DEFENDING THE ICSID: UNDERSTANDING LATIN AMERICA'S DENUNCIATIONS IN CONTEXT AND EXAMINING SCOPE FOR REFORM

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Abstract

Starting with Bolivia in 2007, most of the countries in Latin America have proceeded to denounce the ICSID Convention and withdraw from the membership of the ICSID. This has led to questions as to whether the ICSID is being delegitimized. The question of the greater consequences of these denunciations is something that will only be answered by time. Meanwhile anyone wishing to understand these developments must also pay heed to the various political forces and factors involved at play, both in Latin America, and ICSID.

This paper analyses the various reasons cited by Latin American nations before, during and after the course of their withdrawals and denunciations. It places those reasons in the context of the political and ideological conditions of those countries as well as within the larger framework of investment

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arbitration. This paper defends the ICSID system, on the primary basis that these denunciations are not about the problems with the ICSID system as much as they are about how these countries have fared before it in disputes.

However, this paper also acknowledged that there is scope for reform and improvement in the ICSID system. As such, it suggests reforms in the form of an appellate mechanism, and provides reasons for why this is the most important reform that the ICSID can undertake, and how it would prove useful not only for ICSID, but also for the investment arbitration regime as a whole.

I. INTRODUCTION

The International Centre for Settlement of Investment Disputes ('ICSID') was established in 1966, and it facilitated its first case in 1974[1].Latin America and ICSID did not have comfortable beginnings; in 1964 when the Board of Governors of the World Bank was approving the first draft of the ICSID Convention[2], most Latin American countries[3] voted against it in what has since been referred

[1]Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1, Investor-State, (1974).

[2]Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, 17 UST 1270 (hereinafter ICSID Convention).

[3]Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Republic Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

to as the "No-de-Tokyo".[4] ICSID's primary purpose was to encourage international investment by protecting investors against arbitrary actions by States, and these countries were not as enthusiastic as others to attract foreign investment. Also, they did not wish to give foreign investors any sort of safeguards that their own citizens did not have.[5] The Calvo Doctrine[6] was strongly established in these countries and they did not believe that their courts lacked the competency to try disputes involving foreign investors especially when their own citizens were only entitled to approach the same courts[7].

However, as the world entered the 1980s, these countries' positions changed. They became more accepting of foreign investment, and this led to their signing of multiple bilateral treaties. Perhaps it was almost natural that they would also make a marked departure from their previous stance regarding ICSID, and between 1981 and 2000, most of the Latin American countries signed the ICSID Convention.[8]

However, this tale was not to be a happy one. 27% of all cases registered in the ICSID involved a South American state as a party.[9] As of mid-2013, of the 429 cases before ICSID (decided and pending), 50 involved Argentina, 36 involved Venezuela, Ecuador

[4]Nicolas Boeglin, *ICSID And Latin America: Criticisms. Withdrawals And Regional Alternatives*, COMMITTEE FOR THE ABOLITION OF ILLEGITIMATE DEBT (July 14, 2013), http://cadtm.org/ICSID-and-Latin-America-criticisms.

[5]Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

[6]The Calvo Doctrine is a body of international rules regulating the jurisdiction of governments over aliens and the scope of their protection by their home states, as well as the use of force in collecting indemnities.

[7] Andrea, *supra* note 5.

[8]The earliest Latin American state to sign it was Paraguay in 1982 and the last was the Dominician Republic in 2000.

[9]The ICSID Case Load Statistics (Issue 2012-1), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51.

was involved in 13 and Bolivia was involved in 4.[10] These countries, plagued with the scourge of constantly changing political regimes, and debilitating economic crises had nationalized several projects which foreign entities had been running and had made unilateral changes to contracts signed with foreign investors.[11] Aggrieved, these foreign parties began to approach ICSID to conduct arbitration proceedings as provided for either in the BITs or contracts. The tribunals constituted by ICSID passed awards worth millions of dollars against these countries.

