

# THE ANNULMENT COMMITTEE'S ROLE IN MULTIPLYING INCONSISTENCY IN ICSID ARBITRATION: THE NEED TO MOVE AWAY FROM AN ANNULMENT-BASED SYSTEM

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*This Note critiques the current structure and practice of the ICSID annulment mechanism by shifting away from the traditional focus on the ICSID arbitration system as a dispute settlement body and instead analyzing the annulment mechanism's role in a progressively "judicializing" investor-state arbitration system. Recent developments in ICSID arbitration indicate that, over time, ICSID arbitral tribunals have undergone "judicialization"—that is, they have acquired domestic court-like characteristics enabling them to impact state and individual behavior prospectively, rather than merely to resolve the specific dispute at bar. These developments raise the question of whether the current annulment mechanism, which provides for cancellation of tribunal awards on a strictly limited set of grounds, is capable of accommodating this shift. Although the drafters of the ICSID Convention did not intend to allow an annulment committee, convened after the tribunal's issuance of an award, to review the substantive merits of that tribunal's award, annulment committees have previously based their decisions on more expansive substantive review than that permitted under the Convention. This Note argues that in a recent series of decisions, annulment committees appear to be engaging in greater substantive review of tribunals' awards once again, a fact that triggers a renewed sense that annulment committees are still confused over the proper role of annulment in the ICSID arbitration system. Such confusion has serious implications in that it leads to the production of inconsistent decisions at the annulment level of the ICSID arbitration system, thus adding to the layer of inconsistent decisions produced at the tribunal level. These incoherent decisions may ultimately imperil the legitimacy of the ICSID arbitration system as a judicialized body for shaping prospective state and individual behavior. To strengthen the legitimacy of ICSID arbitral decisions and promote further development of coherent international investment law, I argue that it is critical for ICSID to establish a mechanism with official powers of substantive review.*

## INTRODUCTION

In 2007, after losing in an arbitration brought by a foreign investor, Argentina initiated an annulment proceeding at the International Centre for Settlement of Investment Disputes

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(ICSID)—a standing forum for arbitration between investors and states established under the auspices of the World Bank—in an attempt to invalidate the original tribunal’s award.<sup>1</sup> The ad hoc annulment committee that convened upon Argentina’s request upheld the tribunal’s award, but only after condemning the award’s critically “defective[ ]” legal reasoning.<sup>2</sup> Often characterized as a de facto “appeal on procedural grounds,”<sup>3</sup> the ICSID annulment mechanism strictly precludes invalidation of an award based on review of the substantive merits of the tribunal’s decision, and annulment committees are well aware of this. In fact, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which established ICSID, provides only five limited situations in which a tribunal’s decision can be annulled; defective legal reasoning is not one of them.<sup>4</sup> Thus, in refusing to annul the tribunal’s award based on defective legal reasoning, the annulment committee’s ultimate holding was correct. But in reaching that result, the committee engaged in arguably forbidden substantive review of the tribunal’s award, characterizing it as a product of “cryptically and defectively” applied law.<sup>5</sup> This conclusion significantly weakened the legitimacy of the tribunal’s decision in the eyes of Argentina and other ICSID member states. Unsurprisingly, Argentina refused to pay the victorious foreign investor the \$133.2 million award.<sup>6</sup>

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<sup>1</sup> CMS Gas Transmission Co. v. Argentine Republic (*CMS*), ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 1 (Sept. 25, 2007), 14 ICSID Rep. 251, 251–52 (2009).

<sup>2</sup> *Id.* ¶ 136, 14 ICSID Rep. at 275–76.

<sup>3</sup> Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT’L L. 43, 53 (2008); see also LUCY REED ET AL., GUIDE TO ICSID ARBITRATION, 162 (2011) (describing annulment as “designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings”); CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 892 (2001) (describing annulment as concerned only with “legitimacy of the process of decision”).

<sup>4</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1), Aug. 27, 1965, 17 U.S.T. 1270, 1290, 575 U.N.T.S. 159, 192 [hereinafter ICSID Convention], available at [http://icsid.worldbank.org/ICSID/Static/Files/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/Static/Files/basicdoc/CRR_English-final.pdf).

<sup>5</sup> *CMS*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 136, 14 ICSID Rep. at 276.

<sup>6</sup> Instead of paying out the award, Argentina demanded that the foreign investor, CMS, seek enforcement of the award through Argentine courts. CMS, however, refused to enter into protracted litigation in Argentina. After several months of lobbying Argentina, CMS appears to have transferred the award to a corporation specializing in distressed debts. Luke E. Peterson, *Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*, LAW.COM (June 25, 2009), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202431736731>. At least one scholar notes, however, that no country has thus far completely failed to comply with an ICSID award. Javier Robalino, *Enforcement in South America, the Cases of Argentina and Ecuador, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS* 425, 441 (R. Doak Bishop ed., 2009).

If annulment committees were to incorporate some degree of substantive review of tribunal awards into their decisions, as illustrated in *CMS*,<sup>7</sup> this would have important implications for the overall ICSID arbitration system, in terms of both its historic and evolving identities. The traditional concept of annulment is rooted in commercial arbitration, under which domestic courts have the authority to set aside awards and act as a check on abuses of power by arbitrators. Consequently, for investment arbitrations that take place outside of ICSID—for example, under the framework of the United Nations Commission on International Trade Law or the International Chamber of Commerce—the typical method for a party to challenge an award is to bring a claim in a national court.<sup>8</sup> In contrast, the ICSID Convention does not allow review by national courts of ICSID arbitral tribunal decisions and instead leaves the review function to ad hoc annulment committees established pursuant to the ICSID Convention.<sup>9</sup> This is ICSID's major advantage over other investment arbitration fora. Investors who prevail over a host state in an ICSID arbitration need not fear that a domestic court might set aside the award on amorphous grounds such as "public policy,"<sup>10</sup> and each member state of the ICSID Convention must enforce ICSID awards within its territories as if they were final judgments of a court in that state so long as those awards are not annulled through the annulment mechanism.<sup>11</sup> Any expansion in the scope of review at the annulment-committee level would weaken the historic advantage of the ICSID arbitration system. Moreover, it would limit the ongoing evolution of the ICSID system into a judicialized institution capable of generating coherent rules governing international investment disputes.<sup>12</sup> Thus, annulment committees' departure from their mandated scope of review and the attendant confusion and incoherence are detrimental to the ICSID arbitration system, in terms of both ICSID's ability to

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<sup>7</sup> See *CMS*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 136, 14 ICSID Rep. at 275–76 (expressing judgment regarding substantive aspects of tribunal's decision).

<sup>8</sup> SCHREUER, *supra* note 3, at 889; see also *infra* note 36 (describing principles generally applicable to such review by domestic courts).

<sup>9</sup> See ICSID Convention, *supra* note 4, art. 53.

<sup>10</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 40–42 [hereinafter New York Convention] (laying out grounds for courts to set aside arbitral awards for international commercial arbitrations).

<sup>11</sup> ICSID Convention, *supra* note 4, art. 54.

<sup>12</sup> Sweet has identified three key developments in ICSID arbitration as the main indicia of judicialization: the use of precedent, the acceptance of amicus briefs, and the employment of balancing and proportionality. See Alec S. Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 59–66 (2010), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1044&context=lehr>.

maintain its historic competitive advantage and its ability to develop a new identity.<sup>13</sup>

This Note seeks to critique the current structure and practice of the ICSID annulment mechanism by analyzing the annulment mechanism's role as part of a progressively "judicializing" investment arbitration system.<sup>14</sup> Recent developments in ICSID arbitration indicate that, over time, ICSID arbitral tribunals have been undergoing judicialization—that is, they have acquired domestic court-like characteristics enabling them to impact state and individual behavior prospectively, rather than solely to resolve the disputes in front of them.<sup>15</sup> These developments raise the question of whether the annulment

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<sup>13</sup> See *infra* Parts III.A–B (explaining negative effect annulment mechanism has on consistency in ICSID arbitration decisions).

<sup>14</sup> Investor-state arbitration can be conducted under different arbitral facilities and rules. This Note focuses on arbitration that takes place pursuant to ICSID arbitration rules because ICSID is a leading forum for investment treaty arbitration, its decisions are most accessible to the public, and it has a unique structural design that replaces domestic judicial review of awards with review by an internal annulment mechanism. See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 27 (2007) (characterizing ICSID as "the leading forum for investment treaty arbitration"). ICSID is the only international forum that is required to publicize information on claims; other fora allow claims to be kept confidential, consistent with the tradition of commercial arbitration. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 124 n.11 (2006). While ICSID does not require the publication of awards without consent from the parties, under its 2006 amendments, ICSID does require the publication of excerpts of the legal reasoning of its tribunals. See Int'l Ctr. for Settlement of Inv. Disputes, ICSID Convention, Regulations, and Rules: Rules on Procedure for Arbitration Proceedings (Arbitration Rules) r. 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."). Though ICSID is only one possible facility for arbitration between investors and states, it is a very popular one. Since its inception four decades ago, the ICSID Convention has acquired 144 contracting states, and, in the past couple of decades, there has been a significant expansion in the number of disputes brought to ICSID for arbitration. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION AS OF SEPT. 30, 2010 (2010) [hereinafter LIST OF CONTRACTING STATES], available at <http://icsid.worldbank.org> (follow "Member States" hyperlink; then follow "List of Contracting Parties" hyperlink; then select "English PDF"). Only after 1996 has the caseload for ICSID tribunals started to become significantly heavier: From 1996 to 2005, ICSID registered 166 claims, four times as many claims as in the previous three decades. VAN HARTEN, *supra*, at 4 n.11. In July 2005, ICSID had a total of ninety-nine claims pending, which was more than all of the claims ever registered at ICSID prior to 2001. Van Harten & Loughlin, *supra*, at 124.

<sup>15</sup> See Benedict Kingsbury & Stephen Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION: ICAA INTERNATIONAL ARBITRATION CONFERENCE 5, 5 (Albert Jan van den Berg ed., 2009) (arguing that investor-state arbitration can not only settle disputes but also implement international standards giving rise to effects that go beyond direct parties to arbitration); Sweet, *supra* note 12 (manuscript at 1–2) (arguing that investor-state arbitral tribunals are undergoing process of judicialization by acquiring increasingly governance-like characteristics).

mechanism as it currently stands is capable of accommodating this shift toward judicialization. As a matter of practice, annulment committees have attempted to step beyond the five narrowly defined grounds for review to review tribunal decisions substantively. This Note argues that the ongoing confusion as to the role of the annulment mechanism and the resulting inconsistent decisions of annulment committees jeopardize the legitimacy of the ICSID arbitration system as a judicialized body capable of shaping prospective state and individual behavior. The annulment system itself has been, and still is, a source of inconsistent decisions. It is therefore unable, in its current form, to serve as a check on conflicting awards produced at the tribunal level—a check that would be necessary to enhance the legitimacy of ICSID arbitral decisions if the ICSID system is to proceed further on its path of judicialization.

This Note focuses on the effects of the ICSID annulment mechanism on the legitimacy of the ICSID arbitration system. Many scholars have argued that the lack of consistency in the investment law jurisprudence generated by ICSID arbitral tribunals is a key factor that has contributed to the perceived legitimacy deficit in the ICSID system.<sup>16</sup> Little attention has been given, however, to the effects of annulment committees' decisions on the legitimacy of the ICSID system. This Note seeks to fill this gap in the literature. By analyzing major annulment committee decisions, I argue that the annulment mechanism hinders efforts to legitimize the ICSID arbitration system as a judicialized body capable of shaping prospective state and individual behavior because the annulment system itself is a source of inconsistent decisions and cannot serve as a check on incoherent decisions produced at the tribunal level.

