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## ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration

Kendall Grant

*Osgoode Hall Law School of York University (Student Author)*

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## ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration

### Abstract

The legitimacy and effectiveness of the International Centre for Settlement of Investment Disputes ("ICSID") is a matter of spirited debate. Opponents argue that ICSID's ideological and procedural bias impedes fairness, its complexity and cost restrict access to justice, and its lack of an appeal process exacerbates uncertainty and unpredictability. Dissatisfaction with and ideological critique of ICSID, especially on the part of Latin American states, culminated in 2009 when Ecuador proposed the creation of a regional arbitration centre as part of the Union of South American Nations ("UNASUR"). This article surveys the myriad criticisms launched against ICSID and assesses the likelihood and desirability of the UNASUR Arbitration Centre as an alternative or supplement to ICSID. The article concludes that reforms to ICSID can address most of the problems identified by critics but that the UNASUR Arbitration Centre will continue to gain momentum. The result will be a hybrid international investment law regime, 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.

### Keywords

International Centre for Settlement of Investment Disputes; Investments, Foreign (International law); Arbitration and award

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## ICSID's Reinforcement? UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration

KENDALL GRANT\*

The legitimacy and effectiveness of the International Centre for Settlement of Investment Disputes ("ICSID") is a matter of spirited debate. Opponents argue that ICSID's ideological and procedural bias impedes fairness, its complexity and cost restrict access to justice, and its lack of an appeal process exacerbates uncertainty and unpredictability. Dissatisfaction with and ideological critique of ICSID, especially on the part of Latin American states, culminated in 2009 when Ecuador proposed the creation of a regional arbitration centre as part of the Union of South American Nations ("UNASUR"). This article surveys the myriad criticisms launched against ICSID and assesses the likelihood and desirability of the UNASUR Arbitration Centre as an alternative or supplement to ICSID. The article concludes that reforms to ICSID can address most of the problems identified by critics but that the UNASUR Arbitration Centre will continue to gain momentum. The result will be a hybrid international investment law regime, 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.

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\* JD 2015, Osgoode Hall Law School; Student-at-Law, Blake, Cassels & Graydon LLP. The author would like to thank Gus Van Harten, the instructor of the "International Investment Law" seminar in the Winter semester of 2014 for which this article was originally written, whose exemplary guidance was much appreciated. The article was reworked for publication via the Osgoode Hall Law Journal Writers' Workshop and was selected by a panel of three Osgoode faculty members as the winner of the inaugural Osgoode Hall Law Journal Writing Competition, which is open to Senior Editors of the Journal. Special thanks to Stepan Wood for his invaluable insight and support as supervisor of the Writers' Workshop. Finally, thanks are owed to the Writing Competition judges and to the editors of the Osgoode Hall Law Journal.

La légitimité et l'efficacité du Centre international pour le règlement des différends relatifs aux investissements (« CIRDI ») font l'objet d'un débat animé. Ses opposants avancent que le parti pris idéologique et procédurier du CIRDI l'empêche d'être équitable, que sa complexité et son coût restreignent l'accès à la justice et que l'absence d'un processus d'appel exacerbe l'incertitude et l'imprévisibilité. L'insatisfaction à son égard et la critique idéologique du CIRDI, particulièrement de la part des pays latino-américains, ont culminé en 2009 lorsque l'Équateur a proposé la création d'un centre régional d'arbitration dans le cadre de l'Union des nations sud-américaines (« UNASUR »). Cet article passe en revue la multitude des critiques soulevées à l'égard du CIRDI et tente d'évaluer la vraisemblance et la souhaitabilité du centre d'arbitration de l'UNASUR comme alternative ou complément du CIRDI. L'article conclut que des réformes du CIRDI pourraient régler la plupart des problèmes soulevés par les critiques, mais que le centre d'arbitration de l'UNASUR continuera de prendre de l'essor. Il en résultera, du moins à court ou moyen terme, un régime hybride d'arbitration des investissements internationaux. Ce régime hybride sera fonctionnel, très utile pour les pays d'Amérique latine et fera progresser les objectifs de libéralisation des investissements.

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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<sup>1</sup> and is gaining prominence in a global economic environment that embraces escalating levels of foreign investment, ICSID has seen its third membership withdrawal since 2007<sup>2</sup> and is virtually under non-stop attack.<sup>3</sup> 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 to claims from the United States, Europe, and beyond. Today, Latin American states are respondents in 65 of 213 pending cases.<sup>4</sup> More than one-quarter involve just two

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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, “Background Information on the International Centre for Settlement of Investment Disputes (ICSID),” online: <[icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf](http://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.com/analysis/6766](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 at 353 (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 that contradicts claims of 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 Chicago J Int’l L 471 at 473 (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, “Cases,” online: <[icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?cs=CD27](http://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?cs=CD27)>.

countries—Argentina and Venezuela—while less than one-twelfth involve major developed countries.<sup>5</sup>

In the midst of denunciation and defence and upheaval and entrenchment, the questions on ICSID's horizon are as numerous as they are varied. Is 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 focuses on these issues primarily within the Latin American context. It proceeds in four parts. Part I synthesizes the criticisms levelled against ICSID over the past decade. Part II surveys existing suggestions for reform, including the introduction of an appellate body and the option of recourse to domestic courts. It argues that while these reforms would resolve some problems, they would likely be insufficient to suppress pressures for transformation over the long term. Part III shifts the focus to Latin American countries, chronicling their adverse reactions to ICSID.

Finally, Part IV outlines the major tenets of Ecuador's proposal for an arbitration centre under the rubric of UNASUR, analyzing its strengths and weaknesses and situating it in the larger geopolitical context. Ultimately, this article contends that despite the proposal's promise, its inherent weaknesses and related 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.

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5. *Ibid.*

## I. CHALLENGES TO ICSID: IMBALANCE AND INCONSISTENCY

On 18 March 1965, the *ICSID Convention*<sup>6</sup> established ICSID, an autonomous international institution whose primary purpose is to provide facilities for conciliating and arbitrating international investment disputes. Entering into force on 14 October 1966, the *ICSID Convention* sought to remove impediments to the free international flow of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement.<sup>7</sup>

Before ICSID's establishment, no forum functioned effectively as a means of settling investment disputes directly between a private party and a government. Thus, the development of ICSID's arbitration procedures was a reaction to this existing gap in international law.<sup>8</sup> ICSID's novel institutionalization of investor-state arbitration<sup>9</sup> was unheard of until that point.<sup>10</sup> The promise of increased foreign direct investment supplied states with a reason to concede

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6. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, (entered into force 14 October 1966), online: International Centre for Settlement of Investment Disputes <[icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> [*ICSID Convention*]. For general information on ICSID and investment treaties, see Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Northampton, Mass: Edward Elgar Publishing, 2013) at 363-451 (discussing the mechanics of ICSID arbitration proceedings); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd 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 ICSID).
  7. International Centre for Settlement of Investment Disputes, "About ICSID," online: <[icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx](http://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx)>.
  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 at 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 L* 343 at 343-44.
  9. By drafting agreements with investor-state arbitration clauses, signatory nations sought to depoliticize investment disputes and empower foreign investors in order 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 Ibironke 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.

