2016

Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals

Chiara Giorgetti
University of Richmond, cgiorget@richmond.edu

BETWEEN LEGITIMACY AND CONTROL: CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS

CHIARA GIORGETTI*

INTRODUCTION

International courts and tribunals play an increasingly fundamental role in the maintenance of peace and stability, economic development, and the protection of human dignity.[1] Indeed, the cases they hear and resolve originate and touch upon diverse spheres such as boundary disputes, the use of force, the regulation of trade and investment, and violations of human rights.[2] With

* Associate Professor of Law, University of Richmond Law School. Member, New York State and D.C. Bars. J.S.D. 2008, LL.M. 2002, Yale Law School; M.Sc. 1995, London School of Economics; J.D.-equivalent 1994, Bologna University School of Law. The author is grateful for comments by Susan D. Franck, James Gibson, Ann C. Hodges, Charles C. Jalloh, Corinna Barrett Lain, Shari Motro, Catherine A. Rogers, and Wendy Collins Perdue. This Article was presented at the Faculty Colloquia at William & Mary Law School and Florida International University, and the author is grateful for the helpful comments received there. Parts of this Article were also presented at a workshop on Empirical Perspectives on the Legitimacy of International Investment Tribunals organized by PluriCourts in Oslo in August 2015, and the author is grateful for all comments received. Finally, the author is glad to have the opportunity to thank Cassie Powell of Richmond Law School for her exquisite research assistance and Malcolm Savage, III, also of Richmond Law School, for his essential help collecting the data related to challenges of judges in international criminal tribunals. All comments are welcomed at cgiorget@richmond.edu.

1. *See generally* K.J. Keith, *Resolving International Disputes: The Role of Courts*, 7 N.Z. YEARBOOK INT'L L. 255, 260 (2009) (explaining the roles of international courts and the States' use of them); Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 345 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (explaining the duel role of international courts as protecting and challenging state sovereignty, as the courts gain responsibility and are used more frequently).

2. For a succinct yet comprehensive overview of the work of the International Court of Justice (ICJ), see generally Sean Murphy, *The International Court of Justice*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 11 (Chiara Giorgetti ed., 2012); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal Based Approach*, 106 AM. J. INT'L L. 225, 225–27 (2012) (analyzing the range of international courts and their effectiveness in achieving goals).

increased visibility and relevance, however, comes increased scrutiny.[3]

More and more, these now plentiful international courts are seen as effective agents of change, a feature that inevitably carries many responsibilities.[4] Indeed, observers have focused on issues of legitimacy, effectiveness, and performance of the dozens of international courts and tribunals that are available to the international community.[5]

Some have said that the international dispute resolution system, and in particular investor-state arbitration, suffers "a legitimacy crisis," and have called for changes in the system.[6] Others have framed their demands for legitimacy for international courts and tribunals within the larger discourse of the legitimacy of international organizations.[7] Scrutiny has highlighted concerns related to the procedures applied to select[8] and remove judges and arbitra-

3. *See generally* Cesare Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues and Players, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3 (Cesare Romano, Karen J. Alter, & Yuval Shany eds., 2013) [hereinafter OXFORD HANDBOOK] (examining legitimacy, effectiveness, quality, and systemic concerns raised about international courts).

4. *See, e.g.*, Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFFAIRS 405 (2006) (recognizing the importance and evolving nature of international courts and other institutions).

5. *See, e.g.*, Faculty of Law, *PluriCourts- Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order*, UNIV. OSLO, http://www.jus.uio.no/pluricourts/english/ [https://perma.cc/5GLN-RTJE] (a center of excellence created by the Norwegian government that contains research into the legitimacy concerns and efficiency models for international courts and tribunals) (last visited Oct. 22, 2016); The Danish Research Foundation's Center of Excellence for International Courts, *iCourts*, UNIV. COPENHAGEN, http://jura.ku.dk/icourts/ [https://perma.cc/GW2G-FNUC] (contains research into the legitimacy, causes and effects, and evolution of international legal bodies) (last visited Oct. 22, 2016).

6. Charles N. Brower & Sandie Blanchard, *What Is a Meme? The Truth About International Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed By States*, 25 COLUM. J. TRAN'L L. 689, 761–77 (2014); *see* Amokura Kawhura, *Participation of Non-government Organizations in Investment Arbitration as Amici Curiae, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 275, 283–88 (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin eds., 2010); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1556, 1584–1610 (2005); Susan Franck, *The ICSID Effect?: Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 914 (2011).

7. *See, e.g.*, KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW – COURTS, POLITICS AND RIGHTS (2014) (exploring the scope and powers of international courts operating around the world); LEGITIMIZING INTERNATIONAL ORGANIZATIONS (Dominik Zaum ed., 2013) (comparing and evaluating the legitimization practices of specific international and regional organizations).

8. For the author's earlier work on the selection of judges and arbitrators, see Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431 (2014).

tors as a fundamental principle of due process that contributes to the independence and perceived legitimacy of members of any bench or arbitral tribunal.[9]

Within this framework, robust and effective challenge procedures for judges and arbitrators become fundamental control mechanisms, and are important to guarantee the legitimacy of international courts and tribunals.[10] Indeed, proper challenge procedures ensure the independence of judges and arbitrators at all stages of the procedures. They also allow parties an essential opportunity to raise concerns about any of the decision-makers in their case.[11]

Yet, challenges of judges and arbitrators in international courts and tribunals is a vastly understudied subject.[12] To correct this imbalance, this Article makes three novel contributions. First, and for the first time, it details and compares challenge procedures across a variety of international courts and tribunals, including both permanent and ad hoc institutions. Second, it provides unique data on challenges and provides a detailed analysis of their outcomes. Third, it makes two concrete recommendations that should be adopted as baseline requirements to improve and harmonize existing challenge procedures: (1) it proposes that an external or semi-external institution take decisions on challenges,

---

9. Mackenzie and Sands, pioneers in the systematic study of international courts and tribunals, assert that "judicial independence is recognized to be a significant factor in maintaining the credibility and legitimacy of international courts and tribunals." Ruth Mackenzie & Phillippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. J. INT'L. L. 271, 271 (2003).

10. *See* Rüdiger Wolfrum, *Legitimacy in International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Mar. 2011), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1960?rskey=wsTGyM&result=1&prd=EPIL [https://perma.cc/P38Z-8SVG] (exploring the concept of legitimacy in international law).

11. On the debate between independence and effectiveness of international courts, see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005) (arguing the no such correlation exists). *See* Laurence H. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 902, 955 (2005) (responding to Posner and Yoo and arguing that the most effective courts are the most independent ones); Yuval Shany, *Judicial Independence as an Indicator of International Court Effectiveness: A Goal-Based Approach*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 251, 253 (Shimon Shetreet & Christopher Forsyth eds., 2012) (suggesting a new, goal-oriented approach to assess international judicial effectiveness).

12. *See* Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶ 20 (2013) ("[T]he topic [of recusals] needs more attention with the increasing number of international judges, which will probably lead to an increase in critical situations.").

and (2) it proposes adoption of a common standard of review based on a reasonable third party observer.

The analysis proceeds as follows: Part I first explains why a comparative analysis of rules from different courts and tribunals is necessary and warranted, and then examines the diverse provisions applicable to challenge procedures in some of the most important international courts and tribunals; Part II assesses new empirical data relating to the number of challenges and the success rate of challenge procedures under some of those rules, and explains some of the reasons for those challenges; Part III builds on these findings and concludes by suggesting ways to strengthen the challenge and recusal rules within the existing procedural systems.

I. CHALLENGING JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS

Once rare in proceedings of international courts and tribunals, recently challenges have become more common.[13] Indeed, repeat appointments and potential personal, professional, and case or issue conflicts result in more reasons for parties to suspect the possible partiality or lack of independence of an arbitrator or judge.[14] Additionally, tactical or unmeritorious challenges are also on the rise, and parties use them to delay proceedings, obtain strategic advantages, and minimize possible disadvantages.[15]

13. For example, of the challenges filed under the International Convention for Settlement of Investment Disputes (ICSID), all but two were filed after 2001. *See* KAREL DAELE, CHALLENGES AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 515, 527 (2012) (table of cases); *see also* Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators Under the ICSID Convention and Rules*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 34, 35 (Chiara Giorgetti ed., 2015); *infra* Table 1.

14. Luke A. Sabota, *Repeat Arbitrator Appointments in International Investment Disputes*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS *supra* note 13, 293–94; Romain Zamour, *Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in Devas v. India and its Impact*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS *supra* note 13, at 227, 227–28, 243; *see, e.g.*, Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal or Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), http://italaw.com/sites/default/files/case-documents/italaw3028.pdf [https://perma.cc/3D3Z-XW8A] (arbitrator challenged because, *inter alia*, he had been nominated by claimant's counsel eight times).

15. *See* Costantine Partasides, *The Art of Selecting the Right Arbitrator*, THE LONDON SCH. OF ECON. & POLITICAL SCIENCE (Nov. 9, 2011), http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1252 [https://perma.cc/K7CT-7P3Q] (arguing that parties can have four reasons to launch a tactical challenge: to delay proceedings; send a warning to the challenged arbitrator; drive the arbitrator into making a mistake and create a reason to challenge; and push the arbitrator to resign).

Naturally, requesting the removal of a judge or an arbitrator after their appointment in a specific case is a difficult decision for counsel.[16] Challenges can create tension between the tribunal and the parties, between the parties, and within challenged and unchallenged members of a court or tribunal.[17] They can also result in heightened scrutiny of other procedures that occur during the proceeding.[18] Even successful challenges sour relations, and all challenges add time to the proceedings.[19]

This Part first explains why a comparative study of rules applicable in different courts and tribunals is warranted and necessary. It then compares and assesses the main rules applicable to challenges with a specific eye at identifying the different elements that may strengthen or undermine the legitimacy of the members of international courts and tribunals.

A. *Prolegomena: Comparing Rules from Different Courts*

A comparative study on international challenge procedures may sound far-fetched.[20] Indeed, international courts and tribunals are

16. *See* GÜNTHER HORVATH & STEPHAN WILSKE, GUERILLA TACTICS IN INTERNATIONAL ARBITRATION 8, 15 (2013).

17. *See* DAELE, *supra* note 13, at 103 ("[C]hallenging an arbitrator can be a weapon used by parties who wish to sabotage the arbitration . . . . The later the challenge comes in the arbitration proceeding, the bigger its potential disruptive effect.").

18. Sometimes this heightened scrutiny results from the process being reviewed twice. As Daele notes, sometimes parties to the arbitration are free to agree to continue the arbitration while the challenge procedure is pending, which is then reviewed when the tribunal is reconstituted. DAELE, *supra* note 13, at 102. For example, in *Salini v. Jordan*, the parties agreed upon a procedure informally during the challenge process, which was then reviewed again after the tribunal was reconstituted. *See* Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 9–10 (Nov.29, 2004), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=casesRH&actionVal=showDoc&docId=DC635_En&caseId=C218 [https://perma.cc/EL62-YXCQ].

19. DAELE, *supra* note 13, at 103–05 ("Challenges made at the final stage of the proceeding are potentially the most disruptive because, if upheld and a new arbitrator has to be appointed as successor, parts of the proceeding may have to be repeated."). Daele goes on to cite the case of *Victor Pey v. Chile*, in which Chile challenged the entire tribunal three weeks before the tribunal was scheduled to meet. *Id.* at 105. Two new arbitrators reconstituted the tribunal, extending the time period of the issuance of the award by more than two and a half years. *See* Victor Pey Casado & President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 39 (Dec. 18, 2012).

20. *See generally* Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing The Field*, 109 AM. J. INT'L L. 467 (2015) (describing the challenge and framing the new field of comparative international law); Chiara Giorgetti, *Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings*, *in* PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS (Arman Sarvarian et al. eds., 2015) (comparing various international courts and tribunals).

distinct institutions with specific jurisdictions and rules of procedure. International courts and tribunals may hear disputes between states, between individuals and states, or of individual criminal acts.[21] They pronounce decisions on very diverse matters, including state responsibility, individual criminal responsibility, treaty violations, and standard of treatment of foreign investors.[22]

However, in the universe of international actors, international courts and tribunals remain specific and defined actors that share the common function of adjudicating international disputes.[23] International judicial bodies share other important characteristics, too.[24] First, they are all created by an international legal instrument, such as a treaty, a U.N. Security Council Resolution, or the application of a multilateral convention. Second, they apply and are regulated by international norms and operate in the international legal system, where domestic law is only tangentially relevant, if at all.[25] Third, judges and arbitrators themselves are international actors and, while exercising their function, must be detached from any domestic legal system.[26]

Courts and tribunals themselves routinely look at each other's decisions on matters of challenges to finalize and strengthen their own reasoning on similar matters.[27] Thus, for example, in *Prosecutor v. Anto Furundžija*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY)—a tribunal specially created to hear cases on individual criminal responsibility for grave violations of international criminal law in the former Yugoslavia—was required to decide issues of judicial impartiality.[28] To do so, the Appeals Chamber reviewed in detail the decisions on

21. *See generally* CHIARA GIORGETTI, THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., 2012) (discussing the various jurisprudence of international courts).

22. THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 1 (Ruth Mackenzie et al. eds., 2010).

23. *See generally* Chiara Giorgetti, *International Adjudicative Bodies*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS (Jacob Cogan et al. eds., forthcoming 2016).

24. *See* Chiara Giorgetti, *Introduction*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 1–3 (Chiara Giorgetti ed., 2012).

25. *Id.* at 2.

26. *See generally* Romano, Alter & Shany, *supra* note 3, at 6–7 (explaining that a defining characteristic of international adjudicative bodies is that they are composed of independent individuals who do not represent any state).

27. *See generally* Giorgetti, *supra* note 20, at 224 (discussing how various procedures and laws are shared across international tribunals).

28. Prosecutor v. Furundžija, Case No. IT-95-17/1-A99, Judgment, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf [https://perma.cc/CPQ3-3GHZ].

the issue by the European Court of Human Rights (ECHR), an international court tasked with deciding cases on asserted violations of individual human rights by a state in the territory of the European Council.[29] Specifically, the chamber looked at the interpretation by the ECHR of Article 6 of the European Convention on Human Rights, which provides the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[30]

The same mechanism occurs in international arbitration. For example, in a challenge brought in the context of an inter-state litigation between the United Kingdom and Mauritius, the arbitral tribunal thought it "advisable" to first compare the law and practice of courts and tribunals deciding disputes between states, and then look at the law and practice of other international tribunals dealing with cases between non-state parties or between a state and a non-state entity.[31] In its thorough analysis, the tribunal reviewed the rules of the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), and the International Tribunal for the Law of the Sea (ITLOS).[32]

Thus, it is not only proper, but indeed advisable, to compare the law and practice among different courts to explore and verify the establishment of best practices, since the courts themselves compare and assess their own rules in relation to each other. The following Section does just that.