This Note proceeds as follows. Part I provides a historical overview of the purpose and function of the ICSID arbitration system and the workings of the annulment mechanism, the existence of which distinguishes ICSID from other investor-state arbitration facilities. Part II argues that judicialization of ICSID arbitration bridges the disconnect between the traditionally private investor-state arbitration and the fundamentally public nature of the underlying dispute being

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<sup>16</sup> See, e.g., 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, 299 (2010) (arguing that inconsistent decisions by different investor-state arbitral tribunals on similar fact patterns have delegitimizing impact on investor-state arbitration); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1583 (2005) (same); Kingsbury & Schill, *supra* note 15, at 8 n.7 (noting numerous scholars argued that risk of inconsistent arbitral tribunal decisions will develop into “legitimacy crisis” in investor-state arbitration).

resolved. As such, judicialization is a positive force for the evolution of international investment law. Part II further identifies coherence in decisions as a key legitimacy-enhancing criterion for supranational adjudicatory bodies and analyzes the role that the norm of coherence plays in propelling the trend of judicialization. Part III examines both historical and recent decisions issued by annulment committees to reveal the inconsistent nature of their decisions and their inability to reconcile inconsistencies produced by the tribunals. I argue that, to address this problem, the ICSID arbitration mechanism must include a permanent appeals mechanism that allows for systematic and official substantive review. I also suggest means to achieve this fundamental structural change.

## I

### HISTORICAL PURPOSE OF ICSID ARBITRATION: ICSID AS A MEANS OF DISPUTE RESOLUTION

The significance of the recent trend of judicialization of ICSID arbitral tribunals—and, in turn, the need to enhance the legitimacy of the system by fostering greater coherence—cannot be fully appreciated without an overview of ICSID’s history and purpose. By providing an overview of the ICSID arbitral regime’s *raison d’être*, this Part describes why we should care about changing the current structure of the ICSID arbitration system. Section A explains the broad purpose underlying the creation of ICSID and the instrumentality of the ICSID arbitral mechanism in promoting foreign investment flows between countries. Section B articulates the more specific purpose of the ICSID arbitration system: to provide a comparatively efficient system of dispute-settlement that is shielded from review by domestic courts.

#### A. *ICSID Arbitration: A Mechanism To Enhance Legal Certainty for Foreign Investors*

The normative significance of the ICSID arbitration system is rooted in the original purpose that motivated the system’s formation in 1966—to foster greater foreign investment in developing countries. Before investor-state arbitration emerged as a feasible dispute-settlement mechanism, international law did not allow an individual investor to bring legal claims directly against the host state of her investment. An individual investor who suffered injury from the actions of a host state government (for example, a host state’s uncompensated expropriation of the investor’s investment in the country) instead had to convince her own state to espouse the legal claim on

her behalf and bring the claim against the government of the host state.<sup>17</sup> This process was cumbersome for both the investor and the investor's national government. This process also attached great legal uncertainty to investments in developing countries with weak domestic judicial systems and unstable governments.<sup>18</sup> The new mechanism of investor-state arbitration granted investors standing to bring claims against foreign host states directly in certain arbitral forums to which the host state consented in advance, either through contracts between the investor and the host state or through investment dispute settlement provisions of trade or bilateral investment treaties (BITs) between the host state and the national state of the investor.<sup>19</sup> The ICSID arbitration system provided greater certainty for investments in foreign countries and reduced the risks associated with such investments because it guaranteed direct access to a neutral dispute-settlement forum. As developing countries became more cognizant of their need for foreign investment, agreeing to investor-state arbitration served as an easy means for states to signal their openness to foreign investment. Thus, by reducing the risks involved for investors and providing host states with a means to signal their willingness to treat foreign investors fairly, investor-state arbitration provided a win-win solution for capital-exporting states, capital-importing states, and individual investors.

In 1966, the ICSID Convention established ICSID as the first institution designed specifically as a forum to administer investment disputes between host states and private investors.<sup>20</sup> The World Bank, which sponsored and prepared the first official draft of the Convention,<sup>21</sup> saw ICSID as serving the role of an "impartial international forum providing facilities for the resolution of legal disputes between eligible parties,"<sup>22</sup> thus reducing the political and legal risks

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<sup>17</sup> This system is called "diplomatic protection." See R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 3 (2005) ("[I]nvestors' governments, if . . . inclined to help their nationals, responded either with a show of military force . . . or by providing 'diplomatic protection[.]' [where] the investors' government formally protest[ed] the taking of the investor's property and demand[ed] either its return or the payment of full compensation.").

<sup>18</sup> See *id.* (arguing that diplomatic protection was unwieldy instrument for dealing with foreign investment-related disputes).

<sup>19</sup> Van Harten & Loughlin, *supra* note 14, at 127–29.

<sup>20</sup> BISHOP ET AL., *supra* note 17, at 5.

<sup>21</sup> REED ET AL., *supra* note 3, at 1–2.

<sup>22</sup> About ICSID, INT'L CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal>ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal>ShowHome&pageName=AboutICSID_Home) (last visited Feb. 4, 2010).

to free international movement of private investment.<sup>23</sup> The ICSID Convention established procedural rules for setting up arbitral tribunals to resolve investor-state disputes and created a forum for arbitration, a Secretariat to register and administer arbitrations, and rules on the enforcement, recognition, and annulment of awards. The ad hoc annulment committee, to be convened upon request by parties to the original award, was designed to provide limited review of tribunal decisions and to replace any domestic judicial review of awards.<sup>24</sup>

The creation of the ICSID arbitration system was also a significant development in international law. Though the ICSID Convention does not articulate the substantive standards and norms governing the treatment of foreign investors by host states, it nonetheless facilitates the rapid development of international investment law as an emerging field of international jurisprudence.<sup>25</sup> There is no single multilateral convention providing all of the substantive legal standards for protecting foreign investors. Instead, a web of approximately 2500 BITs and several regional treaties, such as the North American Free Trade Agreement (NAFTA), provide broadly-phrased standards for how each state party to the BIT or trade agreement should treat investors from other contracting state parties.<sup>26</sup> Although the instruments setting out the legal norms are numerous and diverse, they contain similar, overlapping terms so that an ICSID arbitral tribunal interpreting the meaning of “fair and equitable treatment” under a BIT can find guidance in decisions of other tribunals that have interpreted “fair and equitable treatment” in other treaties.<sup>27</sup> Thus, despite a fragmented appearance, the different sources from which investment-related norms are derived produce a somewhat standard set of investment rules. The sheer number of disputes registered under the ICSID—and the explosive growth in the number of ICSID claims starting from

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<sup>23</sup> *Id.*

<sup>24</sup> See ICSID Convention, *supra* note 4, art. 52(1)–(3) (listing limited grounds for annulment and rules on how to convene annulment committees); SCHREUER, *supra* note 3, at 912 (stating that ICSID Convention drafters intended annulment mechanism to be safeguard against egregiously irregular awards only).

<sup>25</sup> See Amin George Forji, *Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity*, 76 ARBITRATION 44, 44 (2010) (noting that, in public international law, ICSID arbitration and bilateral investment treaties (BITs) have replaced political remedies with legal remedies).

<sup>26</sup> See BISHOP ET AL., *supra* note 17, at 8 (“[M]ore than 2200 BITs have been concluded by both developed and developing countries covering every region of the world. . . . [T]here is an astounding similarity in the most important rules.”).

<sup>27</sup> See Franck, *supra* note 16, at 1529–35 (describing trends in rights provided by similar investment treaties); Kingsbury & Schill, *supra* note 15, at 6–7 (describing how arbitral tribunals implement and interpret similar terms in investment treaties).

1996<sup>28</sup>—make ICSID arbitral tribunals powerful sources for concretizing, expanding, or restricting the vaguely-worded standards governing investor protection provided in regional treaties and BITs.<sup>29</sup> Furthermore, the broad base of participation in the ICSID system, which now has 144 contracting member states,<sup>30</sup> has granted ICSID arbitral tribunals the ability to advance public international law by generating a body of international investment law jurisprudence.

### B. *The Uniqueness of ICSID Arbitration: The Annulment Mechanism*

The annulment mechanism is a unique element of the ICSID system that gives ICSID a competitive advantage over other investor-state arbitral forums by removing the possibility of judicial review by domestic courts and replacing it with a system of review by ad hoc annulment committees established by the ICSID Secretariat. In non-ICSID arbitrations, each award rendered is subject to the control of, or review by, domestic courts at the seat of the arbitration.<sup>31</sup> ICSID arbitral tribunal awards, in contrast, are subject to review only by an annulment committee established under ICSID.<sup>32</sup> Nonetheless, the annulment mechanism is only a limited review mechanism for awards rendered by the arbitral tribunals; the mechanism was not designed to function as an appeals system. Thus, under the ICSID Convention, the primary remedy for a party unsatisfied with an arbitral award rendered by an ICSID tribunal is to apply for the formation of an ad hoc annulment committee.<sup>33</sup> An ad hoc annulment committee consists of

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<sup>28</sup> See *supra* note 14 (noting that from 1996 to 2005, ICSID registered 166 claims, far more than the 35 claims it registered in previous three decades combined).

<sup>29</sup> See Kingsbury & Schill, *supra* note 15, at 6–7 (“Investor-State arbitral tribunals . . . concretize and expand or restrict [terms of investment treaties] through interpretation.”).

<sup>30</sup> LIST OF CONTRACTING STATES, *supra* note 14.

<sup>31</sup> See Hans Van Houtte, *Article 52 of the Washington Convention: A Brief Introduction*, in ANNULMENT OF ICSID AWARDS 11, 11 (Emmanuel Gaillard & Yas Banfatemi eds., 2004) (“ICSID awards are thus liberated from the pitfalls of the national legal system in a way commercial arbitration can only dream of.”).

<sup>32</sup> ICSID Convention, *supra* note 4, art. 53 (“The 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.”).

<sup>33</sup> *Id.* art. 52 (“Either party may request annulment of the award by an application in writing addressed to the Secretary-General . . .”). In addition to annulment, there are two other quasi-review mechanisms available to the parties under the Convention. The first is interpretation under Article 50, which allows either party to apply for an “interpretation of the award” by the tribunal that rendered the decision. *Id.* art. 50. Interpretation does not include a review or reconsideration of the merits of the award and does not affect the finality of the award. REED ET AL., *supra* note 3, at 159. Given its limited utility, it is not surprising that as of January 2010, ICSID had received only two requests for interpretation pursuant to Article 50. *See id.* at 160. The second mechanism is revision under Article 51, which allows either party to request that an award be revised, but only “on the ground of

three members, none of whom may have served on the arbitral tribunal that rendered the award being challenged.<sup>34</sup> Article 52 of the ICSID Convention allows for annulment of an award issued by an ICSID tribunal on five limited grounds: (1) when the tribunal is improperly constituted; (2) when the tribunal manifestly exceeds its powers; (3) when a member of the tribunal engages in corruption; (4) when there is a serious departure from the fundamental rules of procedure; and (5) when the award fails to state the reasons on which it is based.<sup>35</sup> Outside of the ICSID system, the scope of review by domestic courts at the seat of arbitration is also narrowly confined by the New York Convention.<sup>36</sup> What makes ICSID's annulment committee more effective at adjudicating disputes than domestic courts is that the annulment committee shields ICSID awards from challenges before potentially investor-unfriendly courts in host states. As a result,

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discovery of some fact of such a nature as decisively to affect the award" and provided that "when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence." ICSID Convention, *supra* note 4, art. 51. Such a request must be made within ninety days of the discovery of the new fact and within three years after the date on which the award was rendered. *Id.* If possible, the original tribunal that rendered the decision takes on such a request for revision; if the Secretary-General is unable to reconstitute the original tribunal, she must arrange the constitution of a new tribunal to hear the request. ICSID Convention, *supra* note 4, art. 51(1), (3). As of January 2010, the ICSID had received three requests for revision under Article 51. Two of these requests were resolved by agreement before they were heard by the tribunal, and the third was rejected by the tribunal on the ground that the new facts would not have had a decisive influence on the award. REED ET AL., *supra* note 3, at 161–62. In contrast to interpretation and revision, parties have made frequent use of the annulment mechanism. As of September 2010, ICSID had registered forty annulment proceedings, twenty-nine of which had been concluded and had resulted in twenty-two published decisions. *Id.* at 163–64.

<sup>34</sup> ICSID Convention, *supra* note 4, art. 52.

