in the AWG case at issue in this article—her position on the Board of Directors of UBS).

81. Madison Park, *Police Shootings: Trials, convictions are rare for police officers*, CNN (Oct. 3, 2018), <https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html>.

III. AVENUES FOR VACATING ARBITRAL AWARDS

A. *ICSID v. UNCITRAL—Annulment vs. Vacatur*

Differences in the arbitral proceedings under the ICSID Convention and the UNCITRAL rules shape both the recourse that parties have to domestic courts as well as the type of review available to challenges regarding arbitrator behavior. The ICSID Convention forecloses recourse to domestic courts, with mechanisms in place to address requests for annulment of awards.⁸² In contrast, arbitrations that take place under UNCITRAL rules may result in national legal systems interpreting matters decided by the arbitral tribunals, with varying degrees of deference.⁸³

ICSID awards may be annulled under limited circumstances as per procedures set out in the ICSID Convention.⁸⁴ As discussed above, Article 14(1) provides the requirement that the arbitrators be able to exercise independent judgment, while Article 57 allows a party to propose disqualification of any arbitration that lacks the qualities required by Article 14(1).⁸⁵ Additionally, Article 52 of the ICSID Convention provides for annulment proceedings on the basis of, amongst others, situations where the tribunal “manifestly exceeded its powers” and where “there was corruption on the part of a member of the Tribunal.”⁸⁶ Application for annulment shall be made within 120 days after the date of the award, except in the case of corruption, where it shall be made within 120 days of the discovery of the corruption and, in any event, within three years of the award.⁸⁷ Determination of whether the award should be annulled will be made by an ad hoc committee of three members of the Panel of Arbitrators, appointed by the Chairman of ICSID.⁸⁸ While these members cannot have been arbitrators on the original tribunal, nor can they be nationals of either party,⁸⁹ the impartiality of members of the close-knit ICSID arbitrator community in evaluating such claims is questionable. Given that the initial review of arbitrator impartiality is conducted by the other panelists on the arbitral tribunal,

82. ICSID Convention, *supra* note 22, arts. 52, 53.

83. Since the UNCITRAL Arbitration Rules can be used in any forum, unlike ICSID, which has organizational support, nothing in the rules specifies anything about annulment of the award, leaving that to national courts to decide.

84. ICSID Convention, *supra* note 22, art. 52(1).

85. *See supra*, notes 61-64 and accompanying text.

86. *Id.* art. 52(1)(b)-(c).

87. *Id.* art. 52(2).

88. *Id.* art. 52(3).

89. *Id.* art. 52(3).

the later annulment review by members of the broader Panel of Arbitrators fails to inspire much confidence. Particularly where arbitrator disqualification is decided by the other arbitrators on a tribunal, a completely impartial, third-party final review is necessary to ensure fairness in the evaluation of arbitrator impartiality in a given case.

The ICSID Convention specifically limits the ability of parties to appeal to domestic courts, with Article 53 stating that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”⁹⁰ Consequently, once the annulment proceeding under Article 52 is exhausted, there can be no further review in the event of questions concerning arbitrator impartiality.

In contrast, UNCITRAL rules do not provide for any annulment mechanism, because, as previously mentioned, UNCITRAL does not provide institutional support.⁹¹ The decision to vacate arbitral awards issued under UNCITRAL rules lies with the domestic court in the place of arbitration.⁹² In both the *BG Group* and the *AWG* cases, arbitration occurred under UNCITRAL rules in Washington, D.C., hence the awards were challenged before the District Court.⁹³

B. *New York Convention and the Federal Sovereign Immunities Act*

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an international treaty that forms the basis for the international recognition and enforcement by domestic courts of arbitral awards concluded in other states.⁹⁴ With 158 state parties, the New York Convention provides nearly universal support for the enforcement of such awards.⁹⁵ For ISDS proceedings occurring outside of the ICSID Convention, the New York Convention is particularly key in ensuring that parties can obtain the damages awarded.

While the New York Convention requires domestic courts to enforce foreign arbitral awards, there are circumstances where it is appropriate to refuse recognition of the award, including where “[t]he recognition

90. *Id.* art. 53.

91. UNCITRAL Arbitration Rules, *supra* note 23, art. 6.

92. James Rogers, Harriet Jones-Fenleigh & Adam Sanitt, *Arbitrating Smart Contract Disputes: Negotiation and Drafting Considerations*, 9 INT’L ARB. REP., NORTON ROSE FULBRIGHT 21 (Oct. 2017).

93. *Argentina v. BG Grp.*, 715 F. Supp. 2d 108 (D.D.C. 2010) [hereinafter *BG Group I*]; *AWG I*, 211 F. Supp. 3d 335 (D.D.C. 2016).

94. New York Convention, *supra* note 4, art. I.

95. *Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 19, 2019).

or enforcement of the award would be contrary to the public policy of that country.”⁹⁶ This provision opens the possibility for vacating arbitral awards that violate domestic law standards regarding how the arbitration should be conducted, including the evident partiality standard.⁹⁷

Where one of the parties to an arbitral award is a state, the Federal Sovereign Immunities Act (FSIA) comes into play.⁹⁸ The FSIA limits the ability for claims to be brought against foreign states in domestic U.S. courts.⁹⁹ This limitation has certain exceptions, however, including an expropriation exception.¹⁰⁰ Most importantly, the FSIA establishes that sovereign immunity shall not apply where the foreign state “has waived its immunity either explicitly or by implication.”¹⁰¹ As the recent Supreme Court case *Venezuela v. Helmerich & Payne International Drilling Co.* reinforced, overcoming the presumptive immunity accorded to foreign states under the FSIA will be difficult, even in a situation where the expropriation exception might apply.¹⁰² The situation of ISDS is different. In the case of BITs, the host states have, in those treaties, waived their immunity in agreeing to have disputes with investors resolved through arbitration.¹⁰³ Therefore, requests to vacate arbitral awards under BITs are far more likely to overcome the barriers to bringing claims against foreign states posed by the FSIA.

96. New York Convention, *supra* note 4, art. V(2)(b).

97. See Gustavo J. Lamelas, “Evident Partiality” as a Challenge to Arbitral Award, 30 INT’L LITIG. 10 (2013); J. Stewart McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 NW. J. INT’L L. & BUS. 58, 65 (1982).

98. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (2000).

99. 28 U.S.C. § 1604.

100. 28 U.S.C. § 1605(a)(3). The exception provides that sovereign immunity will not apply to foreign states in cases “in which rights in property taken in violation of international law are in issue” and where there is a connection with commercial activity in the United States.

101. 28 U.S.C. § 1605(a)(1).

102. See *Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1314 (2017). The case involved an action against the Venezuelan government brought by an American parent company and its Venezuelan subsidiary under the expropriation exception of the FSIA. Although the Supreme Court found that the argument by Helmerich & Payne International Drilling Co. was not frivolous, it was insufficient to confer jurisdiction under the FSIA. The Court held that the non-frivolous argument standard was not consistent with the FSIA, with the expropriation exception requiring that the property in question in fact be “property taken in violation of international law” as per the exception.

103. Kahale, *supra* note 1, at 7.

C. *Domestic Law Standard for Vacating Arbitral Awards—Evident Partiality*

It has long been established in U.S. jurisprudence that a very narrow standard of review applies with respect to arbitral awards.¹⁰⁴ In the 2005 *Nationwide Mutual Insurance Co. v. Home Insurance Co.* case, for instance, the Sixth Circuit reiterated the standard applicable to review of arbitration awards: where courts are called upon to review the decision of an arbitrator, “the review is very narrow; one of the narrowest standards of judicial review in all of American jurisprudence.”¹⁰⁵ Note, however, that this speaks to substantive findings by arbitrators, and not to challenges to arbitrator partiality.

