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THE IMPLICATIONS OF RECENT ICSID ARBITRATOR DISQUALIFICATIONS FOR LATIN
AMERICA
By
Nora Ciancio*

I. INTRODUCTION

In November and December 2013, tribunals constituted under the Rules of the International Centre for Settlement of Investment Disputes (“ICSID”) considered three proposals for arbitrator disqualification stemming from investment disputes in Latin America, and ultimately disqualified two arbitrators in pending proceedings. While the ICSID procedural rules envision challenges to arbitrators, arbitrator disqualification is traditionally an extremely rare result in ICSID proceedings. Accordingly, it is worth analyzing whether the recent rise in successful challenges to ICSID arbitrators marks the beginning of a new adjudicatory trend, and what such a trend may mean for ICSID arbitration.

Although arbitrator challenges can extend the time until the final disposal of ICSID cases, thereby counteracting the goal of providing efficient resolution of investment disputes in the form of arbitration, pursuing more frequent and fully adjudicated arbitrator challenges may strengthen an otherwise underutilized provision in the ICSID Rules. An increase in challenges would signal that the procedure adequately assesses arbitrator qualifications. Additionally, this growing appearance of accountability could prove especially beneficial, as ICSID arbitrations remain common occurrences in Latin America, a region historically skeptical of international forums for dispute resolution. In part, this skepticism arises from the high rate of claims against Latin American nations and neutrality concerns associated with repeat arbitrators.

Without state cooperation and support, international investment arbitration will not succeed. Thus, participants’ perceptions of the forum’s fairness are crucial to the effectiveness of both ICSID and investor-state arbitration in general. In analyzing the efficacy of disqualification proceedings in Latin American investment disputes, it is imperative that scholars and practitioners remain cognizant of Latin America’s perception of ICSID arbitration as an adjudicatory process. More frequent and fully adjudicated arbitrator challenges can both signal to participating nations that they have adequate means of challenging arbitrators, and can also more clearly define ICSID standards of arbitrator qualifications by interpreting arbitrator independence and impartiality.

II. INVESTMENT ARBITRATION IN THE DEVELOPING WORLD

A. *Historically Perceived Inequalities in Arbitration*

There is a common argument asserted on behalf of the developing world that developed countries’ expansion into and exploitation of emerging markets was for the benefit of affluent foreign investors and inured to the detriment of local businesses and

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markets.¹ Countries in Africa, Asia, and Latin America often express that in the course of arbitrators' analyses of investment disputes, arbitration fails to address economic and social issues stemming from the exploitation of colonization by the West in equal balance with the investors' legal claims.² Developing nations believe both institutional and doctrinal bias exists in international arbitration,³ and that international arbitration fails to address the economic and political vulnerability of such regions.⁴

History has shaped a distrustful picture of arbitration in the eyes of Latin American countries. In response to European aggression in the 19th century, many Latin American nations adopted the Calvo Doctrine, which stated that the proper jurisdiction in international investment disputes lies with the country in which the investment is located.⁵ The Calvo Doctrine encouraged countries to require foreign investors and local entities alike to utilize national courts for redress.⁶ Latin American countries, specifically, delayed the ratification of the New York Convention and unanimous ratification did not occur until 2002.⁷ Furthermore, eleven years after ICSID came into force, no Latin American country had ratified the convention.⁸

B. Latin America and ICSID

The developing world has demonstrated similar reservations pertaining specifically to ICSID proceedings due to the perception that the institution was

¹ See Antonius R. Hippolyte, *Third World Perspectives on International Economic Governance: A Theoretical Elucidation of the "Regime Bias" in Investor-State Arbitration and Its Negative Impact on the Economics of Third World States*, 2-4 (June 10, 2012) (unpublished working papers series) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080958).

² G. Moon, *Trade and Equality: A Relationship to Discover*, 12 J. OF INT'L ECON. L., 617, 617(2009) (In 2007, developing countries share of world trade remained at only 37 percent. Most was attributable to only 14 countries, with the remaining 149 developing nations sharing only 7 percent).

³ Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 424 (2000).

⁴ See Hippolyte, *supra* note 1, at 25.

⁵ See *id.* at 23 (citing ANGHIE A, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 208 (Cambridge Univ. Press, 2nd ed. 2007); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 50 (Oxford Univ. Press, 4th ed. 1992)).

⁶ See Hippolyte, *supra* note 1, at 23 (citing Cassese, *supra* note 5; J.T. GATHIL, THIRD WORLD APPROACHES TO INTERNATIONAL ECONOMIC GOVERNANCE IN INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 261 (Richard Falk et al., 2008)) (explaining that the Calvo doctrine was established in response to the 19th century European aggression against economically weak Latin American states and the Calvo doctrine sought to limit the legal and political power of Western countries, whose actions often led to military and political interference)

⁷ See Hippolyte, *supra* note 1, at 12.

⁸ See *id.*

established in the interest of wealthy nations and their investors.⁹ This belief, having built over time as a result of adverse decisions, has led to waning commitment to both ICSID and international agreements previously executed by Latin American nations. Suspicion of ICSID's bias is exacerbated by the fact that ICSID is part of the World Bank Group, and thus acts in support of affluent investors from the United States and Western Europe.¹⁰

In explaining the purpose of the ICSID convention, the Report of the Executive Directors states that in creating ICSID the Executive Directors were "prompted by the desire to strengthen the partnership between countries in the cause of economic development"¹¹ and that "adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment in its territories, which is the primary purpose of the Convention".¹² Despite this expressed purpose, Latin American nations continue to question the fairness of ICSID proceedings because of the economic and power disparities among the developed and developing world.¹³ Latin America has repeatedly demonstrated its distrust of ICSID. Initially, nineteen Latin American countries voted against the adoption of the ICSID convention, which became known at the "No-de-Tokyo".¹⁴

Throughout the 1980s and 1990s, Latin American nations began to adopt the ICSID Convention and entered into numerous Bilateral Investment Treaties ("BITs").¹⁵ This newfound acceptance brought a high number of claims to ICSID.¹⁶ As of 2007, fifteen percent of concluded matters in ICSID involved claims against Latin American countries and as of 2010, this percentage skyrocketed to fifty-two percent.¹⁷ According to the first issue of the 2014 Caseload Statistics, twenty-seven percent of all current ICSID cases arose out of South America, and another seven percent originate in Central

⁹ Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 605-609 (2012).

¹⁰ *See id.* at 611.

¹¹ Report of the Executive Directors of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶ 9 (March 18, 1965).

¹² *Id.* at ¶ 12.

¹³ *See Hippolyte, supra* note 1, at 3-4.

¹⁴ The "No-de-Tokyo" is known in English-speaking discussions as the "Tokyo No". Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 418 (2010).

¹⁵ *Id.* at 420 (citing Stanimir Alexandrov et al., *Making Investment Treaties Work for Latin America*, ARB. REV. OF THE AM. 4 (2009), available at <http://www.globalarbitrationreview.com/reviews/13/sections/50/chapters/497/making-investment-treaties-work-latin-america>).

¹⁶ *Id.* at 420.

¹⁷ *Id.* at 420 (citing Int'l Ctr. Of Inv. Disputes, List of Pending Cases, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal>, (last visited July 7, 2010) (as computed with numbers provided by ICSID)).

America and the Caribbean.¹⁸ Currently, thirty-five percent (66/187) of pending cases under ICSID concern Latin American nations.¹⁹ Although these numbers may be skewed based on the significant number of disputes caused by the 1998-2002 economic crisis in Argentina,²⁰ the statistics still establish the overwhelming presence of Latin American states in ICSID proceedings.

Even though most Latin America nations eventually came to ratify the ICSID convention, a renewed resistance to ICSID has cropped up in recent years.²¹ The wave of opposition began in April 2007, when the Presidents of Bolivia²², Venezuela²³, Cuba, and Nicaragua announced their intended withdrawal from ICSID.²⁴ Following suit, on May 11, 2008, President Rafael Correa of Ecuador publicly announced that he “had no confidence in the World Bank arbitration branch [i.e., ICSID] that is hearing U.S. oil company Occidental’s lawsuit against Ecuador”²⁵ and explained that “Ecuador handed over its sovereignty when it signed international accords binding it to the bank’s ICSID”.²⁶ The expressed mistrust of ICSID in Latin America was clarified in part by Bolivia’s explanation of its withdrawal. The arguments against ICSID included: (i)

¹⁸The ICSID Caseload-Statistics, p.11 (Issue 2012-2)
<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

¹⁹ ICSID List of Pending Cases, INT’L CTR. FOR SETTLEMENT INV. DISP. (last visited Apr. 6, 2014 2:24 PM),
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>.

