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ERROR CORRECTION AND DISPUTE SYSTEM DESIGN IN INVESTOR-STATE ARBITRATION

Andrea Kupfer Schneider*

The current crisis in investor-state arbitration under the International Centre for Settlement of Investment Disputes (ICSID) system is the subject of commentary by both practitioners and scholars in the field. This Article first reviews the current status of ICSID arbitration by specifically using the Argentinean cases as examples of the ongoing legitimacy concerns that many countries have about ICSID. This Article seeks to explain the current crisis using theories of judicial review to understand how the annulment committee process and decisions are contributing to this crisis. The judicial theory of error correction, when utilized to review the recent annulment committee decisions, illuminates the debate in the appropriate use of the appellate function for ICSID. Then the Article will use dispute system design theories of legitimacy and sustainability to suggest potential avenues of moving forward. Through the lens of stakeholder participation, the Article examines concerns with the law applied by the arbitral tribunals and the standards of review used by the annulment committees. Finally, the Article uses dispute system design theory to examine proposals for changing ICSID—both the law and the process—and argues that any changes must be stakeholder-driven.

The current crisis in investor-state arbitration under the International Centre for Settlement of Investment Disputes (ICSID) system has led to much commentary by both practitioners and scholars in the field. This Article is a first attempt to organize a variety of strains of thought using theories of error correction to understand the controversy and then using dispute system design theory to recommend how ICSID can proceed forward in considering and adopting reforms to its current structure.

This Article first reviews the current status of ICSID arbitration particularly focusing on the Argentinean cases¹ and the ongoing legitimacy concerns that many Latin

* Professor of Law and Director of the Dispute Resolution Program, Marquette University Law School. Many thanks to Chad Oldfather, Irene Ten Cate, and Nancy Welsh for their very helpful comments, and to Katie Lonze and Nida Shakir for excellent research assistance. Thanks also to the participants at the symposium hosted by the *Yearbook on Arbitration and Mediation* at Penn State Dickinson School of Law. This article extends ideas begun in Andrea Kupfer Schneider, *Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes*, in *Investor-State Disputes: Prevention and Alternatives to Arbitration II* 93, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (Susan Franck and Anna Joubin-Bret, eds., 2011), available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf; Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 PENN. ST. J. L. & INT'L. AFF. 86 (2012); and particularly Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into International Investment Treaty Arbitration*, 17 HARV. NEGOT. L. REV. (forthcoming 2013).

¹ Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 861 (2011) (energy disputes are the single largest type of disputes under ICSID). See *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf>; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the

American countries have about ICSID. Second, we turn to theories of appellate function including error correction and the difference with how error correction does or does not occur in arbitration settings. Finally, the Article examines how dispute system design theory would apply to both the critiques and suggestions for the ICSID system.

I. THE CURRENT ICSID CRISIS

A. *The History of ICSID*

Member governments of the World Bank ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in 1965 and established the International Centre for the Settlement of Investment Disputes (“ICSID”) to create an international structure for peaceably resolving investment disputes.² Even as governments have tried to create a multilateral system, the bilateral investment treaty (“BIT”) has thrived.³

BITs were originally designed to provide for equal treatment of foreign investment—that foreign investors would have the same laws and same rights as the host country investors.⁴ BITs also now provide for arbitration under the rules of ICSID, the additional facility rules of ICSID⁵ or the United Nations Commission for International Trade Law (“UNCITRAL”).⁶ Arbitration proponents urge that arbitration has played a significant role in easing global commerce by: (1) enabling states and investors to resolve disputes and maintain relationships; (2) providing appropriate remedies to harmed

Application for Annulment of the Argentine Republic (Sept. 25, 2007), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4; *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award (June 29, 2010), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8.

² See *ICSID Convention, Regulations and Rules*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES 5 (April 2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH J. INT’L L. 697, 714-19 (1999) (outlining a description of the investor arbitration regime).

³ Estimates are that over 3000 BITs were signed between 1959 and 2009. See Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 428 (2010).

⁴ Here, we are referencing the history and intent of BITs, not more recent jurisprudence in which the argument has been made that foreign investors actually are treated *better* than domestic investors, due to the right of recourse made available by BITs.

⁵ If only one state is a member of ICSID, the additional facility rules are also available.

⁶ See *Investor-State Disputes: Prevention and Alternatives to Arbitration* 3, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (U.N. Conference on Trade and Dev. ed., 2010) [hereinafter *Investor-State Disputes*], *available at* http://www.unctad.org/en/docs/diaeia200911_en.pdf; see also Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1, n. 1 (1986), cited in Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1345, n. 32 (2006) [hereinafter *Transparency*].

investors; and (3) attracting foreign investment to those states that adhere to the investment treaty regime.⁷

Under ICSID arbitration rules, an investor can bring an arbitration claim against a state for a violation of the operative BIT. For a number of years after its creation, “ICSID registered less than a handful of cases per year.”⁸ In the last decade, however, the number of new cases has risen and “in 2011 alone, thirty-eight new cases were registered with ICSID.”⁹ This increase in cases and awards has already increased scrutiny of ICSID.¹⁰ Perhaps as a result of the increased caseload,¹¹ or the heavy costs of investment treaty arbitration¹² or the magnitude of some arbitral awards, stakeholders are now raising multiple concerns.¹³

⁷ See Investor-State Disputes, *supra* note 6, at 3 (“Host states wishing to attract and promote foreign investment often seek to offer predictability to foreign investors by favouring international arbitration as the means for investors to deal with a dispute.”). *But see* The Role of International Investment Agreements in Attracting Foreign Direct Investment in Developing Countries, xi, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (U.N. Conference on Trade and Dev. ed., 2009) (“IIAs are part of the policy framework for foreign investment . . . IIAs alone can never be a sufficient policy instrument to attract FDI [foreign direct investment]”), available at http://www.unctad.org/en/docs/diaeia20095_en.pdf; see also Jason Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397, 438 (2011) (reporting research suggesting that a nation’s entry into a BIT does not tend to influence companies’ decisions to invest); Susan Rose-Ackerman & Jennifer L. Tobin, *Do BITs Benefit Developing Countries?*, in THE FUTURE OF INVESTMENT ARBITRATION 131, 134-136 (Catherine A. Rogers & Roger P. Alford eds., 2009) (concluding that countries with poor investment environments do not benefit significantly from entering into BITs); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 13-23 (2007) (surveying empirical research regarding investment arbitration).

⁸ Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1110, 1173 (2012).

⁹ *Id.*

¹⁰ See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD STATISTICS 13 (2011), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English21>; see also Jeswald W. Salacuse, *Is There A Better Way? Alternative Methods of Treaty Based Investor-State Dispute Resolution*, 31 FORDHAM INT’L L.J. 138, 143-47 (2007).

¹¹ Significant surges in other contexts have led to similar perceptions of crisis and the need for change. See e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1107 (1996) (noting that surge in asbestos cases may have contributed to a sense that courts were overburdened); Scott Sigmund Gartner & Gary M. Segura, *War, Casualties, and Public Opinion*, 42 J. CONFLICT RESOL. 278, 296-99 (1998) (observing that sudden surges in key indicators – e.g., war deaths – cause change in institutional strategies).

¹² See Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 782-90 (2011) (reporting regarding the costs of investment treaty arbitration); Catherine Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L. J. 341, 357 (2007) (observing that while foreign investors have typically hired major international law firms to represent them in investor-state arbitration, many developing countries have not, due to the expense associated with such representation or for political reasons).

¹³ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 29 (2010); Winslow Christian, Curtis E. von Kann, James M Gaitis & June R. Lehrman, *Introduction*, in COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 1-5 (Curtis E. von Kann et al. eds., 2d ed. 2010); Salacuse, *supra* note 10.

B. *The Annulment Procedure of ICSID*

The annulment procedure is particularly of note in the recent crisis of confidence with ICSID.¹⁴ Parties who are unhappy with the tribunal's decision can "appeal" or ask for a review only under the annulment proceedings set forth in the ICSID convention.¹⁵ An annulment request is heard by an ICSID annulment committee. As opposed to the original arbitration tribunal where each party gets to select its own party arbitrator who then decide on a third neutral arbitrator, this committee is selected by ICSID.¹⁶ ICSID Convention Article 52(1) sets out the grounds for annulment of an ICSID award: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.¹⁷ Thus, the scope of the ICSID annulment committee is ostensibly limited and their decisions are supposed to be solely based off of procedural errors as oppose to substantive errors. Whether ICSID annulment committees have gone beyond their scope or have been inconsistent has already been the subject of much criticism in the past.¹⁸ But, the latest series of cases is even more striking.