B. *Rules Applicable to Challenge Procedures*

There are no uniform rules of procedure applicable to all international judicial proceedings.[33] Quite the contrary—each court and tribunal has adopted specific rules shaped by the unique needs and characteristics of the institution.[34] Although these rules are certainly informed by other existing international procedural

29. *See* Christiane Bourloyannis-Vrailas, *The European Court of Human Rights*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 21, at 362–63.

30. Prosecutor v. Furund_ija, Case No. IT-95-17/1-A99, Judgment, ¶¶ 181–83.

31. The Republic of Mauritius v. United Kingdom of Great Britain and North Ireland, In the Matter of an Arbitration Before an Arbitration Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea (Chagos Marine Protected Area Arbitration), Reasoned Decision on Challenge, ¶¶ 140–55 (Perm. Ct. Arb. 2011), https://www.pcacases.com/web/sendAttach/1792 [https://perma.cc/U3BV-L3WS].

32. *Id.*

33. *See infra* Sections I.B.1–5.

34. *See infra* Table 1 (Summary of Challenge Procedures).

rules, the differences are sufficiently important to call for a detailed institutional analysis.

The rules of procedures relating to challenges in the main international courts and tribunals reviewed below include the rules applied by the ICJ—the principal judicial organ of the United Nations—and those applicable in the context of international investment arbitration, including those used in both United Nations Commission on International Trade Law (UNCITRAL) and International Convention for Settlement of Investment Disputes (ICSID) proceedings. As a useful comparison, the Section also reviews the rules applied in international criminal courts and tribunals that have witnessed several challenge proceedings.

1. The International Court of Justice

The rules and mechanisms to challenge and recuse a judge of the International Court of Justice found in the ICJ Statute are unique and mirror those found in the statute of the ICJ's predecessor, the Permanent Court of International Justice.[35]

Article 2 of the ICJ Statute provides that the court should be comprised of independent judges.[36] Upon taking office, judges make the solemn declaration to perform their duties and exercise their powers "impartially and conscientiously."[37] Article 16 prohibits its members from exercising any political or administrative function or engaging in another professional occupation.[38] Article 17 further establishes certain instances of relative incompatibility and mandates judges not to act as "agent, counsel, or advocate in any case."[39] It also forbids judges from participating in decisions in cases in which they have "previously taken part as agent, counsel, or advocate . . . or as a member of a national or international court, . . . commission of [i]nquiry, or in any other capacity."[40]

Should an incompatibility arise, it is for the judges themselves to raise it first.[41] Indeed, the ICJ Statute relies initially on the self-monitoring of each judge, and envisages only a subsidiary control

35. *See generally* Statute for the Permanent Court of International Justice art. 24, 1921 P.C.I.J. 390, http://www.icj-cij.org/pcij/serie_D/D_01_1e_edition.pdf [https://perma.cc/DT3H-PSKR] (Article 24 provides procedures for recusal).

36. Statute of the International Court of Justice art. 2, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

37. *Id.* art. 20.

38. *Id.* art. 16.

39. *Id.* art. 17.

40. *Id.*

41. *Id.* art. 24.

role for the president of the court and ultimately for the court as a whole.[42] Article 24 of the statute provides that "if, for some special reason, a member of the Court considers he or she should not take part in the decision of a particular case, he shall so inform the President."[43] This situation has occurred several times in the history of the court, especially in the initial period of a judge's tenure, as judges tend to have practiced in front of the court or have had close interactions with it before their election.[44]

Additionally, the president of the ICJ may give notice to a member of the court if, "for some special reason," he or she believes that the member should not sit in a particular case.[45] There is only one case in which the president allegedly used this power.[46] If the member of the court and the president disagree on this, it is the court as a whole that settles the issue by a decision of all the judges.[47] The parties can also initiate requests for disqualification.[48] Article 34 of the Rules of the Court provides that any party may communicate confidentially in writing to the president any facts that the party considers relevant to the application of Articles 17 and 24 of the ICJ Statute.[49]

Requests for removal of a judge are rare.[50] In the history of the ICJ only three cases are known: two pertaining to requests for advisory opinions, and only one brought in the context of a conten-

42. Chiara Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice, in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 13, at 3, 17.

43. ICJ Statute, *supra* note 36, art. 24.

44. *See* ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 136 (2013); Giorgetti, *supra* note 42, at 18 (table of cases).

45. Paragraphs 2 and 3 of Article 24 of the ICJ Statute read as follows:

> 2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
> 3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ICJ Statute, *supra* note 36, arts. 24(2)–(3).

46. Sir Robert Jennings, *Article 24, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 422, n.27 (Andreas Zimmerman et al. eds., 2006).

47. ICJ Statute, *supra* note 36, art. 24.

48. Giorgetti, *supra* note 42, at 27.

49. For the composition of the Court for particular cases, see ICJ Statute, *supra* note 36, art. 34(2), 2007 I.C.J. Acts & Docs. 113.

50. Giorgetti, *supra* note 42, 28–30.

tious case.[51] The court rejected each of these requests.[52] In deciding the three challenges, the court adopted a formalistic reading of the applicable rules and did not elaborate on what would amount to reasons for a successful challenge.[53]

The most recent and well-developed request relates to the challenge of Judge Elaraby.[54] In *Legal Consequence of the Construction of the Wall in the Occupied Palestinian Territory*, the court was asked by the U.N. General Assembly to advise on the legality of Israel's construction of a partition wall in the occupied Palestinian territory.[55] During the proceeding, Israel requested that the president of the court remove the Egyptian judge, Nabil Elaraby, a former senior diplomat for Egypt.[56] The ICJ dismissed Israel's claims and concluded that there was no violation of Article 17(2), as Judge Elaraby had not acted as counsel, agent, or advocate in the case when he was a diplomat for Egypt, and that comments he made before becoming a judge had not expressed an opinion on the case.[57]

2. Rules of the United Nations Commission on International Trade Law

The procedural rules of UNCITRAL (UNCITRAL Rules) are frequently used in international litigation, in both international investment treaty arbitration and other international disputes, including the Iran-U.S. Claims Tribunal.[58]

Under UNCITRAL Rules, arbitrators may be challenged "if circumstances exist" that give rise to "justifiable doubts" as to the

---

51. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 7 (June 21) (finding three judges sitting on the panel did not need to be recused, as prior actions and statements made while in their prior positions did not preclude their participation in this case); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 8 (July 9), http://www.icj-cij.org/docket/files/131/1533.pdf [https://perma.cc/33JU-N5D7] (finding concerns raised by parties were not enough to preclude judge); South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase, Judgment, 1966 I.C.J. 6 (July 18); *see also* Giorgetti, *supra* note 42, at 28–30.

52. Giorgetti, *supra* note 42, at 28–30.

53. *See id.* at 32.

54. *See* Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Order, 2004 I.C.J. 3, ¶ 3 (Jan. 30).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* Jeremy K. Sharpe, *Iran-United States Claims Tribunal*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 21, at 557.

impartiality or independence of an arbitrator.[59] The rules are more generally worded than those of the ICJ and do not indicate specific conflicts.[60] The standard of review calls for "justifiable doubts," generally interpreted to mean that a reasonable and informed third party would have justifiable doubts as to the impartiality of the challenged arbitrator.[61] However, a party can only challenge the arbitrator it appointed for reasons the party learned after it made the appointment.[62]

The combination of the justifiable doubts threshold with the fact that the appointing authority makes challenge decisions, provides a balanced approach to challenges. Under UNCITRAL Rules, a party that intends to challenge an arbitrator must send notice of the challenge within fifteen days after it has been notified of the appointment of the arbitrator, or within fifteen days after learning of the circumstances giving rise to the challenge.[63] The notice of challenge and its reasons are communicated directly to the other party, the arbitrator who is challenged, and to the other arbitrators.[64] If, within fifteen days from the date of the notice, the parties have not agreed on the challenge or the challenged arbitrator has not withdrawn, the party making the challenge may further

59. U.N. Comm'n on Int'l Trade Law, UNCITRAL Arbitration Rules (as revised in 2010), art. 12 (Apr. 2011) [hereinafter UNCITRAL Arbitration Rules], https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf [https://perma.cc/RA2Y-G9DD] ("1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. 2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.").

60. *See id.*

61. For example, the Decision on the Challenge to Mr. J. Christopher Thomas, QC in *Gallo v. Canada* was taken under the UNCITRAL Arbitration Rules. Gallo v. Government of Canada, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶ 1 (Oct. 14, 2009), http://italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf [https://perma.cc/3XLM-PTM2]. In that case, claimant filed a challenge after learning that Mr. Thomas' professional situation had changed since his appointment. *Id.* ¶ 12. Specifically, Mr. Thomas had agreed to advise Mexico, a non-disputing party under the North American Free Trade Agreement, on legal matters, which could include international investment arbitration. *Id.* ¶ 4. The appointing authority concluded that from the point of view of a "reasonable and informed third party" there would be justifiable doubts about Mr. Thomas' impartiality and independence as an arbitrator, and directed him to choose whether to continue to advise Mexico or continue to serve as an arbitrator. *Id.* ¶ 36. He resigned a few days after the decision. Elizabeth Whitsitt, *Arbitrator Forced to Choose in NAFTA Dispute over Thwarted Canadian Garbage Site*, INV. TREATY NEWS (Dec. 4, 2009), https://www.iisd.org/itn/2009/12/04/arbitrator-forced-to-choose-in-nafta-dispute-over-thwarted-canadian-garbage-site/ [https://perma.cc/45LV-GJCZ].

62. UNCITRAL Arbitration Rules, *supra* note 59, art. 12(2).

63. *Id.* art. 13(1).

64. *Id.* art. 13(2).

pursue the challenge by seeking, within thirty days from the date of the challenge notice, a decision on the challenge from the authority who appointed the arbitrator.[65]

An analysis of the available case law shows increasing challenges of arbitrators under these rules. However, challenges are seldom successful. One example where an arbitrator was successfully removed following a challenge is *ICS v. Argentina*.[66] There, the respondent challenged a claimant-appointed arbitrator.[67] The challenge was upheld after the court concluded that there was a sufficiently serious conflict, because the arbitrator was a partner in a firm that had concurrent representation in a separate, long-running case against Argentina.[68] Other types of cases that resulted in challenges include cases of "double-hatting" (where an arbitrator also acted as counsel in related proceedings) and other conflict of interest situations.[69]

3. Rules of the International Convention for Settlement of Investment Disputes

Most international investment cases are heard under the International Convention for Settlement of Investment Disputes (ICSID).[70] Challenge procedures under the ICSID rules are unique.[71] Article 57 of the ICSID Convention provides that a party

65. *Id.* art. 13(4). *See generally* Giorgetti, *supra* note 8, at 449–54 (discussing the eligibility criteria for international arbitrators and possible arbitrator challenges with some reference to UNICITRAL rules).

66. ICS Inspection and Control Services Limited (U.K.) v. Republic of Argentina, NAFTA/UNCITRAL, Case No. 2010-9, Decision on Challenge to Arbitrator, at 4 (Perm. Ct. Arb. Dec. 17, 2009), http://www.italaw.com/documents/ICSArbitratorChallenge.pdf [https://perma.cc/SG4P-85ZS].

67. *Id.* at 2–4.

68. *Id.* at 4–5.

69. *See, e.g.*, Gallo v. Government of Canada, UNCITRAL, Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, at 2–4 (Perm. Ct. Arb. Oct. 14, 2009), http://www.italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision_002.pdf [https://perma.cc/4ZLU-DCBZ] (finding Mr. Thomas must choose between his roles as arbitrator in the case and advisor to Mexico); Sarah Grimmer, *The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 13, at 80.

70. U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2015* 1, 4, UNCTAD/WEB/DIAE/PCB/2016/2 (June 2016) ("About two[-]thirds of last year's [investor-state dispute settlement] cases were filed with the International Centre for Settlement of Investment Disputes (ICSID), either under the ICSID Convention [Arbitration] Rules or under the ICSID Additional Facility Rules . . . . Overall, [sixty-two] per cent of all known cases have been filed under the ICSID . . . .").

71. *See generally* James Crawford, *Challenges to Arbitrators in ICSID Arbitration*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 596, 604–06 (2015) (discussing arbitrator

may propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities" required to be nominated.[72] The qualities are enumerated in Article 14(1) and require an arbitrator to be independent and impartial, and to fulfill certain nationality rules.[73]

In ICSID's practice, the term "manifest" has generally been strictly applied to mean "'obvious' or 'evident' and highly probable, not just possible."[74] For example, in *ConocoPhilipps Company et al. v. The Bolivarian Republic of Venezuela,* the tribunal rejected the disqualification proposal of an arbitrator and recalled that ICSID decisions recognized the above definition of the term "manifest."[75] Indeed, the tribunal imposed a relatively heavy burden on the party proposing disqualification: the manifest lack of the required

---

requirements and standard of disqualification under ICSID and suggesting that the threshold for a successful challenge in ICSID appears to be higher than alternative regimes); Kinnear & Nitschke, *supra* note 13, at 41–50 (introducing the procedural steps to disqualify an arbitrator under ICSID).

72. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 57, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

73. Article 14(1) of the ICSID Convention states:

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

Id. art. 14(1).

74. ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 56 (Feb. 27, 2012), http://www.italaw.com/sites/default/files/case-documents/ita0223.pdf [https://perma.cc/232P-LSX3].

75. *See id.* ¶¶ 56, 68. Similarly, other ICSID tribunals deciding proposals for the disqualification of members of the arbitral tribunal confirmed that the term "manifest" meant "obvious" or "evident," and that such a finding would require "obvious evidence" of a state of mind lacking independence or impartiality. For a well-reasoned explanation and summary, see Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 28 (Oct. 3, 2001) http://www.italaw.com/sites/default/files/case-documents/ita0208.pdf [https://perma.cc/2YDE-27TE]. The tribunal concluded the following:

> [W]e agree with earlier panels which have had to interpret and apply Article 57 that the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member. All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently.