<sup>35</sup> *Id.*

<sup>36</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention") was adopted by diplomatic conference in June 1958 and entered into force in June 1959. The New York Convention requires courts of adopting states to give effect to arbitration agreements and to enforce awards made in other states, subject to limited exceptional circumstances, under which awards may be set aside. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. II, III, V, June 10, 1958, 21 U.S.T. 2517, 2519–20, 330 U.N.T.S. 38, 38, 40, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958\\_NYC\\_CTC-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf). A key difference between the grounds for setting aside awards in domestic courts under the New York Convention and the grounds available under the ICSID Convention is the public policy ground. Under the New York Convention, a domestic court may set aside an award if enforcing it would go against the public policy of the state in which the court is sitting. Some scholars have thus argued that under the New York Convention, domestic courts do in fact retain broad authority to limit the enforcement of awards, although they may not actively exercise such discretion. See, e.g., VAN HARTEN, *supra* note 14, at 52 (arguing that domestic courts have certain amount of discretion in setting aside challenged awards).

the annulment mechanism is heralded as a key factor underlying the success of the ICSID arbitration system.<sup>37</sup>

## II “JUDICIALIZATION” OF ICSID INVESTOR-STATE ARBITRATION

ICSID arbitral tribunals, although created precisely to get away from domestic courts, have acquired domestic court-like characteristics enabling them to impact state and individual behavior prospectively rather than merely to resolve the dispute in front of them.<sup>38</sup> As a result, these tribunals are increasingly becoming capable of defining general standards for acceptable and unacceptable treatment of investors by host states.<sup>39</sup> This Part argues that such judicialization of ICSID arbitration is a positive development for international investment law and that to make progress toward greater judicialization, ICSID arbitral tribunal decisions must convey stronger markers of legitimacy. Section A explains why judicialization is positive by conceptualizing this trend as closing the gap between the thus far disjointed private form and public substance of investor-state arbitration. It then describes the link between judicialization and the need for stronger markers of legitimacy in ICSID arbitral decisions. Section B identifies coherence in decisions as a key legitimacy-enhancing criterion for supranational adjudicatory bodies and analyzes the role that the norm of coherence plays in furthering the process of judicialization.

### *A. Judicialization of ICSID: Closing the Gap Between Substance and Form*

The current structure of investor-state arbitration reveals a discrepancy between the private law-based *form* of dispute resolution (commercial arbitration procedures) and its underlying *substance* (host state actions) that is more appropriately governed by public law.<sup>40</sup> Arbitration is a form of dispute resolution originally designed

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<sup>37</sup> See Van Houtte, *supra* note 31, at 11 (“One of the specific features of ICSID arbitration and reasons of its success is its own annulment-regime.”).

<sup>38</sup> See Sweet, *supra* note 12 (manuscript at 12) (identifying three specific indicators of judicialization of ICSID arbitration: use of precedent, involvement of third parties, and proposals for permanent appeals mechanism).

<sup>39</sup> See Kingsbury & Schill, *supra* note 15, at 7 (arguing that investor-state arbitration is developing into form of global governance).

<sup>40</sup> See Van Harten & Loughlin, *supra* note 14, at 126 (“A key aspect of the investment treaty arbitration is that it transplants this private adjudicative model from the commercial sphere into the realm of government, thereby giving privately-contracted arbitrators the authority to make what are in essence governmental decisions.”).

for the efficient disposition of commercial disputes between *private* parties.<sup>41</sup> The disputes at issue in international investment arbitrations, however, are not over private-to-private contracts, but rather over exercises of governmental authority in the form of regulatory measures or other actions (such as expropriation) against private actors.<sup>42</sup> As such, an arbitrator's role in investor-state arbitration such as ICSID arbitration is fundamentally different from an arbitrator's role in international commercial arbitration involving a dispute between private parties, the outcome of which depends on the contractual intentions of those parties.<sup>43</sup> In international commercial arbitration, the decision of the arbitrator would bind only those parties to the dispute, and no part of the ruling would have to be published without the parties' mutual consent. The parties would choose the procedures of the arbitration, the governing law, and the arbitrators themselves. In investor-state arbitration, on the other hand, the arbitrator in effect takes on more of the role of a public adjudicator because the nature of the dispute is different. The allegedly illegal action being disputed is generally state action, and, as a result, the interests implicated often expand beyond parties immediately involved in the dispute.<sup>44</sup> If a government's regulation is at issue, to the extent that an arbitral award would force the government to modify its policies and conduct to conform to the arbitrator's decision, all persons subject to such a regulation would be impacted. Furthermore, such an arbitral decision would reverberate through other investment treaties containing terms and language similar to those interpreted in that decision. A decision, then, could shape the investment-related policies and conduct of other countries as well.<sup>45</sup>

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<sup>41</sup> See *id.* at 125–26 (noting that “beginning with the Geneva Protocol of 1923, states progressively recognized arbitration as institution for resolution of commercial disputes,” with objective of facilitating international commerce rather than regulating public power, and states further viewed arbitration as private or alternative method of adjudication).

<sup>42</sup> See VAN HARTEN, *supra* note 14, at 58–61 (discussing how investor-state arbitration involves issues relating to exercise of public authority).

<sup>43</sup> See *id.* at 62–65 (discussing difference in source and scope of consent between commercial arbitration and investor-state arbitration); Sweet, *supra* note 12 (manuscript at 8) (asserting principal-agent theory to explain party-arbitrator relationship in terms of delegation of power).

<sup>44</sup> See VAN HARTEN, *supra* note 14, at 67 (noting wide range of interests affected by investor-state arbitration, especially when arbitration involves state regulatory action); Kingsbury & Schill, *supra* note 15, at 6 (“[I]nvestor-State arbitral awards have important effects going beyond those who appear before them in individual disputes.”); Sweet, *supra* note 12 (manuscript at 9) (arguing that arbitrators are moving away from being mere agents of “two contracting Principals” and are increasingly becoming agents of “the greater community”).

<sup>45</sup> See Kingsbury & Schill, *supra* note 15, at 6–7 (“Investor-State arbitral tribunals implement broadly phrased international standards set out in very similar terms in many

Thus, arbitral tribunals can be seen as governance bodies “exercis[ing] power in the global administrative space,”<sup>46</sup> and any significant exercise of power in the public sphere raises demands from various stakeholders that this exercise be legitimate.

From this perspective, judicialization is arguably a positive development for the international investment arbitration regime because it is a force that narrows the existing gap between the form and underlying substance of investor-state arbitration.<sup>47</sup> The concept of judicialization is best understood as the exercise of power by arbitral tribunals to settle the dispute before them and to influence the expectations and conduct of other investors and states outside the confines of that specific dispute.<sup>48</sup> Rather than being limited to resolving the disputes brought to them *ex post*, the arbitral tribunals become more like courts or administrative agencies in that they have the potential to shape the conduct of parties prospectively.<sup>49</sup> The nature of the power exercised by arbitral tribunals takes place in the *public* sphere because it restrains and molds the behavior of state entities that often exercise their sovereign power to regulate.<sup>50</sup> Conventionally, domestic courts

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investment treaties, and concretize and expand or restrict their meaning and reach through interpretation, so that they increasingly define for the majority of States of the world standards of good governance and of the rule of law that are enforceable against them by foreign investors.”).

<sup>46</sup> *Id.* at 7.

<sup>47</sup> See Van Harten & Loughlin, *supra* note 14, at 147 (“[W]hat is especially remarkable about investment treaties is that they *transplant* the procedural framework and enforcement structure of *commercial* arbitration into the *public* realm. . . . By using a private model of adjudication to resolve . . . regulatory disputes, investment treaties have radically transformed how adjudication is used to review and control public authorities.”) (emphasis added)).

<sup>48</sup> See Kingsbury & Schill, *supra* note 15, at 6–7 (arguing that arbitral tribunals influence investors and states other than those involved in specific dispute); Sweet, *supra* note 12 (manuscript at 11) (arguing that judicialization of investor-state arbitration occurs as jurisprudence emerges and zone of discretion of tribunals widens). In the words of Sweet, judicialization of ICSID arbitration can be understood as the “gradual entrenchment of investment arbitration as a stable system of governance in the field of foreign direct investment.” *Id.* (manuscript at 13).

<sup>49</sup> See Kingsbury & Schill, *supra* note 15, at 53 (arguing that when investor-state tribunals “review past actions of States, they in effect set limits to States’ future actions”).

<sup>50</sup> The decision of a state to submit sovereign decisions to review by an adjudicative process (including arbitration) amounts to a policy choice by that sovereign entity. The sovereign entity in reality is an organized political entity made up of multiple constituencies. VAN HARTEN, *supra* note 14, at 48–49. As opposed to commercial arbitration, where a party’s consent to arbitrate is made in a purely private capacity, a State’s consent to arbitrate with private investors has policy implications in that it essentially constitutes consent to use the arbitral tribunal regime as a regulatory tool with respect to foreign investment. See *id.* at 58 (“[S]tates have used investment treaties [providing for investor-state arbitration] to inject into the regulatory domain a private model of adjudication that was originally designed for the resolution of commercial disputes, and thus to establish a uniquely private method of government at the international level.”).

adjudicate such exercises of public authority, acting on the basis of domestic public law.<sup>51</sup> It is not surprising, then, that scholars have claimed that the ICSID arbitration system suffers or is on the verge of suffering from a legitimacy deficit<sup>52</sup> because we generally demand that exercise of and control over public authority be carried out in a legitimate way.<sup>53</sup> There is a tendency to look for certain indicia of restraint—such as review, reason-giving, and transparency—from bodies that are in the business of shaping and limiting exercises of public power, and these indicia are considered proxies for legitimacy in the international sphere.<sup>54</sup> Thus, judicialization can also be seen as the process by which the ICSID arbitration system takes on characteristics of a public law adjudicatory body and thereby becomes subject to more accountability and legitimacy checks.

### B. Enhancing Coherence in Decisions as a Means To Improve Legitimacy

Before discussing the legitimacy-enhancing criteria for supranational adjudicatory bodies, it is important to clarify what this Note means by “legitimacy.” Legitimacy comes in two main forms—formal legitimacy and social legitimacy.<sup>55</sup> Formal (or positivistic) legitimacy of the ICSID system stems from the formal ratification of the ICSID Convention and the legal instrument providing the second source of consent to ICSID jurisdiction.<sup>56</sup> Social legitimacy, on the other hand,

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<sup>51</sup> *Id.* at 49.

<sup>52</sup> See sources cited *supra* note 16 (listing scholars criticizing ICSID arbitration system for lack of legitimacy).

<sup>53</sup> See generally Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 23 (2009) (asserting that “publicness” is key characteristic demanded from law and that general principles of public law combine formal qualities with normative commitments to channel, manage, shape, and constrain political power).

<sup>54</sup> See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16–17 (2005) (noting that accountability deficit in exercise of transnational regulatory power has encouraged application of new mechanisms and principles of administrative law at global level, including transparency, participation, reasoned decision making, legality, and review).

<sup>55</sup> See Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35, 37 (J.H.H. Weiler ed., 2000) (describing difference between formal and social legitimacy and noting that existence of former does not guarantee existence of latter).

<sup>56</sup> Cf. *id.* (explaining that in context of WTO law, formal legitimacy stems from ratification of WTO agreements “according to the internal constitutional arrangements of the Member countries”). For ICSID to have jurisdiction over a dispute, the parties need to meet two levels of consent: First, the parties must have ratified the ICSID Convention (or be a national of a state that has ratified it); second, the investment contract or treaty governing the relationship between the direct parties to the dispute must specifically allow ICSID as an arbitration forum. See ICSID Convention, *supra* note 4, art. 25.

can be defined as the quality of having authority that is “*perceived* as justified” and that “leads people (or states) to *accept* [the body’s] authority . . . because of [this] general sense that the authority is justified.”<sup>57</sup> Social legitimacy reflects whether those affected by a tribunal’s decision fully accept the decision as a legitimate outcome.<sup>58</sup> The focus of this Note is on social legitimacy, which is especially significant in the international context because the effectiveness of the international legal system in the absence of an international police force depends significantly on the willingness of state parties to adopt and implement the rulings produced by public adjudicatory bodies.<sup>59</sup> Moreover, social legitimacy is particularly important for public law adjudicators, who must necessarily adjudicate issues implicating competing values. Investor-state arbitral tribunals fall within this category of public law adjudicators in the sense that they must decide disputes in which private investors’ property rights come into conflict with sovereign states’ interests in regulation.<sup>60</sup> An important way for such an

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<sup>57</sup> Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 110, 115 (2009) (emphasis added).

