

The UNASUR Centre for the Settlement of Investment Disputes and Venezuela

Will Both Ever See the Light at the End of the Tunnel?

María Gabriela Sarmiento

S.C. Sarmiento Núñez Consulting, Zurich Branch; Caracas Main Office

mg.sarmiento@snconsult.com

Abstract

Among the objectives of the Union of South-American Nations (UNASUR) is the creation of a replacement for the International Centre for the Settlement of Investment Disputes (ICSID) with a centre within UNASUR. To that end, UNASUR formed the High Level Experts Working Group on the Settlement of Investment Disputes (High Level Working Group), whose efforts have thus far culminated in the November 2014 Draft Constitutive Agreement (2014 DCA) of the UNASUR Centre. This article reviews the measures taken by UNASUR; analyses *les enjeux politiques* and actions envisioned by UNASUR to change the much-criticized current state of affairs; and describes in detail the 2014 DCA. In addition, it examines the inherent conflict within UNASUR's essential mandate: to establish international common and integrative ground for member States, while also respecting each state's sovereignty. That tension is particularly evident in the case of Venezuela, used in this article as an example of the challenges facing the UNASUR Centre.

Keywords

International investment agreements – investor-State dispute settlement – International Centre for the Settlement of Investment Disputes (ICSID) – Latin America – Union of South American Nations (UNASUR) – Bolivarian Alliance for the Peoples of Our America Trade Treaty (ALBA-TCP) – Bilateral investment treaties – Venezuela

1. Introduction

In recent decades, investor-State arbitration and alternative mechanisms for dispute

settlement have become enormously important for countries eager to attract foreign investment. Countries—and, more recently, sub-regions and regions such as Latin America—have allowed investors to resort to a dispute settlement mechanism other than the one offered by a particular country’s judicial system. Because of the impact that globalisation has had on national judicial systems, these are no longer considered adequate for safeguarding foreign investors against sudden, unanticipated, and disruptive legislation or policy changes that affect their interests. Against this background, some developing countries may have been forced to embrace dispute settlement mechanisms available at the regional and international levels. This has proven uncomfortable, however: the implementation of dispute settlement mechanisms has had unforeseen and potentially negative consequences for the countries’ respective economies and citizens. Recently, some Latin American countries—Bolivia, Ecuador, and Venezuela, but also more generally the Member States of the Union of South American Nations (UNASUR) —have taken measures to counter these effects.¹

UNASUR’s main challenges are to eliminate socio-economic inequalities; achieve social inclusion; enhance citizen participation; strengthen democracy (notwithstanding the widely differing understanding of ‘democracy’ among the member countries); and reduce asymmetries, without violating the independence of its members.² In other words, it is obliged to find a balance between national interests and legal systems and a regional common ground. Such harmony between national investment arbitration regimes and a final set of rules for the UNASUR Centre is essential if the Centre is to become a serious and respected alternate venue for the resolution of investment disputes. However, as this article will explain, any progress toward that condition thus far has been undermined by the absence of consistency among its member States as to their perception of investor-State dispute settlement mechanisms, as is evidenced by their disparate and sometimes contradictory domestic regulations.

It is worth remembering that during an ALBA Summit, the Member-States

¹ UNASUR Member States: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Panama and Mexico have observer status <www.unasursg.org/es/estados-miembros> accessed 25 March 2016.

² Article 2 of the Constitutive Treaty of UNASUR (signed 23 May 2008, entered into force 11 March 2011).

agreed to denounce jointly the ICSID Convention, to guarantee the sovereign right of the people to regulate foreign investment in its territory; and, that during a more recent ALBA Summit, it was affirmed that the vast majority of opinions issued by arbitral bodies have undermined the sovereignty of the states. Latin American countries might well believe that by creating and controlling an investment disputes settlement body, they will protect their respective sovereignties.

With respect to the establishment of a Centre of the Settlement of Investment Disputes (discussed in Chapter 3), UNASUR finds itself attempting to play both political and legislative roles. At present, it is evident that its role is mainly political, overshadowing its integrative mandates for the entire bloc. Moreover, the political instability experienced by some Member States in recent years—a state of affairs that presently shows no signs of abating—threatens UNASUR’s very survival as a cohesive force for the Latin American region.³ Its image and credibility are further challenged by the negative effects of the continuous violation of human rights by such administrations as the Venezuelan.⁴

The UNASUR Member States established the High Level Experts Working Group on the Settlement of Investment Disputes (High Level Working Group), under whose aegis the November 2014 Draft Constitutive Agreement (2014 DCA) establishing the Centre for the Settlement of Investment Disputes (UNASUR Centre) was finalised. However, the legal frameworks of the UNASUR Member States concerning the regulation of investor-State dispute settlement mechanisms thus far differ from one another in many fundamental respects. Each Member State has adopted different constitutional or ordinary legal provisions for settling investor-State disputes, according to its own interests and priorities, without an underlying commitment to shaping a common legal framework and ensuring the unimpeded and effective functioning of the prospective UNASUR Centre.

There is similar incongruity among UNASUR Member States with respect to other regional and international accords as well. In 2015 Chile and Peru signed the

³ Denise Tussie, ‘Presidential diplomacy in UNASUR: coming together for crisis management or marking turfs?’ in Gordon Mace, Jean-Philippe Thérien, and others (ed), *Summits and Regional Governance: The Americas in comparative perspective* (Routledge 2016) 71-87.

⁴ Christopher Sabatini, ‘Meaningless Multilateralism: In International Diplomacy: South America Chooses Quantity Over Quality’ (8 August 2014) *Foreign Affairs* <www.foreignaffairs.com/articles/south-america/2014-08-08/meaningless-multilateralism> accessed 25 March 2016.

Trans-Pacific Partnership Agreement (TPPA). By contrast, other countries, namely Bolivia, Ecuador, and Venezuela, have denounced the 1965 Washington Convention and some of the bilateral investment treaties (BITs) concluded in recent decades.⁵ The latter three, plus Argentina, have amended their national arbitration regulations, to varying degrees, in order to bar the State, any State-owned company, or any State entity from taking part in any arbitration proceedings whatsoever.⁶ Some have allowed arbitration in such cases, but only provided that the arbitration proceedings are conducted in their territory and under their own laws.⁷

This article examines the past three decades and present status quo of arbitration in Venezuela, an especially controversial UNASUR co-founder Member State, as well as the most recent developments in the on-going initiative to establish the UNASUR Centre as an accepted, viable, and reliable alternative to existing and well-established investor-State dispute settlement institutions. The most frequent respondent States as of the end of 2014 was Argentina, followed by Venezuela, according to UNCTAD's ISDS database.⁸ The first has a new President, as of December 2015, the second is still in the hands of a political party who dislikes today's international settlement of investment disputes system. The chaotic status of the international investment arbitration in Venezuela is worth examining. The article does not pretend to provide answers to questions, which remain unsolved. For example, different theories held by and international scholars seeking to determine the moment when the legal effects of the denunciation by Venezuela of the ICSID Convention are shared in this article. However, the doctrine will simply not provide a definitive, consistent, and unequivocal answer. nor this article attempt to do so. Rather, this article, seeks to create awareness within the international community of the difficult path investment arbitration has gone through in Venezuelan politics and the challenge it means to UNASUR to accommodate all the personal interests and opinions of its Member States in a common constitutive treaty for the creation of an international Centre for the Settlement of Investment Disputes. Indeed, this said, the

⁵ Katia Fach Gómez, 'Latin America and ICSID: David versus Goliath?' (2011) vol 17 no 2 Law and Business Review of the Americas 501-549.