The FAA limits the grounds to vacate awards to four situations: where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitrators were guilty of misconduct for refusing to postpone the hearing or refusing to hear evidence or any other type of conduct that might prejudice the rights of the parties; and where the arbitrators exceed their power or execute them so imperfectly that there was no mutual, final, and definite award made on the subject matter.¹⁰⁶ Awards can be further modified or corrected in situations where there was an evident material mistake in descriptions of people, things, or property or an evident material miscalculation of figures; where arbitrators have awarded on a matter not submitted to them unless it does not affect the merits of the decision; and where the award is imperfect in matter of form not affecting the merits.¹⁰⁷

The Supreme Court in *Hall Street Associates* clarified that the statutory grounds for vacatur and modification found in the FAA are exclusive and cannot be supplemented by contract.¹⁰⁸ In other words, Sections 10 and 11 of the FAA “provide the FAA’s exclusive grounds for expedited vacatur and modification.”¹⁰⁹ This failed to lay to rest a debate arising out of *dicta* from the Supreme Court in *Wilko v. Swan* as to whether “manifest disregard” of the law could give rise to a separate

104. See, e.g., *Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001); *Kannuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991).

105. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002)).

106. 9 U.S.C. § 10(a).

107. 9 U.S.C. § 11.

108. *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

109. *Id.*

grounds for vacatur.¹¹⁰ Although most circuits have taken the view that *Hall Street Associates* forecloses recourse to the manifest disregard of the law justification, the Second Circuit notably maintains that there is ambiguity in the interpretation.¹¹¹

The FAA provides, in Section 10(2), that “where there was evident partiality or corruption in the arbitrators, or either of them” the U.S. court wherein the award was made “may make an order vacating the award upon the application of any party to the arbitration.”¹¹² The standard for evident partiality remains somewhat unclear, with different circuits using different standards.¹¹³ The basic scope of evident partiality was set out by the Supreme Court in the seminal evident partiality case, *Commonwealth Coatings v. Continental Casualty*, a 1968 domestic commercial arbitration case.¹¹⁴ The Supreme Court held that arbitrators must “disclose to the parties any dealings that might create an impression of possible bias.”¹¹⁵ While this rule does not require the same standard of impartiality to apply as would apply to judges in a normal court proceedings, *Commonwealth Coatings* established that arbitrators, at least in the context of domestic arbitration, must be transparent with regards to their business dealings.

The Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted a standard for finding evident partiality that merely requires a “reasonable impression” of bias.¹¹⁶ A stricter standard has been adopted by the First, Second, Third, Fourth, Sixth, and Seventh Circuits, wherein a “reasonable person would have to conclude” there was bias.¹¹⁷ The D.C. Circuit has not articulated a clear standard, but has leaned towards the stricter standard in its rulings.¹¹⁸ In determining whether vacating an arbitration award is merited, in these circuits, the burden on the

110. *Id.* (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)); see also Gaitis, *supra* note 7, at 41-47 (discussing the manifest disregard doctrine).

111. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010).

112. 9 U.S.C. §10(a)(2).

113. Gary Born, *The Different Meanings of an Arbitrator’s “Evident Partiality” Under U.S. Law*, KLUWER ARB. BLOG (Mar. 20, 2013), <http://arbitrationblog.kluwerarbitration.com/2013/03/20/the-different-meanings-of-an-arbitrators-evident-partiality-under-u-s-law/>.

114. *Commonwealth Coatings Corp. v. Cont’l Casualty Co.*, 393 U.S. 145 (1968).

115. *Id.* at 149.

116. Born, *supra* note 113; see also Timothy W. Stalker et al., *Vacating Arbitration Awards Due to “Evident Partiality” Under the Federal Arbitration Act*, 83 DEF. COUNSEL J. 207, 208-09 (2016); Christopher D. Kratovil & Anne M. Johnson, *Evident Partiality*, THE ADVOCATE 52 (2013).

117. Born, *supra* note 113; *Certain Underwriting Members of Lloyds of London v. Florida, Dep’t of Fin. Servs.*, 892 F.3d 501, 507 (2d Cir. 2018).

118. Born, *supra* note 113; *AWG II*, 894 F.3d 327, 334 (D.C. Cir. 2018) (adopting the standard articulated by Justice White in his concurrence in *Commonwealth Coatings Corp.* that goes beyond

claimant “is heavy and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator.”¹¹⁹ The partiality “must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative.”¹²⁰ Under this standard, the mere appearance of bias is not sufficient; the claimant has to establish “specific facts indicating actual bias.”¹²¹ The appropriate test is an objective one, focusing on whether a reasonable person would have concluded that the arbitrator was partial to a particular party to the arbitration.¹²²

While evident partiality in the context of ISDS arbitral awards has only been addressed by U.S. courts once, in the *Argentina v. AWG Group* case, other courts have applied the standard to international as well as to domestic commercial arbitration.¹²³

The D.C. Circuit in *Belize Bank Ltd. v. Government of Belize* addressed a challenge by the government of Belize to the enforcement of an arbitration award issued by the London Court of International Arbitration (LCIA).¹²⁴ In the LCIA arbitration, Belize’s challenge to the impartiality of one of the arbitrators was dismissed by a three-member division created by the LCIA to review the challenge.¹²⁵ Belize argued that due to LCIA’s failure to disqualify the arbitrator, the enforcement of the award would be contrary to public policy of the United States, as per Article V(2)(b) of the New York Convention.¹²⁶ The Court disagreed, finding that even if the conduct satisfied the standard of FAA section 10(a)(2) on evident partiality, it would not be able to deny enforcement, because the alleged conduct did not rise to the level of a situation where enforcement would be contrary to the public policy of the United States.¹²⁷ Vacating arbitral awards requires a high burden of

the “reasonable impression” of bias to require disclosure only where the arbitrator “has a substantial interest in a firm which has done more than trivial business with a party.”)

119. *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993).

120. *Id.*

121. *Lagstein v. Certain Underwriters at Lloyd’s London*, 607 F.3d 634, 645-46 (9th Cir. 2010).

122. *AWG I*, 211 F. Supp. 3d 335, 351 (D.D.C. 2016) (citing *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)); *Ometto v. ASA Bioenergy Holding A.G.*, No. 12 Civ. 1328(JSR), 2013 WL 174259, at *3 (S.D.N.Y. Jan. 9, 2013).

123. The discussion of evident partiality in the *BG Group* case was limited to the District Court ruling, which found that Argentina failed to demonstrate evident partiality on the part of one of the arbitrators, Albert Jan van den Berg. The District Court briefly addressed the issue, citing *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C. Cir. 1996), for the requirement that Argentina demonstrate evidence of partiality that is “direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.” *BG Group I*, 715 F. Supp. 2d 108, 124 (D.D.C. 2010).

124. *Belize Bank Ltd. v. Belize*, 852 F.3d 1107, 1108 (D.C. Cir. 2017).

125. *Id.* at 1109.

126. *Id.* at 1111.

127. *Id.* at 1112.

proof,¹²⁸ and where the site of arbitration as well as the parties are foreign, U.S. courts will understandably be unwilling to conduct a *de novo* review where the New York Convention's requirements for rejecting arbitral awards are not met. The situation here differed from that in *BG Group* and *AWG Group*, discussed *infra*, in that the parties in *Belize Bank* had no territorial connection to the United States.¹²⁹

Domestic U.S. cases that apply a *de novo* standard of review regarding determinations of arbitrator impartiality arise out of arbitrations conducted at domestic fora, including the American Film Marketing Association,¹³⁰ the National Association of Securities Dealers,¹³¹ and the American Arbitration Association.¹³² These cases only address situations involving commercial arbitration. It could therefore be argued that *de novo* judicial review should be limited to such cases, and that it has no place in judicial review of international arbitral awards arising from ISDS. The fact of arbitrator impartiality, however, is not altered depending on whether the dispute is domestic or international, or whether the relationship between the parties is determined by contract or by treaty. While domestic arbitration involves far more cases per year than ISDS, the standard for arbitrator impartiality should be the same across domestic and international arbitration, whether commercial or ISDS. This is the case despite the unique nature of ISDS. Ultimately, such questions go to the heart of arbitral tribunals' formation and are issues that cannot be reasonably reviewed except through judicial review or through some other mechanism involving neutral third-party review, which does not exist in the current ISDS system.