Given the financial burden that these awards were imposing, it is not very surprising that the Latin American countries begin to express distrust in the ICSID system once again. Bolivia announced its denunciation of ICSID in May 2007, and the denunciation was deemed effective in November of the same year. Ecuador's denunciation became effective in January 2010. Venezuela's withdrawal became effective in July 2012. Argentina, which was involved in more ICSID cases than any other Latin American country withdrew from the ICSID early last year.[12]

Interestingly, these countries have not denounced the system of international investment arbitration itself. In fact, following the entry into force of the UNASUR Treaty, the signatories have also considered setting up an arbitration centre to retain investor confidence. ICSID is so closely tied up with international arbitration system that the advantages and disadvantages of both are concurrent for the most part. It then makes for an interesting debate as to why these countries would choose to denounce ICSID, but not show disillusionment with investment arbitration. In Part II, this paper

[10]*Supra* note 4.
[11]Diana Marie Wick, *The Counter-Productivity of ICSID. Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239 (2012).
[12]Oscar Lopez, *Smart Move: Argentina to Leave ICSID*, 1 CORNELL INT'L LAW JOURAL, 121 (2012).

examines the most common reasons cited by these countries for withdrawing from the ICSID. It is also argued that most of these are not 'problems' peculiar to the ICSID mechanism, but should be viewed within the larger framework of international arbitration. This paper acknowledges that the ICSID mechanism is not perfect, and that there is scope for reform. The reasons that the Latin American countries give for denouncing the system may be indications of where ICSID could better itself. In Part III, the paper will suggest the means by which the ICSID system can be reformed as to be more inclusive of the concerns of various stakeholders.

II. LATIN AMERICA LEAVES THE ICSID-EXAMINING THE REASONS

Even prior to Bolivia's withdrawal and denunciation from the ICSID in 2007, several Latin American countries expressed their displeasure with the mechanism. This part examines these various criticisms, and attempts to address them by analysing them within the larger framework of investment arbitration.

A. Encroachment Upon State Sovereignty

A majority of the cases against Latin American countries were a result of their expropriation measures damaging the business interests of investors in those countries.[13] These countries claim now that their

[13]For example, See Alexandra Ulmer and Corina Pons, *Venezuela ordered to pay Exxon $1.6 billion for nationalization*, REUTERS (Oct. 9, 2014), http://www.reuters.com/article/2014/10/09/us-venezuela-exxon-dUSKCN0HY20720141009; Alexandra Ulmer, *Gold Reserve says awarded $740.3 mln in Venezuela Brisas arbitration*, REUTERS (Sept. 22, 2014), http://www.reuters.com/article/2014/09/23/venezuela-arbitration idUSL3N0RO01120140923.

natural resources are solely their property and that foreign direct investment encourages imperialistic and capitalist tendencies by allowing foreigners to gain a certain degree of control over these resources.[14] Because of this, they believe that they have the absolute right to decide upon regulatory policies and sanctions.[15]= As bringing the dispute before the ICSID allows investors an opportunity to claim compensation for this expropriation and unilateral imposition of sanctions, these states view ICSID as an unnecessary evil that attempts to obstruct governance of their state as they deem fit.

Two things may be said here. The first is the more obvious; these countries would have known that entering into BITs and the ICSID system would mean that they were agreeing to provide investors with an external recourse. The second is that neutral adjudication by alternative dispute methods is an implicit feature of international investment itself. While discussing the demerits of the investment regime is beyond the scope of this paper, it is necessary to examine why a body like ICSID and procedures like arbitration were deemed necessary. Before the 20th century, European powers would send their warships to states that had wronged their citizens, thus indulging in an exercise that came to be known as "gunboat diplomacy".[16] It is interesting to note that most of these measures were carried out against the Latin American states. Even in the early 20th century, an investor who had been wronged in a foreign state could only hope that he would receive some compensation through diplomatic channels. In the later 20th century, these measures were seen as straining the general relations between states, hence it was deemed necessary to create an independent, unbiased mechanism to arbitrate upon these issues, and this encouraged the development of

[14]Ignacio Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409 (2010).
[15]*Id.*
[16]SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 97 (Hart Publishing, 2d ed. 2008).

international investment law. This was why the creation of ICSID was essential, especially for the Latin American states.