Id.

qualities to sit as an arbitrator had to appear from objective evidence.[76]

Challenge proposals under ICSID must be filed with the secretary general "promptly" and before the proceedings are declared closed.[77] The secretary general then transmits the proposal to the members of the tribunal and notifies the other party.[78] If the challenge relates to a sole arbitrator or the majority of the tribunal, the file is also transmitted to the chairman of the Administrative Council.[79] The challenged arbitrator is then invited to furnish explanations to the tribunal or the chairman.[80]

If only one member of the tribunal is challenged, it is for the remaining two members of the tribunal to decide the challenge.[81] The remaining members of the tribunal thus promptly consider and vote on the proposal.[82] In contrast, it is for the chairman of the Administrative Tribunal to decide the challenge if the challenge pertains to either the sole arbitrator or the majority of the tribunal, or if the remaining members are equally divided.[83] The chairman decides on the challenge, using his or her best effort to make a decision within thirty days after he or she has received the proposal.[84] Pending the decision, the proceedings are suspended.[85]

The strict threshold required to challenge an arbitrator under ICSID and that decisions are considered by the tribunal's remain-

76. ConocoPhillips Company et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, ¶ 56.

77. Int'l Ctr. for Settlement of Inv. Disputes, ICSID Convention, Regulations and Rules: Rules of Procedure for Arbitration Proceedings (Arbitration Rules), r. 9(1) (2006) [hereinafter ICSID Arbitration Rules].

78. *Id.* r. 9(2).

79. *Id.*

80. *Id.* r. 9(3).

81. *See id.* r. 9(4).

82. *Id.* Note that the recent ICSID decision to disqualify an arbitrator is only the second successful challenge in ICSID proceedings. The challenge was motivated by the fact that, inter alia, the arbitrator had been nominated by claimant's counsel eight times. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal or Disqualification of Professor Francisco Orrego Vicuña, ¶ 21 (Dec. 13, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf [https://perma.cc/T3PW-Q8ZE]. The challenge on this point was rejected, but the challenge was subsequently upheld as the ICSID chairman considered that the allegations raised by the challenged arbitrators about the ethics of counsel manifestly evidenced an appearance of lack of impartiality. *Id.* ¶¶ 75, 78–80.

83. *See* ICSID Arbitration Rules, *supra* note 77, r. 9(4).

84. *Id.* r. 9(5).

85. *Id.* r. 9(6).

ing members are unique to these tribunals.[86] Significantly, ICSID tribunals seem recently to have moved from a strict reading of Article 57 to a more refined understanding of "manifest" so as to be closer to other common challenge rules, including those under UNCITRAL.[87]

4. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda

The establishment of ad hoc and permanent international criminal courts and tribunals marked one of the most important developments of international litigation.[88] Within their statutes and governing documents, these courts and tribunals included particular selection and challenge procedures.[89]

The provisions of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are similar, but not identical.[90] Per Article 13 of the ICTY Statute and Article 12 of the ICTR Statute, judges should be "persons of high moral character, impartiality

---

86. On this issue, see Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration, in* INVESTMENT AND COMMERCIAL ARBITRATION—SIMILARITIES AND DIVERGENCES 163 (Christina Knahr et al. eds., 2010), noting the following:

> The ICSID's unique system for adjudicating arbitrator challenges raises interesting questions. Are a challenged arbitrator's colleagues on the tribunal likely to remove him in light of the personal and professional connections between them? It would seem that an arbitral institution . . . would have more interest than co-arbitrators in carefully scrutinizing alleged conflicts of interest, given the systemic and reputational risks that such conflicts implicate.

87. *See supra* Section I.B.3. See the new trends in recent decisions in Chiara Giorgetti, *Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator*, AM. SOC'Y INT'L L. INSIGHTS (Sept. 29, 2014), http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold [https://perma.cc/XF7C-NY3V].

88. *See* Santiago Villalpando, *The International Criminal Tribunal for the Former Yugoslavia* & Robert D. Sloane, *The International Criminal Tribunal for Rwanda, in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 21, at 233, 233.

89. *See* Makane Mbengue, *Challenges of Judges in International Criminal Courts and Tribunals, in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 13, at 183, 184.

90. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by U.N. Security Council Resolutions 808 (1993) and 955 (1994), respectively. For a review of the procedures, see *id.* at 189–201.

and integrity"[91] who solemnly declare they will discharge their duties "honourably, faithfully, impartially and conscientiously."[92]

Rule 15 of both the ICTY and ICTR Rules of Procedure details the applicable procedure for the disqualification of judges.[93] Under Rule 15, a judge may not sit and should withdraw from "any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality."[94] Any party can, based on these grounds, apply to the chamber's presiding judge for the disqualification of a judge of that chamber from a trial or appeal.[95] The presiding judge then confers with the judge in question.[96]

Two different authorities at the ICTY and ICTR decide on judicial disqualification.[97] Under ICTY rules, the presiding judge confers with the challenged judge and then reports to the tribunal's president. If necessary, following the report of the presiding judge, the president may appoint a panel of three judges from other chambers to report to him or her its decision on the merits of the application.[98] If the decision is upheld, the president assigns another judge to sit in the place of the disqualified judge.[99]

At the ICTR, if after consultation between the presiding judge and the challenged judge, it is necessary to consider the disqualification request, the Bureau—composed under Rule 23 of the president, the vice-president, and the presiding judge of the Trial Chambers—decides on the disqualification proposal.[100]

Numerous challenges to judges based on the alleged lack of independence and impartiality have been brought in front of both international criminal tribunals.[101] Notably, the challenge to disqualify Judge Frederik Harhoff was upheld by a chamber of the

91. S.C. Res. 955, Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955, art. 12 (1994) [hereinafter ICTR Statute]; S.C. Res. 808, Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/25704, art. 13 (1993) [hereinafter ICTY Statute].

92. International Criminal Tribunal for the Former Yugoslavia (ICTY), Rules of Procedure and Evidence, r. 14, U.N. Doc. IT/32/Rev.50 (July 8, 2015).

93. *Id.* r. 15; International Criminal Tribunal for Rwanda (ICTR), Rules of Procedure and Evidence, r. 15, U.N. Doc. ITR/3/Rev.23 (May 15, 2015).

94. ICTR, Rules of Procedure and Evidence, *supra* note 93, r. 15.

95. *Id.*

96. *Id.*

97. *Id.*; ICTY, Rules of Procedure and Evidence, *supra* note 92, r. 15.

98. ICTY, Rules of Procedure and Evidence, *supra* note 92, r. 15.

99. *Id.*

100. ICTR, Rules of Procedure and Evidence, *supra* note 93, rs. 15, 23.

101. Mbengue, *supra* note 89, at 184.

ICTY.[102] In the case of Vojislav Šešelj, a Serbian Radical Party leader, a majority of the chamber found that Judge Harhoff "had demonstrated an unacceptable appearance of bias in fav[o]r of conviction" and disqualified him.[103] The chamber's decision was the result of a defense motion, following the publication of a personal letter that Judge Harhoff wrote to numerous other judges and friends that was then leaked to the public.[104] The defense argued, and the chamber agreed, that the letter showed the judge's bias in the current proceedings.[105]

5. The International Criminal Court

Challenge procedures applicable to the International Criminal Court (ICC)—the only permanent, treaty-based international criminal tribunal—follow the footprints of those found in the ICTY and ICTR, but are more detailed and include a binding Code of Judicial Ethics.[106]

Article 40 of the ICC Statute requires judges to be "independent in the performance of their functions."[107] It provides that judges

---

102. *See id.*

103. Press Release, International Criminal Tribunal for the Former Yugoslavia, Judge Harhoff disqualified from Šešelj case, U.N. Press Release MS/CS/PR1578e (Aug. 29, 2013), http://www.icty.org/en/press/judge-harhoff-disqualified-šešelj-case [https://perma.cc/NE55-R2YA]. The press release goes on to say the following:

> The Majority, Judge Liu dissenting, concluded that by "referring to a 'set practice' of convicting accused persons without reference to an evaluation of the evidence in each individual case[,]" Judge Harhoff had demonstrated an unacceptable appearance of bias. The Chamber also noted in this context that no specific reference to the accused was required to reach the conclusion of an unacceptable appearance of bias. The Majority, Judge Liu dissenting, further ruled that the appearance of bias could also be perceived in Judge Harhoff's contention that he was confronted by a "professional and moral dilemma," which in the view of the Majority, was a reference to his difficulty in applying the current jurisprudence of the Tribunal. Judge Frederick Harhoff circulated a private letter to [fifty-six] people on 6 June 2013. The letter then became publicly available through the media and [I]nternet. In the letter, the Judge critici[z]ed a number of recent Appeals Chamber and Trial Chamber Judgments of the Tribunal and claimed that the President of the Tribunal was exerting pressure on his colleagues in deliberations.

Id.

104. *See* Marko Milanovic, *Breaking: Judge Harloff Disqualified from the Seselj Case*, EJIL: TALK! (Aug. 28, 2013), http://www.ejiltalk.org/breaking-judge-harhoff-disqualified-from-the-seselj-case [https://perma.cc/FTA5-7UQS].

105. Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, ¶¶ 14–15 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 28, 2013), http://www.icty.org/x/cases/seselj/tdec/en/130828.pdf [https://perma.cc/E6WY-VFDG].

106. International Criminal Court (ICC), Code of Judicial Ethics, ICC-BD/02-01-05 (Mar. 9, 2005).

107. Rome Statute of the International Criminal Court art. 40(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

cannot "engage in . . . activit[ies that are] likely to interfere with their judicial functions or to affect confidence in their independence."[108] Article 40 also requires judges "to serve on a full-time basis at the seat of the Court" and to "not engage in any other occupation of a professional nature."[109] Furthermore, Article 41 provides that "[t]he President may, at the request of a judge, excuse that judge from the exercise of a function under th[e] Statute," and specifies that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground" including,

> inter alia, [if] that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted . . . or on such other grounds as may be provided for in the Rules of Procedure and Evidence.[110]

The ICC's Rules of Procedure and Evidence are probably the most detailed existing binding procedural rules of any international forum.[111] Rule 34 specifies that in addition to the grounds found in Articles 40 and 41, grounds for disqualification of a judge include the following:

> (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;
> (b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;
> (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;
> (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.[112]

It is for the absolute majority of the judges to decide on issues of independence and challenges.[113] Decisions are considered without the participation of the individual judge. In matters relating to

108. *Id.* art. 40(2).
109. *Id.* art. 40(3).
110. *Id.* art. 41.
111. *See* ICC, Rules of Procedure and Evidence, rs. 23–39, U.N. Doc PCNICC/2000/1/Add.1 (2002) [hereinafter ICC Rules of Procedure and Evidence].
112. *Id.* r. 34.
113. ICC Statute, *supra* note 107, art. 40(4).

challenges, the individual judge can present his or her comments, but cannot take part in the decision.[114]

Rule 33 further provides that if a judge seeks to be excused from his or her function, he or she needs to "make a request in writing to the Presidency," who will treat the request confidentially.[115] Finally, Rule 35 states that a judge should make a request to be excused if he or she has reason to believe that there are grounds for disqualification, without waiting for a request for disqualification to be made.[116]

To date, a total of five requests for disqualification in three separate situations have been brought, but all have been rejected.[117]

II. What Do the Data Show? An Empirical Analysis of Challenge Outcomes

The Section above highlights the rules that are most often applied in resolving challenges of judges and arbitrators in international courts and tribunals. This Section assesses the result of the challenge requests in different courts and tribunals and elaborates on the reasons that parties used to bring a motion to challenge.

A. *Empirical Evaluation*

In order to properly evaluate challenge procedures, it is necessary to know the outcomes of challenges. Until now, however,

---

114. *See id.* arts. 40(4), 41(2)(c).

115. ICC Rules of Procedure and Evidence, *supra* note 111, r. 33 ("1. A judge, the Prosecutor or a Deputy Prosecutor seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused. 2. The Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned.").

116. *Id.* r. 35.

117. *See* Prosecutor v. Dyilo, ICC-01/04-01/06, Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi (June 29, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_08830.PDF [https://perma.cc/SK8C-MJPR]; Prosecutor v. Katanga, ICC-01/04-01/07, Motion for the Disqualification of Judge C. Van den Wyngaert (May 30, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_04535.PDF [https://perma.cc/QY6H-VAYJ]; Prosecutor v. Gombo, ICC-01/05-01/13, Defence Request for the Disqualification of the Single Judge Cuno Tarfusser (May 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_03836.PDF [https://perma.cc/6KPC-Z6SU]; Prosecutor v. Dyilo, ICC-01/04-01/06, Defence Application for the Disqualification of Judge Sang-Hyun Song (Feb. 20, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_01589.PDF [https://perma.cc/2D92-N6LS]; Prosecutor v. Nourain, ICC-02/05-03/09, Defence Request for the Disqualification of a Judge (Apr. 2, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_04486.PDF [https://perma.cc/5U9X-RL24].

those data were largely missing.[118] This Article provides the first collection and analysis of challenge requests across a variety of important international courts and tribunals.[119]

Table 1, below, shows the number of challenges made under the procedures in international courts and tribunals analyzed above, as well as their final outcomes.[120] These data offer multiple interesting insights.

First, they show that, though increasing, challenge procedures continue to be quite rare.[121] In the entire history of the ICJ—since 1946—only three cases were ever brought to the attention of the president of the court.[122] International criminal tribunals and the ICC see a comparably higher number of challenges, but they also deal with a much higher number of cases and procedures.[123]

Second, the data also demonstrate that challenge requests are very rarely accepted.[124] No challenge or disqualification request has ever been upheld in a permanent court such as the ICJ or the ICC.[125] In fact, although several requests were made in both permanent courts, none has ever been accepted.[126]

---

118. *See* Oellers-Frahm, *supra* note 12, ¶ 20 (arguing that "the topic [of judges' recusals] needs more attention with the increasing number of international judges, which will probably lead to an increase in critical situations.").

119. The data have been collected by the author and are available in her files.

120. An important caveat applies. Because of confidentiality rules, not all cases are available. At times, even the existence of the case (and thus the challenge) remains completely confidential. At other times, the reasoning of the decision relating to a challenge remains confidential. Thus, this situation inevitably shows only a partial figure of the total number of cases. Further, there are still a number of challenges that are pending, so any data present a picture taken at a certain time. *See generally* Kinnear & Nitschke, *supra* note 13, at 34–37 (providing statistical figures of disqualification challenges and cases registered, per year); Grimmer, *supra* note 69 (showing an overview of various challenges under UNCITRAL Arbitration Rules).