⁶ Maria Sarmiento, 'Status Quo of Investment Arbitration in South-America: The Cases of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, and Venezuela' (12 Jan 2016) <<http://ssrn.com/abstract=2707701>> accessed 25 March 2016.

⁷ Ibid.

⁸ UNCTAD. *Investor-State Dispute Settlement: Review of Developments in 2014* Issues Note No 2 (United Nations May 2015) 2-3.

interplay between national investment arbitration regimes and the final set of rules to apply to the prospective UNASUR Centre will be critical to enable it to become a serious and respected alternative venue for the settlement of investment disputes.

While all the Member States share, to one degree or another, the legal and political manoeuvrings that stymie UNASUR's efforts, Venezuela—as a co-founder Member State—is an especially influential and disruptive player.

This article therefore begins with a description of the evolution of investment arbitration over the past 30 years of Venezuelan legislative developments and the last decade of measures taken by the executive and judicial powers, illustrating the volatility of that country's position *vis à vis* arbitration, and examines the status quo of arbitration in that country (Chapter 2. Investment Arbitration in Venezuela). It also addresses Venezuelan jurisprudence with respect to the jurisdiction of other regional mechanisms for investment dispute settlement. This refers specifically to the most recent Foreign Investment Law of Venezuela stipulating that foreign investments are subjected to the jurisdiction of the domestic courts and that Venezuela could eventually participate in and make use of other mechanisms of dispute settlement constituted within the framework of the Latin America and the Caribbean region. While the article does not focus on the arbitral bodies of the Mercado Común del Sur (MERCOSUR), it does describes in detail the provisions currently under negotiation of the latest 2014 DCA of the UNASUR Centre including a precedent originated in the heart of the Bolivarian Alliance for the Peoples of Our America Trade Treaty (ALBA-TCP), co-founded by Venezuela and Cuba (Chapter 3. UNASUR Centre for the Settlement of Investment Disputes).

Finally, the conclusion takes up several perspectives on the question central to this article: whether the prospective UNASUR Centre will become, sooner or later, a respected, trusted, and impartial mechanism by which Member States share a common set of internationally recognised principles that foster the smooth conduct of arbitration proceedings and ensure a system of enforcement of awards under a set of rules that respect the parties' legitimate expectations and meet the need for the sound administration of justice (Section 4).

2. Investment Arbitration in Venezuela

2.1 The Political Background

After a decade of military dictatorship which began with a coup d'état in 1948,

freedom and democracy were welcomed and deepened in Venezuela with the signature by three political parties (the social democrat AD, the social Christian COPEI, and the democratic republican URD) of the Punto Fijo Pact in 1958. Members of these parties ran the Venezuelan State between 1959 and 1999, with substantial ups and downs, but nevertheless with presidential elections every five years, under the umbrella of the said Pacto de Punto Fijo.

In 1999, Hugo Chávez, a retired military officer who led the failed 1992 coup d'état was elected President, representing the radical left socialist Movimiento Bolivariano Revolucionario 200 (MBR 200), giving rise to the post-Punto Fijo Pact era. The MBR 200 merged in 1997 with the radical left socialist Movimiento Quinta República (MVR) which in 2007 became the Partido Socialista Unido de Venezuela (PSUV) that continues to be in power at the present time.

2.2 The Venezuelan legislation in support of arbitration.

Beginning in the mid-1980s, Venezuela took steps to enhance commercial and investment arbitration as a means of settling disputes. The legislature made amendments to the arbitration provisions in the Code of Civil Procedure (*Código de Procedimiento Civil*) (CCP), and the State ratified the Panama Inter-American Convention on the recognition of foreign sentences and arbitral awards and Montevideo Inter-American Convention on international commercial arbitration.⁹ In the 1990s, the Congress ratified the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), and incorporated arbitration into multiple special legal texts in the areas of labour, intellectual property, taxation, agriculture, insurance laws, and the oil industry, among others.¹⁰ In 1999, the National Assembly issued the Commercial Arbitration Law and a law for the promotion and protection of investments (LPPI),¹¹ and adopted a Constitution establishing the use of arbitration and alternative dispute

⁹ Code of Civil Procedure (CCP) (22 January 1986) *Gaceta Oficial (GO)* n 3694 extraordinaria (extr.)1-64; CCP (18 September 1990) GO n 4209 extr; *Convención interamericana sobre eficacia extraterritorial de las sentencias y laudos arbitrales extranjeros de Panamá* (15 Jan 1985) GO n 33144; and *Convención interamericana sobre arbitraje comercial internacional de Montevideo* (22 Feb 1985) GO n 33170.

¹⁰ See also Maria Sarmiento, 'Tema 5. Los arbitrajes especiales en Venezuela: Seminario sobre Arbitraje Comercial UJMV' (SNC 2006) in *Publicaciones - Arbitraje Comercial* <<http://es.snconsult.com>> accessed 25 March 2016.

¹¹ Decreto no 356 con rango y fuerza de ley de promoción y protección de inversiones (22 Oct 1999) GO n 5390.

resolutions as a constitutional right.¹²

2.3 Legal interpretations of Venezuelan legislation by the Supreme Court of Justice.

Despite what would appear to be the obvious intent of the aforementioned legislation, Venezuela's judicial branch has on occasions acted in contravention of both the law and its own regulations. The Supreme Court of Justice (*Tribunal Supremo de Justicia*) (SCJ) is composed of several chambers, civil, social, criminal, electoral, political-administrative, and constitutional. Only the decisions of the latter chamber are binding and should be followed and respected by all chambers. Each chamber is composed by five to seven judges, called magistrates. The SCJ plenary chamber is composed of representatives of all the other precedent chambers.

Despite the significant number of legislative initiatives supportive of arbitration, some chambers of the SCJ decided to modify the scope of legal provisions on investment and commercial arbitration. In particular, the magistrates of one of the civil chambers at the Supreme Court of Justice (SCJ) took decisions contrary to the intent of the laws and ignored the SCJ Constitutional Chamber's binding precedents, most likely on the instruction of other powers to avoid the use of arbitration.¹³ Per judicial decision, the arbitration clause was voided in contracts where the State or any public entity was a signatory. With rare exceptions, thus far the clause cannot be subject to negotiation. Legal precedent has expanded the list of matters considered to be of public interest and therefore non-arbitrable. As we will see further, recent legislation, too, excludes the use of arbitration to settle domestic commercial disputes. Previously enacted Venezuelan law, as well as international conventions, were not duly observed and applied.

2.4 Measure against arbitration within the executive power.

¹² 'The law shall encourage arbitration, conciliation, mediation and any other alternative means for resolving conflicts'. Venezuelan Constitution (30 Dec 1999) GO n 36860 extr article 258.