C. *The Argentina Cases*

The cases filed against Argentina illustrate the current crisis with ICSID's awards and annulment procedure. In the early 1990s, many foreign corporations invested in Argentinian companies as Argentina promoted privatization. As part of these investments, Argentina agreed to stabilize the peso against the dollar by collecting tariffs in dollars and readjusting the tariff rate twice a year. Foreign investors benefitted economically from this assurance of a stable tariff. But between 1999 and 2002, "Argentina experienced an economic meltdown of cataclysmic proportion, precipitated

¹⁴ Although this article focuses on the Argentina cases, ICSID has faced other challenges regarding the annulment procedures. In response to a request from the Philippines, ICSID recently published a *Background Paper on Annulment for the Administrative Council of ICSID* (August 10, 2012) outlining the history of annulment procedures and decisions. See also David Caron, *Framing the Work of ICSID Annulment Committees*, 6 *WORLD ARB. & MEDIATION REV.* 173 (2012), available at http://works.bepress.com/david_caron/134/ (reviewing the history of annulments at ICSID and the percentage of decisions annulled in whole or in part).

¹⁵ See David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 *ICSID FOREIGN INVESTMENT L. J.* 21 (1992) (explaining the importance differences between a judicial appeal as we might think of it and the annulment procedure for ICSID.)

¹⁶ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, March 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

¹⁷ *Id.* at art. 52(1); see also W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 *Duke L.J.* 739, 754 (1989).

¹⁸ See Gloria Maria Alvarez, *The ICSID Procedure: Mind the Gap*, 10 *REVISTA E-MERCATORIA* 164, 181-90 (2011), available at <http://ssrn.com/abstract=1987236> (discussing the history of ICSID annulment committees); Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 *U.C. DAVIS J. INT'L L. & POL'Y* 47, 59-70 (2005). See also Reisman, *supra* note 17, at 785-888.

by an exploding budget deficit, a balance of payments crisis, and mounting foreign debt.”¹⁹ In response to the crisis, the government of Argentina passed an emergency law suspending both the favorable conversion ratio and the semi-annual adjustments. Specifically, Argentina devalued the peso significantly, by “terminating the currency board that pegged the peso to the U.S. dollar, the pesification of all financial obligations, and the effective freezing of all bank accounts.”²⁰ Investors argued that Argentina “violated several obligations under the BIT, including obligations to accord fair and equitable treatment to investments and to honor commitments made to investors.”²¹

When investors sued Argentina, Argentina argued that it was not liable as the global economic downturn permitted Argentina to use emergency clauses under the BIT agreement. Even though these emergency clauses are available in most BITs, this was the first time a State pleaded the defense.²² Specifically, as these cases evolved, Argentina made a two-pronged argument for necessity: first, that its response to the crisis was protected under the BIT’s non-precluded measures (NPM). The NPM clause is a standard provision in BITs that exempt state action “when it is necessary for the maintenance of public order.”²³ This clause is not further clarified or interpreted in the BIT. A second prong—and one used by arbitral tribunals to interpret the NPM clause as well—is the necessity defense under customary international law as reflected in Article 25 of the International Law Commission’s Article on State Responsibility.²⁴ The necessity clause is an “exceptional clause available to a state if it is the only means for the State to safeguard an essential interest against a grave and imminent peril.”²⁵ The necessity defense is not available where there exists any other means, including those means which are more costly or less convenient.²⁶ Thus, the question for the arbitral panels is whether Argentina took measures that infringed more on the investor’s rights than necessary for Argentina to achieve its goals.²⁷ While these prongs are ostensibly separate standards—one under treaty law and one under customary law—some tribunals have conflated the interpretations.

A review of each of the cases involving U.S. investors²⁸ and their annulment committee decisions demonstrates the confusion in both applying the original legal

¹⁹ Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 69 (2010).

²⁰ William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 290 (2010). See also David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT’L L. & BUS. 383, 387 (2010).

²¹ Ten Cate, *supra* note 8, at 1175.

²² Sweet, *supra* note 19, at 70.

²³ Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993).

²⁴ Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10.

²⁵ Schneiderman, *supra* note 20, at 388.

²⁶ *Id.*

²⁷ Sweet, *supra* note 19, at 70; Michael Wilson, Note, *The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System*, 43 U. MIAMI INTER-AM. L. REV. 347, 351 (2012) (quoting the ILC and also calling this the “only way” provision).

²⁸ This article focuses on the U.S. investors for clarity as all five cases were heard under the identical BIT. Nonetheless, cases involving other countries’ BIT’s were also occurring and provide similar lessons. See Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-*

standards as well as the proper standard of review by the annulment committee. ICSID tribunals issued five awards –*CMS*, *Enron*, *Sempra*, *LG&E*, and *Continental Casualty*. In three of the five, the arbitral tribunals ordered Argentina to pay more than \$100 million each in damages.²⁹ The first case was *CMS v. Argentina* in 2005 in which the tribunal awarded CMS \$133.2 million. In addition, Argentina was to transfer ownership shares for an additional sum of \$2,148,000. In the next case in May 2007, the *Sempra* tribunal ordered Argentina to pay the claimant compensation in the amount of \$128.3 million. Finally, in September 2007, in *Enron v. Argentina*, the tribunal awarded the claimants compensation in the amount of \$106.2 million.³⁰

The *CMS* tribunal interpreted the BIT emergency clause Article XI through the lens of customary international law on necessity. It found that while the BIT should take precedence over more general rules of customary international law, Article XI lacked sufficient clarity to be evaluated independently. CMS had relied on Argentina's business and legal environment in the gas sector for purposes of investment. Thus, the *CMS* tribunal found that by altering the business and legal environment in the gas sector, Argentina breached its obligation of according fair and equitable treatment to foreign investors. Argentina did not provide CMS with a stable and predictable investment climate required under the BIT.³¹ The *CMS* tribunal came under sustained attack for its application of the necessity defense and its finding that if there were any other option available to the government, it could not claim a defense of necessity.³²

The *Enron* tribunal found that Argentina could not claim that it could escape the terms of its contract with Enron by arguing that its actions against the company were made out of necessity (as understood in customary international law). The tribunal explained that in order to argue necessity under customary international law, Argentina's decision to restructure the terms of its contract with Enron in the wake of the late 1990s financial crisis would have to have been the "only way for the State to safeguard an essential interest against a grave and imminent peril."³³ According to the tribunal, Argentina did not satisfy this condition, as there were other approaches available that the

Expropriation Compensation Model During Financial Crises, 44 GEO. WASH. INT'L L. REV 473, 479 (2012) (outlining the Argentine cases and the standard of damages used in each case).

²⁹ See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award 139 para.2-4 (May 12, 2005), 44 ILM 1205 (2005); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 47 (June 29, 2010), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8; *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 140 (Sept. 5, 2008), available at <http://italaw.com/sites/default/files/case-documents/ita0228.pdf>; *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, 169 (July 30, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf>.

³⁰ *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentina Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, 1, 19 (July 30, 2010), available at <http://italaw.com/documents/EnronAnnulmentDecision.pdf>.

³¹ *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, Award at para. 126, 275 & 281.

³² Schneiderman, *supra* note 20, at 390 n. 53 (citing August Reinisch, *Necessity in International Investment Arbitration-- An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*, 8 J. WORLD INVESTMENT & TRADE 191, 200 (2007) (making the necessity defense "practically unavailable").