121. For a thorough examination of the difficulties of collecting and interpreting challenge decisions in commercial arbitration, see Catherine A. Rogers & Idil Tumer, *Arbitrator Challenges: Too Many Or Not Enough?*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014 128, 129–30 (Oct. 2015).

122. *See infra* Section I.B.1.

123. *See infra* Section I.B.5.

124. "Recent decisions have reinforced an increasingly widespread belief in the arbitration world that there exists only a remote chance of success when challenging arbitrators in ICSID proceedings. Indeed, while there have been over [forty] challenges lodged against sitting ICSID arbitrators since the early 1980s, successfully changing the composition of a tribunal has proven highly problematic in the absence of a voluntary resignation." *Challenges to arbitrators under the ICSID Convention – Increasingly Common but Success remains Improbable*, VOLTERRA FIETTA (Spring 2012), http://www.volterrafietta.com/challenges-to-arbitrators-under-the-icsid-convention-increasingly-common-but-success-remains-improbable/ [https://perma.cc/429A-XD96].

125. *See infra* Sections I.B.1 & I.B.5.

126. *See infra* Table 1.

Third, only one challenge has ever been upheld in an international criminal court or tribunal, namely at the ICTY, in the controversial *Šešelj* case, which was widely discussed in the professional press.[127] No challenges were ever accepted at the ICTR or ICC, though many challenge proceedings were initiated.[128] Similarly, none of the twenty-two challenges presented at the Iran-U.S. Claims Tribunal proceedings were upheld.[129]

Interestingly and unexpectedly, as challenge mechanisms in international arbitration have been deeply criticized, several international arbitrators were removed as a consequence of challenge procedures under both ICSID and UNCITRAL Rules.[130] Under the available data for UNCITRAL,[131] of the twenty-eight arbitrator challenges submitted to the Permanent Court of Arbitration (PCA) for determination, seventeen were rejected, seven were upheld, three resulted in the resignation of the arbitrator, and one was withdrawn during settlement negotiations.[132] In ICSID arbitration, eighty-four arbitrators were challenged, resulting in the rejection of fifty-six requests, the resignation of twenty-one arbitrators, and the withdrawal or discontinuation of three proposals.[133] Only four challenges were upheld.[134] Thus, twenty-two percent of the cases brought to the PCA for determination under UNCITRAL Rules were upheld, while only about five percent of the cases brought at ICSID resulted in the acceptance of the challenge.[135]

127. *See* Press Release, *supra* note 103; *see also* Milanovic, *supra* note 104 (showing the challenge was widely discussed).

128. *See infra* Section I.B.4.

129. For an in-depth analysis of challenges at the Iran-U.S. Claims Tribunal, see Lee M. Caplan, *Arbitrator Challenges at the Iran-United States Claims Tribunal, in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 13, at 115.

130. *See generally* Kinnear & Nitschke, *supra* note 13, at 43–46 (providing an overview of challenges at ICSID including the procedure to bring a challenge); Grimmer, *supra* note 69 (providing an overview of various challenges under UNCITRAL Arbitration Rules).

131. *See supra* note 119 and accompanying text.

132. For more detailed analysis, see Grimmer, *supra* note 69, at 83.

133. Kinnear & Nitschke, *supra* note 13, at 35–37.

134. *Id.*

135. *See* Grimmer, *supra* note 69, at 83.

TABLE 1: TOTAL NUMBER OF KNOWN CHALLENGE CASES PER INSTITUTION AND THEIR RESULTS

Institution	Number of Challenges	Result of Challenges
ICJ[136]	3 cases challenging 5 judges	0 challenges upheld
ICSID (as of September 2014)[137]	84 arbitrators	21 arbitrators resigned 3 proposals withdrawn/discontinued 56 declined 4 upheld
Iran-U.S. Claims Tribunal (UNCITRAL Rules)[138]	22 cases	0 challenges upheld 3 resigned/proposal withdrawn 9 dismissed on technical grounds (e.g., untimely or failure to state reasons) 10 dismissed for failure to establish justifiable doubts
PCA (1976 and 2010 UNCITRAL Rules (as of end of 2014)[139]	28 arbitrators (24 in investor-state arbitrations)	24 resulted in determination: 17 challenges rejected and 7 upheld; 3 resulted in the resignation of the challenged arbitrator; 1 withdrawn in the context of broader settlement negotiations
International Criminal Court	5 judges in 3 situations	0 accepted
ICTY[140]	27 motions in 12 cases[141]	1 accepted: challenge of Judge Harhoff (2013)
ICTR	29 motions in 17 cases[142]	0 accepted

136. Giorgetti, *supra* note 42, at 28–32.

137. Kinnear & Nitschke, *supra* note 13, at 35–37.

138. Caplan, *supra* note 129, at 121–22.

139. Grimmer, *supra* note 69, at 82–85.

140. Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, ¶¶ 14–15 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 28, 2013).

141. Note that motions by the same defendant challenging multiple judges and cases in which challenges were filed by more than one defendant in a case were counted as one motion. The total number of judges challenged in all the motions is forty-eight; three entire trial chambers were also challenged. Data on file with the author. *See, e.g.*, Prosecutor v. Blagojeviæ & Jokiæ, Case No. IT-02-60, Challenge of the Judges of Trial Chamber II (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Lukiæ & Lukiæ, Case No. IT-98-32/1, Challenge of the Trial Chamber (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2008); Prosecutor v. Kanyabashi, Case No. ICTR-96-15, Challenge to the Jurisdiction of Trial Chamber I (June 3, 1999).

142. Note that motions challenging multiple judges by the same defendant and cases in which challenges were filed by more than one defendant in a case were counted as one. The total number of judges challenged in all the motions is sixty-eight. Data on file with the author. *See, e.g.*, Prosecutor v. Karad_iæ, Case No. IT-95-5/18, Challenge to Judges

The overall success rate of challenge procedures, however, does not describe the full picture. In fact, a significant number of arbitrators preferred to resign from the panel once challenged, without waiting for the result of the challenge decision.[143] This may signal different issues, which remain necessarily speculative.[144] Resignation may be the result of a desire of an arbitrator not to disrupt the proceedings and simply withdraw from a case when one of the parties has lost trust in him or her.[145] Resignation may also be the consequence of the arbitrator's perceived likelihood of success of a legitimate challenge.[146]

Another reason that would result in the change of the composition of the bench includes a self-recusal from the judge him- or herself prior to challenge. This is the preferred method at the ICJ, for example, where judges are appointed for nine-year terms and the cases that they will face are not yet known.[147] A judge or an arbitrator could also be excused by the appointing authority before the conclusion of the challenge procedure. For example, in one of the most colorful stories related to challenges at the Iran-U.S. Claims Tribunal, the United States challenged two judges appointed by Iran after they physically attacked the Swedish judge in an attempt to remove him from the tribunal's premises.[148] The United States challenged the two attacking judges and Iran withdrew them shortly thereafter.[149]

Thus, if one considers how often challenge of an arbitrator or judge results in the alteration of the composition of the tribunal (including the number of resignations of arbitrators), the data present a more nuanced picture: under the PCA/UNCITRAL rules, about a third of all the challenges result in a new composition of judges (nine of twenty-seven), while under ICSID

Kwon, Morrison, Baird & Lattanzi (Int'l Trib. for the Former Yugoslavia July 2014); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A, Oral Challenge to Judges Laity Kama and William Sekule (Dec. 7, 1999); Prosecutor v. Ntabakuze, Case No. ICTR-97-34, Challenge to the Judges of Trial Chamber III; Judges Williams, Ostrovsky, and Dolenc (Feb. 20, 2002).

143. *See* Kinnear & Nitschke, *supra* note 13, at 37; Grimmer, *supra* note 69, at 100.

144. *See* Kinnear & Nitschke, *supra* note 13, at 37.

145. *See id.*

146. *See id.*

147. Giorgetti, *supra* note 42, at 4.

148. *See* Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L. ORG. 457, 471 (2000); *see also* Caplan, *supra* note 129, at 121–35 (addressing challenges at the Iran-United States Claims Tribunal).

149. Caplan, *supra* note 129, at 130.

the result is a little less than one third (twenty-five of eighty-four).[150]

The same observation applies also in the context of other international courts and tribunals. Indeed, the composition of the bench of many courts and tribunals has changed as a result of self-recusals.[151] At the ICJ, several judges have recused themselves as a consequence of conflict of interests and past activities; this has also occurred at the ICTY and the ICTR.[152]

B. *Reasons to Challenge*

Having discussed above the data available on challenge outcomes, it is also valuable to explore some of the reasons that prompted challenges. Reasons to challenge vary significantly, and include both reasons that are pre-existing, such as personal or professional connections and activities, as well as reasons that develop during the course of the arbitration, mostly involving the handling of the arbitration procedure.[153]

Specifically, some of the reasons that resulted in the initiation of challenge proceedings include the professional or personal relationship of a judge or arbitrator with a party or counsel, including: the nomination to governmental post or international organization; the merger of law firms, or the assumption of a partnership or adviser role; multiple appointments of an arbitrator by the same party or counsel; financial interest or link to one of the parties; the presence of a long-standing relationship; the fact that the arbitrator or judge and counsel previously acted as co-counsel; professional contacts between the judge or arbitrator and counsel; family links between the judge or arbitrator and counsel for a party; personal animosity between a judge or arbitrator and counsel; and double-hatting.[154]

Challenges were also brought for reasons linked to the conduct of proceedings,[155] including financial dependence, failure to dis-

150. *See* Kinnear & Nitschke, *supra* note 13, at 35–37.

151. *See* Giorgetti, *supra* note 42, at 17.

152. *See* KOLB, *supra* note 44, at 132–37.

153. Grimmer, *supra* note 69, at 97–104.

154. *Id.* In a Permanent Court of Arbitration (PCA) case the respondent challenged the arbitrator appointed by the claimant on the grounds that the arbitrator's daughter was employed as an associate at a branch of the law firm representing the claimant. *Id.* at 104. The secretary general found that these circumstances satisfied the justifiable doubts test. *Id.*

155. Such conduct-based challenges include, especially, Iran's challenges of the presidents of tribunals—seven cases, six of which were dismissed by the appointing authority (and supported by the United States), with eight challenges total—but more recently also

close conflict, and improper conduct or behavior during the proceedings,[156] such as disclosure of deliberation, physical assault to another arbitrator, or failure to act.[157]

Other reasons for challenges include: statements made by the judge or arbitrator in prior awards and decisions outside the context of a case decision or award (such as informal remarks or in academic writing), which give the impression that the arbitrator has developed a conflict;[158] repeat appointments in related cases or cases addressing similar issues; involvement in previous related (domestic or international) proceedings; or prior knowledge of the case from other professional experience (diplomatic or policy-related).[159] The challenge of one arbitrator may produce a chain effect, causing other members of the tribunal to be challenged by the opposing or same party. For example, at the PCA, more than one member was challenged in seven of the twenty-four challenges filed in investor-state arbitrations, and in four of those cases, challenges were lodged by one side against the arbitrator appointed by the other side within one month of each other.[160]

III. Strengthening Challenge and Recusal Rules to Strengthen International Courts and Tribunals

Part I of this Article analyzed the existing challenge procedures in some of the most relevant international courts and tribunals and showed that international judicial actors use many different mechanisms to remove a judge or arbitrator who they believe has lost the required qualities to sit as a judge, namely his or her indepen-

used by Argentina in Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/KB2K-U48P].

156. In the Iran-U.S. Claims Tribunal, reasons alleged by Iran to challenge an arbitrator include: that the arbitrator assisted claimants with their case; that the arbitrator regularly interfered with the presentation of respondent's case; and that the arbitrator exerted an overbearing presence such that he controlled the deliberations of the tribunal. *See* Caplan, *supra* note 129, at 122–29.

157. At the PCA: in a set of challenges against each member of one tribunal, the respondent party alleged that the tribunal had "persistently failed to devote the necessary time to rule on important issues in the arbitration," such that a reasonable observer would conclude that its conduct constituted an impermissible failure to act for the purposes of Article 13 of the Rules. Grimmer, *supra* note 69, at 112. The challenging party also invoked the law of the seat of arbitration that provided that the mandate of the tribunal could be terminated if, after repeated reminders, the tribunal carried out its mandate in an "unacceptably slow manner." *Id.*

158. *Id.* at 106.

159. *Id.* at 107–09.

160. *Id.* at 82–83.

dence. Part I also highlighted some important differences and anomalies among the applicable procedures, and demonstrated that there is no one system, agreed upon by all, to challenge an international adjudicator. Part II examined the results of the application of challenge procedures. It demonstrated that challenges are seldom successful regardless of the applicable procedural mechanisms. This conclusion is valid across the board, for all courts and tribunals, and it is also in line with the rate of challenges accepted in domestic procedures.[161]

This Part assesses and builds on these findings. Specifically, it argues that as the impact and use of international courts and tribunals increases, the mechanisms that guarantee the statutory requirements that judges be independent and impartial become particularly important. Control mechanisms exercised by the parties through challenge procedures need to be responsive, because international courts and tribunals must be seen as independent and impartial actors in the international community for their judgments to be respected. This Part suggests two ways to correct existing anomalies that each build on the existing challenge system: (1) increased use of external actors to decide challenges and (2) adoption of a common standard of review based on a reasonable and informed third party.

A. *International Courts and Tribunals: Independence and Control*

International actors increasingly rely on decisions by international courts and tribunals for several reasons. Former ICJ Judge Kenneth Keith suggests several factors, as follows:

161. There are very little data on the rate of recusals. The Judicial Disqualification Project, a 2008 report funded by the American Bar Association's Standing Committee on Judicial Independence, contains the most comprehensive information about recusals and disqualifications in the United States. The report indicates that only a few states maintain data on the rates of challenges and recusals, and also recommends that states begin to maintain this data in order to better illuminate the recusal process. *See* American Bar Association (ABA), *Report of the Judicial Disqualification Project (Draft)* 33, (Sept. 2008), http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf [https://perma.cc/5J26-YPPY]. There are some data available on Supreme Court recusals. According to an analysis of data from 1946–2010, Justices recuse themselves in 2.1% of cases, on average. Robert J. Hume, *Deciding Not to Decide: The Politics of Recusals on the U.S. Supreme Court*, 48 L. & Soc. Rev. 621, 625 (2014). Justice Fortas had the highest rate of recusals, at 6.2%, and Justice Ginsberg had the lowest rate, at 0.06%. *Id.* at 626. Most judges recuse themselves *sua sponte*; recusal motions are rarely filed, probably because litigants are reluctant to accuse the Justices of being biased. *Id.* at 627.

