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The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration

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International Investment Arbitration**

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The legitimacy and effectiveness of the International Centre for Settlement of Investment Disputes (ICSID)—a dispute resolution body established in 1966 under the auspices of the World Bank—is a matter of spirited debate. It has been argued by some that ICSID’s ideological and procedural bias impedes fairness and by others that its complexity and cost restrict access to justice; many contend that the absence of an appeal process has exacerbated uncertainty and unpredictability. In 2009, in the wake of rampant dissatisfaction and ideological challenge, especially on the part of Latin American states, Ecuador proposed the creation of a regional arbitration centre, as a new component of the Union of South American Nations (UNASUR). This article consolidates the myriad of criticisms launched against ICSID and qualitatively assesses the relative likelihood and desirability of the UNASUR Arbitration Centre as a successful alternative to ICSID and addition to the arbitration system. As analyzed in this article, a combination of comprehensive reform efforts to ICSID can address a majority of the issues at hand. However, as situated in a unique geopolitical context, the UNASUR Arbitration Centre will continue to gain momentum, resulting in a hybrid regime for international investment law, at least in the short- to medium-term. This hybrid regime will be functional, serve an important purpose for Latin American countries, and advance the goals of investment liberalization as a valid agenda.

Keywords:

Dispute resolution, ICSID, international investment arbitration, international law, Latin America, UNASUR

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ABSTRACT

The legitimacy and effectiveness of the International Centre for Settlement of Investment Disputes (ICSID)—a dispute resolution body established in 1966 under the auspices of the World Bank—is a matter of spirited debate. It has been argued by some that ICSID’s ideological and procedural bias impedes fairness and by others that its complexity and cost restrict access to justice; many contend that the absence of an appeal process has exacerbated uncertainty and unpredictability. In 2009, in the wake of rampant dissatisfaction and ideological challenge, especially on the part of Latin American states, Ecuador proposed the creation of a regional arbitration centre, as a new component of the Union of South American Nations (UNASUR). This article consolidates the myriad of criticisms launched against ICSID and qualitatively assesses the relative likelihood and desirability of the UNASUR Arbitration Centre as a successful alternative to ICSID and addition to the arbitration system. As analyzed in this article, a combination of comprehensive reform efforts to ICSID can address a majority of the issues at hand. However, as situated in a unique geopolitical context, the UNASUR Arbitration Centre will continue to gain momentum, resulting in a hybrid regime for international investment law, at least in the short- to medium-term. This hybrid regime will be functional, serve an important purpose for Latin American countries, and advance the goals of investment liberalization as a valid agenda.

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The International Centre for Settlement of Investment Disputes (ICSID) is in a state of crisis. Although it has grown in membership and activity,¹ and is gaining prominence in a global economic environment embracing escalating levels of foreign investment, the ICSID has seen its third membership withdrawal since 2007² and is under virtually non-stop attack.³ Latin America has been a special pressure point. In recent years, the burden of the dramatic rise in the number of ICSID arbitration requests has fallen most heavily on South American countries, which have become respondents of claims from the United States (US) to Europe and beyond. Today, out of 187 cases pending, over seventy-five involve states from the Latin American region.⁴ More than one-quarter involve a meager two countries—Argentina and Venezuela—while less than one-twelfth involve major developed countries.⁵

¹ As of 31 December 2014, 159 states have signed on to the ICSID Convention, 150 of which have deposited instruments of ratification or acceptance. As of 31 December 2014, there are more than 2,700 bilateral investment treaties (BITs) in existence, and ICSID has registered 390 investment dispute cases. See International Centre for Settlement of Investment Disputes, “ICSID Fact Sheet,” online: <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>>.

² After a barrage of anti-ICSID commentary from President Hugo Chavez, Venezuela gave notice of its withdrawal in January 2012. See Luis Britto Garcia, “We Have to Get Out of the ICSID” (24 January 2012), online: Venezuelanalysis <<http://venezuelanalysis.com/analysis/6766>>. Bolivia and Ecuador gave notice in May 2007 and July 2009, respectively.

³ See e.g. Michael Wilson, “The Enron v. Argentina Annulment Decision: Moving a Bishop Vertically in the Precarious ICSID System” (2012) 43:2 U Miami Inter-Am L Rev 347 (cautioning that while *Enron* added a “talismanic piece to the ICSID puzzle,” it leaves the proper scope of annulment review ambiguous and expansive); Julien Fouret, “The World Bank and ICSID: Family or Incestuous Ties?” (2007) 4:1 Int’l Org L Rev 121 (clarifying the possible conflicts of interest between ICSID and the World Bank and identifying associated structural and philosophical problems); Susan D Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions” (2005) 73:4 Fordham L Rev 1521 [Franck, “The Legitimacy Crisis”] (describing three sets of inconsistent decisions that have caused uncertainty and unpredictability). See also Emmanuel Gaillard, “The Denunciation of the ICSID Convention” (2007) 237:122 NYLJ 3. But see Sergio Puig, “Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law” (2013) 44:2 Geo J Int’l L 531 (admitting that ICSID has “serious challenges” that merit action, but providing evidence contradicting claims of the ICSID’s “unprecedented crisis” and explaining that much can be learned from corrective measures previously taken elsewhere); Charles N Brower & Stephan W Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?” (2009) 9:2 Chi J Int’l L 471 (conceding that unpredictability and incoherence are issues in need of “serious attention,” but arguing that a solution will come “with the passage of time”).

⁴ See International Centre for Settlement of Investment Disputes, “List of Pending Cases,” online: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>>.

⁵ *Ibid.*

In the wake of denunciation and defence, upheaval and entrenchment, the questions on ICSID's horizon are as numerous as they are varied. Is the ICSID structurally, procedurally, functionally, or ideologically deficient? Can these deficiencies be justified? Why have major destinations for foreign investment, such as Brazil, never acceded to the ICSID Convention? Should domestic courts be preferred over international forums? Would a Union of South American Nations (UNASUR) Arbitration Centre jeopardize ICSID's future superiority in the increasingly chaotic investment dispute settlement discussion?

This article will focus on these issues, primarily within the Latin American context. It proceeds in four parts. Part I consolidates the criticisms levelled against the ICSID over the past decade. Part II explains existing suggestions for reform, including the introduction of an appellate body and the option of domestic courts. It argues that while delivery on these efforts would constitute partial reclamation, it would likely be insufficient to suppress process transformation over the long term. Part III shifts the focus to Latin American countries, chronicling their adverse reactions to ICSID and the way these reactions have manifested themselves.

Finally, Part IV outlines the major tenets of Ecuador's proposal for an Arbitration Centre under the rubric of UNASUR, analyzes its strengths and obstacles, and describes the larger geopolitical context surrounding Latin America's relationship with ICSID. It ultimately contends that despite UNASUR's promise, the Centre's inherent weaknesses and these geopolitical factors are likely to result in a hybrid regime for international investment arbitration. This hybrid system will better serve the interests of both developed and developing countries by allowing for a

regional dispute resolution forum for some disputes while broadly advancing the goals of investment liberalization as a valid agenda.

I. CHALLENGES TO THE ICSID: IMBALANCE AND INCONSISTENCY

On 18 March 1965, the Washington Convention established the International Centre for Settlement of International Disputes (ICSID),⁶ an autonomous international institution whose primary purpose was to provide facilities for conciliation and arbitration of international investment disputes. Entering into force on 14 October 1966, the ICSID Convention sought to remove impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement.⁷

In the 1970s, there was no forum that functioned effectively and offered suitable means of settling investment disputes directly between a private party and a government. The perceived importance and usefulness of the institutional arbitration procedures of the ICSID were immediately compared against the existing gap in international law.⁸ That said, given its

⁶ For general information on the ICSID and investment treaties, see generally Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Northampton, MA: Edward Elgar Publishing, 2013) at 363-451 (discussing the mechanics of ICSID arbitration proceedings); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 28-43; Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) (providing a thorough description of the history, financing, jurisdiction, and implementation of the Centre).

⁷ International Centre for Settlement of Investment Disputes, "About ICSID," online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home>.

⁸ See Amazu A Asouzu, "A Review and Critique of Arbitral Awards on Article 25(2)(b) of the ICSID Convention" (2002) 3:3 J World Investment 397 (describing ICSID as a "cardinal achievement of the World Bank in the development and advancement of international law). ICSID's purpose was partly to halt the practice of "gunboat diplomacy." See Charles Vuylsteke, "Foreign Investment Protection and ICSID Arbitration" (1974) 4:2 Ga J Int'l & Comp Law 343 at 343-344.

institutionalization of investor-state arbitration,⁹ the ICSID was a novel type of institution at the time—a concept unheard of until that point.¹⁰ The reason that states were willing to concede control was to attract foreign direct investment (FDI).¹¹ ICSID was seen to have a dual function: dispute resolution, in the narrower context of international investment law; and legal interpretation and clarification of other aspects of international law.¹²

Today, 88 per cent of ICSID's caseload consists of Convention arbitration cases; the remainder is comprised of additional facility arbitration cases and conciliation cases. While international commercial arbitration focuses on dispute settlement between private parties and interstate arbitration involves only states, ICSID arbitration oscillates between the two,¹³ with its jurisdiction extending to legal disputes between member countries and individual investors.