control to international arbitrators.<sup>11</sup> 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.<sup>12</sup>

Ninety-eight per cent of ICSID's caseload consists of convention arbitration cases; the remainder is comprised of conciliation cases. While international commercial arbitration focuses on dispute settlement between private parties and interstate arbitration involves only states, ICSID's jurisdiction encompasses legal disputes between any two of the following three parties: member countries, individual investors, and corporate entities.<sup>13</sup>

As a party to a world order dominated by institutions and processes committed to the enhancement rather than distribution of wealth,<sup>14</sup> ICSID has been a target of attack from various fronts since its inception. Governments and scholars from the developing world have formulated an extensive list of complaints. These include ICSID's alleged pro-Western bias, its absence of an appeal mechanism, its lack of transparency, its complexity and cost, its lack of financial and management structures and corresponding inability to manage its burgeoning workload,<sup>15</sup> cracks in its system of voluntary compliance and enforcement,<sup>16</sup> and its inadequate attention to non-commercial interests such

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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 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.
  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 969-75 (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 905-10 (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 161-70 (arguing in favour of waiver clauses and other protective measures to alleviate the perceived weaknesses of ICSID award finality).



as health or environmental protection.<sup>17</sup> This article focuses on the first four of these issues.

#### A. IDEOLOGICAL AND PROCEDURAL BIAS

The first major criticism is that ICSID has a pro-Western bias:<sup>18</sup> ICSID is part of the World Bank Group; the World Bank funds the ICSID Secretariat; the governor of the World Bank is an ex officio member of ICSID's governing body, the Administrative Council; and the president of the World Bank is the chairman of the Administrative Council.<sup>19</sup> The World Bank's intimate relationship with ICSID has led some Latin American states to complain that they cannot criticize ICSID for fear of hampering their access to World Bank credit.<sup>20</sup> While accountability was one reason for placing ICSID within the World Bank, in practice, it makes 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 countries in question.

A related concern is that ICSID arbitration has done more to protect capital-exporting states and their investors than to address the economic and social interests of capital-importing states in Africa, Asia, and Latin America.<sup>21</sup> It seems ironic that whereas the World Bank was created to foster and buttress the economic development of developing states, one of its parts often seems to do the opposite. Most critics admit that ICSID does not have a responsibility to protect weaker parties, but they emphasize that ICSID has not been sufficiently cognizant of its position within the broader World Bank system, which at least theoretically demands that the interests of developing countries be taken into account.

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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 611-12 [Trakman, "The ICSID Under Siege"].

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.

A third concern is that arbitration is biased in favour of investors.<sup>22</sup> Article 14(1) 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, who may be relied upon to exercise independent judgment.”<sup>23</sup> While the composition of arbitral panels has a direct influence on legitimacy,<sup>24</sup> ICSID tribunals seem to weigh on the side of the investor in a dominant proportion of investment arbitration cases.<sup>25</sup> The process of disqualification is shrouded in secrecy, hindering the development of objective standards.<sup>26</sup> If the threshold is whether the arbitrator demonstrates “actual or apparent partiality as well as if there is a risk or potential of bias,”<sup>27</sup> the proper approach must respond to the need for the appearance of a fair process, which arguably does not exist across ICSID arbitration settings.<sup>28</sup> Ultimately, these expressions of possible bias impair ICSID’s procedural fairness and contribute to developing states’ reticence to use ICSID as the premier forum for international investment arbitration disputes.

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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 [Van Harten, “Arbitrator Behaviour”] (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).
  23. *Supra* note 6, art 14(1).
  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 Van Harten, “Arbitrator Behaviour,” *supra* note 22.
  26. See *e.g.* *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic* (2008) (International Centre for Settlement of Investment Disputes) (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 and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (2010) at para 40 (International Centre for Settlement of Investment Disputes) (finding that opinions expressed in prior academic publications were not relevant enough to indicate a “manifest” lack of independence or impartiality).
  27. Schefer, *supra* note 6 at 477. One source of apparent bias can be the nationality of the arbitrator.
  28. In contrast, in the sister case *AWG Group Limited v The Argentine Republic*, which proceeded under the United Nations Committee on International Trade Law (“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. See *AWG Group Limited v The Argentine Republic* (2008) at para 24 (United Nations Committee on International Trade Law).

## B. ABSENCE OF AN APPEALS PROCESS

The second main cluster of concerns relates to the absence of an ICSID appeals process. Since its establishment, ICSID has offered an internal annulment procedure for vexatious outcomes. However, some ad hoc annulment committees have taken a broad view of their powers or have searched proactively for additional grounds of annulment not relied upon by the applicant, thus blurring the line between annulment and appeal. As a result, the risk that an ICSID award will be annulled may be greater than the risk that a non-ICSID award will be set aside by a domestic court.<sup>29</sup> The interventionist character of ICSID annulment proceedings may be viewed favourably by some critics in comparison to set-aside proceedings under the 1958 New York Convention.<sup>30</sup> However, annulment proceedings alone are incapable of responding to the wide variety of investment disputes and arbitral decisions. As such, many have criticized the annulment

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29. See Christoph Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" (2011) 10:2 Law & Prac Int'l Courts & Trib 211.

30. Specifically, the creativity and flexibility of ICSID annulment committees in reaching beyond the strict language of Article 52 of the *ICSID Convention* stands in contrast to the "very limited grounds" on which awards may be set aside under the New York Convention. See J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 442-44.

procedure as insufficient,<sup>31</sup> and several academics advocate for the introduction of an ICSID appellate body.<sup>32</sup>

Even when arbitrators have made errors in law, the lack of an ICSID appellate body has led to unpredictable standards and inconsistent decisions.<sup>33</sup> Different ad hoc tribunals analyze factually similar cases and reach radically disparate results.<sup>34</sup> Tribunals in two Argentine cases, for example, reached virtually identical conclusions on the substantive treatment standards but came to diametrically opposed results on the question of whether Argentina was in a state of necessity during the relevant time period.<sup>35</sup>

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31. 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 further explains:

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 (*ibid* at 568).

32. 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 law-making 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).

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

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

35. See *CMS Gas Transmission Company v Argentine Republic* (2007) at paras 149-50 (International Centre for Settlement of Investment Disputes); *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic* (2006) at para 267 (International Centre for Settlement of Investment Disputes). 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”).