The ICSID is simply a procedural body; it provides the necessary facilities for conducting the arbitration.[17] It cannot be held responsible for the underlying principles on which the investment and investment arbitration regime functions. When these Latin American countries signed multiple BITs and the ICSID Treaty, they did not express any problems with the investment regime. It seems that countries could only begin to see the problems with the ICSID system after awards were granted against them to the order of several million dollars. States, which with full knowledge of ICSID's functioning and with full consent entered into these agreements and treaties with other states, can hardly be allowed to allege violation of sovereignty when the regime is no longer advantageous to them. This is akin to the boy crying wolf.

B. Outsourcing the Adjudication Process

These states also dislike the fact that adjudication of disputes, a judicial function, has been outsourced.[18] This is a remnant of the philosophy of the Calvo Doctine, which espoused that jurisdiction over disputes of foreign investments would lie with the country in which the investment was made. The Calvo Doctrine has its roots in the belief that foreign investors should not be given the benefit of legal recourse that the country's own citizens do not enjoy. By adopting it, the Latin American countries made it clear that according to their political ideology, legal recourse by any investor would have to be sought in local courts first.

[17]Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INR'L L.J. 603 (2013).
[18]Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA.J. INT'L L. 301 (2004).

It seems almost strange that these countries would find this problematic now, years after they voluntarily stopped following the Calvo Doctrine and joined the ICSID. It is possible that when they decided to consider the ICSID mechanism as a means of dispute resolution, they did not anticipate the heavy payments that would be awarded to their investors against them. These countries should not be alleging that an independent entity[19] is problematic because of the fact that it is independent, when it is that very characteristic that allows it to adjudicate and give decisions without bias towards any one party. There is a greater chance of the national court of a country being biased towards its own government in a dispute against a foreign investor than of an independent international body being so. This risk is even greater in Latin America where the dominant philosophy is that of state ownership of natural resources. It is obvious that the independence of the adjudicating body cannot be compromised upon when the parties to the dispute include states or state entities.

C. The Allegations of Investor Bias

However, it so happens that the Latin American states do not believe that the ICSID is an unbiased entity. They reason that the ICSID is aligned too closely with the World Bank[20] to be truly neutral, and its bias leans towards wealthy, developed nations and their investors. In fact, these states have declared that they have "no confidence" in the ICSID mechanism and that it does not provide for a fair and balanced dispute resolution system for developing countries.[21]

[19]Independent in the context of it not being a close part of any state, such as a domestic court.

[20]The ICSID is a part of the World Bank Group and the President of the World Bank Group is the chairman of the ICSID Administrative Council.

[21]Gus Van Harten et al., Public Statement on the International Investment Regime, (Aug. 31, 2010).

Again, this allegation seems to contain more rhetoric than merit. Although it is true that the ICSID has close connections with the World Bank, the rules, doctrine and arbitrators in ICSID arbitration are comparable to that of non-ICSID arbitration as far as procedure is concerned. The procedural framework itself does not contribute to any sort of bias towards the investor. Further, there is a good amount of research to show that States do no worse in ICSID facilitated arbitration than they do in a non-ICSID one.[22]Looking at numbers, as of 2012, Argentina had won six out of the ten resolved cases, and "a dozen more claims"[23] against it had been withdrawn. Hence, there seems to be no weight in the argument that ICSID has an investor bias.

Even if we believe that these Latin American countries are not exaggerating their experience of bias in ICSID, these experiences cannot be superimposed as to be true for developing nations.[24] Many other developing nations who are members of the ICSID may face different circumstances, and since the reasons for their disputes might differ from those of the Latin American countries, it is difficult to understand how ICSID may be deemed as having a pro-investor, anti-developing nation bias based on the experiences of a few countries.