¹³ According to the Commercial Arbitration Law, an arbitral award can only be challenged via recourse to annulment at a Court of appeal located where the award is issued. The law does not provide for recourse to an appeal. However, the SCJ's civil chamber (SCJ/Sala de Casación Civil – SCC) admitted an appeal in cassation challenging a decision of a Court of appeal referring to the annulment of an arbitral award. See *Banco de Venezuela S.A. v Seguros Mercantil C.A.* SCJ/SCC (11 April 2008); *Procter & Gamble de Venezuela S.C.A. v Representaciones Soliempack C.A.* SCJ/SCC Case no AA20-C-2012-000703 (5 Feb and 30 July 2013). But see opposite decision: *Bienes y Raíces Austral CA v Van Raalte de Venezuela C.A.* SCJ/Sala Constitucional (SC). Case no 11-0381 Decision no 1773 (30 Nov 2011). See also Eloy Anzola, '¿Desobedece la Sala de Casación Civil Venezolana?' (Anzola, 23 Sept 2013) <http://eanzola.com/images/uploads/%C2%BFLa_SCC_venezolana_desobedece.pdf> accessed 25 March 2016.

In a reversal of its earlier position, since 2005 the Venezuelan State has been trying to ban arbitration, particularly the ICSID arbitration clauses, by adopting measures that exclude international investment arbitration as a mechanism for settling a dispute in the oil industry.¹⁴ The conditions for the establishment and operation of mixed enterprises, where the State holds more than 50% of the shares, provide that some disputes between the private investors and the State shall only be settled by domestic courts and not by an international arbitration centre (expanding the list of non-arbitrable matters by means of the law¹⁵ and jurisprudence). Decision n° 855¹⁶ constituted one such jurisprudential precedent depriving the parties of the possibility of using arbitration as a dispute settlement mechanism: it established that the contract concluded between the foreign company and the State TV was an administrative contract of public interest, which, according to Article 151 of the Constitution¹⁷, cannot be subjected to arbitration. In contravention of the Venezuelan Constitution and existing laws, the Political-Administrative Chamber (Sala Político-Administrativa) (PAC) has for a long time treated arbitration as an exception to the use of domestic tribunals.¹⁸

Rafael Ramírez, former President of *Petróleos de Venezuela, Sociedad*

¹⁴ '[L]a actual administración venezolana ha decidido ... alejarse –por ... oportunidad política- del arbitraje ...'. Eloy Anzola 'Venezuela: Fatigoso Camino para el Arbitraje' in Irene de Valera (ed), *Arbitraje comercial interno e internacional* (Academia de Ciencias Políticas y Sociales, Comité Venezolano de Arbitraje 2005) 403-429. See also: Odoardo León-Ponte, 'El candado petrolero y el futuro' *El Universal* (Caracas, 11 Sept 2012) <m.eluniversal.com/opinion/120911/el-candado-petrolero-y-el-futuro> accessed 25 March 2016.

¹⁵ See the following legal texts: '[L]os hechos y actividades vinculados al ... Decreto-Ley ... y las controversias que de los mismos deriven, estarán sometidas a la jurisdicción venezolana, en la forma prevista en la Constitución'. Article 13 of *Decreto Ley no 5200 de migración a empresas mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco y los Convenios de Exploración a riesgo y ganancias compartidas* (26 Feb 2007) GO n 38632; *Términos y condiciones para la creación y funcionamiento de las empresas mixtas propuestas por el Ejecutivo Nacional y aprobadas por la Asamblea Legislativa* (31 March 2006) GO n 38410; '*Las dudas y controversias ... con motivo ... de actividades ... no ... resueltas amigablemente ... incluido el arbitraje en los casos permitidos por la ley ... serán decididas por los Tribunales ... de la República ... sin que por ningún motivo ... puedan dar origen a reclamaciones extranjeras.*' Articles 22 and 34(3)(b) of *Ley Reforma Parcial Decreto no 1510 Ley Orgánica de Hidrocarburos* (24 May 2006) GO n 38443. The latter is also in Article 24(6)(b) of *Ley Orgánica de Hidrocarburos Gaseosos* (23 Sept 1999) GO n 36793.

¹⁶ *Venezolana de Televisión C.A. v Eletttronica Industriale S.p.A.* SCJ/PAC Decision no 855 Annulment of arbitral award (5 April 2006) (VTV Case). See also VTV Case (2006) n 17 *Boletín del Comité Venezolano de Arbitraje* 4-10.

¹⁷ 'In the public interest contracts ... a clause shall be deemed included even if not expressed, whereby any doubts and controversies ... concerning such contracts ... shall be decided by the ... courts of the Republic ... and shall not on any grounds ... give rise to foreign claims'. Article 151 of the Venezuelan Constitution. Venezuelan authorities usually invoke this provision to reject arbitration.

¹⁸ Anzola (n 14).

Anónima (PDVSA) and Minister of Energy and Oil, affirmed at the 2006 Third Organization of the Petroleum Exporting Countries (OPEC) International Seminar, held in Vienna, that mixed enterprises cannot agree to settle disputes by means of international arbitration. Ramírez also asserted that according to the 1999 LPPI, a private investor can settle through arbitration an investment dispute having the State as counterparty, but cannot have PDVSA as Respondent.¹⁹ But PDVSA is indeed the partner of private investors under the framework of the mixed enterprises.

Domestic commercial arbitration as well was eliminated from even relatively small contracts for consulting services between a private local legal entity and any public entity (e.g. PDVSA branches and affiliated enterprises, as well as ministries). Over the past decade, the State circumvented investment and commercial arbitration at every level and by means of executive, legislative, and judicial initiatives. The following statement appears in a decision of the Constitutional Chamber of the SCJ:

The displacement of the jurisdiction of State courts in favour of an arbitration in many cases is due to the fact that the conflict resolution will be made by arbitrators who in a considerable amount of cases are linked and tend to favour the interests of transnational corporations, becoming an additional instrument of domination and control of domestic economies. Therefore it is unrealistic to wield an argument of fairness and impartiality of the arbitral justice to the detriment of justice dispensed by domestic courts, to justify the validity of the jurisdiction over contracts of general interest²⁰

This is the same decision that deprived Article 22 of the LPPI of what a number of scholars have described as the unilateral consent of the State to settle investment disputes at the ICSID, by declaring that the article does not contain a unilateral agreement of the State to settle disputes via the ICSID Convention, and that arbitral awards will neither be recognised nor will they be executed if the domestic court considers that they breach public policy.²¹ As Professor Eugenio Hernández-Bretón affirms, ‘even the rejection of international arbitration is advocated as a nationalist

¹⁹ Rafael D. Ramírez C, *Third OPEC International Seminar* 1st session (Vienna, 12 Sept 2006) 10 <www.pdvsa.com/interface.sp/database/fichero/publicacion_opep/2371/164.PDF> accessed 25 March 2016.

²⁰ SCJ/SC Case no 08-0763 Decision no 1541 *Recurso de Interpretación* (17 Oct 2008), para 124. Some judgments also rejected the arbitrability of disputes with State agencies for the fact that the dispute concerned national public interest contracts: VTV Case (n 17), and *Minera Las Cristinas v. Corporación Venezolana de Guayana* SCJ/PAC Decision no 832 (15 July 2004). See also Alfredo de Jesús O., ‘Crónica de Arbitraje Comercial’ (Caracas 2008) Cuarta Entrega no 29 *Revista de Derecho del TSJ* 141-162.