As a witting or unwitting party to a world order dominated by institutions and processes directed towards wealth enhancement, rather than wealth distribution,¹⁴ the ICSID has been a target of attack from various fronts since its inception. As a result, developing countries and scholars began to look at ICSID more critically, formulating an extensive laundry list of

⁹ By drafting agreements with investor-state arbitration clauses, signatory nations sought to depoliticize investment disputes and empower foreign investors to reduce the risk of investment. See Eric Gillman, "The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008" (2008) 19:2 *Am Rev Int'l Arb* 269 at 271.

¹⁰ See Ibrionke T Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World" (2007) 8:2 *San Diego Int'l LJ* 345 at 356.

¹¹ Notably, Brazil, the most successful country in Latin America at achieving this goal, is not a signatory to the ICSID Convention, and it has refused all BITs. Brazil ratified the UNASUR treaty, discussed below, in July 2011.

¹² Susan L Karamanian, "Overstating the Americanization of International Arbitration: Lessons from ICSID" (2003) 19:1 *Ohio St J on Disp Resol* 5 at 9.

¹³ Gautami S Tondapu, "International Institutions and Dispute Settlement: The Case of ICSID" (2010) 22:1 *Bond L Rev* 81 at 81-82.

¹⁴ See generally Davidson Budhoo, "IMF/World Bank Wreak Havoc on the Third World" in Kevin Danaher, ed, *50 Years is Enough: The Case Against the World Bank and the International Monetary Fund* (Brooklyn, NY: South End Press, 1994) 20.

complaints. These include lack of financial and management structure and corresponding inability to face its burgeoning workload;¹⁵ cracks in its system of voluntary enforcement and award compliance;¹⁶ and inattention or lack of adequate attention to non-commercial interests such as health or environmental protection.¹⁷ This article will consider four of the major criticisms in turn.

A. Ideological and Procedural Bias

The first major underlying criticism has been the assumption of Western bias.¹⁸ Typifying this criticism is the ICSID's "umbilical cord" with the World Bank. The ICSID is part of the World Bank Group: in addition to overlapping membership, the Bank funds the ICSID Secretariat; the Governor of the Bank is an *ex officio* member of the ICSID's governing body, the Administrative Council; and the chair of the Council is the President of the Bank.¹⁹ Thus, Latin American states have expressed adamant concern that hostility towards ICSID may hamper

¹⁵ See *e.g.* David Zaring, "Rulemaking and Adjudication in International Law" (2008) 46:3 *Colum J Transnat'l L* 563 (recommending ways to increase the formality and capacity of international institutions of rulemaking while maintaining sufficient flexibility).

¹⁶ See *e.g.* Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47:4 *Va J Int'l L* 953 at 969-975 (explaining the tendency of states such as Indonesia and Pakistan to escape the regime by defying arbitration); Andrew P Tuck, "Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules" (2007) 13:4 *L & Bus Rev Am* 885 at 905-910 (describing the threat of non-enforcement in Latin America and criticizing ICSID's automatic enforcement mechanism as inadequate due to its problematic reliance on national courts). But see David R Sedlak, "ICSID's Resurgence in International Investment Arbitration" (2004) 23:1 *Penn St Int'l L Rev* 147 at 161-170 (arguing in favour of waiver clauses and other protections measures to alleviate the perceived weaknesses of ICSID award finality).

¹⁷ See *e.g.* Odumosu, *supra* note 10.

¹⁸ For a parallel discussion of Western bias as it relates to the International Court of Justice, see generally Eric A Posner & Miguel FP de Figueiredo, "Is the International Court of Justice Biased?" (2005) 34:2 *J Legal Stud* 599.

¹⁹ Leon E Trakman, "The ICSID Under Siege" (2012) 45:3 *Cornell Int'l LJ* 603 at 611-612 [Trakman, "The ICSID Under Siege"].

access to credit.²⁰ While this “relationship of accountability” was partly the point of placing the ICSID within the World Bank, it has the practical effect of making it difficult for developing countries to protect their own investment interests at the expense of more significant powers, especially as perceptions of disobedience or non-compliance are likely to have larger economic implications for the developing country in question.

A related concern is that ICSID arbitration has done more to protect capital exporter states and the “equitable” interests of their investors than to address the economic and social interests of capital importing states in Africa, Asia, and Latin America.²¹ The World Bank was created to foster and buttress the economic development of developing states, yet one of its counterparts, somewhat ironically, often seems to do the opposite. Most critics admit that the ICSID does not have a responsibility to protect weaker parties outright, but do emphasize that regardless of its “investment” orientation, the ICSID has not been sufficiently cognizant of its position within the broader World Bank system, a system which at least theoretically demands that the interests of developing countries be taken into account.

A third concern is a shadow of arbitration bias in favour of the investor.²² Article 14 of the ICSID Convention states, “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance,

²⁰ Ibrahim FI Shihata, “The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, With Particular Reference to ICSID and MIGA” (1986) 1:1 Am U J Int’l L & Pol’y 97 (providing an early discussion of the close relationship between ICSID and the World Bank).

²¹ Trakman, “The ICSID Under Siege,” *supra* note 19 at 606.

²² See *e.g.* Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) 50:1 Osgoode Hall LJ 211 (finding statistically significant evidence that arbitrators favour the positions of claimants over states, and the position of claimants from Western capital-exporting states over claimants from other states).

who may be relied upon to exercise independent judgment.”²³ While the composition of arbitrator panels speaks directly to legitimacy,²⁴ ICSID tribunals seem to weigh on the side of the investor in a dominant proportion of investment arbitration cases. The process of disqualification is shrouded in secrecy, hindering the development of objective standards.²⁵ If the threshold is whether the arbitrator demonstrates “actual or apparent partiality as well as if there is a risk or potential of bias,”²⁶ the proper approach must respond to the need even for the appearance of a fair process, which arguably does not exist across ICSID arbitration settings.²⁷ Ultimately, these expressions of possible bias impair ICSID’s procedural fairness and contribute to developing states’ reticence to its use as the premier forum for international investment arbitration disputes.

B. Absence of Appeals Process

The second main cluster of concerns relates to the absence of an ICSID appeals process. Since the beginning, the ICSID has offered an internal annulment procedure available for vexatious outcomes. However, ad hoc committees have shown an unfortunate tendency to go halfway, with some taking a broad view of their powers or actively searching for additional

²³ International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID/15 (April 2006), article 14.1 [ICSID Convention].

²⁴ Gabriel Bottini, “Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration” (2009) 32:2 Suffolk Transnat’l L Rev 341 (claiming that the independence and impartiality of arbitrators is the *sine qua non* of the system’s legitimacy and stressing the need for more exacting standards).

²⁵ See e.g. *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) (setting out the four factors of proximity, intensity, dependence, and materiality to be used in analyzing a bias challenge, and rejecting an arbitrator’s presence on the board of directors as a serious conflict of interest). See also *Urbaser SA et al v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010) (finding that opinions expressed in prior academic publications were not relevant enough to indicate a “manifest” lack of independence or impartiality).

²⁶ Schefer, *supra* note 6 at 477. One source of apparent bias can be the nationality of the arbitrator.

²⁷ On the contrast, in the sister case *AWG Group Limited v The Argentine Republic*, which proceeded under the UNCITRAL Arbitration Rules, the arbitrators concluded that disqualification was mandated where a reasonable and informed person would have “justifiable doubts” as to the arbitrator’s independence and impartiality.

grounds of annulment not relied upon by the applicant, blurring the line between annulment and appeal and causing the risk that an ICSID award will be annulled to be greater than the risk that a non-ICSID award will be set aside by a domestic court.²⁸ The scrutinizing nature of ICSID annulment proceedings may be viewed in a favourable light when compared, for example, to the set aside proceedings under the 1958 New York Convention. However, annulment proceedings alone are seen as incapable of responding to the wide array of investment disputes, their distinct factual scenarios, and the eventual tribunal decisions. As such, many have criticized the annulment procedure as insufficient,²⁹ and several academics suggest the need for introduction of an ICSID appellate body.³⁰

Even when arbitrators have made errors in law, the lack of an ICSID appellate body has created unpredictable standards and inconsistent decisions due to the lack of precedent or any possibility of *stare decisis*.³¹ Verdicts range across the proverbial spectrum; different ad hoc

²⁸ See Christoph Schreuer, “From ICSID Annulment to Appeal Half Way Down the Slippery Slope” (2011) 10:2 Law & Prac Int’l Cts & Tribunals 211.

²⁹ See Dohyun Kim, “The Annulment Committee’s Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System” (2011) 86:1 NYU L Rev 242; Christopher Smith, “The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure” (2013) 41:2 Ga J Int’l & Comp L 567. Smith expounds further, at 568:

In the process of seeking rapid finality, developments specific to international investment arbitration have created two primary problems.... The first problem is the almost universal lack of a genuine appellate process that would allow parties to appeal awards resulting from the faulty legal reasoning of tribunals. Consequently, errant legal rulings made by arbitrators are not subject to any meaningful form of judicial review. Second, the lack of clear precedent creates additional uncertainty.