<sup>58</sup> See Howse, *supra* note 55, at 37 (“[F]ormal legitimacy . . . rarely provides closure on the issue of whether those affected by a decision can fully accept it as a legitimate outcome . . . ”).

<sup>59</sup> See *id.* (noting that effectiveness of WTO system depended on willingness of state parties to adopt rulings as binding and to implement them, and that both of these factors can be influenced by social legitimacy). Howse cites Richard Falk’s explanation of a “general strategy” for legitimating international adjudication for additional insight: “[T]he authoritativeness of an interpretation derives, in part, from the cohesiveness of the elite creating an aura of objectivity for its interpretative claims and, thereby, soliciting voluntary acquiescence from the general public.” *Id.* at 37–38 (quoting Richard A. Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT’L. L. 323, 326 (1968)).

<sup>60</sup> Investor-state disputes have arisen out of various governmental activities, including a ban on the export of hazardous wastes by the Canadian legislature, a denial of a permit to operate a hazardous waste facility by the U.S. government, and a ban on an environmentally harmful fuel additive by the Canadian government. Kate Miles, *International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World* 10 & n.57–61 (Soc’y of Int’l Econ. Law, Working Paper No. 27/08, 2008), available at <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html>. In this sense, investor-state arbitral tribunals are similar to other intergovernmental adjudicatory bodies such as the WTO’s dispute settlement panels, which often engage in the adjudication of potentially conflicting public and private values. Howse, *supra* note 55, at 38–39. Like international trade disputes, investor-state disputes implicate the public interest. To illustrate, in a case over water services concession agreements between Argentina and foreign investors, an ICSID arbitral tribunal decided to allow a coalition of nongovernmental organizations to submit an amicus curiae brief. The tribunal recognized the public interest involved in an investment dispute arising out of water distribution services and sewage systems and the related human rights issues implicated by the millions of people impacted by these basic services. The tribunal noted that its decision could impact the way governments and foreign investor operators of water services would approach concession agreements in the future. *ICSID Tribunal Accepts Civil Society Organizations as Amicus Curiae*, CENTER FOR INT’L ENVTL.

adjudicatory body, charged with ruling on issues that affect a broad range of stakeholders, to strengthen the authoritativeness of its decisions is to strengthen the social legitimacy of its decisions.

Scholars have presented various criteria for enhancing the social legitimacy of decisions rendered by supranational adjudicatory bodies.<sup>61</sup> The single characteristic among these legitimacy-enhancing criteria that repeatedly appears is the norm of coherence.<sup>62</sup> By the

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L., [http://www.ciel.org/Tae/ICSID\\_AmicusCuriae\\_24Feb07.html](http://www.ciel.org/Tae/ICSID_AmicusCuriae_24Feb07.html) (last visited Feb. 22, 2011); see also Suez, Sociedad General de Aguas de Barcelona v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-governmental Organizations for Permission To Make an Amicus Curiae Submission, ¶ 27 (Feb. 12, 2007), available at [http://www.ciel.org/Publications/ICSID\\_Response\\_12Feb07.pdf](http://www.ciel.org/Publications/ICSID_Response_12Feb07.pdf) (holding that third party petitioners may file amicus curiae submission according to certain procedures).

<sup>61</sup> Supranational adjudication is defined as “adjudication by a tribunal that [is] established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties.” Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 289 (1997). The dispute may be between a private party and a foreign state; a private party and her own state; private parties themselves; or a private party and a prosecutor’s office in the criminal context. *Id.* Though tribunals engaged in supranational adjudication also can exercise jurisdiction over traditional international adjudication (state-to-state litigation), when they act in their supranational capacity “they have the potential to be far more effective than their pure international counterparts.” *Id.*

<sup>62</sup> Extensive literature exists on identifying the legitimacy-enhancing elements of international and supranational adjudicatory institutions. See, e.g., THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990) (identifying four indicators, including “coherence,” of “rule-legitimacy” in international society); Grossman, *supra* note 57, at 6 (addressing what makes states perceive international tribunals as legitimate and what makes them comply with rules and decisions of those tribunals); Helfer & Slaughter, *supra* note 61, at 298–99 (providing checklist of attributes for effective supranational adjudication); Howse, *supra* note 55, at 41–42 (grouping Helfer & Slaughter’s checklist into three competing values: fair procedures, coherence and integrity in legal interpretation, and institutional sensitivity). Representative scholars have each identified a set of factors as the key legitimacy-enhancing features for supranational and international institutions. Franck identifies determinacy, symbolic validation, coherence, and adherence as the main factors that contribute to the legitimacy of international rules. FRANCK, *supra*. Grossman explains further that determinacy relates to the clarity of the meaning of the rule; symbolic validation involves the validity that is bestowed on a symbolic communication’s recipient; coherence means the consistent application of rules to similar situations; and adherence is the existence of a vertical relationship between primary obligations and secondary rules. *Id.* Howse identifies fair procedures, coherence and integrity in legal reasoning, and institutional sensitivity as the main legitimacy-enhancing criteria in the context of the WTO. Howse, *supra* note 55, at 41–42. Grossman, whose research focuses specifically on tribunals such as ICSID, argues that exhibiting a fair and unbiased nature, interpreting and applying norms in a way that is consistent with what states believe the law is or should be (i.e., applying legally sound norms), and having a transparent democratic process are the three key factors contributing to legitimacy of supranational tribunal decisions. Grossman, *supra* note 57, at 7. Helfer and Slaughter lay out a detailed checklist of criteria that applies to a broad range of supranational adjudicatory bodies. Helfer & Slaughter, *supra* note 61, at 298–337. Applying Helfer and Slaughter’s checklist, the factors relevant for assessing the legitimacy-enhancing capacity of ICSID tribunals are neutrality and autonomy, incrementalism, quality of legal reasoning, and judicial cross-fertilization.

norm of coherence, I mean the desirability of issuing decisions that are consistent with prior decisions rendered on similar facts.<sup>63</sup> Coherence, in both the domestic and international settings, is an important rule-of-law norm because it directly impacts the willingness and ability of those governed to adhere to promulgated rules.<sup>64</sup> When rules lack coherence, parties subject to those rules cannot properly plan their conduct to be in compliance.<sup>65</sup> This undermines the legitimacy of the law and significantly decreases the utility of the law to those it governs.<sup>66</sup> I focus on coherence in this Note because of the important role it plays in imposing structure on the arbitral tribunals' decision-making processes and its ability to strengthen the rule of law in international investment arbitration. The norm of coherence acts as a check against arbitrators' discretion and contributes to the development of a body of rules that affected parties can rely on to shape their conduct and transactions. Coherence thus enhances the legitimacy and law-like nature of the rules generated through investor-state arbitration. Lack of coherence, on the other hand, weakens the rule of law in investor-state arbitration because affected parties have less incentive to adhere to the decisions or to take the decisions into consideration when structuring their transactions. Thus, promoting coherence in ICSID arbitral decisions is critical to enhancing the legitimacy of ICSID arbitral decisions in the eyes of governments, investors, and affected third parties, and, moreover, to strengthening the rule of law in the realm of international investment.

### III THE ICSID ANNULMENT MECHANISM'S INABILITY TO SERVE AS A CHECK ON INCONSISTENCY

Parts I and II have demonstrated that the judicialization of ICSID can be seen as investor-state arbitration's evolution away from its private arbitration roots and toward a public adjudicatory mechanism. I further argued that, to continue such a trend while minimizing possible legitimacy-based criticisms, the ICSID arbitration system needs to implement the principle of coherence in arbitral decision-

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<sup>63</sup> See Franck, *supra* note 16, at 1585 ("As aptly explained by Professor Thomas Franck, '[a] rule is coherent when its application treats like cases alike when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every "similar" or "applicable" instance.'" (alteration in original)).

<sup>64</sup> *Id.* at 1584.

<sup>65</sup> *Id.*

<sup>66</sup> See *id.* at 1585 ("Coherence is another key element of legitimacy; it requires consistency of interpretation and application of rules in order to promote perceptions of fairness and justice.").

making processes. The mechanism to implement coherence could be provided either by some type of appeals process or by the existing ICSID annulment mechanism, which already provides a form of review of arbitral tribunal decisions, albeit a very limited one. In this Part, I argue that annulment committees in their current form are not fit to provide coherence, and I demonstrate that recent annulment committee decisions reveal a jurisprudence still ridden with inconsistency and confusion regarding the annulment committee's proper role.<sup>67</sup> Based on this observation, I assert that the annulment mechanism as currently implemented has a negative effect on the general effort to foster greater coherence in the jurisprudence of investment law produced by ICSID arbitral decisions.

Section A analyzes three main groups of annulment committee decisions to illustrate that the annulment committee is still confused over the correct standard of review it should employ and has produced inconsistent decisions as a result. Section B argues that only fundamental structural change would be able to promote coherence in ICSID arbitral decisions and provides possible means for achieving such structural reform.

#### A. *The ICSID Annulment Mechanism Is Still Torn over the Proper Standard of Review*

##### 1. *Purpose of Annulment*

The annulment mechanism is a limited review mechanism for awards rendered by ICSID arbitral tribunals, and the drafters of the ICSID Convention did not intend for it to function as an appeals system. In other words, an annulment committee can declare an arbitral award (or part of it) to be completely or partially invalid only for certain egregious flaws, but it cannot *modify* the award with its own decision on the merits.<sup>68</sup> As noted in Part I.B, the scope of authority of the annulment committee is found in Article 52(1) of the ICSID Convention. The language of the ICSID Convention makes clear that annulment was not designed to serve as an appeals process; Article 53 provides that the arbitral tribunal's award shall not be subject to *any appeal* or to any other remedy except those provided in the

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<sup>67</sup> Much scholarly literature on ICSID has focused on the arbitral tribunals' inconsistent decisions, and thus this Note will not reiterate these arguments. For a thorough discussion, see Franck, *supra* note 16, at 1558–82.

<sup>68</sup> SCHREUER, *supra* note 3, at 891 (“A decision-maker exercising the power to annul has only the choice between leaving the original decision intact or declaring it void. . . . [An ICSID annulment] committee may not amend or replace the award by its own decision on the merits.”).

Convention.<sup>69</sup> Annulment, which is a remedy provided in the Convention, thus does not constitute an appeals mechanism,<sup>70</sup> and successive annulment committees have emphasized that annulment is in fact different from appeal.<sup>71</sup> Indeed, as the five limited grounds for annulment reflect, the drafters intended the annulment mechanism to act as an extraordinary remedy to void awards with unusually egregious flaws.<sup>72</sup>

Still, even within the five limited grounds, there is potential room for the annulment committee to engage in substantive review of the merits of arbitral decisions. According to Christoph Schreuer, the key difference between annulment and appeal is that the former is concerned only with the “legitimacy of the *process* of decision” and “not concerned with its substantive correctness,” whereas the latter is concerned with both.<sup>73</sup> However, this is not an entirely accurate depiction of the grounds for annulment.<sup>74</sup> The “manifest excess of powers” ground for annulment has been interpreted by Schreuer to include lack of or excess of jurisdiction, nonexercise of jurisdiction, and failure

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<sup>69</sup> ICSID Convention, *supra* note 4, art. 53 (“The 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. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”).

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 44 (Sept. 25, 2007), 14 ICSID Rep. 251, 258 (2009) (noting that annulment has limited function in ICSID system); Maritime Int’l Nominees Establishment v. Republic of Guinea (*MINE*), ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 4.03 (Dec. 22, 1989), 4 ICSID Rep. 79, 84 (1997) (noting that annulment committee cannot substitute its determination on merits for that of tribunal); see also Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17, 17 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) (noting that successive ad hoc committees have drawn distinction between annulment and appeal).