### 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 criticism or complaints to be heard and redressed. In the area of investment, transparency discussions can focus on internal or external transparency. Internal transparency aims to improve investors' and host states' 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 outsiders. This is where a majority of the criticism of ICSID has fallen. Efforts are underway to increase the transparency of investment arbitration through public registration of disputes, public hearings, and publication of party submissions and awards, but reforms are not moving fast enough.<sup>36</sup> Third-party participation in arbitrations remains a topic of controversy.<sup>37</sup> While traditional arbitration is typically confidential and constrained to the parties in question, investor-state arbitration impacts a host of actors in addition to the parties, all of whom have a stake in the outcome. Consequently, more work must be done to implement external transparency and to mitigate its potential disadvantages, such as the impact on confidentiality, the compromise of procedural integrity, and the rise of potential conflicts of interest.<sup>38</sup> Experts should also investigate effective methods of assessing transparency in the investment arbitration context.

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36. See *e.g.* Daniel Barstow Magraw Jr & Niranjali Manel Amerasinghe, "Transparency and Public Participation in Investor-State Arbitration" (2009) 15:2 ILSA 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 settlements 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.

#### D. COMPLEXITY AND COST

The fourth functional challenge to ICSID arbitration is the most straightforward: cost and complexity. The financial crisis in Argentina and several nationalizations by leftist governments in South America have spawned a burgeoning number of claims before ICSID, and some respondent nations have been unable to cope.<sup>39</sup> ICSID proceedings are difficult to manage and prohibitively expensive. Their cost and complexity exacerbate the economic struggles of respondent developing countries and impair these countries' access to justice.<sup>40</sup> Defending a case costs on average four and a half million dollars,<sup>41</sup> and there are increasing pressures to hire expensive foreign law firms.<sup>42</sup> In addition, travel costs to common arbitration venues like Washington and London are sometimes insurmountable.<sup>43</sup> Finally, investors' resources often dwarf those of respondent states: When Shell filed charges against Nicaragua, it had revenues sixty-two times the state's gross national product.<sup>44</sup>

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39. For in-depth discussions of the Argentine 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.
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. Matthew Hodgson, "Counting the costs of investment treaty arbitration" (24 March 2014), *Global Arbitration Review*, online: <[www.allenoverly.com/SiteCollectionDocuments/Counting\\_the\\_costs\\_of\\_investment\\_treaty.pdf](http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf)>. See also Matthew Hodgson, "Costs in Investment Treaty Arbitration: The Case for Reform" (2014) 11:1 *Transnat'l Disp Mgmt* 1.
42. 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.
43. Choosing the "seat" of arbitration is a strategic consideration and often stems from the leverage that one party to the dispute exerts over the other. As such, "friendly" procedural centres such as Washington, London, or New York receive the greatest amount of attention, requiring some parties to cross significant distances to attend.
44. Fiezzoni, *supra* note 34 at 136.

## II. REFORM OF ICSID: RESPONSES AND SOLUTIONS

Arbitration has numerous advantages over other alternative dispute resolution (“ADR”) processes, including the ability to predetermine which national or international law will govern the dispute, codify the scope of the dispute resolution agreement, and agree how disputes will be adjudicated even before they arise.<sup>45</sup> It may also be more effective at resolving disputes. One study found a success rate of 63 per cent for arbitration compared to less than 20 per cent for bilateral negotiation and mediation.<sup>46</sup> Despite the lack of traditional enforcement, international investment arbitration is effective because of incentives to preserve the general legitimacy of international law and to avoid international reputation costs, which can be very steep in some circumstances.<sup>47</sup> Successful arbitration nevertheless typically requires a distinctive blend of perceived legitimacy, award enforcement, and a delicate balance of power between the parties.<sup>48</sup> Arbitrators, investors, and policy makers are conscious of this fact.<sup>49</sup>

ICSID has not been oblivious to the challenges described above and has taken some remedial action.<sup>50</sup> In April 2006, ICSID implemented a number of reforms to its Rules and Regulations,<sup>51</sup> 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

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

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

47. See Stephen E Gent, “The Politics of International Arbitration and Adjudication” (2013) 2:1 Penn St JL & Int’l Aff 66 at 69-70. See generally George W Downs & Michael A Jones, “Reputation, Compliance, and International Law” (2002) 31:1 J Legal Stud S95.

48. For commentary on the challenges of the political aspect and its interaction with legal mechanisms, see Gent, *supra* note 47.

49. *Ibid.* Curiously, there appears to be a negative correlation between 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).

50. In October 2004, the ICSID Secretariat prepared and released a discussion paper that 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.

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

of the dispute.<sup>52</sup> The amendments were the product of “18 months’ consultation with ICSID contracting states, the business community, civil society, arbitration experts and other arbitral institutions.”<sup>53</sup>

Two prominent scholars have been similarly inclined to encourage ICSID adjustment rather than overhaul and have recently voiced strong support for ICSID reform instead of replacement.<sup>54</sup> Other proponents have joined in the chorus of optimism,<sup>55</sup> and some have even claimed to provide preliminary evidence that the criticism of ICSID as biased is misplaced.<sup>56</sup> Most critics remain wary of ICSID’s progress, however, and have pushed either for reform or for the consideration of alternatives. Certain suggestions for improvement and several alternatives will be discussed below.

#### A. IMPROVEMENTS: AN APPELLATE BODY AND BEYOND

One major recommendation to bolster ICSID’s effectiveness is the expansion or alteration of its annulment procedure. For some, this would entail the introduction of a full appellate body capable of an adapted form of judicial review.<sup>57</sup> Others would be content with the annulment committees taking a more

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52. 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.

53. Tuck, *supra* note 16 at 892.

54. 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.

55. See *e.g.* Kristina Andelic, “Why ICSID Doesn’t Need an Appellate Procedure, and What to Do Instead” (2014) *Transnat’l Disp Mgmt* 1; Diel-Gligor, *supra* note 32.

56. 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 nevertheless urges appropriate caution about the finding given the size of the pre-2007 population and the presence of other studies claiming statistical significance.

57. 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 31.



active role.<sup>58</sup> Ultimately, an appellate body would be a necessary, if not sufficient, condition for greater ICSID effectiveness in the future. Specifically, it would address concerns about the absence of an avenue to correct errors and would assist in building a system of precedent to increase certainty and predictability. An appellate body would also have indirect benefits, such as increased 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 that ICSID should continue its recent efforts to improve transparency and accountability, which include greater access to public hearings and disclosure of documents and awards.<sup>59</sup> Similarly, some push for an expansion of ICSID's jurisdiction to include "any plausibly economic asset or activity."<sup>60</sup> To enhance the legitimacy of international investment law, Stephan W. 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.<sup>61</sup>

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58. 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 at 20 (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).
59. 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).
60. 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*).
61. "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 454-73 (questioning whether the discretion to allow an *amicus curiae* submission should rest with the parties).