²¹ *Ibid.*, *Recurso de Interpretación*.

flag in official speeches and on billboards as part of the policy of oil sovereignty developed since 2005.²² The Venezuelan administration would appear to have conflated investment and commercial arbitration²³ and thus extended its aversion to ICSID and international investment dispute resolution to all types of arbitration, as a mean for settling disputes.

2.5 Denunciation of the ICSID Convention and open discussion on the effects of the notice.

In 2012, Venezuela officially denounced the ICSID Convention, but some scholars consider that the country is still bound by ICSID jurisdiction, because the ICSID Convention stipulates that the effects of denunciation shall take place six months after receipt of the formal notice of denunciation. However, even after six months the ICSID Convention might still be a valid venue for settling investment disputes, because cases pending at the Centre are also to be solved within the Centre.²⁴ Thus, the arbitral awards to be issued by ICSID on all existing cases where Venezuela was a respondent party at the time of the denunciation will still be binding on the country, even if they are issued after the date of denunciation of the ICSID Convention. It also has been affirmed that the denunciation by a Contracting State of the ICSID Convention will not affect the rights and obligations under the Convention of that State or of any national of that State arising out of an unconditional consent to the jurisdiction of the Centre given by any of the parties to the dispute before the notice of denunciation is received by the depositary of the Convention.²⁵ An international debate is on-going concerning the exact time a denunciation of the Convention takes

²² Eugenio Hernández-Bretón, 'El arbitraje internacional con entes del Estado venezolano' (2009) *Boletín Academia de Ciencias Políticas y Sociales* 148 <http://acienpol.msinfo.info/bases/biblo/texto/boletin/2009/BolACPS_2009_147_141-168.pdf> accessed 25 March 2016.

²³ E.g. see Article 18(4) of the LPPI.

²⁴ Article 71 of the ICSID Convention.

²⁵ The text of the arbitral and dispute settlement clauses of each BIT shall be reviewed to determine if the consent of the State was granted unconditionally. In such case, the notice of denunciation of the Convention shall not limit the rights of the investor to settle a dispute at the ICSID. Roland Pettersson Stolk, 'La Salida de Venezuela del CIADI: Sus efectos jurídicos desde el punto de vista de la Inversión Extranjera' (Badell & Grau, 7 March 2012) <www.badellgrau.com/?pag=17&ct=1153> accessed 25 March 2016 and Article 72 of the ICSID Convention. See also ICSID Press Release, 'Venezuela Submits a Notice under article 71 of the ICSID Convention' (26 Jan 2012) <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=57&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us> accessed 25 March 2016.

effect²⁶ and according to the above interpretation, Venezuela—like Bolivia and Ecuador— would remain bound by the ICSID Convention.²⁷ Some scholars have also held that disputes that may arise on the basis of BITs could still be resolved by ICSID because of the provisions of the 2006 ICSID Additional Facility Rules applicable to disputes between ICSID contracting States and non-contracting States.²⁸ In addition, even if a Venezuelan BIT establishing the settlement of investment disputes at the ICSID is terminated, the survival clause contained therein can extend the BIT's validity by on average five to 15 years from the date of denunciation by the country of the BIT.²⁹

The general thought is that the country will have to renegotiate all BITs³⁰ in order to prevent investors from bringing disputes before ICSID. Venezuela has signed twenty-seven BITs with countries on different continents.³¹ These BITs incorporate an offer to settle disputes between Venezuela and other countries or nationals of other countries by means of the ICSID Convention, International Chamber of Commerce or ad hoc arbitration using UNCITRAL Rules, among others.

Also by the time of the denunciation of the ICSID Convention back in 2012, some scholars argued that the provision of Article 22 of the LPPI implied a consensual declaration of the Venezuelan State to submit investor-State disputes automatically to an ICSID arbitration procedure.³² A number of scholars has also

²⁶ A.A. Mezgravis and C. Gonzalez, 'Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked' (Dec 2012) Vol 9 issue 7 Transnational Dispute Management.

²⁷ 'Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State of any of its constituent subdivisions or agencies or any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary'. Article 72 of ICSID Convention.

²⁸ Article 2(a) of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (10 April 2006).

²⁹ Article 13(2) of Ley aprobatoria del Acuerdo entre Venezuela y Costa Rica para la promoción y protección recíproca de inversiones (28 Jan 1998) GO n 36383 (Venezuela-Costa Rica BIT) contains a sunset clause, as well as, BITs concluded by Venezuela with Argentina, Barbados, Canada, Czech Republic, Chile, Denmark, Ecuador, Germany, Great Britain, Lithuania, Peru, Portugal, Spain, The Netherlands, and Uruguay. Pettersson (n 26).

³⁰ Maria Sarmiento, 'Proposals to South American Countries to Negotiate Bilateral or Multilateral Investment Treaties' (30 November 2015) <<http://ssrn.com/abstract=2702595>> accessed 25 March 2016.

³¹ BITs with Argentina, Barbados, Belgium and Luxembourg, Byelorussia, Canada, Chile, Costa Rica, Cuba, Czech Rep, Denmark, Ecuador, France, Germany, Iran, Italy, Lithuania, The Netherlands, Paraguay, Peru, Portugal, UK, Uruguay, Russia, Spain, Sweden, Switzerland, and Vietnam<<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/BITDetails.aspx?state=ST153>> accessed 22 March 2016.

³² 'Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provision of the Convention Establishing the Multilateral Investment

argued that ICSID decisions have held that contracting States can unilaterally consent to submit their investor-State disputes to arbitration through their legislation (e.g. *Southern Pacific Properties v Egypt*) and that Venezuela did so by adopting the above-referred Article 22.³³

In order to eliminate such argument, Venezuelan jurisprudence established that the abovementioned Article 22 does not open the way to settling disputes via ICSID arbitration.³⁴ The referred jurisprudence has been quoted in ICSID Cases. For example, in *Cemex Caracas v Venezuela*,³⁵ the tribunal referred to the Venezuelan SCJ Decision No 1541 limiting the effects of the provision contained in Article 22.³⁶

2.6 *The current status of arbitration in Venezuela.*

The tension between recourse to ICSID arbitration by foreign investors and the latest Venezuelan jurisprudence shows no signs of abating. On the one hand, by the end of 2014, Venezuela was identified as the second most frequently named ICSID respondent State. On the other hand, Venezuelan law³⁷—like Ecuadorian³⁸—has erected obstacles to arbitration as a contractually agreed-upon mechanism for settling investment disputes: the law provides that, where the State is one of the parties, *prior*

Guarantee Agency (OMGI —MIGA) or the Convention on the Settlement of Investment Disputes between States and National of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.’ Article 22 of the LPPI. *Mobil Corporation Venezuela Holdings BV and ors v Venezuela* ICSID Case ARB/07/27 Decision on Jurisdiction (10 June 2010).