> 1. [T]he changing international context which increasingly includes extensive international regulation the application of which gives rise to more and more disputes;
> 2. [T]he related recognition by [s]tates that third party settlement may have a necessary place in more and more of those areas of international relations;
> 3. [T]he increasing recognition, at least as [Judge Keith] see[s] it, that the courts and tribunals are composed of well qualified, independent, conscientious judges following fair proceedings and deciding according to law.[162]

That judges are seen as independent is, then, one of the key reasons that parties choose international judicial mechanisms.[163] Once judges are selected, their independence is guaranteed by challenge procedures and controlled by the parties' ability to make challenges.[164]

1. Challenge Mechanisms Guarantee the Independence of Judges and Arbitrators

When states choose to go to international adjudication, "they choose to forego some amount of their sovereignty in favor of other values."[165] These values include peaceful dispute resolution over use of force, universal human rights, addressing the concerns of international investment in the resolution of economic disputes, and the collective punishment of those who are accused of committing atrocities against humanity.[166] Similarly, private parties' preference for international adjudication over domestic proceedings highlights the values of neutrality and comity.[167] To ensure these choices remain valuable and justified, international proceedings offer certain guarantees of independence to users.[168]

Independence is an essential tenet of fair and unbiased proceedings. Judicial independence is "recognized to be a significant factor in maintaining the credibility and legitimacy of international

---

162. Keith, *supra* note 1, at 266.

163. *See generally* Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 L. & CONTEMP. PROBS. 37, 56–64 (2008) (demonstrating a proliferation in the number of international courts and its usage); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73 (2009) (addressing the rise in the number of international courts and parties' increased invocation).

164. *See infra* Sections III.A.2–3.

165. Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 159 (2009).

166. *Id.* at 160.

167. *See* Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 404 (2009).

168. *See* Grossman, *supra* note 165, at 133.

courts and tribunals."[169] Indeed, as highlighted above,[170] the statutes of every international court and tribunal require judges and arbitrators to be independent and impartial.[171] The ICTY addressed this point and confirmed the importance of the independence and impartiality of arbitrators and judges as a main requirement of a fair trial.[172] In the seminal case of *Prosecutor v. Anto Furundžija*, the Appeals Chamber of the ICTY affirmed that "the fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial."[173]

In addition to being an essential element of a fair trial, independence of the judiciary also enhances the legitimacy of international courts and tribunals, understood as "the perception that an international adjudicative body possess justified authority, and that this perception may vary over time and across different international actors who may influence state preferences."[174] Because international courts and tribunals decide an increasing number of disputes involving sovereign states that have important economic, political, and social implications, rules of procedure and control mechanisms related to ensuring the independence and impartiality of judges and arbitrators are key components of legitimacy.[175]

Former International Tribunal for the Law of the Sea (ITLOS) President, Rüdiger Wolfrum, asserted that an authority is considered "legitimate because it exercises its powers through procedures seen as adequate or fair."[176] In particular, rules concerning the "composition or establishment of an institution and rules concern-

169. Mackenzie & Sands, *supra* note 9, at 271.

170. *See supra* Part I.

171. *See* Mackenzie & Sands, *supra* note 9, at 275 ("The statutes and rules of the various tribunals address the issue[s], at least in general terms, by setting out the criteria for qualification as a judge and the requirements of independence and impartiality . . . . Although the formulations and practices vary, the rules demonstrate a general commitment to independence and impartiality.").

172. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-A99, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

173. *Id.*

174. Grossman, *supra* note 165, at 160 (also noting that a court would be perceived as legitimate if it is "fair and unbiased" and "transparent and infused with democratic norms").

175. *See* Oellers-Frahm, *supra* note 12, ¶ 33; *see also* RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010) (describing the global importance and mechanics of the judicial appointment process in the International Court of Justice and the International Criminal Court).

176. Wolfrum, *supra* note 10, ¶ 7 (exploring the concept of legitimacy in international law).

ing its decision-making process may become relevant in this context."[177] The European Court of Human Rights (ECHR) confirmed "[a]n international human rights tribunal which lacks independence cannot be legitimate. An international tribunal without legitimacy cannot be effective."[178] It is important that, by being independent, international courts and tribunals are considered and perceived as holding legitimate authority by all constituencies.

Moreover, an independent judiciary ensures that others trust and legitimize judicial actors, which in turn ensures institutional support and guarantees that the institution's awards and judgments are respected and implemented.[179] International courts and tribunals rely on their legitimacy to safeguard enforcement of their decisions.[180] Indeed, there is no enforcement authority despite the legal mandate to ensure enforcement of their decisions.[181]

The requirement of independence is exemplified in the process of selection and removal of judges and arbitrators. As in domestic systems, in the international context "judicial independence has numerous dimensions" including procedures for nomination and selection.[182] The most important criteria to assess the independence of international judges are independent selection and tenure.[183] Challenge procedures relate to these criteria because they address concerns that parties may have after the judges' initial selection and during their tenure in office. The ECHR addressed the issue and, in *Langborger v. Sweden*, confirmed that "to establish whether a body can be considered 'independent,' regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an

177. *Id.*

178. Kanstantsin Dzehtsiarou & Donal K. Coffey, *Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights*, 37 HASTINGS INT'L & COMP. L. REV. 271, 272 (2014).

179. On the debate between independence and effectiveness of international courts, see Posner & Yoo, *supra* note 11, at 7 (arguing that no such correlation exists); Helfer & Slaughter, *supra* note 11, 904–05 (responding to Posner and Yoo and arguing that the most effective courts are the most independent ones); Shany, *supra* note 11, 253–54 (suggesting a new, goal-oriented, approach to assess international judicial effectiveness).

180. *See supra* Section III.A.1.

181. *See supra* Section I.A.

182. Mackenzie & Sands, *supra* note 9, at 276.

183. Keohane et al., *supra* note 148, at 460 ("[T]he extent to which members of an international tribunal are independent reflects the extent to which they can free themselves from at least three categories of institutional constraints . . . . The most important criterion is independent selection and tenure.").

appearance of independence."[184] Similarly, in *Prosecutor v. Zejnil Delalic,* the ICTY made this point clearly and explicitly, asserting that,

> [i]n determining whether a body can be considered to be independent—notably of the executive and the parties in the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[185]

The Sections below explain how challenge procedures guarantee the independence of judges and arbitrators by providing the parties with an opportunity to correct any potential lack of independence or appearance of lack of independence.

2. Challenge Mechanisms Allow Parties to Control the Independence of Judges and Arbitrators

Decisions of international courts and tribunals are processes that are essentially voluntary and consensual.[186] Parties participating in these processes maintain an expectation of certain specific forms of control,[187] where "[c]ontrol is concerned with maintenance of the minimum conditions necessary for the continuation of the process of decision itself."[188] Challenges are thus important mechanisms by which parties, both states and individuals, exercise control over the independence of international judges and arbitrators once they have been appointed.[189] That parties have this control allows for the continuation of the process of decision-making by guaranteeing the independence of judges and arbitrators.

Challenges as a control mechanism are also important because they ensure that parties remain engaged and satisfied with the proceedings. Indeed, when mechanisms of control break down, actors may choose other mechanisms to resolve disputes.[190] Retaining challenges as a control mechanism is also particularly important in

184. Langborger v. Sweden, 155 Eur. Ct. H.R. (ser. A) at 16 (1989).

185. Prosecutor v. Delalic, Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 1998) (quoting Campbell & Fell v. United Kingdom, 80 Eur. Ct. H.R. (ser. A) at 39–40 (1984)), http://www.icty.org/x/cases/mucic/tdec/en/80904MSX5309.htm [https://perma.cc/86BR-3MBX].

186. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration,* 1989 Duke L.J. 740, 743 (1989).

187. *Id.*

188. *Id.* at 748.

189. Another important control mechanism is the selection process itself. For the author's work on selection, see generally Giorgetti, *supra* note 8.

190. *See* Reisman, *supra* note 186, at 743.

an international judicial setting, which lacks a systematic and hierarchical organization and is based on voluntary commitments.[191]

In this day and age, the exercise of that control is also important because, as a consequence of the increased recourse to international courts and tribunals, there are also more challenge requests filed by the parties.[192] Indeed, the topic of challenges "needs more attention with the increasing number of international judges, which will probably lead to an increase in critical situations."[193]

3. Independence and Control in Current Challenge Procedures

Similar to existing debates on the domestic level,[194] avoiding "the appearance of bias by judges in international courts and tribunals" has become an important concern in the international context.[195] There is no single mechanism to challenge international judges and arbitrators.[196] Some of the mechanisms that presently exist to ensure the possibility of challenging judges and arbitrators—and thus that have a control function in guaranteeing independence—may not be seen as providing a sufficient guarantee of independence.

---

191. *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 23–24 (2d ed. 1979) (discussing the limitations of international law, specifically that the law of nations is based upon states' voluntary obligations to one another and lacks an "effective judiciary to clarify and develop the law, to resolve disputes impartially, and to impel nations to observe the law.").

192. VOLTERRA-FIETTA, *supra* note 124 ("In recent years, there has been a proliferation of challenges to arbitrators in international investment treaty arbitrations. . . . This proliferation may be attributed to various factors, including: (i) conflicts arising from the fact that a rapidly expanding caseload has jeopardi[z]ed the perceived independence of individuals who have acted as counsel or sat as arbitrator in numerous proceedings; (ii) the perception that parties are, in any case, increasingly interested in the impartiality of their tribunal; and (iii) the desire by some parties to disrupt and delay proceedings to the maximum possible extent.").

193. Oellers-Frahm, *supra* note 12, ¶ 20.

194. There is abundant literature that studies this issue domestically, but the issue is newer for international courts and tribunals, which, as dispute resolution fora, have only more recently acquired "teeth." *See, e.g.*, Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046 (1993) (addressing whether domestic courts avoid the appearance of bias by allowing a judge to be disqualified *sua sponte* or by motion of one of the parties for a proscribed conflict of interest under 28 U.S.C. § 455(b)); Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994) (discussing whether and how a judge must, may, or cannot refer a motion to disqualify another judge); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (discussing the need for significant revisions to existing disqualification procedures for federal appellate judges); Debra Lyn Bassett, *Recusal and the Supreme Court*, 55 HASTINGS L.J. 657 (2005) (discussing the constitutional and enforcement issues of recusal in the United States Supreme Court).

195. Mackenzie & Sands, *supra* note 9, at 272.

196. *See supra* Section I.A.

Further, it is extremely difficult to remove an arbitrator or a judge under the present rules.[197] Most courts and tribunals, including such important institutions as the ICJ and the ICC, have not seen any case of successful challenge proceedings.[198] This is not problematic per se. In domestic proceedings the rate of accepted challenges is also very low.[199] In the United States, for example, available data are limited to self-recusal by members of the Supreme Court, and show that from 1946–2010, Justices recused themselves in 2.1% of cases.[200] Domestic statistics may not necessarily be a good baseline for comparison, however, as the international adjudicatory system is substantially different from the domestic one.[201] Still, there appears to be much more interest in international judicial challenges, while domestic challenges remain a relatively uncontested issue.[202]

Moreover, a problem arises if the low rate of successful challenges is seen as the result of unfair procedures.[203] As the use of international courts increase and more parties select international proceedings, avoiding any appearance of bias becomes increasingly important to ensure the existence of the system. Challenge and recusal procedures must be seen as fair and legitimate.

First, it is important that decisions regarding challenges are made by an authority that is considered independent and legitimate. As Mackenzie and Sands note:

> In many cases these general formulations are supplemented by more detailed rules guiding, for example, when judges ought to recuse themselves. In some cases, international courts have extremely strict rules prohibiting all forms of outside activity as a means of ensuring independence. In other cases, the guidelines are more flexible. Although the formulations and practices

197. *See supra* Section II.A.

198. *See id.*

199. *See generally* ABA, *supra* note 161 (indicating that only a few states maintain data on the rates of challenges and recusals).

200. *See* Hume, *supra* note 161, at 625.

201. The author is grateful to Catherine Rogers for this comment. In contrast to an international tribunal, for example, the United States' federal judiciary is based on permanent judges, cases are often assigned after pre-screening, and bases for recusals are different.

202. The author wishes to thank Susan Franck for this insight. On international challenges, a recent six-part story investigates investor-state dispute settlement that appeared on Buzzfeed. Chris Hamby, *Secrets of a Global Super Court*, BUZZFEED, https://www.buzzfeed.com/globalsupercourt [https://perma.cc/VC9A-4Y5J] (last visited Oct. 21, 2016).

203. *See id.*

> vary, the rules demonstrate a general commitment to independence and impartiality.[204]

Second, when deciding on challenge and recusal requests, the same standard of independence and appearance of independence should be upheld. Certainly, in the context of international courts and tribunals "the guiding principle seems to be that 'the appearance of fairness is as important as fairness itself[,]'" because the appearance of fairness promotes the confidence of the public in the legitimacy of international courts and tribunals.[205] Thus, "[l]egitimizing international adjudicators increases trust in the rule of law, persuading governments and private disputants to rely upon international courts and tribunals."[206] Tribunals themselves have recognized this principle. As the ICTY asserted in *Furundžija*, a tribunal is required "not only [to be] genuinely impartial, but also [to] appear[ ] to be impartial."[207]

Third, the appearance-of-independence requirement must also be preserved when assessing challenge requests. At present, certain rules—notably ICSID's—require a "manifest" or objective standard while other rules—for example, the ICJ's—do not explicitly require any standard of review.[208] Moreover, the present system allows, in certain cases (and notably at ICSID), fellow arbitrators to decide on challenges.[209] This does not fulfill the appearance-of-independence requirement, and thus undermines the normative and sociological legitimacy of courts and tribunals.

B. *Who Decides the Challenge?*

Currently, decisions are made either by the remaining members of the court or by an external or semi-external body.[210] However,

---

204. Mackenzie & Sands, *supra* note 9, at 275.

205. Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, BERKELEY J. INT'L L. 111, 113 (2008).