In June 2018, the Second Circuit in *Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services* found with respect to evident partiality and party-appointed arbitrators that "the principles and circumstances that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who are expected to serve as *de facto* advocates."¹³³ The court further held that vacatur on the basis of evident partiality where arbitrators are party-appointed is limited to situations where clear and convincing evidence shows that the failure

128. *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., Kochav S.A.R.L.*, 729 F.3d 99, 102 (2d Cir. 2013).

129. *Belize Bank*, 852 F.3d at 1109-10.

130. *New Regency Prods. v. Nippon Herald Films*, 501 F.3d 1101 (9th Cir. 2007).

131. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994).

132. *Applied Indus. Materials Corp. v. Ovalara*, 492 F.3d 132 (2d Cir. 2007).

133. *Certain Underwriting Members of Lloyds of London v. Florida, Dep't of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018).

to disclose by the arbitrator “either violates the qualification of disinterestedness or had a prejudicial impact on the award.”¹³⁴ The court further noted that “if any personal or financial relationship constituted disqualifying partiality, ‘the entire commercial arbitration system . . . would be undermined.’”¹³⁵

Without qualifications limiting the language of the opinion to reinsurance cases, this judgment could be read to apply to party-appointed arbitrators in the context of ISDS, which would undermine the ability of domestic U.S. courts to uphold claims for vacatur on the basis of evident partiality in many if not most cases. Given the systemic issues concerning conflict of interest in ISDS, such a reading would foreclose another avenue of review of UNCITRAL awards, and highlights one of the problematic aspects of turning to domestic courts to review ISDS awards. Although a uniform standard of review across arbitral awards is desirable, domestic courts interpret arbitration in the context of commercial arbitration and, given how rarely ISDS claims arise, do not account for the vagaries of the treaty-based regime.¹³⁶ While the effects of *Lloyds v. Florida* remain to be seen, if broadly interpreted, it could lead to fewer findings of partiality within the Second Circuit.

U.S. courts reviewing claims of evident partiality in the context of commercial arbitration awards do, on occasion, find grounds to vacate awards.¹³⁷ This contrasts with the near-impossibility of finding partiality in the context of ISDS awards, whether under ICSID or UNCITRAL rules.¹³⁸ At the same time, the legal requirement for finding evident partiality is at least as strict as the legal standards used by arbitral tribunals in ICSID or UNCITRAL arbitrations.¹³⁹ This suggests that application of a *de novo* standard of review, discussed below, would not result in too-frequent findings of arbitrator partiality, but would rather provide an impartial and rigorous review of determinations originally made by

134. *Id.* at 511.

135. *Id.* at 508.

136. *See, e.g.*, the Supreme Court majority analysis in *BG Grp. v. Argentina*, 572 U.S. 25, 25 (2014).

137. *See, e.g.*, *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968); *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); *New Regency Prods. v. Nippon Herald Films*, 501 F.3d 1101 (9th Cir. 2007).

138. See data available on United Nations Conference on Trade and Development (UNCTAD), *Investment Dispute Settlement Navigator*, INV. POLICY HUB, <https://investmentpolicy.hub.unctad.org/ISDS/> (last visited Jan. 19, 2019).

139. The standards expressed by the different circuit courts with respect to evident partiality combined with the reticence of domestic U.S. courts to review arbitral awards reflect a high level of scrutiny on par with those applied by tribunals and appointing authorities in ICSID and UNCITRAL arbitrations.

the arguably less impartial parties involved in determining conflicts of interest in UNCITRAL arbitral proceedings. Nevertheless, as *Certain Underwriting Members of Lloyds of London* indicates, without clear rules on the applicable standard for evident partiality, courts have the ability to muddy the waters and leave parties bringing the challenge high and dry. Reforming ISDS to provide for more rigorously impartial review offers a better avenue for clear outcomes and a consistent application of uniform standards than domestic courts.

IV. THE APPROPRIATE STANDARD OF DEFERENCE: *BG GROUP* AND *AWG GROUP*

In the context of domestic judicial review by U.S. courts, the standard of *de novo* review in such situations has a basis in case law on commercial arbitration.¹⁴⁰ In order to establish the appropriate standard of deference that should be applied to questions of arbitrator partiality, it is first necessary to understand the standard of deference applied by the Supreme Court in *BG Group* in relation to the question of arbitrability.

A. *A High Standard of Deference: BG Group and the Question of Arbitrability*

BG Group marked the first time that the Supreme Court reviewed the decision of an arbitral tribunal under the ISDS provision of a BIT.¹⁴¹ As such, it set important precedent for the standard of review to be accorded arbitral decisions under BITs.¹⁴²

The *BG Group* case arises out of an investment law dispute between Argentina and the U.K. company, BG Group, under the Argentina-U.K. BIT.¹⁴³ The dispute, which was heard under UNCITRAL rules, arose out of the 1998 Argentinian financial crisis.¹⁴⁴ During the crisis, Argentina adopted certain measures to correct macroeconomic problems and address political instability.¹⁴⁵ These measures had an adverse effect on BG Group's investments, which gave rise to the claim.¹⁴⁶

140. See, e.g., *Commonwealth Coatings Corp.*, 393 U.S. at 145; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 640 (6th Cir. 2005).

141. Luis Miguel Velarde Saffer & Jonathan Lim, *Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone between Jurisdiction and Admissibility*, 8 No. 1 DISP. RES. INT'L 85, 85 (2014).

142. See Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 AM. J. INT'L L. 750 (2014), for an excellent overview of the BG Group case.

143. *BG Grp. v. Argentina*, Final Award, ¶¶ 1-2 (Dec. 24, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf>.

144. *Id.* ¶ 62.

145. *Id.* ¶ 62.

146. *Id.* ¶¶ 62, 84-85.

The Argentina-U.K. BIT contains a provision requiring partial exhaustion of local remedies, which Argentina argued precluded BG Group from bringing its claim before the tribunal, given that BG Group never sought relief in Argentine courts.¹⁴⁷ Article 8(1) of the Argentina-U.K. BIT provides that disputes with regards to an investment that arise between an investor and the host state shall be submitted, at the request of one of the parties to the dispute, to a competent tribunal in the host state's territory.¹⁴⁸ Article 8(2) requires disputes to be submitted to domestic courts for eighteen months before they can be submitted to international arbitration.¹⁴⁹ The tribunal found that BG Group's claim was admissible, despite its failure to submit the dispute to Argentine courts before going to international arbitration,¹⁵⁰ and in 2007, the tribunal awarded BG Group \$185.3 million plus interest.¹⁵¹

In 2008, Argentina filed a motion to vacate the arbitral award with the District Court as the seat of arbitration, on the basis that the arbitrators misunderstood applicable law, failed to apply the law correctly, and exceeded their authority by failing to disqualify one of the arbitrators, which resulted in an award that was procured by "corruption, fraud, or undue means," and which was "disproportionate and unfair."¹⁵² In 2010, the District Court held in favor of BG Group and denied Argentina's petition to vacate the award.¹⁵³ Argentina appealed.¹⁵⁴ In a surprising reversal, the D.C. Circuit found in favor of Argentina, holding that "the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty."¹⁵⁵ According to the court, this resulted in the arbitral tribunal

147. *Id.* ¶ 141.

148. Agreement for the Promotion and Protection of Investments, Arg.-U.K., art. 8(1), 1990, 34 U.N.T.S. 1765 [hereinafter Argentina-U.K. BIT].

149. *Id.* art. 8(2).

150. The basis for the finding of admissibility rested on the tribunal finding that the clause requiring exhaustion of domestic remedies could not be construed "as an absolute impediment to arbitration" where "recourse to the domestic judiciary is unilaterally prevented or hindered by the host State. *BG Grp. v. Argentina*, Final Award, ¶ 147 (Dec. 24, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf>. Due to legislative restrictions that barred recourse to the courts, the tribunal found that it was unreasonable to expect that domestic remedies must first be exhausted. *Id.* ¶¶ 148, 156.

151. *Id.* ¶¶ 156, 458.