<sup>72</sup> Schreuer, *supra* note 71, at 17.

<sup>73</sup> SCHREUER, *supra* note 3, at 892 (emphasis added).

<sup>74</sup> Schreuer acknowledges that it has been difficult to draw the exact line in annulment jurisprudence between “exceptional emergency supervision” (that is, correction of tribunal errors in only the most egregious cases, which is allowed under Article 52 of the ICSID Convention) and “correction of perceived substantive mistakes” (that is, correction of tribunal errors based on annulment committee’s analysis of the merits of the tribunal’s decision, which is not permitted under the ICSID Convention). *Id.* at 894. He asserts that the principle of finality often trumps the principle of correctness in international arbitration—that is, the desire to see a dispute settled is regarded as more important than the substantive correctness of the decision. *Id.* at 893. Annulment is ICSID’s way of striking a balance between the two objectives of finality and substantive correctness, with a thumb on the scale for finality. *Id.* at 893–94. Thus, it is not surprising that commentators have tended generally to criticize annulment committees for overstepping the legal grounds for annulment set out in Article 52, even if the committees did so in an attempt to promote greater substantive accuracy of arbitral tribunal decisions. *Id.* at 901, 948.

to apply the proper law.<sup>75</sup> Each of these subcategories could involve at least some probing into the substantive reasoning of the tribunal, and it is up to the annulment committee to restrain itself from undertaking significant substantive review of the tribunal's reasoning. The question of exercise or nonexercise of jurisdiction, for example, would require the annulment committee to review the substance of the tribunal's decision and determine whether its decision regarding jurisdiction was correct.<sup>76</sup> The "failure to state reasons" prong, which Schreuer has interpreted to include absence of reasons, insufficient and inadequate reasons, contradictory reasons, and the failure to deal with every question raised,<sup>77</sup> also can be interpreted as an amorphous category allowing the annulment committee to review substantively the quality of the reasons provided by the tribunal. Thus, notwithstanding the intent of the Convention's drafters, potential exists for annulment committees to exploit the vagueness of the Convention's text and sneak in substantive review.

## 2. First Three Generations of Annulment Decisions

Scholars have characterized annulment decisions as falling into three distinct "generations."<sup>78</sup> The first generation of annulment committees had a broader reading of their annulment powers than scholars like Schreuer would prefer, and these earliest annulment committees arguably overstepped their boundaries. *Klöckner v. Cameroon*<sup>79</sup> and *Amco v. Indonesia*,<sup>80</sup> the two main decisions in this first generation, each annulled a tribunal's award based on an argu-

<sup>75</sup> Schreuer, *supra* note 71, at 25–29.

<sup>76</sup> See Franklin Berman, *Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration*, in THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 253, 260 (Emmanuel Gaillard ed., 2010) ("If you look at the *ad hoc* Committee decisions . . . you will find again and again that what *ad hoc* Committees are doing is actually that they are looking into the substance, the rightness of the finding by the tribunal that it did have or did not have jurisdiction.").

<sup>77</sup> *Id.* at 33–38.

<sup>78</sup> See, e.g., Walid Ben Hamida, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control: Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo*, 24 J. INT'L ARBITRATION 287, 301 (2007) (discussing categorization of annulment decisions into three generations, ranging from most intrusive decisions (first generation) to least intrusive decisions (second and third generations)); Schreuer, *supra* note 71, at 17–19 (finding that cases in first generation overstepped line between annulment and appeals, cases in second generation alleviated this concern, and cases in third generation struck intended balance for annulment process); Van Houtte, *supra* note 31, at 11–16 (discussing three generations of annulment decisions).

<sup>79</sup> *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon (Klöckner I)*, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Rep. 95 (1994).

<sup>80</sup> *Amco Asia Corp. v. Republic of Indonesia (Amco Asia)*, ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986), 1 ICSID Rep. 509 (1993).

able reexamination of the merits of the award, and both were harshly criticized by scholars for “improperly crossing the line between annulment and appeal.”<sup>81</sup>

In *Klöckner*, the foreign investor, Klöckner, concluded a series of contracts with the government of Cameroon for the establishment and management of a joint venture fertilizer factory in Cameroon. The Cameroonian government eventually shut down the factory after a period of unprofitable operation, and Klöckner filed a request for ICSID arbitration. Klöckner claimed the balance of the price of the factory from Cameroon, and Cameroon counterclaimed, demanding damages for the losses that it had incurred in the project.<sup>82</sup> The tribunal found for Klöckner, but Cameroon successfully challenged the award under Article 52 of the ICSID Convention.<sup>83</sup>

Scholars criticized the annulment committee in this case for engaging in substantive review of the merits in reaching its decision.<sup>84</sup> The committee claimed that the tribunal, in purportedly applying the law of Cameroon to the dispute (which was the proper applicable law), had assumed the existence of certain relevant legal principles (the principles of confidence, loyalty, and openness) rather than actually demonstrating the existence of these principles.<sup>85</sup> Therefore, the annulment committee held that the tribunal had failed to apply the proper law and thus had manifestly exceeded its powers, a ground for annulment under Article 52 of the Convention.<sup>86</sup> The annulment committee also concluded that the tribunal had failed to state the reasons on which the award was based because the reasoning that led to the tribunal’s calculation of damages was unacceptable, thereby amounting to a failure to state reasons.<sup>87</sup> The committee held that the reasons the tribunal provided for its application of certain equitable principles were not “sufficiently relevant.”<sup>88</sup> In the words of the

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<sup>81</sup> Schreuer, *supra* note 71, at 18. For examples of criticisms of these two decisions, see Jason Clapham, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?*, 26 J. INT'L ARBITRATION 437, 454–56 (2009); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 755–81; and Schreuer, *supra* note 71, at 17–18.

<sup>82</sup> *Klöckner*, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983), 2 ICSID Rep. 3 (1994); SCHREUER, *supra* note 3, at 897.

<sup>83</sup> MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 98 (2d ed. 2001).

<sup>84</sup> Schreuer, *supra* note 71, at 17–18, 35.

<sup>85</sup> SCHREUER, *supra* note 3, at 951.

<sup>86</sup> *Id.* at 898.

<sup>87</sup> *Klöckner I*, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), ¶ 176, 2 ICSID Rep. 95, 161; SCHREUER, *supra* note 3, at 991–92; see also Thomas Johnson, *Factual Review*, in INVESTMENT TREATY LAW: CURRENT ISSUES I 59, 60–61 (Federico Ortino, Audley Sheppard & Hugo Warner eds., 2006).

<sup>88</sup> *Klöckner I*, ICSID Case No. ARB/81/2, ¶ 171, 2 ICSID Rep. 95, 159.

annulment committee, “[o]n the basis of the Award’s own citations, [its] conclusion does not necessarily follow, nor does it conform to the understanding *the [Annulment] Committee* may have of this area of law.”<sup>89</sup> This statement made it evident that the committee was in effect reviewing the substance of the tribunal’s award and annulling it because the committee disagreed with the reasons the tribunal had provided.<sup>90</sup>

The second controversial annulment decision, *Amco v. Indonesia*, arose from a tribunal award rendered for a dispute involving agreements between Amco, the foreign investor, and the government of Indonesia to develop and manage a hotel and office block in Indonesia.<sup>91</sup> As part of these agreements, Amco committed to invest at least three million U.S. dollars in the development project. The project went forward, and, while the hotel was in operation, Amco became involved in a dispute with its local partner company, which led the local partner to take control of the hotel with the assistance of members of the Indonesian armed forces.<sup>92</sup> To make matters worse, the Indonesian government revoked the investor’s investment license, citing Amco’s failure to satisfy its side of the bargain.<sup>93</sup> Amco submitted a request for ICSID arbitration, and the tribunal found in Amco’s favor, holding that, under Indonesian law and the applicable rules of international law, Indonesia was not justified in revoking the investment license and that it had revoked the license without due process.<sup>94</sup>

The annulment committee annulled the tribunal’s award on the ground that the tribunal had manifestly exceeded its powers by failing to apply the proper law to the contract.<sup>95</sup> The tribunal, however, actually had undertaken a detailed examination of Indonesian law in its opinion to determine the total amount of investment made by the claimant investor, so it made little sense under a plain meaning interpretation of the term “application” to claim that the tribunal had not applied the proper law.<sup>96</sup> Nonetheless, the annulment committee held

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<sup>89</sup> *Id.* (emphasis added).

<sup>90</sup> See Johnson, *supra* note 87, at 60–61 (noting that Klöckner committee annulled tribunal’s award for failure to state reasons because it “did not like the idea that the tribunal . . . was approximating the value of Klöckner’s services”).

<sup>91</sup> *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 1 ICSID Rep. 377, 377–80 (2008); SCHREUER, *supra* note 3, at 899.

<sup>92</sup> *Amco Asia*, ICSID Case No. ARB/81/1, Award, 1 ICSID Rep. at 379.

<sup>93</sup> *Id.* at 379–80.

<sup>94</sup> *Id.*; SCHREUER, *supra* note 3, at 899.

<sup>95</sup> *Amco Asia*, ICSID Case No. ARB/81/1, Decision on Annulment, ¶ 111–12, 1 ICSID Rep. at 539; Johnson, *supra* note 87, at 60; Schreuer, *supra* note 71, at 28.

<sup>96</sup> Johnson, *supra* note 87, at 60.

that the tribunal's application of the law was so incorrect that the application essentially amounted to nonapplication.<sup>97</sup> In so holding, the annulment committee eliminated any meaningful difference between nonapplication of proper law, which constitutes a manifest excess of powers and therefore a ground for annulment, and erroneous application of proper law, which is essentially a review of the merits of the tribunal's reasoning and therefore beyond the power of annulment committees.<sup>98</sup> Like the *Klöckner* annulment committee, the *Amco* committee decision used the broad and vaguely defined "manifest excess of powers" prong to undertake substantive review of the tribunal's reasoning.

The second wave of annulment decisions, *Klöckner v. Cameroon II*,<sup>99</sup> *Maritime International Nominees Establishment v. Republic of Guinea (MINE)*,<sup>100</sup> and *Amco v. Indonesia II*,<sup>101</sup> parted from the more activist approach of the first generation and applied the grounds for annulment more strictly. The annulment committees in *Klöckner II* and *Amco II* upheld the original tribunals' awards, whereas the *MINE* committee partially upheld the original tribunal's award.<sup>102</sup> In

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<sup>97</sup> *Id.* The annulment committee in *Amco* found the tribunal's calculation of the total sum of the claimant investor's actual investments to be faulty because, under the relevant provisions of Indonesian Foreign Investment Law, only those amounts that the competent Indonesian authorities recognized and registered qualified as investments. The annulment committee also criticized the tribunal's inclusion of a loan in its calculation of the total investment amount. On these facts, the annulment committee held that the tribunal had so inaccurately applied the relevant Indonesian law provisions that its application amounted to not having applied Indonesian law at all. For a detailed discussion, see SCHREUER, *supra* note 3, at 949–50.

<sup>98</sup> See SCHREUER, *supra* note 3, at 950 ("The *ad hoc* Committee simply came to a different interpretation and described what it perceived as an erroneous application as a nonapplication.").

<sup>99</sup> The second *Klöckner* annulment committee decision was not published. See Schreuer, *supra* note 71, at 18. According to ICSID's website, the parties registered a resubmission proceeding following the first annulment in July 1985, and the new tribunal rendered an award in January 1988. That award was challenged again in July 1988, and in an unpublished decision in May 1990, the second *ad hoc* annulment committee issued a decision rejecting the application for annulment. *List of Concluded Cases*, INT'L CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last visited February 25, 2011).

<sup>100</sup> Mar. Int'l Nominees Establishment v. Republic of Guinea (*MINE*), ICSID Case No. ARB/84/4, Decision on Annulment (Dec. 22, 1989), 4 ICSID Rep. 79 (1997).