206. *Id.*

207. Prosecutor v. Furund_ija, Case No. IT-95-17/1-A99, Judgment, ¶ 182.

208. *See supra* Section I.B.1.

209. *See supra* Section I.B.3.

210. *See supra* Section I.B. This challenge system, where the remaining judges decide by majority issues of recusals, mirrors the system used in domestic courts. Still, international and domestic systems are very different, such that what works in domestic systems does not necessarily translate to the international system. Indeed, there may be a higher requirement for independence in international courts, which lack a police force to enforce their decisions and rely on voluntary agreements. Moreover, and more cogently, the domestic system itself is not immune from criticism. *See generally*, Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 passim (2009) (discussing the challenges of an election system where individuals with matters before the Court are able to contribute to judicial campaigns); Harold Hongju Koh, *Why Do Nations*

having an external actor decide on the delicate matter of removal of a judge or an arbitrator is preferable to a decision by the remainder of members of the court, because this ensures that an independent entity, not vested in the specific case, decides this fundamental matter.

Under some procedural rules, decisions on challenges are taken by an external body. Under UNCITRAL Rules, for example, the appointing authority decides on challenges.[211] Under other rules, the decision is taken by a body that is external to the case, but still within the judicial organ.[212] At the ICTY, the ICTY president may appoint a panel of three judges from other chambers to report to him or her their decision on the challenge application.[213] At the ICTR, it is the Bureau, composed of the president, the vice-president, and the presiding judge of the Trial Chambers, that decides on the request.[214]

Requiring an international court or tribunal to hand challenge decisions to an external or semi-external actor could pose drawbacks, however. For example, a decision taken by an external actor may take longer than a decision taken in-house. Indeed, the deciding authority may be required to review voluminous case materials with which he or she is not familiar, but which would be utterly familiar to judges and arbitrators participating in the case.[215]

Practice, however, shows that this is not necessarily the case. For example, an external party may be able to reach a decision in a matter of months. In a case relating to the challenge of two ICSID arbitrators brought by respondent Argentina, it was decided that the secretary general of the PCA would recommend a course of action, as required by prior agreement of the parties.[216] The secretary general of the PCA had not been part of the litigation prior to

---

Obey International Law?, 106 YALE L.J. 2599 passim (1997) (providing background on the complex and multi-dimensional reasoning behind a nation's choice to follow international law); Amy Brittain & Sari Horwitz, *Justice Scalia Spent His Last Hours with Members of This Secretive Society of Elite Hunters*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/world/national-security/justice-scalia-spent-his-last-hours-with-members-of-this-secretive-society-of-elite-hunters/2016/02/24/1d77af38-db20-11e5-891a-4ed04f4213e8_story.html [https://perma.cc/WE7U-AGPQ] (describing the secret friendships judges can have, which calls into question the legitimacy of the body).

211. UNCITRAL Arbitration Rules, *supra* note 59, art. 13(4).

212. *See supra* Section I.B.

213. *See supra* Section I.B.4.

214. *See id.*

215. *See infra* note 216 and accompanying text.

216. *See* Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan Van Den Berg

the request, and to make an informed decision he asked to review the entire file.[217] This required all the documents to be sent to The Hague.[218] The underlying ICSID proceedings were suspended, and the decision was issued on December 19, 2011, approximately three months after Argentina filed its request and only one month after the request was sent to the PCA.[219] Thus, though the proceedings were delayed, the delay was minimal and in line with the length of challenge proceedings decided by an internal actor.[220] This example demonstrates that an external actor can efficiently take decisions on urgent and delicate matters related to challenges.

An additional concern about appointing an external or semi-external actor is that he or she may not be bound by the same confidentiality requirements as the adjudicators.[221] This is a valid concern, but one that can easily be overcome by imposing on the deciding authority confidentiality obligations.

Another important issue to consider is that an external actor may not be as familiar with the applicable rules of procedure; however, it is important that someone familiar with the rules is chosen to take challenge decisions. In international arbitration under UNCITRAL Rules, for example, it is the appointing authority that decides on challenges.[222] Because the appointing authority was involved in the initial selection of the challenged arbitrator, he or she will be familiar with the rules applicable to the proceedings.[223]

When procedural rules call for an external or semi-external actor to decide challenges, several methods can be used to estab-

---

Dated September 15, 2011, ¶ 24 (Dec. 19, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0240.pdf [https://perma.cc/FJ5X-DXMU].

217. *See id.* ¶ 27.

218. *See id.* ¶¶ 33, 42.

219. *See id.* ¶¶ 15–43 (procedural history).

220. For example, in a subsequent challenge in the same case decided by the secretary general of ICSID, Argentina filed its request on December 19, 2013 and January 13, 2014, and the decision was issued on February 4, 2014. Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 45–46, 83 (Feb. 4, 2014), http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf [https://perma.cc/57C9-TZE3].

221. On the issue of confidentiality, see Neale H. Bergman, *Transparency of the Proceedings and Third Party Participation*, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 375 (Chiara Giorgetti ed., 2014) (discussing the shift towards more transparent arbitration procedures, while maintaining protection for confidential matters); Loretta Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States Go to Arbitration Rather Than Adjudication*, 5 L. & PRAC. INT'L CT. & TRIBUNALS 133, 140 (2006).

222. *See supra* Section I.B.2.

223. *See id.*

lish that external body. In arbitration under UNCITRAL Rules, the external actor is the appointing authority.[224] Other international courts use a semi-external actor to decide on challenges. The ICTR and ICTY, for example, constitute a special ad hoc body composed of judges not involved in the specific proceedings at issue.[225] Thus, at the ICTY, if a challenge arises, the chamber's presiding judge confers first with the judge in question, and then, if necessary, the ICTY president appoints a panel of three judges from other chambers to report their decision on the merits of the challenge to the president.[226] Similarly, at the ICTR, the chamber's presiding judge would first confer with the judge in question and then, if necessary, the Bureau (composed of the ICTR president, the vice-president, and the presiding judge of the Trial Chambers) would determine the merits of the challenge.[227] This structure is possible because both the ICTR and the ICTY are divided into Trial Chambers and Appeals Chambers, while other courts decide en banc.[228]

Using a body external to the arbitrators or creating a separate body—within the court—of judges who take no part in the specific case maintains the independence of judges and ensures that there is no appearance of bias.[229] Moreover, it strengthens the legitimacy of the forum and thus the effectiveness of its decisions.[230]

Though an external or semi-external entity can be constructed in different ways per procedural rules, not all courts and tribunals rely on this mechanism to decide challenges. Generally, perma-

224. *See id.*

225. *See supra* Section I.B.4.

226. *See id.*

227. ICTR Rules of Procedure and Evidence, *supra* note 93, rs. 15, 23.

228. *Organisational Chart: Organisation of the International Tribunal for the Former Yugoslavia*, ICTY, http://www.icty.org/en/about/tribunal/organisational-chart [https://perma.cc/8NAH-MRUH] (last visited Oct. 21, 2016); U.N. Mechanism for the Int'l Crim. Tribunals, *Chambers*, ICTR, http://unictr.unmict.org/en/tribunal/chambers [https://perma.cc/PQU2-HDRJ] (last visited Oct. 21, 2016).

229. For a review of the meaning of impartiality, and interesting empirical assessment of the European Court of Human Rights (ECHR), see Erik Voten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 417 (2008) (additionally stating, "Despite the consensus that impartiality is the cornerstone of effective international adjudication, there is no agreement on whether or under what circumstances international judges can indeed be relied upon to impartially resolve disputes. Some scholars argue that governments exert a great deal of influence over the choices of even formally independent international judges. Others, however, counter that the ability of governments to monitor and sanction judges is generally weak and ineffective at swaying judges.") (internal citations omitted).

230. *See* Helfer & Slaughter, *supra* note 11, 904–05 (responding to Posner and Yoo and arguing that the most effective courts are the most independent ones).

nent courts do not use an external or semi-external actor to take decisions on challenges. In permanent courts, like the ICJ and the ICC, decisions are typically taken by a majority of the judges, without the participation of the challenged judge.[231] For example, the ICC is—similarly to the ICTY and ICTR—composed of Trial and Appeals Chambers, yet the majority of the full court decides challenges.[232] The views of the challenged judge are normally heard and taken into consideration, but the challenged judge can neither participate in the deliberation of the court on the matter, nor take part in the voting.[233]

Some may link the differences in procedures amongst international courts and tribunals with the discrepancy in tenure amongst the different international adjudicators as a possible explanation for diverse challenge procedures. Security of tenure and mode of election may be important in assessing judicial behavior during challenge proceedings. At the ICJ, for example, judges serve nine-year terms and they can be re-elected.[234] At the ICC, judges also serve for nine years, but can only serve for one term.[235] In contrast, judges at the ICTY and ICTR are elected for four-year terms but may be re-elected multiple times.[236] Arbitrators, on the other hand, typically sit for much shorter periods[237]: they are appointed for a specific case and when the case terminates, their mandate ends as well, though they are very often repeat players.[238] Thus, one could argue that a longer term (as at the ICJ) or a unique term (as at the ICC) may guarantee a more independent judiciary and thus could justify members of the court themselves taking challenge decisions directly.

---

231. *See supra* Sections I.B.1, I.B.5.

232. *See supra* Section I.B.5.

233. *See id.*

234. ICJ Statute, *supra* note 36, art. 13.

235. ICC Statute, *supra* note 107, art. 36(9)(a) ("[J]udges shall hold office for a term of nine years and subject to [two minimal and enumerated exceptions] shall not be eligible for re-election.").

236. *Election Process*, ICTY, http://www.icty.org/en/about/chambers/election-process [https://perma.cc/38Y3-2WN3] ("Permanent judges serve for a term of four years after which they are eligible for re-election.") (last visited Oct. 13, 2016); ICTR, *supra* note 228 (regarding ICTR election procedures, "All of the judges were elected by the United Nations General Assembly from a list submitted by the Security Council. The Judges were elected for a term of [four] years and were eligible for re-election.").

237. *See generally* Chiara Giorgetti, *The Arbritrial Tribunal: Selection and Replacement of Arbitrators*, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE, 145, 145 (Chiara Giorgetti ed., 2014) (describing the process in international investment arbitrations of party and third-party appointment of the arbitration panel members).

238. *See* Giorgetti, *supra* note 8, at 454.

However, critics also point out that judges may be cognizant of length and security of tenure when making decisions, such that they may be more cautious or inclined to find for a state or an appointing actor when the judges are subject to re-election.[239] Others view judges' re-election as a safety mechanism to ensure a less idiosyncratic judiciary and are more inclined to view changes in the bench positively.[240] Thus, based on the possibility of re-election, one might argue that judges at the ICJ, ICTY, or ICTR would be more inclined to find for the state or an appointer than a judge at the ICC. The length of tenure may also play a role, as a judge or an arbitrator whose re-election or re-appointment is on the line may be more attentive to the appointing authority.

Yet, the difference in tenure itself may not be as staggering as initially perceived. For example, once their term in one court is terminated and cannot be renewed, several judges seek election in other international courts and tribunals.[241] It is also the case that judges and arbitrators increasingly sit on several cases at one time, which may intensify possible conflicts and the appearance of bias.[242]

Thus, though the system of self-recusals and full court decisions have worked in the past, the current situation of increased use of international judicial bodies—and the ensuing increase in the number of judicial actors—may require a rethinking of what constitute the best challenge procedures.[243]

Another argument to justify the different challenge procedures in the various international courts and tribunals is the fact that per-

239. *See generally* Mackenzie & Sands, *supra* note 9, at 278–79 (stating that elections to the ICJ are "highly politicized" and "[w]ithout the support of any influential states, the electoral prospects for any candidate would be slim. . . . Elections involving judges standing for re[-]election can focus on cases decided by the judge. This practice raises many eyebrows.").

240. *Id.*

241. For example, ICJ Judge Julia Sebutinde, who before joining the ICJ was a judge at the Special Court of Sierra Leone. *See Current Members: Judge Julia Sebutinde*, INT'L CT. JUST., http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=194 [https://perma.cc/YH26-RPH3] (last visited Oct. 13, 2016). Another example is Judge Elizabeth Odio Benito, who was a judge at the ICTY from 1993 to 1998 and was elected to the ICC in 2003. *See Judge Elizabeth Odio Benito*, U.N. AUDIOVISUAL LIBR. INT'L L., http://legal.un.org/avl/pdf/ls/Odio-Benito_bio.pdf [https://perma.cc/664N-NS3S] (last visited Oct. 13, 2016). Similarly, Judge Bruno Simma was nominated to judge at the Iran-U.S. Claims Tribunal after serving at the ICJ. *See* John Masson, *MLaw Prof. Appointed to Iran-United States Claims Tribunal*, MICH. L. NEWSROOM (Nov. 6, 2012), https://www.law.umich.edu/newsandinfo/features/Pages/simma_appointment.aspx [https://perma.cc/E8YE-9VJQ].

242. For a thorough analysis of the relationships between arbitrators and their cases, see Sergio Puig, *Social Capital in the Arbitration Market*, 25 EURO. J. INT'L L. 387 (2014).

243. *See* Giorgetti, *supra* note 42, at 4, 15–18.

manent courts are typically constituted by a substantial number of judges.[244] The ICJ has fifteen judges, and the ICC eighteen.[245] The approach of letting the remaining members of a permanent court decide on the removal of one of its members may initially seem reasonable because the number of judges in the respective courts dilutes the relevance of the vote of any particular judge.

Though this argument may ease concern for an appearance of bias, it is not ideal for members of the same court to decide on whether a fellow judge should sit on a certain case.[246] Even if the membership of the court is large, it can still create conflicts, resentment, and uneasiness.[247] Moreover, the *esprit de groupe* may make members of the same group (in this case the court) reluctant to decide against another member, as they may do in an otherwise similar situation.[248]

---

244. *See supra* Sections I.B.1, I.B.5.