## B. ALTERNATIVES: DOMESTIC COURTS, MEDIATION, AND OTHER AVENUES

One alternative to ICSID is the use of domestic courts for investor-state disputes.<sup>62</sup> Proponents of this view presume that if investment arbitration privileges foreign investors, it undermines the national interest, and if it detracts from the national interest, it ought to be replaced by local courts.<sup>63</sup> Domestic courts are subject to established 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.<sup>64</sup>

Australia endorsed this approach in 2011, when it issued a trade policy statement expressing the view that domestic courts, not investment tribunals, are the appropriate bodies to resolve investment disputes between states and foreign investors.<sup>65</sup> The effect of this policy shift is that the Australian government may negotiate for investment disputes to be heard by domestic courts rather than by international investment arbitration tribunals. However, domestic litigation is also open to criticism:

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62. 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).
63. A third option in addition to ICSID and domestic courts, whereby foreign investors who feel their rights have been violated can seek diplomatic intervention by their home state, is conceivable but less frequently mentioned.
64. Trakman, “The ICSID Under Siege,” *supra* note 19 at 650.
65. Austl, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (12 April 2011), online: <[blogs.usyd.edu.au/japaneselaw/2011\\_Gillard%20Govt%20Trade%20Policy%20Statement.pdf](http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf)>. 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. 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-investor-state arbitration stance in the Korea-Australia Free Trade Agreement concluded on 5 December 2013, discouraging the complete rejection of investor-state arbitration and reaffirming the challenges of domestic courts to resolve investor-state disputes).

[P]oking metaphorical holes in [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, [investor-state arbitration] provisions in [bilateral investment treaties] provide a greater level of uniformity, predictability and security than resort to domestic courts.<sup>66</sup>

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 some domestic legal systems.<sup>67</sup> Domestic courts do not ordinarily share tribunals' expertise in international investment law,<sup>68</sup> and even with access to appeals, variations between countries may exacerbate inconsistency and uncertainty on the global scale. Therefore, while domestic courts undoubtedly have potential to sidestep the obstacles that ICSID has encountered, their success is unpredictable and they have undeniable drawbacks, leading us to look for solutions elsewhere.

Mediation is an underused tool in investor-state dispute resolution and may become a useful alternative to international investment arbitration in the future.<sup>69</sup> As discussed above, investment disputes have increased in number, complexity, cost, and duration. 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. Mediation has several advantages over arbitration: lower costs, more flexible format, quicker time frames, enhanced party control over the process and outcome, and a greater space for creative agreements that incorporate non-legal and non-monetary interests.<sup>70</sup>

Other ADR tools receiving heightened attention include investment dispute detection, prevention, and management systems; early alert systems; and application of the "ombudsman model" to investment dispute settlement.<sup>71</sup>

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66. Trakman, "Choosing Domestic Courts," *supra* note 65 at 984.

67. Odumosu, *supra* note 10 at 377.

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

69. 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.

70. See Silvia Constain, "Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape" (2013) 29:1 ICSID Rev 1. But see Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'" (2012) 17:1 Harv Negot L Rev 61 at 61 (arguing that "the boundaries between mediation and arbitration are blurring").

71. See Constain, *supra* note 70; Neville Melville, "Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" (2010) 22:1 SA Mercantile LJ 50.

Mediation will not likely 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 take advantage of its benefits. A first step would be to establish explicit provisions encouraging the use of non-arbitration ADR in investor-state dispute settlement agreements.

### III. THE LATIN AMERICAN REACTION: SUSPICION AND WITHDRAWAL

Developing countries have borne the brunt of ICSID's shortcomings and have criticized its tepid reforms. Their displeasure has been expressed in widespread denunciation of ICSID. In Latin America in particular, there are signs of a backlash against ICSID, including award non-compliance, creation of public agencies, and withdrawal from the *ICSID Convention*. These adverse reactions are explored in greater detail in Parts III(A)–(C), below. Part III(D) situates these developments in a larger context and analyzes the varied Latin American responses through the lens of regional geopolitics.<sup>72</sup>

#### 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."<sup>73</sup>

By contrast, Argentina contends that ICSID's preferential treatment of foreign investors amounts to discrimination in violation of the Argentine Constitution's principle of equality before the law.<sup>74</sup> This view, known as the "Rosatti Doctrine," named after a former Argentine Minister of Justice, holds that bilateral investment treaties ("BITs") and the *ICSID Convention* are subordinate to the Argentine Constitution and that awards should be reviewable

72. This geopolitical context has additional impacts 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).

73. *Supra* note 6, art 54.

74. Katia Fach Gómez, "Latin America and ICSID: David versus Goliath?" (2011) 17:2 L & Bus Rev Am 195 at 201. 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.

by national courts.<sup>75</sup> In *Jose Cartellone Construcciones Civiles SA v Hidroelectrica Norpatagonica SA*,<sup>76</sup> the Argentine Supreme Court stressed that it may review arbitral awards if it finds the awards “unconstitutional, unreasonable or illegal,” even if the parties have waived their right to appeal.<sup>77</sup>

Bolivia and Ecuador have taken a similarly radical approach to eliminating perceived threats to their constitutional sovereignty and jurisdictional supremacy. Article 366 of the 2009 Bolivian Constitution states, “All 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.”<sup>78</sup> Article 422 of the 2008 Ecuadorian Constitution prohibits the enactment of treaties or international instruments in which Ecuador cedes sovereign jurisdiction to international arbitration.<sup>79</sup> In July 2010, the Ecuadorian Constitutional Tribunal declared a number of ICSID-related BITs unconstitutional on this basis.<sup>80</sup>

## B. INSTITUTIONAL RESISTANCE: NATIONAL COURTS AND PUBLIC AGENCIES

On 15 June 2009, Venezuela’s Supreme Court issued a press release entitled “Venezuela’s Immunity against Foreign Courts is Consolidating,” in which it rejected the classical configuration of international investment arbitration.<sup>81</sup> Since then, Venezuela has pursued a policy of “preventive soaking,” in which the country’s willingness to submit disputes to “foreign courts” has dwindled significantly.<sup>82</sup> By contrast, the state asserted that it is “absolutely sovereign,” and it is “only by consent of the highest authorities of the national power” that Venezuela will recognize international jurisdiction.<sup>83</sup> Venezuela may also resort to

75. Gómez, *supra* note 74 at 201, n 53.

76. Corte Suprema de Justicia de la Nación [Supreme Court], Buenos Aires, 1 June 2004 (Argentina).

77. Gómez, *supra* note 74 at 201.

78. *Ibid* at 203.

79. *Ibid*. For a discussion on several dire implications of Ecuador’s new approach that also expresses skepticism about the faithful implementation of Article 422 and the potential loss of foreign direct investment, see Gillman, *supra* note 9 at 294-98.

80. Gómez, *supra* note 74 at 203.

81. Tribunal Supremo de Justicia [Supreme Court], “Se consolida la inmunidad de Venezuela frente a tribunals extranjeros” (15 June 2009), online: <eanzola.com/images/uploads/Nota\_de\_Prensa\_-\_TSJ\_-\_15\_junio\_09.pdf> (Venezuela) [Tribunal Supremo de Justicia] [translated by author].

82. *Ibid* [translated by author].