²⁰ See Vincentelli *supra* note 14, at 423-24 (citing Paolo Di Rosa, *The Recent Waive of Arbitration Against Argentina Under Bilateral Investment Treaties: Background and Principal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 73 (2005) (explaining that the financial crisis in 2001 and 2002 in Argentina led to dozens of claims being filed by foreign investors against the state and led it to be the country with the most claims filed in ICSID)).

²¹ See Vincentelli, *supra* note 14, at 419, 421.

²² *ICSID News Release*, INT’L CTR. FOR SETTLEMENT INV. DISP. (July 9, 2009),
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

²³ Venezuela did not officially submit a notice of denunciation until 2012. *ICSID News Release*, INT’L CTR. FOR SETTLEMENT INV. DISP. (Jan. 26, 2012),
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement10>.

²⁴ Cuba and Nicaragua never officially submitted a notice of denunciation under Article 71 of ICSID. *Id.* at 421.

²⁵ See Vincentelli, *supra* note 14, at 422 (citing See Gabriel Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case*, USA TODAY, (MAY 11, 2008), available at <http://www.usatoday.com/money/economy/2008-05-11-3404362337>).

²⁶ *Id.*

ICSID awards are not subject to appeal; (ii) the fact that a vast majority of ICSID awards have been decided in favor of the private investors shows that the system lacks neutrality and impartiality; (iii) only private companies may sue at this forum; and (iv) the cost to litigate these claims is very high.²⁷ The manner and impact of these denunciations are somewhat unclear,²⁸ but nonetheless, these actions and rationales demonstrate aggressive manifestations of displeasure with the forum as a facilitator of fair investment dispute resolution. Because no ICSID disputes have yet dealt with denunciation,²⁹ the implications of denunciation on the party consent and status as a contracting state as conditions for ICSID jurisdiction are unknown.³⁰ It remains unclear whether host states can revoke their consent to arbitrate given by BITs through an ICSID denunciation and highlights the uncertainty surrounding the potential for investors to continue to bring cases after the deposit of the denunciation notice or after the six month period mandated before the denunciation comes into effect.³¹ After denunciation, there is no existing definitive standard that dictates or describes the denouncing state's relationship with ICSID moving forward.

Because prevailing arguments state that systemic incentives (e.g., financial gain) push arbitrators to decide in favor of investors to maximize the popularity of investor-state proceedings and increase the likelihood of their reappointment,³² it can be said that this lack of independence and impartiality exemplifies institutional bias. Furthermore, signatories to the ICSID convention have an obligation to recognize and enforce ICSID awards, and, thus, awards are often considered automatic.³³ Articles 53(1) of the ICSID rules provide that an award rendered is binding and cannot be appealed unless enforcement is stayed pursuant to ICSID provisions.³⁴ The perceived automatic

²⁷ *Id.* at 422-23 (citing *See Bolivia se va del CIADI*, THE WORLD BANK (Nov. 3, 2007), <http://go.worldbank.org/2L60H0X80> (explaining that these reasons are enumerated in the World Bank press release (in Spanish) announcing Bolivia's exit to ICSID)).

²⁸ Wolfgang Alschner et al., *Legal Basis and Effect of Denunciation Under International Investment Agreements* (May 9, 2010) (unpublished research paper, The Graduate Institute of International and Development Studies) (on file with The Graduate Institute of International and Development Studies).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 651 (2009).

³³ James W. Barratt and Margarita N Michael, *The 'Automatic' Enforcement of ICSID Awards: The Elephant in the Room*, THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW, (2014), available at <http://globalarbitrationreview.com/reviews/58/sections/202/chapters/2274/the-automatic-enforcement-icsid-awards-elephant-room/> (This article sheds light on the current discussion that ICSID awards may not be technically 'automatic' because the procedure of enforcement is governed by the laws of the country in which the enforcement is sought. Article summaries go in parentheses).

³⁴ *See id.* (explaining ICSID Article 53(1)).

enforcement as pertaining to members of ICSID may be seen to developing nations as another procedural disadvantage. In the event states believe an award to be unjust, developing nations cannot turn to an appeal process to remedy the matter.

Because ICSID as a forum does not have a system of precedents or a formal law of foreign direct investment much of the alleged bias asserted above manifests itself at the individual arbitrator level. Scholarship discussing Latin American participation in ICSID suggests that the lack of arbitrator independence and impartiality is viewed by Latin American states as an institutional bias and has been a point of contention regarding international investment arbitration.³⁵

III. INTERNATIONAL STANDARDS FOR ARBITRATORS AS NEUTRALS

Neutrality is vital for effective adjudication. Although an absolute standard of neutrality has been repeatedly held as a desirable and defining standard for adjudicators,³⁶

³⁵ One of the greatest criticisms of investment arbitration is the impartiality of arbitrators. Critics believe that arbitrators produce decisions reflecting their own ideologies and personal self-interests and in a way to maximize their likelihood of future appointments. Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 217, 219 (2013). Another criticism voiced is that investment arbitrators favor investments over state interests in order to increase personal business opportunities or because of policy preferences. *Id.* at 220 ((citing Cf. Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279, 1282 (2000) (hypothesizing that in domestic arbitration, by ignoring applicable mandatory rules, arbitration can “develop a reputation as a desirable arbitrator” and thus increase their chance at future selection); This concern is echoed by many scholars. See, e.g., Anthea Roberts, *Powers and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 207 (2010)). In contrast, defenders argue that developing reputations for impartiality is of a greater self-interest in the career of an arbitrator than reappointment and that partisan bias would be counterproductive. *Id.* at 220-21 ((citing Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492 (2009)). However, in a 2010 study, a leading arbitrator and scholar, Albert Van den Berg, demonstrated that nearly all dissents written by party-appointed arbitrators are written in favor of the appointing party, which that the promotion of self-interest among arbitrators affects the neutrality of international arbitration. See *id.* at 235 ((citing Albert van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 824 (2010)).

³⁶ Martin H. Redish & Colleen McNamara, *Habeus Corpus, Due Process and the Suspension Clause: A Study In the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1379 (2010) (citing See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (holding that an individual detained by the government was entitled to a neutral adjudicator “as a matter of due process of law”); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (concluding that due process requires “a neutral and detached judge in the first instance”); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (“While [m]any controversies have raged about . . . the Due Process Clause, . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.”) (quoting *Mullane*, 339 U.S. at 313); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (“That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule.”)) (explaining that a neutral adjudicator is an essential principle of due process in the U.S.); See Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 111 (2008) (expressing that there is an intuition that international adjudicators should not have preconceived notions on issues arising in the case). Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*,

it becomes convoluted when it is carried over to arbitration.³⁷ Non-neutral arbitrators are said to possess a conflict of interest and can ultimately lead to disqualification. The often elusive concept of neutrality is further complicated in the realm of investment arbitration, in which the pool of arbitrators is noticeably small³⁸ and in which repeat appointments are common.³⁹

A. Repeat Appointments and Theories of Arbitrator Motivation

The term “repeat arbitrator” refers to an arbitrator who has been appointed by the same company or industry group persistently.⁴⁰ In international arbitration, party input in the arbitrator selection and disqualification process allows participating parties to feel comfortable with the legitimacy of the tribunal.⁴¹ When party input results in the reappointment of arbitrators, however, the legitimacy of the tribunal may be compromised. In the context of investor-state arbitration administered by ICSID, this practice can create the perception that the forum is an institutionally biased mechanism designed to protect the interests of merely one side of the dispute.