152. *BG Group I*, 715 F. Supp. 2d 108, 114-15 (D.D.C. 2010).

153. *Id.* at 113.

154. *Argentina v. BG Grp.*, 665 F.3d 1363, 1365-66 (D.C. Cir. 2012) [hereinafter *BG Group II*].

155. *Id.*

rendering “a decision wholly based on outside legal sources and without regard to the contracting parties’ agreement establishing a precondition to arbitration.”¹⁵⁶ In its approach, the D.C. Circuit did not accord any special standard of deference to the arbitration award, instead opting to review Argentina’s claim *de novo*.¹⁵⁷

Reversing the D.C. Circuit, the Supreme Court found in *BG Group v. Argentina* that a high standard of deference must apply, akin to that which “courts ordinarily owe arbitration decisions.”¹⁵⁸ This decision has since generated significant scholarly criticism.¹⁵⁹

In answering the central question whether a U.S. court should review the arbitrators’ interpretation of the local litigation provision *de novo* or with a high standard of deference, the majority took a perplexing approach.¹⁶⁰ The majority chose to first evaluate the BIT as an ordinary contract between private parties, and then, upon finding that deference would be accorded to arbitrators in a domestic situation, determined that the BIT, being a treaty should not result in different analysis.¹⁶¹ The dissent argued that Article 8 operates as a “unilateral standing offer” to arbitrate that is extended by the host state to the investor.¹⁶² Article 8’s local litigation requirement is an essential term.¹⁶³ Justice Breyer, writing for the majority, dismissed this argument by stating that such an approach “is not consistent with our case law interpreting similar provisions appearing in ordinary arbitration contracts.”¹⁶⁴ By treating a BIT as a contract between the investor and the host state, the Supreme Court made a significant error. BITs are treaties between states, and as Justice Roberts noted in his dissent, “[n]o investor is a party to that Treaty.”¹⁶⁵

The nuances of the Supreme Court’s substantive holding in this case have been ably analyzed elsewhere.¹⁶⁶ The Supreme Court emphasized

156. *Id.*

157. *Id.* at 1365-66.

158. *BG Group III*, 572 U.S. 25, 29 (2014).

159. *See, e.g.*, Roberts & Trahanas, *supra* note 142; Jarrod Wong, *BG Group v. Republic of Argentina: A Supreme Misunderstanding of Investment Treaty Arbitration*, 43 PEPP. L. REV. 541 (2016); Alan Scott Rau & Andrea K. Bjorklund, *BG Group and “Conditions” to Arbitral Jurisdiction*, 43 PEPP. L. REV. 577 (2016).

160. *BG Group III*, 572 U.S. at 33.

161. *Id.*

162. *Id.* at 41.

163. *Id.*

164. *Id.*

165. *Id.* at 50 (Roberts, J., dissenting).

166. *See, e.g.*, Roberts & Trahanas, *supra* note 142; Konstanze von Papp, *Biting the Bullet or Redefining ‘Consent’ in Investor-State Arbitration? Pre-Arbitration Requirements after BG Group v*

that in matters where the dispute is over “the meaning and application of particular procedural preconditions for the use of arbitration,” arbitrators rather than courts are presumed to have been intended by the parties to decide such disputes.¹⁶⁷ The Supreme Court found that the local litigation clause in Article 8(2)(a) of the Argentina-U.K. BIT operated as a procedural condition precedent to arbitration, as evidenced by the lack of finality accorded to local court determinations in the language of the BIT.¹⁶⁸ As such, the Court viewed the litigation provision as “a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.”¹⁶⁹

Self-review of jurisdiction on the part of the body whose jurisdiction is being questioned is not limited to arbitral tribunals in ISDS. The idea of *Kompetenz-kompetenz* has long existed in EU law, as well as in other international law fora, and applies equally to arbitral tribunals.¹⁷⁰ In the context of arbitral tribunals, it is, as Michael Waibel has argued, “a necessary precondition for arbitral tribunals to be able to properly exercise their arbitral function,” because otherwise, states “would be able to frustrate dispute settlement before arbitral tribunals *ex post*, even once they have consented.”¹⁷¹ With no other body available to evaluate questions of jurisdiction, it is necessary for arbitral tribunals to retain that ability.

By glossing over the distinctiveness of ISDS provisions in the context of BITs, however, the Supreme Court fundamentally erred in its characterization of BITs. BITs are not ordinary commercial contracts, and as Justice Sotomayor pointed out in her concurrence, in the context of standing offers from states to arbitrate with “an amorphous class of private investors,” the host state “might reasonably wish to condition its consent to arbitrate with a previously unspecified investor counterparty on the investor’s compliance with a requirement that might be deemed ‘purely procedural’ in the ordinary commercial context.”¹⁷² Again, the

Argentina, 16 J. WORLD INV. & TRADE 695 (2015); John V.H. Pierce, *BG Group PLC v. Republic of Argentina*, 15 J. WORLD INV. & TRADE 1053 (2014); Rau & Bjorklund, *supra* note 159, at 577; Santacroce, *supra* note 14, at 1; Wong, *supra* note 159, at 541.

167. BG Grp. III, 572 U.S. at 34-35.

168. *Id.* at 35.

169. *Id.* at 35-36.

170. Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility* 21-22 (U. OF CAMBRIDGE LEGAL STUD. RES. PAPER SERIES, Paper No. 9/2014, Feb. 2014). *Kompetenz-kompetenz* is a legal doctrine wherein a legal body has the authority to determine questions concerning its own jurisdiction regarding a matter before it.

171. *Id.* at 21.

172. BG Group III, 572 U.S. at 46-47.

difference between ISDS and commercial arbitration plays a critical but glossed-over role in evaluating the appropriate standard of review to be applied.

While the Supreme Court was analyzing a procedural provision (exhaustion of local remedies) here rather than addressing a question of arbitrator impartiality, the standard of deference articulated by the Supreme Court has bearing on how other ISDS claims may be reviewed before U.S. domestic courts. How the Supreme Court characterized BITs may further complicate how domestic courts interpret cases involving ISDS arbitration.

In the wake of *BG Group*, it seems likely that U.S. courts will apply a high standard of deference to arbitral awards arising from BITs, at least where the questions relates to the arbitrability of the matter, but potentially more broadly.¹⁷³ The Supreme Court's approach to BITs, particularly in its treatment of a BIT as a contract between a host state and an investor, offers little room for deviating from the standard of deference applicable to domestic commercial arbitration cases, while simultaneously according a high standard of deference to the award as a product of arbitration between a foreign state and an investor.

The application of domestic standards of deference to the review of international arbitral awards may make sense in some contexts, however. Where the challenge is to the integrity of the arbitral tribunal itself, for instance, as is the case with evident partiality, a standard of review similar to that applied to domestic arbitral awards is the more appropriate one. The *Argentina v. AWG Group* case provides the platform for this Article's articulation of what the appropriate standard is, applying, as the District Court ruling did, an incorrect standard drawn from *BG Group*. In affirming the District Court's ruling, the D.C. Circuit clarified the degree of conflict of interest that would be required for a vacation of the award due to evident partiality, but did not address the nature of ISDS as compared to commercial arbitration.¹⁷⁴

B. *Argentina v. AWG Group*—Overview of the ISDS Arbitration

The procedural history leading to the dispute at the heart of this Article is particularly complex, but a cursory overview is necessary to understand how the particular challenges reached the District Court.

As in *BG Group*, the dispute in *AWG Group* arose out of the Argentine financial crisis. Together with Suez and Vivendi Universal S.A., two

173. *Id.* at 41.

174. *AWG II*, 894 F.3d 327, 337 (D.C. Cir. 2018).

French companies, AWG Group Ltd, a U.K. company, formed a company in 1993 to invest in water distribution and waste water treatment services in Buenos Aires.¹⁷⁵ Following the 2000 financial crisis, Argentina enacted certain emergency measures (which formed the basis of the challenge in *BG Group* as well) including the devaluation of the Argentine peso and fixed tariffs for water and sewage treatment.¹⁷⁶ These measures led to the financial failure of the company formed by AWG, Vivendi, and Suez.¹⁷⁷ In 2003, the parties filed a request for arbitration under the Argentina-France, Argentina-Spain, and Argentina-U.K. BITs with ICSID.¹⁷⁸

Unlike the Argentina-Spain and Argentina-France BITs, which both require investor-state arbitration to be subject to ICSID arbitration, Article 8(3) of the Argentina-U.K. BIT provides that where a dispute is referred to international arbitration, the parties to the dispute may agree to refer it either to ICSID or may submit it to an ad hoc arbitration tribunal or an arbitrator to be appointed under UNCITRAL rules.¹⁷⁹ Absent agreement within three months from the written notification of the claim, the parties shall submit it under UNCITRAL rules.¹⁸⁰ Because Argentina and AWG failed to reach agreement in this situation, the claims by AWG were brought under UNCITRAL rules, although Argentina did agree for the case to be administered by ICSID.¹⁸¹ To simplify the proceedings, the parties agreed that the same arbitral tribunal would hear all three cases, two of which came under ICSID rules, while the third, involving AWG, was to be decided under UNCITRAL rules.¹⁸²

In October 2007, Argentina filed a challenge against one of the arbitrators, Gabrielle Kaufmann-Kohler, on the basis of her alleged partiality.¹⁸³ The initial claim was based on Kaufman-Kohler's participation on an ICSID tribunal in another ISDS case that decided against

175. Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award ¶ 2 (Apr. 9, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw6304.pdf>.

176. *Id.* ¶ 3.

177. *Id.*

178. *Id.* ¶ 5.

179. Argentina-U.K. BIT, *supra* note 148, art. 8(3).

180. *Id.*

181. Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 6 (Oct. 22, 2007).

182. *Id.* ¶ 8.

183. *Id.* ¶ 12.

Argentina.¹⁸⁴ The initial challenge was dismissed as untimely, however, because under UNCITRAL rules, a challenge must be made within fifteen days of the appointment of the arbitrator or within fifteen days after the party challenging gains knowledge of the circumstances giving rise to the challenge.¹⁸⁵ In the two parallel ICSID proceedings, the submission was likewise found not to be sufficiently prompt, as required by Article 9(1) of the ICSID rules.¹⁸⁶

A second challenge to Kaufmann-Kohler's impartiality was filed in November 2007 by Argentina.¹⁸⁷ This challenge, the basis for the appeal to the District Court, arose from Argentina's allegation that Kaufmann-Kohler's position on the UBS Board of Directors meant that she could not be "relied upon to exercise independent judgment," and that she had "failed to disclose this fact to the parties and to ICSID as is required by the ICSID Rules."¹⁸⁸ Since UBS held 2.38% of Vivendi's registered voting stock and 2.1% of Suez's voting shares, Argentina argued that Kaufmann-Kohler's impartiality and independence of judgment were negatively affected.¹⁸⁹

In her defense, Kaufmann-Kohler submitted a letter clarifying that UBS had many business relationships, but that she had no involvement in their investment decisions as an independent, non-executive director, nor had she been aware of UBS's business relationships with either Suez or Vivendi.¹⁹⁰ UBS's General Counsel further indicated that these shareholding were small, without any strategic meaning for a company of UBS's size.¹⁹¹ Here, the Claimants also noted that UBS had previously given advice to and had a client relationship with Argentina.¹⁹²

Under ICSID rules, as previously discussed, the other members of the arbitral tribunal make the determination regarding a challenge to an arbitrator.¹⁹³ Under UNCITRAL rules, on the other hand, where there is an appointing authority, the appointing authority decides.¹⁹⁴

184. *Id.*

185. *Id.* ¶ 19 (citing UNCITRAL Rules, art. 11).

186. *Id.* ¶ 26.

187. Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 1 (May 12, 2008).

188. *Id.* ¶ 9.

189. *Id.* ¶ 12.

190. *Id.* ¶ 14.

191. *Id.*

192. *Id.* ¶ 15.

193. *Id.* ¶ 20 (citing ICSID Arbitration Rule 9(4)).

194. UNCITRAL Arbitration Rules, *supra* note 23, arts. 13, 6.

The other two arbitrators in this dispute decided to proceed on the basis that, in order to meet the parties' agreement that all three cases would be heard by a single tribunal, their agreement gave the arbitrators the authority to decide the outcome of the challenge to Kaufmann-Kohler under UNCITRAL as well as ICSID Rules.¹⁹⁵ None of the parties objected.¹⁹⁶

UBS was not a shareholder in AWG Group.¹⁹⁷ The tribunal nevertheless found that were Kaufmann-Kohler predisposed in favor of Suez and Vivendi due to her position with UBS, "such predisposition would also favor" AWG Group, as a partner with the other claimants in the water privatization at issue here.¹⁹⁸

The tribunal analyzed the challenge under both Article 10(1) of the UNCITRAL Arbitration Rules¹⁹⁹ and under Article 57 of the ICSID Convention,²⁰⁰ in the cases of AWG, and Suez and Vivendi, respectively. In both cases, the two members of the tribunal, including the arbitrator appointed by Argentina, concluded that there were insufficient grounds to establish that there was a lack of independence or impartiality on the part of Kaufmann-Kohler.²⁰¹

On balance, the tribunal's finding that Kaufmann-Kohler's position as a non-executive member of the UBS Board of Directors did not demonstrate a lack of independence or impartiality seems well-founded. UBS's investments in both Vivendi and Suez were insignificant in comparison with their overall holdings, and UBS acted as a passive investor in both companies.²⁰² Kaufmann-Kohler had no say over UBS's management decisions, as per the separation of functions required by Swiss law.²⁰³ Perhaps the only element of the claim to give pause was Kaufmann-Kohler's failure to disclose her UBS Board membership, given UBS's position as one of the leading global investment and banking firms.²⁰⁴ However, the other two arbitrators found that the lack of disclosure would only be relevant had she reason to believe that her

195. Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 9 (May 12, 2008).

196. *Id.*

197. *Id.* ¶ 25.

198. *Id.* ¶ 21.

199. *Id.* ¶ 22.

200. *Id.* ¶ 27.

201. *Id.* at Conclusion, ¶ 1.

202. *Id.* ¶ 36.

203. *Id.*

204. *Id.* ¶ 45.

position on the UBS Board would cause her impartiality to be questioned.²⁰⁵ Kaufmann-Kohler subsequently stepped down from the board to avoid any semblance of impropriety.²⁰⁶ Following the unsuccessful challenge to Kaufmann-Kohler, the arbitral tribunal found in favor of AWG Group in the amount of \$21 million plus interest.²⁰⁷

Despite the reasonable analysis by the two arbitrators in their decision on Kaufmann-Kohler's impartiality, that two of the arbitrators were able to make themselves the appointing authority because of the parallel ICSID and UNCITRAL proceedings suggests that in other similar situations, however rare, the outcome might not be as reasonable.²⁰⁸ In the absence of ISDS reform, as will be discussed below, the appropriate standard of review by U.S. courts of the tribunal's decision in this matter should have been *de novo* review. While domestic courts should not become a forum for relitigation of matters that have been previously decided by arbitral tribunals, challenges to arbitrator impartiality are unlike challenges to substantive rulings by arbitrators.

C. Argentina v. AWG Group—D.C. District Court

In the wake of the arbitral tribunal's award, in *Argentina v. AWG Group*, Argentina brought a claim before the District Court seeking to vacate the award made against them under Sections 10(a)(2) and 10(a)(4) of the FAA, arguing Kaufmann-Kohler acted with evident partiality and that the arbitral tribunal exceeded its powers.²⁰⁹ The claim by Argentina in this case in many ways mirrors Argentina's claim in the *BG Group* case, and could arguably be viewed as a collateral attack on the award by a losing party.²¹⁰

In response to Argentina's Section 10(a)(2) claim that the award should be vacated because of the evident partiality by Kaufmann-Kohler, AWG argued that a deferential standard of review should apply

205. *Id.* ¶ 46.

206. AWG I, 211 F. Supp. 3d 335, 342 (D.D.C. 2016).

207. Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award, ¶ 116 (Apr. 9, 2015).

208. Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 9 (May 12, 2008).

209. AWG I, 211 F. Supp. 3d at 339.

210. *Id.* at 338. As in *BG Group*, the claim in AWG arose as a result of measures taken by Argentina during its financial crisis. The District Court in *AWG Group* cited to *BG Group* when it noted that "Argentina's instant petition is not the only effort by the country to avoid unfavorable arbitration awards arising out of disputes between Argentina and private consortia that contracted with Argentina to provide infrastructure and public services in the country." *Id.*

to the decision by the other two arbitrators not to disqualify Kaufmann-Kohler, and that in any event, Argentina failed to demonstrate that her conduct rose to the level required by the “evident partiality” standard.²¹¹ The District Court found for AWG, denying Argentina’s request to vacate and granting AWG’s cross-petition to confirm the award.²¹²

Judge Beryl A. Howell, writing the opinion, clarified from the outset the well-established relationship between arbitration and judicial review, emphasizing that “the standard of review of arbitral awards is so narrow” that courts cannot reconsider the merit of an arbitral award, even where the award is based on factual errors or on misinterpretations of the contract.²¹³ Citing *BG Group*, the opinion further noted that it makes no critical difference that the document containing the arbitration clause is a treaty, since treaties are contracts between nations.²¹⁴

In addressing the disagreement between AWG and Argentina concerning the applicable level of deference that the court should extend to the arbitral tribunal’s conclusion that there was no conflict of interest, the court held that Argentina’s argument for a *de novo* standard of review relied on

[O]ut-of-circuit and State court decisions, which are all inapposite since none of these decisions involved either, as here, judicial review of a reasoned decision by neutral arbitrators regarding the purported bias of a fellow arbitrator, or the applicable standard of review when presented by a record with such an arbitration decision.²¹⁵

Instead, the court sided with AWG, which advocated for a deferential standard of review, finding that “[s]uch deference is consistent with the overwhelming weight of authority requiring deference to decisions of arbitration panels.”²¹⁶

In so finding, Judge Howell shifted the *de novo* standard of review that would normally apply to requests for vacatur based on section 10(a)(2) of the FAA on questions of arbitrator impartiality to one of high deference due to the prior involvement of arbitrators in the original determination, effectively refusing to provide review of a pre-existing

211. *Id.* at 347.

212. *Id.* at 339.

213. *Id.* at 343-44 (citing *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987)).

214. *Id.* at 344 (citing *BG Group III*, 572 U.S. 25, 36 (2014)).

215. *Id.* at 350 n.19.

216. *Id.*

arbitral decision.²¹⁷ In other words, where a finding on partiality has been made, in Judge Howell's eyes, the normal standard of deference that would be applicable to substantive findings of arbitral tribunals should apply since there has already been judicial review on the part of the arbitrators who decided the question of partiality.

This approach is problematic. Here, Argentina was not requesting a review of the award, which would naturally fall outside of the scope of judicial review, but rather a review of a determination on a matter that spoke to the constitution of the arbitral tribunal itself and potentially significantly affected the tribunal's review. The strict adherence to a high standard of deference in any situation where arbitral tribunals have made decisions is inappropriate in situations involving systemic issues concerning impartiality as is the case with ISDS awards. However, the domestic judicial system is not designed to review such awards, and, as will be discussed *infra*, while U.S. courts could be better at articulating a clear standard in such cases, reform of the ISDS system itself would be far preferable. Because arbitration is contractual, the arbitration rules provide the basis for what the parties agreed to and would be the most effective means of ensuring arbitrator impartiality without resorting to the ill-fitting domestic arbitration-focused standards that domestic courts apply. At the same time, where challenges to arbitrator impartiality arising out of ISDS are brought before domestic courts, they should be treated the same as evident partiality challenges arising out of domestic arbitration, where the court is reviewing the challenge for the first time and thus applying a *de novo* standard of review.

The District Court's opinion in *Argentina v. AWG Group* is problematic in other ways as well. The inconsistency between the extensive discussion of the appropriate legal standard of review and the actual analysis of the case is jarring. In the former, Judge Howell emphasized well-established notions that review of arbitral awards is extremely limited and that arbitration should not become a prelude to judicial review.²¹⁸ In the latter, she appeared to engage in what effectively amounted to *de novo* review of the issues at stake, going far beyond the standard of deference she articulated.²¹⁹ While it is standard practice in

217. *Id.* (the cases that Argentina relies on "are all inapposite since none of these decisions involved either, as here, judicial review of a reasoned decision by neutral arbitrators regarding the purported bias of a fellow arbitrator, or the applicable standard of review when presented by a record with such an arbitration decision").

218. AWG I, 211 F. Supp. 3d 335, 343 (D.D.C. 2016) (citing *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006) and *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2013)).

219. *Id.* at 350-62.

judicial opinions to recite the facts, the court's opinion goes beyond that in fully reviewing the legal and factual circumstances. Arguably, in providing a full analysis of whether Kaufmann-Kohler's actions gave rise to a violation of Sections 10(a)(2) or 10(a)(4) of the FAA, the court was protecting itself from the perhaps inevitable appeal by Argentina by having its extensive analysis on the record. Additionally, with a foreign sovereign as a party, federal courts will likely be more cautious in reviewing the facts and reasoning to protect foreign relations between the United States and the state in question.²²⁰

The court's opinion also continues the ISDS-related fallacy set out in *BG Group* by citing that case for the proposition that a treaty is a contract between nations.²²¹ While that proposition is undoubtedly true, as previously discussed in the context of the *BG Group* case, it is also clearly not the case in relation to arbitration arising out of BITs, for the foreign investor is not party to the treaty. By only citing this line from the majority opinion in *BG Group*, without any explanation other than to support deference towards arbitration, the court continued to obfuscate the nature of BITs in relation to ISDS, failing to acknowledge the public international law aspect of the treaties as well as the relationship between the private investor and the host state in such situations.²²² It is important to note that in certain cases, there may be separately negotiated contracts between the host state and the investor that must also be taken into account in addition to the BITs to determine jurisdiction.²²³

The District Court's substantive analysis of the facts was, for the most part, thorough and well-reasoned. While the court, like most domestic U.S. courts are wont to do, conflated commercial arbitration with ISDS, Judge Howell provided a clear analysis of what is required to sustain a claim of evident arbitrator partiality under 10(a)(2) of the FAA, following from the Supreme Court's reasoning in *Commonwealth Coatings Corp.* through the D.C. Circuit Court's holding in *Al-Harbi v. Citibank*.²²⁴ However, the inconsistency of the deference standard with the *de novo* analysis can be seen in statements such as the following: "the Court agrees with the conclusion of the two unchallenged arbitrators, whose decision is, in any event, due deference."²²⁵ Why two out of three

220. Charles B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitrations*, 27 J. INT'L ARB. 505, 506 (2010) ("International arbitration is a creature of consent.")

221. AWG I, 211 F. Supp. 3d at 344.

222. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232 (1995).

223. Examples of negotiated contracts between investors and host states include concession agreements, production sharing agreements, and build-operate-transfer agreements.

224. AWG I, 211 F. Supp. 3d at 350-52.

225. *Id.* at 356.

arbitrators ruling on the partiality of the third arbitrator should be granted the same deference that a full arbitral tribunal providing substantive reasoning on the merits would be given is unclear. At the same time, the review provided by the District Court seems to be *de novo*, which would be the correct standard of review for an evident partiality challenge arising out of domestic commercial arbitration.