83. *Ibid* [translated by author].

an “internal test” argument, borrowed from Argentina, to effect non-compliance with any award ICSID renders against it.<sup>84</sup> In other words, the submission of international arbitration disputes “must be approved by the President of Venezuela and the treaty ratified by the National Assembly; on the basis of sovereignty, the state may denounce or modify international treaties where Venezuela is subject to a foreign jurisdiction.”<sup>85</sup> As a result, foreign investors may be confronted with a formidable shield between Venezuela and ICSID.

Another expression of Latin American institutional resistance is the creation of specialized public agencies to defend ICSID disputes. In April 2007, Nicaragua created the Interinstitutional Commission for the Defense of the Nicaraguan State against Investment Disputes.<sup>86</sup> In June 2008, Bolivia created a new ministry responsible for the legal defence of investment arbitration claims.<sup>87</sup> Its motto, translated, reads, “[T]he motherland is not for sale, but to be defended.”<sup>88</sup> While these agencies may be seen as an implicit endorsement of ICSID arbitration, they also indicate, at the very least, a skepticism and distrust of the ICSID regime and, when seen in the context of other actions taken, a pattern of denunciation.

### C. SYSTEMIC REJECTION: BITS, RESOURCE NATIONALISM, AND CONVENTION WITHDRAWAL

Some Latin American countries have shifted towards a policy of resource nationalism,<sup>89</sup> placing natural resources, particularly oil, under the control of national companies. The president of Bolivia approved the nationalization of mining and other sectors in 2006 even though Bolivia’s nationalization of the hydrocarbons sector in the last century had been harshly reviewed.<sup>90</sup> Venezuela followed a similar approach, signing cooperation and integration agreements within Latin America and adopting new Terms and Conditions

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84. Gómez, *supra* note 74 at 205. See e.g. *Sempra Energy International v Argentine Republic* (2010) (International Centre for Settlement of Investment Disputes).

85. Tribunal Supremo de Justicia, *supra* note 81 [translated by author].

86. Gómez, *supra* note 74 at 221.

87. *Ibid* at 222.

88. *Ibid*.

89. For a 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.

90. Gómez, *supra* note 74 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 regionalism, economic defence, and political messaging, all of which are discussed further in Part III(D), below.

for the Establishment and Operation of Mixed Enterprises that stressed that the Venezuelan courts, not international arbitrators, are the competent venues for dispute resolution.<sup>91</sup> Whether declining oil prices will cause a retreat from resource nationalism or broader regional approaches will take a firm and lasting hold remains to be seen.<sup>92</sup>

Latin American countries have also begun to use BITs as a means to combat ICSID by (1) introducing new BITs that contain an option to choose between ICSID and ad hoc arbitration under United Nations Commission on International Trade Law ("UNCITRAL") rules, (2) terminating existing BITs, and (3) developing new model BITs. The first approach has been used by Paraguay, Colombia, Peru, and other countries in multiple BITs with China, Japan, and European countries since 2005.<sup>93</sup> The second approach has been used by Venezuela and Ecuador, with the former terminating its BIT with the Netherlands in 2008 and the latter terminating BITs with as many as thirteen countries.<sup>94</sup> The third approach may be illustrated by Colombia's 2007 BIT Model. This model establishes a fork in the road between national courts and international arbitration and does not include an umbrella clause that precludes a breach of contract between a state and foreign investor from becoming a breach of the BIT.<sup>95</sup>

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91. *Ibid* at 206-207.

92. After considerable fluctuation throughout 2014 and early 2015, oil prices have remained steady since April 2015; however, 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: Expectations for summer demand limit fears surrounding Greek bailout and Iran's nuclear talks," *The Wall Street Journal* (26 June 2015), online: <[www.wsj.com/articles/oil-prices-fall-on-concerns-about-greek-bailout-and-iran-nuclear-deals-1435309493](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.

93. Gómez, *supra* note 74 at 213-14.

94. These countries include Cuba, the Dominican Republic, El Salvador, Finland, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay. Furthermore, the Ecuadorian 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: <[www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework](http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework)>.

95. Gómez, *supra* note 74 at 220.

The most dramatic form of Latin American denunciation of ICSID is withdrawal from the *ICSID Convention*.<sup>96</sup> An exit from the global forum signals countries' terminal loss of faith in the system and raises questions about ICSID's fitness for purpose.<sup>97</sup> For a period of time, it appeared as if the statements made by Latin American governments, no matter how vilifying, were empty threats. In May 2007, however, the World Bank received written notice of Bolivia's denunciation of the *ICSID Convention*. The denunciation took effect six months after receipt, in November 2007.<sup>98</sup>

Ecuador at first sought a partial escape from ICSID by invoking Article 25(4) of the *ICSID Convention*, which provides 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 or other[s] . . . ."<sup>99</sup> Almost two years later, Ecuador notified the World Bank of its withdrawal from the *ICSID Convention*. The withdrawal was decided in an Ecuadorian Executive Decree and took effect on 7 January 2010. Finally, in January 2012, Venezuela gave notice of its intent to withdraw from the *ICSID Convention*,<sup>100</sup> making it the third Latin American state to file for divorce from ICSID in barely five years.

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96. Unfortunately, there are contradictory interpretations of the *ICSID Convention*'s provisions on denunciation as to whether the denouncing state remains bound only to disputes initiated before the denunciation (the "theory of offer to consent") or to future disputes (providing that the state's consent to ICSID arbitration exists in that country's BIT) (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. See Cesare PR Romano, "The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent" (2007) 39:4 NYU J Int'l L & Pol 791; Gaillard, *supra* note 3.
97. Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve" (13 April 2012), International Institute for Sustainable Development, online: <[www.iisd.org/itm/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve](http://www.iisd.org/itm/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve)>.
98. International Centre for Settlement of Investment Disputes, News Release, "Bolivia Submits a Notice under Article 71 of the *ICSID Convention*" (16 May 2007), online: <[icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html](http://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html)>.
99. Gómez, *supra* note 74 at 211.
100. See Elizabeth Eljuri & Ramón J Alvins S, "Venezuela denounces the ICSID Convention" (January 2012), online: <[www.nortonrosefulbright.com/files/venezuela-denounces-the-icsid-convention-pdf-92kb-62432.pdf](http://www.nortonrosefulbright.com/files/venezuela-denounces-the-icsid-convention-pdf-92kb-62432.pdf)>. The withdrawal took effect in July 2012.