³³ *Southern Pacific Properties (Middle East) v Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction and Dissenting Opinion (14 April 1988). See also Centro de Investigaciones Jurídicas de la Academia de Ciencias Políticas y Sociales, ‘Denuncia de Venezuela al Convenio de CIADI’ (23 May 2013) <<http://cij.org.ve/site/denuncia-de-venezuela-al-convenio-del-ciadi/>> accessed 25 March 2016.

³⁴ The LPPI ‘[N]o contiene en sí misma una manifestación unilateral general de sometimiento al arbitraje internacional regulado por ... el ... CIADI ... remite al contenido de los mismos para determinar la procedencia del arbitraje ... situación que no ocurre para el caso del artículo 25 ... Convenio CIADI ... la sola suscripción del Convenio no comporta una pretendida oferta unilateral. A igual conclusión debe arribarse de la lectura integral del artículo 22 ... LPPI ... no contiene en sí, manifestación alguna de voluntad para el sometimiento al sistema arbitral ...’. *Recurso de Interpretación* (n 21) 67-68.

³⁵ *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v Venezuela*, ICSID Case No ARB/08/15 Decision on Jurisdiction (30 Dec 2010).

³⁶ *Ibid.*, para. 26 and *passim*. See also paras 137-138: ‘[I]f it had been the intention of Venezuela to give its advance consent to ICSID arbitration ... it would have been easy for the drafters of article 22 to express that intention clearly by using any ... well-known formulae ... The Tribunal thus arrives at the conclusion that such an intention has not been established ...’.

³⁷ Article 4 of Ley de Arbitraje Comercial (7 April 1998) GO n 36430.

³⁸ ‘[P]ara que las ... entidades que conforman el sector público puedan someterse al arbitraje ... tendrán que ... a) Pactar un convenio arbitral, con anterioridad al surgimiento de la controversia; en caso de que se quisiera firmar el convenio una vez surgida la controversia, deberá consultarse al Procurador General del Estado, dictamen que será ... obligatorio ...’. Article 4 of Ley no 2006-014 Codificación de la Ley de Arbitraje y Mediación (14 Dec 2006) Registro Oficial no 17.

authorisation is mandatory in order to resolve conflicts through arbitration.

The 1999 LPPI was abrogated by the 2014 Law on Foreign Investments (LFI)³⁹, which provides, under article 3, that foreign investments are of public interest, as well as, under article 5, that foreign investments are subjected to the jurisdiction of the domestic courts and that Venezuela could participate in and make use of other mechanisms of dispute settlement created within the framework of the Latin America and the Caribbean region. The latter contains a similar provision to the 2008 Ecuadorian Constitution. Both countries trust the settlement of investment disputes to a regional Centre for the settlement of investment and commercial disputes, such as UNASUR Centre.

3. UNASUR Centre for the Settlement of Investment Disputes

3.1 Origin of UNASUR initiative to create a Centre.

Any discussion of UNASUR Centre—its creation, purpose, and provisions—needs to acknowledge the context in which it emerged: the the Bolivarian Alliance for the Peoples of Our America Trade Treaty⁴⁰ (ALBA-TCP), co-founded by Venezuela and Cuba during ALBA-TCP First Summit held in 14 December 2004—the same year that UNASUR was created. Considering its founders and the probability that, until recently, it was financed by the Venezuelan State, it is not surprising that some see ALBA merely as a left-wing propaganda platform. Nevertheless, a number of its resolutions are relevant to investment arbitration. In the same year, UNASUR is created under another named.

During the ALBA 2009 VI Extraordinary Summit, a working group was formed to explore the creation of a regional *locus* for dispute resolution. During the 2013 XII Summit, ALBA expressed its categorical disagreement with the imposition of tools such as bilateral investment protection treaties, bodies such as ICSID, and the proliferation of free trade agreements (FTAs) such as the Dominican Republic-Central America FTA also signed by Chile and Peru; suggested ‘consolidat[ing] new arbitration bodies’; and held that ‘the judgements and rulings of the national justice

³⁹ Decree no 1.438 *Ley de Inversiones Extranjeras* (18 Nov 2014) GO n 6152 extr.

⁴⁰ ALBA member States: Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Granada, Nicaragua, Saint Kitts and Nevis, Santa Lucia, San Vicente and The Grenadines, and Venezuela. <alba-tcp.org/en> accessed 1 March 2016. There are 21 investment agreements between UNASUR countries, four among ALBA’s member States and four among Mercosur’s member States.

systems prevail over rulings of the arbitral bodies'.⁴¹ ALBA's Summit reports reflect the attitude of the region towards industrialised countries, ICSID, the World Bank, and investors. The extent to which these feelings of rejection⁴² have influenced the Latin American region⁴³ is clearly evident in the proposal of a new dispute settlement system that is neither based in the North nor financed by the World Bank.⁴⁴

3.2. UNASUR Centre.

During the 2010 IV Ordinary Session, the UNASUR Heads of State and Government decided to create a High Level Working Group (UNASUR's High Level Working Group) in charge of analysing a recent Ecuadorian proposal⁴⁵ on the establishment of a UNASUR Dispute Settlement Centre, a Centre for legal advice on investment matters, and a Code of Conduct for the members of arbitral tribunals. It is presumed that, during the 2011 II Meeting of UNASUR's High Level Working Group, a first draft version of the Constitutive Agreement (CA) on the UNASUR Centre was approved. During the 2012 IV Meeting of the UNASUR's High Level Working Group a second draft version of the CA on the UNASUR Centre⁴⁶ was elaborated. The current version of the 2014 DCA⁴⁷ on the UNASUR Centre was issued⁴⁸ during the November 2014 UNASUR's High Level Working Group Meeting. It is worth

⁴¹ ALBA, 'Statement of ALBA from the Pacific' and 'Annex 2.3 Special Resolution on Arbitration and Transnational Companies' *XII Summit* (Guayaquil, 30 July 2013).

⁴² As Latin American expert Sabatini has observed ALBA and UNASUR rely on an 'anti-imperialist' sentiment and what he calls 'the vague basis of norms of regional solidarity'. Alexander Cooley and others, 'Authoritarianism Goes Global' (July 2015) vol 26 n 3 *Journal of Democracy* 56.

⁴³ The 'Latin-American countries affected by transnational interests through arbitral awards' also encouraged UNASUR to approve a regional mechanism of dispute settlement and promote the inclusion of other Latin-American countries in such a mechanism. Ministerio de Relaciones Exteriores y Movilidad Humana of Ecuador 'Southern States organize Observatory on Transnational Investment' (10 Sept 2014) <www.cancilleria.gob.ec/southern-states-organize-observatory-on-transnational-investment/> accessed 25 March 2016.

⁴⁴ See ALBA's 2004-2015 Summit Reports related to investment disputes and historical background of the UNASUR initiative in Maria Sarmiento, 'The Bolivarian Alliance for the Peoples of our America Trade Treaty (ALBA-TCP) and the Creation of a Centre for the Settlement of Investment Disputes' (30 Nov 2015) <<http://ssrn.com/abstract=2702419>> accessed 25 March 2016.

⁴⁵ Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Arbitration' (2011) 2 *Beijing Law Review* 134-144.