³⁰ See e.g. William H Knull, III & Noah D Rubins, “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) 11:4 Am Rev Int’l Arb 531. But see Irene M Ten Cate, “International Arbitration and the Ends of Appellate Review” (2012) 44:4 NYU J Int’l L & Pol 1109 (clarifying that the case for appellate review in investment arbitration only targets the lawmaking function, not error correction); Katharina Diel-Gligor, “Competing Regimes in International Investment Arbitration: Choice between the ICSID and Alternative Arbitral Systems” (2011) 22:4 Am Rev Int’l Arb 677 (asserting that ICSID’s lack of appeal process is a strength due to the narrowness of remedies and assumed finality).

³¹ See e.g. Franck, “The Legitimacy Crisis,” *supra* note 3.

tribunals analyze factually similar cases and reach radically disparate results.³² For example, in *CMS v Argentina*³³ and *LG&E v Argentina*,³⁴ the two tribunals reached virtually identical conclusions on the substantive treatment standards, but came to diametrically opposed results on the question of whether Argentina had been in a state of necessity during the relevant time period.³⁵

C. Lack of Transparency

In law, transparency includes making information and procedures accessible to other parties and the public, holding decision-makers accountable for their decisions, and providing avenues for criticisms or complaints to be heard and redressed. In the area of investment, the transparency discussions can focus on either internal or external transparency. Internal transparency aims to improve the investors' and hosts' access to relevant information and to increase the foreseeability of the expected standards of behaviour through administrative efficiency and reciprocal policy awareness.

External transparency refers to the openness of the investment system to those outside it. This is where a majority of the criticism of ICSID has fallen. Efforts are underway to increase transparency by arbitration panels as well as by the public's access to documents—through the

³² See Silvia Karina Fiezzoni, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration" (2011) 2:1 Beijing L Rev 134.

³³ See *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007), at paras 149-150.

³⁴ See *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006), at para 267.

³⁵ For a detailed analysis of this divergence in the context of necessity, see Michael Waibel, "Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*" (2007) 20:3 Leiden J Int'l L 637. See also Harout Samra, "Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom" (2007) 38:3 U Miami Inter-Am L Rev 667 at 693 (describing the tribunal's award as "an effort to prolong the final resolution").

registration of disputes, public hearings, the publication of party submissions, and the availability of awards—but it is simply not moving fast enough.³⁶ Third party participation remains a topic of controversy.³⁷ Consequently, more work must be done to explore implementation, as well as the means of mitigating the disadvantages of transparency, such as the impact on confidentiality, the compromise of procedural integrity, and the rise of potential conflicts of interest.³⁸ Experts should also investigate effective methods of assessing transparency in the investment arbitration context.

D. Complexity and Cost

The fourth functional challenge to ICSID arbitration is the most straightforward: the sheer cost and complexity. In the last decade, the financial crisis in Argentina and several nationalizations carried out by young leftist governments in South America have spawned a burgeoning number of claims before ICSID, and some nations have been unable to cope.³⁹

³⁶ See e.g. Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, “Transparency and Public Participation in Investor-State Arbitration” (2009) 15:2 ISLA J Int’l & Comp L 337; Mabel I Egonu, “Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality” (2007) 24:5 J Int’l Arb 479.

³⁷ See Eugenia Levine, “*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation” (2011) 29:1 Berkeley J Int’l L 200 (tracing the rationale for third-party participation in dispute settlement as a means of increasing legitimacy and accountability); Barnali Choudhury, “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?” (2008) 41:3 Vand J Transnat’l L 775 (positing that the efficacy of investment arbitration decisions on public interest issues is limited by the lack of public participation); J Anthony VanDuzer, “Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and *Amicus Curiae* Participation” (2007) 52:4 McGill LJ 681 (arguing that tribunals’ realization of greater openness will diminish the potency of the accountability critique).

³⁸ See Joshua DH Karton, “A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards” (2012) 28:3 Arb Int’l 447. Means of mitigation may include joint third party submissions, tighter schedules for timely disclosure, page and subject matter limits on amicus briefs, and exceptions for state secrets. See Magraw & Amerasinghe, *supra* note 36 at 356-59.

³⁹ For in-depth discussions of the Argentinian crisis and its interaction with ICSID, see Eric David Kasenetz, “Desperate Times Call for Desperate Measures: The Aftermath of Argentina’s State of Necessity and the Current Fight in the ICSID” (2010) 41:3 Geo Wash Int’l L Rev 709; William W Burke-White, “The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System” (2008) 3:1 Asian J WTO & Int’l Health L & Pol’y 199; Charity L Goodman, “Unchartered Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina” (2007) 28:2 U Pa J Int’l Econ L 449.

ICSID proceedings are difficult to manage and prohibitively expensive, impairing access to justice and exacerbating the economic struggles of respondent developing countries.⁴⁰ It is said that every case costs the state party four million dollars, and there are increasing pressures to resort to assistance from extremely expensive foreign law firms.⁴¹ In addition, travel costs to Washington, DC and London alone are sometimes insurmountable; when Shell filed charges against Nicaragua, it had revenues 62 times the state's GNP.⁴²

II. REFORM OF THE ICSID: RESPONSES AND SOLUTIONS

Arbitration has numerous advantages over other alternative dispute resolution processes: the ability to predetermine what national or international law will apply to govern the dispute, to codify the scope of the arbitration agreement, and to agree how disputes will be adjudicated even before they arise.⁴³ One study found a success rate of 63 per cent for arbitration, compared to less than 20 per cent for bilateral negotiation and mediation.⁴⁴ Two of the main reasons for international investment arbitration's effectiveness despite the lack of traditional law enforcement are members' incentives to preserve the general legitimacy of international law and to avoid international reputation costs, which can be very steep in some circumstances. Nevertheless, successful arbitration typically requires a distinctive blend of perceived legitimacy,

⁴⁰ See *e.g.* Trakman, "The ICSID Under Siege," *supra* note 19 at 616. But see Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change" (2012) 11:2 J Int'l Bus & L 239 (alleging that ICSID arbitration is actually less expensive than UNCITRAL or the charges of other arbitral institutions).

⁴¹ See *e.g.* Eric Gottwald, "Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration" (2007) 22:2 Am U Int'l L Rev 237.

⁴² Fiezzoni, *supra* note 32 at 136.

⁴³ Sedlak, *supra* note 16 at 170-71 (finding that the benefits of ICSID arbitration outweigh the limitations).

⁴⁴ See Stephen E Gent & Megan Shannon, "The Effectiveness of International Arbitration and Adjudication: Getting into a Bind" (2010) 72:2 J Pol 366.

award enforcement, and a delicate balance of power between the parties.⁴⁵ Arbitrators, investors, and policy-makers are conscious of this fact.⁴⁶

That said, the ICSID has not been oblivious to the challenges described above, and has taken some steps to remediate.⁴⁷ In April 2006, the ICSID implemented a number of reforms to its Rules and Regulations,⁴⁸ including the introduction of Rule 37, which provides that a tribunal may admit, after consulting the direct parties, the brief of a non-disputing party, as long as it addresses a matter within the scope of the dispute.⁴⁹ The amendments were the product of “18 months’ consultation with ICSID contracting states, the business community, civil society, arbitration experts and other arbitral institutions.”⁵⁰

Two prominent scholars have been similarly inclined to encourage ICSID adjustment rather than overhaul, recently voicing particularly strong support for ICSID reform instead of replacement.⁵¹ Others have joined in the chorus of optimism.⁵² Some have even claimed to

⁴⁵ For commentary on the challenges of the political aspect and its interaction with legal mechanisms, see Stephen E Gent, “The Politics of International Arbitration and Adjudication” (2013) 2:1 Penn St JL & Int’l Aff 66.

⁴⁶ Curiously, there appears to be a negative correlation between the ICSID entry incentives of international political clout and domestic judicial capacity: the greater the former incentive, the weaker the latter (*e.g.*, Brazil) and vice versa (*e.g.*, Nicaragua).

⁴⁷ In October 2004, the ICSID Secretariat prepared and released a discussion paper which identified two overriding issues: a lack of transparency in ICSID proceedings and a lack of public participation in, and access to, ICSID awards. However, the responses were wildly uneven, and the ICSID Secretariat lacks the legal authority to initiate substantial reform. See Trakman, “The ICSID Under Siege,” *supra* note 19 at 630-31.

⁴⁸ For a thorough overview of the 2006 reforms, see Tuck, *supra* note 16 at 892-901.

⁴⁹ Nevertheless, the tribunal’s discretion is limited, and tribunals are likely to equate the need for a “sufficient interest” with requiring a “public interest.” In addition, the third party must bring “particular knowledge or insight that is different from that of the disputing parties.” Most seriously, a third party must not “unduly burden or unfairly prejudice either party.” See Trakman, “The ICSID Under Siege,” *supra* note 19 at 633-34.

⁵⁰ Tuck, *supra* note 16 at 892.