#### D. STRATEGIC SIGNALLING: THE IMPACT OF REGIONAL GEOPOLITICS

States have multiple avenues to settle disputes, from bilateral negotiations to non-binding mediation to military conflict. They must forego other options when choosing arbitration, whether at ICSID or under the aegis of a regional body such as UNASUR. There are two primary reasons for developing countries to agree to BITs involving international investment arbitration. The first is the pursuit of economic self-interest: In addition to investment in-flows,<sup>101</sup> BITs enable a host country to leverage the power of a resource group and to extract greater value from the investment without traditional legal or contractual enforcement.<sup>102</sup>

Second, developing countries may use arbitration strategies as an opportunity to engage in political messaging or to signal discontent that is separate from the shortcomings of the investment system itself.<sup>103</sup> On some level, the Latin American reaction to ICSID represents an ideological challenge to trade liberalism. The “engine of ideology” can be seen clearly when examining individual states’ responses to ICSID since 2005.<sup>104</sup> Bolivia and Ecuador, the most radical of the ICSID-hostile countries, have led the charge towards ICSID denunciation. Most notably, these two countries have withdrawn from the *ICSID Convention* along with Venezuela. As discussed above, Bolivia and Ecuador have taken dramatic steps—in the form of constitutional amendments—to distance themselves from international arbitration jurisdiction. Finally, Ecuador and

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

102. See Andrew T Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38:4 Va J Int’l L 639 at 644. Guzman explains 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 (*ibid* at 688).

103. 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 International Monetary Fund and World Bank to do what they do and learn or fail to learn from those choices).

104. For a preliminary and forward-looking discussion with emphasis on the ideological component prior to UNASUR entering into force, see Ignacio A Vincentelli, “The Uncertain Future of ICSID in Latin America” (2010) 16:3 L & Bus Rev Am 409. Vincentelli states that “[i]f, 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” (*ibid* at 411).

Venezuela have terminated the highest number of BITs compared to their Latin American counterparts.

In 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 flexibility within existing BITs. This simultaneous antagonism towards and embrace of the international arbitration regime splits Latin America along ideological lines. Policy makers must recognize these realities and the impact of their underlying ideological agendas on the long-term viability of any international arbitration system. These considerations 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 has left Latin America in a state of transition when it comes to resolving international investment disputes. Dozens of BITs still exist and ICSID still plays a predominant role in the region, but the search for a permanent alternative that addresses Latin America's 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 must be overcome for it to arrive at a place of serious legitimacy.

##### A. OVERVIEW OF ECUADOR'S PROPOSAL<sup>105</sup>

The Constitutive Treaty of UNASUR was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela on 23 May 2008<sup>106</sup> and entered into force on 11 March 2011.<sup>107</sup> In June 2009, at the thirty-ninth Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister suggested the creation of a UNASUR arbitration centre as a forum for resolving international

105. Due to the lack of English translations of UNASUR's rules of operation and other primary documents, including the Ecuadorean proposal for a UNASUR arbitration centre, this account relies heavily on Fiezzoni's article for the texts and histories of these documents. See Fiezzoni, *supra* note 34.

106. "South American Union of Nations Constitutive Treaty" (2009) 15:2 Law & Bus Rev Am 465.

107. Fiezzoni, *supra* note 34 at 140. UNASUR is the first regional organization to comprise most South American countries. Five of the twelve UNASUR countries currently face fifty-three cases before ICSID, which represents almost 25 per cent of the total caseload.

investment disputes. In December 2010, Ecuador submitted a proposal for the arbitration centre's dispute settlement system. At that meeting, the foreign ministers of the UNASUR member countries unanimously agreed that Ecuador should chair the associated working group.<sup>108</sup>

The Ecuadorian proposal consisted of three elements: (1) a set of rules of operation (the "Rules") for an Arbitration Centre (the "Arbitration Centre"), (2) a code of conduct for UNASUR arbitrators, and (3) a "Counseling Centre of Investment Disputes"<sup>109</sup> ("Counseling Centre"). The Board of the Arbitration Centre was to be made up of representatives of member states, with the country holding the Presidency Pro-Tempore of UNASUR also acting as chair of the Board.<sup>110</sup> The Rules provide for the settlement of disputes between states and between a state and investor by virtue of any provision in a contract or international instrument.<sup>111</sup>

As a precondition for arbitration, member states may require applicants to exhaust all domestic remedies. In circumstances where the claim arises in relation to a state's administrative actions, local remedies must always be exhausted first.<sup>112</sup> The parties must attempt to resolve a dispute by consultation within six months from the date of filing the request, unless the parties agree otherwise.<sup>113</sup> By mutual agreement, the parties may proceed directly to mediation.<sup>114</sup> Under Article 5, the mediation is closed (1) when the parties sign a settlement agreement, (2) by written decision of any party at any time after attendance at the first meeting, or (3) by decision of the mediator where the continuation of mediation is unlikely to settle the dispute.<sup>115</sup> Under Article 6, the member state of the investor may initiate a mediation process.<sup>116</sup> However, in the case of an investor-state dispute, the investor must notify the respondent state before it initiates the process.<sup>117</sup>

Article 19 establishes the exclusivity of the Arbitration Centre. As such, when parties submit a dispute to the Arbitration Centre, they renounce the use of all other forums for disputes related to the same matter.<sup>118</sup> To ensure transparency,

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108. *Ibid.*

109. *Ibid.*

110. *Ibid.*

111. *Ibid* (Article 2).

112. *Ibid* (Article 3).

113. *Ibid.*

114. *Ibid* (Article 4).

115. *Ibid* at 140.

116. *Ibid* at 140-41.

117. *Ibid* at 140.

118. *Ibid* at 141.

all aspects of an arbitration, including all documents, records, evidence, hearings, and awards, will be publicly accessible, except for those relating to defence and national security and special cases determined by mutual consent of the parties.<sup>119</sup>

The tribunal generally will be composed of three arbitrators. Each party appoints one arbitrator, and both parties designate the tribunal's president and substitute by mutual agreement. If there is no agreement on the selection of the president, the General Director of the Arbitration Centre will designate him or her by lot.<sup>120</sup>

In line with UNCITRAL<sup>121</sup> and Stockholm Chamber of Commerce Arbitration<sup>122</sup> 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.”<sup>123</sup> In this context, independence is an objective test focused on the absence or existence of identifiable relationships with any party to the proceedings, whereas impartiality is a subjective test examining the likelihood that an arbitrator will favour one side in the dispute.<sup>124</sup> To support this objective, Article 6 prohibits former arbitrators from commenting publicly on cases analogous to those that they previously decided.<sup>125</sup>

Any party may challenge an arbitrator's appointment under any circumstances that give rise to justifiable doubt about the arbitrator's impartiality, independence, or overall compliance with the Code of Conduct.<sup>126</sup> Within five days of the challenge, the disputing parties may agree to accept the challenge, in which case the challenged arbitrator will resign. If there is no agreement between the parties, the General Director will decide the recusal.<sup>127</sup>

Regarding *amicus curiae*, or third party intervention, the tribunal may receive unsolicited letters from individuals or other legal entities established in

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119. *Ibid* (Articles 23 and 26)

120. *Ibid* at 141 (Article 9). The general appointment process under UNASUR does not deviate significantly from ICSID.

121. United Nations Commission on International Trade Law, “UNCITRAL Arbitration Rules (as revised in 2010)” (April 2011), online: <[www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf)>.