D. The Problem of High Costs

The Latin American countries have also cited high costs as a reason for denouncing ICSID. They believe that the investment claims brought before the ICSID are "*notoriously …expensive*".[25] Further,

[22]Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INTL'L 826 (2011).
[23]*Come and Get Me*, THE ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547836.
[24]*Supra* note 22.
[25]*Supra* note 18.

they claim that investment arbitration is "*neither speedy nor cost effective*".[26]

As mentioned above, these countries also assert that ICSID has a close relationship with the World Bank. Although this does not cause the investor bias that they allege, this close relationship ensures that the World Bank funds the ICSID Secretariat so that all its day- to- day administrative costs are managed, and this actually brings down the cost that will have to borne by the parties to a dispute.[27] As opposed to ICSID, if these countries wished to refer their disputes to ad hoc tribunals (which, hypothetically, will not have the investor bias which they allege exists in ICSID) they will incur even greater costs then they are incurring in ICSID as the administrative costs will also have to borne by them.

It is possible that these countries do not wish to seek recourse in ad hoc tribunals. They might be attempting to seek recourse elsewhere, by creating an entity such as the UNASUR Arbitration Centre[28] . This will prove problematic for them on two levels. One, they will still bear the administrative costs, either indirectly as founders of the Centre, or directly, as parties to a dispute and two, if their problem is that investment arbitration itself is not speedy or cost effective, then simply redirecting claims to another entity supervising arbitration will not change the status quo.

E. The Issue With Confidentiality

A lack of transparency and enough accountability in arbitration proceedings have been cited as reasons for denouncing

[26]*Id.*
[27]See Organizational Structure of ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action.
[28]UNASUR stands for the Union of South American Nations. Its constitutive treaty entered into force on Mar. 11, 2011.

ICSID.[29]Confidentiality in proceedings is one of the most fundamental features of any arbitration, whether commercial or investment, whether ICSID or non-ICSID.[30] In fact, one of the reasons arbitration is desired is because of this confidentiality it provides to the parties. However, it is acknowledged that when states are involved as parties in their sovereign capacity and the award impacts the lives of ordinary citizens of the state, there must be a degree of transparency.

It is also important to understand and acknowledge that ICSID provides for a greater degree of transparency in its arbitration proceedings than non-ICSID mechanisms.[31] For example, in an arbitration governed by the UNCITRAL, the existence of the case itself might be kept confidential.[32] ICSID does not do this, and even its awards are accessible.

On examination of the above, it must be conceded that these 'problems' are not unique to the ICSID alone, but are basic features of the investment arbitration regime.

However, it does not appear as though Latin American countries have a problem with investment arbitration itself. In fact, they have actively been involved in the development of the UNASUR Arbitration Centre.[33] The UNASUR Centre principles are framed in

[29]*Supra* note 11.
[30]James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, UNIVERSITY. OF EDINBURGH LAW SCHOOL. WORKING PAPER NO. 2011/01, (2011), http://papers.ssrn.com/sol3/papers.
[31]*Supra* note 18.
[32]Claudia M. Gross, *Current Work of UNCITRAL on Transparency in Treaty-Based Investor-State Arbitration,* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (July 30, 2014), http://www.oecd.org/investment/internationalinvestmentagreements/46770295.pdf.
[33]Antoine P. Martin, *ICSID v. UNASUR: same game, new rules?,* (July 30, 2014), http://internationallawnotepad.wordpress.com/2013/04/30/icsid-v-unasur-same-game-new-rules.

such a way that the factors which these countries found so problematic in the ICSID would not exist within its framework.[34] By doing so, they have not only changed the principles of investment arbitration are they are understood, but they have also essentially done away with the advantages that investment arbitration offers, and consequently, with any stimulus that it may have offered towards foreign investment.

If these states would argue that they have a problem with the investment system itself, then they must be prepared for the ramifications of such a policy. Investors would not be comfortable with putting their capital into a country when they cannot even be assured of proper legal protection and an impartial mechanism to seek recourse from. Critics of the ICSID might argue that Brazil and Australia attract considerable foreign investment in spite of not being members of the ICSID. It is important to remember that Australia is a developed nation and Brazil is the 6th largest economy in the world. They have a very different system of governance and governmental policies. Their courts are considered much more impartial. In comparison, the Latin American countries are medium level developing countries with unstable political regimes. Investors may not have the same sort of faith in their judicial systems as they do for that of Australia and Brazil.

[34]For example, the tribunals constituted by the UNASUR Arbitration Centre will not have jurisdiction over the economic effects of internals laws of any state.

III. POTENTIAL FOR IMPROVEMENT- HOW ICSID CAN CHANGE FOR THE BETTER

One of the most problematic features of the ICSID system is its lack of an appeals system.[35] In non-ICSID arbitration mechanisms, a party which feels that the award rendered is unfair or unjustified may approach a domestic tribunal for judicial review. While acknowledging that this is not possible in the ICSID regime which aims for an independent adjudication process that is insulated from any potential 'domestic biases', the problems with the present annulment system should be considered.

ICSID awards can only be reviewed by an annulment committee which is constituted as per procedures stipulated by the ICSID Convention itself.[36] As per the ICSID Convention, an unsatisfied party may apply for an ad hoc annulment committee to be constituted.[37] However, such a committee can only annul an award on five specified grounds, which are largely procedural in nature, thus excluding scope for substantive review[38].

The problem with this system is two-pronged. *One*, an ad hoc committee is constituted to look into an award only when it is *prima facie* problematic due to one of the listed reasons, and *two*, the ad hoc committees can only annul the award and cannot substantially review

[35]Bolivia se va del CIADI (English Translation), THE WORLD BANK (Nov. 3, 2007), http://go.worldbank.org/2L60II0X80.

[36]ICSID Convention, Art. 53, The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

[37]ICSID Convention, Art. 52.

[38]Article 52 of the ICSID Convention lists the grounds when the tribunal rendering the award was improperly constituted, when a tribunal member was found to be corrupt, when there is a serious departure from the fundamental rules of procedure, when the tribunal manifestly exceeds its powers or when the tribunal does not justify the award that it renders.

them.[39] It is necessary to examine how these problems can be rectified without compromising on the essential nature of ICSID.

A plain reading of the five limited basis on which the award can be annulled makes it evident that the annulment is possible only on the basis of procedural flaws. Therefore, if the unsatisfied party is able to prove that a procedural breach existed, and has the award annulled, it leaves the dispute unsettled, and parties are back to square one. The parties then need to resubmit their dispute to ICSID for adjudication once again. This process is *prima facie* more time consuming and expensive when compared to a process of appeals where the original award could be modified, if the appellate tribunal found such an action necessary. This would shorten the entire process that the parties have to go through.

However, if the annulment committee also upholds the original award, then there is no scope for an unsatisfied party to seek recourse from elsewhere. This could prove problematic in many ways, for example, the enforcement of the award might prove difficult if the losing party is unsatisfied with the award and feels that it did not get a fair hearing. An appeals mechanism would at least ensure that parties do not feel that they have suffered as a result of an incomplete adjudication process or lack of fair hearing.

ICSID is often criticised for the inconsistency of the awards that it delivers.[40] ICSID panels are constituted independently for each dispute and there is no principle of *stare decisis.* However, because different arbitrators sit on different disputes, two tribunals may give two differing judgements in two different cases which have identical

[39]Compania de AguasdelAconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Application for Annulment, ¶247, (2002).

[40]Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

or similar fact situations. A policy which is interpreted in one manner by one Tribunal may be interpreted in a different manner by another Tribunal and a State would stand to lose both ways and end up paying heavy fines.[41] This would extremely problematic for any country, especially a developing country like those in Latin America. A consistent set of awards and principles is essential for any system that is based on the consent and trust of its members. The ICSID system is based on trust (through consent) and the Latin American denunciations are a fine example of what happens when this trust is lost.

Having an appeals process as opposed to annulment process might contribute towards bringing some consistency into this system. ICSID could ensure that the appellate body focuses on creating a coherent body of principles, by having a pool of arbitrators to choose from to hear the appeals.[42] Further, each independent ICSID tribunal is vertical in terms of power to the other, but an appellate body would be superior to the tribunals. Because the adjudicators would be from a common pool, and the appellate body would be a superior independent body, it would most likely produce consistent decisions. Of course, this is only possible if the appellate body is allowed to review awards substantially, not merely on a procedural basis.

[41]The best possible examples of such a scenario are the SGS cases. The ICSID tribunal in SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan, said that an umbrella clause in a BIT would not elevate a breach of contract into a breach of the treaty itself. However, the tribunal in SGS Socit Gondrale de Surveillance S.A. v. Republic of the Philippines concluded that a breach in contractual commitment could be made into a breach of a treaty if the treaty contained an umbrella clause. The factual situation in both these cases was almost identical. However, the inconsistency in the interpretation of how umbrella clauses could be used lead to much uncertainty among States as well as investors.

The Appellate Body of the WTO Dispute Settlement Body would be a good model to focus on. Disputes between WTO members are settled by panels, and a party who is unhappy with the decision may appeal to it. The Appellate Body's decision is final and must be accepted by the parties to the dispute. The Appellate Body is made up of a standing body of seven persons.

Tribunals will also begin to produce decisions that are consistent with the appellate body's rulings, thus harbouring in a certain degree of predictability.

The more viable option for ICSID is for it to create such a system for safeguards for the parties involved, rather than suffer a widespread denunciation of the system. However, the creation of such an appeal system should not be construed as a sign of weakness or a compromise, because it can only serve to improve the ICSID mechanism and create a healthier environment on which investment disputes can be resolved.

IV. CONCLUSION

It is unfortunate that several Latin American countries have withdrawn from and denounced the ICSID. The ICSID provides an independent body for adjudication, and thus, contributes greatly to the international investment regime by encouraging foreign investment by guaranteeing an unbiased dispute resolution system. The withdrawals and denunciations are a relatively new development, hence it remains to be seen whether they will have a greater impact on ICSID or the withdrawing states.

It seems more likely that the ICSID will emerge unscathed. It is a strong mechanism, which has been able to produce a conducive environment for dispute resolution. The reasons which the states gave for withdrawing from the Convention have been countered in this paper. The ICSID mechanism does not encroach upon State sovereignty to any degree than that which the states themselves consented to. This consent was given when they agreed to become members of the ICSID, and thus, agreed to outsource their investment disputes to an external, independent body which would be bias-free. That ICSID shows a pro-investor bias is mostly political and

diplomatic rhetoric. Accessing statistics which evidence this and analysing them is made possible because of the transparency which the ICSID offers *vis-à-vis* other arbitration systems. ICSID assured enough transparency as is required for accountability without compromising on confidentiality. Finally, ICSID costs are much lower than what they would be for a non-ICSID tribunal or an ad-hoc tribunal.

Having defended the core principles of ICSID, which in a sense are necessary for international investment to flourish, it is necessary to acknowledge that there is an area where the ICSID might consider amending its principles. This is its annulment system. An unsatisfied party cannot appeal an award, but can only ask for it to be annulled on the basis of a procedural wrong as specified by the Convention itself by an ad hoc annulment committee. This also means that there is no requirement of consistency for ICSID tribunals to follow. This is problematic, and the creation of an appeals mechanism might give countries the satisfaction of knowing that they have a suitable recourse. Further, they will also be assured that and that their dispute is being resolved on the basis of a coherent set of principles and decisions because their decision can be reviewed on a substantive basis by the appellate tribunal.

Finally, as developing countries with suffering economies and much political turmoil, the Latin American countries might bear the brunt of their withdrawals. It is possible that they might be willing to reconsider their denunciations if the ICSID makes the suggested changes. However, there is a requirement of acceptance of their part that the other aspects which they found problematic could be faced by them before any other Tribunal, and not only in an ICSID one.

This mutual compromise, for lack of a better term, will prove beneficial not only to ICSID and Latin America, but also to the investment arbitration regime as a whole.