<sup>101</sup> The second *Amco* annulment committee decision was not published. Schreuer, *supra* note 71, at 18. Following the decision annulling the original award, the parties filed an application for a new arbitration proceeding in June 1987. The new tribunal rendered a new award in June 1990. An application to annul that award was filed in February 1991, and in an unpublished decision rendered in December 1992, the second annulment committee rejected the application for annulment. *List of Concluded Cases*, *supra* note 99.

<sup>102</sup> SCHREUER, *supra* note 3, at 901, 903; see *MINE*, ICSID Case No. ARB/84/4, Decision on Annulment, ¶¶ 6.97–6.112, 4 ICSID Rep. at 107–09 (anulling damages and

*MINE*, the only published decision of the three, Guinea used the advocacy strategy of the *Amco I* applicant to support its argument to annul a portion of the tribunal's award regarding breach of contract. Guinea argued that, *inter alia*, the tribunal manifestly exceeded its powers by failing properly to apply the applicable law to such an egregious degree that it essentially amounted to not applying the proper law at all.<sup>103</sup> Unlike *Amco I*, the *MINE* annulment committee found that the error made by the tribunal in the identification of the proper law was technical and inconsequential and therefore could not be a ground for annulment.<sup>104</sup> The *MINE* annulment committee thus refrained from elevating this legal error to a manifest excess of powers by the tribunal. The *MINE* committee's cautious approach alleviated critics' concerns following *Klöckner I* and *Amco I* that the annulment committees were improperly acting as appeals bodies.<sup>105</sup>

Similarly, cases in the third wave of annulment decisions, *Wena Hotels Ltd. v. Arab Republic of Egypt* (*Wena*)<sup>106</sup> and *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* (*Vivendi*),<sup>107</sup> also were cautious in interpreting annulment committees' powers and did not attempt to review the substantive merits of the tribunals' decisions under the guise that the decisions constituted a manifest excess of powers or that there was a failure to state reasons. Both annulment committees refused to annul the tribunals' awards based on technical reasons alleged by the parties.<sup>108</sup> Scholars noted these decisions as

costs awards). The *Klöckner II* and *Amco II* decisions came about after the annulments in those cases led to a resubmission of each case to a new arbitral tribunal. The resubmissions, in turn, led to a second round of awards and annulment proceedings. This time, the annulment committees upheld the respective awards. SCHREUER, *supra* note 3, at 898, 900. Both decisions remain unpublished, however, making it difficult to analyze the reasoning underlying the second decisions. Schreuer, *supra* note 71, at 18.

<sup>103</sup> *MINE*, ICSID Case No. ARB/84/4, Decision on Annulment, ¶¶ 2.05, 6.38, 4 ICSID Rep. at 82, 95.

<sup>104</sup> *Id.* ¶¶ 6.38–6.43, 4 ICSID Rep. at 95–96. The *MINE* annulment committee annulled the damages portion of the award for failure to state reasons. *Id.* ¶ 6.109, 4 ICSID Rep. at 109.

<sup>105</sup> Schreuer, *supra* note 71, at 17–18.

<sup>106</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt* (*Wena*), ICSID Case No. ARB/98/4, Decision on Annulment (Feb. 5, 2002), 6 ICSID Rep. 129 (2002).

<sup>107</sup> *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* (*Vivendi*), ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), 6 ICSID Rep. 340 (2002).

<sup>108</sup> Schreuer, *supra* note 71, at 20. The *Vivendi* annulment committee annulled part of the tribunal's award based on the tribunal's nonexercise of proper jurisdiction, *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 115, 6 ICSID Rep. at 371, but Schreuer notes that the committee did so because the question that the tribunal had failed to answer was one of fundamental importance not only in that case but also in several other cases that were pending at the time. Schreuer, *supra* note 71, at 20.

The *Vivendi* annulment committee emphasized an overall cautious approach toward annulment, specifically stating that, with regard to excess of powers, it is “only where the

“demonstrat[ing] that the ICSID annulment process [had] found its proper balance.”<sup>109</sup> Thus, for a while, it appeared that the annulment committees had finally come to peace with their limited mandate under Article 52 of the Convention and their powerlessness to correct substantive errors in the tribunals’ decisions.

### 3. *Manifest Excess of Powers Redux: Mitchell and MHS Annulments*

Despite the caution evident in the third generation of annulment decisions, a set of more recent annulment committee decisions indicates that annulment committees may still be confused over the proper role of annulment in the ICSID system. The annulment decisions in *Mitchell v. Democratic Republic of Congo*,<sup>110</sup> *CMS Gas Transmission Co. v. Argentine Republic*,<sup>111</sup> and *Malaysian Historical Salvors v. Malaysia (MHS)*<sup>112</sup> indicate that annulment committees once again may be taking on a more activist approach, departing from the restraint found in the third wave of annulment decisions.

#### a. The Definition of Investment and Manifest Excess of Powers

To understand fully the context of the *Mitchell* and *MHS* decisions, we must start with a survey of the grounds for ICSID jurisdiction, which requires two layers of consent. First, the host state and the national state of the investor must be party to the ICSID Convention; second, both the investor and the host state must have consented to arbitrate investor-state disputes in ICSID facilities.<sup>113</sup> In addition to

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failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.” *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 86, 6 ICSID Rep. at 363. The committee also reiterated that “an ad hoc committee is not a court of appeal” and that “[p]rovided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e).” *Id.* ¶ 64, 6 ICSID Rep. at 358.

<sup>109</sup> Schreuer, *supra* note 71, at 18.

<sup>110</sup> ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006), <http://ita.law.uvic.ca/documents/mitchellannulment.pdf> (annulling tribunal award on grounds of manifest excess of power and failure to state reasons).

<sup>111</sup> ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 136 (Sept. 25, 2007), 14 ICSID Rep. 251, 275–76 (2009) (dismissing Argentina’s claims despite finding defects in tribunal reasoning).

<sup>112</sup> See *Malaysia Historical Salvors SDN BHD v. Gov’t of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment (Apr. 16, 2009), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030\\_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247) (annulling tribunal jurisdictional award under manifest excess of power prong).

<sup>113</sup> See ICSID Convention, *supra* note 4, art. 25 (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute

satisfying this dual layer of consent, the parties must have a “legal dispute arising directly out of an investment” according to Article 25 of the ICSID Convention.<sup>114</sup> The Convention, however, does not define what constitutes “investment,” and defining this term is by no means straightforward. As a result, ICSID arbitral tribunals have split in articulating a test for defining “investment” between the “subjective test” and the “objective test,”<sup>115</sup> an issue which the annulment committees reviewed—though perhaps improperly—in *Mitchell* and *MHS*.

The subjective test mandates that the tribunal first look to the parties’ intentions as manifested in the BIT providing one of the two levels of consent for ICSID jurisdiction.<sup>116</sup> The objective test, on the other hand, requires that the tribunal first look to the ICSID Convention, which establishes an objective limitation to ICSID jurisdiction separate from that to which the parties have consented.<sup>117</sup>

In *Salini Construttori S.p.A. v. Morocco* (“*Salini*”),<sup>118</sup> the tribunal fleshed out the objective test. It stated that the existence of an investment depended on four criteria: “(1) contributions [by the investor] in cash, in-kind, or labor; (2) certain duration of performance; (3) investor participation in the risks of the transaction; and (4) investor contribution to the economic development of the host state.”<sup>119</sup>

On one side of the spectrum, some ICSID tribunals have adopted the entire *Salini* test,<sup>120</sup> and others have adopted modified versions of it. Yet, tribunals have disagreed over whether the economic development criterion should be part of the test.<sup>121</sup> On the other side of the

consent in writing to submit to the Centre.”). Consent of the parties is a threshold requirement to establish the jurisdiction of an ICSID tribunal over a matter. The host state’s consent to arbitrate generally takes the form of consent provided in a direct written agreement with the investor or consent provided in the national laws, BITs, or other international investment agreements of the host state. REED ET AL., *supra* note 3, at 35.

<sup>114</sup> ICSID Convention, *supra* note 4, art. 25.

<sup>115</sup> Ben Hamida, *supra* note 78, at 289–91.

<sup>116</sup> *Id.* at 289.

<sup>117</sup> *Id.* at 290–91.

<sup>118</sup> ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 6 ICSID Rep. 398 (2004).

<sup>119</sup> Ben Hamida, *supra* note 78, at 290 (paraphrasing *Salini*, ICSID Case No. ARB/00/4, ¶ 52, 6 ICSID Rep. at 413).

<sup>120</sup> These tribunals are exemplified by the decisions in *Consortium R.F.C.C. v. Morocco* and *Joy Mining v. Egypt*. See Ben Hamida, *supra* note 78, at 290 (discussing two tribunals that employed objective theory in defining “investment”).

<sup>121</sup> For example, the tribunal in *Consortium Groupement L.E.S.I. DIPENTA v. Algeria* outlined contribution, duration, and risk as the three criteria for an investment under the ICSID Convention. See Ben Hamida, *supra* note 78, at 290–91. This tribunal took out economic development as the fourth criterion because the tribunal believed that the

spectrum, some tribunals have stuck with the subjective test for defining investment, arguing against the adoption of a bright-line rule and suggesting instead that tribunals should fully rely on the parties' intent as manifested in the treaty providing the definition of investment.<sup>122</sup> Thus, the test for defining an investment for ICSID jurisdiction purposes is still an unsettled area of investment law jurisprudence.

The unsettled nature of the investment test is directly relevant to the manifest excess of powers ground for annulment. This ground encompasses lack of jurisdiction as a subcategory because an arbitral tribunal exercising jurisdiction when it has none (or vice versa) is in manifest excess of its powers.<sup>123</sup> Manifest excess of powers, however, must be "discerned with little effort and without deeper analysis," and is not necessarily "an indication of [the] gravity" or "seriousness of the excess" of the "fundamental nature of the rule that has been violated."<sup>124</sup> This principle should apply to the subcategories making up the manifest excess of powers prong, which include the commonly invoked lack of jurisdiction subcategory. In other words, a strict reading of the manifest excess of powers prong would require that, for lack of jurisdiction to qualify as a manifest excess of powers, the lack of jurisdiction must be apparent on the face of the arbitral tribunal's award and discernable without extensive substantive analysis of the tribunal's reasoning. In both *Mitchell* and *MHS*, the question of whether there was ICSID jurisdiction was not apparent on the face of the award because the answer depended on which test—the subjective, objective, or some modified form of either—was applied. Rather than taking the more cautious approach evident in the third generation annulment decisions, however, the *Mitchell* and *MHS* annulment committees reviewed the substantive reasoning of the arbitral tribunals on how to define an investment, thereby introducing more confusion into the realm of investment law.

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criterion was too difficult to establish and that it was implicitly covered by the other three conditions. *Id.* at 291. The tribunal in *LESI, S.p.A. v. Algeria* followed this truncated version of the objective test. See Ben Hamida, *supra* note 78, at 291 & n.22 (discussing case).

<sup>122</sup> See Malaysian Historical Salvors SDN BHD v. Gov't of Malaysia (*MHS*), ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 76 (Apr. 16, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet> (citing Schreuer for proposition that characteristics identified by *Salini* tribunal should not be understood as "jurisdictional requirements but merely as typical characteristics of investments under the Convention").

<sup>123</sup> See Compañía de Aguas del Aconquija S.A. v. Argentine Republic (*Vivendi*), ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 115 (July 3, 2002), 6 ICSID Rep. 340, 371 (2004) ("[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims.").

<sup>124</sup> SCHREUER, *supra* note 3, at 933.