³³ *Id.*

country could have taken to address its economic crisis. In the words of one commentator, the *Enron* tribunal rejected the necessity defense, “paying only lip service to the economic hardship experienced by ordinary Argentinians.”³⁴

These three cases ended up being the high water mark for investor protection. Annulment committees and subsequent arbitral tribunals started to find in favor of Argentina.³⁵ First, the tribunal in *LG&E* in June 2007 found that Argentina was excused for paying damages during the State of Necessity (approximately eighteen months) as contemplated by the emergency clauses under the BIT. Damages of \$57 million were awarded only for the period after 2003-2005.³⁶ Next, the annulment committee for *CMS v. Argentina* in September 2007 started to discuss the problems in the legal reasoning in the arbitral award for CMS. The annulment committee declined to annul the tribunal's award in full, noting that its “limited jurisdiction” prevented it from annulling the award. However, the committee stated that “the Tribunal made a manifest error of law [by] simply assuming that Article XI and Article 25 are on the same footing.”³⁷ Further, the committee declined to find a failure to state reasons on this particular issue under Article 52(1)(e). It did note that the tribunal's analysis on Article XI and Article 25, “should certainly have been more explicit” in its discussion.³⁸ Although the annulment committee let the award stand, this critique effectively annulled it. As one commentator noted, “the decision effectively tainted the legitimacy of the *CMS* tribunal award, making it politically unappealing, and thus unlikely, that Argentina would comply with the \$133.2 million judgment.”³⁹

Then, in *Continental Casualty v. The Argentine Republic*,⁴⁰ decided in 2008, Argentina was ordered to pay (only) \$2.8 million plus interest for a relatively minor transgression of the BIT. By 2010, the tide had definitely turned. In the annulment decision for *Sempra v. Argentina*,⁴¹ the committee annulled the award in full because the

³⁴ Schneiderman, *supra* note 20, at 391-92.

³⁵ Wilson, *supra* note 27, at 356; *see also* Schneiderman, *supra* note, 20 at 388.

³⁶ *See, e.g.*, *LG&E Energy Corp., LG&E Capital Corp. and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1. Although an annulment request was filed in 2008, the parties agreed to suspend the proceeding which is its current status.

³⁷ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Application for Annulment (Sept. 25, 2007), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4. The history of the drafting of ICSID demonstrates that this interpretation would be appropriate if the states had understood these laws to be different. The Background Paper on Annulment for the Administrative Council of ICSID notes that in Legal Committee meetings held in 1964, Chairman Aron Broches confirmed that, “failure to apply to proper law could amount to an excess of power if the parties had agreed on an applicable law.” ICSID Report at para. 26, p. 10.

³⁸ *Id.* (Stating that the “Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal... Although applying [Article XI] cryptically and defectively, it applied it. There is accordingly no manifest excess of powers”).

³⁹ Dohyun Kim, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away From an Annulment-Based System*, 86 N.Y.U. L. REV. 242, 273 (2011).

⁴⁰ *See generally*, *Cont'l Cas. Co. v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (Sept. 16, 2011), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC291_En&caseId=C13.

⁴¹ *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Annulment (June 29, 2010), *available at*

tribunal manifestly exceeded its power when it failed to apply Article XI of the US-Argentina BIT. In doing so, the committee said that the tribunal “failed altogether to apply the applicable law” and failed to enter into a discussion of where to draw the line between annulable and non-annulable errors of law.⁴² The *Sempra* committee used the same rationale as the *CMS* committee and affirmed that, generally, treaty law is superior to customary law. Additionally, the committee noted that Article XI and the necessity defense serve different purposes. Article XI defines the boundaries for when actions under the treaty would not be invalid. The necessity defense only applies when a party actually commits an infringement. Lastly, the necessity defense and Article XI have material differences, so the necessity defense should not be used to interpret Article XI. As such, the *Sempra* committee expressly held that the tribunal made a fundamental error when identifying and applying the correct law, which was a manifest excess of its powers and the entirety of the award was annulled.⁴³ The *Enron* award was also annulled and the minimal award for *Continental Casualty* was sustained all along similar lines.

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8 [hereinafter *Sempra* Annulment].

⁴² *Id.* at para. 165.

⁴³ *Id.* at para. 208-09.

Case	CMS	Enron	LG & E	CMS Annulment	Sempra	Continental Casualty	Sempra Annulment	Enron Annulment	Continental Casualty Annulment
Date	(May 2005)	(May 2007)	(June, 2007)	(Sept 25, 2007)	(Sept 28, 2007)	(Sept 2008)	(June 2010)	(July 2010)	(Sept 2011)
Holding	\$133.2M	\$106.2M	\$57.4M	\$132.3M Stands BUT...	\$128.3M	\$2.8M	None Annulled	None Annulled	None Upheld
Arbitrators	Vicuna Lalonde Rezek	Vicuna Van den Berg Tschanz	De Mackelt Rezek Van den Berg	Guillaume Elaraby Crawford	Vicuna Lalonde Rico	Sacerdoti Veeder Nader	Soderland Edward Jecovides	Griffith Robinson Tresselt	Griffith Ajibola Soderlund
Reasoning	BIT assessed using narrow necessity interpretation in international law	Argentina actions were not "only way" to safeguard against peril	Argentina excused from damages for period of State of Necessity; damages assessed on lost dividends	Manifest error of law in interpreting BIT and Art 25 as same--but can't overturn	BIT too vague to assess independently of narrow necessity interpretation in international law; not "only way" to safeguard	Government actions necessary in economic crisis; but restructuring of t-bills violate	Tribunal's award was "manifest excess of powers;" failed to apply applicable law	Annulled on "failure to apply the proper law"	Upheld--tribunal did not exceed powers

One of the key issues stemming from the tide of cases out of the Argentinean crisis is the lack of consistency in the holdings.⁴⁴ The facts are virtually the same in all cases. They arise from the same economic crisis and the same governmental response. It is perhaps understandable that some variation might arise out of different BIT agreements where the clauses for different countries could vary slightly.⁴⁵ Yet in the Argentina cases, the sheer number of cases has highlighted this concern with inconsistency more clearly. The conflicting outcomes thus far have obviously not alleviated this problem. While ICSID has faced this critique before in terms of annulment gone amuck,⁴⁶ the concern with overreaching or under-reaching by the annulment committees is at a peak.

Stemming from the confusion and unhappiness with the awards against Argentina and other Latin American countries, states in that region have reacted strongly. The growing resistance to ICSID from Latin American countries focuses on four primary arguments: (i) ICSID awards are not subject to appeal [just annulment committees]; (ii) the fact that the vast majority of ICSID awards have been decided in favor of the private investors shows that the system lacks neutrality and impartiality; (iii) only companies may sue at this forum [states may not bring claims—they can only defend them]; and (iv) the cost to litigate these claims is very high.⁴⁷ Bolivia and Ecuador have withdrawn in whole or in part from the ICSID,⁴⁸ Argentina has not paid any award against it,⁴⁹ and unrest continues.⁵⁰ Such opposition and the implementation of threats of non-compliance

⁴⁴ See Ten Cate, *supra* note 8, at 1180; see also Irene Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration* 51 COLUM. J. OF TRANSNAT'L L. 418, 427-435 (2013).

⁴⁵ This is at least one of the explanations given for the different outcomes in the Lauder cases where the outcomes varied. In *Lauder v. Czech Republic* under the US-Czech BIT, with Lauder in an individual capacity, and under ICSID, the tribunal found that the Czech Republic had not expropriated Lauder's media licenses. In *CME v. Czech Republic* under the Netherlands-Czech BIT, with Lauder represented through his parent company, and under the UNCITRAL rules, the arbitral tribunal found that the Czech Republic had violated the BIT and awarded damages of \$270 million plus interest. Compare Franck, *supra* note 18, at 60-61 (discussing the Lauder awards as examples of inconsistency), with Jan Paulsson, *Avoiding Unintended Consequences*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 241, 249 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008) (arguing that the different outcomes can be attributed to the tribunals' assessment of the facts, and that the awards are not inconsistent in a meaningful sense because "[t]heir understanding of the relevant legal standards . . . were perfectly congruent").

⁴⁶ See Reisman, *supra* note 17.

⁴⁷ Ignacio A. Vincentelli, *The Uncertain Future of ICSID In Latin America*, 16 LAW & BUS. REV. AM. 409, 422-23 (2010).

⁴⁸ *Id.* at 425; see also Nicolle E. Kownacki, *Prospects for ICSID Arbitration in Post-Denunciation Countries: An 'Updated' Approach*, 15 UCLA J. INT'L L. & FOREIGN AFF. 529 (2010) (outlined what can happen in Bolivia and Ecuador under ICSID in the future.)

⁴⁹ Argentina reportedly took the position that CMS had to seek enforcement in the Argentine courts, which CMS refused. Luke E. Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, LAW.COM (June 25, 2009), <http://justinvestment.org/2009/07/argentine-crisis-arbitration-awards-pile-up-but-investors-still-wait-for-a-payout>. CMS eventually transferred the award to Blue Ridge Investments, a subsidiary of Bank of America. Argentina's failure to pay the CMS award and a second final ICSID award in favor of another American investor, Azurix Corp., has now resulted in political sanctions. On March 26, 2012, President Barack Obama announced a suspension of Argentina's trade benefits under the U.S. Generalized System of Preferences program due to its failure to pay the awards. Doug Palmer, *Obama Says to Suspend Trade Benefits for Argentina*, REUTERS.COM (Mar. 26, 2012), <http://www.reuters.com/article/2012/03/26/us-usa-argentina-trade-idUSBRE82P0QX20120326>.