⁵¹ Sergio Puig, “Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda” (2013) 36:2 Fordham Int’l LJ 465; Wick, *supra* note 40.

⁵² See *e.g.* Kristina Andelic, “Why ICSID Doesn’t Need an Appellate Procedure, and What to Do Instead” (2014) TDM 1; Diel-Gligor, *supra* note 30.

provide preliminary evidence that the criticism of perceived bias has been misattributed to ICSID.⁵³ Most, however, remain wary of ICSID's progress, and have pushed for reform efforts or for the consideration of alternatives, several of which will be described below.

A. *Improvements—An Appellate Body*

One major recommendation to bolster the ICSID's effectiveness is the expansion or alteration of its annulment procedure. For some, the change means the introduction of a full appellate body capable of an adapted form of judicial review.⁵⁴ Others would be content with the annulment committees taking a more active role in their decision-making.⁵⁵ In the end, an appellate body would be a necessary, if not sufficient, condition for greater ICSID effectiveness in the future. Specifically, it would eliminate concerns about the absence of an appeals process and would assist in building a system of precedent to increase certainty and predictability. An appellate body would also have indirect benefits, such as a positive impact on transparency and reduced perceptions of bias. One drawback would be a likely increase in complexity and cost.

While the conflict between confidentiality and transparency is another contentious aspect of investor-state arbitration, most scholars and practitioners agree on the need for the

⁵³ See Susan D Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards" (2011) 51:4 Va J Int'l Law 825 (arguing that ICSID should minimize concerns about legitimacy and maximize opportunities for equality). Indeed, when controlling for energy disputes, Latin American respondents, and development status, the results indicated that there was no reliable statistical relationship between ICSID arbitrations and either amounts claimed or ultimate outcomes, and amounts claimed against Latin American states were higher, but only for non-ICSID arbitration. Franck still urges appropriate caution about the finding, given the size of the pre-2007 population and the presence of other studies claiming statistical significance.

⁵⁴ See Johanna Kalb, "Creating an ICSID Appellate Body" (2005) 10:1 UCLA J Int'l L & Foreign Aff 179 (arguing that states should take steps towards ICSID reform as a way of preserving sovereignty and maximizing autonomy); Smith, *supra* note 29.

⁵⁵ Tsai-Yu Lin, "Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?" (2012) 5:1 Contemp Asia Arb J 1 (considering the impact of a more active role of the annulment committees by taking "inducement" effects into account in their decision making). See also David Collins, "ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?" (2013) 30:4 J Int'l Arb 333 (encouraging the adoption of a selection procedure similar to the World Trade Organization's Appellate Body).

continuation of ICSID’s recent transparency and accountability efforts, including greater access to public hearings and document and award disclosure.⁵⁶ Similarly, some push for an expansion of the ICSID’s jurisdiction to include “any plausibly economic asset or activity.”⁵⁷ To counteract declines in legitimacy, Stephan Schill recommends an expansion of public law thinking within the existing structure of investment treaty arbitration and a reconceptualization of international investment treaty arbitration as a public law discipline that transcends territorial borders.⁵⁸

B. *Alternatives—The Domestic Courts Option*

One alternative to the ICSID that has been put forward forcefully by some is the use of domestic courts for investor-state disputes.⁵⁹ It is presumed that, if investment arbitration privileges foreign investors, it undermines the national interest; and if it detracts from the national interest, local courts ought to replace it.⁶⁰ Domestic courts are subject to established

⁵⁶ See Amanda L Norris & Katina Z Metzidakis, “Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War” (2010) 15:1 Harv Negot L Rev 31. Another recommendation is improving the constitution of ICSID panels through changes to arbitrator qualification. See Odumosu, *supra* note 10. But see Wick, *supra* note 40 at 283 (alleging that the alternative forums for investor-state arbitration are all less transparent than ICSID).

⁵⁷ See Julian Davis Mortenson, “The Meaning of ‘Investment’: ICSID’s *Travaux* and the Domain of International Investment Law” (2010) 51:1 Harv Int’l LJ 257 (urging a reversal of the trend to curtail the categories of investment eligible for protection under the ICSID Convention).

⁵⁸ For the entire discussion, which is an impressive display of theoretical innovation, see Stephan W Schill, “Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach” (2011) 52:1 Va J Int’l L 57. See also Schefer, *supra* note 6 at 454-473 (questioning whether the discretion of whether to allow an *amicus curiae* submission should rest with the parties).

⁵⁹ See *e.g.* Thiago Braz Jardim Oliveira, “The Authority of Domestic Courts in Adjudicating International Investment Disputes: Beyond the Distinction Between Treaty and Contract Claims” (2013) 4:1 J Int’l Disp Settlement 175 (arguing that deference to international dispute settlement mechanisms is incompatible with dispute settlement clauses contained in investment treaties and contractual agreements that foresee a role to be played by domestic courts).

⁶⁰ A third option, whereby foreign investors who feel that their rights have been violated can seek diplomatic intervention by their home states, is conceivable but less frequently mentioned.

procedural and evidential constraints in deciding cases, and their decisions are subject to appeal. Support for domestic courts over arbitrators is also grounded in economic efficiency.⁶¹

Australia has been one country to indicate adoption of this approach in the very recent past: a trade policy statement released on 12 April 2011 enshrines Australia's view that domestic courts, not investment tribunals, are the appropriate bodies to resolve investment disputes between domestic states and foreign investors.⁶² The effect of the policy shift is that the Australian government may negotiate that investment disputes be heard by domestic courts, rather than by international investment arbitration tribunals. However, while the most practical alternative to investor-state arbitration is domestic litigation, domestic litigation is just as open to criticism:

[P]oking metaphorical holes in ISA [investor-state arbitration] is offset by debilitating holes in domestic courts attempting to resolve investor-state disputes transparently, even-handedly and in particular, consistently and fairly. Indeed, ISA provisions in BITs provide a greater level of uniformity, predictability and security than resort to domestic courts.⁶³

In addition, the wholesale embrace of domestic courts has other repercussions. If domestic courts have the final word on investor-state arbitration, domestic laws and interests are likely to further dilute international investment law and practice. Investors are highly skeptical of

⁶¹ Trakman, "The ICSID Under Siege," *supra* note 19 at 650.

⁶² While doubts about ICSID are not limited to Australia, and Australia's stance towards investor-state arbitration is more moderate than that taken by Latin American states, Australia is the first developed state to openly indicate that it will no longer agree to the adoption of arbitration within its Bilateral and Regional Trade Agreements (BRTAs). See Leon E Trakman, "Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo" (2012) 35:3 UNSWLJ 979 [Trakman, "Choosing Domestic Courts"]. But see Leon E Trakman, "Investor-State Arbitration: Evaluating Australia's Evolving Position" (2014) 15:1 J World Trade 152 (showing Australia's retreat from its anti-ISA stance in the Korea-Australia Free Trade Agreement concluded on 5 December 2013, discouraging the complete rejection of ISA, and reaffirming the challenges of domestic courts to resolve investor-state disputes).

⁶³ Trakman, "Choosing Domestic Courts," *supra* note 62 at 984.

some domestic legal systems.⁶⁴ Domestic courts do not ordinarily share tribunals' expertise in international investment law,⁶⁵ and even with access to appeals, the multitude of judicial representation may exacerbate inconsistency and uncertainty on the global scale. Therefore, while domestic courts undoubtedly have potential to sidestep the obstacles that the ICSID has encountered, their success is unpredictable, especially in Latin America, and their implications are undeniable and partially perverse, leading us to look for solutions elsewhere.

C. Trends—Mediation and ADR

Mediation, an underused tool in investor-state dispute resolution, may become a useful alternative to international investment arbitration in the future.⁶⁶ As discussed above, investment dispute cases have increased in number, complexity, cost, and length. Today, the measures challenged cover a broad range of policy areas, including tax, subsidies, and licenses, and diverse sectors such as oil and gas, mining, tourism, public utilities, and communications, among others. Mediation has several useful advantages over arbitration: lower costs, flexibility of format, reduced time frames, ownership of the process and outcome by the disputing parties, and a space for more creative agreements that incorporate non-legal and non-monetary interests.

Other forms of alternative dispute resolution (ADR) receiving heightened attention include investment dispute detection, prevention, and management systems; early alert systems;

⁶⁴ Odumosu, *supra* note 10 at 377.

⁶⁵ Trakman, "The ICSID Under Siege," *supra* note 19 at 653.

⁶⁶ For an excellent discussion on mediation as a meaningful supplement to arbitration, see Nancy A Welsh & Andrea Kupfer Schneider, "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration" (2013) 18:1 Harv Negot L Rev 71.

and application of the “ombudsman model” to investment dispute settlement.⁶⁷ Despite the lack of enforceability, the self-determining nature that is at the core of mediation and ADR may lead to more sustainable and durable agreements. It remains unlikely that mediation will overtake arbitration as the preferred method of addressing investor-state disputes in the near term, but the evolving investment environment provides a setting for its use and an opportunity for parties to consider taking advantage of the benefits. A first step would be to establish explicit provisions on the use of non-arbitration ADR in investor-state dispute settlement agreements.