Institutional bias refers to the propensity for outcomes to favor one class of participants over another.⁴² Bias is perceived to be institutional if the causes of the uneven outcomes are widely distributed throughout the entire arbitral system.⁴³ When looking at ICSID disputes, outcomes suggest that arbitrators favor claimant-investors in order to promote their own reappointment.⁴⁴ An opposite tendency would arguably diminish the attractiveness of ICSID arbitration in the eyes of investors, decreasing its

41 STAN. J INT’L L. 53, 56 (2005) (citing John Leubsdorf, *Theories of Judging and Judge Disqualification*, 52 N.Y.U. L. REV. 237, 237 (1987)) (explaining that impartiality is a defining feature of a judge).

³⁷ See Rogers, *supra* note 36, at 56.

³⁸ See Margaret Moses, *Reasoned Decisions in Arbitrator Challenges* 6 (UNIV. OF CHI. SCH. OF L., Pub. L. & Legal Theory Research Paper, No. 2012-011), available at <http://ssrn.com/abstract=2114551>.

³⁹ See Chiara Giorgetti, *Challenges of Arbitrators in International Disputes: Two Tribunals Reject the “Appearance of Bias” Standard*, AMERICAN SOCIETY OF INTERNATIONAL LAW (Jun. 6, 2012), available at http://www.asil.org/insights/volume/16/issue/20/challenges-arbitrators-international-disputes-two-tribunals-reject-#_edn32.

⁴⁰ See Park, *supra* note 32, at 653 (citing *see generally* Fatima-Zahra Slaoui, *The Rising Issue of “Repeat Arbitrators”: A Call for Clarification*, 25 ARB. INT’L 103 (2009)).

⁴¹ See Trakman, *supra* note 13, at 659.

⁴² See Roger J. Peristadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. Chi. L. Rev. 1983, 1985-86 (2002).

⁴³ *Id.* at 1986.

⁴⁴ See Park, *supra* note 32, at 658 (citing Gus Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW*, 175-84 (Oxford Univ. Press 2007)).

usage as an adjudicatory process. Creating an overall investor-friendly forum remains more lucrative for arbitrators because it increases the overall number of disputes they can potentially adjudicate in the future. This proves to be particularly true in the case of ICSID, a World Bank affiliate.⁴⁵ One scholar suggests, “as merchants of adjudicative services, arbitrators have a financial stake in furthering [arbitration’s] appeal to claimants” that can lead to an “apprehension of bias in favour of allowing claims and awarding damages against governments.”⁴⁶

B. The Standard of Neutrality in Arbitration – Conflict of Interest

According to scholarly analysis of the concept of neutrality, conflicts of interest can be classified as either: 1) lack of independence; or 2) arbitrator impartiality.⁴⁷ The former contemplates improper connections an arbitrator may have to the dispute. Some examples include financial relationships with an adjudicating party, or personal financial interests in the underlying investment.⁴⁸ Arbitrator impartiality contemplates arbitrators’ preconceived notions that could threaten the neutrality of the arbitral process. Examples include biases toward favored nations, prior unrelated relationships with one or both parties, or other personal biases that could inspire party favoritism by an arbitrator. For international arbitration to function as a trusted form of investment adjudication, it is essential that international arbitrators remain both independent and impartial.⁴⁹ Appointed arbitrators should not have any economic or emotional links to the dispute.⁵⁰ One commentator notes that, “Although few people are free of predispositions in an absolute sense, some will prove relatively more detached than others with respect to any given dispute”.⁵¹ While helpful in articulating a mission of equity and fairness in ICSID arbitration, clear definitions of independence and impartiality remain evasive. Accordingly, it will prove valuable to future proceedings to clearly define the amount of acceptable bias allowable to still render arbitrators independent and impartial, and will

⁴⁵ See *id.* at 653-8 (citing Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, 152-3, 16 (Oxford Univ. Press 2007) (discussing that the counterargument to arbitrators seeking repeat appointment is that such action is counterintuitive and would in fact decrease the chance of reappointment by tarnishing their reputation as an unbiased adjudicator. Further, some believe there is a stronger incentive for arbitrators to safeguard their professional status as neutral adjudicators and be respected among peers).

⁴⁶ *Id.* at 651 (citing Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, 152-53 (Oxford Univ. Press 2007)).

⁴⁷ *Id.* at 636.

⁴⁸ See *id.*

⁴⁹ See Park, *supra* note 44, at 637.

⁵⁰ See *id.*

⁵¹ *Id.* at 632.

instill confidence in developing nations that the arbitral process is a fair form of adjudication.⁵²

C. The Duty to Disclose

Another key question that remains is to what extent an arbitrator must disclose past, present, and potential conflicts of interest and the consequences of failing to disclose these possible conflicts of interest.⁵³ As noted in scholarly commentary on the topic, there is a notion that arbitrators are less impartial than judges due to several factors including that arbitrators in identifying a conflict of interest, are often required to act contrary to their own financial interest, and the ability of parties to select arbitrators that serve party interests.⁵⁴ Disclosure of disqualifying relationships is particularly suspect when arbitrators are given the task of self-diagnosing a conflict of interest because at times, disclosure of a conflict of interest can cost an arbitrator hundreds of thousands of dollars in relinquished fees.⁵⁵ However, the decision of whether to disclose is extremely important in the arbitration proceedings because failure to do so can lead to nullification or non-enforcement.⁵⁶

Subject to some variation, the United Nations Commission on International Trade Law, the International Chamber of Commerce, the London Court of International Arbitration, and the Stockholm Chamber of Commerce rules all prescribe a duty, at the outset and throughout the proceeding, to disclose “any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties,” or if “circumstances exist that give rise to justifiable doubt’s as to the arbitrator’s impartiality and independence.”⁵⁷ Furthermore, in these forums, arbitrator reappointment in two or more related cases raises questions about the arbitrator’s independence, especially where prior cases exposed the arbitrator to privileged information that could prejudice an arbitrating party.⁵⁸

ICSID provides for a less detailed duty to disclose in its rules. Under Rule 6(2)

⁵² See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 362 (2002).

⁵³ David Allen Larson, *Conflicts of Interest and Disclosures: Are we Making a Mountain out of a Molehill?*, 49 S. TEX. L. REV. 879, 880 (2008).

⁵⁴ See Rogers, *supra* note 36, at 71-74.

⁵⁵ See *id.* at 72.

⁵⁶ *Id.*

⁵⁷ Piero Bernardini, *ICSID Versus Non-ICSID Investment Treaty Arbitration*, THE INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (Nov. 2, 2011), http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf (citing The London Court of International Arbitration, Rules, art. 10.3; United Nations Commission on International Trade Law, Arbitration Rules, art. 10; The Stockholm Chamber of Commerce, Arbitration Rules, art. 14(2)).

⁵⁸ See Bernardini, *supra* note 57.

each arbitrator is required to produce a declaration, stating that he or she has disclosed:

... (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.⁵⁹

Article 13(2) of the Additional Facility Rules⁶⁰ calls for similar actions, but uses even broader language, stating that an arbitrator shall sign “a statement of my past and present professional, business or other relevant relationships (in any) with the parties is attached hereto.” Both of these provisions fail to elaborate on the types of relationships that would affect the arbitrator’s “independent judgment” and are especially silent on whether repeat appointments would run afoul of the intent of the disclosure requirement.

IV. THE CURRENT STATE OF THE ICSID PROCESS ON ARBITRATOR SELECTION AND DISQUALIFICATION

ICSID’s arbitrator selection and disqualification processes are wrought with deficiencies that convolute the duties of arbitrators and disputing parties when issues of arbitrator independence and impartiality arise. Because so few arbitrator disqualifications have been fully adjudicated, the standards for arbitrator qualifications enumerated in the rules are left vague and unclear due to the lack of application or guidance.

A. The Arbitrator Selection Process

The composition of the Tribunal is described in Convention Article 37 (2) (a), which sets forth that “the Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators as the parties shall agree.”⁶¹ Under this, freedom of party contract will dictate the selection process unless none exists, in which case Article 37 (2) (b) will preside. Article 37(2)(b) states, “ Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the

⁵⁹ The International Centre for Settlement of Investment Disputes (hereinafter “ICSID”), Rules of Procedure For Arbitration Proceedings (hereinafter “Arbitration Rules”), and Regulations, R. 6(2), Apr. 2006.

⁶⁰ ICSID, Additional Facility Rules, art. 13(2), Jan. 2003.

⁶¹ ICSID, Convention on the Settlement of Investment Disputes Between States And Nationals of Other States (hereinafter “Convention”), art. 37 (2)(a).

president of the Tribunal, appointed by the agreement of the parties.”⁶² The appointment of arbitrators under Article 37 (2)(b) is dictated by Rule 3 of the Arbitration Rules of ICSID that states either party in communication to the other party shall:

...name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator.⁶³

In response, the other party must reply with the name of their choice of arbitrator appointment, and also must either concur in the appointment of the arbitrator proposed to be the President of the Tribunal or offer an alternative person for this role.⁶⁴ If an alternative is offered, the initiating party shall also notify the replying party of whether it concurs in the appointment of the alternative proposal of President of the Tribunal.⁶⁵ In the event that ninety days or another agreed upon length of time passes after the dispatch from the Secretary-General of the notice of the registration and the Tribunal is still not completely formed, either party may request that the Chairman complete the appointment process by selecting the remaining arbitrators and designating one to be President of the Tribunal.⁶⁶

During the appointment process, parties are responsible for selecting adjudicators that exhibit certain characteristics. Article 14(1) establishes the criteria for arbitrators on ICSID tribunals:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitration.⁶⁷

Despite the assertion that arbitrators must exercise independent judgment, the term “independent,” is largely left undefined in the context of Article 14(1). Increased

⁶² *Id.* at art. 37 (2)(b).

⁶³ *See* ICSID Arbitration Rules, *supra* note 59, at r. 3(1)(a).

⁶⁴ *Id.* at r. 3(1)(b).

⁶⁵ *Id.*

⁶⁶ *Id.* at 4(1).

⁶⁷ *See* ICSID Convention, *supra* note 61, at art. 14(1).

accountability in arbitration will contribute to a perception of legitimacy by clarifying to arbitrators and parties alike what type of conduct is acceptable and unacceptable and thus, can aid in correcting some of the limitations set in the ICSID rules.⁶⁸

B. The Arbitrator Disqualification Process

The standard for arbitrator disqualification is provided in Article 57 of the ICSID Rules, which states:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest⁶⁹ lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings, may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.⁷⁰

Relying on Article 14(1), as referred to previously, the disqualification process fails to develop identifiable characteristics of arbitrators that will lead to disqualification.

Article 58 then lays out the process of review of the proposal:

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman⁷¹ shall take that decision. If it is decided

⁶⁸ See Rogers, *supra* note 36, at 72.

⁶⁹ Multiple decisions have concluded that manifest is defined as “evident” or “obvious.” *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 34 (October 22, 2007); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶ 37 (March 19, 2010); *Universal Compression International Holdings, S.L.U v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, ¶ 71 (May 20, 2011); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, ¶ 59 (February 27, 2013),

⁷⁰ See ICSID Convention, *supra* note 61, at art. 57.

⁷¹ As defined in Article 5 of the ICSID Convention, the President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council. See ICSID Convention, *supra* note 61, at art. 5.

that the proposal is well-founded, the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or section 2 of Chapter IV.⁷²

Interpretation of Article 14(1) and its application to the challenged arbitrator is initially assigned to the members of the panel not in question, who must determine if the arbitrator's conduct or relationships reach that standard of apparent bias.⁷³ As stated above, in the event that the Tribunal cannot reach consensus in deciding on the proposal for disqualification, the decision shall be reserved for the Chairman. Past studies have shown that arbitrators are often reluctant to disqualify colleagues,⁷⁴ and more often than not, the decision then gets pushed to the Chairman in a majority of cases.⁷⁵

Because disqualification goes first to the remaining members of the Tribunal, followed by potential deference to the Chairman, this procedure can lengthen the process of adjudication. This peculiar procedure, not present in non-ICSID disqualifications of arbitrators, creates a system within ICSID that makes it difficult and time consuming to disqualify arbitrators.⁷⁶ However, the rules emphasize that this portion of the adjudication is to be handled efficiently. Pursuant to Article 15 in the ICSID Additional Facility Rules⁷⁷ and Rule 9 of ICSID's Rules of Arbitration,⁷⁸ a proposal for disqualification of an arbitrator shall be made promptly and before the proceeding is declared closed.⁷⁹ After the proposal is filed with the Secretary-General, the Secretary-General must transmit the proposal to the Tribunal and the Chairman if necessary, and notify the other party of the proposal.⁸⁰ The accused arbitrator may without delay submit explanations to the Tribunal or Chairman. In the event that the Chairman has to decide on a proposal to disqualify, he

⁷² See ICSID Convention, *supra* note 61, at art. 58.

⁷³ Although it is unclear why ICSID often relies on the standard of "apparent bias", one can speculate that the standard is adopted from a US arbitration case, *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 152 (1968), which first asserted this standard. *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶59 (Nov. 12, 2013) (citing *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 28 (October 22, 2007)).

⁷⁴ See *supra* note 3, at 426.

⁷⁵ KAREL DAELE, *CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION* 106 (Kluwer Law International ed., 2012).

⁷⁶ See generally *id.* at 106-110.

⁷⁷ See ICSID Additional Facility Rules, *supra* note 60, at art. 15.

⁷⁸ See ICSID Rules of Arbitration, *supra* note 59, at r. 9.

⁷⁹ See ICSID Additional Facility Rules, *supra* note 60, at art. 15(2).

⁸⁰ *Id.* at art. 15(3).

must use his best efforts to take that decision within 30 days.⁸¹ However, in the event that the Chairman exceeds the 30-day recommendation, ICSID does not provide for any safeguards to move the process forward. Article 15(7) firmly states that the proceeding shall be suspended until a decision has been taken on the proposal.⁸²

C. The Process of Filling Vacancies.

In the case of the disqualification, death, incapacity or resignation of an arbitrator, Rule 11(1) provides the process for filling the resulting vacancy:

Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.⁸³

Paragraph 2 provides that the Chairman shall appoint a person from the Panel of Arbitrators:

(a) to fill a vacancy caused by the resignation, without consent of the Tribunal, of an arbitrator appointed by a party; or (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.⁸⁴

Under R 11(1), the disqualification of an arbitrator will thus result in allowing the appointing party to fill the vacancy. At this stage, the appointing party might be inclined to choose a new arbitrator that is more impartial or independent, but will still have the strong incentive to appoint an arbitrator that will serve party needs with regards to subject matter expertise or favorable perspective of the law. Therefore, disqualification alone does not provide an assurance of a more-neutral replacement.

D. Statistics on Arbitrator Disqualification

Collected figures reveal the infrequency of arbitrator disqualification. The success rate for arbitrator challenges in ICSID currently hovers around a meager three percent.⁸⁵ From the early 1980's through 2011, there have been a total of forty-two

⁸¹ *Id.* at art.15(6).

⁸² *Id.* at art. 15(7).

⁸³ See ICSID Arbitration Rules, *supra* note 59, at r. 11(1).

⁸⁴ *Id.* at r. 11(2).

⁸⁵ See Moses, *supra* note 38, at 4.

challenges, nine of which resulted in resignation by the implicated arbitrators.⁸⁶ ICSID's case statistics do not provide for a statistical break down of resignations, disqualifications, and proposals for disqualification that are overruled. Because publication of disqualifications is optional and needs consent from all parties, statistics arising from these decisions is limited and provide little guidance. Furthermore, even if a complete set of data existed regarding the limited decisions on disqualifications, the miniscule sample size would restrict the formation of reliable conclusions.

Whether these numbers demonstrate success or failure is illusive due to the re-appointment process described previously. In all but one scenario, both arbitrator resignations and disqualifications give the party that originally appointed that arbitrator another opportunity to select an arbitrator for the tribunal, as discussed in Article 11(1). The only situation in which that right would be taken from the appointing party is enumerated in ICSID rule 8(2)⁸⁷ and Article 14(3) of the ICSID Additional Facility Rules,⁸⁸ which state that, when the arbitrator resigned without the consent of the continuing members of the Panel, the Chairman is delegated the task of filling the vacancy.⁸⁹ In every case but one, *Victor Pey v. Chile*, the tribunal consented to the resignation.⁹⁰ Therefore, in eight out of the nine resignations, the original appointing authority was able to appoint an arbitrator of their choosing to fill the vacancy. Because resignation absent consent is rare, neutrality of arbitrators is still questionable in the majority of cases in which resignation has occurred. Until 2011, twenty-nine challenges were rejected, and three challenges did not go forward.⁹¹ Ultimately, only one resulted in disqualification.⁹²

E. Payment Process

The process for payment of arbitrator fees under ICSID may encourage arbitrators to both fail to disclose conflicts of interest and decide in favor of investors in order to maximize potential earnings. The evident self-interest created through the

⁸⁶ *Id.* at 6 (citing *See Karel Daele, Interview, IA REPORTER*, (Jun, 8, 2011) (For criticisms of the ICSID challenge procedures)).

⁸⁷ *See* ICSID Arbitration Rules, *supra* note 59, at r. 8(2).

⁸⁸ *See* ICSID Additional Facility Rules, *supra* note 60, art. 14(3).

⁸⁹ *See* ICSID Convention, *supra* note 61, at art. 56(3).

⁹⁰ The challenge decision in *Victor Pey v. Chile* cannot be found published with the ICSID decisions published for this case. It can be assumed that ICSID, since it is only able to publish challenge decisions with the consent of all parties, did not publish this decision due to lack of consent. *See* Daele, *supra* note 75, at 106.

⁹¹ *See* Daele, *supra* note 75, at p. 203-204 (explaining that in *Alas v. Bosnia and Tanesco v. IPTL II*, the arbitration proceedings were discontinued at the request of the parties and in *Electricidad v. Argentina*, the proceedings were suspended at the request of the parties before a decision on the challenge was taken).

⁹² *See id.*

payment process further frustrates the goal of setting standards of independence and impartiality by creating a system in which arbitrators are motivated to conceal their lack of neutrality.

Article 60 of the Convention establishes that “Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.”⁹³ In addition to allowing for a changeable calculation of fees for arbitrators, Article 60 also upholds freedom of contract in allowing party agreements in advance with the Commission or Tribunal about fees and expenses of its members.⁹⁴ Party agreements on the calculation of fees for arbitrators will supersede ICSID regulations on the same matter. In the event that parties do not have a controlling agreement on the calculation of fees, Regulation 14 of the Financial Provisions listed under the Administrative and Financial Regulations provides that members of a Tribunal shall receive fees, allowances, and travel expenses as determined by the Secretary-General with the approval of the Chairman.⁹⁵ The members of the Tribunal are compensated by the Centre, and not by individual parties.⁹⁶ Even though arbitrators will get compensated for their provided services no matter the outcome of a specific dispute, siding with investors will increase the potential for reappointment in the future by making ICSID a more attractive forum to foreign investors.

F. Potential Effects

Increased accountability and the clarification of standards of independence and impartiality will contribute to a perception of legitimacy by dictating to arbitrators and parties alike what type of conduct is acceptable and unacceptable and thus, can aid in correcting some of the limitations of the ICSID rules.⁹⁷ One of the major limitations of ICSID rules is the vague standards set forth previously in Rule 14 that fails to define what constitutes “independence,” which makes it difficult both for parties to identify adjudicators who meet this qualification, and for arbitrators to know what circumstances mandate a duty to disclose. Furthermore, the disqualification process complicates the removal of unfit arbitrators by lengthening the arbitration proceedings and reducing both the efficiency of utilizing ICSID to adjudicate international disputes thereby decreasing the attractiveness of international investment arbitration in general. Even after a successful disqualification, as seen in Rule 11, allows for appointment of the replacement by the same original method and, thus, does not ensure more independent or impartial

⁹³ See ICSID Convention, *supra* note 61, at art. 60(1).

⁹⁴ *Id.* at art. 60(2).

⁹⁵ International Centre for Settlement of Investment Disputes, Administrative and Financial Regulations (hereinafter “Regulations”), Regulation 14(1)(a)-(d) (Apr. 2006).

⁹⁶ *Id.* at Regulation 14(2).

⁹⁷ See Rogers, *supra* note 36, at 112.

adjudicators. The infrequency of arbitrator disqualification and low success rate warrants a discussion not only of the procedure's efficacy,⁹⁸ but also demonstrates that ICSID should amend its process to challenge arbitrators in order to fulfill the overall goal of maintaining the integrity and fairness of arbitration as an adjudicatory process.⁹⁹ In order to promote efficiency in the adjudication process and instill confidence within Latin American parties as to the integrity and fairness of ICSID proceedings, it is essential to establish standards of independence, impartiality, and identify behavior that demonstrates a manifest lack of these qualities so that parties will be able to (a) initially appoint an impartial and independent arbitrator and (b) in filling vacancies on the Tribunal, appoint an impartial and independent replacement so as not to extend the length of the proceedings and risk further disqualifications and (c) have confidence that arbitrators exhibiting partiality or dependence will be held accountable.

IV. RECENT DISQUALIFICATIONS

A. Blue Bank v. Venezuela

On June 25, 2012, Blue Bank International & Trust (hereinafter "Blue Bank") filed a request for ICSID arbitration against the Venezuela.¹⁰⁰ Blue Bank alleged that Venezuela breached the 1994 Agreement for the Promotion and Protection of Investments (the "Agreement"), a bilateral investment treaty ("BIT") between Barbados and Venezuela.¹⁰¹ On October 8, 2012, Blue Bank appointed Mr. José María Alonso (hereinafter "Alonso") as its arbitrator.¹⁰² Venezuela, in turn, appointed Dr. Santiago Torres Bernárdez (hereinafter "Bernárdez") from Spain as its arbitrator.¹⁰³

Venezuela submitted a proposal to disqualify Alonso under Article 57 of the ICSID Arbitration Rules.¹⁰⁴ Although Blue Bank also submitted a proposal to disqualify

⁹⁸ See generally Moses, *supra* note 38.

⁹⁹ See *id.* at 7-8.

¹⁰⁰ Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 1 (Nov. 12 2013), available at, <http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf>.

¹⁰¹ *Id.* at ¶ 3.

¹⁰² Pursuant to Rule 6 (2) of the ICSID rules, Alonso issued a statement that noted he was a partner at Baker & McKenzie Madrid, S.L.P, in charge of the Dispute Resolution department in Madrid and that neither himself nor Baker & McKenzie have or have had any relationship with parties in the proceeding. *Id.* at ¶ 5.

¹⁰³ *Id.* at ¶ 6.

¹⁰⁴ *Id.* at ¶ 7.

Bernárdez as an arbitrator,¹⁰⁵ Bernárdez submitted his resignation from the tribunal and thus, the Chairman did not analyze the proposal to dismiss Bernárdez.¹⁰⁶

Venezuela opposed the appointment of Alonso due to his position at Baker & McKenzie, a firm that represented Blue Bank in *Longreef Investments A.V.V v. Bolivarian Republic of Venezuela*.¹⁰⁷ Venezuela further asserted that Alonso is a member of international committees within his firm, and that part of his compensation depended on the global returns of the firm.¹⁰⁸ In Venezuela's view, these facts established a direct and indirect economic interest in the outcome of the case, giving rise to reasonable doubts regarding Alonso's independence and impartiality.¹⁰⁹

In response, Blue Bank stated that Venezuela mischaracterized the facts and legal standard by incorrectly describing Alonso's role in the firm's International Arbitration Steering Committee.¹¹⁰ Blue Bank believed that Venezuela had not proved a manifest lack of impartiality or independence, and more specifically that the standard established by the term "manifest" was not met.¹¹¹ Thus, Blue Bank requested that the proposal to disqualify Alonso be denied.¹¹²

Alonso's argument was threefold. First, he argued that the Baker & McKenzie offices representing *Longreef*—located in New York and Caracas—are independently functioning legal entities that function separately from Alonso's office. Accordingly, Alonso's association with a single Baker & McKenzie office would not create conflicts with clients of other offices.¹¹³ Second, Alonso asserted that he did not lead the global arbitration practice at Baker & McKenzie, and thus, his participation in the International Arbitration Steering Committee did not meet the standard for disqualification under the ICSID convention.¹¹⁴ Third, Alonso offered that his income as a partner of the Madrid office depends solely on the profit derived at that office and not on the financial situation

¹⁰⁵ Blue Bank, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal at ¶ 11.

¹⁰⁶ *Id.* at ¶ 17.

¹⁰⁷ *Id.* at ¶ 22.

¹⁰⁸ *Id.* at ¶ 25.

¹⁰⁹ Blue Bank, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, at ¶ 26.

¹¹⁰ *Id.* at ¶¶ 33-37.

¹¹¹ *Id.* at ¶ 34.

¹¹² *Id.* at ¶¶ 35-37.

¹¹³ *Id.* at ¶ 38.

¹¹⁴ Blue Bank, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, at ¶ 38.

at the New York and Caracas offices.¹¹⁵ Accordingly, Alonso concluded that the Chairman had no basis to find reasonable doubt as to his impartiality because he did not and had never personally represented either of the parties, had never acted against the respondent, and he had no economic or other interest in the result of *Longreef*.¹¹⁶ The motion for disqualifications brought by Venezuela alleged a manifest lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention.¹¹⁷

The Chairman's analysis of the party arguments notes an inconsistency between the English and Spanish versions of Article 14, in which the English version refers to "independent judgment," while the Spanish version requires "imparcialidad de juicio (impartiality of judgment)."¹¹⁸ Because both versions are considered authentic, the accepted view is that arbitrators must be both impartial and independent.¹¹⁹

The Chairman stated that "Impartiality refers to the absence of bias or predisposition towards a party" and that "independence is characterized by the absence of external control."¹²⁰ Both independence and impartiality "protect parties against arbitrators being influenced by factors other than those related to the merits of the case."¹²¹ Furthermore, Article 57 and 14(1) of the ICSID convention do not require proof of actual dependence or bias, but only require the appearance of dependence or bias for disqualification actions to be appropriate.¹²² The Chairman asserted that the only guidelines that bind him or her are those of the ICSID and others, such as the IBA guidelines, may be useful references. The decision he makes can only be according to Articles 57 and 58 as set forth by ICSID.¹²³

In analyzing the proposal to disqualify Alonso, the Chairman found significant that Alonso's compensation from the International Arbitration Steering Committee relied

¹¹⁵ *Id.* at ¶ 40.

¹¹⁶ *Id.* at ¶ 44.

¹¹⁷ *Id.*, at ¶ 58.

¹¹⁸ *Id.*, at ¶ 58.

¹¹⁹ *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, at ¶ 58.

¹²⁰ *Id.* at ¶ 59 (citing *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007)).

¹²¹ *Id.* at ¶ 59.

¹²² *Id.* (citing *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 43 (August 12, 2010)).

¹²³ *Id.* at ¶ 62.

primarily, but not exclusively, on the financial performance of the Madrid office.¹²⁴ According to the Chairman, the fact that even a small part of Alonso's compensation was contingent on factors other than the performance of the Madrid office was enough to trigger a conflict with the *Longreef* adjudication.¹²⁵ Moreover, the Chairman concluded that the *Blue Bank* adjudication would likely present substantively similar issues to those arising in *Longreef*, which would present additional conflicts under the ICSID rules.¹²⁶ Therefore, the Chairman disqualified Alonso under Articles 14(1) of the ICSID Convention.¹²⁷

B. Implications of Blue Bank

Even though Chairman's disqualification of Alonso was based on his speculation about a lack of independence and theoretical impartiality, his reasoning marks the initial steps in formulating a comprehensible standard for conflicts of interest that render an adjudicator partial under ICSID. It also begins to establish a standard for when an arbitrator has a duty to disclose such conflicts. Under the Chairman's analysis, an arbitrator's financial ties, however tentative and indirect, to a firm that has a prior relationship with the claimant-investor, can create a conflict of interest, and demonstrates that the adjudicator in question lacks the necessary qualities of independence and impartiality as established in Rule 14, quoted beforehand. Additionally, as previously referred to in Rule 6, Alonso had a duty to disclose any relationship or circumstance in which the reliability for independent judgment to be questioned by a party. Accordingly, even though not specified by the Chairman in the *Blue Bank* decision, Alonso should have disclosed his full relationship with Baker & McKenzie.

Although the Chairman's decision on the proposal for disqualification in *Blue Bank* is a crucial first-step in establishing which financial and professional relationships can negate the independence and impartiality of arbitrators and render the appointment of such arbitrators inappropriate under ICSID, the Chairman's analysis is underdeveloped. It is not uncommon for arbitrators to have past or current careers with law firms. Without the Chairman's ability or willingness to adequately show how Alonso's position at Baker & McKenzie and ties to *Longreef* cause him to be partial in the current proceedings raises question as to the existence of actual bias. The tentative relationship established between Alonso and Baker & McKenzie, is one that is a common occurrence in the world of arbitration and deeming such relationships, as automatically constituting partiality may be unreasonable for the successful future of international arbitration. Clear and defined standards of independence and impartiality would be valuable to ICSID as an institution in order to promote the neutrality of adjudicators, encourage the efficiency of arbitration

¹²⁴ *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, at ¶ 67.

¹²⁵ *Id.* at ¶ 67.

¹²⁶ *Id.* at ¶ 68.

¹²⁷ *Id.* at ¶¶ 69-71.

proceedings, and make arbitration attractive to investors and state alike. Thus, it remains unclear as to why the Chairman in *Blue Bank* failed to offer adequate evidence or reason as to why Alonso's relationship with Baker & McKenzie implied that Alonso was a partial adjudicator in these arbitral proceedings.

C. Burlington Resources v. Ecuador

In *Burlington Resources v. Ecuador*, Professor Francisco Orrego Vicuña (hereinafter "Vicuña"), a Chilean attorney, was disqualified from an ICSID panel adjudicating a dispute between Burlington Resources and Ecuador.¹²⁸ Vicuña was appointed by Burlington Resources, the claimant, who was represented by the law firm Freshfields Bruckhaus Deringer (hereinafter "Freshfields").¹²⁹ During the course of proceedings, Vicuña issued a dissenting opinion¹³⁰ to a jurisdictional decision rendered in January 2010¹³¹ and a dissenting opinion on the "Decision on Liability"¹³² in March 2011. On July 8, 2013, counsel for Ecuador contacted Vicuña concerning news reports suggesting that Vicuña had been appointed by Freshfields' clients to arbitrate multiple disputes, at least one of which included a separate attempt by an arbitrating party to disqualify Vicuña as a repeat arbitrator.¹³³ Dechert Paris asked Vicuña to disclose all cases in which he had been appointed by Freshfields, and all assets and compensation received after submitting the requisite disclosures under ICSID Arbitration Rule 6.¹³⁴ On July 24, 2013, Ecuador motioned for the disqualification of Vicuña. Consequently, the arbitration proceedings were suspended. The Tribunal failed to reach a decision on the

¹²⁸ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, ¶ 1 (Dec. 13, 2013), available at, <http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf>.

¹²⁹ *Id.* at. ¶¶ 1-2.

¹³⁰ The dissenting opinion of Vicuña on jurisdiction attached to the Decision on Jurisdiction is unavailable. *Id.* at ¶ 3.

¹³¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, (Jun. 2, 2010).

¹³² Vicuña's dissenting opinion did not demonstrate flagrant favoritism of Burlington, in part, because the Tribunal had already decided this issue in favor of the Claimant. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña, ¶ 1-2 (Nov. 8, 2012) (In Vicuña's dissenting opinion, he agreed with the Tribunal's decision, including the final one, that there had been an act of expropriation arising out of the taking possession of the Blocks by the Respondent, which dispossessed the Claimant of its oil production share, related revenue, means of production and thus, the Claimant was totally deprived of the effective use and control of the investment. He dissented in regards to the Tribunal's failure to address the additional rights of the investor in the context of PSCs, the Hydrocarbons Legal Framework and the Treaty and International Law).

¹³³ *Id.* at ¶ 4.; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Challenge to Arbitrator Francisco Orrego Vicuña, (Jun. 14, 2013).

¹³⁴ *Id.*

disqualification. Accordingly, the decision was reserved for the Chairman of the Administrative Council in accordance with Article 58 of the ICSID Convention.¹³⁵

Ecuador's disqualification proposal was based on three separate claims: 1) Vicuña had been appointed by Freshfields in an "unacceptably high number of cases;"¹³⁶ 2) Vicuña had breached his obligation to disclose circumstances that might affect his reliability for independent judgment;¹³⁷ and 3) Vicuña had demonstrated a "blatant lack of impartiality to the detriment of Ecuador" during the course of arbitration.¹³⁸

Burlington responded alleging that Ecuador's proposal was a dilatory measure aimed at sabotaging the arbitral proceedings because it was not made "promptly"¹³⁹ and

¹³⁵ Burlington Resources, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, at ¶ 16.

¹³⁶ The eight cases referred to in Ecuador's proposal are:

- i. *Eni Dacion v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/04)
- ii. *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/05)
- iii. *Itera International Energy LLC and Itera Group NV v. Gerogia* (ICSID Case No. ARB/08/07)
- iv. *EVN AG v. Macedonia, former Yugoslav Republic* (ICSID Case No. ARB/09/10)
- v. *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8)
- vi. *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11)
- vii. *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF)/12/5)
- viii. *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38).

See id. at ¶ 22.

¹³⁷ With respect to the second ground for disqualification, Ecuador contended that Professor Orrego Vicuña failed to fulfill his duty of disclosure "both prior to and after his appointment." Ecuador argued that at the time Professor Orrego Vicuña was appointed in the present case, he did not disclose his prior or contemporaneous appointments by Freshfields in the *ENI Dación BV v. Venezuela* and *Itera v. Georgia* ICSID cases. Ecuador noted that subsequently, Professor Orrego Vicuña failed to disclose his appointments by Freshfields in five additional ICSID cases, contrary to the obligation he had assumed in his 2008 Declaration. Furthermore, Ecuador argued that Professor Orrego Vicuña had adopted an inconsistent view of his duty of disclosure. To substantiate its allegation, Ecuador submitted Professor Orrego Vicuña's declaration of June 6, 2011 in *Pan American Energy v. Bolivia*, a case in which Dechert acted as counsel for Bolivia and in which Professor Orrego Vicuña disclosed that he had been appointed as an arbitrator by Freshfields in *Itera*, *EVN*, and *Burlington*. *See id.* at ¶ 25-6.

¹³⁸ *See id.* at ¶ 21. In Ecuador's claim, it alleged that Vicuña answered a vast majority of questions in favor of the Claimant and attempted to undermine Ecuador's position and the credibility and that Vicuña demonstrated a "pattern of consistently dissenting from the Arbitral Tribunal's majority on those points decided in Ecuador's favor" *See id.* at ¶¶ 30-31.

¹³⁹ In its analysis, the Tribunal noted that because ICSID does not define the term "promptly" or does not specify a time period, the analysis of promptness must be made on a case by case basis. Using this method, the Tribunal decided that Ecuador had sufficient information to file a proposal for disqualification based on repeat appointments, non-disclosure, or the existing dissent to the 2010 Decision on Jurisdiction well before the actual filing of the proposal and thus, the filing was not prompt and constitutes a waiver. In contrast, Vicuña's conduct after the July 8th letter was raised in a timely matter. *Id.* at ¶¶ 75-76.

failure to do so amounted to a waiver.¹⁴⁰ Because Ecuador waited until information about Vicuña's involvement in *Repsol v. Argentina* became publically available, the disqualification proposal was untimely and the delayed challenge amounted to a waiver.¹⁴¹ Secondly, Burlington asserted that Ecuador's proposal threatened the due process rights of all parties in investment arbitration to their choice of arbitrators under the ICSID convention.¹⁴² Thirdly, Burlington argued that arbitrator reappointment is not a per se grounds for arbitrator disqualification.¹⁴³ To disqualify an arbitrator for reappointment, the party challenging the arbitrator's qualifications must allege that reappointment somehow impedes the arbitrator's independent assessment of the underlying dispute. Here, Burlington argued, Vicuña was not economically dependent on Freshfields because he did not derive a significant portion of his income from his prior appointments by Freshfields' clients.¹⁴⁴ Finally, Burlington argued that upholding Ecuador's challenge based on repeat appointment would have a negative systemic effect on investment arbitration, and that repeat appointments are a necessary part of the practice for the foreseeable future.¹⁴⁵

Vicuña claimed that he disclosed all of his Freshfields appointments in accordance with Ecuador's request, and believed that none of his previous or ongoing appointments interfered with his ability to impartially adjudicate the current dispute.¹⁴⁶ He stated that all requested information was posted on the ICSID website, and that his actions differed in *Rusoro v. Venezuela*,¹⁴⁷ a dispute arising out of an expropriation claim

¹⁴⁰ Burlington Resources, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, at ¶¶ 39-40.

¹⁴¹ *Id.* at ¶¶ 40-42.

¹⁴² *Id.* at ¶ 43.

¹⁴³ *Id.* ¶ 45.

¹⁴⁴ *See id.* at ¶¶ 45-6.

¹⁴⁵ Burlington Resources, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, at ¶ 55. Presumably, as international arbitration becomes a more frequently utilized form of commercial adjudication, more market solutions will emerge to rectify the problem of repeat arbitrators.

¹⁴⁶ *See id.* at ¶¶ 56-7.

¹⁴⁷ Vicuña disclosed his participation in *Repsol* during his appointment in *Rusoro*. His inconsistency in disclosure was considered subject to suspicion by Ecuador.

In *Repsol v. Argentina*, the Chairman rejected the proposal to disqualify Vicuña. Argentina alleged that its successful nullification of awards in CMS, Enron, and Sempra, Vicuña was biased against Argentina and thus could not be impartial in the proceedings. *Repsol S.A., and Respsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/12/38, ¶ 78 (Dec. 13, 2013)(English translation by author). However, the Chairman noted that those decisions were based on different facts, different laws and occurred at different times than the present case. The successful exercise of their right to propose disqualification under Article 52 of the convention does not necessarily mean that Vicuña lacks impartiality in the present case and that his references to a publication of a third party does not demonstrate a manifest impartiality against Argentina as required by Article 57. *See id.*, at ¶¶ 78-79. Furthermore, the Chairman concluded that

by a Canadian miner, because *Rusoro* requested a list of all his appointments.¹⁴⁸ In sum, Vicuña rejected Ecuador's claims of partiality during the course of arbitration.¹⁴⁹

In ruling on Vicuña's arbitral eligibility, the Chairman of the Administrative Counsel, like the tribunal chair in *Blue Bank*, noted that proof of actual dependence or bias is not necessary; it is sufficient to establish the appearance of dependence or bias.¹⁵⁰ According to the Chairman, whether a prior relationship between a challenged arbitrator and an adjudicating party constitutes the appearance of bias is an "objective standard based on a reasonable evaluation of the evidence by a third party."¹⁵¹ The subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.¹⁵² The Chairman also noted that "manifest lack of the [Article 14(1)] qualities," is defined as meaning "evident" or "obvious."¹⁵³

Applying Article 57 and 14(1), the Chairman laid out the three grounds for the possible disqualification of Vicuña: 1) Vicuña's repeat appointments as arbitrator by Freshfields; 2) Vicuña's non-disclosure of these appointments in prior to this case; and 3) Vicuña's conduct as an arbitrator in the *Burlington Resources* adjudication, particularly his dissenting opinions to the 2010 Decision on Jurisdiction and 2012 Decision on Liability, and his conduct during the pre-hearing telephone conference.¹⁵⁴ The Chairman determined that Ecuador had knowledge of Vicuña's repeat appointments and dissenting opinions well before filing the proposal for disqualification. Accordingly, these claims were untimely, and Ecuador had waived its right to address them before the Tribunal.¹⁵⁵ Vicuña's conduct after being confronted with non-disclosure of reappointment, however, was both timely and sufficient to challenge his qualifications.¹⁵⁶ The Chairman also found that a reasonable third party conducting an evidentiary review of the matter would conclude that Vicuña's conduct demonstrated an appearance of impartiality warranting

Vicuña's ties to the Pinochet regime were unrelated to the case and not sufficient to show a clear lack of authority required by Article 14 (1). *Id.*

¹⁴⁸ *Id.* at ¶ 58.

¹⁴⁹ *Id.* at ¶ 62.

¹⁵⁰ *Burlington Resources*, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, at ¶ 66.

¹⁵¹ *Id.* at ¶ 67.