D. Argentina v. AWG Group—D.C. Circuit

In July 2018, the D.C. Circuit affirmed the District Court’s ruling, without critiquing the shifting standard of review applied by Judge Howell in reviewing the case.²²⁶ Given Argentina’s tendency to bring (arguably) frivolous claims for vacating arbitration awards, and the particular facts of this case, the inconsistencies in the District Court’s opinion did not receive the attention that they deserve.²²⁷

Reaffirming that vacating an arbitrator’s decision is limited to very unusual circumstances, the D.C. Circuit emphasized that the goal of arbitration is to avoid the time and expense of litigation.²²⁸ Without the high burden of proof on the challenger, “losing parties would have every reason to challenge the process in court.”²²⁹ This goal may be true with respect to commercial arbitration, but is not the primary motivation for ISDS. In the case of ISDS, the goal of arbitration is to find a forum where the investor’s interest will not be prejudiced by appearing in the courts of the sovereign nation against whom the investor has a claim.²³⁰ Unlike in domestic arbitration, where the claim may be brought by either party to the dispute, the investor is always the claimant in ISDS.²³¹ The uniqueness of ISDS lies in the state having given up some of its sovereign immunity to appear before a tribunal. Despite this difference in motivation between ISDS and domestic arbitration, however, the high burden of proof should apply in either case. The ISDS system was designed without an appellate mechanism, and that aspect

226. AWG II, 894 F.3d 327, 331 (D.C. Cir. 2018).

227. *BG Group III*, 572 U.S. 25, 59-60 (2014) (Roberts, J., dissenting). Chief Justice Roberts noted in his dissent in *BG Group* that none of his arguments “should be interpreted as defending Argentina’s history when it comes to international investment,” noting that this is not the question, and that the question is rather “whether it makes sense for either Contracting Party to insist on resort to its courts before being compelled to arbitrate anywhere in the world before arbitrators not of its choosing.” *Id.*

228. AWG II, 894 F.3d at 333.

229. *Id.*

230. Howse, *supra* note 26, at 2 (citing Letter to Members of Congress, <https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>).

231. Kahale, *supra* note 1, at 5.

of it brings it much closer in nature to domestic commercial arbitration.

The D.C. Circuit did not discuss the appropriate standard of review or distinguish unique aspects of ISDS in its analysis, but executed a *de novo* analysis of whether Kaufmann-Kohler's conduct demonstrated evident partiality.²³² The D.C. Circuit turned to the Supreme Court opinion in *Commonwealth Coatings Corp.* to determine the appropriate level of disclosure for arbitrators where they have significant interests in the parties.²³³ While the plurality opinion in the case "proposed adopting the same standard for avoiding partiality for arbitrators that governed judges," the D.C. Circuit adopted the position from the concurring opinion, where Justice White suggested that arbitrators should not be required to disclose "trivial interests."²³⁴ The D.C. Circuit previously applied this rule in other cases including *Al-Harbi* and *Belize Bank Ltd.*²³⁵

Key to the D.C. Circuit's finding that Kaufmann-Kohler's position on the UBS board did not amount to evident partiality was that UBS had not done more than trivial business with either Suez or Vivendi.²³⁶ The court noted that "[i]f the interest presented here could disqualify an arbitrator who did not disclose it, parties would hesitate to select arbitrators associated with financial companies that invest broadly."²³⁷ Given the previously discussed systemic issues within ISDS, however, such hesitation might actually be a good way of preventing some of the conflicts of interest that plague the system. Of course, this might require international arbitrators to be held to a higher standard than domestic arbitrators, but given the delicate nature of having a state as a party, there is good reason for making this distinction. Such a distinction could be difficult to enforce in domestic courts, however, which are not equipped to apply different standards to ISDS as compared to commercial arbitration challenges.

Even though the D.C. Circuit found that Kaufmann-Kohler's conduct did not rise to the level of partiality required for a conflict of interest finding under the FAA, this holding should not foreclose the broader point that the D.C. Circuit was correct to conduct a *de novo* review, not least because two of the arbitrators made the executive decision to be the appointing authority for the arbitration between AWG

232. AWG II, 894 F.3d 327, 334 (D.C. Cir. 2018).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 336.

237. *Id.* at 337.

and Argentina under UNCITRAL rules.²³⁸ The challenge to Kaufmann-Kohler was made under both ICSID and UNCITRAL rules.²³⁹ Because the ICSID Convention prevents bringing claims for vacating awards before domestic courts,²⁴⁰ Argentina could only bring a claim on the basis of the UNCITRAL case involving AWG. Here, rather than use the appointing authority as the arbitrator of Kaufmann-Kohler's impartiality, the other two arbitrators determined (and the parties did not object) that they would be the appointing authorities as per the UNCITRAL rules so as to keep all of the three proceedings the same.²⁴¹

Arguably, had Argentina had a real issue with the tribunal's operation and ability to judge impartially, it had an avenue in this situation to demand a different appointing authority, such as the head of the Permanent Court of International Justice, as provided for in the UNCITRAL rules.²⁴² Argentina's failure to object to having the remaining arbitrators act as the appointing authority undermines its claim, given that it had an opportunity to take a different approach. However, for the two arbitrators to make the decision to be the appointing authority was a particularly problematic course of action and could be interpreted as reflecting the structural corruption in ISDS. Appointing authorities are meant to be neutral third parties, and neutrality is unlikely to occur where two arbitrators are judging the impartiality of a fellow arbitrator. The following section argues for reform to ISDS mechanisms while laying out a standard of review that could be applied domestically to provide greater oversight over arbitral tribunals in situations where the integrity of the tribunal is challenged.

V. A *DE NOVO* STANDARD OF REVIEW VS. ISDS REFORM

As previously discussed, arbitration arising from ISDS provisions in BITs is the source of growing criticism, in no small part due to the small community of investment law experts who repeatedly engage with each other as arbitrators, legal counsel to parties, expert witnesses, and

238. *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 13 (May 12, 2008).

239. *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, ¶ 106 (Apr. 9, 2015).

240. ICSID Convention, *supra* note 22, art. 53.

241. *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 13 (May 12, 2008).

242. UNCITRAL Arbitration Rules, *supra* note 23, art. 6.

tribunal presidents, often in shifting capacities.²⁴³ The possibility of conflicts of interest arising from the convoluted relationships between arbitrators, private investors, and host states is significant,²⁴⁴ and existing mechanisms for reviewing arbitrator impartiality are inadequate in providing truly neutral review.

At the same time, as the holding in *AWG* shows, there is a lack of clarity in U.S. courts concerning how to interpret arbitral awards ensuing from ISDS provisions in BITs. Not only are courts, particularly post-*BG Group*, likely to be confused about the nature of the relationship between states and investors, but they also appear to apply a shifting understanding of the standard of deference.

The appropriate standard of review to be applied by U.S. courts in reviewing motions to vacate arbitral awards on the basis of evident partiality must be a *de novo* one in cases involving domestic commercial arbitration. This *de novo* standard is necessitated by the domestic U.S. courts acting as the first and only reviewers of the partiality question. In *AWG*, however, the higher standard of deference applicable to situations involving review of the substance of arbitral awards was incorrectly applied to such a motion.²⁴⁵ The unstated justification was clearly that there had been review of the arbitrator's impartiality by her two colleagues on the arbitral tribunal. While ultimately conducting a *de novo* review, despite statements to the contrary, the District Court agreed "with the conclusion of the two unchallenged arbitrators, whose decision is, in any event, due deference."²⁴⁶ In the situation of ISDS, however, particularly in the instant case where ICSID arbitrator review procedures were applied to a dispute under UNCITRAL rules, it is incorrect to apply the higher standard of deference due to substantive findings by arbitrators. The *de novo* review standard must apply here because of the lack of neutral third party evaluation on the partiality challenge.

Unlike in *BG Group*, where the question involved arbitrability, which could justifiably be found to be due a higher standard of deference as forming part of the substantive findings of the arbitrators, the appropriate standard of deference for situations involving motions to vacate international arbitral awards on the basis of claims of arbitrator partiality arising out of ISDS is one of *de novo* review, as would be applied to a normal arbitrator partiality challenge under the FAA. This standard of

243. See Langford et al., *supra* note 33.

244. See, e.g., *id.*; Kahale, *supra* note 1.

245. *AWG I*, 211 F. Supp. 3d 335, 356 (D.D.C. 2016).

246. *Id.*

review suggested in this Article can be drawn from the “evident partiality” analysis previously discussed in relation to domestic arbitration claims, providing an effective means of protecting parties to ISDS for arbitrator impropriety.