### b. *Mitchell*

The *Mitchell* annulment committee heard a dispute between U.S. citizen Patrick Mitchell, the representative of the law firm Mitchell and Associates, and the Democratic Republic of Congo (DRC). The Military Court of the DRC had allegedly ordered temporary seizure of the law firm's premises in the DRC.<sup>125</sup> The ICSID tribunal found that the dispute was within its jurisdiction pursuant to the BIT between the United States and the DRC, which provided for ICSID jurisdiction in settlement of disputes arising out of investments between either country and nationals of the other country.<sup>126</sup> The tribunal held for Mitchell, finding that the DRC expropriated Mitchell's investment in the DRC in violation of the nonexpropriation provision in the bilateral treaty. The tribunal ordered the DRC to pay Mitchell \$750,000 in damages plus interest.<sup>127</sup>

The annulment committee in *Mitchell* annulled the tribunal's award upon a finding that the tribunal had lacked jurisdiction over the case and therefore had manifestly exceeded its powers.<sup>128</sup> To reach this conclusion, the annulment committee, contrary to the tribunal, appears to have adopted the *Salini* test and reinstated the criterion that Mitchell's project must contribute to the economic development of the host state in order to qualify as an investment under the ICSID Convention.<sup>129</sup> The annulment committee explicitly stated that the controversial economic development criterion was "essential" and "unquestionable."<sup>130</sup> Appearing to apply a robust *Salini* test,<sup>131</sup> the committee held that the tribunal had failed to state reasons and had manifestly exceeded its powers in characterizing the claimant's legal consulting firm as an investment.<sup>132</sup>

To legitimate the first ground for annulment, the annulment committee stated that the tribunal did not indicate the manner in which the claimant's services "concretely assisted" the host state.<sup>133</sup> As a result, the tribunal award was "incomplete and obscure as regards what it considers an investment."<sup>134</sup> The tribunal had not elaborated on these points, however, because it had not perceived economic

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<sup>125</sup> *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 1 (Nov. 1, 2006), <http://ita.law.uvic.ca/documents/mitchellannulment.pdf>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ¶ 3.

<sup>128</sup> *Id.* ¶¶ 46–48.

<sup>129</sup> *Id.* ¶¶ 27–33.

<sup>130</sup> *Id.* ¶ 33.

<sup>131</sup> See *id.* ¶ 30 (discussing *Salini* and related cases).

<sup>132</sup> *Id.* ¶¶ 41, 46–48.

<sup>133</sup> *Id.* ¶ 39.

<sup>134</sup> *Id.* ¶¶ 39–40.

development as a necessary element within the term “investment.”<sup>135</sup> In effect, the *Mitchell* annulment decision equated the tribunal’s rejection of the *Salini* test as inadequate reason giving, when the tribunal in fact had merely disagreed with the annulment committee on a substantive matter of international investment law.

The annulment committee also lacked clear grounds to find a manifest excess of power in the tribunal’s finding that it had jurisdiction over the dispute. The text of the relevant provision in the BIT between the DRC and the United States defined investment as “every kind of investment.”<sup>136</sup> This definition appears to allow the possibility that a legal consulting firm would be an “investment.” Therefore, the tribunal’s finding of jurisdiction was not necessarily egregiously incorrect on the face of the decision and did not necessarily constitute a manifest excess of power.<sup>137</sup> The *Mitchell* annulment committee thus stepped beyond its limited reviewing authority, and, in effect, replaced the tribunal’s decision with its own judgment on what should be the proper test for investment.<sup>138</sup>

### c. Malaysian Historical Salvors

In *Malaysian Historical Salvors* (MHS), the tribunal considered whether the claimant, which contracted with the government of Malaysia to salvage a shipwreck, invested in Malaysia within the

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<sup>135</sup> See *id.* ¶¶ 24, 40 (citing various paragraphs from Award illustrating annulment committee’s broad interpretation of investment, and arguing that tribunal award was “incomplete and obscure as regards what it considers an investment”).

<sup>136</sup> The precise language of the definition is as follows:

“Investment” means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts, and includes:

- (i) tangible and intangible property, including all property rights, such as . . . ;
- (ii) a company or shares or stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trades [sic] secrets and know how, and goodwill;
- (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
- (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
- (vii) returns which are reinvested.

*Id.* ¶ 26 (quoting Investment Treaty, U.S.-Dem. Rep. Congo, art. I, Aug. 3, 1984, S. TREATY DOC. NO. 99-17).

<sup>137</sup> See *supra* text accompanying note 124 (discussing manifest excess of power).

<sup>138</sup> See Ben Hamida, *supra* note 78, at 303 (noting that annulment committee engages in substantive review of tribunal’s decision when it annuls tribunal decision on basis that tribunal applied approach that is not unanimously adopted).

meaning of Article 25(1) of the ICSID Convention.<sup>139</sup> In its 2007 jurisdictional award, the tribunal followed the *Mitchell* annulment decision and adopted the four-part objective test for investment, which included the economic development prong. Following this test, the tribunal held that the claimant company's investment in a marine salvage operation did not qualify as an investment for ICSID Convention purposes because the claimant did not significantly contribute to the Malaysian economy.<sup>140</sup> On that legal ground, the tribunal dismissed the claim for lack of ICSID jurisdiction.<sup>141</sup>

In contrast to *Mitchell*, in which the annulment committee struck down the tribunal's award for finding that ICSID *had* jurisdiction, two out of three members of the annulment committee in *MHS* held that the tribunal had "manifestly exceeded" its powers by finding that ICSID *did not have* jurisdiction.<sup>142</sup> In *MHS*, both the Malaysia-U.K. BIT, which provided the second level of consent necessary to trigger ICSID jurisdiction, and the ICSID Convention provided much broader definitions of investment than the definition that the tribunal had adopted.<sup>143</sup> Thus, the choice between subjective and objective tests for determining whether there was an investment was arguably outcome determinative in this case. The annulment committee further stated: "While this committee's majority has every respect for the authors of the *Salini v. Morocco* Award and those that have followed it, . . . it gives precedence to awards and analyses that are consistent with *its* approach."<sup>144</sup>

The majority of the *MHS* annulment committee thus adopted the subjective test over the objective test to determine ICSID jurisdiction. In a strongly worded dissent, the committee's third member asserted that the committee should have included the economic development prong as a criterion to assess whether the marine salvage operation

<sup>139</sup> Malaysian Historical Salvors SDN BHD v. Gov't of Malaysia (*MHS*), ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 76 (Apr. 16, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C247>.

<sup>140</sup> *Id.* ¶¶ 22–23 ("[T]he Tribunal considered that 'the weight of the authorities . . . swings in the favor of requiring a *significant* contribution to be made to the host State's economy.'" (quoting Malaysian Historical Salvors SDN BHD v. Gov't of Malaysia (*MHS*), ICSID Case No. ARB/05/10, Award, ¶ 123 (May 17, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C247>).

<sup>141</sup> *MHS*, ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 23.

<sup>142</sup> *Id.* ¶¶ 80–84.

<sup>143</sup> *Id.* The ICSID Convention does not exactly define what investment is, so there is significant scope for arbitral tribunals to decide. See ICSID Convention, *supra* note 4, art. 25 (discussing jurisdiction of arbitral tribunal but failing to define "investment").

<sup>144</sup> *MHS*, ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 78 (emphasis added).

was an investment.<sup>145</sup> The dissent explicitly referred to the *Mitchell* annulment committee's decision, which determined that the economic development prong is essential to defining investment.<sup>146</sup>

#### d. CMS

The *CMS* annulment committee's decision further reflects the confusion over the extent of substantive review that an annulment committee should undertake. The *CMS* tribunal, and several other tribunals convened by foreign investors against Argentina, considered whether Argentina could validly raise its 2001–2002 economic crisis as a defense to these foreign investors' claims. In these cases, the economic crisis had prompted Argentina to terminate the right it had granted private licensees of public utilities to adjust tariffs according to the U.S. producer price index and to calculate tariffs in dollars.<sup>147</sup> The termination of this right resulted in financial damage to the foreign investors that had obtained licenses under Argentina's public utilities privatization program.<sup>148</sup> The issue thus became whether the existence of an economic crisis could potentially give rise to a defense of necessity for Argentina under the U.S.-Argentina BIT.<sup>149</sup> The *CMS* tribunal, along with two other ICSID tribunals ruling on the same state actions,<sup>150</sup> held that this necessity defense was unavailable; therefore, Argentina was required to pay the investors compensation.<sup>151</sup>

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<sup>145</sup> *Id.* ¶ 2 (Shababuddeen, J., dissenting).

<sup>146</sup> *Id.* ¶ 15.

<sup>147</sup> See *CMS Gas Transmission Co. v. Argentine Republic (CMS)*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 31–36 (Sept. 25, 2007), 14 ICSID Rep. 251, 255–56 (2009) (discussing Argentinian economic crisis and Argentina's termination of rights of licensees of public utilities).

<sup>148</sup> See *id.*

<sup>149</sup> *Id.* ¶¶ 35–38, 14 ICSID Rep. at 255–56. For critical discussion of these decisions, see William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 201–02 (2008), and Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361, 385 (2008) (discussing series of ICSID cases involving Argentina, including *CMS*, and comparing legal analyses of tribunals).

<sup>150</sup> *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 348–55 (Sept. 28, 2007), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC509\\_En&caseId=C8](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC509_En&caseId=C8); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), ¶¶ 11–13 (Aug. 2, 2004), 11 ICSID Rep. 295, 296–97 (2007).

<sup>151</sup> See *CMS Gas Transmission Co. v. Argentina (CMS)*, ICSID Case No. ARB/01/8, Award, ¶ 217, 14 ICSID Rep. 158, 193 (May 12, 2005), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504\\_En&caseId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4) (holding defense of necessity not applicable in this case); see also McLachlan, *supra* note 149, at 386–87 (discussing *CMS* tribunal's findings).

A fourth tribunal dealing with claims arising in the aftermath of Argentina's response to its economic crisis, the *LG&E Energy Corp. v. Argentine Republic* (*LG&E*) tribunal, diverged from the first two tribunals and found that Argentina could raise the defense of necessity.<sup>152</sup> Without a doubt, there was a clear split at the tribunal level over whether the defense of necessity was available to Argentina under international law.

Argentina requested the annulment of the *CMS* tribunal's award that had come out against it. The *CMS* annulment committee took this as its chance to weigh in on this debate, although it ultimately did not annul the decision. The annulment committee found manifest errors of law in the tribunal's treatment of the necessity defense.<sup>153</sup> However, the committee noted that such errors were not egregious enough to amount to a manifest excess of powers or a failure to give reasons; therefore, the errors did not provide a basis for annulment.<sup>154</sup> By refusing to annul the tribunal's award while still engaging in substantive criticism of the tribunal's legal reasoning, the *CMS* annulment committee in effect took sides in a heated and unsettled doctrinal debate while formally keeping within the bounds of its powers.

The *CMS* annulment decision thus created "considerable disarray,"<sup>155</sup> both for Argentina as judgment creditor and for the development of investment law doctrine on the necessity defense.<sup>156</sup> First, 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.<sup>157</sup> More-

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<sup>152</sup> *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶¶ 2–3 (Jan. 25, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet>.

<sup>153</sup> *CMS Gas Transmission Co. v. Argentine Republic (CMS)*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 132–35 (Sept. 25, 2007), 14 ICSID Rep. 251, 275 (2009).

<sup>154</sup> *Id.* ¶ 136 ("[N]otwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it.").

<sup>155</sup> McLachlan, *supra* note 149, at 386.

<sup>156</sup> The pivotal difference between the *LG&E* and *CMS* decisions was that *LG&E* interpreted the relevant treaty provision first as the primary source of the obligation, using customary international law as a supplementary source of authority, whereas *CMS* went to customary international law first and turned to the more specific treaty language only afterward. *See id.* at 387–91 (comparing treaty interpretation methodology of *LG&E* tribunal and *CMS* tribunal).

<sup>157</sup> See W. Michael Reisman, *Reflections on the Control Mechanism of the ICSID System*, in *THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS* 197, 250 (Emmanuel Gaillard ed., 2010) (expressing concern over possibility that *CMS* annulment committee's substantive criticisms of tribunal's award, which exceeded scope of annulment committee's authority under Article 52, might "erode the authority of an award that has, ironically, been confirmed and, accordingly, must be implemented by the respondent State").

over, it also tainted the legitimacy of the two other arbitral decisions that had used similar interpretive methods to reach similar results. Second, the *CMS* annulment committee's condemnation of the tribunal's legal reasoning created further confusion in the body of ICSID arbitral decisions. The committee clearly stepped beyond its authority when it claimed that the tribunal had given an "erroneous interpretation to Article XI" and that the tribunal's errors could have had "a decisive impact on the operative part of the Award."<sup>158</sup> The annulment committee's dicta may have been an attempt by a body of renowned arbitrators to reduce the precedential effect of the *CMS* tribunal's allegedly flawed reasoning.<sup>159</sup> However, it is unclear if the annulment decision actually had this effect. By explicitly condemning one approach to the doctrine of necessity, a hotly disputed area of investment law, without actually explaining what the more appropriate approach would be, the *CMS* annulment added little to the doctrinal debate. More importantly, the annulment committee did not possess the legal authority to provide such an alternative approach.<sup>160</sup> Overall, the annulment committee's substantive critique demonstrated the consequences that flow from substantive review carried out without authority to modify in any way the original decision.

#### e. Upshot of *Mitchell*, *MHS*, and *CMS*

These recent annulment decisions reveal that annulment committees are still uncertain about the exact role they should play in the substantive review of tribunal decisions. Although a strict reading of the five limited grounds for annulment would indicate that annulment committees should annul only for the most egregious errors, and therefore not take sides in unsettled substantive debates that require extensive analysis of the tribunal's legal argument, a review of the most recent decisions reveals that the annulment committees still view themselves as having some role in correcting what they perceive to be substantive mistakes committed by tribunals. In the absence of a concrete mechanism to promote coherence—for example, in the form of some type of appeals process—the way that the annulment commit-

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<sup>158</sup> *CMS*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 135–36, 14 ICSID Rep. at 275–76.

<sup>159</sup> See Burke-White, *supra* note 149, at 227 (arguing that *CMS* annulment committee's criticism of tribunal's substantive reasoning could be interpreted as committee's attempt to restrict precedential effect of decision or as attempt to call into question legitimacy of ICSID system as whole).

<sup>160</sup> See *CMS*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶ 136, 14 ICSID Rep. at 275–76 (noting its limited capacity to annul tribunal decision); see also Burke-White, *supra* note 149, at 225 (noting that annulment committee engaged in substantive analysis of tribunal's decision, though it did not impact award).

tees work in practice detracts from the endeavor to foster coherence in the jurisprudence produced by ICSID arbitral tribunals.

The upshot of the *Mitchell* and *MHS* annulment decisions is further confusion over what the proper test is for defining an investment, without any additional clarification of the existing inconsistent arbitral decisions on the issue.<sup>161</sup> After *Mitchell* and *MHS*, an investor or government is not any more informed as to what would qualify as an investment triggering ICSID jurisdiction. *CMS* yielded similar uncertainty with no further benefit.<sup>162</sup> In fact, because the annulment committee did not annul the award itself, but still condemned its defective reasoning, the committee created a situation where the losing state government faced the political burden of having to pay an award that has lost a significant degree of legitimacy in the eyes of its public. In their attempts to correct the substantive reasoning of the tribunals without explicitly overstepping the boundaries outlined in Article 52 of the Convention, the annulment committees have introduced greater confusion into the law produced by ICSID arbitration.

### *B. The Need for Fundamental Structural Change in the Form of an Appeals Mechanism*

A systematic attempt to promote greater coherence in investor-state arbitral decisions cannot be implemented through the current annulment mechanism. As demonstrated in the above discussion of recent annulment decisions, there is a real need for coherence and sound legal reasoning in investor-state arbitration in order for investor-state arbitral tribunals to play a role in shaping prospective state and investor conduct. The analysis of the evolution of annulment decisions reveals that, thus far, the annulment committees have not been able to serve as this check because they simply do not have the formal authority to do so under the ICSID Convention.

More importantly, when the committees attempt to provide this check by overstepping their power boundaries, they only infuse greater confusion into the body of law because they are inherently unable to modify substantively incorrect or inconsistent decisions. Annulment committees are thus unfit to serve as a check on coherence and, at worst, may only delegitimize tribunal decisions by

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<sup>161</sup> See *supra* notes 125–46 and accompanying text (describing disagreement between annulment committee and tribunal, in both *Mitchell* and *MHS*, as to what constitutes “investment” under ICSID).

<sup>162</sup> See *supra* notes 155–60 and accompanying text (explaining that *CMS* annulment decision generated “‘considerable disarray’ . . . for the development of investment law doctrine”).

attempting to provide substantive review that is outside of their legal authority, even if they do not end up annulling on this basis.

These limitations suggest the need for an appeals mechanism to instill a norm of coherence in ICSID decisions. There are several ways to implement such a mechanism.<sup>163</sup> The first and ideal proposal is to establish a fully fledged, permanent investment court for hearing these appeals from ICSID and other investor-state arbitral awards.<sup>164</sup> Establishing a court, however, would require amending the ICSID Convention, which prohibits any type of appeals-like process other than annulment. An amendment, in turn, would require the unanimous consent of all 144 member states.<sup>165</sup>

Such a permanent appeals body would close the gap between the private form of arbitration and the public nature of investor-state disputes. Furthermore, permanent public judges would presumably comprise this court, subject to strict conflicts checks. The judges would thus be more likely to take into account systemic sensitivities of public international law than would commercial arbitrators. This proposal has already been discussed in great detail, but without much progress given the formidable task of having to obtain the unanimous consent of all ICSID member states.<sup>166</sup>

A second, more moderate solution is the creation of bilateral appeals bodies in BITs that would apply only to the state parties of each treaty. Creating bilateral appeals bodies could be more feasible than creating a permanent appeals court. A bilateral body could be created by only partial amendment of the ICSID Convention between particular pairs of states, combined with the amendment of BITs or newly ratified comprehensive free trade agreements (FTAs). In fact, the United States, pioneering this approach, has already included provisions contemplating the establishment of a bilateral appeals body for

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<sup>163</sup> See generally KARL P. SAUVANT, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (2008) (discussing various forms that appeals mechanism could take, from permanent standing body to ad hoc bilateral system); VAN HARTEN, *supra* note 14, at 175, 180–84 (discussing different possible appeals mechanisms).

<sup>164</sup> See Franck, *supra* note 16, at 1524–26 (advocating for establishment of permanent appeals court for investment disputes). The ICSID Secretariat has also proposed this option. ICSID SECRETARIAT, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION, Annex, at 3 (Oct. 22, 2004), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14\\_1.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf).

<sup>165</sup> ICSID Convention, *supra* note 4, art. 66.

<sup>166</sup> See Franck, *supra* note 16, at 1617–25 (noting need to amend ICSID Convention in order to set up permanent appeals body). See generally SAUVANT, *supra* note 163 (providing thorough analysis of possible appeals systems for investor-state disputes).

investor-state arbitral awards in its newest set of FTAs.<sup>167</sup> The ICSID Secretariat, however, dismissed this option because creating a set of bilateral appeals mechanisms could have the effect of further fragmenting the already fragmented ICSID arbitral regime.<sup>168</sup> While the possibility of further fragmentation and inconsistency is a real concern, outsourcing the function of appellate review to a permanent international court could mitigate this concern. If groups of states agree on a single permanent body to which they would send all of their appeals requests, the common panel of public international judges deciding the issues could act as the restraint on further fragmentation, notwithstanding the fact that the requests would arise under different bilateral appeals mechanisms.

A third proposal involves establishing something similar to the NAFTA Free Trade Commission (FTC), instead of a judicial appeals mechanism, that could function as a check on inconsistency. The NAFTA's FTC is made up of the trade ministers from the three NAFTA member states. It has the authority to issue binding interpretations of legal standards in the text of NAFTA, which then become

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<sup>167</sup> The investment chapter of the Free Trade Agreement between the U.S. and Central America and the Dominican Republic, for example, stipulates:

Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement.

Dominican Republic-Central American Free Trade Argeement, Annex 10-F, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-FTA/final-text>. The U.S.-Chile FTA, the U.S.-Korea FTA, the U.S.-Morocco FTA, and the U.S.-Singapore FTA, just to name a few, contain similar provisions. See United States-Chile Free Trade Agreement, U.S.-Chile, Annex 10-H, Jan. 1, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-FTA/final-text> (designating three month timeline and outlining general purpose of appeals mechanism); United States-Korea Free Trade Agreement, U.S.-S. Kor., Annex 11-D, June 30, 2007, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-FTA/final-text> (same); United States-Morocco Free Trade Agreement, U.S.-Morocco, Annex 10-D, Jan. 1, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-FTA/final-text> (same); see also Letter from Robert B. Zoellick, U.S. Trade Rep., to George Yeo, Minister for Trade & Indus., Singapore (May 6, 2003), *available at* [http://www.ustr.gov/sites/default/files/uploads/agreements/FTA/singapore/asset\\_upload\\_file159\\_4060.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/FTA/singapore/asset_upload_file159_4060.pdf) (proposing appellate mechanism provision in United States-Singapore Free Trade Agreement); U.S. Dep't of State, Model BIT, Annex D (2004), *available at* <http://www.state.gov/documents/organization/117601.pdf>.

<sup>168</sup> See ICSID SECRETARIAT, *supra* note 164, ¶ 23 (“It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. . . . If . . . multiple appeal mechanisms are to be established, ICSID might best abstain from pursuing the creation of an Appeals Facility as it might otherwise only add to the number of appeal mechanisms.”).

part of the applicable law in future arbitrations.<sup>169</sup> This approach could serve as an effective check on coherence if such a centralized body could be established on the international level, encompassing all ICSID member states.

Such a centralized mechanism would, ideally, issue clear guidance on controversial legal issues, such as the appropriate test for defining an investment or for determining when the defense of necessity applies. It would thereby aid in the prevention of inconsistent tribunal and annulment committee decisions.<sup>170</sup> However, this approach would be effective only if the FTC's power were exercised in a legitimate way.<sup>171</sup> The NAFTA's FTC, for example, has been criticized for issuing such interpretive notes in a "nonpublic, self-serving manner," "call[ing] into question the legitimacy of the FTC authority and application of its power."<sup>172</sup> Furthermore, it is unclear whether the domestic bureaucrats comprising this body would be able to take into account the same systemic sensitivities as a public international judge would. For example, domestic bureaucrats would perhaps be unable to address international law's progressive fragmentation, or they might not fully consider the delicate manner in which investment law interacts with other specific areas of international law.

Notwithstanding the drawbacks of each proposal, any of these approaches most likely would be more effective in promoting coherence in ICSID arbitral tribunal decisions than the current annulment committee mechanism. The first step could be to set up bilateral appeals mechanisms that can refer questions to permanent international courts. This mechanism would test whether adding an element of permanent public law adjudication to ICSID arbitration could mitigate the level of inconsistency and fragmentation in international investment law. If these bilateral bodies were successful, the result would be a more coherent body of investment law jurisprudence upon which state and private actors can rely in shaping their transactions. This outcome could in turn create the momentum necessary for obtaining the unanimous consent of ICSID member states that is required to establish a permanent standing investment court. What is most important today is finding a way to trigger the process of fundamental structural change in ICSID arbitration in order to jump-start

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<sup>169</sup> Franck, *supra* note 16, at 1604.

<sup>170</sup> See *id.* at 1605 (discussing how establishment of FTC-type body could promote coherence in arbitral tribunal decisions).

<sup>171</sup> See *id.* (advancing methods to bolster FTC's legitimacy and noting dangers in unfairly administering NAFTA).

<sup>172</sup> *Id.*

the long overdue process of moving away from the inconsistency-ridden and fragmented structure of ICSID investor-state arbitration.

### CONCLUSION

With the growing judicialization of ICSID arbitral tribunals, it is increasingly important that the legitimacy of the tribunals' decisions grows correspondingly. The ICSID annulment mechanism has proven, both historically and recently, that it is a hazard both to fostering coherence in arbitral decisions and to improving the legitimacy of ICSID arbitral rulings. Put simply, it is an impediment to further judicialization of ICSID investor-state arbitration. It is thus time that scholars and policymakers place more attention on moving away from the current internal review structure of investor-state arbitration under the ICSID Convention and toward a new structure of review that might eventually include a permanent appeals mechanism and that will enable investor-state arbitration to develop further as a means of global governance.