⁵⁰ Vincentelli, *supra* note 47; Leah D. Harhay, *Investment Arbitration in 2012: A Look to Diversity and Consistency*, 18 SW. J. INT'L L. 89, 89-90 (2011); Investor-State Disputes, *supra* note 6, at 15-16; Franck,

have the potential to inject substantial uncertainty about the sustainability of the current system of international investment and trade. Rebuilding the legitimacy of the ICSID system is crucial for the long term prospects of the foreign investment system.⁵¹

II. USING THEORIES OF JUDICIAL REVIEW TO UNDERSTAND THE ICSID ANNULMENT CRISIS

Adjudicatory structures generally include an appeals function.⁵² In understanding the choices that arbitration makes in general, and ICSID in particular, to balance finality as a value against that of accuracy,⁵³ we need to understand what values an appeals system can promote. The appellate review function has been characterized as “derivative dispute resolution” in which courts have the opportunity to correct an error in the lower courts.⁵⁴ Furthermore, the measures of success outlined in dispute system design theory discussed further later in the article—legitimacy and sustainability—equally apply to an adjudicatory system like that of ICSID. As Judge Posner put it:

[M]any of the decisions that constitute the output of a court system cannot be shown to be either ‘good’ or ‘bad’, whether in terms of consequences or of other criteria, so it is natural to ask whether there are grounds for confidence in the design of the institution and in the competence and integrity of the judges who operate it.⁵⁵

Under derivative dispute resolution theory discussed above, this secondary dispute—as to whether the lower court got it right—is a derivative dispute between the parties that is linked but not exactly the same as the primary dispute between the parties. When courts address this derivative dispute, courts are tasked with potentially refining the law and reviewing the lower court for error (what has also been called the “guidance”

supra note 7, at 64-65; *see also* Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims, U.N. Conference on Trade and Dev. IIA Issues Note No. 2, at 4-5 U.N. Doc. UNCTAD/WEB/DIAE/IIA/2010/2 (Dec. 2010) (describing withdrawal of Bolivia and Ecuador from ICSID and Ecuador’s termination of several bilateral investment treaties), *available at* http://www.unctad.org/en/docs/webdiaeia20106_en.pdf.

⁵¹ Franck, *supra* note 1, at 844-849 (outlining the parameters of the current crisis.) *See, e.g.*, ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM XIV-XV, 3-4 (1997) (regarding non-compliance with arbitral awards arising out of the GATT and subsequent replacement with WTO system). Threats of non-compliance certainly are not new, or even unique to international arbitration. *See* *Marbury v. Madison*, 5 U.S. 137 (1803) (In the U.S., the famous case of *Marbury v. Madison* involved a freshly-minted Supreme Court similarly struggling to establish its legal and political authority while also acknowledging its dependence on the enforcement power wielded by the executive branch of government).

⁵² *See generally* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C.L. REV. 411, 428-429 (1987).

⁵³ Thomas W. Walsh, Note, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality*, 24 BERKELEY J. INT’L L. 444 (2006); Erin Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7 PEPP. DISP. RESOL. L.J. 269 (2007).

⁵⁴ Chad M. Oldfather, *Error Correction*, 85 IND. L. J. 49 (2010).

⁵⁵ *Id.* at 85 (quoting RICHARD A. POSNER, HOW JUDGES THINK 3(2008)).

function versus the “correctness” function).⁵⁶ Scholars have debated extensively the nature and proper bounds of the mechanisms by which appellate courts create and refine law.⁵⁷ For our purposes here, we need not address this issue as annulment committees are clearly *not* supposed to create law in any way.⁵⁸ Yet the second function of appeals—that of error correction—is something that arguably applies in the arbitration context.⁵⁹ Professor Oldfather outlines that error correction generally occurs in one of four (often linked) categories: correcting injustice; correcting mistakes; promoting uniform law application; and reviewing the lower court processes.⁶⁰ These four categories can be used to analyze the Argentina cases and help shed light on the frustration and concern regarding these awards and decisions.

A. *Correcting Injustice*

A common theory of how appellate courts operate is that appellate courts ensure that trial level courts do not commit injustice and that the result at the trial level is a “fair” one. Under this theory, appellate courts focus on the correctness of the outcome itself—did the “right” party prevail? Even if one assumes the appellate court finds itself constrained to refrain from *de novo* review,⁶¹ the court’s focus on justice could affect the implementation of “procedural” error. In other words, the court might use a lower standard of review for outcomes it agreed with and a higher standard of review when it thought that the correct party prevailed.⁶² Similarly, the “harmless error” standard could shift. For an outcome with which the appellate court agreed, even a procedural error could be categorized as “harmless” so that the substantive outcome would stand.

In ICSID, the annulment committee is not supposed to examine the result of the arbitral tribunal. No standard outlined in ICSID refers to the correctness or fairness of the outcome. And yet, arguably, the use of this standard is exactly from where the current crisis stems. Commentators who argue that ICSID is biased against the state,⁶³ or that investors should share in the pain of Argentina’s crisis believe that the tribunals finding against Argentina must be reviewed for fairness.⁶⁴ Furthermore, it appears that

⁵⁶ David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 302 (1984).

⁵⁷ See, e.g., Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002); see also Oldfather, *supra* note 54 at 50.

⁵⁸ Alvarez, *supra* note 18 (annulment decisions are supposed to concern procedural legitimacy while an appeal decision also reviews the substantive accuracy). But see S. Bhushan, *Re-Discovering the Role of the Annulment Committee in Shaping International Investment Law Jurisprudence*, NALSAR University of Law, *working paper* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027781 (arguing that the ICSID annulment committees shape international investment law).

⁵⁹ Anna-Rose Mathieson & Samuel R. Gross, *Review for Error*, 2 LAW PROBABILITY & RISK 259 (2003) (reviewing the theory versus practice of error correction at the appellate level in the U.S. and our ambivalence about the importance of accuracy.).

⁶⁰ Oldfather, *supra* note 54, at 59-62.

⁶¹ Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308 (2009) (explaining the tension between the theory of universal de novo review and the reality of appellate deference and avoidance).

⁶² Oldfather, *supra* note 54, at 59.

⁶³ Schneiderman, *supra* note 20, at 387.

⁶⁴ *Id.*

the harsh and public response to earlier panel awards like *CMS* or *Enron* affected how the annulment committees for both *Continental* as well as *Sempra* used the nominally neutral procedural review to arrive at a more just result.⁶⁵ Not surprisingly, from the arbitration purists and investor-side counsel, this latter legal analysis has come under grave attack.⁶⁶

B. Correcting Legal and Factual Mistakes

A second, and more limited, theory of how appellate courts act is one in which the appellate court reviews the lower court only to correct errors made by mistake. As Professor Oldfather notes, this narrower focus means that the appellate court will potentially focus on particular issues rather than the entire case result.⁶⁷ For example, if the wrong evidence is admitted, the appellate court would first examine whether there was a mistake in the legal standard applied and then, second, whether this affected the verdict. Of course, as Professor Oldfather notes, this standard could also be relatively malleable to achieve the result desired at the lower court.

The ICSID standard of annulment most closely linked to this theory of error correction would either be that the tribunal exceeded its powers (by not applying the correct legal standard)⁶⁸ or failed to state its reasons⁶⁹ (and therefore there is no way to confirm that the legal analysis was not mistaken).⁷⁰ Interestingly, and similar to domestic standards of arbitration annulment,⁷¹ factual mistake is not sufficient to annul an arbitration award.

The annulment committees that appear to be using this standard were the *Enron* and *Sempra* committees, which found that the lack of application of the BIT emergency defense—separate from the necessity defense under customary international law—was a

⁶⁵ *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 74 (June 10, 2010). *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, (Sept. 5, 2008).

⁶⁶ Burke-White & von Staden, *supra* note 20, at 297-302.

⁶⁷ Oldfather, *supra* note 54, at 59.

⁶⁸ *Sempra Energy Int'l*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, at 218.

⁶⁹ *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, 220, 405 (July 30, 2010).