Domestic arbitral awards are generally to be afforded limited judicial review.²⁴⁷ This standard must, at a minimum, be extended to international arbitral awards, where the nature of the parties, particularly in ISDS proceedings, is such that any formal judicial review by domestic courts will give rise to questions of infringement upon the sovereign immunity of another state, even where there is a territorial connection. Nevertheless, different grounds for review require different standards of review, even where one of the parties is a foreign state.

It is almost never appropriate for domestic courts to review the substantive findings of arbitral tribunals, whether domestic or international. However, where the arbitrator’s partiality is challenged before U.S. courts, a *de novo* standard of review should be applied to the analysis under FAA section 10(a)(2). With the community of international arbitrators being so close-knit, and in light of the special nature of ISDS, to apply a high standard of deference would, to use Chief Justice Roberts’ words from his dissent in *BG Group*, “trivialize[] the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world, solely at the option of private parties.”²⁴⁸

One of the main arguments against allowing *de novo* review of arbitration decisions is that this will cause additional burdens to the litigation system, leading arbitration to become “merely a prelude to a more cumbersome and time-consuming judicial review process.”²⁴⁹ With respect to situations involving claims of arbitrator partiality, however, this worry does not appear to be justified. In *AWG*, even the appellate brief on behalf of *AWG Group* structured its argument around *de novo* review.²⁵⁰ Only in the last section of its argument pertaining to Argentina’s allegations of evident partiality did *AWG Group* bring up the issue of deference, noting that the D.C. Circuit does not need to decide if deference was owed to the arbitrators’ challenge decision, as the degree of deference owed “is academic.”²⁵¹ The brief further notes that “[i]ndeed, the

247. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) (citing *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002)).

248. *BG Group III*, 572 U.S. 20, 51 (2014) (Roberts, J., dissenting).

249. *Id.* at 33 (majority opinion) (citing *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000)).

250. See Brief for Appellee at iv-v, *AWG I*, 211 F. Supp. 3d 335 (D.D.C. 2016) (No. 16-7134), 2017 WL 1019642.

251. *Id.* at 42.

district court did undertake its own comprehensive, *de novo* review of Argentina's challenge."²⁵²

That AWG Group's primary argument was not a "standard of deference" one is indicative of the uncertainty as to the appropriate standard of review for arbitrator impartiality in situations involving ISDS. The way the arguments were structured by both parties in their appellate briefs suggests that arguments against allowing *de novo* review in these situations are misplaced. After all, Judge Howell at the district court level, the subsequent appellate briefs, and the D.C. Circuit all provide substantive *de novo* analysis of the issue of partiality based on the FAA's "evident partiality" standard. There is no additional burden that would fall to domestic courts in reviewing these issues in which they do not already engage.

It could also be argued that allowing *de novo* review of arbitrator impartiality challenges arising out of ISDS would open the door to parties bringing frivolous claims before domestic courts. This too seems unlikely, since even with a higher standard of deference than *de novo* review being applied by domestic courts, there is nothing precluding parties from bringing such challenges. Absent evidence that domestic *de novo* review would result in much more frequent findings of arbitrator partiality, it seems unlikely that such review would encourage parties to submit more claims of evident partiality, especially since ultimately, the parties bringing the claims are more often states than private parties. For foreign states to subject themselves to the jurisdiction of another country's courts requires giving up a degree of sovereign immunity that in some ways goes beyond what these states agree to within the confines of BITs.

The scope of the argument here is narrow and applies only to a small subset of cases—those where the place of arbitration was in the United States and the arbitration took place under UNCITRAL rules. With the majority of ISDS cases coming under ICSID rules, which preclude motions to vacate awards before domestic courts, the *de novo* standard of review for questions involving arbitrator impartiality would necessarily be limited and would not address the more serious questions of arbitrator impartiality posed by the self-review of such issues under ICSID rules. Furthermore, the more fundamental problems with the use of domestic courts in reviewing treaty-based dispute settlement is not at all resolved by applying *de novo* review.

As previously suggested, a more helpful solution to questions of arbitrator impartiality would be to revise the rules of ISDS to provide for an

252. *Id.* at 43.

impartial review by a multilateral judicial body. Some scholars have suggested that aligning the ICSID regime to better reflect the UNCITRAL arbitration rules would help ameliorate issues relating to conflicts of interest.²⁵³ Inconsistencies between UNCITRAL and ICSID rules give rise to additional issues, with ICSID rules being particularly unfavorable to challenges to arbitrator impartiality.²⁵⁴ Recent proposals to amend ICSID rules include a new requirement that parties must disclose third-party funding and the source of that funding, which can pose a problem with respect to conflicts of interest.²⁵⁵ Additionally, ICSID is working together with the UNCITRAL Secretariat to create a Code of Conduct for Arbitrators that would apply across arbitral systems.²⁵⁶ As the international investment law community takes the systemic issues with ISDS more seriously, there is the possibility of substantive reform that will take conflicts of interest in the arbitral community more seriously. The investment law community is at a crossroads, and how reform is handled will affect the success of ISDS going forward.

Key to the reform of ISDS is to ensure that review of claims of arbitrator partiality are handled by a neutral third party across all arbitral fora. The fact that until late 2013, only one arbitrator had ever been disqualified from serving on an ICSID arbitral tribunal suggests that the mechanism used under ICSID whereby the remaining two arbitrators review the challenge against the third arbitrator is necessarily prone to favor arbitrators.²⁵⁷ While more challenges against arbitrators have succeeded under UNCITRAL, the flexibility of the UNCITRAL rules can result in odd situations such as in *AWG Group* where parallel proceedings result in ICSID rules being applied to an UNCITRAL arbitration. While arbitration is something that parties contract for, unlike in commercial arbitration, ISDS centers on states giving up sovereign immunity with respect to private parties on the basis of treaties between states. As such, ensuring that review of challenges to arbitrators is conducted by neutral third parties is critical for the transparency and legitimacy of the system. Perhaps, as a modest proposal that might be achievable as part of discrete reform of the rules, there should be recognition within the ISDS system that in situations where there are parallel UNCITRAL and ICSID proceedings with the same tribunal overseeing

253. James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 *ARB. INT'L* 189, 190 (2014).

254. *Id.* at 191.

255. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Synopsis 5* (Aug. 2, 2018) https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf.

256. *Id.* at 6.

257. Vasani, *supra* note 77, at 2.

both, in the event of a challenge to arbitrator impartiality, the other two tribunal members cannot make themselves the appointing authority. This would at least address the situation that arose in *AWG* and prevent such situations from arising in the future.

VI. CONCLUSION

A *de novo* standard of review in U.S. domestic judicial review of challenges to arbitrator impartiality arising from ISDS awards will not solve the systemic issues plaguing ISDS and the investment treaty regime more generally. Creating a small avenue for judicial review of arbitrator impartiality is only a Band-Aid, especially because the proposal in this Article is limited to the courts of the United States and to the smaller subset of arbitrations that take place under UNCITRAL rather than ICSID rules. The problems with international investment law go far beyond the issue of arbitrator impartiality.

Other mechanisms that are less intrusive with respect to sovereign regulatory autonomy could take the place of BITs without significant harm to foreign direct investment levels.²⁵⁸ Political risk insurance, in particular, exists to protect investors against many of the risks in host countries which are currently addressed by the substantive provisions of BITs.²⁵⁹ Perhaps the answers to the significant problems with the international investment law regime will lie in forging a new path entirely; one that leaves behind BITs and ISDS and levels the playing field between host states and investors. Perhaps a multilateral investment court such as that suggested by the EU²⁶⁰ will allow a balance to be found. But until then, incremental steps that afford greater transparency and review will improve the international investment law system, even if those increments are small in light of the broader issues.

258. Puig & Shaffer, *supra* note 3, at 396 (citing UNCTAD, *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014* (Sept. 2014)).

259. *See* Howse, *supra* note 26, at 18-19 (discussion of political risk insurance as an alternative to BITs).

260. *See, e.g., Commission Concept Paper, supra* note 56; Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID REV. 673 (2017).