122. Arbitration Institute of the Stockholm Chamber of Commerce, “2010 Arbitration Rules” (1 January 2010), online: <[www.sccinstitute.com/media/40120/arbitrationrules\\_eng\\_webbversion.pdf](http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf)>.

123. Fiezzoni, *supra* note 34 at 142.

124. *Ibid* (Article 5).

125. *Ibid*.

126. *Ibid* at 141.

127. *Ibid* (Article 10).

the territory of the parties, unless the parties agree otherwise.<sup>128</sup> The letters must be concise, address issues relevant to matters of fact and law submitted for the tribunal's consideration, and be received within ten days from the date of the tribunal's confirmation.<sup>129</sup>

During the proceedings, if 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 fifteen days from first becoming cognizant of the violation.<sup>130</sup> If the arbitrator is not the tribunal's president, the parties may agree to elect a replacement pursuant to the normal election procedure. If the parties fail to reach agreement, they must request that the president make the final decision.<sup>131</sup> If the president does not meet the requirements of the Code of Conduct, 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 must choose a new president by lot.<sup>132</sup> To avoid inconsistency and promote predictability, all awards are to be published and have precedential value.<sup>133</sup> Under Article 22, the arbitral tribunal is required to consolidate multiple proceedings with common questions of fact or law.<sup>134</sup> The tribunal has 240 days to decide the dispute, with a possible extension of up to 120 days with the mutual agreement of the parties.<sup>135</sup>

With the exception of a civil or economic emergency, parties are required to comply with an award immediately or within a mutually agreed upon time frame.<sup>136</sup> Under Article 47, the only basis for refusing to enforce an award is that the subject of the dispute is not arbitrable or is contrary to public policy.<sup>137</sup> Where the award is not honoured, the matter is returned to the original tribunal that heard the dispute. Where the state does not comply with an award, the investor's home state may temporarily suspend obligations owed to the host state. Such suspension must be proportional to the degree of non-compliance.<sup>138</sup>

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128. *Ibid.*

129. *Ibid.* (Article 35).

130. *Ibid.*

131. *Ibid.*

132. *Ibid.* (Article 12).

133. *Ibid.* (Articles 21 and 26).

134. *Ibid.*

135. *Ibid.* (Article 41).

136. *Ibid.* at 142 (Article 46).

137. *Ibid.*

138. *Ibid.* (Article 49).

Awards may be challenged by rectification, annulment, and appeal. Annulment may be sought on grounds similar to ICSID, namely that (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.<sup>139</sup> Where an award is submitted for appellate review of questions of law, an appellate tribunal will decide by consensus.<sup>140</sup> Eight arbitrators constitute the pool for the appellate tribunal, which is comprised of three arbitrators for any given case.<sup>141</sup> Both annulment applications and appeals must be decided within sixty days of the constitution of the respective tribunal.<sup>142</sup>

The Arbitration Centre's jurisdiction excludes disputes concerning education, energy, health, taxation, 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 with respect to the internal laws of a UNASUR member state.<sup>143</sup>

Pursuant to Article 2, the Counseling Centre is responsible for engaging in research, developing specialized studies, and providing technical assistance, legal guidance, and legal representation in investment disputes.<sup>144</sup> If a conflict of interest arises in which the antagonistic parties are members of UNASUR and the Arbitration Centre, the Arbitration Centre is disqualified from providing its services.<sup>145</sup> Both the Arbitration Centre and the Counseling Centre are limited to UNASUR members for the first three years. For the next three years, they will be open to other Latin American countries. After six years, the Arbitration Centre and Counseling Centre will be open to all countries.<sup>146</sup>

## B. STRENGTHS AND BENEFITS

Ecuador's proposal addresses all four of the concerns raised in Part I of this article: ideological and procedural bias, absence of an appeals process, lack of transparency, and complexity and cost. First, the arbitrator disqualification

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139. *Ibid* at 141-42.

140. *Ibid* at 142. 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.

141. *Ibid*.

142. *Ibid* (Articles 42, 44).

143. *Ibid* at 140.

144. *Ibid* at 142.

145. *Ibid* (Article 3).

146. *Ibid*.

process alleviates ideological and procedural bias by closely mirroring the International Chamber of Commerce and Stockholm Chamber of Commerce Arbitration Rules. It also improves arbitrator regulation through the addition of selection by lot.<sup>147</sup> While ICSID's rules simply require disclosure of conflicts of interest, UNASUR's requirements of independent judgment raise the standard to the likelihood of prejudgment or anything that "might reasonably create an impression of dishonest or unfair behavior ... ."<sup>148</sup> 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 of 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.<sup>149</sup> However, UNASUR's process and its higher subjective standards assist in addressing the issue of bias.

Second, the establishment of an appeal mechanism and a system of precedent accrues further benefits. The resulting consistency of jurisprudence would create predictability and enhance the legitimacy of the investment arbitration system.

Third, the rules on transparency, providing exceptions only for national security and special cases, are consistent with the North American Free Trade Agreement ("NAFTA") arbitration framework<sup>150</sup> and would foster greater openness and democratic 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's.

Fourth, Latin American countries could take advantage of the cost efficiencies associated with the Arbitration Centre. For example, the Arbitration Centre's use would eliminate the excessive expense of travelling to London or Washington for investment disputes.

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147. *Ibid* at 141.

148. *Ibid* at 142.

149. See *e.g.* Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 627; Gus Van Harten, "A Case for an International Investment Court" (2008) Society of International Economic Law Working Paper No 22/08, online: <[www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-60international\\_arbitration.pdf](http://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-60international_arbitration.pdf)>; Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge" (2003) 44:1 Harv Int'l LJ 271. A related concern would be finding an objective method for case assignment.

150. NAFTA Secretariat, "Dispute Settlement" (2014), online: <[www.nafta-sec-alena.org/Home/Dispute-Settlement](http://www.nafta-sec-alena.org/Home/Dispute-Settlement)>.

Finally, the rollout implementation strategy and the integration of consultation and mediation opportunities prior to arbitration are creative approaches that appear to have few downsides.<sup>151</sup> The influence of the World Trade Organization's dispute settlement system regarding the consultation stage, appellate proceedings, and award compliance is constructive,<sup>152</sup> 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 obstacles. One immediate caveat is that it is untested. The remaining obstacles can be divided into three categories: practical calibrations,<sup>153</sup> perceived insulation, and 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 could force injured parties to wait for years before they may apply to the Arbitration Centre. Undeniably, there are good reasons for this precondition, including economic, legal, and precedential considerations, and 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 ICSID, its jurisdictional exclusions considerably reduce its competence over matters connected with commerce.<sup>154</sup> Moreover, it will be impossible to eliminate forum shopping entirely, as the investor cannot prohibit its shareholders from suing in another forum.<sup>155</sup>

In addition, the rollout implementation model may result in a perception of regional insulation. Some critics believe that the main flaw of UNASUR is its attempt to supply a regional ideological retort to US hegemony.<sup>156</sup> ICSID and

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

152. The World Trade Organization's compliance levels are fairly high. See Fiezzoni, *supra* note 34 at 143.

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

154. Fiezzoni, *supra* note 34 at 140.

155. *Ibid* at 141.