⁷⁰ Many scholars have argued that the process of writing the opinion and putting ones reasoning into writing is a crucial activity of judges that also improves judicial reasoning. *See, e.g.*, Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 780 (2006); Mary M. Ross, *Reflection on Appellate Courts: An Appellate Advocate's Thoughts for Judges*, 8 J. APP. PRAC. & PROCESS 355, 365 (2006) (arguing that judges have a responsibility to advocates that includes acknowledging and reflecting their arguments in the opinion).

⁷¹ *See* 9 U.S.C. § 10(a) (2006); UNIF. ARB. ACT: VACATING AWARDS § 23 (2000); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) (“factual or legal errors by arbitrators—even clear or gross errors—do not authorize courts to annul awards”).

manifest excess of powers on the part of the tribunal.⁷² Even the *CMS* annulment committee, which upheld the arbitral award, sharply criticized the *CMS* panel's decision.

Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underline by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate. . . .⁷³

Of course, this willingness to criticize, even when upholding the award, has come under much attack. First, it makes it highly unlikely that the Argentinean government will ever actually pay an award that the ICSID annulment committee has said is riddled with errors.⁷⁴ Second, this restraint in not overturning the arbitral award itself is really not that restrained at all given the extensive dicta in the annulment committee's opinion.⁷⁵ As Professor Oldfather hypothesized appellate courts might do, the annulment committees expansively used their procedural rules in order to correct what it saw as a significant and serious legal error.⁷⁶ This expansive use has also come under much attack.⁷⁷

C. *Ensuring Uniform Application of the Law*

A third function of appellate courts could be seen as ensuring that lower courts apply the law uniformly—that all lower courts interpret the law similarly and that all cases are being measured against the same law. Of course, there are different parties and different facts in each case so the goal for appellate courts is that “courts strive to achieve uniformity with respect to treatment of the significant, rule-triggering facts. . . .”⁷⁸

In contrast, uniformity is not written into any standard of review for arbitration. Inconsistency is seen as a distinct possibility in arbitration with the ability of individual arbitrators to apply the law to each particular set of facts unconcerned with uniformity per se.⁷⁹ Error in the application of law, as we have seen above, is not a ground for

⁷² *Enron Creditors Recovery Corp.*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, at 349; *Sempra Energy Int'l*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, at 74. See generally Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 PENN ST. Y.B. ARB. & MEDIATION 1 (2013) (discussing the manifest excess of powers of tribunals).

⁷³ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Application for Annulment, 158 (Sept. 25, 2007).

⁷⁴ Caron, *supra* note 15, at n.18.

⁷⁵ Caron, *supra* note 15, at 185.

⁷⁶ Oldfather, *supra* note 54, at 84-85.

⁷⁷ Caron, *supra* note 15, at 187-89 (outlining several different theories as to why annulment committees have tendencies to go beyond their narrow procedural limits of review).

⁷⁸ Oldfather, *supra* note 54, at 61.

⁷⁹ Franck, *supra* note 18, at 68. Irene Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. OF TRANSNAT'L L. 418, 447 (2013) (discussing the benefits and costs of consistency in ICSID awards.)

annulment. Similarly, lack of adherence to a uniform standard (should there even be one) would also not be grounds for annulment.⁸⁰

And yet much of the concern and criticism in the Argentinean crisis is located in this function—different arbitral tribunals have applied the same law differently and even the annulment committees have interpreted the law differently. In fact, the *Enron* annulment committee stressed that it fell to the *tribunals* to develop a consistent body of law:

[T]he role of an *ad hoc* committee is a limited one, re-stricted to assessing the legitimacy of the award and not its correctness The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of “*une jurisprudence constante*.”⁸¹

With the same facts precipitating over 40 arbitration cases against Argentina, the lack of uniform law or application is starker than might otherwise be the case in typical arbitration scenarios.⁸² This lack of consistency undermines the overall legitimacy of the ICSID system by forcing one to question either the early tribunals who found Argentina liable or the latter annulment committees who found the original reasoning incorrect.⁸³

D. Review of Lower-Court Processes

The last function of appellate courts in error correction is the one focused on procedure.⁸⁴ The appellate court examines the procedural choices made at the lower court level—witnesses, evidence, etc.—and does not examine the substantive ruling. This last type of review is commonly called procedural review.

It is here that arbitration annulment standards typically focus and ICSID is no exception. The query of whether the tribunal is properly constituted, whether the arbitrators are corrupt, and whether there has been a departure from a procedural rule are all specific standards that fit within the review of procedure.⁸⁵ None of the Argentina

⁸⁰ Kim, *supra* note 39, at 261 (arguing that the annulment committee’s procedures require the committee to refrain from a substantive review of the law and, therefore, limit the ability to provide for coherent and consistent law).

⁸¹ *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, 65 (July 30, 2010).

⁸² Caron, *supra* note 15 at 189, 191 (outlining why the annulment committees concern with consistency and accuracy might explain their willingness to review the substantive merits of the claims).

⁸³ Kim, *supra* note 39, at 255-56 (outlining social legitimacy as decisions that are perceived as justified and that states accept are justified). For an argument as to why inconsistency in the Argentina cases can be valued, see Ten Cate, *supra* note 79, at 469-471.

⁸⁴ Oldfather, *supra* note 54, 61-63.

⁸⁵ Burke-White & von Staden, *supra* note 20, at 297-301. This is not to ignore a separate concern in terms of the composition of the tribunals and committees. See Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer*

cases have been annulled using these standards. Arguably, even the two other guidelines on manifestly exceeding its powers and requirement to state the reasons for the award are procedural standards. However, the ICSID annulment committees have used these latter two standards, as explained above, to engage in a more substantive review of the case.

III. USING DISPUTE SYSTEM DESIGN TO MOVE FORWARD

The theories behind dispute system design are a combination of conflict theory, organizational behavior, and alternative dispute resolution that have now been applied to everything from creating in-house corporate dispute resolution systems to mass tort claims to human rights courts.⁸⁶ Dispute system design theorists outline the qualities that

Lemon Laws, 46 LAW & SOC'Y REV. 463, 474-75(2012). As many have argued, the arbitrators in the ICSID context are a narrow group of experts, grounded in commercial law, with little appreciation for the nuances of public or international law. In a study of the actual arbitrators serving on the tribunals and panels, David Schneiderman examined four different theories based in political science literature to see if any of these theories could explain the otherwise conflicting and contradictory decisions. Comparing the social background model (decisions are based on where and how adjudicators grow up and receive their professional training); the attitudinal model (decisions are based on the political affiliation of the adjudicator); the strategic model (decisions are based on goals bounded by the institution and the behavior of other adjudicators); and new institutionalism (decisions are both enabled and constrained by institutions, including other actors, legal norms, and expectations). Schneiderman argues that this last theory can explain how the investment regime's "structural tilt ensures that arbitral choices will be more likely to favor investment promotion over the interests of state parties who wish to pursue countervailing social policy initiatives. . . ." Schneiderman, *supra* note 20, at 410-11. As he notes, the arbitrators are drawn from the world of international commercial arbitration into investor-state arbitration. See Harhay, *supra* note 50, at 93-93 (outlining that of the four Argentina cases—CMS, Enron, Sempra and LG&E—three arbitrators (Orrego Vicuna, Mark Lalone, and Albert van den Berg) each sat on two of them). When the decisions then differed in result, confusion about this was even more problematic. See also Franck, *supra* note 1, at 861-64 (arguing that ICSID is not significantly different than other arbitral forums concerning energy or Latin America). The procedural differences—where commercial arbitration is conducted privately, ad hoc, with little national oversight or publicity—would be quite different from the pressures and the reality of the Argentinean economic crisis. Schneiderman hypothesizes that the arbitration bar's very defensiveness to the attacks after the Argentina decisions reflects their unawareness of the complex and public situation in which they found themselves. Schneiderman, *supra* note 20, at 412. Similarly, the structure of ICSID itself could perpetuate this anti-public law bias. See Harhay, *supra* note 50, at 90-92; see also Wilson, *supra* note 27, at 361-63.