245. ICJ Statute, *supra* note 36, art. 3 and ICC Statute, *supra* note 107, art. 36, respectively.

246. Witness, for example, the current debate on the replacement of Justice Scalia of the U.S. Supreme Court. The issue of recusal was engendered by the fact that the Justice was found in a resort and it was unclear who had paid for the stay or the charter plane there. The question of recusal of Justices was also discussed in a 2011 report by Chief Justice Roberts, who noted that while lower domestic courts can substitute for one another, there is only one U.S. Supreme Court, and "if a Justice withdraws from a case, the Court must sit without its full membership." Sup. Ct. of the U.S., 2011 Year-End Report on the Federal Judiciary 9 (2011). As the Washington Post reported:

> Roberts issued his report at the end of a year in which more than 100 law professors nationwide asked Congress to give the Supreme Court an ethical code of conduct after it emerged that Scalia and Justice Clarence Thomas had attended private political meetings sponsored by billionaire conservative donors David and Charles Koch. That same year, Kagan was called on to recuse herself from hearing challenges to health-care reform, and a watchdog group said Thomas had failed to report his wife's income from a conservative think tank before he amended his financial forms. [Roberts added that] it would not be wise for [J]ustices to review the recusal decisions made by the their peers. He said that "it would create an undesirable situation" enabling [J]ustices to play a role in determining which others get to weigh in on cases. He said, "I have complete confidence in the capability of my colleagues to determine when recusal is warranted," [and that] "[t]hey are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process."

Mark Berman & Jerry Markon, *Why Justice Scalia was Staying for Free at a Texas Resort*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/17/justice-scalias-death-and-questions-about-who-pays-for-supreme-court-justices-to-visit-remote-resorts/?hpidHP_rhp-top-table-main_scalia-resort-925am%3Ahomepage%2Fstory [https://perma.cc/J8XE-RV3J].

247. *See generally* Todd Tucker, *Inside the Black Box: Collegial Patterns on Investment Tribunals*, 7 J. INT'L. DISP. SETTLEMENT 183 (2016) (examining the collegial dynamics of within investment tribunals).

248. *See generally* ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 81 (2014) (discussing the *esprit de corps* versus the concept of autonomy among the justices of the ICJ); Susan D. Franck, *Empirically Evaluating Claims About Investment*

Still, it may be justifiable to ask all the members of the court to decide a challenge because judges in permanent courts are elected through an intricate process that involves national nomination committees, states, and several organs of the United Nations.[249] This presumably insulates the judges from fear of retaliation or uneasiness in their position.[250]

However, though it is true that judges in permanent international courts are not nominated directly by the parties—as is the case in arbitration—but indirectly by governments, this does little to undermine the argument that to avoid the appearance of bias, decisions on challenges should be taken by an external actor.[251] Indeed, in this day and age, much more is expected of members of the international judiciary. To reinforce their independence and appearance of independence,[252] decisions on challenges would be stronger if taken by an independent and *super partes* body.

Permanent tribunals have several options to establish independent bodies responsible for deciding challenges. For example, retired judges and former ICJ presidents could be asked to assume the role of advisers in such matters. The use of an external decision-maker may also be envisaged. For example, the Rules of Procedure of the Eritrea-Ethiopia Claims Commissions (which adopted modified UNCITRAL Rules) specified that if a commissioner were to be challenged, the U.N. Secretary General would be tasked with naming an "Appointing Authority" to resolve the challenge.[253] Alternatively, but less preferably, in the case of the ICJ, the process could be strengthened internally: where the court generally decides en banc, a standing committee on disciplinary matters or judicial ethics could be created, composed of the president, the vice-president, and certain nominated members of the court, to give advice to the entire court on the challenge application.

Treaty Arbitration, 86 N.C. L. Rev. 1, 75 (2007) (empirically assessing the claim that arbitrators are "Pale, Male and Stale" or "Mafia").

249. For more on the election of judges at the ICJ and ICC, see Mackenzie et al., *supra* note 175, at 102.

250. *See* ICJ Statute, *supra* note 36, art. 2; ICC Statute, *supra* note 107, art. 36; Kolb, supra note 44, at 138; Giorgetti, *supra* note 42, at 3–5.

251. *See* Mackenzie et al., *supra* note 175, at 26 (discussing general selection criteria for judges); Giorgetti, *supra* note 237, at 146.

252. *See* Giorgetti, *supra* note 8, at 453.

253. Eritrea-Ethiopia Claims Comm'n, Rules of Procedure, art. 6(6) (2001) ("If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made by an Appointing Authority designated by the Secretary General of the United Nations. Pending the Appointing Authority's decision, the challenged arbitrator shall continue to serve as an arbitrator of the Commission, and the Commission shall continue to perform its duties under the Agreement.").

The ICC, on the other hand, could adopt mechanisms similar to either the ICTY or the ICTR.[254]

The situation is more urgent at ICSID. As provided by the applicable rules, decisions on challenges to the majority of the tribunal, sole arbitrators, or when the remaining arbitrators do not agree are taken by the chairman of the Administrative Council (and president of the World Bank).[255] This procedure allows for an independent and generally expeditious review, detached from the proceedings.[256] These decisions are taken expeditiously and by someone familiar with the rules and with easy access to the case.[257] However, when only one arbitrator is challenged on a three-arbitrator panel, ICSID's procedures are wanting.[258] In these situations, under the ICSID Convention, the remaining two members of the tribunal decide on the challenge.[259]

This procedure raises many concerns. First, it puts the two remaining arbitrators in an untenable (and unenviable) position of having to decide on the disqualification of someone with whom they unavoidably have a working relation. Given the small pool of arbitrators, the challenged arbitrator would also be someone whom the remaining members may soon encounter again as either counsel, fellow arbitrator, or someone in front of whom they may appear as counsel.[260] Moreover, the complexity of deciding the removal of a fellow arbitrator is corroborated by the available data. Indeed, of the eighty-four challenge requests filed at ICSID, in only one case have the two remaining arbitrators decided to uphold the request and disqualify the challenged arbitrator.[261]

---

254. *See supra* Sections I.B.4, I.B.5.

255. ICSID Arbitration Rules, *supra* note 77, r. 9.

256. *See supra* Section I.B.3.

257. *Id.*

258. VOLTERRA-FIETTA, *supra* note 124. The article further notes the following:

> The second perceived flaw relates to the procedural method by which decisions on disqualification are made. In this regard, it has been argued that there is a certain illogic to placing these decisions in the hands of a challenged individual's co-arbitrators. There are several potential reasons for concern. Those co-arbitrators may have been working with that individual for some time and be reluctant to acknowledge any bias. Further, they may have extensive personal relationships with the individual which might influence their decision. Finally, there may be an underlying reluctance (however unconscious) to "cut the branch of the tree on which they were sitting"—namely, a hesitancy for arbitrators to allow challenges to succeed when that might consequently increase the chances of a successful challenge being made against them.

Id.

259. *See id.*; *see also* ICSID Arbitration Rules, *supra* note 77, r. 9.

260. On the issue of the small pool of arbitrators, see Puig, *supra* note 242, at 388.

261. Caratube Int'l Oil Co. LLP & Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 111

Instead, it would be more desirable if the two remaining, unchallenged arbitrators declined to decide, and as a matter of course sent the decision to the chairman of the Administrative Council. This course of action could be an acceptable reading of the ICSID Convention, which provides that if the "members are equally divided," the decision is taken by the chairman.[262] Indeed, it is possible to envisage that arbitrators can remain divided and thus request the chairman to decide on each case.

In sum, while a decision by the remaining members of the court may be understandable in certain circumstances, as explained, an external or semi-external decision-maker is the preferable choice to resolve challenge requests. This is especially true for arbitral tribunals, which are composed by only a small number of arbitrators. That an external decision-maker for challenges is the right course of action and is responsive to public expectations is further supported by the wording of the newly negotiated E.U.-Canada Comprehensive Economic and Trade Agreement, which calls for decisions on challenges of arbitrators to be made by the ICJ president.[263]

(Mar. 20, 2014), http://italaw.com/sites/default/files/case-documents/italaw3133.pdf [https://perma.cc/KB8A-G5SR].

262. ICSID Convention, *supra* note 72, art. 58. Article 58 of the ICSID Convention provides as follows:

> 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 Chairman shall take that decision. If it is decided 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.

Id.

263. *See* Comprehensive Economic and Trade Agreement, Can.-E.U., art. 8.30.3, July 5, 2016, COM(2016) 443 final [hereinafter CETA], http://eur-lex.europa.eu/resource.html?uri=cellar:1fcbd7d1-4356-11e6-9c64-01aa75ed71a1.0001.02/DOC_2&format=PDF [https://perma.cc/PE67-9XH4] (has been formally proposed to the Council of Europe, and now awaits a confirmation, and signatures from EU Member states). Article 8.30 of the CETA states the following:

> 1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.
>
> 2. If a disputing party considers that a Member of the Tribunal has a conflict of interest, it may invite the President of the International Court of Justice to issue a

C. *Applicable Standard of Review*

Having determined that preference should be given to an external or semi-external body, this Section explores the standard that international courts and tribunals should adopt and apply to the review of challenge requests.

Across all courts and tribunals, the conditions to sit as a judge or arbitrator include the essential requirement that the adjudicator be impartial and independent.[264] Requirements of independence and impartiality are found in both permanent courts like the ICJ and the ICC, as well as in the rules of international arbitral proceedings, including UNCITRAL and ICSID.[265] These requirements are common for courts—such as the ICC, the ICTY, and the ICTR—and ICSID tribunals that adjudicate inter-state claims, as well as claims brought against or by individuals.[266] In fact, independence and impartiality are at the very core of the judicial function.[267]

A judge or arbitrator is carefully vetted during the selection process to ensure he or she possesses the qualities of independence and impartiality that are required.[268] Then, once the selection occurs and the judge or arbitrator is appointed, there should be a presumption of impartiality that applies to the judicial function.[269]

---

decision on the challenge to the appointment of such Member. Any notice of challenge shall be sent to the President of the International Court of Justice within [fifteen] days of the date on which the composition of the division of the Tribunal has been communicated to the disputing party, or within [fifteen] days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.

3. If, within [fifteen] days from the date of the notice of challenge, the challenged Member of the Tribunal has elected not to resign from the division, the President of the International Court of Justice may, after receiving submissions from the disputing parties and after providing the Member of the Tribunal an opportunity to submit any observations, issue a decision on the challenge. The President of the International Court of Justice shall endeavor to issue the decision and to notify the disputing parties and the other Members of the division within [forty-five] days of receipt of the notice of challenge. A vacancy resulting from the disqualification or resignation of a Member of the Tribunal shall be filled promptly.

Id. art. 8.30 (footnote omitted).

264. *See supra* Section I.B.

265. *See id.*

266. *See id.*

267. *See supra* Part I and Section III.A.

268. On the selection of international judges, see Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 390–98 (2009) (examining in detail the politics of the appointment process and how it shapes the composition of the international judiciary).

269. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-A99, Judgment, ¶ 196.

In other words, challenging or trying to remove a selected arbitrator or elected judge should not be easy and should require a high threshold of evidence, which requires a reasonable apprehension of bias.

In *Furundžija*, the ICTY made this principle very clear.[270] Anton Furundžija was accused of committing torture and the crime of outrages against personal dignity, including rape, and he was on trial at the ICTY.[271] A challenge was brought against a female judge, Judge Mumba, who had, prior to joining the court, served on the U.N. Commission on the Status of Women.[272] The defendant in the proceedings had argued that past activities resulted in a bias in favor of women and against crimes committed against them.[273] In reviewing and rejecting the challenge, the Appeals Chamber of the ICTY observed that:

> [I]n the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality.[274]

Similarly, the ECHR also confirmed that "the personal impartiality of a judge must be presumed until there is proof to the contrary . . . ."[275]

Hence, as a starting point, courts agree that a simple assertion by one of the parties that they believe the judge or arbitrator is not independent and impartial should not result in the removal of the adjudicator. Indeed, impartiality cannot be proven by a mere assertion of one of the parties, when the threshold of proof is high and a presumption of impartiality accompanies the adjudicator. In *Dalalic*, the ICTY justified the high threshold required to challenge and concluded that:

> The reason for this high threshold is that, just as any real appearance of bias [on] the part of a judge undermines confidence in the administration of justice, it would be as much of a

270. *See id.* ¶ 197.
271. *See id.* ¶ 5.
272. *Id.* ¶ 164.
273. *See id.* ¶ 206.
274. *Id.* ¶ 197.
275. Hauschildt v. Denmark, 154 Eur. Ct. H.R. (ser. A) ¶ 47 (1989). The applicant filed a petition alleging that he did not receive a fair trial by an impartial tribunal under Article 6 of the Convention. *See id.* at 18. He asserted that some of the sitting judges who had convicted him had circulated numerous pretrial decisions concerning his case. *See id.* The court held that a violation of Article (6) had occurred. *Id.* at 23.

> potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.[276]

How, then, should the impartiality of the adjudicator be assessed?

Most international fora have adopted a "reasonable" apprehension or doubt standard, as assessed by a reasonable and informed third party.[277] It calls for the facts which are the basis of the challenge to raise justifiable doubts in a third party about the impartiality and independence of an arbitrator.[278] This is an objective standard that allows for an acceptable review of the evidence and that takes into consideration that challenges are serious issues that should be proven by a reasonable third party.[279] In the words of the ICTY in *Furundžija*, "[D]isqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established.'"[280]

There may be a risk that the same "third-party justifiable doubts" standard would not be uniformly applied by different tribunals with jurisdiction over different issues,[281] for example, that an ICTY judge may be required to use a different standard than an arbitrator deciding on investment issues. That said, as demonstrated below, practice has shown remarkable commonalities amongst international courts and tribunals on the interpretation of standards of judicial behavior. One might nevertheless expect that certain differences would exist between different judicial bodies, as they often continue to exist in the jurisprudence of the same courts deciding cases based on unique facts. Finally, divergent applications of the same standard can still inform the interpretation of the

276. Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 707 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

277. *See generally* Catherine A. Rogers, *The Ethics of International Arbitrators, in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008) (providing an overview of the essential considerations for arbitrators and parties); CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014) (addressing professional obligations of primary participants in international arbitration).

278. *See* DAELE, *supra* note 13, at 115.

279. *See* Chiara Giorgetti, *Towards A Revised Threshold for Arbitrators' Challenges Under ICSID?*, KLUWER ARBITRATION BLOG (July 3, 2014), http://kluwerarbitrationblog.com/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid [https://perma.cc/6W37-BJ2X]; Giorgetti, *supra* note 87.

280. Prosecutor v. Furund_ija, Case No. IT-95-17/1-A99, Judgment, ¶ 197 (quoting Mason J, in *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Austl.)).