¹⁵² *See id.*

¹⁵³ *Id.* at ¶ 68.

¹⁵⁴ *Id.* at ¶ 70.

¹⁵⁵ *Burlington Resources*, ICSID Case No. ARB/08/05, Decision on the Proposal For Disqualification of Professor Francisco Orrego Vicuña, at ¶ 76.

¹⁵⁶ *Id.*

disqualification under ICSID Articles 14(1).¹⁵⁷ Furthermore, based off of a reasonable evaluation of the July 31, 2013 explanations the Chairman concluded that a third party would conclude that Vicuña's allegations into the ethics of counsel for Ecuador demonstrated an appearance of a lack of impartiality with respect to Ecuador and its counsel.¹⁵⁸ Accordingly, the Chairman upheld Ecuador's proposal to disqualify Vicuña.¹⁵⁹

D. Implications of Burlington

At first glance, the Chairman's dismissal of Ecuador's arguments that Vicuña should be disqualified due to his repeat appointments and dissenting opinions seem to offer little guidance on the establishment of more clear standards for disqualification. The sheer recognition of these proposals as potentially being appropriate means for disqualification, however, has important implications for ICSID proceedings moving forward. Undoubtedly, the Chairman's analyses of the claims of lack of independence and impartiality stemming from repeat appointments and dissenting opinions would have been extremely helpful in constructing precise guidelines that parties could have utilized in the future to select unbiased adjudicators. Moreover, arbitrators themselves could have utilized these guidelines to determine if they had a duty to disclose repeat appointments. Unfortunately, the Chairman's failure to pursue these claims in his decision signifies a lost opportunity to explain why repeat appointments and dissenting opinions indicate a lack of independence and impartiality. The Chairman's unwillingness to explore these claims may even show his own impartiality, for without establishing how Vicuña's repeat appointments and dissents lack independence or impartiality, the Chairman's assertions that these commonplace practices in international investment arbitration might be indicative of arbitral misconduct is largely baseless. Repeat appointments and dissenting opinions are not uncommon in arbitration. In fact, in performing their prescribed duties as an adjudicator, arbitrators may lawfully issue dissenting opinions in pursuit of fair adjudication. Without showing how an arbitrator's reasoning in a dissenting opinion reaches to the point of misconduct by revealing an obvious favoritism for or opposition against a single party, the Chairman in *Burlington* would have been viewed as punishing an arbitrator for diligently performing the duty he was appointed to execute.

The Chairman's recognition that repeat appointments can be an appropriate grounds for the disqualification of an arbitrator, and his disqualification of Vicuña based of his July 31 accusations that Ecuador's counsel was unethical, do in fact encourage Latin American states to perceive ICSID proceedings as a fairer and more equitable adjudicatory process. Although complete analysis is absent from the Chairman's decision, the disqualification sets a preliminary standard. No matter how tentative, that certain behavior by arbitrators and repeat appointments can be deemed as constituting dependence or partiality. Accordingly, parties may be less likely to select repeat

¹⁵⁷ *Id.* at ¶ 79.

¹⁵⁸ *See id.* at ¶¶ 80-81.

¹⁵⁹ *Id.*

arbitrators or ones likely to act inappropriately, and arbitrators will be encouraged to disclose repeat appointments. Because arbitrators in international investment disputes are often perceived as favoring investors, Latin America may view this development in disqualification proceedings to note that repeat appointments can demonstrate a lack of neutrality as an advancement in the quest to ensure and promote the appointment of truly neutral adjudicators. Furthermore, the Chairman's willingness to recognize new and different grounds for disqualification demonstrates that arbitrator disqualification may be easier to achieve in the future and enhances the accountability of the system in the eyes of Latin America.

E. The Limits of Establishing a Standard for Independence and Impartiality

As previously asserted, creating a well-defined standard of independence and impartiality under ICSID and clarifying when a conflict of interest exists and when an arbitrator has a duty to disclose, may place a degree of trust in Latin American states that tribunals constituted under ICSID remain a fair and effective way to adjudicate international investment disputes. The Chairmen's overlooked opportunities in both *Blue Bank* and *Burlington* are undoubtedly a lost chance to more thoroughly shed light on the behavior, relationships, and characteristics of arbitrators that may render them partial. Yet, their decisions still serve as a beneficial first-step at formulating a clearer standard. Still, the benefits of creating such a standard may be limited.

Even if standards of independence and impartiality are set, repeat arbitrators still create an appearance of bias. In order to ensure a process that is truly neutral, ICSID may eventually have to address this common practice. The problem is noticeably complicated and the solution must balance the rights of parties to appoint their choice of arbitrator and the need for the arbitral proceedings to remain neutral. Encouraging complete disclosure by arbitrators so that parties are aware of potential bias, or setting a time period between appointments that repeat arbitrators must wait until serving on another tribunal in order to encourage the diversification of the existing pool of arbitrators, may be appropriate, if not imperfect solutions. It may also prove to be more beneficial not to address the problem of partiality of repeat arbitrators because proposed solutions may not guarantee more neutral adjudicators, and the appearance of bias of repeat players does not necessarily equate to actual bias. For example, in the instance that a tribunal consists of three arbitrators, the independence and impartiality of party-appointed arbitrators may be less concerning as long as the third arbitrator is deemed truly neutral.

Another remaining question arising from the quest to define independence and impartiality is whether doing so will truly soothe the sentiments of distrust regarding ICSID in Latin America. As previously noted, Latin America remains skeptical of ICSID as a fair adjudicatory process in part because of the 19th century aggression and colonization by the West. The past history of oppression and interference by the North in Latin America has justifiably created tension between these regions, that continues due to differences in economic policy, politics, and culture. These tensions may also be affecting Latin America's perception of ICSID. Latin America's expressed concern that the majority of ICSID cases being decided in favor of investors demonstrates a lack of impartiality and neutrality in ICSID may be but a mask to hide its displeasure with continuing to participate in arbitration proceedings that time and time again result in

unfavorable decisions for Latin American states. It must therefore be noted that if Latin America's criticism of ICSID is in actuality the persistence of unfavorable decisions rendered by tribunals against state actors, establishing a standard for independence and impartiality may do little to urge Latin America to embrace ICSID.

F. Conclusion

The decisions on the proposals to disqualify arbitrators in *Blue Bank* and *Burlington Resources* help to establish standards of independence and impartiality. In *Blue Bank*, the Chairman recognizes that Alonso had a conflict of interest stemming from the *Longreef* proceedings and accordingly, Alonso would be unable to exercise independent judgment as mandated by Article 14. *Blue Bank* establishes that financial and professional relationships may demonstrate arbitrator bias. The decision in *Burlington* also creates a newfound willingness to consider repeat appointments as a basis for disqualification. Published reasoning for these disqualifications both clarifies and defines the standards for independence and impartiality for arbitrators. As the standards for independence and impartiality become more evident, Latin American countries will gain confidence in ICSID proceedings because they will be able to identify disqualifying characteristics of arbitrators and be assured that ICSID tribunals will now be willing to disqualify arbitrators lacking independence and impartiality. Although the recent trend in utilizing the disqualification process helps to instill confidence within Latin America regarding the fairness of ICSID proceedings, hopefully the clearer standards established through recent published decisions will lead to a diminished need for the disqualification process as parties are able to identify neutral arbitrators at the onset in order to guard the efficiency and timeliness of the adjudication process.

V. CONCLUSION

Latin America's complicated past with colonization has undoubtedly shaped its current skepticism of the fairness and neutrality of arbitration proceedings. Its history with ICSID in particular does not assuage perceptions of bias in investment arbitration. Instead, the unclear standards pertaining to independent judgment of arbitrators, disclosure, and the timely process of disqualification, combined with the low number of arbitrator disqualifications over time create a sentiment of mistrust and confusion. The benefit of the recent spike in disqualifications of arbitrators in Latin America is that the published decisions help create standards for independence and impartiality and show ICSID's willingness to disqualify arbitrators who violate such standards. Moving forward, Latin America will hopefully gain confidence in the system because it is able to identify relationships that require disclosure, define qualities within arbitrators that will constitute grounds for disqualification, and see that arbitrators of both investors and developing nations alike will be held to a uniform set of standards.