⁸⁶ First popularized in the book, *Getting Disputes Resolved* in 1988, dispute system design presents a practical and thoughtful approach to organizational disputes that has now been through several evolutions. See generally, WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1st ed.1988). Originally, designers focused on structures that would require disputants to move up a disputing pyramid—that is resolving most disputes by using interests, then relying on rights, then moving to assertions of power only for the most intransigent and difficult disputes. *Id.* at 42. (In their book, Ury, Brett, and Goldberg outline six key principles for designing a presumptively interests-oriented dispute resolution system: (1) put the focus on interests; (2) build in opportunities to return (or "loop-back") to negotiations ("Loop-backs" are defined as the opportunity to continue to move around in the process choices. So, for example, the parties should be able to go back and negotiate at *any* stage outlined in a dispute resolution process and not be limited to a "negotiation" stage that occurs early on. Similarly, the term "loop forward," developed in later dispute system design literature, also means that parties can choose to jump around among the process choices choosing to engage, for example, in fact-finding before negotiation.) (3) provide low-cost rights and power backups to interest-based processes; (4) build in consultation before creating the dispute system and feedback after the implementation and use of the system; (5) arrange procedures in a low-to-high-cost sequence; and (6) provide the necessary

usually distinguish effective systems: stakeholders have participated in designing them, the systems are fluid and flexible, and the system is transparent and accountable.⁸⁷ Organizations can gauge their success by measuring efficiency, effectiveness, and satisfaction.⁸⁸

The initial focus of dispute system design theory—on how to establish systems with multiple process options—will not be addressed in this Article. I have elsewhere discussed the different process options that could exist in the investor treaty context.⁸⁹ Instead, we will use the focus on how different dispute system design theorists have measured success and undertake analysis using their framework. Susskind, for example, highlights fairness, efficiency, stability and wisdom. Costantino and Merchant focus on efficiency, effectiveness, and satisfaction. Under either framework, the current system of

motivation, skills, and resources to permit participants and the organization to begin with a focus on interests and then move to assertions of rights and power only as necessary). The second generation of dispute system design, primarily highlighted by Cathy Costantino and Christina Sickles-Merchant's book, *Designing Conflict Management Systems*, more specifically discusses how ADR methods can be brought into an organization in advance of a particular conflict. See generally CATHY A. COSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* 52, 120-121 (1st ed. 1996). The book also examines *how* these new systems were developed, noting that some organizational leaders had used rights-based mechanisms to impose interest-based processes upon stakeholders. Costantino and Merchant outline their principles as: (1) developing guidelines for whether ADR is appropriate; (2) tailoring the ADR process to the particular problem; (3) building in preventative methods of ADR; (4) making sure that disputants have the necessary knowledge and skill to choose and use ADR; (5) creating ADR systems that are simple to use and easy to access and that resolve disputes early, at the lowest organizational level, with the least bureaucracy; and (6) allowing disputants to retain maximum control over the choice of ADR method and selection of neutral wherever possible. Now in the "next generation" phase of dispute system design, commentators have coalesced around several factors that highlight the best systems: (1) multiple process options for parties, including rights-based and interest-based processes; (2) ability for parties to "loop back" and "loop forward" between these process options; (3) substantial stakeholder involvement in the system's design; (3) participation that is voluntary, confidential and assisted by impartial third party neutrals; (4) system transparency and accountability; and (6) education and training of stakeholders on the use of available process options. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009); Andrea Kupfer Schneider & Natalie Fleury, *There's No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368 (2011) (applying Dispute System Design to foreclosure mediation structure); Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009) (applying Dispute System Design to human rights violations).

⁸⁷ Smith & Martinez, *supra* note 86, at 128.

⁸⁸ See Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 425-429 (2005) (It may be worthwhile to note that McAdoo and Welsh proposed a framework for evaluation that included efficient justice, substantive justice and procedural justice). See also Jeanne M. Brett, Stephen B. Goldberg, and William L. Ury, *Designing Systems for Resolving Disputes in Organizations*, 45 AM. PSYCHOLOGIST 162, 169 (1990) (exploring the relevance of procedural justice to dispute system design, in terms of "incentives associated with process").

⁸⁹ Andrea Kupfer Schneider, *Using Dispute System Design to Add More Process Choices to Investment Treaty Disputes*, in *Investor-State Disputes: Prevention and Alternatives to Arbitration II* 93, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (Susan Franck and Anna Joubin-Bret, eds., 2011), available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf; see also Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation,"* 1 PENN. ST. J. L. & INT'L. AFF. 86 (2012); Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into International Investment Treaty Arbitration*, 17 HARV. NEGOT. L. REV. (forthcoming 2013) [hereinafter *Thoughtful Integration*].

ICSID dispute resolution is not working successfully, primarily because of concerns of legitimacy—in process and in outcome. This focus on legitimacy of the system ties directly into its sustainability. As Kim notes, since the power exercised by the arbitral tribunals takes place in the public sphere and molds the behavior of state entities, we look for the same indicia of legitimacy and accountability as any other public law adjudicatory body.⁹⁰ Particularly with a voluntary system in which sovereign states can choose to sign BITs or adhere to the investor arbitration system, the perception of legitimacy is crucial. Furthermore, concepts grounded in dispute system design can be used to assess the different types of justice that different structures can provide.⁹¹

For the purposes of this analysis, two key principles of dispute system design will be used to analyze the ICSID system. First, we have already used the concept of accountability to assess ICSID's dispute resolution process. A system is accountable when its opinions are understood to be correct *and* that there exists a reasoned way to correct errors.⁹² Now, we will address the issue of stakeholder participation in a system. For ICSID, we will examine what stakeholders believed they were agreeing to when signing onto these treaties—what was the applicable law under which disputes were to be resolved and, second, what was the applicable process used to resolve these disputes, including any appeal or annulment proceedings.

Participation in a dispute resolution process—adjudicatory or consensual—ties directly into theories of procedural justice. ICSID's adjudicatory process was established by a consensual process so concerns of procedural justice resonate at two levels. Empirical research reveals that decision-making and dispute resolution procedures are most likely to be effective if they are perceived as procedurally fair.⁹³ If parties perceive a dispute resolution or decision-making process as procedurally fair, they are more likely

⁹⁰ Kim, *supra* note 39, at 255 (arguing that judicialization of the ICSID system is a good thing since it provides for more of these checks and balances that are required in the public law sector).

⁹¹ See generally Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008).

⁹² In addition, as Judge Posner notes above, a system must also be accountable in terms of its decision-makers. Arguments about bias of the arbitrators—based on their past experience and/or education—would fall under the category of accountability.

⁹³ Much of this discussion on procedural justice relating to ICSID has been more extensively outlined in Welsh & Schneider, *Thoughtful Integration*, *supra* note 89. Professor Welsh has examined procedural justice extensively, in a variety of settings. See e.g., Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski, eds.) (forthcoming 2013) (application to judges); Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 197, n. 60 (2012) (application to arbitration); Nancy A. Welsh, *What Is (Im)Partial Enough in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 424-26 (2010) (application to arbitration); Nancy A. Welsh, *Perceptions of Fairness*, in THE NEGOTIATOR'S FIELDBOOK 165 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006) (application to negotiation); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About the Place, Value and Meaning of Mediation*, 19 OHIO ST. J. DISP. RESOL. 573 (2004) (application to mediation); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise[,] Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L. Q. 787, 859-61 (2001).

to perceive the outcome as substantively fair (even if it is adverse to them)⁹⁴ and comply with that outcome.⁹⁵ This is the particular concern with the Argentinean cases and highlighted by many Latin American countries who threaten further noncompliance. Furthermore, when the process itself is perceived as fair, parties will also perceive the institution that provides or sponsors the process as legitimate.⁹⁶

Procedural justice research is particularly important in the investment treaty context where this dual concern in both the *consent* to the process (established by the states in the ICSID structure) and then *participation* in the actual arbitration process. States and investors need to perceive both the basis of the investment treaty initial arbitration process as procedurally just as well as its decisions.⁹⁷

A. *Substantive Legitimacy—Confusion and Consent in the Legal Standards Used*

A clear concern arising from the Argentina cases is the lack of clarity over the use of the emergency clause in the BIT and exactly to what extent state action should be constrained by the rights of the foreign investor. Arguably, states would never have agreed in advance that the rights of investors should trump their own ability to deal with economic crises and protect their citizens. There is an ongoing dispute as to how to interpret these emergency clauses within the treaties⁹⁸ and to what extent international law principles and the sense of public law concerns should determine the applicable law. An understanding that the investor state arbitration system operates in both the public and private realm is not necessarily agreed to or understood by all parties. Contrary to international commercial arbitration, “the allegedly illegal action being disputed is

⁹⁴ See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66-70, 205 (1st ed. 1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 119 (2000) [hereinafter *Social Justice*].