III. THE LATIN AMERICAN REACTION: SUSPICION AND WITHDRAWAL

Bearing the brunt of its shortcomings and significant condemnation for its tepid or unsatisfactory measures of reform, ICSID’s reputation among the countries of the developing world has been dwindling to the point of consequential discredit. This displeasure has led to widespread maligning and denunciation, and in Latin America particularly, a number of signs point to a backlash against the ICSID, including award non-compliance, creation of public agencies, and withdrawal from the ICSID Convention. These adverse reactions are explored in greater detail in the first three subsections below, the fourth of which situates the discussion in the larger context and analyzes the varied Latin American response through the lens of regional geopolitics.⁶⁸

⁶⁷ See Silvia Constain, “Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape” (2013) ICSID Review 1; Neville Melville, “Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution” (2010) 22:1 SA Merc LJ 50.

⁶⁸ This geopolitical context has additional impact on the practical feasibility and shortcomings of both ICSID and the UNASUR Arbitration Centre, described in Part IV(A), below. Specifically, it comprises the second driving factor behind the main argument of this article, *i.e.*, that a hybrid regime is both likely and desirable. See *infra* note 110 and accompanying text.

A. *Overt Disobedience—Non-Compliance with ICSID Awards*

Article 54 of the ICSID Convention states, “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”⁶⁹ On the contrast, Argentina defends the “Rosatti doctrine,” an approach—named after the former Argentinian Minister of Justice—which claims that the ICSID’s favouring of foreign investors amounts to discrimination and violates the Argentine Constitution’s principle of equality before the law.⁷⁰ Therefore, Articles 27 and 75.22 of the Constitution are interpreted to imply that BITs and the ICSID Convention are subordinate, and awards should be reviewable by national courts. In *Jose Cartellone v Hidroelectrica*, the Argentine Supreme Court stressed that it may review arbitral awards if it finds the awards “unconstitutional, unreasonable or illegal,” even if the parties had waived their right to appeal.⁷¹

Similarly, Article 366 of the 2009 Bolivian Constitution states, “[A]ll foreign companies operating in the oil and gas sector are subject to the sovereignty of the State and under no circumstances will a foreign tribunal be recognized nor can international arbitration or diplomatic interventions be resorted to”; and Article 422 of the 2008 Ecuadorian Constitution prohibits the enactment of treaties or international instruments in which Ecuador cedes sovereign

⁶⁹ ICSID Convention, *supra* note 23, Chapter IV, article 54.

⁷⁰ Katia Fach Gomez, “Latin America and ICSID: David versus Goliath?” (2011) 17:2 Law & Bus Rev Am 195 at 201 [Gomez]. But see generally Anibal Sabater, “The Weakness of the Rosatti Doctrine: Ten Reasons Why ICSID’s Standing Provisions Do Not Discriminate Against Local Investors” (2004) 15:3-4 Am Rev Int’l Arb 465; Bernardo M Cremades, “Resurgence of the Calvo Doctrine in Latin America” (2006) 7:1 Bus L Int’l 53.

⁷¹ Gomez, *supra* note 70 at 201.

jurisdiction to international arbitration.⁷² In July 2010, the Ecuadorian Constitutional Court declared a number of ICSID-related BITs unconstitutional on this basis.

B. Institutional Resistance—National Courts and Public Agencies

Over the past three years, Venezuela has pursued a policy of “preventive soaking.” On 15 June 2009, its Supreme Court issued a press release, under the title “Venezuela’s immunity against foreign courts is consolidating,” emphasizing its rejection of the classical configuration of international investment arbitration.⁷³ Venezuela may also resort to an “internal test” argument borrowed from Argentina to effect non-compliance with any ICSID award rendered against it. As a result, foreign investors may be confronted with a formidable “shield” between Venezuela and ICSID, contributing to a further weakening of its legitimacy.

Another expression of Latin American institutional resistance is the creation of specialized public agencies to protect themselves from ICSID arbitration. In April 2007, Nicaragua created the Interinstitutional Commission for the Defense of the Nicaraguan State against Investment Disputes.⁷⁴ In June 2008, Bolivia created a new Ministry responsible for the legal defence of the state against foreign investors.⁷⁵ Translated, its motto reads, “the motherland is not for sale, but to be defended.” While these agencies may be seen by some as a logical response to investment treaties and, as such, an implicit endorsement of the role of ICSID arbitration, they also indicate, at the very least, a skepticism and distrust of the ICSID regime by

⁷² Gomez, *ibid* at 203. For a discourse on several dire implications of Ecuador’s new approach, including a skepticism about faithful implementation and the potential loss of FDI, see Gillman, *supra* note 9 at 294-98.

⁷³ Gomez, *supra* note 70 at 205.

⁷⁴ Gomez, *ibid* at 221.

⁷⁵ Gomez, *ibid* at 222.

developing countries, and, when seen in the context of other actions taken, a pattern of denunciation.

C. Systemic Rejection—BITs, Resource Nationalism,⁷⁶ Convention Withdrawal

Some Latin American countries have shifted towards a policy of resource nationalism, placing natural resources, especially oil, under the control of national companies. For example, although Bolivia's nationalization of the hydrocarbons sector in the last century was harshly reviewed, the president approved the nationalization of mining and other sectors in 2006.⁷⁷ In Venezuela, President Hugo Chavez has followed a similar approach, signing cooperation and integration agreements within Latin America and adopting a clause within its Terms and Conditions for the Establishment and Operation of Mixed Enterprises which stressed that the Venezuelan courts, not international arbitrators, are the competent venues for dispute resolution.⁷⁸ The looming question is whether, if oil prices decline, it will lead to a fading of resource nationalism, or if broader regional approaches will have taken a firm and lasting hold.⁷⁹

Latin American countries have also begun exploiting BITs in order to turn them against ICSID or to effect its ostracization. These objectives have materialized in three ways: (1) the

⁷⁶ For broader use of this term in the Latin American energy context, see Jason Pierce, "A South American Energy Treaty: How the Region Might Attract Foreign Investment in a Wake of Resource Nationalism" (2011) 44:2 *Cornell Int'l LJ* 417.

⁷⁷ Gomez, *supra* note 70 at 206. After the nationalization, foreign companies were forced to negotiate new, less profitable contracts that eliminated ICSID arbitration as a recourse and under which they would pay up to eighty-two per cent of profits to the state in taxes. Reasons for the nationalization included increasing regionalistic policy, economic defence strategy, and political messaging, discussed further in Part III(D), below.

⁷⁸ Gomez, *ibid* at 206-7.

⁷⁹ After considerable swinging and dipping throughout 2014 and early 2015, oil prices have remained steady since April, although bailout talks with Greece and a nuclear deal with Iran have introduced new uncertainty and downward pressure despite expectations of typical summer demand. See Timothy Puko, "Oil Prices Pare Losses to End Flat" (26 June 2015), *Wall Street Journal*, online: <<http://www.wsj.com/articles/oil-prices-fall-on-concerns-about-greek-bailout-and-iran-nuclear-deals-1435309493>>. The long-term impact, if any, on resource nationalism in Latin America and elsewhere has yet to be seen.

inclusion of options to choose between ICSID and ad hoc arbitration under UNCITRAL; (2) the widespread termination of BITs; and (3) the drafting of new model BITs. The first has been practiced by Paraguay, Colombia, and Peru, among others, in multiple BITs with China, Japan, and European countries since 2005;⁸⁰ the second, by Venezuela and Ecuador, with the former terminating its BIT with the Netherlands in 2008, and the latter terminating BITs with ten countries.⁸¹ Colombia's 2007 BIT "Model" provides an illustration of the third: it establishes a "fork-in-the-road" between national courts and international arbitration, and it does not include an umbrella clause, precluding that a breach of contract between a state and foreign investor becomes a breach of the BIT.⁸²

The most dramatic form of denunciation that has demonstrated Latin America's resolve to flaunt the ICSID is withdrawal from the Convention.⁸³ Any exit from the global forum signals countries' terminal loss of faith in the system and raises questions about ICSID's fitness for purpose.⁸⁴ For a period of time, it appeared as if the statements made by Latin America—no matter how vilifying—were empty threats. Suddenly, in May 2007, the World Bank received a

⁸⁰ Gomez, *ibid* at 213-14.

⁸¹ These ten countries are Cuba, the Dominican Republic, El Salvador, Finland, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay. Furthermore, the National Assembly approved BIT termination with Finland, Sweden, France, Germany, and the United Kingdom, and is considering BIT termination with Argentina, Bolivia, Canada, Italy, Peru, Spain, Switzerland, and the United States. See Francisco X Jijón, "Ecuador Evaluates Investment Treaty Framework," online: Latin Arbitration Law <<http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework/>>.

⁸² Gomez, *supra* note 70 at 220.