⁴⁶ Maria Sarmiento, 'The 2012 Draft Constitutive Agreement of Centre for the Settlement of Investment Disputes of the UNASUR' (20 Nov 2015) <<http://ssrn.com/abstract=2698574>> accessed 25 March 2016.

⁴⁷ Maria Sarmiento, 'The 2014 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR' (14 Dec 2015) <<http://ssrn.com/abstract=2703651>> accessed 25 March 2016.

⁴⁸ See extracts of the UNASUR Meeting Reports on investment disputes in Maria Sarmiento, 'The Centre for the Settlement of Investment Disputes of the UNASUR Historical Background and Current Status of the Centre' (14 Dec 2015) <<http://ssrn.com/abstract=2703587>> accessed 25 March 2016.

looking into the most relevant provisions of the 2014 DCA on the UNASUR Centre.

3.3 2014 Draft Constitutive Agreement of the UNASUR Centre.

3.3.1 General Provisions. The agreement will not affect the application of investment dispute settlement mechanisms and other obligations contained in international agreements signed and ratified by any member State (Article 2).

The Centre has international legal personality and is aimed at settling investment disputes and providing facilitation services with regard to investment matters (Article 4). The jurisdiction of the Centre can be extended to disputes or situations⁴⁹ that the parties would have consented in writing to submit to the jurisdiction of the Centre. When both parties have consented to submit a particular dispute or situation to the Centre, they will not be able to withdraw *unilaterally* from such jurisdiction (Article 5.1). The Centre has jurisdiction over disputes that may arise between: a) Member States of the Centre; b) a UNASUR Member State and a national of another UNASUR Member State; c) a UNASUR Member State and a non-Member State; d) a national of a UNASUR Member State and a non-Member State; and e) a UNASUR Member State and a national of another non-Member State (Article 5.2(a-e)). The consent of a State to submit any dispute or situation to the jurisdiction of the Centre may be given in international agreements, contracts, unilateral specific declarations or other equivalent legal acts concluded in writing by the competent authority of such State (Article 5.8). The consent of a territorial unit or statutory body of a State to submit a dispute or situation to the Centre will require the express approval of the central government of that State, unless the latter notifies the Centre that such approval is not required. When a dispute arises between States, the parties shall use their best efforts to reach a mutually satisfactory solution through consultations and negotiations via diplomatic channels. In the case of disputes between a State and a national of another State, the State *may* require that local administrative or judicial remedies be exhausted as a pre-condition to submitting a dispute to conciliation or arbitration at the Centre (Article 5.9-11). Parties to a dispute can negotiate and reach agreements in the middle of an ongoing settlement procedure at the Centre, at any time before an arbitral award or a decision of the conciliation

⁴⁹ Situation refers to facts related to an investment on the basis of which the parties consent to request a technical opinion, in order to verify or clarify such facts in a particular case, although a dispute has not yet arisen. Article 3 of the 2014 DCA.

commission is published (Article 5.12). The jurisdiction of the Centre excludes any other jurisdiction (Article 5.13).

3.3.2 Composition of the Centre and Mechanisms for Settling Disputes

The Centre is composed of a Board of Directors and a Secretariat (Article 7.2).

The Mechanisms of the Centre for settling investment disputes are A) facilitation, B) conciliation and C) arbitration (Article 13).

A) Facilitation. Facilitation is an optional preventive mechanism to which the State and the national of another State parties to a dispute can turn for a non-binding technical opinion. The technical review can only be invoked in conciliation, arbitration, or judicial trial, or in front of any other authorities, if consented to by the parties (Article 14.1-2). Impartiality and neutrality should guide the conduct of the facilitators, who must limit their work to the terms expressed by the parties in their request (Article 14.8).

B) Conciliation. Conciliation will be performed either by a sole conciliator or by a conciliation commission. The parties to a dispute will mutually agree on the number of conciliators and the method for appointing them (Article 15.4). Before or after the beginning of an arbitration procedure, the disputing parties can jointly request conciliation (Article 15.6). The sole conciliator or the conciliation commission will decide on their own competence (Article 16.1). If the parties reach an agreement, the conciliator or the conciliation commission shall issue a decision stating the agreement reached by the parties. If at any stage of the procedure the sole conciliator or the conciliation commission consider that an agreement between the parties is not possible to reach, the procedure will be declared terminated (Article 17.3). The possible agreement between the parties to the conciliation shall be public, with exceptions (Article 17.5). Either party may terminate the conciliation process (Article 17.6).

C) Arbitration. The arbitral tribunal will comprise a unique arbitrator or an odd number of arbitrators that are appointed as agreed to by the parties (Article 18.5).⁵⁰ The majority of the arbitrators and the President of the arbitral tribunal cannot be nationals of the State or States party to the dispute or of the State whose national is a party to the dispute, nor may they reside permanently in one of the abovementioned

⁵⁰ See further on this José Manuel Álvarez Zárte and Rebecca Pendleton, 'Democracy and the International Rule of Law in Investment Arbitration: Latin American Advances in Arbitrator Appointment and Disqualification' (2016) 17 JWIT ##.

States (Articles 18.7). The arbitral tribunal will determine its own jurisdiction and competence (Article 19.1). In the case of disputes between a State and a national of another State, the law applicable to the merits of the dispute will be agreed upon by the parties and, failing such agreement, the applicable law will be the law of the host State, including its rules of private international law and the principles and rules of international law applicable to the parties. In State-to-State disputes, the principles and rules of international law applicable to each State taking part in the dispute shall be considered as the law governing the substance of the dispute (Article 19.3-4). When expressly so agreed by the parties, the arbitral tribunal can decide *ex aequo et bono* (Article 19.6). Decisions will be taken by a majority of the arbitrators composing the arbitral tribunal. The decisions shall be in writing and the reasons for taking such a decision shall be expressed in the awards, which shall be made public, with some exceptions (Article 22).

3.3.3 Available Remedies (Initial Proceeding)

Parties can submit requests for the interpretation of an award, requests for rectification of an award, and requests for the issuance of additional awards (Article 23.1). Should an arbitral award contain material, arithmetic, or other similar errors, and should, at the same time, the arbitral tribunal have failed to rule on submissions made during the arbitration process, the parties to a dispute may submit a request for rectification of the award and the issuance of an additional arbitral award (Article 23.2). Once any of the abovementioned requests is submitted, the enforcement of the arbitral award will be suspended (Article 23.4). Either party may request of the arbitral tribunal an interpretation—that is, a clarification or explanation—of the award and the correction of any calculation errors in the award, any copy or typographical error, or any other error or omission of a similar nature. The arbitral tribunal may also make such rectifications on its own initiative. Such rectifications shall be made in writing and will form part of the arbitral award (Articles 24.1, 25.1-3). Either party may request of the arbitral tribunal an additional award related to requests made during the arbitration process but omitted from the main arbitral award (*infra petita*). The additional award is considered an integral part of the main arbitral award (Articles 26.1, 26.5).

3.3.4 Recourses against awards.

There is no consensus among member States on the type of recourses against awards issued by the UNASUR Centre. So far, the recourses available to challenge awards

are: clarification, revision, and annulment (Article 27). Argentina, Bolivia, Ecuador, Peru, and Venezuela also propose to allow an appeal against the award.

When a disagreement arises between the parties as to the meaning or scope of the arbitral award, either party may submit a written request for clarification to the Secretary. The same arbitral tribunal that has issued the award will decide on the motion for clarification. The enforcement of the award may be suspended (Article 28.1-2). The petition for review of the award may be made when either party discovers any fact that could have been decisive for the award, provided that, at the time the award was rendered, that fact was unknown to the tribunal and to the petitioner of the review and that the lack of this information is not due to the latter's negligence. The same arbitral tribunal that has issued the award will decide the review. The enforcement of the award may be suspended (Articles 29.1, 29.2 bis, 29.3). The petition for annulment may be brought by either party if a) the Tribunal was not properly constituted; b) the Tribunal has manifestly exceeded its powers; c) there was corruption of any member of the tribunal;⁵¹ d) there was a serious breach of a fundamental rule of procedure; or e) the arbitrators did not give grounds for the decision (Article 30.1).

Some remaining issues divide UNASUR Member States. One such issue is which panel shall decide on the partial/total annulment of an award. Argentina, Ecuador, Paraguay, and Venezuela propose to form a permanent court⁵² within the Centre, which will decide on the partial or total annulment of an award; Brazil, Colombia, and Peru propose that in case either party requests the annulment of the award, an ad hoc commission composed of three members selected from the list of arbitrators of the Centre shall immediately be formed. In either case, the enforcement of the award may be suspended (Article 30.3-5). In the event of a partial annulment of the award, the part of the award that was not annulled shall become final, and the new

⁵¹ The content of the Code of Conduct for arbitrators and conciliators of the Centre should be available to the public in order to complement the statement of this provision with those of the Code that might establish the cases of corruption in more detail. Article 32(bis) of the 2014 DCA.

⁵² Within the framework of the Transatlantic Trade and Investment Partnership (TTIP) the EU has proposed the creation of a permanent investment court, comprising an Appeal Tribunal that will hear appeals challenging the awards of the Tribunal. The EU intends the court, which is also included in the FTA with Singapore and the Comprehensive Economic and Trade Agreement (CETA) with Canada, to become eventually multilateral. Although we ignore whether any South American State located in the Atlantic side of the sub-continent will in the future join this or another international investment court, the documents published by the European Commission could be of great value to the High Level Working Group.

decision of the arbitral tribunal shall not involve a review of that part of the award (Article 30.7).

Brazil and Peru suggest that the possibility of appeal be provided in the instrument by which the State consented to the jurisdiction of the Centre, if either party considers that a) there has been an error in the application or interpretation of the law applicable to the dispute, or b) there has been a manifest error of judgement in complete disregard of the facts, which negatively influenced the assessment of evidence that would have otherwise changed the outcome of the award, as Argentina, Paraguay, and Venezuela proposed (Article 31.1). Argentina, Ecuador, Paraguay, and Venezuela suggest referring the decision on the appeal to the permanent court, while Brazil, Colombia, and Peru propose the immediate creation of an ad hoc Appeal Commission composed of three members (Article 31.2). The decision of the Commission will be final and binding. Under this same provision, Argentina proposes that the decision of the permanent court be final and binding upon both parties (Article 31.7). The enforcement of the award may be in either case suspended (Article 31.8). The parties may also file an appeal to subsidy a petition for annulment in which case both should be analysed by the same chamber of the permanent court (Article 31.9). Peru suggests that the parties may, when expressing their consent to submit a dispute to the Centre, explicitly accept the filing of an appeal within a particular dispute (Article 31.10). Argentina and Peru propose that the party filing an appeal shall present affidavit as sufficient warranty or a bank guarantee as suggested by Venezuela, prior to the processing of an appeal (Articles 31.11, 32.4).

According to the proposal made by Argentina, Ecuador, Paraguay and Venezuela, the permanent court shall be composed of up to twelve members, one from each Member State of the Centre (Article 32.1). The members of the permanent court shall be qualified persons who inspire confidence in their impartiality and independence of judgement. They will be independent of central public administrations of any State and may not receive instructions from any government or have interests in disputes. The Code of Conduct will contain provisions for ensuring the independence of the members of the permanent court from all parties to a dispute, whether they will be States or investors. Any party to a dispute may challenge members of the permanent court (Article 32 bis.1-2).

3.3.5 Recognition and Enforcement of Awards.

The award shall be final and binding upon both parties to the dispute and shall

become enforceable (have the force of *res judicata*). The State where such recognition and enforcement is sought shall apply as appropriate the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Panama Inter-American Convention on International Commercial Arbitration (Article 33.1). The Centre shall maintain a list of conciliators and arbitrators. Every Member State may propose to the Centre up to five names for each list. The lists shall be composed exclusively of qualified persons who are law professionals and inspire confidence in their impartiality and independence of judgement. The members of the lists will be nominated for a renewable term of four years (Article 34.1-5). At any stage of the conciliation or arbitration procedures, either party may propose to the Secretary the disqualification of members of the conciliation commission, the sole conciliator, or the relevant arbitral tribunal or the permanent court (Article 34 bis).

3.3.6 Transitional provisions.

All UNASUR Member States can participate in the negotiation of the documents required for the operation of the Centre. The documents necessary for the Centre to run are a) the administrative and financial regulations, which shall include the institutional, administrative and financial rules; b) the rules of the Centre related to facilitation, conciliation and arbitration; and, c) the Code of Conduct governing the Centre's adjudicators.⁵³

Whether UNASUR Member States will adapt their domestic legislation to the final CA on the UNASUR Centre and respect its prospective awards is, of course, unknown, it might all depend on the political changes and willing of these countries.

4 Conclusion: Ideology versus a Wise Regional Initiative?

4.1 The Optimistic Approach

Despite the aversion of some Latin American States to ICSID and the continued negotiation of trade and investment agreements, the region remains an attractive destination for investment. Although 'Foreign Direct Investment (FDI) flow[ing] to

⁵³ Ecuador's Proposal of an Agreement to create an Arbitration Centre established that the arbitral tribunal could receive unsolicited letters from individuals or legal entities located in the territory of the parties to the dispute (*amicus curiae*). The proposal also stipulated that arbitral awards would constitute a precedent followed by future cases and awards as a mean to avoid inconsistency. Neither provision appears in the 2014 DCA. Hopefully the High Level Working Group will incorporate such provisions inside the Mechanisms Rules of the Centre.

Latin American and the Caribbean States ... decreased by 14 per cent to 159 billion US dollars in 2014 after four years of consecutive increases',⁵⁴ according to data available as of June 2015, the region remains a relatively appealing market for investment, in part because of its inexpensive manufacturing and labour, the availability of raw materials, income tax benefits, relaxed rules and regulations, and large internal markets.

It is both sensible and feasible to create a regional or Latin American Centre for the settlement of investment disputes, in the hope of improving the current state of international investment dispute settlement. If the UNASUR Centre ever becomes a legitimate alternative for Latin American countries, the hope is that the efforts of the UNASUR bloc will grant these countries significant self-confidence and esteem. UNASUR's objective of creating such a body would gain traction if it takes into account the criticisms of the current investment dispute settlement system and adopts measures required to amend and improve it, eliminating the basis for such criticism. There are many valuable proposals from multiple sources available for this task. It is worth citing Professor Titi in recommending the ultimate, exemplary solution to the current status of investment dispute settlements:

Foreign investment participants will be best served by a hybrid system composed of both ICSID and regional arbitration forums, such as the UNASUR Centre, and by preserving the investment liberalization ... attractive to developed States, as well as by providing regional alternatives ... attractive to developing States⁵⁵

The political, social, economical, and legal realities of the parties to an investor-State dispute should be taken into account if there are to be effective dispute settlement bodies and awards. Foreign investments involve global economic operations with different legal personalities, jurisdictions, nationalities, currencies, idiosyncrasies, customs, cultures, laws, and interests. The countries, the investors, and the beneficiaries of investments also differ. The States involved could be least developed countries, developing countries, or industrialised countries. It is difficult to imagine how they would be treated at the same level in a multilateral agreement, BIT,

⁵⁴ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 58-59.

⁵⁵ Catharine Titi, 'Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas' (2014) 30 *Arbitration International* 357.

or any other kind of international investment agreement. Both economic concerns and national public interests are at risk, and depending on the actual needs of each country, the pendulum will swing to one side or the other.

If the UNASUR Centre can provide a common ground for investors and Latin American States alike, without falling into the trap of ideology, corruption, and politicising of the dispute settlement body, then within a couple of decades the Centre could gain the necessary credibility and respect in the international community.

In 11 June 2015, Marco Albuja, an Ecuadorian delegate to the High Level Working Group of the UNASUR Centre and permanent representative to the Organisation of American States, affirmed that the UNASUR body for the settlement of investment disputes will be approved and take its first steps by January 2016.⁵⁶ In 19 January 2016, Mr Albuja announced the opening of the XIII Meeting of the High Level Working Group of the UNASUR Centre held between the 19-21 January in Montevideo, Uruguay to finalise the definitive version of the Draft Constitutive Agreement of the UNASUR Centre. There, the High Level Working Group was to deliberate, among other subjects, on whether to create a Permanent Court to decide on recourses submitted by the parties to a dispute against an arbitral awards or to create an *ad hoc* Commission to decide on the recourses of annulment or appeal submitted by the parties to a dispute against an arbitral award. It was as well to discuss the adoption of rules and regulations on transparency to be applied to the arbitration, mediation, and facilitations processes.⁵⁷

A final agreement was not reached during the XIII Meeting, thus, the next XIV Meeting of the High Level Working Group will be held between the 29-31 March 2016 in Montevideo to finalise the negotiation process of the Draft Constitutive Agreement of the UNASUR Centre, which will be submitted for approval to the foreign ministers of the UNASUR Member States.

4.2 The Pessimistic Approach

A dissertation on the extremes of complete success or utter failure with regard to

⁵⁶ Agencia Pública de Noticias del Ecuador y Sur América, 'Avanzan trabajos desde Ecuador para la creación de Centro de Solución de Controversias en Inversiones de Unasur' (Quito, 11 June 2015).

⁵⁷ Agencia Pública de Noticias del Ecuador y Sur América, 'Expertos de UNASUR ultiman detalles para creación de Tribunal o Comisión para Solución de Controversias' (Quito, 19 Jan 2016) <www.andes.info.ec/es/noticias/expertos-unasur-ultiman-detalles-creacion-tribunal-o-comision-solucion-controversias.html> accessed 25 March 2016.

UNASUR's initiative is much hazardous. However it should be noted that not all relevant parties are interested in this solution nor believe in it. One examples within many, is the prognosis of a scholar who believes that if investors perceive UNASUR to be 'a mere regional consortium or an improper venue', the Centre will not succeed in the medium- or long-term. In addition to political factors and the absence of cohesiveness among the Member States, the scholar emphasises that the UNASUR Centre 'will have to overcome some technical hurdles by fine-tuning its proposed scheme and rules'.⁵⁸

Although there is hope within the Member States of the UNASUR that the initiative will eventually be put into practice, it should be noted that it took at least 30 years for ICSID to gain an international reputation among investors and to reach the status it currently holds for the international investment regime. It could take another 30 years for the UNASUR Centre to gain similar international credibility, reputation, and experience. And it is doubtful that the UNASUR Centre will dethrone currently available investment dispute settlement fora. Most Venezuelan international arbitrators have paid little attention to the initiative of UNASUR to create a body where investment disputes could be settled. They might consider that it makes no sense to create a Centre where Latin American States will settle disputes on investment matters, particularly because investors are and will still be able to settle disputes in trade and investment agreements using well-established arbitration, mediation, and conciliation centres such as the International Court of Arbitration of the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, and ICSID. Moreover, the value of such a body is further diminished in light of investors' ability to negotiate the incorporation in BITs or other instruments and the possibility of settling investment disputes using the ICSID Additional Facility for countries that are not signatories to the Convention or countries that have denounced it.⁵⁹ At the same time, if the UNASUR Centre is successfully constituted, operates in proper manner, and provides efficient investment dispute settlement, it may nevertheless have to fight against and overcome political pressure by member States, such as those brought to bear by domestic courts in

⁵⁸ Kendall Grant, 'The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration' (2015) 108 *Osgoode Legal Studies Research Paper Series Paper*.

⁵⁹ Pettersson (n 26).

Venezuela.⁶⁰ Nevertheless, the one trap that Latin American States must avoid is asserting the worn-out ideologies related to twenty-first-century socialism, in which imperialism is the source of all the ills of developing countries. According to Professor Karsten Nowrot, '[t]his process, in order to be ... successful, requires engaging in open and inclusive discussions without ideological or other "blindings"' It should be aimed at reaching 'a politically feasible, acceptable ... option to facilitate reconciliation based on ... more balanced terms between countries ... and the international legal regime of foreign investments'.⁶¹

The opportunity for building trust and experience within UNASUR has been so far limited; it is to be hoped that the errors of the past will be superseded by a common effort to benefit from experience and develop a new international system for the settlement of investment disputes providing a balance between the interests of stakeholders and those of countries hosting foreign investments and their inhabitants. To a great degree the above will depend on the courage and spirit that individual personalities will deploy to make real and practical contributions to an administrative framework that can only work if the leaders of UNASUR Member States want to build a promising future for the region. Remember: '*Rien n'est possible sans les hommes, rien n'est durable sans les institutions*'.⁶²

⁶⁰ Amnesty International, *Report 2014/15 The State of the World's Human Rights* (2015) 402-403 <www.amnesty.org/en/documents/pol10/0001/2015/en/> accessed 25 March 2016. See also the World Justice Project, *Rule of Law Index* (2015) 6 20 23 155; and José de Cordoba and other, 'Venezuelan Prosecutor Franklin Nieves Says Opposition Leader's Trial Was a Sham' *The World Street Journal* (26 Oct 2015).

⁶¹ Karsten Nowrot, 'International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism' in Christian Tietje and other (ed), *Beiträge zum Transnationalen Wirtschaftsrecht* (Heft 96, May 2010).

⁶² Jean Monnet, *Mémoires* éd. Fayard (1976) 412.