⁹⁵ See Tyler, *Social Justice*, *supra* note, 94 at 119; E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 177, 192 (Austin Sarat, et al., eds., 1998); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 857 (1994) [hereinafter *Psychological Models*]; Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 660-70, 673-74 (2006-2007) [hereinafter *Rule of Law*] (describing procedural justice findings generally and research that has identified “procedural justice and trust as the key antecedents of the willingness to defer to legal authorities”).

⁹⁶ See LIND & TYLER, *supra* note 94, at 209; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94-108 (1990); LIND & TYLER, *supra* note 94, at 188; DAVID B. ROTTMAN, *TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS* 24 (2005); Tyler, *Rule of Law*, *supra* note 95, at 665.

⁹⁷ See, e.g., Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12, 15 (2000) (describing procedural justice-related performance criteria used in court-sponsored evaluation programs and proposing additional measurement of trustworthiness); Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction: A White Paper*, 44 CT. REV. 4, 5 (2007). The National Center for State Courts offers *CourTools*, *Trial Court Performance Measures* that include a series of questions focusing on litigants’ perceptions regarding access to the courts and the fairness of their procedures. See THE NATIONAL CENTER FOR STATE COURTS, *CourTools: Giving Courts the Tools to Measure Success* (2005) [hereinafter *CourTools*], available at http://www.courttools.org/~media/Microsites/Files/CourTools/CourTools_Trial_Brochure.ashx.

⁹⁸ Schneiderman, *supra* note 20, at 387.

generally state action.”⁹⁹ As Burke-White and von Staden have explained, “investment treaty arbitration still continues to operate as if it were purely private law . . . [and] investment treaty arbitrators still apply standards of review developed from arbitration’s private contract law origins. Today, these private law approaches are incompatible with and inappropriate to investment treaty arbitration’s new public law functions.”¹⁰⁰ Some have characterized the investment treaty arbitration as a “comprehensive form of global administrative law.”¹⁰¹ And, while historically investment treaty arbitration may have dealt with traditional state action as expropriation or national treatment, this series of cases from Argentina and elsewhere reach deeply into actions more closely tied to basic regulatory and security rights of the state.¹⁰² The amount of damages awarded in these cases is also a question of balancing state and investor interests.¹⁰³ An ensuing concern now arises in which changing this common understanding of the law—perhaps allowing more ability to use emergency clauses—still leaves us with the question of how to implement that change in a procedurally just manner.

B. Procedural Legitimacy—What Should the Standard of Review Be for the Annulment Committees?

It is clear that arbitration, like other forms of adjudication, operate along a continuum of values in which finality versus accuracy is weighed.¹⁰⁴ For increased accuracy in an adjudicative system, we would have repeated reviews and appeals of decisions to make sure we get it right (arguably the way that, for example, death penalty cases are handled). For increased finality, as is often the goal in arbitration, we structure systems with very limited review over the decision.¹⁰⁵ Ironically, the lack of an appeal has been widely hailed as one of the important components in arbitration—it means that an award is final and this reduces the cost of arbitrations.

In the context of ICSID, however, this lack of appeal has in fact added to the uncertainty. The interesting thing is that, unlike appeals to a court, a successful annulment results in the erasure of the original arbitral panel’s ruling. It is as if that arbitral panel never existed. This means that the original case is now re-assigned to a new arbitral tribunal and the entire proceedings start over. Rather than providing the

⁹⁹ Kim, *supra* note 39, at 253.

¹⁰⁰ Burke-White & von Staden, *supra* note 20, at 288.

¹⁰¹ *Id.* at 289 n. 24 (quoting Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 123 (2006)). See also GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

¹⁰² Burke-White & von Staden, *supra* note 20, at 289-292; see also Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 U. TORONTO FAC. L. REV. 1 (2007) (arguing that the interpretation of clauses under the BIT must take into account public international law jurisprudence).

¹⁰³ Desierto, *supra* note 28, at 518 (arguing for a standard of proportional compensation).

¹⁰⁴ See Caron, *supra* note 15; Oldfather, *supra* note 54.

¹⁰⁵ See generally Allen Blair, *Is Less Really More?* Hall Street Associates, *Private Procedural Ordering and Expanded Review of Arbitral Awards in State Courts*, 5 PENN ST. Y.B. ARB. & MEDIATION 74 (2013) (discussing finality versus accuracy).

finality or cost-savings that no-appeal is supposed to provide, the ICSID annulment process can double the costs and draw out a decision for years.¹⁰⁶

The lack of a working appeal process also has led to states blocking implementation of awards at the state level through enforcement proceedings. Again, Argentina provides the clearest example of using its own state courts to add a layer of appeal. The federal Supreme Court of Argentina has held that “local courts could review an arbitral award even when the parties involved have specifically agreed to waive the right of appeal” to ensure that the award complies with Argentinean public policy.¹⁰⁷

As we move forward in ICSID, this balance between accuracy versus finality is evolving. And some commentators have raised the issue that stakeholders did not consent to this evolution. As Baetens writes:

From a public international law point of view, particularly the Vienna Convention rules on treaty interpretation with their focus on ‘object and purpose of a treaty’, the question can be raised whether this extensive use of the annulment option was at all foreseen and consented to by the States when drafting, signing and ratifying the ICSID Convention. Specifically the situation where an annulment decision condemns the original award but leaves it standing [CMS] because it is not *so* deeply flawed that it fulfills one of the five annulment thresholds of Article 52, erodes the status of international investment law as a stable, reliable and predictable legal system.¹⁰⁸

Other commentators are instead concerned with the annulment committee’s overreaching of its narrow procedural mandate. At either extreme, the contradictory approaches of recent annulment committees raise the question of whether states have either explicitly or implicitly agreed to how the annulment committees should operate and what standard of review they should use.

In response to this concern, Professor Alec Stone Sweet outlines a standard of proportionality that should be used by the ICSID annulment committees. As he notes,

¹⁰⁶ The issue of costs brings up two different fairness issues. First, less developed states or smaller investors cannot afford the best legal counsel or devote the state resources necessary to defending themselves in this expensive international forum. Second, the fact that the annulment procedure “has started to resemble a form of standard appeal,” means that the entire process now costs much more. See Freya Baetens, *Enforcement of Arbitral Awards: To ICSID or Not to ICSID is Not the Question*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (Todd Weiler & Ian Laird, eds.) (forthcoming 2013). Legal costs can now run for the length of the original arbitral panel, the annulment committee, and —with a successful annulment—start all over with a second run through each process. This also provides a significant advantage for those parties that have more resources. See Christian J. Tams, *An Appealing Opinion? The Debate about an ICSID Appellate Structure*, SOCIAL SCIENCE RESEARCH NETWORK 15, available at <http://ssrn.com/abstract=1413694> (arguing that this would provide greater authority for ICSID’s decisions).

¹⁰⁷ Gleason, *supra* note 53, at 283 (citing Carlos E Alfaro Abogados, *Argentina: ICSID Arbitration and BITs Challenged By the Argentine Government* (December 21, 2004), available at <http://www.alfarolaw.com/ima/tapa/alfaro3.htm>). See also Osvaldo J. Marzorati, *Enforcement of Treaty Awards and National Constitutions (the Argentinian Cases)*, 7 BUS. L. INT’L 226, 226 (2006).

¹⁰⁸ Baetens, *supra* note 106, at 6. See generally THE FUTURE OF ICSID, (Todd Weiler and Ian Laird, eds. forthcoming 2013).

this standard of review is already used by General Agreement on Tariffs and Trade (GATT) panels and the Appellate Body under the World Trade Organization (WTO) and helps to balance the private and public interests.¹⁰⁹ Professors Burke-White and von Staden advocate for a “margin of appreciation” when reviewing state action.¹¹⁰ Von Staden has more recently argued that “the democratic legitimacy of international courts rises and falls with the extent to which the exercise of their review activities is based on a defensible theory of the allocation of decision-making authority between the international judiciary, on the one hand, and national decision-makers, on the other.”¹¹¹

The issue of deference to arbitral awards exists in numerous contexts and is particularly tricky in areas where we worry about structural bias.¹¹² For example, in an examination of the ERISA context, Professor Nancy Welsh has noted that the courts have used the inherent structural bias that exists and made that a factor considered during judicial review.¹¹³ Similarly, in the ICSID context, one could think about a standard of review of arbitral tribunals that recognized concerns with power imbalances or structural bias against public law concerns.¹¹⁴

¹⁰⁹ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008).

¹¹⁰ Burke-White & von Staden, *supra* note 20, at 304.

¹¹¹ Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. OF CONST. L. 1023 (2012).

¹¹² See Thomas Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. INT'L ARB. 417, 422-23 (2012) (outlining the common law ground for overturning arbitration awards in the United States and explaining recent U.S. jurisprudence on manifest disregard of the law.).

¹¹³ Nancy Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187 (2012).

¹¹⁴ See Talesh, *supra* note 85. Another concept to think about in terms of procedural justice and participation in adjudicatory processes is in examining the opinion itself. Professor Martha Morgan has argued that there is a “constitutional right to know why” a judge has come to particular opinion. Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 307 (1982). She grounds her arguments in several theories. First, by explaining “why,” we protect ourselves against poor or arbitrary opinions. Second, an opinion that explains its thinking provides dignity to the parties and requires the court to “address the affected individual as a person. . . .” *Id.* at 305. Third, a reasoned opinion promotes public order—“the appearance of fairness, as well as its actual existence, is essential to public confidence in democratic order.” *Id.* at 307. Finally, reasoned opinions can also be located under First Amendment values of a right to know that which the government is doing. Professor Oldfather explains further that a duty of weak responsiveness—in which the court opinion at least addresses the parties’ arguments whether or not the court agrees with them—promotes adjudicative legitimacy. Chad Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 172 (2005). Relying on Lon Fuller, Oldfather argues, “we credit participation, and Fuller argued for the significance of participation, not based on some sense that participation simply inheres in the adjudicative process, but rather because party participation plays a crucial instrumental role in making the process effective. . . .” Oldfather, *supra* note 54, at 82. The annulment committee is already tasked with ensuring that an arbitral tribunal provides clear reasons for its opinion. Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 409, 415-21 (2009). The concept of a weakly responsive opinion, though, would also apply at the annulment committee level and ICSID annulment committees in the past have required that. *Id.* As Alvarez and Reisman have put it, citizens of a host state that bear the costs of an award against them should be entitled to understand why that decision was made. Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well are Awards Reasoned?*, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 31 (Guillermo Aguilar Alvarez & W. Michael Reisman eds, 2008).

Other proposals to reform ICSID are structural. To fix the problems of inconsistency and inaccuracy, many commentators have urged ICSID to adopt an appellate body structure like that of the World Trade Organization (WTO).¹¹⁵ ICSID has itself considered the addition of an appellate body.¹¹⁶ The WTO has a standing body which hears appeals from any arbitral tribunal. This standing appellate body, after some initial concern, has now been widely hailed as successful and crucial to maintaining the WTO's legitimacy among its member states.¹¹⁷

Another interesting reform would be to start referring cases to the International Court of Justice ("ICJ") or referring particular questions of international law to the ICJ much like the reference process under the European Union.¹¹⁸ When a question of international law arises, much like the issue in the Argentina cases about the proper scope of the necessity defense, this question could be referred to the ICJ for clarification. Other suggested reforms to address the problem of inconsistency include providing parties better access to previous awards (now not generally widely shared), consolidation of similarly-situated claims, and relying on jurisprudence from the academic community.¹¹⁹

If parties were, instead, to determine that finality in the ICSID process is the primary goal, it is clear that annulment committees must refocus their review on the procedure of the arbitral panel rather than on the substance of the decision. Professor David Caron outlines five principles by which the annulment committee should operate: (1) remember that annulment is exceptional since it denies the very existence of the award; (2) the focus should be on the illegitimacy of the process, not the award; (3) the task is not to amend the ICSID system; (4) the record should be as it was before the tribunal; and (5) the committee should not decide more than is asked or say more than is needed.¹²⁰

C. *Institutional Legitimacy and Sustainability—Who Participates in Reaching an Updated Consensus?*

Resolving these hard issues of both procedural and substantive legitimacy will require stakeholders—states that belong to ICSID as well as municipalities, investors, and their counsel—to be part of the conversation. Even the question of how international law should apply is an issue where stakeholders will have important opinions. Professor Lisa Bingham has noted:

¹¹⁵ See Ten Cate, *supra* note 8, at 1185; Gleason, *supra* note 53; David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006) (comparing how ICSID could operate with the current situation under NAFTA); see also Tams, *supra* note 106.

¹¹⁶ See Franck, *supra* note 1, at 841-42 (noting that ICSID decided not to include such a procedure at that time but did promote greater transparency in the process).

¹¹⁷ See Gleason, *supra* note 53, at 274-75 (noting that after an initial surge in appeals, the number of appeals have dropped, seeming to evidence a certainty in the law).

¹¹⁸ See Tams, *supra* note 106, at 42-44.

¹¹⁹ See Franck, *supra* note 18, at 93-98.

¹²⁰ See Caron, *supra* note 15, at 192-97.

[i]n its best practice, dispute system design . . . uses inclusive, participatory, stakeholder-driven processes to change existing or create new dispute resolution structures.¹²¹

Stakeholders are likely to perceive procedural justice in this sort of “inclusive, participatory” process only if they have an opportunity for serious consideration of their concerns and are treated equally when the stakeholders either re-design or amend the dispute resolution clause in an investment treaty.¹²²

In other words, their perceptions of procedural justice will depend upon *how* their participation is managed in any treaty or process change. Such perceptions will matter because they will influence stakeholders’ perceptions regarding the substantive justice of the treaty’s dispute resolution clause and prescription of particular procedures, the likelihood of the stakeholders’ compliance with the treaty provisions and the legitimacy of the states engaged in making the treaty. Instead, it appears as if the ICSID annulment committees are in the process of creating law. Even if the outcomes of the annulment committees are ones with which the state might agree (as in the annulment overturning the award against Argentina), the process by which this change is occurring—through the annulment committee—is not one in which stakeholders have a direct voice. This change should be a legislative change in which the states agree on the law versus a judicial change in which this interpretation is handed down.

It is clear moving forward that ICSID needs to improve its legitimacy in order to remain sustainable. First, it needs a consensus on the applicable law in these hard cases. The balance between international law, public law, and commercial law needs to be struck. Second, ICSID needs to reach a new consensus on the goals of the annulment committee procedure—whether this review should achieve uniformity, accuracy, or finality—as it moves forward to either reconfigure this procedure into a standing body or maintain the current structure. Finally, ICSID’s true legitimacy comes from this consensus—where the stakeholders work to find this consensus rather than rely on the annulment committees to create new law. This stakeholder participation will, in turn, lead to more stability and legitimacy in the long run. We can predict that economic crises

¹²¹ Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 74 (2011).

¹²² See also Welsh & Schneider, *Thoughtful Integration*, supra note 89; Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented By Community Conflicts Over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295, 303-305 (2002). Note that “participation” is sometimes used as a synonym for “voice.” See, e.g., Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 487(2010) (“A study of small claims courts found that the opportunity for direct, unmitigated participation—especially the opportunity for the litigant to tell his story before a judge—was an important determinant of the litigant’s satisfaction.”). But active “participation” in a decision-making process is likely to require something more than just “voice.” It requires give-and-take, and listening as well as expressing one’s own point of view. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. DISP. RESOL. 573, 606 (2004). Researchers have found that while mediating parties’ perceptions of procedural justice are enhanced by the opportunity to “tell their views,” these perceptions are not affected by the opportunity to “participate” in the process. This has led Roselle Wissler to suggest that “parties’ sense of voice is more important to their experience in mediation than is how much they participate.” See Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 450 (2010).

will occur. We can predict that states will act in necessary ways to protect their domestic interests. What is open to debate at the moment is how the investor-state treaty system can best address these disputes and strike a balance among these competing needs and interests.

IV. CONCLUSION

The Argentine crisis and ensuing cases under the BIT with the U.S. has raised the recurring issue of annulments under ICSID. While ICSID has faced charges of inconsistency, error, and unfairness before, the plethora of cases from 2005 to the present has raised the issue more starkly than ever. The result is a crisis of legitimacy. The theory of error correction for judicial review can help shed light on why these decisions were so frustrating and confusing for all stakeholders involved. Dispute system design can provide guidance on both substantive and procedural legitimacy moving forward. ICSID has the opportunity to rethink its structure and rules to build effectiveness; including a wide variety of stakeholders in that decision-making ensures sustainability into the future.