⁸³ Unfortunately, the Convention's provisions on denunciation are the source of contradictory interpretations as to whether the denouncing state remains bound only in relation to disputes initiated before the denunciation (the "theory of offer to consent") or in relation to future disputes as long as the state's consent to ICSID arbitration exists in that country's BITs (the "theory of consent"). Under the latter interpretation, states must separately terminate all BITs that contain an ICSID arbitration option, and exposure to ICSID proceedings will persist throughout the period dictated by the BIT's survival clause.

⁸⁴ Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve" (13 April 2012), International Institute for Sustainable Development, online: <<http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>>.

written notice of denunciation of the ICSID Convention from Bolivia, and pursuant to Article 71 of the Convention, the denunciation took effect six months after receipt, in November 2007.⁸⁵

Simultaneously, Ecuador sought to escape by relying on Article 25.4 of the Convention, providing for the exclusion of “differences arising on matters concerning the treatment of an investment, resulting from economic activities concerning the use of natural resources such as oil, gas, minerals...” from ICSID’s jurisdiction.⁸⁶ Almost two years later, Ecuador notified the Bank of its withdrawal from the ICSID Convention. The withdrawal was decided by Ecuadorian Executive Degree, and took effect on 7 January 2010. Finally, in January 2012, Venezuela gave notice of its intent to withdraw from the Convention,⁸⁷ comprising the third Latin American state to file for divorce from the ICSID in barely five years.

D. Strategic Signalling—The Impact of Regional Geopolitics

States have multiple avenues—from bilateral negotiations to non-binding mediation to military conflict—to reach settlements over disputed issues. They must forego other options when choosing arbitration, whether under the ICSID or the aegis of a regional body such as UNASUR. There are two primary reasons for developing countries to agree to bilateral investment treaties involving international investment arbitration. The first is in pursuit of economic self-interest: in addition to investment in-flows,⁸⁸ BITs enable the host country to

⁸⁵ International Centre for Settlement of Investment Disputes, Publications, “Bolivia Submits a Notice under Article 71 of the Convention” (16 May 2007), online: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>>.

⁸⁶ Gomez, *supra* note 70 at 211.

⁸⁷ The withdrawal took effect in July 2012.

⁸⁸ See generally A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003).

leverage the power of a resource group and to extract greater value from the investment without traditional legal or contractual enforcement.⁸⁹

Secondly, developing countries may use arbitration strategies as an opportunity to engage in political messaging or to signal larger discontent, separate from the shortcomings of the investment system itself.⁹⁰ These non-economic, non-legal variables include strategic behaviour and historical background.⁹¹ On some level, the Latin American reaction to ICSID represents an ideological challenge to trade liberalism. This “engine of ideology” can be seen clearly when examining the individual state response to the ICSID over the past five years.⁹² Bolivia and Ecuador, the most radical of the ICSID-hostile countries, have led the charge towards ICSID denunciation. Most notably, these two countries—along with Venezuela and its openly-disgruntled leaders—are the countries that have withdrawn from the Convention. As discussed above, Bolivia and Ecuador have taken dramatic constitutional steps to distance themselves from

⁸⁹ See Andrew T Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38: Va J Int’l L 639 at 644 (explaining the BIT explosion by inferring that BITs provide potential investors with protections that are superior, in all forms of investor-host conflicts, to those of customary international law by allowing them to negotiate for whatever protections and safeguards they feel are needed). However, although BITs improve the efficiency of foreign investment, they may not increase the welfare of developing countries, as the “group gains” are relatively modest and are often outweighed by “bid losses” suffered by the countries due to competition for further investment. See Guzman, *ibid* at 688.

⁹⁰ See generally Ngaire Woods, *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Ithaca, NY: Cornell University Press, 2006) (untangling how politics, ideology, and economics drive the IMF and World Bank to do what they do and learn or fail to learn from those choices).

⁹¹ David Schneiderman explains the difficulty of reconciling tribunal awards by pointing to a number of these variables, including social background, attitudinal behaviour, and “new institutionalism,” which allow arbitrators to make decisions inconsistent with predictable or preferred outcomes. See David Schneiderman, “Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes” (2010) 30:2 *Northwestern J Int’l L & Bus* 383.

⁹² For a preliminary and forward-looking discussion with emphasis on the ideological component prior to UNASUR going into force, see Ignacio A Vincentelli, “The Uncertain Future of ICSID in Latin America” (2010) 16:3 *Law & Bus Rev Am* 409 (“If, moved by the engine of ideology, the rest of Latin America follows the example of Bolivia and Ecuador ... the future of ICSID in Latin America becomes uncertain”).

international arbitration jurisdiction. Finally, Ecuador and Venezuela have terminated the highest number of BITs compared to their Latin American counterparts.

On the contrast, Colombia, Paraguay, and Peru, among others, have chosen to pursue their interests from a position of compromise: by drafting new BITs or by pushing for greater option flexibility within existing BITs. This simultaneous antagonism toward and embrace of the international arbitration regime splits Latin America along ideological lines. It is critical that policymakers recognize these realities and the impact of the underlying political thrust on the long-term viability of any international arbitration system. These must therefore be kept in mind when assessing the UNASUR Arbitration Centre as a regional alternative, a task to which this article now turns.

IV. THE PROMISE OF UNASUR: RECOGNITION AND RELIEF

Frustration with ICSID—or, in three instances, its abandonment—has left Latin America in a state of transition when it comes to resolving international investment disputes. As dozens of BITs still exist, ICSID plays a predominant role in the region, but the search for a permanent alternative addressing Latin American complaints has become ever more urgent. Part IV focuses on the most promising of the alternatives proposed, a regional arbitration centre within UNASUR, analyzing its potential strengths and describing the weaknesses that it will be forced to overcome to arrive at a place of serious legitimacy.

A. Overview of Ecuador's Proposal

On 23 May 2008, the Constitutive Treaty of the Union of South American Nations (UNASUR) was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana,

Paraguay, Peru, Uruguay, and Venezuela; on 11 March 2011, the treaty entered into force.⁹³ In June 2009, at the 39th Session of the General Assembly of the Organization of American States (OAS), Ecuador's Foreign Minister proposed that UNASUR create an arbitration centre as an alternative to ICSID. In December 2010, Ecuador submitted a proposal for the arbitration centre's dispute settlement system, and the Foreign Ministers of the UNASUR member countries unanimously decided that Ecuador should chair the corresponding working group.

The Ecuadorian proposal contained three documents: (1) a set of rules for an Arbitration Centre (the "Centre"); (2) a Code of Conduct for UNASUR arbitrators; and (3) a Counseling Centre for settling investment disputes. The Arbitration Centre shall be composed of the Centre Board (representatives of member states) and the General Director. The country holding the Presidency Pro-Tempore of UNASUR shall fill the Chair of the Centre Board. The Operating Rules allow settlement of dispute between states and between a state and investor by virtue of any contractual provision or provision in an international instrument (Article 2).⁹⁴

The jurisdiction of the Centre precludes disputes concerning health, education, taxation, energy, and the environment, unless expressly stated otherwise in the relevant contract or treaty. Under no circumstances will an arbitral tribunal have jurisdiction to resolve disputes concerning the internal laws of a UNASUR member state or to the economic effects of a general norm.

As a precondition for arbitration, the states can require the exhaustion of domestic judicial and administrative remedies, and in circumstances where a claim arises in relation to a state's administrative actions, there will always be a duty to have exhausted local remedies

⁹³ UNASUR is the first regional organization to comprise most South American countries. Eight of the 12 UNASUR countries currently face 65 cases before ICSID, which represents 34.8% of the total caseload.

⁹⁴ Fiezzoni, *supra* note 32 at 140.

(Article 3). The parties shall endeavour to resolve any dispute by consultations concluded within 6 months from the date of filing the request, unless the parties agree otherwise. The parties may by mutual agreement proceed directly to the stage of mediation (Article 4).⁹⁵

The mediation is closed (a) when the parties sign a settlement agreement; (b) by decision of the mediator where it is deemed unlikely that the continuation of mediation will settle the dispute; or (c) by written decision of any party at any time after attendance at the first meeting (Article 5). The state of the investor can initiate a mediation process, but the parties may by mutual agreement dispense with this process (Article 6). In the case of an investor-state dispute, the investor shall notify the state before initiating the arbitration process.

The tribunal shall be composed of three arbitrators, unless the parties decide that another odd number would be appropriate. Each party shall appoint one arbitrator, and both parties shall, within 30 days and by mutual agreement, designate the tribunal's president and substitute. If the parties do not select an arbitrator, or if there is no agreement on the selection of the tribunal's president, the General Director of the Centre shall designate him or her by lot (Article 9).⁹⁶

In line with the UNCITRAL⁹⁷ and SCC⁹⁸ Rules, Article 3 provides that an arbitrator must disclose any "interest, relation or issue that may affect the independence or impartiality or that might reasonably create an impression of dishonesty or unfair behavior in the process." In this context, independence is an objective test relating to the absence or existence of actual

⁹⁵ Fiezzoni, *ibid* at 140.

⁹⁶ Fiezzoni, *ibid* at 141. The general appointment process under UNASUR does not deviate significantly from ICSID.

⁹⁷ United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, online: <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>.

⁹⁸ Stockholm Chamber of Commerce, Arbitration Rules, online: <http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf>.

identifiable relationships with any party to the proceedings, whereas impartiality is a subjective test examining the likelihood of an arbitrator's state of mind favouring one side in the dispute (Article 5). To support this objective, Article 6 states that former arbitrators cannot publicly comment on cases similar to those that they previously decided.

Any party may challenge an arbitrator during the election, under any circumstances that give rise to justifiable doubt about their impartiality, independence, and compliance with the Code of Conduct. Within five days of the challenge, the disputing parties may agree to accept the challenge, in which case the challenged arbitrator shall resign. If there is no agreement between the parties, the General Director shall decide the recusal within five days (Article 10).

During the proceedings, when any party determines that an arbitrator should be replaced for failing to meet the requirements of the Code of Conduct, that party must notify the other party within 15 days from the date on which the party became cognizant of the violation. If the arbitrator replaced is not the tribunal's president, the parties can reach an agreement to replace him or her, and shall elect a replacement pursuant to Article 9. If the parties fail to reach agreement, they must request that the matter be raised to the president, whose decision is final. If the president does not meet the requirements of the Code and there is no agreement between the parties, either party may request that one member on the list of arbitrators, chosen by lot, decide the matter. If this arbitrator decides against the president of the tribunal, the arbitrator shall choose a new president by lot (Article 12).⁹⁹

In order to avoid forum shopping, Article 19 establishes the exclusivity of the Arbitration Centre. It states that when parties submit a dispute to the Centre, they renounce the use of

⁹⁹ Fiezzoni, *supra* note 32 at 141.

another forum for disputes related to the same matter. In relation to the transparency of the proceedings, all arbitrations, including the associated documents, records, evidence, hearings, and awards, shall be completely public, except for those relating to defence and national security or special cases determined by mutual consent of the parties (Articles 23 and 26).

Regarding *amicus curiae*, or third party intervention, the tribunal can receive unsolicited letters from individuals or other legal entities established in the territory of the parties, unless the parties agree otherwise. The letters must be concise in addressing issues relevant to the matter of fact or law submitted for the tribunal's consideration, and must be received within 10 days from the date of the tribunal's confirmation (Article 35).

In order to avoid inconsistent decisions and awards, the arbitral tribunal shall consolidate two or more proceedings with common questions of fact or law (Article 22). The award shall be decided within a period of 240 days from the date of the tribunal's constitution, extendable up to 120 days with the mutual agreement of the parties (Article 41). The awards will be published and have precedential value (Articles 21 and 26).

The awards rendered under a tribunal can be challenged by rectification, revision, annulment, and appeal. An application for annulment is based on the following grounds: (1) the tribunal was not properly constituted; (2) the tribunal manifestly exceeded its powers; (3) a tribunal member was corrupt; (4) there was a serious departure from a fundamental rule of procedure; or (5) the award did not state the reasons upon which it was based. The application of annulment must be decided within 60 days of the constitution of the annulment tribunal.¹⁰⁰

¹⁰⁰ Fiezzoni, *ibid* at 141-42.

Where an award is submitted for appellate review of questions of law, an appellate tribunal will decide by consensus. Eight arbitrators would constitute the pool for the appellate tribunal, which would then be comprised of three arbitrators for any given case. The appeal must be decided within 60 days of the constitution of the appellate tribunal (Article 44).¹⁰¹

The enforcement regime envisaged by the Centre requires immediate compliance with an award, or within a time frame agreed to by the parties, with exceptions for civil or economic emergency. The only basis for denying recognition and enforcement of the award is when the subject of the dispute is not arbitral or is contrary to public policy (Article 47). In the event that the award is not honoured, the matter shall be returned to the original tribunal that heard the dispute. In investor-state disputes where the state does not wholly comply with the award, the home state may temporarily suspend concessions and obligations owed to the host state. Such suspension must be proportional to the degree of non-compliance (Article 49).¹⁰²

The Counseling Centre will provide legal guidance, technical assistance, research, and specialized studies, as well as legal representation in investment disputes (Article 2). If a conflict of interest arises, where the antagonistic parties are among countries part of UNASUR and the Centre, the Centre is prohibited from providing its services (Article 3).

Both the Arbitration Centre and the Counseling Centre will begin with a three-year period of UNASUR members-only use. During a second three-year stage, launching immediately following the first stage, other Latin American countries will be invited to use the Centres. After six years, the Centres will be open to all countries.

¹⁰¹ The appellate dimension of UNASUR is one of the most important distinctions from the current ICSID structure, especially given the challenges outlined in Part I(B), above.

¹⁰² Fiezzoni, *supra* note 100 at 142.

B. Strengths and Benefits

Ecuador's proposal addresses all four of the concerns raised in Part I of this article: (i) ideological and procedural bias; (ii) absence of an appeals process; (iii) lack of transparency; and (iv) complexity and cost. First, the nature of the disqualification process alleviates ideological and procedural bias by closely mirroring the International Chamber of Commerce and SCC Rules, and improves arbitrator regulation through the addition of selection by lot. In contrast with the ICSID's demand for disclosure of any conflicts of interest, UNASUR's rules and requirements of independent judgment raise the standard to the likelihood of prejudgment or that which "might reasonably create an impression of dishonesty." This approach does not remove concerns with respect to arbitration's lack of institutional safeguards of judicial independence (especially security of tenure and financial security, in the form a set salary from the state), nor address the lack of prohibitions of side work as a lawyer that may create conflicts of interest with cases heard by an arbitrator.¹⁰³ However, both UNASUR's process and higher subjective standard do assist in addressing the issue of bias raised earlier.

The establishment of an appeal mechanism and a system of precedent accrues further benefits, and responds directly to the second weakness, namely the absence of an appeals process. The resulting consistency and coherence of jurisprudence would create predictability and enhance the legitimacy of the investment arbitration system. Thirdly, the rules on transparency, providing exceptions only for national security and special cases, are consistent with the NAFTA arbitration framework¹⁰⁴ and would foster greater openness and democratic

¹⁰³ A related concern would be finding an objective method for case assignment.

¹⁰⁴ North American Free Trade Agreement, NAFTA Secretariat, "Dispute Settlement," online: <<https://www.nafta-sec-alena.org/Default.aspx?tabid=86&language=en-US>>.

initiative. The enforcement limitations for non-arbitrable subjects or on grounds of public policy mimic the New York Convention and most international arbitration rules apart from ICSID.

Fourthly, Latin American countries could take advantage of cost efficiencies associated with the Centre as arbitration forum. For example, the Centre's use would extinguish the excessive expense of travelling to London or Washington, DC for any investment disputes settled therein. Finally, the rollout implementation strategy and the integration of consultation and mediation opportunities prior to arbitration are creatively useful approaches that appear to have few downsides.¹⁰⁵ The influence of the World Trade Organization's dispute settlement system regarding the consultation stage, appellate proceedings, and award compliance, is constructive,¹⁰⁶ and the common political will of UNASUR member countries to establish the Arbitration Centre speaks to the depth of their commitment.

C. Potential Obstacles

Although UNASUR's Arbitration Centre has many benefits that address ICSID's four major shortcomings, it nonetheless suffers from a number of certain and potential obstacles. One immediate caveat is that it is unproven. The remainder can be divided into three categories: (1) practical calibrations;¹⁰⁷ (2) perceived insulation; and (3) overall lack of cohesion.

First, UNASUR's Arbitration Centre will have to overcome some technical hurdles by fine-tuning its proposed scheme and rules. For example, the requirement to exhaust domestic remedies, whether administrative or judicial, could force the injured party to wait years until applying to the UNASUR Centre. Undeniably, there are good reasons for the duty, including

¹⁰⁵ The major downside, *i.e.*, perceived insulation, is discussed in Part IV(C), below.

¹⁰⁶ The WTO's compliance levels are fairly high. See Fiezzoni, *supra* note 32 at 143.

¹⁰⁷ Several recommendations to achieve these necessary adjustments will be proposed in Part IV(D), below.

economic, legal, and precedential considerations, but UNASUR member countries must be cautious to develop a clear and concrete framework that advises countries on their responsibilities and settlement recourses at various points in a dispute. Although the Arbitration Centre's scope of action would be significantly enlarged compared to the ICSID, the jurisdictional stipulations considerably reduce matters connected with commerce. It will be impossible to eliminate forum shopping entirely, as the investor cannot prohibit its shareholders from suing in another forum.

In addition, the rollout implementation model may result in a perception of regional insulation. Some believe that the main flaw of UNASUR is in its attempt to supply an ideological retort to US hegemony.¹⁰⁸ Likewise, ICSID and UNCITRAL are universal, if imbalanced, forums for international investment arbitration. If UNASUR's Centre is viewed as a mere regional consortium or as an improper venue by investors,¹⁰⁹ it might be spurned wholesale as a second-tier example of NAFTA with developing countries at the forefront. Admittedly, global respect for Brazil as an economic powerhouse may suppress these impressions, but the risks remain. Any such forum, whether regional or global, will also carry risks of political interference, especially in the absence of the conventional elements of judicial independence.

A third potential obstacle is UNASUR's lack of cohesion as a whole. The model to which UNASUR compares itself is far from perfect: despite strong beginnings, the European Union (EU) is showing present signs of difficulty to generate consensus and distribute benefits to its

¹⁰⁸ Carola Ramón-Berjano, "UNASUR: When Thinking Big Is Not Necessarily the Best" (Spring 2011) Regional Survey 16 at 16.

¹⁰⁹ Mariano Tobías has such a pessimistic outlook, stating that the Centre is "doomed to fail" because investors will not consider the forum to be an impartial venue to resolve an eventual dispute. See Mariano Tobías, "Investment Arbitration and Latin America: Irreconcilable Differences?" (21 May 2013), online: Kluwer Arbitration Blog <<http://kluwerarbitrationblog.com/blog/2013/05/21/investment-arbitration-and-latin-america-irreconcilable-differences/>>.

member countries, and prioritizing the expansion over the deepening of the union has resulted in crisis. Similarly, a wide spectrum of economic policy differences exists among Latin American countries: Colombia and Mexico favour free trade, while Venezuela and Bolivia are more left-wing.¹¹⁰ It is arguable that historic rivalries between Brazil and Argentina, or territorial disputes between Chile, Ecuador, and Peru, will never truly disappear. Given the relative lack of resources in Latin America, is it worthwhile to channel them towards bureaucracy? Finally, the political mood on the continent is quite unruly, and new governments could radically change the diplomatic configuration.

D. Recommendations

UNASUR's proposed Arbitration Centre has adequate promise to remain a part of the discussion on how to resolve international investment disputes. However, policymakers must address the shortcomings highlighted above, especially promoting independence, fairness, openness, and a proper balance between investor protection and regulatory flexibility. UNASUR must work to ensure that investors see the Centre as a viable venue for arbitration. In addition, there are several items that demand consideration.

First, ensuring the high academic and professional qualifications of the arbitrators, as well as their independence and impartiality in practice, will be essential to the success and longevity of the proposed Centre. It will be important to relax the limitations on the scope of jurisdiction, and to state a reasonable limit of time for the requirement to exhaust domestic judicial remedies, to protect certainty and predictability. The 10-day limit on *amicus curiae* is too short; it should be extended until the submission of the allegations. There must also be some

¹¹⁰ Ramón-Berjano, *supra* note 108 at 16.

flexibility regarding exclusivity. The Centre should include a fee cap on the costs of arbitrators, and a binding cooling-off period of three years post-service, during which arbitrators cannot work as counsel or experts in investment cases.¹¹¹

It is also recommended that the consultation stage be mandatory only for state-state disputes, because in the case of investor-state disputes, parties do not have equal negotiating leverage and would benefit from the intervention of a mediator or arbitrator. In relation to the consolidation of similar proceedings, it is necessary to consider the NAFTA Rules to permit a tribunal feasibility evaluation on a case-by-case basis. To strike an effective balance between transparency and confidentiality, the parties should have a more versatile right to request confidentiality of certain documents, such as those containing corporate secrets. Finally, the Centre should be creative in its structure and available selection: submitting to arbitration rulings over a series of smaller issues poses less of a risk to disputants than a comprehensive ruling, as it provides the ability to back out at various stages.

Arbitration will be most effective when it reflects the political realities on the ground and produces settlements that do the same. As a result, foreign investment participants worldwide will be best served by a “hybrid” system that includes both ICSID and regional arbitration forums such as the UNASUR Arbitration Centre. This hybrid system will preserve investment liberalization, which is attractive for developed states, and preserve a regional alternative, which is attractive for developing states.¹¹² A similar desire for flexibility and the need to find

¹¹¹ These suggestions would be equally applicable to UNASUR member states negotiating the terms of their investment treaties under other frameworks. Treaties should also encompass obligations on issues such as environmental and human rights impact assessments, and compliance with laws on health, labour and taxation.

¹¹² Catharine Titi, “Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas” (2014) 30:2 *Arbitration Int’l* 357 (arguing that there is no single Latin American approach to investment arbitration and that the region should not be considered as particularly hostile to it, as such a characterization fails to capture the complex nuances of the relationship between Latin America and the investor-state dispute resolution mechanism).

agreement over complex, multidimensional issues supports the usefulness of a hybrid system, which would allow for the UNASUR Centre to handle region-specific disputes or disputes between accepting countries, and for the ICSID to remain in place when non-accepting countries are involved. This hybrid regime also recognizes the complex political undercurrents in regions such as Latin America, and provides a framework that is more robust as local and national governments inevitably change over time.

One possible counter-argument is that such a hybrid system would create the perception of a “two-tier” regime for international investment arbitration. However, this criticism can be discounted on the following grounds. First, it need not be restricted to a developing/developed state dichotomy. UNASUR should take steps to frame the Centre as a legitimate alternative for all countries and to encourage global participation in its Centre and other regional alternatives if and when they arise. Secondly, even if such a perception is somewhat inevitable, the flexibility, comprehensiveness, and other benefits of a hybrid regime make the trade-off worthwhile.

Another potential counter-argument is that the rationales from both the perspective of developed and developing states do not support a hybrid system. In other words, developed states will want to enforce ICSID only, based on efficiency grounds, and developing states should be coaxed to “get with the program” and embrace the ICSID system so as to gain greater access to capital. However, if the Centre is viewed as a dispute resolution alternative of mutual benefit under certain circumstances, developing states, including Latin American countries, should feel empowered, not hindered, by espousing its use. Developed states might be more of a tough sell, but they may also stick with the ICSID in the short term. Over time, as the Centre establishes

itself and can be observed to fill a helpful niche within international investment law, developed states will be motivated to agree to its use as an alternative arbitration forum.

In the end, the UNASUR Arbitration Centre can be an alternative forum for investment dispute resolution, but it must offer a legitimate and profound alternative. ICSID is costly and close-mouthed; the Centre must be at least marginally affordable. ICSID is beholden to those with power; the Centre must accommodate those without. ICSID works with the present; the Centre must operate in the future. ICSID is driven by commercial interests; the Centre must grapple with the interests of justice and society. The Centre should seek to inspire a root-and-branch review of the patterns of international investment arbitration, and imbue developing countries with the conviction to regain some of the clout that has been thereby forfeited.

V. CONCLUSION

The system surrounding international investment law has undergone significant change over the past decade. The number of arbitration cases has skyrocketed; ICSID has come under increasing scrutiny; new strategies, such as mediation, are gaining ground; and non-ICSID alternatives have been proposed and developed. The fracture is widening, and a Latin American apparition lurking in the waters is steadily making its way towards land, upsetting the stability of a lucrative industry built on illusions of neutrality. Brazil's rise, coupled with the diminished influence of the United States and the progressively salient global role of China, has reshuffled the kaleidoscope of regional allegiances in the Americas. Emerging counterweights, competing asymmetries, and shifting fault lines have had grave repercussions that threaten an economic earthquake of mammoth proportions.

Although its task is formidable, the UNASUR Arbitration Centre, with its singular ambition and the chance to learn from “deficient” projects like Mercosur, has crucial prospects for investors, states, and scholars alike. Michael Shifter explains:

It is tempting to be skeptical about the proliferation of these crosscutting and often overlapping mechanisms.... It is hard to know whether they will be able to sustain and strengthen their efforts, or will, with time, simply fade into the background. Even so, it would be a mistake to ignore or dismiss the rich institutional experimentation under way and the new regional architecture that is taking shape.¹¹³

This article has taken steps not to “ignore or dismiss,” but to engage critically with one form of Latin America’s “rich institutional experimentation.” The system of international investment arbitration in Latin America and beyond is no longer on the “eve of a drastic change,”¹¹⁴ but it is evolving quickly in the direction of a hybrid regime. Looking forward, it is expected that ICSID will continue to retain a stronghold, although its mantle as the dominant forum for investment arbitration may have been shaken.¹¹⁵

Latin America, in particular, will see a distinct fusion of arbitration methodologies. This hybrid system, comprised of both ICSID arbitration and regional alternatives such as the UNASUR Arbitration Centre, is both likely to emerge and desirable. It will be functional in addressing the problems that continue to plague the ICSID. It will also satisfy international investment participants. First, the hybrid system will advance the goals of investment liberalization, which is desirable for developed states. More importantly for Latin America and

¹¹³ Michael Shifter, “The Shifting Landscape of Latin American Regionalism” (February 2012) *Current History* 56 at 56.

¹¹⁴ Vincentelli, *supra* note 92 at 411.

¹¹⁵ Trakman sees the adoption of BIT policies that provide investor-state parties with a choice among dispute-resolving measures, including access to domestic courts. See Trakman, “The ICSID Under Siege,” *supra* note 19.

other developing states, it will allow for regional cooperation and collaboration in the case of some disputes, which will mean cost efficiencies, reduced perceptions of bias, and an overall sense of ownership. In the final analysis, the UNASUR Centre may not be faultless in addressing ICSID's shortcomings and providing a sound alternative to classic international investment arbitration, but with its unique contribution and the measured incentive of its member states, it will remain with us for a period of considerable duration.