156. Carola Ramón-Berjano, "UNASUR: When Thinking Big Is Not Necessarily the Best" *Regions Magazine* 281:1 (28 February 2011) 16 at 16.



UNCITRAL are universal, if imbalanced, forums for international investment arbitration. If investors view UNASUR's Arbitration Centre as a mere regional consortium or as an improper venue,<sup>157</sup> they might reject it 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 conventional elements of judicial independence.

A third potential obstacle is UNASUR's lack of cohesion. The model to which UNASUR compares itself is far from perfect: Despite strong beginnings, the European Union has difficulty generating consensus among and distributing benefits to its member countries. Prioritizing the expansion over the deepening of the European 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 protectionist.<sup>158</sup> 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, it is arguably not worthwhile to channel them towards additional bureaucracy. Finally, the political mood on the continent is quite unruly, and new governments could radically change the diplomatic configuration.

#### D. RECOMMENDATIONS

Ecuador's proposed arbitration centre has adequate promise to remain a part of the discussion on how to resolve international investment disputes. However, policy makers must address the shortcomings highlighted above, particularly independence, fairness, openness, and a proper balance between investor protection and regulatory flexibility. UNASUR must work to ensure that investors see the Arbitration Centre as a viable venue for arbitration. This section makes several recommendations to enhance the potential of the UNASUR Arbitration Centre to play a constructive role in the international investment system.

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157. Mariano Tobías has a pessimistic outlook, stating that the Arbitration 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), *Kluwer Arbitration Blog* (blog), online: <[kluwerarbitrationblog.com/blog/2013/05/21/investment-arbitration-and-latin-america-irreconcilable-differences](http://kluwerarbitrationblog.com/blog/2013/05/21/investment-arbitration-and-latin-america-irreconcilable-differences)>.

158. Ramón-Berjano, *supra* note 156 at 16.

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 Arbitration Centre. To enhance arbitrator independence, the Arbitration Centre should cap arbitrators' fees and impose a binding cooling-off period of three years post-service, during which arbitrators may not work as counsel or experts in investment cases.<sup>159</sup> Second, obstacles to arbitration should be lowered by relaxing the limitations on the scope of jurisdiction and setting a reasonable time limit for the exhaustion of domestic judicial remedies.<sup>160</sup> Third, public accountability and participation should be enhanced by, among other things, extending the ten-day limit on *amicus curiae* until the submission of the allegations.<sup>161</sup> To strike a more effective balance between transparency and confidentiality, parties should have the right to request confidentiality for documents containing corporate secrets.<sup>162</sup>

Fourth, the consultation stage should be mandatory only for state-state disputes because parties to investor-state disputes do not have equal negotiating leverage and would benefit from the intervention of a mediator or arbitrator.<sup>163</sup> Fifth, consolidation of multiple proceedings should follow the NAFTA Rules in permitting a case-by-case feasibility evaluation.<sup>164</sup> Sixth, the Arbitration Centre should be creative in its structure and availability: Submitting to arbitration rulings for 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. This flexibility would encourage disputants to consider the Arbitration Centre for a "trial run" where they would otherwise be disinclined.

Moving to broader systemic considerations, 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 a regional

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159. These suggestions would be equally applicable to UNASUR member states negotiating terms of investment treaties under other frameworks. Treaties should also encompass obligations to conduct environmental and human rights impact assessments and to comply with laws on health, labour, and taxation.

160. Fiezzoni, *supra* note 34 at 140.

161. *Ibid* at 141.

162. *Ibid*.

163. *Ibid* at 140.

164. *Ibid* at 141.

alternative, which is attractive for developing states.<sup>165</sup> A similar desire for flexibility and the need to find agreement over complex multidimensional issues supports the usefulness of a hybrid system, which would allow the UNASUR Arbitration Centre to handle region-specific disputes or disputes between accepting countries and 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 more robust framework 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. First, the hybrid system need not reflect a dichotomy between developing and developed states. UNASUR should take steps to frame the Arbitration Centre as a legitimate alternative for all countries and to encourage global participation in the Arbitration Centre and other regional alternatives if and when they arise. Second, even if the perception of a two-tier system is accurate, the flexibility, comprehensiveness, and other benefits of a hybrid regime make the trade-off worthwhile.

Another potential counter-argument is that a hybrid system is in the interest of neither developed nor developing countries. According to this view, developed countries have an interest in enforcing ICSID alone on efficiency grounds while developing countries have an interest in “getting on board” with ICSID to gain greater access to capital. However, if the Arbitration Centre is viewed as a dispute resolution alternative of mutual benefit, developing states should feel empowered, not hindered, by promoting its use. Developed states might be more of a tough sell. But, as the Arbitration Centre establishes itself and proves it can fill a niche within international investment law, developed states will be motivated to agree to its use as an alternative arbitration forum.

The UNASUR Arbitration Centre can be an alternative forum for investment dispute resolution, but it must offer a legitimate alternative. ICSID is costly; the Arbitration Centre must be at least marginally affordable. ICSID is beholden to those with power; the Arbitration Centre must accommodate those without. ICSID works with the present; the Arbitration Centre must operate in the future. ICSID is driven by commercial interests; the Arbitration Centre must promote

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165. Catharine Titi, “Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas” (2014) 30:2 *Arb 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).

the interests of justice and society. The Arbitration Centre should seek to inspire a root-and-branch review of the patterns in international investment arbitration and instill confidence in developing countries 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 gap between ICSID and its critics is widening. 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 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.<sup>166</sup>

This article has taken steps not to “ignore or dismiss” but to engage critically with one form of Latin America’s “rich institutional experimentation.”<sup>167</sup> The system of international investment arbitration in Latin America and beyond is no longer on the “eve of a drastic change,”<sup>168</sup> but it is evolving quickly in the direction of a hybrid regime. Looking forward, it is expected that ICSID will

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166. “The Shifting Landscape of Latin American Regionalism” (2012) 111:742 *Curr Hist* 56 at 56.

167. *Ibid.*

168. Vincentelli, *supra* note 104 at 411.

continue to retain a stronghold, although its mantle as the dominant forum for investment arbitration may have been shaken.<sup>169</sup>

Latin America, in particular, will see a distinct fusion of arbitration methodologies. The emergence of this hybrid system, comprised of both ICSID arbitration and regional alternatives such as the UNASUR Arbitration Centre, is both likely and desirable. It will be useful in addressing the problems that continue to plague ICSID. The hybrid system will also satisfy international investment participants; advance the goals of investment liberalization, which is desirable for developed states; and, more importantly for Latin America and other developing states, allow for regional cooperation and collaboration in some disputes, which will mean cost efficiencies, reduced perceptions of bias, and an overall sense of ownership. The UNASUR Arbitration 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.

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169. 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.