281. *See generally* Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223 (2013) (discussing the issue of comparative statistics and baselines when comparing different tribunals).

standard vis-à-vis the principles of independence and impartiality, which are inherently undetermined.[282]

The Appeals Chamber of the ICTY confirmed the existence of a uniform approach in *Furundžija* where, after consulting the jurisprudence of many other international courts, it found that there was a "general rule" that judges should not only be subjectively free from bias, but also that nothing in the surrounding circumstances should objectively give rise to "an appearance of bias."[283] The Appeals Chamber then observed that the appearance of bias should be assessed by a reasonable observer and maintained that "the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that [j]udges swear to uphold."[284]

The ECHR also shares and applies a similar approach. In *Hauschildt v. Denmark*, the ECHR addressed the question of impartiality of a judge in relation to Article 6 of the European Convention on Human Rights, which guarantees a right to fair trial.[285] The court asserted that, quite apart from the personal conduct of the judge, to assess the existence of impartiality, it should determine whether there are ascertainable facts which may raise doubts as to a judge's impartiality[286] from the prospective of a reasonable observer.[287] The ECHR found in favor of Mr. Hauschildt and concluded that in the circumstances of the case, the impartiality of the tribunals at issue were "capable of appearing to be open to doubt."[288] The ECHR argued that "even appearances may be of a certain impor-

---

282. *See generally* ROGERS, *supra* note 277, ch. 7 (expounding on the principles of independence and impartiality).

283. Prosecutor v. Furund_ija, Case No. IT-95-17/1-A99, Judgment, ¶ 189.

284. *Id.* ¶ 190 (quoting R.D.S. v. The Queen (1997) 3 S.C.R. 484, 486 (Can.)).

285. *See* Hauschildt v. Denmark, 154 Eur. Ct. H.R. (ser. A) ¶ 1 (1989). Article 6, paragraph 1 of the European Convention on Human Rights provides the following:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention on Human Rights art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

286. Hauschildt v. Denmark, 154 Eur. Ct. H.R. (ser. A) ¶ 48.

287. *See id.* ¶ 43.

288. *Id.* ¶ 52.

tance[,]" because what is at stake "is the confidence which the courts in a democratic society must inspire in the public."[289]

Importantly, the same standard is also adopted in international arbitration under UNCITRAL Rules.[290] Article 12(1) of the UNCITRAL Rules provides that an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts" as to the "impartiality or independence" of the arbitrator.[291] In applying this standard, arbitral tribunals constituted under those rules clarified that "this is an objective standard in that it requires not only a showing of doubt, but doubt that is justifiable."[292] Thus, for example, in *Vito Gallo v. Canada,* the appointing authority decided that from the point of view of a "reasonable and informed third party" in the case, "there would be justifiable doubts" about the "impartiality and independence" of the challenged arbitrator if he did not discontinue certain "advisory services" to potential intervener Mexico for the remainder of the arbitration.[293]

In sum, there is a general consensus amongst many international courts and tribunals that the appropriate standard to use is the reasonable, third-party standard. This standard is adopted by fora that decide on a variety of issues, including individual criminal responsibility, human rights violations, and investment issues.

However, the standard is not unanimously adopted. Until recently, ICSID tribunals, for example, were unique in adopting a much different and narrowly read standard under Article 57 of the ICSID Convention, which allowed for the removal of an arbitrator only upon proof of a "manifest" lack of the qualities required to sit as an arbitrator.[294] The standard allowed for the acceptance of a challenge only if the challenged arbitrator manifestly lacked the qualities required to sit as an arbitrator, and ICSID interpreted the word "manifest" as equivalent to "obvious" or "evident."[295] The application of the "manifest standard" had been rightly criticized

289. *Id.* ¶ 48.

290. *See* UNCITRAL Arbitration Rules, *supra* note 59, art. 12(1).

291. *Id.*

292. Gallo v. Government of Canada, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, ¶ 19 (Oct. 14, 2009); Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Decision on the Challenge to Arbitrator James Anaya, 2 (Nov. 28, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0382_0.pdf [https://perma.cc/7YNE-QDNP].

293. Gallo v. Government of Canada, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC ¶ 36.

294. *See* ICSID Convention, *supra* note 72, arts. 14, 57.

295. *See* Baiju S. Vasani & Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, 30 ICSID Rev. 194, 199–201 (2015).

as excessively difficult to prove and too protective of the arbitrator.[296] Indeed, as seen above, the presumption of impartiality as explained in *Furundžija* already provides sufficient protection to the challenged arbitrator.[297]

More recently, though, in *Blue Bank v. Venezuela*, the chairman of the ICSID Administrative Council altered the interpretation of the manifest standard.[298] In the case, Venezuela had challenged a claimant-appointed arbitrator, alleging that the international law firm at which he was a partner represented a client against Venezuela in another case, albeit in a different office.[299] The chairman applied "an objective standard based on a reasonable evaluation of the evidence by a third party" and interpreted the word "manifest" in the ICSID Convention "as meaning 'evident' and 'obvious' and relating to the ease with which the alleged lack of qualities can be perceived."[300] Hence, the chairman upheld the challenge while staying within the boundaries set in Article 57 of the ICSID Convention.[301] Shortly thereafter, the chairman used the same standard of assessment to decide another challenge in *Burlington v. Ecuador*.[302] This development is welcomed and hopefully demonstrates a change of course in challenges decided under the ICSID Convention.

One outlier remains—the ICJ. Differently from all other courts, neither the applicable rules nor the jurisprudence of the ICJ have resulted in the development of a standard of review to challenges

296. *See* Charles B. Rosenberg, *To Use a Cannon to Kill a Mosquito: Why the Increase in Arbitrator Challenges in Investment Arbitration Does Not Warrant a Complete Overhaul of the System*, *in* 8 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 19 (Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens & Todd J. Weiler eds., 2015).

297. Prosecutor v. Furund_ija, Case No. IT-95-17/1-A99, Judgment, ¶¶ 196–97.

298. Blue Bank Int'l & 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, ¶¶ 59–62 (Nov. 12, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf [https://perma.cc/DT7Y-VQ43]. In the case, the respondent had challenged the arbitrator appointed by claimant because of his partnership in the Madrid office of Baker & McKenzie. *Id.* ¶ 23. At the time, Baker & McKenzie also represented claimant in another case against Venezuela through its offices in New York and Caracas. *Id.* ¶ 22.

299. *Id.* ¶¶ 22–26.

300. *Id.* ¶¶ 60–61 (internal quotation marks omitted) (quoting Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Cases No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 39 (Oct. 22, 2007)).

301. *Id.* ¶ 71.

302. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 68 (Dec. 13, 2013).

there. In the only publicly available opinion on this issue, the court rejected a request for removal of one judge without giving any specifics of the adopted standard.[303] In the case, *Legal Consequence of the Construction of the Wall in the Occupied Palestinian Territory*, the U.N. General Assembly asked the court to determine the legality of Israel's construction of a partition wall in the occupied Palestinian territory.[304] During the proceeding, Israel requested the president of the court to remove the Egyptian judge, Nabil Elaraby, a former senior diplomat for Egypt. Israel raised three issues.[305]

First, it claimed that Judge Elaraby should be recused because of his active official and public roles as an Egyptian diplomat.[306] The court rejected this claim and noted that Judge Elaraby had acted as the legal adviser to the Egyptian government, which had occurred many years before the issue of the construction of the wall arose.[307] Second, Israel claimed that Judge Elaraby had been involved in decisions at the General Assembly that were relevant for the case.[308] The ICJ again dismissed the claim and concluded that the questions submitted to the court were not discussed until after Judge Elaraby had participated in them.[309] Third, Israel complained that in an interview prior to his election to the court, Judge Elaraby had made statements that could suggest a prejudgment of some of the issues in the case.[310] The court again dismissed the claim and concluded that Judge Elaraby's comments had "expressed no opinion on the question put in the present case."[311]

Israel's request was rejected thirteen to one—as is customary, Judge Elaraby did not participate in the vote—and the court concluded that Judge Elaraby had not previously taken part in the case, as required for a finding of relative incompatibility by Article 17(2) of the ICJ Statute.[312] Interestingly, Judge Buergenthal dis-

303. In the opinion, Israel sent a confidential letter to the ICJ president to bring to his attention certain facts it considered possibly relevant to the participation of Judge Elaraby in the case. *See* Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Order, 2004 I.C.J. 3, ¶¶ 3–5 (Jan. 30).

304. *See id.*; *see also supra* Section II.B.1.

305. Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2004 I.C.J. 3, ¶¶ 2–5 (Jan. 30).

306. *Id.* ¶¶ 2–3.

307. *Id.* ¶ 8.

308. *Id.* ¶ 4.

309. *Id.* ¶ 8.

310. *Id.* ¶ 4.

311. *Id.* ¶ 8.

312. *Id.* ¶ 7.

sented on the last point and asserted that although the "formalistic and narrow" construction of Article 17(2) had not been violated, his concern was that the interview created "an appearance of bias" that required the court to preclude Judge Elaraby's participation in the proceedings.[313]

Regardless of the outcome in any specific case, it would be preferable for the ICJ to adopt a clear standard of review that is in line with other international courts and tribunals, and namely that applies a more explicit "appearance-of-bias" test, as assessed by a reasonable third party.[314] As demonstrated above, there is a consensus among essentially all international courts and tribunals that a standard requiring a reasonable doubt, as assessed by a third party, is an acceptable and correct standard to be used in challenge procedures in international courts and tribunals. While challenges at the ICJ remain rare occurrences, if the court is faced by one such case it would benefit the standing and legitimacy of the court to issue a reasoned opinion based on a clearly articulated standard. Indeed, while an analysis of the factual circumstances surrounding the case should take priority, assessing those facts under a reasonable standard would also facilitate an analysis of the decision.

International courts and tribunals are tasked to do much more today, and their decisions affect an ever-increasing number of people. Adopting a reasonable third-party standard would strengthen a decision by the court and allow it to be rooted within an existing theoretical framework. Doing so would also facilitate an understanding of the applicable rules and would be especially important to strengthen the sociological legitimacy of the court. Moreover, as the jurisprudence of ICSID analyzed above demonstrates, this step would not necessarily require a change of the rules, but rather could be accomplished with a novel reading of the existing applicable procedural rules.

CONCLUSION

The analysis in this Article confirms a certain degree of uniformity among challenge procedures, but also identifies several anomalies pertaining to who decides the challenge and the standard to be

313. *See id.* ¶ 13 (Buergenthal, J., dissenting); *see also supra* Section II.B.1.

314. *See generally* Dame Rosalyn Higgins, *What International Courts (and Judges) May and May Not Do*, U.N. CODIFICATION DIVISION, LEGAL AFFAIRS, http://legal.un.org/avl/ls/Higgins_CT_video_1.html [https://perma.cc/63BB-ALRA] (last visited Oct. 21, 2016) (explaining that each court has various rules and case law but that there should still be standards as to what courts and judges may and may not do).

adopted. It concludes that a best practice has developed, which calls for challenge decisions made by an external or semi-external body using a justifiable standard as assessed by a reasonable third party.[315]

Robust challenge and recusal procedures for judges and arbitrators in international courts and tribunals are fundamental to guarantee the legitimacy and effectiveness of international courts and tribunals. Continuing changes in this direction will also ensure that judges and arbitrators are and continue to be seen as independent adjudicators.

315. *See* Mackenzie & Sands, *supra* note 9, at 285 ("[W]e suggest that it is both possible and desirable to identify certain common core guidelines for judicial independence applicable to all international judges, regardless of the tribunal on which they sit. Indeed close scrutiny of existing relevant rules, guidelines, and practices may reveal that agreement on these core criteria already exists.").

APPENDIX 1: SUMMARY OF CHALLENGE PROCEDURES

Court or Tribunal	To Whom to File the Request	When to Submit	Who Decides	Reasons for Proposal
ICJ	To the president of the ICJ confidentially in writing; the president can also act sua sponte if there is some special reason;[316] the judge can also recuse him/herself	No deadline	Members of the court	ICJ Statute Articles 16 and 17: Judges exercising political or administrative function, or acting as agent, counsel or advocate in any case (only for elected members of the court), past participation in a case as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or commission of enquiry, or in any other capacity (both for elected and ad hoc judges)
ICSID	To the secretary general	"Promptly" and in any case before the proceeding is declared closed	The remaining members of the tribunal if only one arbitrator is challenged; the chairman of the Administrative Council if the remaining members are equally divided or if the proposal refers to the majority or sole arbitrator	ICSID Convention Article 57: On account of any fact indicating a manifest lack of the qualities required to be nominated
UNCITRAL	Directly to the other party, the arbitrator who is challenged, and to the other arbitrators	Fifteen days after the party has been notified of the appointment of the arbitrator or within fifteen days after learning of the circumstances	If, within fifteen days from the date of the notice, the parties have not agreed on the challenge or the challenged arbitrator has not withdrawn, the party	UNCITRAL Rules (2010), Article 12(1): Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

316. ICJ Statute, *supra* note 36, art. 24.

		giving rise to the challenge	making the challenge may pursue the challenge by seeking, within thirty days from the date of the challenge notice, a decision on the challenge from the appointing authority.	
ICC	Rule 34(2): "Made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions."	As soon as there is knowledge of the grounds on which the challenge is based	The absolute majority of the judges	ICC Statute Article 41: Judges should not participate in any case in which his or her impartiality might be reasonably be doubted on any ground. Rule 34 grounds include "personal interest in the case, including any person or professional relationship with any other parties, involvement in his/her private capacity in any legal proceedings involving the accused, performance of functions prior to taking office during which he/she could be expected to have formed an opinion on the case in question on the parties or their legal representatives that 'objectively, could adversely affect the required impartiality of the person concentered' and expression of opinions 'through the communication of media, in writing or in public actions, that objectively, could adversely affect the required impartiality of the person concerned.'"
ICTY	To the presiding judge of the chamber	Not specified	The presiding judge first confers with the judge in question. If necessary, following the report of the	ICTY Statute Rule 15(B): If necessary, following the report of the presiding judge, the president may appoint a panel of three judges from other chambers to report to him its decision on the merits of the

			presiding judge, the president may appoint a panel of three judges from other chambers to report to him its decision on the merits of the application.	application. A judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality.
ICTR	To the presiding judge of the chamber	Not specified	The presiding judge first confers with the judge in question. The Bureau (composed of the president, the vice-president and the presiding judge of the Trial Chambers) if necessary, shall determine the matter.	ICTR Statute Rule 15: A judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality.