



## **Nationality and Representation in the Composition of the International Bench**

*Lessons from the Practice of International Courts and  
Tribunals and Policy Options for the  
Multilateral Investment Court*

Catharine Titi

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## **Nationality and Representation in the Composition of the International Bench**

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**Catharine Titi\***

### **Abstract**

*There is little doubt that the nationality of the international adjudicator matters. Judges sitting on international courts have often arrived on the bench after a career in government and may identify with the interests of their home state. Empirical data shows that a judge called to decide a case involving the state of his or her nationality (national judge) tends to vote in its favour. Yet nationality is not only relevant as an argument to discredit a judge who is seen as partial to his or her home state: it also confers legitimacy on international dispute settlement. International courts must be representative of their membership and representation calls for the inclusion of diverse nationalities in their ranks. In light of the ongoing efforts to establish a multilateral investment court, the paper considers nationality and representation in the composition of international courts and tribunals. It reviews, on the one hand, nationality and geographical representation on the court as a whole and, on the other, the presence of national judges and judges ad hoc in specific chambers or divisions. The paper assesses the reasons that lead different courts and tribunals to regulate nationality and representation differently, it analyses newly-collected data and draws normative conclusions. Ultimately, it makes policy suggestions for the multilateral investment court. Its overarching thesis is that an international court must be representative of its membership but that the presence of national judges and judges ad hoc in particular chambers or divisions depends on the function of a court. In relation to the multilateral investment court, the paper expresses scepticism about the presence of national judges and judges ad hoc in divisions of three constituted to decide investor-state disputes.*

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## Executive Summary

The nationality of the international adjudicator can affect his or her decision-making. Judges sitting on international courts have often arrived on the bench after a career in government and may identify with the interests of their home state. Empirical data shows that a judge called to decide a case involving the state of his or her nationality (national judge) tends to vote in its favour. Yet nationality is not only relevant as an argument to discredit a judge who is seen as partial to the state of his nationality: it also confers legitimacy on international dispute settlement. International courts must be representative of their membership and representation calls for the inclusion of diverse nationalities in their ranks. In light of the ongoing efforts to establish a multilateral investment court, the paper considers nationality and representation in the composition of international courts and tribunals.

In a first step, the paper considers nationality and representation in the overall composition of a court. Despite rare references to election or appointment of judges ‘regardless of their nationality’, most court statutes are not indifferent to nationality. On the contrary, statutes seek to reconcile the challenges that attach to the presence of national judges on the bench and the difficulties that their absence would entail, such as by debarring co-nationals from sitting together and ensuring geographical representation. Calls for representation go hand-in-hand with the presumption that states with a national on a court are better off defending their interests than states without representation. Statutes tend to limit representation to the court’s membership: only nationals of member states are eligible to serve as judges on the court. This limitation encourages states to submit to the court’s jurisdiction in order to place a judge of their nationality on the bench and, in the case of selective representation courts, it ensures that member states have a better chance of being represented.

Various formulations are used to ensure representation. Some statutes ask of electors that they should be mindful that the body as whole must be representative ‘of the main forms of civilization’, a term that has been the subject of nagging criticism. Others focus on representation of ‘the principal legal systems of the world’, a plausible but not altogether inevitable alternative. Others still aim to ensure that the court is ‘broadly representative’ of its membership. Further possible formulations include ‘equitable’, ‘reasonable’, ‘so far as is reasonable’, or ‘fair’ geographical representation, which the paper suggests may be adopted as standalone options. However, it is acknowledged that geographical representation may be in tension with the need to ensure that qualified judges serve on an international court and the paper argues that both representation and properly qualified judges are essential to the legitimacy of an international court.

In a few courts, a handful of members have achieved what may be termed ‘permanent’ representation. Accordingly, some states are guaranteed to always have a judge of their nationality on the bench, if they put forward a candidate. The paper critically reviews such arrangements that emerge as a result of power politics and questions their sustainability going forward, in light of the recent ‘loss’ of such a ‘permanent’ judge at the International Court of Justice (ICJ).

In a second step, the paper turns to nationality and representation in particular chambers or divisions, focusing on national judges and the institution of judges ad hoc. Statutes do not generally prevent national judges from sitting in cases involving the state of their nationality. When one of the disputing parties does not have a national judge on the bench, some court statutes allow it to choose a judge ad hoc. However, not all international courts tolerate the presence of national judges and judges ad hoc. There is a distinction to be drawn between a ‘classic’ international court, such as the ICJ, and human rights courts. The former’s workload consists in interstate cases. In this context, national judges and judges ad hoc may be explained by the principle of sovereign equality of states and the fact that this is a dispute settlement system made by states for states. By contrast, human rights courts decide primarily individual applications and the presence of a national judge and a judge ad hoc could arguably offer the state an undue procedural advantage that violates the parties’ equality of arms. The European Court of Human Rights allows national judges to sit in the Chamber and the Grand Chamber, and admits ‘ad hoc judges’ in individual cases. In reality, the institution is different to traditional judges ad hoc. Contrariwise, since 2009, the Inter-American Court of Human Rights permits neither national judges nor judges ad hoc in individual cases. The arguments that have been presented in that context are relevant to the discussion about national judges and judges ad hoc in relation to the multilateral investment court.

In all cases, equality of arms must be assured: if one party has a national judge on the bench either the other party should be allowed its own judge or the national judge should step down. In mixed disputes, that is, in disputes involving a state and a private entity, especially when the right to appoint a judge ad hoc is only accorded to the disputing *state* party, the presence of national judges and the institution of judges ad hoc seem problematic.

Judges ad hoc also reveal that while nationality weighs in decision-making, it is not the only element that matters. Judges ad hoc are not required to have the nationality of the disputing party that nominates them, and very often they do not. The paper presents newly-collected data on the nationality of judges ad hoc at the ICJ and the International Tribunal for the Law of the Sea (ITLOS) to demonstrate that states tend to choose non-nationals as judges ad hoc. On occasion, states may even select as judge ad hoc a national of the *other* disputing party. Further data suggests that judges ad hoc of the nationality of the appointing state are more likely to vote in favour of this state than judges ad hoc of a nationality other than the nationality of the appointing state.

Investment arbitration offers an example of how the nationality of the international adjudicator can be regulated differently. There are no formal considerations of geographical representation in relation to the constitution of particular tribunals. In investment arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) nationality becomes relevant when states and the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) nominate persons to serve on the Panel of Arbitrators; and when a tribunal or an annulment committee is constituted. When it comes to the constitution of a tribunal, the

majority of the arbitrators cannot have the nationality of the disputing parties, unless the parties agree on each individual member of the tribunal. When the Chairman appoints arbitrators or members of annulment committees, these individuals can have neither the nationality of the state party to the dispute nor the nationality of the investor's home state. Further limitations apply in the case of appointments of annulment committee members. The above restrictions do not apply to conciliators under the ICSID Convention. Other arbitration rules do not adopt the same model. For instance, the UNCITRAL Arbitration Rules state that the appointing authority 'shall take into account the advisability of appointing an arbitrator of a nationality other than the nationality of the parties', thus arguably creating a presumption in favour of the appointment of a national.

In a further step, the paper advances policy suggestions for the prospective multilateral investment court (the Court), in light of the lessons drawn from the practice of international courts and tribunals.

In relation to geographical representation, the paper suggests that the Court should limit representation to its membership. In order to obtain initial momentum, the Statute's drafters may consider whether to entice new state members by promising them a seat on the Court. The paper canvasses appropriate types of geographical representation that may garner support, and argues that while seeking to ensure representation, the Statute's drafters should not lose sight of the need to guarantee that judges possess the necessary qualifications.

In relation to particular divisions constituted to hear a dispute, the paper considers the likely function of the Court: mixed disputes decided in their majority by small divisions. In this light, the paper contends that the presence of national judges and judges ad hoc is inapposite to investor-state disputes. The proposed ban on national judges may be absolute or it may be modulated, so as to allow the presence of a national judge or the investor's co-national, if the disputing parties agree. A further option is to model the presence of national judges on the ICSID Convention, in order to ensure that the majority of the judges shall be nationals of states other than the state party to the dispute and the state whose national is a party to the dispute, unless the parties agree on each judge. The most efficient option however will be to exclude national judges altogether. The combined effect of such provisions will be to ensure procedural fairness and equality of arms, and ultimately to counter criticisms that judges may be more favourably inclined towards states because they are chosen by states.

## Introduction

It is generally accepted that the nationality of the international adjudicator can affect his or her decision-making: adjudicators cannot be expected to arrive at a court or tribunal as *tabulae rasae*,<sup>1</sup> nor by donning judicial robes do they ‘[cease] to be human’, ‘[strip themselves] of all predilections’ and become ‘passionless thinking machine[s]’.<sup>2</sup> Judges sitting on international courts have often ‘spent their careers in national service as diplomats, legal advisors, administrators, and politicians’, and they may identify with the interests of the state of their nationality.<sup>3</sup> Empirical studies on voting patterns in international courts show that judges on the international bench tend to vote in favour of their home state.<sup>4</sup> A singular example is that of Italian Judge Luigi Ferrari Bravo<sup>5</sup> who, sitting on the European Court of Human Rights (ECtHR), dissented from the majority in 133 judgments concerning alleged Italian violations of the European Convention on Human Rights (ECHR).<sup>6</sup>

But nationality is not only relevant as an argument to discredit a judge who is seen as partial to the state of his nationality or to his appointing state; it is also an element that confers legitimacy on international dispute settlement. International courts must be representative of their membership. This requires the inclusion of diverse nationalities in their ranks. The distribution of seats on an international court ensuring representation of different nationalities is a seminal component of such legitimacy.<sup>7</sup> So much so that representation can become a condition to allow

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<sup>1</sup> Tom Dannenbaum, ‘Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed’ (2012) 45 Cornell International Law Journal 77, 120, citing Rosalyn Higgins.

<sup>2</sup> Manfred Lachs, ‘Some Reflections on the Nationality of Judges of the International Court of Justice’ (1992) 4 Pace Yearbook of International Law 49, 58, n. 17, citing Jerome Frank, *Law and the Modern Mind* (1949).

<sup>3</sup> Eric A. Posner and Miguel de Figueiredo, ‘Is the International Court of Justice Biased?’ (2004) John M. Olin Program in Law and Economics Working Paper No. 234, 11. See further Erik Voeten, ‘The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights’ (2007) 61 International Organization 669, 696-697; Erik Voeten, ‘The Politics of International Judicial Appointments’ (2009) 9 (2) Chicago Journal of International Law 387, 390-391, remarking that judges who were formerly diplomats are more likely to favour their home state in a dispute than judges who were in private practice or who were academics.

<sup>4</sup> Posner and de Figueiredo (n 3) 4; Voeten (n 3). It has been observed that this experience is not borne out by the WTO Appellate Body, see Dannenbaum (n 1) 166.

<sup>5</sup> Elected in respect of San Marino rather than Italy in 1998. See ECtHR, ‘Judges of the Court since 1959’, [https://www.echr.coe.int/Documents/List\\_judges\\_since\\_1959\\_BIL.pdf](https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf). Luigi Ferrari Bravo was legal adviser to the Italian government and sat as judge on the ICJ for Italy between 1995 and 1997.

<sup>6</sup> The 133 cases concerned similar petitions (violation of the right to a hearing ‘within a reasonable time’) and were all decided on 28 February 2002. Judge Luigi Ferrari Bravo attached the same dissenting opinion to each judgment. The opinion was drafted in broad language to encompass all 133 judgments (‘*Je regrette de devoir me dissocier de mes collègues dans les 133 affaires jugées aujourd’hui [...]*’, etc.) but was not modulated to take into account the particular case. For instance, the awarded amounts mentioned do not apply to all cases, but a *mutatis mutandis* statement is included (‘*La même chose arrive, mutatis mutandis, pour la grande majorité des autres arrêts*’). E.g. Dissenting Opinion of Judge Ferrari Bravo in *Lucia Riccardi v. Italy*, Application No. 51095/99 (ECtHR, 28 February 2002), *Cerbo and others v. Italy*, Application No. 52835/99 (ECtHR, 28 February 2002), and *Tarantino v. Italy*, Application No. 51122/99 (ECtHR, 28 February 2002).

<sup>7</sup> Ruth Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press 2010) 165. Cf. Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, Special Issue of the European Yearbook of International Economic Law (Springer 2nd edn open access <https://www.springer.com/gp/book/9783662597316> 2018, 2020) 37.

states to join a court. States expect to be ‘represented’ even if the notion of representation seems at odd with the concept of judicial independence.<sup>8</sup>

It is then not astonishing that the statutes of international courts and tribunals ordinarily make some reference to nationality. In doing so, they often seek to reconcile the challenges that attach to the presence of judges of the nationality of one of the disputing parties on the bench (national judges) and the difficulties that their absence would entail, such as by debarring co-nationals from sitting together or by allowing the appointment of judges ad hoc when a disputing party does not have one of its nationals on the bench. The statutes of a minority of courts do *not* care very much about nationality. This is true in particular of regional integration courts, including notably the Court of Justice of the European Union (CJEU),<sup>9</sup> the Court of Justice of the European Free Trade Association (EFTA Court),<sup>10</sup> and the Caribbean Court of Justice.<sup>11</sup> These courts are unique in that, while established at the supranational level, partake of an essentially domestic, *if sui generis*, nature<sup>12</sup> and are not comparable to other international courts, including

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<sup>8</sup> Mackenzie et al. (n 7) 165.

<sup>9</sup> E.g. see Article 18 of the Statute of the CJEU (‘A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party’).

<sup>10</sup> E.g. see Article 15 of Protocol 5 to the ESA/Court Agreement on the Statute of the EFTA Court (‘A party may not apply for a change in the composition of the Court on the grounds of either nationality of a Judge or the absence from the Court of a Judge of the nationality of that party’).

<sup>11</sup> The Caribbean Court of Justice is the court of the Caribbean Community (CARICOM) established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice. Following the entry-into-force of the Agreement, the Court was inaugurated in 2005. The Caribbean Court of Justice is different in its composition from other regional integration courts, such as the CJEU and the Court of Justice of the Andean Community. The latter include one judge from each member state, see respectively Article 19(2) of the Treaty on European Union (TEU) and Article 6 of the Treaty Creating the Court of Justice of the Andean Community (which provides for five judges; following Venezuela’s withdrawal from the Andean Community, the Court has been left with four judges, one from each member state of the Andean Community, see <https://www.tribunalandino.org.ec/index.php/nosotros/magistrados/>). In contrast with these courts, the Caribbean Court of Justice adopts a system of selective representation: as of December 2019, the Court has 12 signatories (Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and The Grenadines, Suriname, and Trinidad and Tobago) but only seven judges. See also Article IV(1) of the Agreement Establishing the Caribbean Court of Justice, which provides among others that ‘the Judges of the Court shall be the President and *not more than* nine other Judges’, emphasis added. But the Caribbean Court of Justice is also different from other regional integration courts in another way. Notably, the judges of the Caribbean Court of Justice are not appointed by governments but by the Regional Judicial and Legal Services Commission, chaired by the President of the Court and composed of representatives of the legal profession, chairpersons of national judicial and public service committees, members appointed by the Secretary General of CARICOM and the Director-General of the Organisation of Eastern Caribbean States jointly following consultation with non-governmental organisations (NGOs). CARICOM prides itself on being the only regional integration organisation ‘whose judges are not directly appointed or elected by Member States’, which is seen as a guarantee of independence. See ‘FAQs’ <https://www.ccj.org/about-the-ccj/faqs/>. It should then come as little surprise that judges sitting on the Caribbean Court of Justice are not always nationals of states that are signatories to the Court or even CARICOM members; co-nationals may sit on the bench; and the nationality of judges is relegated to matters of secondary importance, to the extent that it is not necessarily indicated on the Court’s official website. On current and past judges of the Caribbean Court of Justice, see <https://www.ccj.org/about-the-ccj/judges/>. On the Caribbean Court of Justice in general, see Andrew N. Maharajh, ‘The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean’s First Independent and Interdependent Court’ (2014) 47 Cornell International Law Journal 735; Dannenbaum (n 1) 101-103.

<sup>12</sup> E.g. consider the CJEU which behaves as a constitutional court, see CJEU, Opinion 1/17 of the Court, 30 April 2019, ECLI:EU:C:2019:341, paras 110ff.

regional human rights courts. For this reason, the paper does not deal with regional integration courts and refers to them only exceptionally.

This paper reviews nationality and representation in the composition of international courts and tribunals against the backdrop of the ongoing efforts to establish a multilateral investment court and the negotiations in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). Nationality and representation become relevant to two distinct aspects of the composition of an international adjudicatory body: first, in relation to the body as a whole and, secondly, in relation to the constitution of particular chambers or divisions. While some common threads run through various court statutes and arbitration rules, different adjudicative bodies tend to decide how to deal with nationality and representation differently. The paper delves into the statutes and practice of international courts and tribunals to explain the reasons that lead to these differences, such as in relation to the institution of judges ad hoc in ‘classic’ international courts and human rights courts. Its analysis is conceptual and to some extent empirical; the paper analyses newly-collected data on nationality and representation. The paper also draws normative conclusions and makes policy suggestions for the multilateral investment court. Its overarching theses are that an international court must be representative of its membership (while guaranteeing judges’ qualifications) and that the desirability of the presence of national judges and judges ad hoc in particular chambers depends on the function of a court and the nature of the disputes it hears.

The remainder of this paper proceeds in five parts. Part I addresses nationality and geographical representation in the composition of the court as a whole. Part II turns to nationality and representation in specific chambers or divisions of a court and assesses critically the presence of national judges in disputes involving a party of their nationality and the institution of judges ad hoc. Part III considers the different role of nationality in investment arbitration. In light of the analysis in Parts I-III, Part IV draws some lessons and makes policy suggestions for the prospective multilateral investment court. A final part concludes.

By way of a final caveat, while this paper queries into judges ad hoc, it does not examine judges ad litem at the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>13</sup> and the International Criminal Tribunal for Rwanda (ICTR),<sup>14</sup> introduced as additional judges to spread the workload; interim judges at the Inter-American Court of Human Rights (IACtHR), appointed to preserve a quorum;<sup>15</sup> substitute and alternate judges.<sup>16</sup> The paper also does not deal with panels in the World Trade Organization (WTO), only with the Appellate Body (AB). By contrast, for comparative purposes, the paper takes on occasion into account the statutes of some non-judicial organs, such as the Statute of the International Law Commission (ILC). Finally, the focus of the paper on nationality is without prejudice to the fact that nationality is

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<sup>13</sup> Articles 12, 13 *ter* and 13 *quater* of the Statute of the ICTY.

<sup>14</sup> Articles 11, 12 *ter* and 12 *quater* of the Statute of the ICTR.

<sup>15</sup> Articles 6(3) and 19(4) of the Statute of the IACtHR.

<sup>16</sup> E.g. Rules 24, 26 and 93 of the ECtHR Rules of Court. On alternate judges in international criminal courts, see Megan Fairlie, ‘Alternate Judge: International Criminal Courts and Tribunals’, Max Planck Encyclopedia of International Procedural Law (February 2019).

only one element of the identity of an international adjudicator that may affect decision-making: other elements are ethnicity, country of legal education, country of residence, whether one comes from an industrialised or a developing country, gender, religion, etc. These are not examined in the present.

## I. Nationality and Representation on the Court as a Whole

Nationality and representation first come into play when considering the overall composition of an international court. Part I canvasses three selective topics within this broader theme: election or appointment regardless of nationality; geographical representation; and the ban on co-nationals sitting on the bench. Exceptionally, some references are made to nationality and representation in particular chambers for comparative purposes. Appendix A provides a comparative table on nationality and representation on the court as a whole.

### 1. Election or appointment regardless of nationality

It is unusual for court statutes to provide that judges shall be elected or appointed ‘regardless of their nationality’. The Statute of the International Court of Justice (ICJ) is a rare example of a statute that does. It establishes that:

‘The Court shall be composed of a body of independent judges, elected *regardless of their nationality* from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.’<sup>17</sup>

Pursuant then to this provision, not only nationality may not limit who can be elected as judge – or nationality is irrelevant to who is elected as judge –, but it is also a negative condition sitting alongside positive elements that, in contrast with it, *must* be present: independence, personal qualities and professional competencies. On the face of it, the provision creates the fiction that nationality does not matter. That the Court should be composed of independent judges, elected on the basis of their personal qualities and professional qualifications, irrespective of nationality, would be ‘the best of all possible worlds’.<sup>18</sup>

Nonetheless, nationality does matter. In the case of the ICJ, the significance of this pronouncement on the irrelevance of nationality is circumscribed by the immediately ensuing provision, which states that no two judges may be nationals of the same state.<sup>19</sup> The Statute goes so far as to make provision for persons who for the purposes of the membership of the Court could be considered to be dual nationals: they shall be considered to be nationals of the state in which they typically exercise their civil and political rights.<sup>20</sup> In addition, the Statute

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<sup>17</sup> Article 2 of the Statute of the ICJ, emphasis added.

<sup>18</sup> Georges Abi-Saab, ‘Ensuring the Best Bench: Ways of Selecting Judges’, in Connie Peck and Roy S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff 1997) 166, 166.

<sup>19</sup> Article 3(1) of the Statute of the ICJ.

<sup>20</sup> Article 3(2) of the Statute of the ICJ.

enjoins the electors<sup>21</sup> to bear in mind ‘that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured’.<sup>22</sup> To some extent, ensuring representation of the principal legal systems of the world also means that nationality *may* play a role in the election of judges.<sup>23</sup>

A ‘regardless of their national origin’ statement is included in a different context in relation to a court that is not broadly concerned with nationality, and so is at the antipodes of the ICJ. This is the case of the Appellate Body of the WTO, however there the provision relates to the composition of divisions of three constituted to hear an appeal rather than the composition of the Appellate Body as a whole. This provision is discussed below.<sup>24</sup>

In short, most court statutes make no general claim about the ‘indifference’ of nationality to the election or appointment of judges. This is because most of the times statutes are anything but indifferent to nationality. Judges may be effectively appointed *regardless of their nationality* when court statutes are silent on nationality, such as in the case of the Caribbean Court of Justice, a regional integration court.<sup>25</sup>

## 2. Geographical representation

The term ‘geographical representation’ is used here in a broad sense to encompass a range of issues relating to representation of different nationalities on the international bench. Since representation as discussed here concerns the composition of the full court, it is without prejudice to the composition of particular chambers, which may be more or less representative, for example they may include more than one judge from the same region but may exclude others.<sup>26</sup> This section commences by canvassing the scope of geographical representation, in other words it addresses the question of who is concerned by geographical representation. Next, it considers geographical representation in a strict sense, including representation of the principal legal systems of the world and equitable geographical representation. This is followed by a discussion of ‘permanent’ (or ‘privileged’ or ‘guaranteed’) representation of some members. The section closes with a brief consideration of the relationship between geographical representation and qualifications.

### *a. Representation limited to the court’s membership*

Statutes tend to provide that judges shall have the nationality of a state signatory to the court. This requirement accomplishes two objectives: it encourages states to submit to the court’s jurisdiction in order to place a judge of their nationality on the bench and, in the case of selective representation courts, it ensures that member states, probably already vying for seats, have a

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<sup>21</sup> That is, the members of the General Assembly and the Security Council who elect the judges.

<sup>22</sup> Article 9 of the Statute of the ICJ.

<sup>23</sup> Cf. Shabtai Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff 1965) 168.

<sup>24</sup> See n 120-121 and accompanying text.

<sup>25</sup> See n 11.

<sup>26</sup> See also Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff 2015) 1200.

better chance of being represented since judgeships are not open to each and every state but only to members. The Rome Statute of the International Criminal Court (ICC) offers an example of this approach: it provides that candidates put forward by states for any given election shall in all cases be nationals of a state party.<sup>27</sup> The WTO ensures that membership of the Appellate Body ‘shall be broadly representative of membership in the WTO’.<sup>28</sup> Regional human rights courts generally follow the same approach, restricting who can be elected to nationals of their (by definition *regional*) membership. The Statute of the Inter-American Court of Human Rights establishes that the judges making up the Court shall be nationals of the member states of the Organization of American States (OAS), even though they can be proposed by states other than the state of their nationality.<sup>29</sup> Similarly, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (AfCtHPR Protocol)<sup>30</sup> provides that only nationals of member states of the Organization of African Unity (OAU) are eligible to serve as judges.<sup>31</sup>

Even when a statute does not expressly specify that only nationals of member states are eligible to be elected or appointed, it tends to work this way. The Statute of the ILC, a non-judicial organ, does not restrict who can sit on the Commission to nationals of UN member states, but no non-member state nationals have ever been elected to the ILC.<sup>32</sup> A Swiss national was nominated in 1968, at a time when Switzerland was not a UN member,<sup>33</sup> but was eventually not elected.<sup>34</sup> The ECtHR offers another example. The ECHR does not expressly limit who can be elected as judge to nationals of its member states,<sup>35</sup> and it is recognised that a party may nominate nationals of other parties or even of non-parties. However, according to an Explanatory Report of the Council of Europe on the topic, ‘[a] State Party will have the possibility [of putting] forward the name of a judge who is a national of another State Party rather than propose a judge from a State which has not ratified the Convention.’<sup>36</sup> This statement reveals that while the possibility of nominating the national of a non-party is admitted, this is actively discouraged. Accordingly, as of January 2020, only one judge out of about 200 regular judges to have served on the Court has had a nationality of a state that is not a member of the

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<sup>27</sup> Article 36(4)(b) of the Rome Statute of the ICC.

<sup>28</sup> Article 17(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), emphasis added.

<sup>29</sup> Article 4(1) of the Statute of the IACtHR.

<sup>30</sup> The African Court on Human and Peoples’ Rights was established by member states of the African Union by virtue of Article of the AfCtHPR Protocol was adopted in 1998 and came into force in 2004. It has its permanent seat in Tanzania. See <https://www.african-court.org/en/index.php>.

<sup>31</sup> Article 11(1) of the AfCtHPR Protocol.

<sup>32</sup> See <http://legal.un.org/ilc/ilcmembe.shtml#a7>.

<sup>33</sup> Switzerland joined the UN in 2002, see UN News, ‘Switzerland admitted as 190th member of the United Nations’, September 2002, <https://news.un.org/en/story/2002/09/44772-switzerland-admitted-190th-member-united-nations>.

<sup>34</sup> *ibid.* See <http://legal.un.org/ilc/ilcmembe.shtml#a7>.

<sup>35</sup> Article 22 of the ECHR on ‘Election of judges’ provides that judges shall be elected ‘from a list of three candidates nominated by the High Contracting Party’, without further specification as to their nationality.

<sup>36</sup> Council of Europe, ‘Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby’ (1994) para. 59.

Council of Europe.<sup>37</sup> In short, in 99.5 percent of cases, regular judges elected to serve on the Court have the nationality of a signatory to the ECHR.

Finally, a number of court statutes provide for the nomination of judges who are nationals of states other than the nominating state. Some of these statutes provide for the possibility of nominating non-nationals, others for an obligation to do so. For instance, the Statute of the ICJ states that out of the maximum number of four persons that national groups may nominate, no more than two may be of their nationality.<sup>38</sup> Almost invariably however, these non-nationals must have the nationality of states members of the court in question.

*b. Geographical representation stricto sensu*

Once the broader scope of geographical representation has been established, that is the question of whether only member states or also non-member states can provide judges, the question arises of how exactly these are going to be represented. It is generally accepted that if the bench is composed of jurists from diverse parts of the globe, the court as a collective body ‘will have no great difficulty in identifying and following the principles and rules common to the various legal systems’.<sup>39</sup> In reality, representation is more often than not the outcome of power politics, based on the underlying supposition that states with a national on a court are better off defending their interests than those without representation.<sup>40</sup> Several formulations exist, sometimes used in combination, and a survey of the types of geographical representation assured by court statutes reveals that there is a certain evolution over time. This section considers these formulations, including representation of ‘the main forms of civilisation’, representation of ‘the world’s principal legal systems’, and ‘equitable geographical distribution’.

Older statutes, such as notably the Statute of the ICJ, demand of electors that they should be mindful that the body as whole should be representative ‘of the main forms of civilization’.<sup>41</sup> Representation of the ‘main forms of civilization’ seems to mirror the ‘general principles of law recognized by civilized nations’ in Article 38(1)(c) of the Statute of the ICJ. While it has been argued that ‘civilisation’ has an impact on how law functions in a society and how this society views international law,<sup>42</sup> the term ‘main forms of civilization’ has been criticised as assuming a tacit ‘grading’ or ‘a certain Darwinian classification’ of nations, which cannot be

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<sup>37</sup> This was the case of Ronald St. John Macdonald, a Canadian national, who served on the ECtHR between 1980 and 1998. He was elected in respect of Liechtenstein. See ECtHR, ‘Judges of the Court since 1959’, [https://www.echr.coe.int/Documents/List\\_judges\\_since\\_1959\\_BIL.pdf](https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf) (accessed 2 January 2020).

<sup>38</sup> Article 5(2) of the Statute of the ICJ.

<sup>39</sup> Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 113; Terry D. Gill, *Rosenne’s The World Court: What it Is and How it Works* (Martinus Nijhoff 6th revised edn 2003) 48.

<sup>40</sup> Bardo Fassbender, ‘The Representation of the “Main Forms of Civilization” and of the “Principal Legal Systems of the World” in the International Court of Justice’, in Denis Alland et al. (eds), *Unité et diversité du droit international / Unity and Diversity of International Law* (Martinus Nijhoff 2014) 581, 583.

<sup>41</sup> Article 9 of the Statute of the ICJ. This is also true of the Statute of the ILC: Article 8 of the ILC Statute.

<sup>42</sup> Abi-Saab (n 18) 170-171 (‘For law is not a simple set of definitions, concepts and techniques which can be applied mechanistically [...] Thus regardless of the formal legal system a society may adopt or adhere to, its “view of the world” (*Weltanschauung*) and of the place and role of law in it [...] determines how law functions in that society and how, through its own legal experience, it perceives international law and acts upon it’).

reconciled with the principle of sovereign equality of states.<sup>43</sup> Accordingly, representation of the main forms of civilization has lost its significance except ‘as a metaphor for cultural diversity broadly understood’,<sup>44</sup> and on balance appears inapposite. In newer court statutes, such as the Rome Statute of the ICC, the term has been abandoned and is replaced by ‘geographical representation’.<sup>45</sup>

The Statute of the ICJ combines the requirement for representation of the ‘main forms of civilization’ with representation ‘of the principal legal systems of the world’.<sup>46</sup> There is some debate as to the exact meaning of the term ‘principal legal systems of the world’. The first obvious distinction is the one between the civil and the common law systems.<sup>47</sup> It is also possible to draw more nuanced distinctions among systems, such as Chinese law and Hindu law.<sup>48</sup> However, in many states in which the latter developed, the civil and the common law systems were later incorporated and adapted to varying degrees.<sup>49</sup> It has been further pointed out that the diversity within the two dominant legal traditions (civil law and common law) calls for representation and at the same time international law should not be identified with any particular legal system.<sup>50</sup> In this context, it is interesting to note the peculiarity of certain legal systems that are best described as hybrid or mixed, notably combining elements of the civil law and the common law.<sup>51</sup> However, in all cases, the representation of the legal systems must relate to the legal systems present in a court’s membership.<sup>52</sup>

‘Equitable geographical distribution’ is another term used in court statutes to determine representation. ‘Equitable geographical distribution’ is not new and, although not present in the Statute of the ICJ, it figures in the Charter of the United Nations.<sup>53</sup> The Statute of ITLOS aims to ensure equitable geographical distribution. It provides that ‘[i]n the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.’<sup>54</sup> The Statute of ITLOS further aims to ensure ‘the representation of the principal legal systems of the world and equitable geographical distribution’ also in the

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<sup>43</sup> *Abi-Saab* (n 18) 170; Bardo Fassbender, ‘Article 9’, in Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 3rd edn 2019) 355, 375; Fassbender (n 40) 587-588.

<sup>44</sup> Fassbender (n 40) 588; Fassbender (n 43) 376.

<sup>45</sup> Article 36(8) of the Rome Statute of the ICC.

<sup>46</sup> Article 9 of the Statute of the ICJ. See also Article 8 of the ILC Statute.

<sup>47</sup> Gill (n 39) 47; Fassbender (n 40) 584-585; Fassbender (n 43) 371-373.

<sup>48</sup> *Abi-Saab* (n 18) 169; Kolb (n 39) 114; Gill (n 39) 48.

<sup>49</sup> *Abi-Saab* (n 18) 169.

<sup>50</sup> *Abi-Saab* (n 18) 169-170.

<sup>51</sup> E.g. Canada, Cyprus, Malta, Scotland, South Africa.

<sup>52</sup> To take an example from a regional integration court, the Caribbean Court of Justice: The Caribbean Court of Justice includes original and appellate jurisdiction. The terms do not correspond to what most of us would normally understand by first and second instance proceedings. In its original jurisdiction, the Court discharges the functions of a tribunal applying rules of international law; in its appellate jurisdiction, the Court applies municipal law rules. The Caribbean Court of Justice is focused on common law jurisdictions. Among the Court’s current signatories, only Suriname is a civil law jurisdiction. Accordingly, among the current seven judges of the Court, only Justice Jacob Wit (Netherlands Antilles) is a civil law judge on the bench. See ‘FAQs’ <https://www.ccj.org/about-the-ccj/faqs/> and <https://www.ccj.org/about-the-ccj/judges/> (accessed 1 November 2019).

<sup>53</sup> Article 23(1) of the Charter of the United Nations, where the term is used in relation to the composition of the UN Security Council.

<sup>54</sup> Article 2(2) of the Statute of ITLOS.

composition of the Seabed Disputes Chamber.<sup>55</sup> There is no similar requirement in relation to the composition of other special chambers,<sup>56</sup> however it has been reported that ‘the Tribunal adheres to the principle [...] as far as possible’.<sup>57</sup> However, the ITLOS Rules of the Tribunal provide that the members of a special chamber shall be selected following a proposal by the President from among the members of the Tribunal ‘having regard to any special knowledge, expertise or previous experience which any of the Members may have in relation to the category of disputes the chamber deals with.’<sup>58</sup> Read in combination, these provisions seem to allow the Tribunal to disregard representation requirements within the chambers in order to focus on special knowledge and experience. The Statute of ITLOS further stipulates how such equitable geographical representation is to be achieved: the Tribunal will include ‘no fewer than three members from each geographical group as established by the General Assembly of the United Nations’.<sup>59</sup>

The Rome Statute of the ICC also provides for equitable geographical representation in combination with representation of the principal legal systems. Accordingly, when selecting judges, state parties should take into account the ‘need’ in respect of the membership of the Court for ‘(i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges.’<sup>60</sup> Like ITLOS, the ICC allocates a minimum number of seats to each UN regional group of states.<sup>61</sup> This minimum used to be either two or three seats per regional group depending on the number of states parties to the Rome Statute in each regional group: if the regional group had up to 16 member states, the minimum number of seats would be two; if a regional group had more than 16 member states, the number of seats would be three.<sup>62</sup> At the present time, all regional groups have more than 16 member states,<sup>63</sup> therefore no fewer than three members can be included from each regional group.

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<sup>55</sup> Article 35 of the Statute of ITLOS.

<sup>56</sup> Special chambers constituted pursuant to Article 15 of the Statute of ITLOS.

<sup>57</sup> P. Chandrasekhara Rao and Philippe Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006) 68.

<sup>58</sup> Article 29(2) of the ITLOS Rules of the Tribunal.

<sup>59</sup> Article 3(2) of the Statute of ITLOS. The geographical groups are the African Group, the Asia-Pacific Group, the Eastern European Group, the Latin American and Caribbean Group, and the Western European and Others Group. The latter includes Australia, Canada, New Zealand, and, for electoral purposes only, the United States of America. For the composition of the geographical groups see <https://www.un.org/depts/DGACM/RegionalGroups.shtml>.

<sup>60</sup> Article 36(8)(a) of the Rome Statute of the ICC. Interestingly, Article 12(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III)) also requires that ‘[d]ue consideration shall be given to adequate gender representation in nomination process’. It is expected that the statutes of new international courts established in the future are likely to include provisions on representativeness, including gender parity.

<sup>61</sup> ICC, Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court, Consolidated version (ICC-ASP/3/Res.6) [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-3-Res.6-CONSOLIDATED-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-3-Res.6-CONSOLIDATED-ENG.pdf).

<sup>62</sup> ICC (n 61) para. 20(b).

<sup>63</sup> ICC, ‘The States Parties to the Rome Statute’ [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

The allocation of a minimum number of seats per regional group at both ITLOS and the ICC, courts with 21 and 18 judges respectively,<sup>64</sup> allows for a number of ‘floating seats’ for which any regional group may ‘compete’.<sup>65</sup> In practice, the distribution of seats on the ICJ also reflects the UN regional groups of member states, which, according to an unwritten rule, are the ones to choose their candidates.<sup>66</sup>

The WTO DSU, while broadly agnostic about nationality, also aims to ensure representation. As previously mentioned, members of the Appellate Body ‘shall be broadly representative’ of WTO membership.<sup>67</sup> Finally, while global courts encourage broad geographical representation, by necessity, regional courts encourage *regional* representation. For instance, this is the case of the AfCtHPR Protocol,<sup>68</sup> which cares for ‘representation of the main regions of Africa and of their principal legal traditions.’<sup>69</sup>

In contrast with the above international courts, the ECtHR is a full representation court. All member states are represented.<sup>70</sup> The ECtHR’s Rules of Court provide for geographical representation of sections (a section is a ‘Chamber set up by the set up by the plenary Court for a fixed period in pursuance of Article 25(b) of the [ECHR]’).<sup>71</sup> Every judge has to be member of a section.<sup>72</sup> Accordingly, ‘[t]he composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties’.<sup>73</sup> Some provision for geographical balance is also made in relation to the Grand Chamber.<sup>74</sup>

This section has briefly surveyed the formulations in use that assure each a slightly different type of representation. Representation of ‘the principal legal systems of the world’ is a popular choice for court statutes typically found in combination with representation of ‘the main forms of civilization’ (in older statutes) or ‘equitable geographical distribution’. But while representation of ‘the main forms of civilization’ appears an improbable candidate for court statutes going forward, and representation of ‘the principal legal systems of the world’ is more plausible as an alternative, neither is inevitable. ‘Broad’, ‘equitable’, ‘fair’ geographical representation and equivalent formulations might be preferable as standalone options. The

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<sup>64</sup> Article 2 of the Statute of ITLOS; Article 36(1) of the Rome Statute of the ICC.

<sup>65</sup> Cf. Mackenzie et al. (n 7) 166.

<sup>66</sup> Malcolm N. Shaw, *Rosenne’s Law and Practice of the International Court: 1920-2015* (Brill online, Vol. I, 2017), Chapter 6, para. 88; Kolb (n 39) 114.

<sup>67</sup> Article 17(3) of the DSU.

<sup>68</sup> According to Article 11(1) of the AfCtHPR Protocol, discussed elsewhere in the present, the judges must be nationals of member states of the OAU.

<sup>69</sup> Article 14(2) of the AfCtHPR Protocol.

<sup>70</sup> Article 22 of the ECHR.

<sup>71</sup> Rule 1(d) of the ECtHR’s Rules of Court.

<sup>72</sup> Rule 25(2) of the ECtHR’s Rules of Court.

<sup>73</sup> Rule 25(2) of the ECtHR’s Rules of Court.

<sup>74</sup> Rule 24(2)(e) of the ECtHR’s Rules of Court (‘The judges and substitute judges who are to complete the Grand Chamber in each case referred to it shall be designated from among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar. The modalities for the drawing of lots shall be laid down by the Plenary Court, having due regard to the need for a geographically balanced composition reflecting the different legal systems among the Contracting Parties’).

paper will return to these formulations when discussing policy options for the multilateral investment court.

*c. Permanent representation of some members*

While the statutes of international courts aim to ensure representation indiscriminately, in reality in some settings some members have achieved what may be termed ‘permanent’, ‘guaranteed’ or ‘privileged’ representation. Accordingly, in certain courts there seem to be tacit conventions according to which some states are guaranteed to always have a judge of their nationality on the bench. The most conspicuous example of this is the ICJ. Although the Statute of the ICJ provides that judges shall be elected without reference to their nationality,<sup>75</sup> there is an informal understanding according to which the permanent members of the UN Security Council are guaranteed to have a judge of their nationality on the bench, if they put forward a candidate.<sup>76</sup> This arrangement goes back to the Permanent Court of International Justice (PCIJ) and the debate that preceded that Court’s creation in the Advisory Committee of Jurists in 1920.<sup>77</sup> While the then Great Powers insisted on having a permanent seat on the Court,<sup>78</sup> other states predictably opposed this position. The deadlock was broken by means of a procedural tweak that essentially assured the permanent representation of the Great Powers without putting it in so many words: the system of the double election by the Council and the Assembly.<sup>79</sup> This double election would assure the protection of the interests of the Great Powers through the Council where they were dominant, while the interests of the other states would be protected through the Assembly, where they were in the majority.<sup>80</sup> This system was inherited by the current ICJ.

Exceptionally, in 2017, the United Kingdom ‘lost’ its judge.<sup>81</sup> After an initial deadlock, during which neither of the two remaining candidates (Judges Christopher Greenwood from the United Kingdom and Dalveer Bhandari from India) obtained an absolute majority in both the General Assembly and the Security Council, Judge Greenwood withdrew his candidacy.<sup>82</sup> Whatever the particular reasons that led to the withdrawal of the UK candidate,<sup>83</sup> this development has created a precedent that could be repeated in the future.

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<sup>75</sup> Article 2 of the Statute of the ICJ.

<sup>76</sup> Shaw (n 66) Chapter 6, para. 77, also para. 88, footnote 2; *Abi-Saab* (n 18) 173; *Kolb* (n 39) 114.

<sup>77</sup> PCIJ, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee 16 June-24 July 1920 with Annexes* (Van Langenhuyzen 1920), 105ff and *passim*.

<sup>78</sup> See in particular arguments advanced by Adatci and Phillimore in PCIJ (n 77) 105, 118.

<sup>79</sup> *Abi-Saab* (n 18) 174 (‘The problem was solved, not by a formal requirement that great powers be permanently represented on the Court, thus offending frontally and explicitly the principle of equality of States, but via a procedural device which ensures this result without elevating it to the status of principle’).

<sup>80</sup> Elihu Root in PCIJ (n 77) 109, also 108.

<sup>81</sup> ICJ, ‘United Nations General Assembly and Security Council Re-elect Judge Dalveer Bhandari as a Member of the Court’, Press Release No. 2017/36 (21 November 2017) <https://www.icj-cij.org/files/press-releases/0/000-20171121-PRE-01-00-EN.pdf>. See also Owen Bowcott, ‘No British judge on world court for first time in its 71-year history’, *The Guardian* (20 November 2017), <https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history>.

<sup>82</sup> ICJ (n 81).

<sup>83</sup> Bowcott (n 81). See also Fassbender (n 43) 366-367.

Similarly, in the case of the WTO, the EU and the US have always been represented on the AB, although such permanent representation is not in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).<sup>84</sup> China, which became a WTO member in December 2001,<sup>85</sup> has also been continuously represented on the AB since 2008.<sup>86</sup> Japan has also been represented for a long time.<sup>87</sup> Other states with long but not continuous representation are India<sup>88</sup> and Egypt,<sup>89</sup> followed by the Philippines,<sup>90</sup> and Australia and New Zealand combined.<sup>91</sup> It is of interest to note a proposal of the European Commission geared towards breaking the current deadlock at the WTO, according to which increasing the number of AB members from seven to nine could improve ‘the geographical balance on the Appellate Body after the accession of important Members since 1995’.<sup>92</sup> The age-old dilemma of how to strike the balance between, on the one hand, representativeness and legitimacy and, on the other, speed and effectiveness of a court is relevant to such considerations.<sup>93</sup>

Finally, similar informal conventions seemed to play a role in the election of ICTY judges.<sup>94</sup> Practices such as these emerge as a result of power politics and informal understandings.<sup>95</sup> Yet ‘privileged’ representation can only be assured for so long as a particular matrix of political power lasts. The fact that one UN Security Council Member has lost its judge on the ICJ is evidence of this.

#### *d. Representation and qualifications*

A final consideration is necessary before concluding this section. Geographical representation as a selection criterion in addition to qualifications may result in allowing individuals who are less qualified to accede to international judicial institutions. Ensuring that appropriately qualified judges serve on an international court may be in tension with geographical representation as an absolute value. While it is true that if the only criterion for election or

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<sup>84</sup> For the EU: Claus-Dieter Ehlermann (Germany, 1995-2001), Giorgio Sacerdoti (Italy, 2001-2009), and Peter Van den Bossche (Belgium, 2009-2017). For the US: James Bacchus (1995-2003), Merit E. Janow (2003-2007), Jennifer Hillman (2007-2011), and Thomas R. Graham (2011-2019).

<sup>85</sup> See list of ‘Members and Observers’ on the WTO website: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>86</sup> Yuejiao Zhang (2008-2016), Hong Zhao (2016-2020).

<sup>87</sup> Mitsuo Matsushita (1995-2000), Yasuhei Taniguchi (2000-2007), and Shotaro Oshima (2008-2012).

<sup>88</sup> Arumugamangalam Venkatachalam Ganesan (2000 -2008) and Ujal Singh Bhatia (2011-2019).

<sup>89</sup> Said El-Naggar (1995-2000) and Georges Michel Abi-Saab (2000-2008).

<sup>90</sup> Florentino Feliciano (1995-2001) and Lilia R Bautista (2007-2011).

<sup>91</sup> Australia with John Lockhart (2001-2006) and New Zealand with Christopher Beeby (1995-2000).

<sup>92</sup> European Commission, Concept paper on ‘WTO modernization – Future EU proposals on rulemaking’ (29 June 2018) [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf). The Concept paper is intended to serve as a basis for discussions with the European Parliament, the Council and other WTO members, but it is ‘without prejudice to the final position of the European Commission on the matters described within’.

<sup>93</sup> Kolb (n 39) 115.

<sup>94</sup> Allison Danner and Erik Voeten, ‘Who Is Running the International Criminal Justice System?’ in Deborah D. Avants, Irvine, Martha Finnemore, and Susan K. Sell (eds), *Who Governs the Globe?* (Cambridge University Press 2010) 35, 48-49.

<sup>95</sup> Ruth Mackenzie, ‘The Selection of International Judges’, in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 737, 745.

appointment were the judges' personal qualifications, some 'legal systems', in light of their 'high level of development of international law' might come to dominate some international courts,<sup>96</sup> it is equally true that requirements for geographical representation may jar with the need to ensure the election or appointment of 'independent judges based on merit'.<sup>97</sup> A careful reading of various court statutes reveals that the qualifications and requirements for representation are cumulative. For instance, the relevant provisions in the Statute of the ICJ do not suggest representation *in the absence* of qualifications.<sup>98</sup> On the contrary, a well-functioning court depends on the competence of its decisionmakers possibly more than it does on them coming from different national legal cultures.<sup>99</sup> But an international court draws its legitimacy from both representation and the qualities and qualifications of its judges. The nagging question of how to maintain qualifications while ensuring representation leaves us in a quandary that is outside the scope of the present to resolve, but the concern must be acknowledged that political considerations should not impede the selection of individuals with the high professional qualifications required.<sup>100</sup> The concern also relates to the political process of the selection of candidates starting within their legal systems. Transparency in the selection process and public calls for expressions of interest are necessary together with safeguards (such as a supervising institution) to prevent blanket rubber-stamping of candidates who lack the appropriate personal qualities and professional qualifications.

### 3. No two judges of the same nationality

It is a widespread rule that a court shall not include in its ranks two judges of the same nationality. The Statute of the ICJ,<sup>101</sup> the Statute of ITLOS,<sup>102</sup> the Rome Statute of the ICC,<sup>103</sup> the American Convention on Human Rights,<sup>104</sup> the Statute of the Inter-American Court of Human Rights,<sup>105</sup> and the AfCtHPR Protocol<sup>106</sup> all prevent co-nationals from sitting on the bench. Similar provision is made in the Statute of the ILC.<sup>107</sup> The rule has been interpreted to apply only to permanent judges but not to judges ad hoc; as a result, a number of co-nationals (permanent judge and judge ad hoc) have sat on the bench simultaneously.<sup>108</sup> In addition, on

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<sup>96</sup> Lachs (n 2) 50, discussing the ICJ.

<sup>97</sup> Mackenzie (n 95) 742.

<sup>98</sup> See Articles 2 and 9 of the Statute of the ICJ. In particular, notice the language in Article 9: 'the electors shall bear in mind *not only that the persons to be elected should individually possess the qualifications required, but also* that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured', emphasis added.

<sup>99</sup> Fassbender (n 43) 373-374.

<sup>100</sup> Gill (n 39) 48-49.

<sup>101</sup> Article 3 of the Statute of the ICJ.

<sup>102</sup> Article 3 of the Statute of ITLOS.

<sup>103</sup> Article 36(7) of the Rome Statute of the ICC.

<sup>104</sup> Article 52 of the ACHR.

<sup>105</sup> Article 4 of the IACtHR Statute.

<sup>106</sup> Article 11(2) of the AfCtHPR Protocol.

<sup>107</sup> Article 2(2) of the ILC Statute. The latter goes so far as to provide for how to resolve the issue in a situation where more than one national of the same state obtain a sufficient number of votes for election: 'the one who obtains the greatest number of votes shall be elected, and, if the votes are equally divided, the elder or eldest candidate shall be elected', Article 9(2) of the ILC Statute.

<sup>108</sup> E.g. in *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1985, p. 192, French Judge ad

occasion the two judges ad hoc selected by states other than the state of their nationality have held the same nationality together with an elected judge, resulting in three co-nationals on the bench.<sup>109</sup>

However, the rule is not universal. It used to be that no two judges of the same nationality could sit on the ECtHR,<sup>110</sup> but the provision was removed with the entry-into-force of Protocol 11 in 1998. The new provision states that the Court ‘shall consist of a number of judges equal to that of the High Contracting Parties’.<sup>111</sup> These judges are elected with respect to each party from a list of three candidates nominated by that party.<sup>112</sup> This leads to the assumption that ‘[i]n principle, there should be no more than two judges of the same nationality on the Court’,<sup>113</sup> although a state could put forward a candidate who is a national of another member state thus leading to two judges of the latter’s nationality.

Consequently, a small number of co-nationals have served as judges simultaneously on the ECtHR: this is the case of three Swiss nationals nominated by Liechtenstein who served in parallel with three Swiss nationals nominated by Switzerland;<sup>114</sup> and the case of two Italian judges who served in parallel nominated respectively by Italy and San Marino.<sup>115</sup> Such appointments are not unique to the ECtHR. Liechtenstein has also appointed at least one Swiss

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hoc Suzanne Bastid selected by Tunisia sat with elected French Judge Guy Ladreit de Lacharrière; in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, French Judge ad hoc Claude-Albert Colliard sat with elected French Judge Guy Ladreit de Lacharrière; in *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 102, French Judge ad hoc Jean-Yves de Cara sat with elected French Judge Gilbert Guillaume, see also n 306; in *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, ICJ Reports 2005, p. 6, British Judge ad hoc Franklin Berman sat with elected British Judge Rosalyn Higgins; in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, French Judge ad hoc Gilbert Guillaume sat with elected French Judge Ronny Abraham (President); in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 3, US Judge ad hoc David Caron sat with elected US Judge Joan E. Donoghue; in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, p. 3, French Judge ad hoc Gilbert Guillaume sat with elected French Judge Ronny Abraham (President).

<sup>109</sup> E.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* where both judges ad hoc were French (Yves Daudet chosen by Qatar and Jean-Pierre Cot selected by the United Arab Emirates) and sat with elected French Judge Ronny Abraham; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* where both judges ad hoc were yet again French (Gilbert Guillaume chosen by Cambodia and Jean-Pierre Cot selected by Thailand) and sat with elected French Judge Ronny Abraham.

<sup>110</sup> Ex-Article 38 of the ECHR.

<sup>111</sup> Article 20 of the ECHR.

<sup>112</sup> Article 22 of the ECHR.

<sup>113</sup> Council of Europe (n 36), para. 59.

<sup>114</sup> These are respectively Lucius Cafilisch (1998-2006), Mark Villiger (2006-2015) and Carlo Ranzoni (2015-), elected in respect of Liechtenstein and Luzius Wildhaber (1991-2006), Giorgio Malinverni (2007-2011) and Helen Keller (2011-), elected in respect of Switzerland. See ECtHR, ‘Judges of the Court since 1959’, [https://www.echr.coe.int/Documents/List\\_judges\\_since\\_1959\\_BIL.pdf](https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf) (accessed 2 January 2020).

<sup>115</sup> There are Luigi Ferrari Bravo, elected in respect of San Marino, and Benedetto Conforti, elected in respect of Italy. Both served between 1998 and 2001. See ECtHR, ‘Judges of the Court since 1959’, [https://www.echr.coe.int/Documents/List\\_judges\\_since\\_1959\\_BIL.pdf](https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf) (accessed 2 January 2020).

national to serve on the EFTA Court.<sup>116</sup> But this approach has also been used in courts whose statutes do not allow adjudicators of the same nationality to serve in parallel. Panama, for instance, nominated in 2002 Elizabeth Odio Benito, a Costa Rican national and former minister in her home state, to serve on the ICC.<sup>117</sup> In such situations, an issue can arise when one state nominates the national of another state, potentially preventing the latter from nominating a candidate of its own nationality. The examples discussed here either concern microstates or relatively small states, which leads to a reasonable assumption that the pool of qualified individuals available to serve on international courts may be limited within the confines of some states.

## **II. Nationality and Representation in Particular Chambers or Divisions: National judges and Judges ad Hoc**

Having examined provisions concerning nationality and representation in the overall composition of a court, this part now turns to nationality and representation in the constitution of particular chambers or divisions of a court. Part II is interested in particular in the presence of national judges in chambers deciding a dispute that involves the state (or a party) of their nationality, and in judges ad hoc. Provisions on national judges and judges ad hoc are closely entwined: the institution of judges ad hoc exists because national judges can sit in cases involving the state of their nationality. For this reason, the two are considered jointly. The paragraphs that follow commence by critically examining the statutes and practice on the presence of national judges in specific chambers and the institution of judges ad hoc. Next, the paper delves into the debate about the pros and cons of the two, with a focus on the judge ad hoc, and appraises them in light of the relevant experience of international courts. Finally, this part addresses the issue of the nationality of the judge ad hoc. Appendix B provides a comparative table on national judges and judges ad hoc in specific chambers or divisions.

### **1. Court statutes and practice**

International court statutes do not generally prevent judges from sitting in cases involving the state of their nationality or a party of their nationality. When one of the disputing parties does not have a national judge on the bench, some court statutes allow it to choose a judge ad hoc. However, not all international courts tolerate the presence of national judges and judges ad hoc. This is notably the case of some regional human rights courts hearing individual – as opposed to interstate – petitions. It is therefore necessary to distinguish between ‘classic’ international courts focusing on interstate cases and international courts hearing mixed cases, involving an individual applicant and a state. The following paragraphs will focus on the two types of international courts in turn.

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<sup>116</sup> Daniel Terris et al., *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Brandeis University Press 2007) 28.

<sup>117</sup> See ‘Nominations for judges of the International Criminal Court’ [https://legal.un.org/icc/elections/judges/odio\\_benito/odio\\_benito.htm](https://legal.un.org/icc/elections/judges/odio_benito/odio_benito.htm). She was elected and served as judge on the ICC between 2003 and 2012. See ICC, ‘Former Judges’, <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/former-judges.aspx>.

International criminal courts are not considered in the present. The latter tend not to contain provisions on national judges and judges ad hoc.

a. *'Classic' international courts*

This section discusses national judges and judges ad hoc in the statutes and practice of 'classic' international courts, notably in the context interstate disputes. It examines in particular the ICJ, ITLOS, and in the Appellate Body of the WTO.

The Statutes of the ICJ and ITLOS affirm that judges who have the nationality of a disputing party retain their right to sit in the case.<sup>118</sup> The rule is qualified by some exceptions, such as at the ICJ that in the event that the President of the Court is a national of one of the disputing parties he must relinquish his presidential functions in respect of the given case.<sup>119</sup> National judges can also be present in divisions of three established to decide appeals as part of the WTO Appellate Body. According to the *WTO Working Procedures for Appellate Review*, '[t]he Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve *regardless of their national origin*.'<sup>120</sup> As a consequence, the fact that a member of the Appellate Body is a national of a disputing party is not a problem and not infrequently divisions have included the national judge of a disputing party.<sup>121</sup>

Since judges are allowed to sit in cases involving the state of their nationality, if one of the disputing states has its national judge on the bench but the other disputing state does not, some statutes allow the latter to choose its own judge. This is a natural consequence of the principle of the equality of states under public international law as enshrined in the Charter of the United Nations,<sup>122</sup> but also of the need to respect the principle of equality of arms. Concretely, the Statute of the ICJ provides that if the Court includes on the bench a judge who has the nationality of one of the disputing parties, 'any other party may choose a person to sit as

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<sup>118</sup> Article 31(1) of the Statute of the ICJ; Article 17(1) of the Statute of ITLOS.

<sup>119</sup> Article 32 of the Statute of the ICJ. Similar provision is made for the Vice-President or senior judge when called to act as President, *ibid*.

<sup>120</sup> Rule 6 of the *WTO Working Procedures for Appellate Review*, emphasis added. Contrast this with the rules concerning the composition of panels (Article 8(3) of the DSU: 'Citizens of Members whose governments are parties to the dispute or third parties [...] shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise'; Article 8(10) of the DSU: 'When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member').

<sup>121</sup> E.g. Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (adopted 7 September 2016) (Thomas R. Graham – United States); Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted 18 May 2011) (Peter Van den Bossche – Belgium/EU).

<sup>122</sup> E.g. Article 1(2) of the UN Charter, identifying one of the purposes of the UN as the development of 'friendly relations among nations based on respect for the *principle of equal rights*', emphasis added; Article 2(1) of the UN Charter ('The Organization is based on the principle of the sovereign equality of all its Members. '); Article 55 of the UN Charter, which refers to stability and well-being as conditions 'necessary for peaceful and friendly relations among nations based on respect for the *principle of equal rights* and self-determination of peoples', emphasis added.

judge'.<sup>123</sup> The judge so chosen should be preferably a person among those who had been nominated as candidates.<sup>124</sup> But the Statute goes further to state that if the Court does not include on the bench a judge of the nationality of the parties, each party may choose a person to sit as judge, in accordance with the preceding provision.<sup>125</sup> In short, if one party does not have its national judge on the bench, it can choose a judge ad hoc, independently of whether the other party has a national judge or chooses a judge ad hoc. Given that the ICJ is a selective representation court that consists of 15 permanent judges,<sup>126</sup> often neither disputing party has its national judge on the Court and appointments of judges ad hoc concern both disputing parties, that is, they fall under the latter provision.<sup>127</sup>

The possibility of choosing a judge ad hoc exists irrespectively of the reason why a party does not have a national judge in the particular chamber or division: if the state has a national judge but at some stage he or she becomes unable to sit, the state concerned becomes entitled to choose a judge ad hoc.<sup>128</sup> If the national judge later becomes available to sit, he or she will resume his or her place on the bench.<sup>129</sup>

When a disputing party chooses a judge ad hoc, it is not limited to selecting among its nationals. The Rules of Court of the ICJ make this explicit: 'The judge *ad hoc* does not need to be of the nationality of the party that chooses him.'<sup>130</sup> If two or more states have the 'same interest'<sup>131</sup> in a dispute and none of them has a national judge on the bench, the Rules of Court make provision for the joint appointment of a judge ad hoc.<sup>132</sup> The provisions on judges ad hoc apply to both contentious and advisory proceedings before the Court (in the latter case so long as the proceedings concern 'a legal question actually pending between two or more States').<sup>133</sup> Between August 2018 and July 2019, judges ad hoc were chosen at the ICJ in 27 instances.<sup>134</sup>

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<sup>123</sup> Article 31(2) of the Statute of the ICJ.

<sup>124</sup> Article 31(2) of the Statute of the ICJ.

<sup>125</sup> Article 31(3) of the Statute of the ICJ.

<sup>126</sup> Article 3 of the Statute of the ICJ.

<sup>127</sup> The contrary should happen in full representation courts, such as the ECtHR, since all member states have 'their' judge on the Court.

<sup>128</sup> Article 37(1) of the ICJ's Rules of Court.

<sup>129</sup> The only condition is that the national judge in that case must become available no later than 'the closure of the written proceedings in that phase of the case', see Article 37(3) of the ICJ's Rules of Court.

<sup>130</sup> Article 35(1) of the ICJ's Rules of Court.

<sup>131</sup> In case of doubt, whether the parties are 'in the same interest' is decided by a decision of the Court, Article 31(5) of the Statute of the ICJ. For a discussion of the 'same interest', see Kolb (n 39) 128; Pieter Hendrik Kooijmans, 'Article 31' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012) 530, 536-539; Quintana (n 26) 210-212; Bruno Simma and Jan Ortgies, 'Ad Hoc Judge', Max Planck Encyclopedia of International Procedural Law (January 2019), paras 18ff.

<sup>132</sup> Article 36(1) of the ICJ's Rules of Court.

<sup>133</sup> Article 102(3) of the ICJ's Rules of Court in conjunction with Article 68 of the Statute of the ICJ. For a discussion, see Kooijmans (n 131) 539-540; Kolb (n 39) 125-126; Rosalyn Higgins et al., *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 1150-1157.

<sup>134</sup> This corresponds to 14 individuals, some of whom served in more than one case, see 'Report of the International Court of Justice, 1 August 2018-31 July 2019', General Assembly, Seventy-fourth Session, Supplement No. 4 (United Nations 2019) 17.

The impact of a judge ad hoc depends among others on the total number of judges forming the particular chamber. Judges ad hoc tend to be supernumerary to the regular judges.<sup>135</sup> Typically at the ICJ, judges ad hoc will be one or two judges added to the Court consisting of between nine<sup>136</sup> and fifteen<sup>137</sup> judges. In this scenario, the impact of the judge ad hoc is limited, since he or she is outnumbered by far by the regular judges. But judges ad hoc are also allowed in cases dealt with by a special chamber<sup>138</sup> or the Chamber of Summary Procedure,<sup>139</sup> in which case the weight of judges ad hoc resembles more the weight of party-appointed arbitrators. This is especially so in view of the fact that, in this context, national judges and judges ad hoc replace regular judges of the chamber in question, that is they are not supernumerary to them.<sup>140</sup>

In 2002, the ICJ adopted Practice Directions that make some provision in relation to judges ad hoc.<sup>141</sup> Accordingly, the Court encourages parties, when selecting a judge ad hoc, to ‘refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court.’<sup>142</sup> In addition, ‘parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court.’<sup>143</sup>

Provisions on judges ad hoc, similar or quasi-identical to those of the Statute of the ICJ, figure in the Statute of ITLOS and the ITLOS Rules of the Tribunal,<sup>144</sup> that appear to have been

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<sup>135</sup> E.g. Article 31(3) of the Statute of the ICJ. Exceptions exist, e.g. Article 31(4) of the Statute of the ICJ; also, outside the ICJ, Rule 53(3) of the ECtHR’s Rules of Court.

<sup>136</sup> Nine being a quorum, Article 25(3) of the Statute of the ICJ.

<sup>137</sup> The full Court being made up of 15 judges, Article 3(1) of the Statute of the ICJ.

<sup>138</sup> Article 26(1) and (2) of the Statute of the ICJ. See also Articles 17(2) and 91(2) of the ICJ’s Rules of Court. Chambers constituted according to Article 26 are composed of ‘three or more judges as the Court may determine, for dealing with particular categories of cases’ or ‘for dealing with a particular case’ in which case the number of judges constituting the chamber will be determined by the ICJ with the parties’ approval.

<sup>139</sup> Article 29 of the Statute of the ICJ. See also Article 91(2) of the ICJ’s Rules of Court. The Chamber of Summary Procedure is composed of five judges. Two additional judges are selected ‘for the purpose of replacing judges who find it impossible to sit’.

<sup>140</sup> See Article 31(4) of the Statute of the ICJ (‘In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber *to give place* to the members of the Court of the nationality of the parties concerned, and, failing such, of if they are unable to be present, to the judges specially chosen by the parties’, emphasis added). Contrast this with Article 36 of the Statute of ITLOS on ad hoc chambers. However, the constitution of ad hoc chambers resembles the constitution of arbitral tribunals. E.g. see Rao and Gautier (n 57) 66 (‘In the *ad hoc* chamber system, the parties can enjoy all the benefits of ordinary arbitration, without having to bear the expenses of the chamber’); Kolb (n 39) 126-127; Kooijmans (n 131) 532. At least two authors have commented on the peculiar situation where a state with a legal interest in a case is allowed to intervene under Article 62 of the Statute of the ICJ, and, considering that it is not ‘in the same interest’ with another disputing party, it is allowed to choose a judge ad hoc; in that case, the chamber will consist of three regular judges and three judges ad hoc – or if there is more than one intervening state, each with a judge ad hoc, the judges ad hoc will constitute the majority, thus resembling even more arbitration. See Kolb, *ibid* 127; Kooijmans, *ibid* 541.

<sup>141</sup> See <https://www.icj-cij.org/en/practice-directions>.

<sup>142</sup> ICJ Practice Direction VII.

<sup>143</sup> ICJ Practice Direction VIII.

<sup>144</sup> Article 17(2)-(3) and (5) of the Statute of ITLOS and Articles 19-21 of the ITLOS Rules of the Tribunal.

modelled on the ICJ Statute.<sup>145</sup> Moreover, ITLOS includes some unique provisions on judges ad hoc. In particular, ITLOS is exceptional in allowing non-state entities to choose judges ad hoc.<sup>146</sup> Article 305 of the United Nations Convention on the Law of the Sea (UNCLOS) establishes that international organisations can be party to the Convention, in accordance with Annex IX.<sup>147</sup> Notably, the European Union is party to UNCLOS.<sup>148</sup> Moreover, not only states but other actors, such as international organisations, natural and legal persons, including state enterprises, can be party to disputes before the Tribunal and the Seabed Disputes Chamber.<sup>149</sup>

Accordingly, the ITLOS Rules of the Tribunal allow an ‘entity other than a State’ to choose a judge ad hoc under two conditions: first, ‘one of the other parties is a State Party and there is upon the bench a judge of its nationality or, where such party is an international organization, there is upon the bench a judge of the nationality of one of its member States or the State Party has itself chosen a judge ad hoc’; and, second, if ‘there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties’.<sup>150</sup> If there is already on the bench a judge of the nationality of one of the member states of the international organisation, or a judge of the nationality of the sponsoring state of a natural or juridical person or state enterprise, the international organisation or a natural or legal person or a state enterprise respectively is not entitled to choose a judge ad hoc.<sup>151</sup> When an international organisation is a disputing party and there is on the bench a judge of the nationality of a member state of the international organisation, the other disputing party may choose a judge ad hoc.<sup>152</sup> When an international organisation, or a natural or juridical person or state enterprise, is party to a dispute, if two or more judges on the bench are nationals respectively of member states of the international organisation, or of the sponsoring states of a party, the President, after consulting with the parties, may request one or more such judges to withdraw from the bench.<sup>153</sup> It must be stressed that these provisions affect only the composition of particular chambers convened to hear a dispute, but not the overall composition of the Tribunal, and only to the extent that an international organisation, or a natural or juridical person, including a state enterprise, is one of the disputing parties. In particular with respect to international organisations, to the extent that an international organisation is not a federal state, such provisions could not apply under any circumstances when an individual member state of an international organisation is party to a dispute. ITLOS considered the above rules when deciding on the composition of a special chamber in a dispute involving the European Union in 2000.<sup>154</sup>

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<sup>145</sup> Rao and Gautier (n 57) 25.

<sup>146</sup> Article 22 of the ITLOS Rules of the Tribunal.

<sup>147</sup> Article 305(1)(f) of UNCLOS.

<sup>148</sup> EU, Council Decision ‘concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof’, 23 March 1998, 98/392/EC, OJ L 179, 23 June 1998. On the EU and UNCLOS, see Esa Paasivirta, ‘The European Union and the United Nations Convention on the Law of the Sea’ (2015) 38 (4) *Fordham International Law Journal* 1045.

<sup>149</sup> Article 20(2) of the Statute of ITLOS; Article 187 of UNCLOS.

<sup>150</sup> Article 22(1) of the ITLOS Rules of the Tribunal.

<sup>151</sup> Article 22(2) of the ITLOS Rules of the Tribunal.

<sup>152</sup> Article 22(3) of the ITLOS Rules of the Tribunal.

<sup>153</sup> Article 22(4) of the ITLOS Rules of the Tribunal.

<sup>154</sup> *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, Order of 20 December 2000, ITLOS Reports 2000, p. 148.

In ITLOS, the institution of judges ad hoc does not only apply when the Tribunal sits as full court of 21 elected members, but it also applies to: the Seabed Disputes Chamber<sup>155</sup> – but not to an ad hoc chamber formed by the Seabed Disputes Chamber under Article 36 of the Statute of ITLOS –;<sup>156</sup> to special chambers composed of three or more elected members to deal with particular categories of disputes;<sup>157</sup> to special chambers established to deal with a particular dispute whose composition is determined by the Tribunal with the approval of the parties;<sup>158</sup> and to the Chamber of Summary Procedure composed of five elected members.<sup>159</sup>

In contrast to the ICJ and ITLOS, there is no provision for judges ad hoc in relation to the Appellate Body of the WTO.

### *b. Human rights courts*

The procedural rules of human rights courts also provide for national judges and judges ad hoc, although the latter institution is not identical to the one just discussed. The particular nature of human rights adjudication means that their role and function in that context can be different. First, a distinction needs to be drawn between individual cases, that is disputes involving applications lodged by individuals (whether directly<sup>160</sup> or indirectly<sup>161</sup>) and interstate disputes. Both the European Convention on Human Rights<sup>162</sup> and the American Convention on Human Rights<sup>163</sup> provide for interstate dispute settlement, and 24 interstate cases have been brought before the European Court of Human Rights since 1956.<sup>164</sup> No interstate cases appear to be reported under the system of the Inter-American Court of Human Rights.<sup>165</sup> The majority of human rights cases concern individual applications. Depending on the court, the rules on national judges and judges ad hoc vary according to whether the disputing parties are states or a state and a private entity. Second, in individual human rights cases, alleged victims often have the nationality of the respondent state, so the state's national judge may also be the alleged victim's national judge (although the judge will have been elected in respect of the *state*). The judge ad hoc remains the judge of the party who selects him or her. Under current rules, to the

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<sup>155</sup> Article 14 of the Statute of ITLOS, in conjunction with Article 17(4), *ibid.*

<sup>156</sup> Article 36(3) of the Statute of ITLOS provides that 'Members of the *ad hoc* chamber must not be in the service of, or nationals of, any of the parties to the dispute.' It has been observed that this provision seems to go against the logic that underlies the institution of judges ad hoc in Article 17 of the Statute of ITLOS, see José Luis Jesus, 'Judges ad hoc in the International Tribunal for the Law of the Sea', in Holger P. Hestermeyer et al. (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff 2011) 1661, 1670.

<sup>157</sup> Article 15(1) of the Statute of ITLOS, in conjunction with Article 17(4), *ibid.*

<sup>158</sup> Article 15(2) of the Statute of ITLOS, in conjunction with Article 17(4), *ibid.*

<sup>159</sup> Article 15(3) of the Statute of ITLOS, in conjunction with Article 17(4), *ibid.*

<sup>160</sup> E.g. before the ECtHR, see Article 34 of the ECHR.

<sup>161</sup> E.g. before the IACtHR, see Article 61 of the ACHR; Article 5 of the AfCtHPR Protocol.

<sup>162</sup> Article 33 of the ECHR.

<sup>163</sup> Article 45 of the ACHR.

<sup>164</sup> See 'Inter-State Applications' (11 September 2019) [https://www.echr.coe.int/Documents/InterState\\_applications\\_ENG.pdf](https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf).

<sup>165</sup> See the official website of the IACtHR <http://www.corteidh.or.cr>.

extent that the institution of judges ad hoc is allowed only the state has the right to appoint a judge ad hoc and not the individual applicant.<sup>166</sup>

The following paragraphs focus in turn on two human rights courts, the European Court of Human Rights and the Inter-American Court of Human Rights, that resolve the issue of national judges and judges ad hoc in a different manner. Some references are made in passing to the African Court on Human and Peoples' Rights and human rights committees.

i. The European Court of Human Rights

The ECtHR is different from other courts examined in this paper, including the IACtHR, in that it ensures full representation: all contracting parties have their judge on the court. The ECHR provides that '[t]here shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned'.<sup>167</sup> The Chamber and the Grand Chamber comprise respectively seven and seventeen judges.<sup>168</sup> In the case of committees of three-judges,<sup>169</sup> if the judge elected in respect of the disputing state party is not a member of the committee, the committee may, by a unanimous vote, 'invite that judge to take the place of one of its members'.<sup>170</sup> Exceptionally, a judge elected in respect of a state is not allowed to hear a case involving that state if sitting in a *single* judge formation.<sup>171</sup> The same exclusion applies to a judge of the nationality of a disputing state party, if the judge is elected in respect of a state other than the state of his or her nationality.<sup>172</sup> By the same token, judges may not preside if the contracting party of which they are nationals or in respect of which they are elected is party to the dispute.<sup>173</sup>

If the permanent judge elected in respect of a party is unable to sit, then the institution of the 'ad hoc judge'<sup>174</sup> kicks in.<sup>175</sup> Properly speaking, this is not the traditional institution of the judge ad hoc, although the term 'ad hoc' is retained in the present discussion because the Rules of Court (but not the ECHR) employ the term.<sup>176</sup> Prior to the entry-into-force of Protocol 14, the ECtHR had an institution of judges ad hoc similar to the one that other 'classic' international law courts have.<sup>177</sup> The institution became the object of nagging criticism: it was described as

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<sup>166</sup> E.g. Article 26(4) of the ECHR. Cf. Article 55(2)-(3) of the ACHR, which however is applicable only in relation to interstate cases.

<sup>167</sup> Article 26(4) of the ECHR.

<sup>168</sup> Article 26(1) of the ECHR.

<sup>169</sup> Article 26(1) of the ECHR.

<sup>170</sup> Article 28(3) of the ECHR; Rule 53(3) of the ECtHR's Rules of Court.

<sup>171</sup> Article 26(3) of the ECHR provides that '[w]hen sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.'

<sup>172</sup> Rule 27A of the ECtHR's Rules of Court.

<sup>173</sup> Rule 13 of the ECtHR's Rules of Court. The same rule applies to judges ad hoc, *ibid*.

<sup>174</sup> Rule 1 of the ECtHR's Rules of Court.

<sup>175</sup> Article 26 of the ECHR.

<sup>176</sup> Rule 1 of the ECtHR's Rules of Court ('the expression "ad hoc judge" means any person chosen in pursuance of Article 26 § 4 of the Convention and in accordance with Rule 29 to sit as a member of the Grand Chamber or as a member of a Chamber'). See also Rule 29, *ibid*. Compare with Article 26 of the ECHR which does not use the term 'ad hoc'.

<sup>177</sup> Former Article 27(2) of the ECHR. See also Council of Europe, 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the

troubling in terms of the ad hoc judges' independence and impartiality and considered to leave the procedure bereft of democratic legitimacy,<sup>178</sup> in addition, it resulted in delays owing to the appointment procedure and the fact that judges ad hoc had often other parallel commitments that competed for their time.<sup>179</sup>

Provisions on judges ad hoc changed with Protocol 14. The judges are no longer chosen by the disputing state party when the dispute arises, but by the President of the Court from a list submitted in advance by the disputing state party.<sup>180</sup> The procedure is the following: if there is no judge to sit as an ex officio member of the Chamber and the Grand Chamber in respect of the disputing state party, the President of the Court chooses a person to sit in the capacity of judge from the reserve list submitted in advance by the party.<sup>181</sup> The list must contain the names of three to five persons designated by the submitting state as eligible to serve as judges ad hoc for a renewable period of four years.<sup>182</sup> Still, the mechanism ensures that the state party concerned shall have 'its own' judge sit on the Chamber or the Grand Chamber.

Judges ad hoc are allowed both in interstate<sup>183</sup> and individual applications,<sup>184</sup> including in requests for a revision of a judgment,<sup>185</sup> and in advisory proceedings.<sup>186</sup> However, it does not appear to be possible to choose a judge ad hoc when the dispute is heard by committees of three judges or single judge formations.<sup>187</sup> The ECtHR's Rules of Court further seek to prevent a judge ad hoc from taking part 'in the consideration of any case' if he or she 'engages in any political or administrative activity or any professional activity which is incompatible with his or her independence or impartiality'.<sup>188</sup> Finally, even under the new system, states are discouraged from proposing for the post of regular judges candidates whose election might result in the need to appoint a judge ad hoc.<sup>189</sup> Examples include candidates who may have

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Convention' Council of Europe Treaty Series - No. 194 (13 May 2004) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f>, para. 64.

<sup>178</sup> William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 694; Council of Europe, 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention' Council of Europe Treaty Series - No. 194 (13 May 2004) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f>, para. 64; Parliamentary Assembly of the Council of Europe, 'Ad Hoc Judges at the European Court of Human Rights: An Overview', Committee on Legal Affairs and Human Rights, Rapporteur: Marie-Louise Bemelmans-Videc (19 October 2011), para. 10.

<sup>179</sup> Parliamentary Assembly of the Council of Europe (n 178) para. 10; William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 694.

<sup>180</sup> Article 26(4) of the ECHR. See also Rule 1(i) of the ECtHR's Rules of Court.

<sup>181</sup> Article 26(4) of the ECHR. See also Rule 1(i) of the ECtHR's Rules of Court.

<sup>182</sup> Rule 29(1)(a) of the ECtHR's Rules of Court.

<sup>183</sup> Rule 51(2) of the ECtHR's Rules of Court.

<sup>184</sup> Rule 52(2) of the ECtHR's Rules of Court.

<sup>185</sup> Rule 114(3)(b) of the ECtHR's Rules of Court.

<sup>186</sup> Rule 87 of the ECtHR's Rules of Court.

<sup>187</sup> Article 26(1) of the ECHR.

<sup>188</sup> Rule 28(2)(c) of the ECtHR's Rules of Court.

<sup>189</sup> Parliamentary Assembly of the Council of Europe, 'Procedure for the election of judges to the European Court of Human Rights as of 15 April 2019 – Memorandum prepared by the Secretary General of the Assembly', SG-AS (2019) 05 rev (8 July 2019) 1, 10. See also Parliamentary Assembly of the Council of Europe, Resolution 1646

conflicts of interest, such as when they have been government agents preparing numerous cases before the ECtHR or when they have participated in many judgments or decisions rejecting applicants final domestic appeals.<sup>190</sup>

The ECHR is an exception among human rights courts in that it allows national judges to sit in cases involving individuals when the state of their nationality is the defendant state, and provides for judges ad hoc in individual cases. By contrast, at the IACtHR, whereas national judges and judges ad hoc can sit in interstate cases,<sup>191</sup> they are prevented from doing so in cases involving individuals (see succeeding section).<sup>192</sup> Likewise, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights prevents a judge from hearing a case involving the state of his nationality.<sup>193</sup> There is no provision for judges ad hoc. The conciliation commissions appointed by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination cannot include nationals of the states concerned.<sup>194</sup> Two quasi-judicial organs, the Inter-American Commission of Human Rights and the Committee against Torture, also prevent nationals from hearing cases involving the state of their nationality.<sup>195</sup> The latter further explicitly prevents nationals from being present 'during any non-public consultations or meetings' between the Committee and various institutions and entities.<sup>196</sup>

## ii. The Inter-American Court of Human Rights

The system of the Inter-American Court of Human Rights provides for national judges and judges ad hoc,<sup>197</sup> and like ITLOS the relevant provision, Article 55 of the ACHR, appears to be modelled on the Statute of the ICJ.<sup>198</sup> However, while the Court's docket is focused on individual cases, since Advisory Opinion OC-20/09 of the IACtHR, Article 55 of the ACHR

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(2009) 'Nomination of candidates and election of judges to the European Court of Human Rights', point. 4.5. The latter precedes the entry-into-force of Protocol 14.

<sup>190</sup> Parliamentary Assembly of the Council of Europe, 'Procedure for the election of judges' (n 189), 10.

<sup>191</sup> Article 55(1) of the ACHR and Article 10(1) of the Statute of the IACtHR.

<sup>192</sup> IACtHR, Advisory Opinion OC-20/09 of 29 September 2009 requested by the Republic of Argentina, Article 55 of the American Convention on Human Rights.

<sup>193</sup> Article 22 of the AfCtHPR Protocol. See also Rule 12(2) of the Rules of Court of the AfCtHPR.

<sup>194</sup> Article 42(2) of the International Covenant on Civil and Political Rights; Article 12(2) of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>195</sup> Article 17(2) of the Rules of Procedure of the Inter-American Commission on Human Rights ('Members of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission [...] if they are nationals of the State which is the subject of the Commission's general or specific review, or if they were accredited or carrying out a special mission as diplomatic agents before that State'; Rule 73(1) of the Rules of Procedure of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/3/Rev.6, 1 September 2014) ('A member shall not take part in the consideration of a report by the Committee or its subsidiary bodies if he/she is a national of the State party concerned, is employed by that State, or if any other conflict of interest is present.')

<sup>196</sup> Rule 73(2) of the Rules of Procedure of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/3/Rev.6, 1 September 2014) ('Such a member shall not be present during any non-public consultations or meetings between the Committee and National Human Rights Institutions, non-governmental organizations, or any other entities referred to in rule 63, as well as during the discussion and adoption of the respective concluding observations.')

<sup>197</sup> Article 55 of the ACHR; Article 10 of the Statute of the IACtHR.

<sup>198</sup> Advisory Opinion OC-20/09 (n 192) paras 34ff.

only covers interstate cases; in individual cases neither national judges can be present nor judges ad hoc be appointed.<sup>199</sup> This had not been so clear at the beginning. The impassioned debate that preceded the advisory opinion and the arguments that were articulated in that context supply useful insights into the role of national judges and judges ad hoc in mixed disputes involving private entities alongside a state party. This section examines the particular case of national judges and judges ad hoc at the IACtHR in light of the evolution of the practice and the U-turn that came about with Advisory Opinion OC-20/09.

The ACHR does not provide for national judges and judges ad hoc in individual cases. An interpretation of Article 55 of the ACHR in accordance with the Vienna Convention on the Law of Treaties<sup>200</sup> clearly indicates that the presence of national and ad hoc judges is only admitted in relation to interstate disputes. Article 55 of the ACHR states that if a judge is a national of ‘any of the States Parties to a case’, he shall retain his right to sit in the case.<sup>201</sup> With respect to judges ad hoc, the same provision establishes, first, that if one of the judges called upon to hear a case is a national of ‘one of the States Parties to the case, any other State Party’ may select a judge ad hoc;<sup>202</sup> and, second, that if none of the judges called upon to hear a case is a national of any of the ‘States Parties to the case, each of the latter’ may choose a judge ad hoc.<sup>203</sup> Article 55 of the ACHR refers clearly to disputing state parties, in plural. This language notwithstanding, the practice of the Inter-American Court of Human Rights had been to invite states to select judges ad hoc in cases brought by individuals against states.<sup>204</sup> The individuals concerned had no corresponding right to appoint a judge ad hoc.<sup>205</sup>

This practice of allowing national judges and judges ad hoc outside interstate disputes started with the Court’s very first contentious cases, which were brought against Honduras in 1986.<sup>206</sup> Jorge R. Hernández Alcerro, the Honduran judge, recused himself from hearing the cases, in accordance with the procedure set out in Article 19(2) of the Statute of the IACtHR.<sup>207</sup> On the same day, the President of the Court informed Honduras of ‘its right to appoint a judge ad hoc’, which the state promptly did.<sup>208</sup>

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<sup>199</sup> Advisory Opinion OC-20/09 (n 192) paras 66-67 and 86 and operative part.

<sup>200</sup> Article 31 of the Vienna Convention on the Law of Treaties.

<sup>201</sup> Article 55(1) of the ACHR; Article 10(1) of the Statute of the IACtHR.

<sup>202</sup> Article 55(2) of the ACHR; Article 10(2) of the Statute of the IACtHR.

<sup>203</sup> Article 55(3) of the ACHR; Article 10(3) of the Statute of the IACtHR.

<sup>204</sup> For a discussion, see Advisory Opinion OC-20/09 (n 192).

<sup>205</sup> Cf. n 166 and accompanying text.

<sup>206</sup> These cases were brought to the IACtHR on 24 April 1986, see IACtHR, *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 1; IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 2; IACtHR, *Godínez Cruz v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series D, No. 3.

<sup>207</sup> Article 19(2) of the Statute of the IACtHR provides: ‘If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide.’ For the recusal, see IACtHR, *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 1, para. 4; IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 2, para. 4; IACtHR, *Godínez Cruz v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series D, No. 3, para. 4.

<sup>208</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 1, para. 4; IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series C, No. 2, para. 4; IACtHR, *Godínez Cruz v. Honduras*, Preliminary Objections, Judgment, 26 June 1987, Series D, No. 3, para. 4.

Despite the actual wording of the provision in the ACHR, and in the Statute of the IACtHR, this practice went unchallenged until the *Gómez Paquiyauri Brothers v. Peru* case<sup>209</sup> close to 20 years later.<sup>210</sup> And although some judges had started to recuse themselves from individual cases when they had the nationality of the respondent state,<sup>211</sup> the scope of Article 55 of the ACHR was not clarified until the issue came to a head in 2008, when Argentina requested an advisory opinion (Advisory Opinion OC-20/09), three decades after the Court started to operate.<sup>212</sup>

Argentina's request raised the issue of the interpretation of Article 55 of the ACHR, on the one hand, in relation to the institution of judges ad hoc and equality of arms in individual cases and, on the other, in relation to the nationality of judges and the right to an independent and impartial judge. Concretely, Argentina asked the Court to pronounce on whether the possibility of appointing a judge ad hoc should be limited to interstate cases and whether in individual cases a judge who is a national of the respondent state should disqualify himself from the deliberation and decision in order to ensure an 'impartial and unbiased decision'.<sup>213</sup> With respect to the first question, Argentina acknowledged that while the letter of Article 55 of the ACHR suggests that the institution of judges ad hoc should apply only to interstate cases, the long-standing practice of the Court had been to accept judges ad hoc in individual cases.<sup>214</sup> According to Argentina, rule of law considerations argued in favour of a reconsideration of this traditional interpretation of Article 55, and in particular the fact that the alleged victim did not have the right to choose a judge ad hoc, which affected the parties' equality of arms.<sup>215</sup> With respect to the second question, Argentina stated that 'it would be healthy for the system' for any judge who is a national of the state that is a party to the dispute to 'disqualify himself from taking part in the deliberation and in the decision'.<sup>216</sup>

In conformity with the Rules of Procedure of the Court,<sup>217</sup> the Secretariat had communicated the request to all OAS member states for the submission of written observations and invited various organisations, including academia and civil society, to submit their opinion.<sup>218</sup> The response was tremendous.<sup>219</sup> However, with the exception of Argentina, and a couple of states that deferred to what the Court would decide, all other state submissions backed the Court's

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<sup>209</sup> IACtHR, *Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs, Judgment, 8 July 2004, Series C, No. 110.

<sup>210</sup> Mónica Feria Tinta, "Dinosaurs" in Human Rights Litigation: The Use of Ad Hoc Judges in Individual Complaints Before the Inter-American Court of Human Rights' (2004) 3 (1) *The Law and Practice of International Courts and Tribunals* 79.

<sup>211</sup> Advisory Opinion OC-20/09 (n 192) para. 82. See also Concurring Opinion of Judge Sergio García-Ramírez attached *ibid*, paras 52ff.

<sup>212</sup> Argentina's request was submitted on 14 August 2008. Advisory Opinion OC-20/09 (n 192) para. 1.

<sup>213</sup> Advisory Opinion OC-20/09 (n 192) para. 3.

<sup>214</sup> Advisory Opinion OC-20/09 (n 192) para. 11.

<sup>215</sup> Advisory Opinion OC-20/09 (n 192) para. 11.

<sup>216</sup> Advisory Opinion OC-20/09 (n 192) para. 11.

<sup>217</sup> Article 67(1) of the Rules of Procedure of the IACtHR.

<sup>218</sup> Advisory Opinion OC-20/09 (n 192) para. 6.

<sup>219</sup> Advisory Opinion OC-20/09 (n 192) para. 11.

practice of endorsing judges ad hoc and national judges.<sup>220</sup> Contrariwise, the Inter-American Commission agreed with Argentina on the issue of judges ad hoc, arguing that a textual interpretation of Article 55 of the ACHR ‘does not establish grounds for the practice of the Court to include Judges ad hoc in those cases that do not involve disputes between States. [...] the institution of Judges ad hoc is absolutely exceptional and as such, it must be restrictively applied’.<sup>221</sup> This last argument was taken up by the Court when it stated in its findings that ‘[a]s an exception, the intervention of the Judge ad hoc must not be extended to proceedings for which it is not expressly provided’.<sup>222</sup>

The Court started its analysis by addressing the first question on judges ad hoc. It relied on an interpretation in accordance with Articles 31 and 32 of the Vienna Convention,<sup>223</sup> and observed that the ordinary meaning of Article 55 of the ACHR (references to states parties in plural) makes it evident that the provision takes for granted the participation of more than one disputing state party.<sup>224</sup> The Court recalled that two different kinds of complaints or communications are possible before the Inter-American Commission: individual petitions<sup>225</sup> and interstate petitions.<sup>226</sup> Article 55 is applicable only to interstate communications.<sup>227</sup> The Court consequently confirmed the above interpretation by analysing the object and purpose of Article 55.<sup>228</sup> It reasoned that ‘the different provisions contained in Article 55 [...] are intended to preserve the procedural equity between the parties, constituted by two or more sovereign States equal under the law and whose relations are governed by the principle of reciprocity.’<sup>229</sup> This reasoning only makes sense in the context of interstate disputes.<sup>230</sup> Supplementary means of interpretation further confirmed this interpretation.<sup>231</sup> The Court concluded that the institution

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<sup>220</sup> Barbados argued in favour of the presence of both judges ad hoc and national judges; Bolivia deferred to the Court on the issue of judges ad hoc but argued against national judges; Brazil argued in favour of both judges ad hoc and national judges, making some surprising claims about e.g. judges ad hoc voting mostly in favour of the victims, and putting forward some impractical suggestion about keeping e.g. judges ad hoc but subjecting their selection to ‘a dialogue with the domestic civil society, in accordance with the principle of objective good faith’; Colombia deferred to the Court on the issue of judges ad hoc but had no problem with national judges considering that nationality is less important than a judge’s personal and professional qualities. It further stated that Argentina’s proposal to remove national judges ‘would create a factual presumption according to which the nationality of the judge is, by itself, a sufficient element to consider his or her position to be biased’; El Salvador was in favour of both judges ad hoc and national judges, considering that the institution of judges ad hoc is ‘part of the due process established in favour of States’; Guatemala was in favour of both judges ad hoc and national judges, and even argued that the institution of judges ad hoc ‘is beneficial [to] the alleged victims’; two last states, Mexico and Venezuela, were also in favour of both judges ad hoc and national judges. Advisory Opinion OC-20/09 (n 192) para. 11 (p. 4-14). It does not appear that Ecuador, another member state, provided comments to the Court in relation to the advisory opinion. However, it is interesting to note that Ecuador’s Constitution of 2008 establishes that national judges may not intervene in cases between ‘states and Latin American citizens’ if the state of their nationality or their co-nationals are part of the dispute (*‘No podrán intervenir jueces de los Estados que como tales o sus nacionales sean parte de la controversia’*).

<sup>221</sup> Advisory Opinion OC-20/09 (n 192) para. 11.

<sup>222</sup> Advisory Opinion OC-20/09 (n 192) paras 38-39.

<sup>223</sup> Advisory Opinion OC-20/09 (n 192) paras 23ff.

<sup>224</sup> Advisory Opinion OC-20/09 (n 192) para. 30.

<sup>225</sup> Article 44 of the ACHR.

<sup>226</sup> Article 45 of the ACHR. See Advisory Opinion OC-20/09 (n 192) para. 32.

<sup>227</sup> Advisory Opinion OC-20/09 (n 192) para. 33.

<sup>228</sup> Advisory Opinion OC-20/09 (n 192) para. 34.

<sup>229</sup> Advisory Opinion OC-20/09 (n 192) para. 36.

<sup>230</sup> Advisory Opinion OC-20/09 (n 192) para. 36.

<sup>231</sup> Advisory Opinion OC-20/09 (n 192) paras 41ff.

of the judge ad hoc is limited to contentious cases initiated by interstate communications and it is not possible to derive a similar right of a state for individual cases.<sup>232</sup> It must be added that judges ad hoc cannot be appointed in advisory proceedings or in requests for provisional measures.<sup>233</sup>

Turning to the second question on the presence of national judges in cases originated in individual petitions, the Court examined two possible interpretations.<sup>234</sup> Either, recalling its above finding, Article 55 of the ACHR relates to the composition of the Court only in interstate cases,<sup>235</sup> or Article 55 is silent on the possibility of national judges sitting in individual cases, given that it refers exclusively to interstate cases, in which case its silence must be interpreted.<sup>236</sup> The Court concluded that the national judge must not participate in individual cases.<sup>237</sup>

Following Advisory Opinion OC-20/09, the Court approved its revised Rules of Procedure.<sup>238</sup> The new Rules of Procedure that entered in force on 1 January 2010 make it clear that judges ad hoc can only sit in interstate cases. For instance, Article 20 is entitled ‘Judges Ad Hoc in Interstate Cases’. Some ad hoc judges were still able to hear cases that had been submitted prior to the entry-into-force of the new Rules.<sup>239</sup>

By way of a closing remark, the IACtHR system provides for an intermediate institution, that of interim judges, appointed in order to preserve a quorum or when one or more judges are disqualified.<sup>240</sup> Interim judges are not discussed here, but judges ad hoc at the ECtHR have been described as similar to interim judges at the IACtHR.<sup>241</sup>

## 2. Debate and appraisal (with a focus on judges ad hoc)

The presence of national judges in cases involving the state of their nationality and the institution of judges ad hoc can serve to both decrease and increase the legitimacy of the adjudicative process. They can lessen legitimacy when national judges and judges ad hoc are seen as partial to the state of their nationality or their appointing state; they can bolster legitimacy, when states are intent on the presence of a national judge or of ‘their’ judge as a *sine qua non* in order to submit to the jurisdiction of a court. The institution of judges ad hoc is worth particular attention. The term ‘judge ad hoc’ seems a contradiction in itself. We tend to understand judges as ‘permanent’, whatever permanence means, but certainly not as ad hoc.

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<sup>232</sup> Advisory Opinion OC-20/09 (n 192) para. 66.

<sup>233</sup> Advisory Opinion OC-20/09 (n 192) para. 36.

<sup>234</sup> Advisory Opinion OC-20/09 (n 192) para. 72.

<sup>235</sup> Advisory Opinion OC-20/09 (n 192) paras 73-78.

<sup>236</sup> Advisory Opinion OC-20/09 (n 192) paras 79-85.

<sup>237</sup> Advisory Opinion OC-20/09 (n 192) para. 86.

<sup>238</sup> The Rules of Procedure were approved by the Court in its LXXXV Regular Period of Sessions (16-28 November 2009), that is less than two months since the advisory opinion was issued.

<sup>239</sup> ‘Annual Report of the Inter-American Court of Human Rights 2010’, 2011 [http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng\\_2010.pdf](http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf), p. 2.

<sup>240</sup> Articles 6(3) and 19(4) of the Statute of the IACtHR.

<sup>241</sup> Simma and Ortgies (n 131) para. 93.

Arbitrators are ad hoc – not judges. Unsurprisingly, the judge ad hoc is by and large considered to be a remnant of interstate arbitration,<sup>242</sup> and the scepticism that attaches to arbitrators, sometimes presumed to vote in favour of their appointing party,<sup>243</sup> also concerns judges ad hoc.<sup>244</sup> But despite the criticisms that have been levelled at the institution of judges ad hoc, it exists because states opted for it.<sup>245</sup> That judges ad hoc can broaden the acceptance of an international court is a fact that is not bereft of value even after a court has been established.<sup>246</sup> The following paragraphs probe the pros and cons of judges ad hoc.

On the one hand, judges must be absolutely impartial and independent and there is a concern that the institution of judges ad hoc is at odds with the principle that no one should be judge in his own cause (*nemo iudex in sua causa*, in the Latin slogan); as such it may be contrary to judicial independence and impartiality.<sup>247</sup> Empirical studies across international courts have shown that national judges and judges ad hoc tend to vote in favour of their national state or their appointing party, with judges ad hoc demonstrating a higher bias in favour of their nominating state.<sup>248</sup> That does not mean that national judges and judges ad hoc are forever

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<sup>242</sup> Kolb (n 39) 119; Kooijmans (n 131) 532; ICJ, *The International Court of Justice Handbook* (United Nations 2014) 26; Editorial, ‘Face-à-face: Interview with President Yusuf – President of the International Court of Justice’ *The Law and Practice of International Courts and Tribunals* (forthcoming, on hold with the author). See also Gill (n 39) 56.

<sup>243</sup> Jan Paulsson, ‘Moral Hazard in International Dispute Resolution’, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law (29 April 2010) [https://www.arbitration-icca.org/media/0/12773749999020/paulsson\\_moral\\_hazard.pdf](https://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf); Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration’, in Mahnouch Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011).

<sup>244</sup> See Gill (n 39) 56, who describes judges ad hoc as ‘national arbitrators’.

<sup>245</sup> To appreciate how attached states are to the institution of judges ad hoc, suffice it to review the majority of arguments put forward by states in relation to Advisory Opinion OC-20/09 (n 192), see n 220. See also Kolb (n 39) 119; Simma and Ortgies (n 131) para. 22. Cf. ‘Interview with President Yusuf’ (n 242).

<sup>246</sup> Simma and Ortgies (n 131) paras 117-118.

<sup>247</sup> Concurring Opinion of Judge Sergio García-Ramírez to Advisory Opinion OC-20/09 (n 192) para. 38; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, Order of 28 February 1990, ICJ Reports 1990, p. 3, Dissenting opinion of Judge Shahabuddeen, 45 (‘It is not easy to think of any concept of judicial independence which is consonant with particular judges being named to sit in a particular case practically at the behest of the parties’); Gill (n 39) 56; Iain Scobbie, ‘“Une heresie en matière judiciaire” – The Role of the Judge ad hoc in the International Court’ (2005) 4 *The Law and Practice of International Courts and Tribunals* 421, 428 (‘In a domestic legal system, any judge with an interest in a case would be expected to stand down’); Dannenbaum (n 1) 146, discussing the ‘dependence’ of the judge ad hoc as being ‘in stark contrast to the judicial ideal presented with respect to the permanent judge’; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011, first edn 1933) 236ff. See also Shabtai Rosenne, ‘International Court of Justice’ (2006) *Max Planck Encyclopedia of Public International Law*, para. 37. Cf. Kooijmans (n 131) 541.

<sup>248</sup> E.g. see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Reports 2002, 625, Dissenting opinion of Judge ad hoc Franck, para. 10, observing that ‘Between March 1948 (*Corfu Channel (United Kingdom v. Albania)*) and July 2002 (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*) there have been *ad hoc* judges in 45 cases and 53 phases of cases before this Court. Of these, 29 have written dissenting opinions, corresponding quite closely to the number of *ad hoc* judges appointed by losing parties.’ See also Fred J. Bruinsma, ‘The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)’ (2008) *Ancilla Iuris* 32, 37; Martin Kuijer, ‘Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice’ (1997) 10 *Leiden Journal of International Law* 49, 59-60, 63-64; Erik Voeten, ‘The Impartiality of International Judges: Evidence from the European Court of Human Rights’ (2008) 102 (4) *The American Political Science Review* 417, 425; Voeten (n 3) 400-401; Parliamentary Assembly of the Council of Europe (n 178) para. 19.

sympathetic to the interests of their home state or to their appointing state.<sup>249</sup> Sometimes judges of the same nationality can arrive at different results,<sup>250</sup> and it cannot be excluded that at least sometimes judges vote in a certain way because they genuinely agree with the legal arguments presented.<sup>251</sup> It is also a fact that disputing parties have at times forgone their right to appoint a judge ad hoc,<sup>252</sup> including, albeit rarely, when the adverse disputing party had a judge of its nationality on the bench.<sup>253</sup> Admittedly, in some of these cases non-appointment of a judge ad hoc was due to the fact that the disputing state party entitled to choose a judge ad hoc refused to appear before the court.<sup>254</sup>

Others regret practical problems that the institution of judges ad hoc has thrown up, such as the need for more office space,<sup>255</sup> and the institution's negative impact on a court's finances.<sup>256</sup> For

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<sup>249</sup> Some examples of judges ad hoc not voting in favour of their appointing state include the following: Judge ad hoc Suzanne Bastid nominated by Tunisia voted against the claims of its nominating state in *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1985, 192, 231; Judge ad hoc Gilbert Guillaume appointed by France voted against France on the merits in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment of 4 June 2008); Judge ad hoc Giorgio Gaja, appointed by Italy, voted broadly against his appointing state in *Jurisdictional Immunities of the State (Germany v. Italy)* first by declaring Italy's counterclaim inadmissible, and then by voting with the majority recognising various violations of international law by Italy (*Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, ICJ Reports 2010, 310 and *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, Judgment, ICJ Reports 2012, 99). This did not prevent Italy from nominating Judge Giorgio Gaja to the Court. It is noteworthy however that the latter judgment was issued only three days before Judge Giorgio Gaja took office. Judge ad hoc Yves Daudet, appointed by Burkina Faso, rejected its appointing state's main claim (unanimously with the rest of the tribunal) in *Frontier Dispute (Burkina Faso/Niger)* (Judgment of 16 April 2013); in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, 61, Judges ad hoc Jean-Pierre Cot and Bernard H. Oxman joined the rest of the court in a unanimous vote determining the maritime boundary; Judge ad hoc Antônio A. Cançado Trindade partly dissented in *Gangaram Panday v. Surinam* considering that the state was responsible for violations that the majority had rejected, IACtHR, *Gangaram Panday v. Surinam*, Merits, Reparations and Costs, Judgment of 21 January 1994, C Series No. 16, Operative part and *Voto disidente de los jueces Picado Sotela, Aguiar-Aranguren y Cançado Trindade*.

<sup>250</sup> E.g. see *Certain Criminal Proceedings in France (Republic of the Congo v. France)* where the two judges of French nationality (Gilbert Guillaume and Jean-Yves de Cara) voted differently. See text accompanying n 312ff.

<sup>251</sup> Scobbie (n 247) 441 ('A mere head-counting approach to the voting record of judges *ad hoc* is simplistic: there are other factors in play apart from the fact of being appointed by a litigant State.').

<sup>252</sup> E.g. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, p. 1045. An interesting example is *Temple of Preah Vihear (Cambodia v. Thailand)*. In that case, the disputing parties chose not to nominate judges ad hoc, but they both did so when the case was followed up with *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*.

<sup>253</sup> E.g. this is the case of Portugal in *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, although the applicant had chosen a judge ad hoc (Milenko Kreća). See also Stephen M. Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48 *International & Comparative Law Quarterly* 889, 897.

<sup>254</sup> Kolb (n 39) 122. For example, Turkey in *Aegean Sea Continental Shelf (Greece/Turkey)*, ICJ Reports 1978, p. 3; and Iran in *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 3.

<sup>255</sup> This is a consequence of the fact that a judge ad hoc typically participates in terms of complete equality with the regular judges and is entitled to the same privileges, e.g. Article 31(6) of the Statute of the ICJ; Article 7(2) of the ICJ's Rules of Court; Article 17(6) of the Statute of ITLOS; Article 8(1) of the ITLOS Rules of the Tribunal. See also Article 51 of the ECHR.

<sup>256</sup> Speech by Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations (30 October 2008) <https://www.icj-cij.org/files/press-releases/3/14823.pdf> 5 ('Judges *ad hoc* now represent 2 per cent of the Court's annual budget – and offices and secretarial support are also required for them'; also mentioning 'the increasing percentage of ICJ costs associated with judges *ad hoc*'); Rosalyn Higgins and Robert Jennings, 'General Introduction', in Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 3rd edn 2019) 3, 19; Higgins et al. (n 133) 1146; Simma and Ortgies (n 131) para. 50 (discussing the ICJ: 'judges ad hoc have become quite a financial

example, in 2018-2019, judges ad hoc represented more than two percent of the ICJ's budget.<sup>257</sup> Moreover, heavily involved judges ad hoc who may try to ensure that each and every argument of the appointing state is addressed, can 'bloat the court's workload, prolong the decision-making cycle, and slow down the process'.<sup>258</sup>

On the other hand, various arguments have been put forward to explain the presence of judges ad hoc. According to some of these arguments, the rationale for the institution of the judge ad hoc is similar to that for the presence of national judges. The arguments point to a mistrust in the regular formation of the court and reveal an implicit assumption that counsel have failed in their task of representation, since judges ad hoc are seen as necessary to represent the interests of the state concerned.<sup>259</sup> It is said for instance that they can help the court understand issues of national jurisprudence or domestic law that may require specialised knowledge,<sup>260</sup> and they can appreciate the culture, legal traditions and problems of the state of their nationality.<sup>261</sup> However, such arguments can be specious, since most judges ad hoc do *not* have the nationality of their appointing state.<sup>262</sup> In addition, it is questionable how often an international court has to interpret and apply domestic law.<sup>263</sup> Related statements include that a judge ad hoc ensures that the arguments of the nominating state 'are fully addressed by the Court, whether or not they

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and physical strain on the Court'). On the remuneration of judges ad hoc, see General Assembly Resolution 61/262 of 4 April 2007. See further Shaw (n 66) Chapter 8, para. 127.

<sup>257</sup> ICJ, 'Report of the International Court of Justice, 1 August 2018-31 July 2019', General Assembly, Seventy-fourth Session, Supplement No. 4 (United Nations 2019) 65.

<sup>258</sup> Simma and Ortgies (n 131) para. 133.

<sup>259</sup> Fernando Vidal Ramírez, 'La judicatura ad hoc' [Year and Publication Unknown] <https://archivos.juridicas.unam.mx/www/bjv/libros/5/2454/38.pdf> 589, 594; Higgins et al. (n 133) 1144; Elihu Lauterpacht, 'The Role of ad Hoc Judges', in Connie Peck and Roy S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff 1997) 371, 374. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, Separate opinion of Judge ad hoc Lauterpacht, explaining that that a judge ad hoc should be 'regarded as a representative of the State that appoints him' is 'contrary to principle and cannot be accepted', *ibid* 409.

<sup>260</sup> Scobbie (n 247) 434.

<sup>261</sup> Gilbert Guillaume, 'Some Thoughts on the Independence of International Judges vis-à-vis States' (2003) 2 *The Law and Practice of International Courts and Tribunals* 163, 164. See also Advisory Opinion OC-20/09 (n 192) para. 11 (E.g. submission made by Barbados: 'The institution of the Judge *ad hoc* provides a fundamental guarantee that the membership of the [Court] will include at least one judge with an in-depth understanding of the intricacies and values of the national legal system under consideration. [...] Only in this manner will the composition of the Court include a judge who is both (1) well versed in the intricacies of the common law legal systems, and (2) understands the legal, social, economic, and cultural values of the States'; submission made by Brazil: 'The possibility of appointing judges *ad hoc* also addresses the need of national societies to see their cultures and values represented in the Inter-American System'.)

<sup>262</sup> See Section 'The nationality of judges ad hoc', p. 35ff.

<sup>263</sup> In reality, in international adjudication, domestic law tends to be considered as a fact and international courts rarely engage in extensive analysis of domestic law, see Scobbie (n 247) 459 and Dannenbaum (n 1) 169. Exceptionally, in investment dispute settlement domestic law has to be applied and it is not considered a fact. For an exception to the exception, see investment agreements negotiated by the European Union, where EU law is to be considered as a fact, e.g. Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. Following Opinion 1/17 of the CJEU, the separation between domestic and international law has become a constitutional obligation in the EU in relation to investment dispute settlement, see CJEU, Opinion 1/17 of the Court, 30 April 2019, ECLI:EU:C:2019:341; Marc Bungenberg and Catharine Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS', EJIL: Talk! (5 June 2019) <https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/>.

convince the majority of the judges’;<sup>264</sup> the judge ad hoc makes sure that ‘so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write’.<sup>265</sup> This is made easy by procedural reality: judges ad hoc take precedence after the elected judges according to age.<sup>266</sup> As a rule, judges are called to express their views and vote in reverse order of precedence,<sup>267</sup> therefore judges ad hoc are often the first to address the Court, which gives them the opportunity to set the tone of the debate.<sup>268</sup> Having said that, judges ad hoc at the ICJ, also national judges, are not typically part of a drafting committee.<sup>269</sup> This is not the case at ITLOS.<sup>270</sup>

Even so, it is the role of counsel, not that of judges, to represent a party and make its arguments heard,<sup>271</sup> and it is the role of witnesses to clarify aspects of domestic law.<sup>272</sup> This may be part of the reason why some observers have gone so far as to describe the judge ad hoc as a ‘judge-advocate’.<sup>273</sup> If a court lacks information, ‘it shall require the presence of experts, not turn a member of the tribunal into an expert, whose explanations – offered during the private deliberation of the judges – would not be heard and analyzed under the principle of the presence of both parties’.<sup>274</sup> Courts not only have ‘ample rights to receive all documentary, testimonial, and expert evidence and information’ they deem pertinent,<sup>275</sup> but they may also have access to amicus curiae briefs.<sup>276</sup> Reconsideration of arguments on procedure and merits during the deliberation in the absence of the disputing parties may be difficult to reconcile with due process.<sup>277</sup>

Further opinions that have been advanced in favour of the institution of the judge ad hoc are that judges ad hoc can help with the drafting of a judgment so as not to ‘unduly ruffle the susceptibilities of the losing State’<sup>278</sup> – evidently, the argument does not account for the fact

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<sup>264</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Reports 2002, 625, Dissenting opinion of Judge ad hoc Franck, para. 10.

<sup>265</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, Separate opinion of Judge ad hoc Lauterpacht. See also Schwebel (n 253) 893.

<sup>266</sup> E.g. Article 7(3) of the ICJ’s Rules of Court; Article 8(2) of the ITLOS Rules of the Tribunal; Rule 5(4) of the ECtHR’s Rules of Court; Article 13(3) of the Statute of the IACtHR.

<sup>267</sup> E.g. Articles 5(i) and 8(i) of the Resolution concerning the International Judicial Practice of the Court (ICJ); Rule 23(3) of the ECtHR’s Rules of Court; Article 16(2) of the Rules of Procedure of the IACtHR.

<sup>268</sup> ‘Interview with President Yusuf’ (n 242).

<sup>269</sup> Hugh Thirlway, ‘The Drafting of ICJ Decisions: Some Personal Recollections and Observations’ (2006) 5 *Chinese Journal of International Law* 15, 17.

<sup>270</sup> Article 6 of the Resolution on the Internal Judicial Practice of the Tribunal, 2005. See also Simma and Ortgies (n 131) para. 59.

<sup>271</sup> Simma and Ortgies (n 131) para. 128.

<sup>272</sup> Cf. Concurring Opinion of Judge Sergio García-Ramírez to Advisory Opinion OC-20/09 (n 192) para. 46.

<sup>273</sup> Michael Reisman, ‘Nullity and Revision: The Review and Enforcement of International Judgments and Awards’ (1971) 479, as cited in Dannenbaum (n 1) 146.

<sup>274</sup> Concurring Opinion of Judge Sergio García-Ramírez to Advisory Opinion OC-20/09 (n 192) para. 46.

<sup>275</sup> Advisory Opinion OC-20/09 (n 192) para. 59, in relation to judges ad hoc in individual proceedings.

<sup>276</sup> Advisory Opinion OC-20/09 (n 192) para. 60.

<sup>277</sup> Advisory Opinion OC-20/09 (n 192) para. 62.

<sup>278</sup> Scobbie (n 247) 434.

that, as it has been explained, judges ad hoc cannot always be part of a drafting committee;<sup>279</sup> that the judge ad hoc can be explained as ‘a concession to diplomatic susceptibilities’;<sup>280</sup> or by the need of ‘diplomatic representation’ in a system ‘made by States for States’.<sup>281</sup> The latter statement too must be put in perspective; while this is certainly true when considering ‘classic’ international courts deciding interstate disputes, it is at the very least debatable whether specialised legal regimes established for the benefit of third parties, such as notably human rights and investment treaties, are made exclusively ‘for states’. Whether the ultimate users of a system are states, or states *and* private parties can have an impact on the appropriateness of the institution of judges ad hoc.

The institution of the judge ad hoc can be explained by reference to the principle of equality of arms: if we assume that the national judge will always have a penchant for his or her home state, it is important to allow the other party too to have ‘its own’ judge.<sup>282</sup> This also reveals how closely entwined the two institutions are. The votes of the national and ad hoc judge in favour respectively of the state of their nationality and their appointing state will have the effect of cancelling each other out.<sup>283</sup> It is possible that the same holds true for arbitrators selected by the parties in a three-member panel, where the final decision may be left to the presiding arbitrator.<sup>284</sup> For this and other reasons, it has been argued that ‘if judges ad hoc sometimes do little good, they usually do little harm’,<sup>285</sup> and the judge ad hoc has been described as ‘functionally useless’.<sup>286</sup> The alternative, in order to preserve procedural equality, is to consider asking the national judge to step down.

But a distinction needs to be drawn between allowing judges ad hoc in order to ensure equality of arms, such as when only one of the disputing parties has a national judge on the bench, and allowing judges ad hoc when none of the disputing parties has a national on the bench. While the former mechanism may help prevent an inequality that would otherwise obtain, the latter does not find such justification. In 2008, then ICJ President Rosalyn Higgins suggested that in disputes where neither disputing party has a national judge on the court, the parties might want to give careful consideration to the possibility of refraining from nominating judges ad hoc.<sup>287</sup> Of course, this has not prevented states appearing before the ICJ from continuing to nominate judges ad hoc.

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<sup>279</sup> See n 269-270 and accompanying text.

<sup>280</sup> Gill (n 39) 57.

<sup>281</sup> Simma and Ortgies (n 131) para. 121. See Advisory Opinion OC-20/09 (n 192) para. 11, El Salvador’s Submission.

<sup>282</sup> Simma and Ortgies (n 131) para. 120.

<sup>283</sup> See Gill (n 39) 56; Scobbie (n 247) 448.

<sup>284</sup> Michael Waibel and Yanhui Wu, ‘Are Arbitrators Political? Evidence from International Investment Arbitration’ (January 2017) 18 <https://pdfs.semanticscholar.org/0be8/b7c939d4943917b9879ebd4183afe98b8c55.pdf>. Cf. text accompanying n 337.

<sup>285</sup> Schwebel (n 253) 898-899.

<sup>286</sup> Scobbie (n 247) 462.

<sup>287</sup> Speech by Judge Rosalyn Higgins (n 256) 5-6.

A further argument must be considered. International courts need to convince states to become members and submit to their jurisdiction, and states, as is evident from the arguments presented in the context of Advisory Opinion OC-20/09, generally favour judges ad hoc (as they favour their national judges).<sup>288</sup> The fact that a state may choose a judge when it has no national to sit on the bench could muster support for an international court and increase its membership.<sup>289</sup> The absence of the institution of the judge ad hoc may be politically unpalatable to some states. Indeed, there are those who are more comfortable with arbitration than international courts, because in arbitration in principle all adjudicators are appointed ad hoc.<sup>290</sup> In this light, the institution of judges ad hoc can have a powerful legitimising effect. When all is said and done, the question is political, not legal.<sup>291</sup>

However, the above arguments are stated in the abstract and must be put in perspective. Notably, they do not consider the differences between interstate and mixed disputes. Nor do they take into account the size of the particular chamber or division deciding a dispute in order to appreciate the full impact of the addition of a judge ad hoc to the division. Yet the context is of the utmost importance. For instance, it makes little sense to argue in favour of the appointment of a judge ad hoc in order to safeguard procedural equality in mixed disputes, if only the state party is allowed to select a judge ad hoc but the other disputing party is not. No equality of arms could come about as a result of a right accorded to one disputing party only.

In conclusion, judges ad hoc may be surrounded by a whiff of ‘dependence’ on their appointing state, but the institution is significant in that it may be a means of expanding a court’s jurisdiction. Equality of arms must be assured, so that if one party has a national judge on the bench either the other party should be allowed its own judge or the national judge should step down. Last but certainly not least, a distinction must be drawn between, on the one hand, interstate disputes, in which the presence of national judges and judges ad hoc may be justified in light of the sovereign equality of states, and, on the other hand, mixed disputes. In the latter, especially when the right to appoint a judge ad hoc is only accorded to the disputing state party, the presence of national judges and the institution of judges ad hoc seem problematic. The paper will return to this discussion when considering options for the multilateral investment court. It will suggest that in that particular context both national judges and judges ad hoc should be excluded.

### **3. The nationality of judges ad hoc**

The institution of the judge ad hoc also serves to highlight that while nationality weighs in decision-making, it is not the only element that matters. Judges ad hoc are not required to have

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<sup>288</sup> See n 220.

<sup>289</sup> Scobbie (n 247) 463; Dannenbaum (n 1) 172; Guillaume (n 261) 164 ; ICJ (n 242) 26.

<sup>290</sup> For instance, this has become obvious in the arguments used by a number of States in the negotiations in UNCITRAL Working Group III that express scepticism *vis-à-vis* the establishment of international investment court. Catharine Titi, ‘Who’s Afraid of Reform? Beware the Risk of Fragmentation’, (2018) 112 AJIL Unbound 232.

<sup>291</sup> Scobbie (n 247) 463. See also ‘Interview with President Yusuf’ (n 242).

the nationality of the disputing party that nominates them.<sup>292</sup> The assumption that states *must* prefer their nationals is so strong that a 2017 publication co-authored by an ex-President of the ICJ noted that judges ad hoc ‘usually’, although ‘not necessarily’, have the nationality of the appointing state.<sup>293</sup> This statement is not corroborated by the facts. When it comes to appointments of ad hoc judges, states tend to choose non-nationals.

At the ICJ, that much has been certain since the *Corfu Channel* case and the appointment of the very first judge ad hoc, who was not a national of the nominating state.<sup>294</sup> As of the start of 2020, about 60 percent of all appointments of judges ad hoc do not concern a judge of the nationality of the appointing state.<sup>295</sup> The tendency *not* to choose a national judge as a judge ad hoc has strengthened in recent years: while by the end of 2013, appointments of judges ad hoc with a nationality other than the nationality of the selecting state corresponded to approximately 55 percent of all appointments of judges ad hoc,<sup>296</sup> in the cases pending before the ICJ at the time of writing, almost 90 percent of appointments<sup>297</sup> concern judges with a nationality other than the nationality of the nominating state.<sup>298</sup> Appendix C provides a list of judges ad hoc at the ICJ with a nationality other than the nationality of the nominating state.

At ITLOS, appointments of judges ad hoc are also skewed in favour of non-nationals. In 12 out of a total of 21 appointments of judges ad hoc, in other words, in 57 percent of all appointments as of the time of writing, the nominating state has selected a non-national.<sup>299</sup> On eight occasions, the appointing state chose a national, and in one case the judge ad hoc was jointly appointed by two states in the same interest,<sup>300</sup> one of which was the state of his nationality.<sup>301</sup> Appendix D provides a list of judges ad hoc at ITLOS with a nationality other than the nationality of the nominating state.

Certainly, not every state is equally open to selecting non-nationals to serve as judges ad hoc. For instance Australia, Canada, Denmark, France, Germany, Greece, India, Italy, Switzerland, and the United States of America, have only ever chosen judges with their nationality in both

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<sup>292</sup> E.g. Article 35(1) of the ICJ’s Rules of Court and Article 19(1) of the ITLOS Rules of the Tribunal. This was different in the original 1922 Rules of Court of the Permanent Court of International Justice, whose Article 4 provided for the parties choosing ‘a judge *ad hoc* of their own nationality’.

<sup>293</sup> Higgins et al. (n 133) 1147.

<sup>294</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*. The appointing state was Albania, and it chose a judge ad hoc of the nationality of a neighbouring state, Czechoslovakia. Albania is also designating foreign nationals to serve on the ICSID panels. See also n 329.

<sup>295</sup> Statistic compiled from ICJ, ‘All Judges *ad hoc*’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 2 January 2020).

<sup>296</sup> Statistic compiled from a list of judges ad hoc at the ICJ by 31 December 2013 at ICJ (n 242) 289-296.

<sup>297</sup> This corresponds to 23 out of 26 appointments.

<sup>298</sup> Information correct as of 2 January 2020, see ‘Current Judges *ad hoc*’ <https://www.icj-cij.org/en/current-judges-ad-hoc> (accessed 2 January 2020).

<sup>299</sup> Information correct as of 2 January 2019. See ITLOS website <https://www.itlos.org/the-tribunal/judges-ad-hoc/>. At the time of writing, according to ITLOS there is a pending decision of a judge ad hoc to be appointed by Mauritius in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (ibid).

<sup>300</sup> Article 17(5) of the Statute of ITLOS; Article 20 of the ITLOS Rules of the Tribunal, also Article 21(2), ibid.

<sup>301</sup> This was the case of Ivan Shearer, an Australian national, jointly nominated by Australia and New Zealand in *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, see <https://www.itlos.org/the-tribunal/judges-ad-hoc/>.

ICJ<sup>302</sup> and ITLOS cases.<sup>303</sup> But others, such as Liechtenstein, have only selected non-nationals.<sup>304</sup> In relation to appointments to the ICJ, while some have been repeatedly chosen as judges ad hoc by the state of their nationality (e.g. this is the case of Judge ad hoc Milenko Kreća),<sup>305</sup> several have received repeat appointments by states other than their home state (see Appendix C). Gilbert Guillaume, a French national, has been appointed nine times as judge ad hoc by a state other than France (and twice by France);<sup>306</sup> Yves Daudet, also a French national, has been appointed eight times by states other than France – he has never been appointed as judge ad hoc by France; Christopher J. R. Dugard (South Africa) and Jean-Pierre Cot (France) have each been appointed seven times by a state other than the state of their nationality – neither has been appointed by the state of his nationality.<sup>307</sup> These examples reveal a certain popularity of French nationals as judges ad hoc. In reality, about 14 percent of appointments of judges ad hoc concern French nationals.<sup>308</sup> To some extent, sub-Saharan African states when selecting judges of a foreign nationality display a certain preference for judges ad hoc of the nationality of their former colonial powers,<sup>309</sup> notably French and Belgian. This experience is not borne out by former Spanish colonies, which only exceptionally have chosen Spanish nationals as judges ad hoc.<sup>310</sup>

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<sup>302</sup> See ‘All Judges ad hoc’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 2 January 2020).

<sup>303</sup> See <https://www.itlos.org/the-tribunal/judges-ad-hoc/> (accessed 2 January 2020). The exceptions are Canada, Denmark, Germany, Greece, India, and the United States, which have never chosen judges ad hoc for ITLOS cases, see <https://www.itlos.org/cases/> (accessed 2 January 2020).

<sup>304</sup> At the ICJ, Liechtenstein has selected three judges ad hoc none of whom had its nationality: Franklin Berman (United Kingdom) and Ian Brownlie (United Kingdom) in *Certain Property (Liechtenstein v. Germany)*; and Paul Guggenheim (Switzerland) in *Nottebohm (Liechtenstein v. Guatemala)*. Liechtenstein, which is a landlocked state, has signed but not ratified UNCLOS, and therefore has not been party to an ITLOS dispute.

<sup>305</sup> ICJ, ‘All Judges ad hoc’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 2 January 2020).

<sup>306</sup> One of the two cases in which Guillaume appears to have been selected as judge ad hoc by France is *Certain Criminal Proceedings in France (Republic of the Congo v. France)*. In the early part of the case, resulting in *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 102, Judge Gilbert Guillaume was the French elected judge (his term lasted from 1987 to 2005). He appears to have been selected as judge ad hoc for the case at a later stage, during the term of elected French Judge Ronny Abraham (2005-), the latter having recused himself. See ICJ, ‘Report of the International Court of Justice 1 August 2007-31 July 2008’ (United Nations 2008) 8 and ICJ, ‘All Judges ad hoc’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (information correct as of 2 January 2020).

<sup>307</sup> See ICJ, ‘All Judges ad hoc’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 2 January 2020).

<sup>308</sup> See ‘All Judges ad hoc’, <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 2 January 2020).

<sup>309</sup> For instance, Burkina Faso has only ever selected French judges ad hoc (Jean-Pierre Cot, Yves Daudet, and François Luchaire). The Republic of the Congo selected a French judge ad hoc (Jean-Yves de Cara) in *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, a case which pitted the state against its former colonial power. The Democratic Republic of the Congo selected three times a Belgian judge ad hoc (Joe Verhoeven), but it also once selected a French national (Yves Daudet) and on five occasions its own nationals (Sayeman Bula-Bula, Auguste Mampuya Kanunk’a Tshiabo, and Jean-Pierre Mavungu Mvubidi-Ngoma). Notably, Congolese judge ad hoc Sayeman Bula-Bula was selected to serve in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which pitted the Democratic Republic of the Congo against its former colonial power. Belgium had appointed a Belgian judge ad hoc (Christine van den Wyngaert). Burundi, on the one occasion it chose a judge ad hoc, selected a Belgian judge (Jean Salmon). See <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 1 November 2019).

<sup>310</sup> Out of about 50 occasions involving a former Spanish colony selecting a judge ad hoc, only 5 (that is about 10 percent) concerned the appointment of a Spanish judge ad hoc (all appointments concerned Judges Julio Diego González Campos and Santiago Torres Bernárdez, were made by Honduras and Uruguay, and in every instance all disputing parties were former Spanish colonies). See <https://www.icj-cij.org/en/all-judges-ad-hoc> (accessed 1 November 2019).

More extraordinary still is that on occasion a state has selected as judge ad hoc a national of the *other* disputing party. This might seem counterintuitive, since it turns on its head the presumption that the national judge is likely to vote in favour of the state of his nationality. However, it is also an indication of the fact that the role of a judge ad hoc may be more similar to that of a party-appointed arbitrator rather than to that of a national judge.<sup>311</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France)* provides an interesting example.<sup>312</sup> An application was filed by the Republic of the Congo seeking the annulment of an investigation and prosecution measures taken by France in relation to alleged crimes against humanity and torture committed in the Congo against Congolese individuals. The application of the Republic of the Congo was accompanied by a request for provisional measures seeking the suspension of the judicial proceedings. France already had an elected national judge on the bench, Judge Gilbert Guillaume.<sup>313</sup> The Republic of the Congo was within its right to choose a judge ad hoc, and its choice fell on another French national, Jean-Yves de Cara. This not only led to two co-nationals sitting together but notably to two co-nationals of the nationality of *one* of the two disputing parties. *Certain Criminal Proceedings in France (Republic of the Congo v. France)* was ultimately discontinued,<sup>314</sup> but prior to discontinuance an order was issued on the Republic of the Congo's request for provisional measures.<sup>315</sup> With it, the Court decided to reject the Republic of the Congo's application by 14 votes to one. The one vote in favour of the Congo's request for provisional measures and against France was that of French Judge Jean-Yves de Cara who had been selected as judge ad hoc by the Republic of the Congo.<sup>316</sup>

It would be interesting to consider the reasons that may lead a state to select a judge ad hoc who does not have its nationality. It is beyond the scope of this paper to probe this issue. However, it is worth drawing a brief comparison with a proposal that has been made in a different context, that of mediation and conciliation proceedings. Some have advised that parties should consider the appointment of mediators proposed by the other disputing party.<sup>317</sup> Such appointments may include mediators who are nationals of or have the same nationality as the adverse disputing party.<sup>318</sup> The argument goes that this could encourage the other disputing party to commit to the process and it would enhance trust.<sup>319</sup> However, it is difficult to transpose this argument to international judicial settlement. While mediation is a voluntary non-binding process,

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<sup>311</sup> Cf. n 242-244 and accompanying text.

<sup>312</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 102.

<sup>313</sup> See n 306, and n 309 and accompanying text.

<sup>314</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, ICJ Reports 2010, p. 635.

<sup>315</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 102.

<sup>316</sup> *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p. 102.

<sup>317</sup> Charles H. Brower II, 'Selection of Mediators', in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 301, 306.

<sup>318</sup> Brower II (n 317) 307.

<sup>319</sup> Brower II (n 317) 306.

international adjudication is both compulsory, once consent has been granted, and binding.<sup>320</sup> It does not rely on trust and does not require commitment to the process. It can proceed even if one of the disputing parties fails to appear.<sup>321</sup> What is more, nationality plays a different role in international judicial or arbitral proceedings, on the one hand, and in mediation or conciliation, on the other.<sup>322</sup>

A brief survey of ITLOS cases does not appear back the position that a non-national judge ad hoc is *more likely* to vote in favour of his or her appointing state than a national judge ad hoc. At ITLOS, judges ad hoc who are not nationals of the appointing state have voted in favour or broadly in favour of the appointing state in approximately 37 percent of cases and they have voted against it in about 28 percent of cases.<sup>323</sup> By contrast, judges ad hoc of the nationality of the nominating party have voted in favour or broadly in favour of the appointing state in 87.5 percent of cases and against it in 12.5 of cases.<sup>324</sup> Appendix E presents national and non-national judges ad hoc at ITLOS and voting outcomes. Further research would be necessary to appreciate the significance of these statistics in light of various factors beyond nationality that can be relevant to voting and to examine whether they represent a lone example or are part of a pattern that is confirmed across international courts.

In conclusion, the preference for non-national judges when it comes to appointments of judges ad hoc narrows the relevance of the lessons that can be drawn about the impact of nationality on decision-making. It demonstrates that at least some states either lack a pool of qualified nationals or prefer to choose a non-national.

### III. Nationality of Arbitrators in Investment Arbitration

Nationality plays a different role in investment arbitration. In contrast with permanent international courts, arbitration tribunals comprise consistently few adjudicators, as a rule of thumb three; in contrast with ‘permanent’ judges sitting on international courts, investment arbitrators are appointed ad hoc to hear a dispute; and they are usually appointed by the disputing parties. Given that, unlike international courts, arbitration does not in principle involve a centralised system of dispute settlement<sup>325</sup> and that arbitrators are typically appointed by the disputing parties, there are no formal or obligatory considerations of geographical

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<sup>320</sup> Catharine Titi, ‘Mediation and the Settlement of Investment Disputes: Between Utopia and Realism’, in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 21.

<sup>321</sup> E.g. Article 53 of the Statute of the ICJ; Article 28 of the Statute of ITLOS. See further Shaw (n 66) Chapter 23.

<sup>322</sup> See text accompanying n 348-351.

<sup>323</sup> The remaining percentage concerns disputes where it is not entirely clear if there is a winner and loser and in this respect the vote of the judge ad hoc appears ‘neutral’ or relatively ‘neutral’, i.e. not favouring either party.

<sup>324</sup> For the purposes of the statistics, a judge ad hoc appointed jointly by Australia and New Zealand has been considered to be a national judge ad hoc, see also Appendix E.

<sup>325</sup> But exceptions can be said to exist, e.g. the Iran-United States Claims Tribunal. For a discussion on the nature of the Tribunal, see David D. Caron, ‘The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution’ (1990) 84 *American Journal of International Law* 104.

representation *in the constitution of particular tribunals*.<sup>326</sup> Arbitrators resemble to some extent judges ad hoc, owing to the fact that they are appointed by the disputing parties. Investment arbitration offers a useful example of how the nationality of the international adjudicator can be allocated a *different* role.

## 1. The ICSID Convention

In investment arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) nationality becomes relevant at three stages. First, when states and the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) nominate persons to serve on the Panel of Arbitrators; secondly, when a tribunal is constituted; thirdly, when an annulment committee is constituted. The three will be considered in turn. A final paragraph will draw a comparison with the role of nationality in conciliation proceedings under the Convention. Provisions on nationality and representation in the ICSID Convention are mapped in the comparative tables in Appendices Appendix A and Appendix B.

### a. *The Panel of Arbitrators*

The Panel of Arbitrators is one of ICSID's two panels of adjudicators.<sup>327</sup> Each contracting state may designate four persons to serve on the Panel of Arbitrators.<sup>328</sup> The persons so designated may or not have the nationality of the designating state.<sup>329</sup> The Chairman of ICSID's Administrative Council may also designate ten persons to the Panel of Arbitrators.<sup>330</sup> These persons must each have a different nationality.<sup>331</sup> In addition, when designating these persons, the Chairman is required to 'pay due regard to the importance of assuring representation on the [Panel] of the principal legal systems of the world and of the main forms of economic

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<sup>326</sup> As a consequence, investment arbitrators are unevenly distributed among different regions, with the majority coming from a handful of industrialised countries. At the International Centre for Settlement of Investment Disputes (ICSID), arbitrators from North America (Canadian, Mexican and US) correspond to 20 percent of all appointments, although only 4 percent of disputes involve a North American state as respondent. In 2018, French, UK and US arbitrators corresponded to one quarter of all ICSID appointments, while collectively arbitrator appointments from North America (Canada and United States only) and Western Europe amounted to 57 percent of all 2018 appointments. See World Bank, 'The ICSID Caseload Statistics', Issue 2019-1, 11 and 19 [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf) (accessed 2 January 2020); ICSID, '2018 Annual Report' (2018) 33 in combination with <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (accessed 2 January 2020); Sergio Puig, 'Social Capital in the Arbitration Market', (2014) 25 *European Journal of International Law* 387, 405; Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus', (2015) 109 *American Journal of International Law* 761, 771.

<sup>327</sup> The other one is the Panel of Conciliators, Article 12 of the ICSID Convention.

<sup>328</sup> Article 13(1) of the ICSID Convention.

<sup>329</sup> Article 13(1) of the ICSID Convention. For instance, in its latest round of designations to the ICSID Panel of Arbitrators for the period 2019-2025, Germany included Italian national Franco Ferrari. All current designations by Albania concern foreign nationals: Cherie Blair (United Kingdom), Yves Derain (France), George Kahale III (United States), and Toby Landau (United Kingdom). The same is true for Georgia, and so on. See ICSID, 'Database of ICSID Panels', <https://icsid.worldbank.org/en/Pages/about/Database-of-Panel-Members.aspx> (accessed 2 January 2020).

<sup>330</sup> Article 13(2) of the ICSID Convention.

<sup>331</sup> Article 13(2) of the ICSID Convention.

activity.<sup>332</sup> In reality, arbitrators sitting on ICSID tribunals do not have to be appointed from within the Panel of Arbitrators, unless the appointment is made by the Chairman,<sup>333</sup> including when the appointment concerns the members of annulment committees.<sup>334</sup>

*b. Constitution of a tribunal*

During the preparation of the ICSID Convention, the nationality of arbitrators was a subject of much debate with some delegates favouring the total exclusion of national arbitrators.<sup>335</sup> Ultimately, a compromise solution was adopted, according to which the majority of the arbitrators cannot have the nationality of the disputing parties, unless the parties agree on each individual member of the tribunal.<sup>336</sup> According to Aron Broches, this provision was intended to ‘avoid a situation in which the third arbitrator, as the only one appointed by a neutral party, might find himself in the position of a sole arbitrator in having to maintain a balance between two other arbitrators who were more inclined to act as advocates for the parties appointing them’.<sup>337</sup> But national arbitrators are allowed if they constitute the minority, such as if the tribunal is composed of five or more arbitrators, in which case each party may have its national arbitrator.<sup>338</sup>

When the parties do not agree on the constitution of the tribunal, a three-member tribunal is formed in accordance with the following default method: each disputing party appoints one arbitrator and the third arbitrator, who serves as the president of the tribunal, is appointed by agreement of the parties.<sup>339</sup> If the tribunal is constituted in accordance with this procedure, a disputing party shall ‘name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal’.<sup>340</sup> In other words, the arbitrators appointed by the parties according to the default procedure cannot be a national of or have the same nationality as one of the disputing parties, but the president of the tribunal, appointed by agreement of the parties, can be a national of or have the same nationality as one of the disputing parties.

If the parties cannot agree on who shall sit on the tribunal, the procedure set out in Article 38 of the ICSID Convention kicks in. Accordingly, the Chairman of ICSID’s Administrative

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<sup>332</sup> Article 14(2) of the ICSID Convention.

<sup>333</sup> Article 40(1) of the ICSID Convention. See also Article 52(3) of the ICSID Convention concerning appointments of annulment committee members.

<sup>334</sup> Article 52(3) of the ICSID Convention (‘On receipt of the request the Chairman shall forthwith appoint *from the Panel of Arbitrators* an *ad hoc* Committee of three persons’, emphasis added).

<sup>335</sup> Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* (Oxford University Press 2nd edn 2009) 498-499.

<sup>336</sup> Article 39 of the ICSID Convention. See also Rule 1(3) of the ICSID Arbitration Rules; ICSID, Report of the Executive Directors on the Convention, annexed to the ICSID Convention, para. 36.

<sup>337</sup> ICSID, *History of the ICSID Convention* (ICSID Volume II, Part 2 1968) 983.

<sup>338</sup> ICSID, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (World Bank 1965), para. 36; Schreuer et al. (n 335) 499.

<sup>339</sup> Article 37(2)(b) of the ICSID Convention.

<sup>340</sup> Rule 3(1)(a) of the ICSID Arbitration Rules.

Council appoints the remaining arbitrators at the request of a party ‘after consulting both parties as far as possible’.<sup>341</sup> When the Chairman appoints arbitrators pursuant to this procedure, these arbitrators can have neither the nationality of the state party to the dispute nor the nationality of the investor’s home state.<sup>342</sup> This provision is not without significance: according to ICSID data as of October 2019, in 219 out of 763 original arbitration proceedings brought under the ICSID Convention at least one member of the tribunal has been appointed by the Chairman of the ICSID Administrative Council.<sup>343</sup>

*c. Constitution of an annulment committee*

In contrast with the constitution of tribunals in original proceedings, when it comes to annulment under the ICSID Convention, all three members of the annulment committee are appointed by the Chairman of ICSID’s Administrative Council.<sup>344</sup> Certain limitations apply, such as that the Chairman cannot appoint an individual who sat in the original proceeding that issued the award under review or who acted as conciliator in the dispute.<sup>345</sup> Notably, the Chairman cannot appoint an individual who is a national of the state party to the dispute or who has the same nationality as the investor, or an individual who has the same nationality as any member of the original tribunal that issued the award; nor can the Chairman appoint an individual who has been designated to the panel of ICSID arbitrators either by the state party to the dispute or by the investor’s home state.<sup>346</sup> The latter limitation (inability to appoint a person designated by a disputing party or a disputing party’s home state but who does not have the nationality of that party or its home state) does not appear to apply to appointments made by the Chairman pursuant to Article 38 of the ICSID Convention. However, since in that case the Chairman needs to consult the disputing parties,<sup>347</sup> appointment of a non-national designated by the disputing state party or the investor’s home state is unlikely to occur with any frequency.

Finally, unlike international courts, the rule according to which co-nationals cannot sit together does not apply to proceedings under the ICSID Convention (whether original or follow-up proceedings).

*d. Comparison with conciliation*

The limitations on the acceptance of national arbitrators do not apply to conciliators under the ICSID Convention.<sup>348</sup> While in conciliation candidates with nationalities other than those of the disputing parties are still to be preferred – unless there is a reason for the parties to place

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<sup>341</sup> Article 38 of the ICSID Convention. See also Rule 4(4) of the ICSID Arbitration Rules.

<sup>342</sup> Article 38 of the ICSID Convention.

<sup>343</sup> See <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (accessed 2 January 2020).

<sup>344</sup> Article 52(3) of the ICSID Convention.

<sup>345</sup> Article 52(3) of the ICSID Convention.

<sup>346</sup> Article 52(3) of the ICSID Convention.

<sup>347</sup> See text accompanying n 341.

<sup>348</sup> Articles 29-31 of the ICSID Convention.

importance on nationality –,<sup>349</sup> there is no formal obligation to do so: conciliators may have the nationality of the disputing state party or of the investor’s home state. This must be understood both in light of the fact that conciliation is not binding and that it is not an adversarial procedure in the way arbitration is.<sup>350</sup> For the same reason, it is also possible to give preference to a conciliator of the nationality of the *other* party.<sup>351</sup>

## 2. The UNCITRAL Arbitration Rules

The ICSID Convention’s approach to the appointment of arbitrators who are nationals or co-nationals of a disputing party is not adopted in other arbitration rules. The UNCITRAL Arbitration Rules remain somewhat cryptic about the desirability of national arbitrators. These Rules state that the appointing authority ‘shall take into account the advisability of appointing an arbitrator of a nationality *other than* the nationality of the parties’.<sup>352</sup> This appears to point to an assumption in favour of the appointment of arbitrators of the nationality of one of the disputing parties. It is then not surprising that in arbitrations on the basis of the North American Free Trade Agreement (NAFTA), very often the party-appointed arbitrators have had the nationality of the appointing parties.<sup>353</sup> US national Charles N. Brower has been appointed to at least five arbitrations initiated under the UNCITRAL Arbitration Rules by US investors.<sup>354</sup> Canadian national J. Christopher Thomas has been appointed to at least one UNCITRAL case by Canada.<sup>355</sup> Canadian national L. Yves Fortier has been appointed to at least two UNCITRAL arbitrations involving Canada or a Canadian investor.<sup>356</sup>

## 3. Other arbitration rules

The Arbitration Rules of the Stockholm Chamber of Commerce (SCC) provide that ‘the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or the Board otherwise deems it appropriate’.<sup>357</sup> The Board that appoints arbitrators must consider several aspects, including the circumstances of the dispute and the applicable law, but also the nationality of the disputing

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<sup>349</sup> Brower II (n 317) 306-307.

<sup>350</sup> See n 317ff and accompanying text.

<sup>351</sup> See n 317ff and accompanying text.

<sup>352</sup> Article 6(7) of the UNCITRAL Arbitration Rules, emphasis added.

<sup>353</sup> E.g. *Ethyl Corporation v. Canada* (Charles N. Brower and Marc Lalonde); *S.D. Myers v. Canada* (Bryan Schwartz and Edward C. Chiasson, replaced by Bob Rae); *Methanex Corporation v. USA* (J. William Rowley and W. Michael Reisman); *Chemtura Corporation v. Canada* (Charles N. Brower); *GAMI Investments, Inc. v. Mexico* (Charles N. Brower); *Glamis Gold Ltd. v. USA* (David D. Caron); *Tembec Inc. and others v. USA* (Armand de Mestral and Davis R. Robinson); *Terminal Forest Products Ltd. v. USA* (Armand de Mestral and Davis R. Robinson) (with the caveat that in not all of the above cases it was possible to identify with absolute certainty the nationality of both co-arbitrators).

<sup>354</sup> *Ethyl Corporation v. Canada*; *Chemtura Corporation v. Canada*; *Occidental v. Ecuador (I)*; *Chevron Corporation and Texaco Petroleum Company v. Ecuador (I)*, PCA Case No. 2007-02/AA277; *Mesa Power v. Canada*.

<sup>355</sup> *Vito G. Gallo v. Canada*, PCA Case No. 55798.

<sup>356</sup> *United Parcel Service of America, Inc. (UPS) v. Canada*, ICSID Case No. UNCT/02/1; *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09.

<sup>357</sup> Article 17(6) of the SCC Arbitration Rules (2017).

parties.<sup>358</sup> Similar provisions exist in the Arbitration Rules of the London Court of International Arbitration (LCIA).<sup>359</sup> A different clause is included in the Arbitration Rules of the International Chamber of Commerce. While in confirming or appointing arbitrators their nationality shall be taken into account, and the sole arbitrator or the president of the tribunal cannot be of the nationality of one of the parties, these Rules also provide that ‘in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national’.<sup>360</sup> Finally, the Iran-United States Claims Tribunal contains a provision similar to the UNCITRAL Arbitration Rules’ on the advisability of the appointment of non-nationals by the appointing authority.<sup>361</sup>

#### **IV. Policy Suggestions for the Multilateral Investment Court**

With the ongoing efforts for the creation of a multilateral investment court, including within UNCITRAL Working Group III, this is a cardinal moment in which to consider possible options for the prospective Statute of the Court. The moment of the establishment of an international court is more opportune for any root and branch reform than any later stage in that court’s existence. In view of the lessons that can be drawn from the preceding parts, some tentative suggestions for the multilateral investment court can be advanced. The following paragraphs focus on two issues: first, geographical representation in the composition of the court as a whole, and secondly, national judges and judges ad hoc in specific divisions.

##### **1. Geographical representation in the composition of the court as a whole**

In accordance with the practice of most international courts, it would be appropriate for the multilateral investment court to limit representation to its membership. Eligible judges should be nationals of states or international organisations that are signatories to the Court Statute, irrespective of whether they are also nationals of the nominating state. This approach signals to non-members that they must join the Court before their nationals can serve as judges. Since the Court is likely to begin its existence as plurilateral rather than multilateral, limiting representation this way will act as an incentive for some states to become signatories to the Court Statute. In addition, this will ensure a better representation of the Court’s membership, since all available seats will be reserved for members’ judges. In order to obtain initial momentum for the Court, the Statute’s drafters may consider whether to entice new state members by promising them a seat on the Court in the first mandate of its judicature. However, this is a perilous enterprise that requires meticulous care both in order to obtain the agreement of some member states that might see their chances of electing ‘their’ national judge displaced or postponed (in light of the sovereign equality of states, any privilege offered some states but not others may be difficult to explain in the absence of agreement) and in order to ensure proper screening of judges’ qualifications.

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<sup>358</sup> Article 17(7) of the SCC Arbitration Rules (2017).

<sup>359</sup> Article 6 of the LCIA Arbitration Rules (2014).

<sup>360</sup> Article 13 of the Arbitration Rules of the International Chamber of Commerce (2017).

<sup>361</sup> Article 6(4) of the Rules of Procedure of the Iran-United States Claims Tribunal.

Next, the drafters of the Court Statute must determine the type of geographical representation the Statute will aim for. Representation of the ‘main forms of civilization’ seems an inapposite candidate, for reasons that have already been exposed.<sup>362</sup> Representation of ‘the principal legal systems of the world’ is a plausible but not inevitable alternative. If the drafters opt for such a provision, representation should still be limited to the legal systems present in the Court’s membership. A not unattractive alternative would be a Court that is ‘broadly representative’ of its membership, as in the WTO. However, the way this has worked in practice (representation of the EU, US, and China) may lead some states to object to it. In terms of legal language, ‘broad representation’ is an appropriate stipulation and, to the extent that the above objection is not raised, it should be seriously considered. Other formulations that could garner support include ‘equitable’, ‘reasonable’, ‘so far as is reasonable’ or ‘fair’ geographical representation. It is submitted that any of the latter are appropriate, and possibly preferable, alternatives and would suffice as standalone provisions, without the need to refer to the principal legal systems of the world.

Ultimately, while seeking to ensure representation, the Court’s Statute should not lose sight of the need to guarantee that judges possess the necessary qualifications. Ensuring representation *and* ensuring qualifications may appear as two objectives in tension with each other, but both are essential to the credibility and success of the Court. But while representation is relative (‘broad’, ‘fair’, ‘equitable’), judges’ qualifications are absolute. Judges should only arrive on the bench if they possess the necessary personal and professional qualities.

## **2. National judges and judges ad hoc in particular divisions**

Part II of this paper drew a distinction between interstate disputes and mixed disputes, i.e. cases involving a state and a private party, for the purposes of determining whether to accept the presence of national judges and judges ad hoc in particular chambers or divisions. In contrast with ‘classic’ international courts, the Court’s principal workload will consist in disputes initiated by private parties.<sup>363</sup> In this sense, the Court will resemble human rights courts and the presence of national judges and judges ad hoc in particular divisions may be gaged in light of the considerations that have become relevant to the human rights’ context.

Another relevant consideration, at the present time an unknown, is how many judges will constitute each division. The potential impact of a national judge and a judge ad hoc in a chamber or division of 15 judges is different than in a chamber or division of three judges. The optimal size of different divisions will depend among others on how busy the Court’s docket is likely to be. A probable scenario is the following. The Court will have an evolving membership and increasingly numerous applications will be filed. Anticipated docket pressures, financial pressures, and the need for efficiency seem to indicate that the optimal solution for the bulk of

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<sup>362</sup> See text accompanying n 43.

<sup>363</sup> Cf. discussion about disputes brought by entities other than states to ITLOS at n 146ff and accompanying text.

investment disputes at first instance will be divisions of three judges,<sup>364</sup> as in the Comprehensive and Trade Agreement (CETA)<sup>365</sup> and in EU investment protection agreements (IPAs).<sup>366</sup> (This does not exclude that the Court may also have a plenary chamber or other chambers with more than three judges. However, the argument presented here takes into account how the *majority* of disputes are likely to be decided.)

If the Court Statute provides for national judges and judges ad hoc in divisions of only three, the majority of states will lack a national judge and therefore the institution of judges ad hoc will be much resorted to. The likelihood of respondent states having a national judge in the division hearing their dispute would increase, if the national judge is included ex officio in the division, such as in the case of the ECtHR,<sup>367</sup> or – which achieves the same outcome – if the President of the division requests a member of the division to give his or her place to the national judge, such as in ICJ special chambers or the Chamber of Summary Procedure.<sup>368</sup> However, efforts to include national judges in multiple divisions of three and arrangements to provide for judges ad hoc will make the process redolent of arbitration and, importantly, a logistical burden on the Court, that will undercut efficiency and increase costs.

By the same token, if national judges can sit in cases involving the state of their nationality and if in the absence of a national judge states can choose a judge ad hoc, the question emerges of whether investors will be granted a corresponding right. In human rights adjudication to the extent that the institution of judges ad hoc is admitted in individual disputes, only states are entitled to select a judge ad hoc.<sup>369</sup> In contrast with that context where, as previously discussed, victims often have the nationality of the respondent state, and the state's national judge may also be the alleged victim's national judge,<sup>370</sup> in investment dispute settlement, the state's national judge will always be a national of *the other disputing party*. In short, in investment disputes, both the state's national judge and its judge ad hoc might be presumed to be partial to the state but not to the investor. More significant still, allowing the state to have its national judge in the division constituted to hear the dispute or, in the absence of such a judge, to choose a judge ad hoc will create a procedural imbalance between the disputing parties, unless a co-national of the investor also sits in the division. This imbalance will affect the parties' equality of arms.

The resultant situation is not sustainable and could harm the legitimacy of the process, especially since those sceptical about the Court have expressed concerns about judges being pro-state. Therefore it may be necessary to extend the right to select a judge ad hoc to

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<sup>364</sup> Contra Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?' CIDS Report (3 June 2016) [https://www.cids.ch/images/Documents/CIDS\\_First\\_Report\\_ISDS\\_2015.pdf](https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf) 65. Cf. Bungenberg and Reinisch (n 7) 58.

<sup>365</sup> Article 8.27(6) of CETA.

<sup>366</sup> Article 3.9(7) of the EU-Singapore IPA; Article 3.38(6) of the EU-Vietnam IPA.

<sup>367</sup> Article 26(4) of the ECHR.

<sup>368</sup> Article 31(4) of the Statute of the ICJ.

<sup>369</sup> See n 166 and accompanying text.

<sup>370</sup> See n 166 and accompanying text.

investors.<sup>371</sup> If the right to choose a judge ad hoc is extended to investors, every time that a state has a national judge in the division of three or, in the absence of such a judge, it chooses a judge ad hoc, the investor will also select a judge ad hoc. The result would be a system in which for almost every dispute the disputing parties would each appoint a judge ad hoc, and only the President would be a regular judge. This system would be closer to arbitration than an international court system. If the judges ad hoc were to be supernumerary to the regular judges, then for almost every dispute one or two judges ad hoc would need to be added. In short, if the right to choose a judge ad hoc is accorded to both states and investors, the operational challenge and related costs become even more appreciable.

In conclusion, the likely function of the Court (mixed disputes decided by small divisions) reveals that national judges and judges ad hoc would be inappropriate in that particular context. Maybe the time has come to resort to international dispute settlement without the need for specific representation in a division. In relation to national judges, the limitation would of course apply to both states and investors, so that not only the state's national judge but also a co-national of the investor would be prevented from hearing the case. The prohibition may be absolute or it may be modulated, so as to allow the presence of a national judge or the investor's co-national, if the disputing parties agree.<sup>372</sup> A further option would be to model the presence of national judges on the ICSID Convention, in order to prevent the majority of judges from being nationals or co-nationals of the disputing parties, unless the parties agree on each judge.<sup>373</sup> The most straightforward option however might be to prevent national judges altogether from deciding a case involving a party of their nationality<sup>374</sup> and to exclude judges ad hoc. The combined effect of such provisions will be to ensure procedural fairness and equality of arms, and ultimately to counter criticisms that judges may be more favourably inclined towards states because they will be chosen by states.

## Conclusion

This paper has presented some preliminary thoughts on the nationality of the international adjudicator and representation on international courts. It has considered how statutes aim to reconcile the challenges that attach to the presence of the national judge in chambers or divisions involving the state of his nationality throws up and the need to keep states happy through representation on the court as a whole and in particular chambers or divisions. Geographical representation is essential to the legitimacy of an international court, but it should be guaranteed alongside personal qualities and professional qualifications of a court's judges. This is true in the abstract and it is certainly true when in relation to the prospective multilateral investment court. The paper further appraised the presence of national judges in particular chambers or divisions of a court and the institution of judges ad hoc and insisted on the importance of the distinction between a court that decides interstate disputes and a court that

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<sup>371</sup> See also Bungenberg and Reinisch (n 7) 54.

<sup>372</sup> The latter suggestion has been made in Bungenberg and Reinisch (n 7) 53.

<sup>373</sup> Article 39 of the ICSID Convention. See Section 'Constitution of a tribunal', p. 40-41.

<sup>374</sup> This would minimise logistical costs, such as going back and forth to the parties to determine if they have agreed on a judge.

decides mixed disputes. While the principle of sovereign equality of states may be a sufficient argument to admit national judges and judges ad hoc in interstate disputes, the situation changes when one party is a state and the other a private entity. In all cases, equality of arms must be assured: if one party has a national judge on the bench either the other party should be allowed its own judge or the national judge should step down. In mixed disputes, especially when the right to appoint a judge ad hoc is only accorded to the disputing *state* party, the presence of national judges and the institution of judges ad hoc seem unsuitable. For this reason, the paper suggested that the multilateral investment court should exclude national judges from small divisions hearing investor-state disputes and should not provide for judges ad hoc. Variations on this model of absolute exclusion on national judges from specific divisions of the court were considered. Ultimately, the paper argued that the combined effect of such provisions should be to safeguard procedural fairness and equality of arms and counter concerns that judges may be more favourably inclined towards states.

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## APPENDICES

### Appendix A

#### NATIONALITY AND REPRESENTATION ON THE COURT AS A WHOLE

	<i>Election or appointment of judges 'regardless of their nationality'</i>	<i>Geographical representation</i>	<i>'Permanent' or 'guaranteed' representation of some members</i>	<i>Nationals of states other than the nominating state</i>	<i>No two judges of the same nationality</i>
ICJ Statute	Article 2: <i>'The Court shall be composed of a body of independent judges, elected regardless of their nationality [...]'</i>	Article 9: <i>'At every election, the electors shall bear in mind [...] that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.'</i>	<i>Not in the Statute</i> but the five permanent Members of the UN Security Council have always each appointed an ICJ Judge; an exception to this practice occurred for the first time in 2017.	Article 5: <i>'No [national] group may nominate more than four persons, not more than two of whom shall be of their own nationality.'</i>	Article 3: <i>'The Court shall consist of fifteen members, no two of whom may be nationals of the same state.'</i>
ITLOS Statute		Article 2: <i>'In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.'</i>  Article 3: <i>'There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.'</i>  Article 35 <i>'In the selection of the members of the [Seabed</i>			Article 3: <i>'No two members of the Tribunal may be nationals of the same State'</i>

		<i>Disputes] Chamber, the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.'</i>			
WTO AB DSU & Working Proced. for Appellate Review	<i>Not in relation to composition of the AB as whole.  Cf. Rule 6 of the WTO Working Procedures for Appellate Review: 'The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.'</i>	<i>Article 17: 'The Appellate Body membership shall be broadly representative of membership in the WTO.'</i>	<i>Not in the DSU but the EU and the US always represented.</i>		
Rome Statute of the ICC		<i>Article 36: 'The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation [...]'</i>		<i>Article 36: 'Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.'</i>	<i>Article 36: 'No two judges may be nationals of the same State.'</i>
ECHR		<i>Article 22: 'The judges shall be</i>		<i>Explanatory Report to</i>	–

		<i>elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.’</i>		Protocol 11: ‘ <i>A State Party will have the possibility [of putting] forward the name of a judge who is a national of another State Party’.</i>	(Provision removed with Protocol 11 in 1998.)
ACHR & IACtHR Statute				Article 53 of the ACHR: ‘ <i>When a slate of three [candidates] is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.’</i>  Article 7 of the IACtHR Statute: ‘ <i>When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.’</i>	Article 52 of the ACHR: ‘ <i>No two judges may be nationals of the same state.’</i>  Article 4 of the IACtHR Statute: ‘ <i>No two judges may be nationals of the same State.’</i>
Protocol AfCHPR		Article 14: ‘ <i>The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.’</i>		Article 12: ‘ <i>States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.’</i>	Article 11: ‘ <i>No two judges may be nationals of the same State.’</i>
ICSID Conv. <sup>375</sup>		Article 14: ‘ <i>The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to</i>		Article 13: ‘ <i>Each Contracting State may designate to each Panel four persons who may</i>	

<sup>375</sup> Included for comparative purposes, since this is not a court.

		<i>the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.’</i>		<i>but need not be its nationals.’</i>  <i>Cf. Article 39: ‘The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.’</i>	
ILC Statute <sup>376</sup>		<i>Article 8: ‘At the election the electors shall bear in mind [...] that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.’</i>		<i>Article 4: ‘Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other States.’</i>	<i>Article 2: ‘No two members of the Commission shall be nationals of the same State.’</i>

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<sup>376</sup> Included for comparative purposes only, since the ILC is not a court.

Appendix B

**NATIONALITY AND JUDGES AD HOC IN SPECIFIC CHAMBERS OR DIVISIONS**

	<i>National judges</i>	<i>Judges ad hoc</i>
ICJ Statute	Article 31: ‘ <i>Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.</i> ’	Article 31: ‘ <i>If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates</i> ’; ‘ <i>If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge [...]</i> ’  Article 35 of the Rules of Court: ‘ <i>The judge ad hoc may be of a nationality other than that of the party which chooses him.</i> ’
ITLOS Statute	Article 17: ‘ <i>Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal.</i> ’	Article 17: ‘ <i>If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal</i> ’; ‘ <i>If the Tribunal, when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal.</i> ’  Article 22: ‘ <i>An entity other than a State may choose a judge ad hoc only if: (a) one of the other parties is a State Party and there is upon the bench a judge of its nationality or, where such party is an international organization, there is upon the bench a judge of the nationality of one of its member States or the State Party has itself chosen a judge ad hoc; or (b) there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties. [...]</i> ’
WTO DSU (AB)	[Rule 6 of the WTO Working Procedures for Appellate Review on the members constituting a division: ‘ <i>The Members constituting a division shall be selected [...], while taking into account the [...] opportunity for all Members to serve regardless of their national origin.</i> ’]	
Rome Statute of the ICC		

<p>ECHR</p>	<p>Article 26(4): <i>‘There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned.’</i></p> <p>But Article 26(3): <i>‘When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.’</i></p>	<p>Rule 1 of the Rules of Court: <i>‘the expression “ad hoc judge” means any person chosen in pursuance of Article 26 § 4 of the Convention and in accordance with Rule 29 to sit as a member of the Grand Chamber or as a member of a Chamber’.</i></p> <p>Article 26(4): <i>‘If there is [no ex officio member of the Chamber and the Grand Chamber elected in respect of the High Contracting Party concerned] or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.’</i></p> <p>Rule 29 of the Rules of Court: <i>‘If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall appoint an ad hoc judge, who is eligible to take part in the consideration of the case [...], from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as ad hoc judges for a renewable period of four years and as satisfying the conditions set out in paragraph 1 (c) of this Rule. [...]’</i></p>
<p>ACHR</p>	<p>–</p> <p>(Article 55 no longer applicable to individual cases)</p>	<p>–</p> <p>(Article 55 no longer applicable to individual cases)</p>
<p>Protocol AfCHPR</p>	<p>Article 22: <i>‘If a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.’</i></p>	
<p>ICSID Conv.</p>	<p>Article 39: <i>‘The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.’</i></p>	<p>NA</p> <p>All appointments ad hoc</p>

Appendix C

**ICJ: JUDGES AD HOC OF A NATIONALITY OTHER THAN THE NATIONALITY OF THE NOMINATING STATE (AS OF 1 NOVEMBER 2019)<sup>377</sup>**

<b>Judge ad hoc</b>	<b>Nominating state</b>	<b>Dispute</b>
Georges Abi-Saab (Egypt)	Mali	<i>Frontier Dispute (Burkina Faso/Republic of Mali)</i>
	Chad	<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>
Adetobunboh A. Ademola (Nigeria)	Ethiopia	<i>South West Africa (Ethiopia v. South Africa)</i>
	Liberia	<i>South West Africa (Liberia v. South Africa)</i>
Roberto Ago (Italy)	Honduras	<i>Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)</i>
Awn Shawkat Al-Khasawneh (Jordan)	Nicaragua	<i>Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)</i>
	Nicaragua	<i>Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)</i>
Louise Arbour (Canada)	Chile	<i>Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)</i>
Enrique c. Armand-Ugon (Uruguay)	Spain	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)</i>
Garfield Barwick (Australia)	New Zealand	<i>Nuclear Tests (New Zealand v. France)</i>
Suzanne Bastid (France)	Tunisia	<i>Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)</i>
	Guinea	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i>
	Nicaragua	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>
	Niger	<i>Frontier Dispute (Benin/Niger)</i>
		<i>Obligations concerning Negotiations relating to Cessation</i>

<sup>377</sup> Excludes judges ad hoc chosen for the same dispute by a group of states including the state of the judge's nationality and judges from former Yugoslavia and successor states when chosen by Yugoslavia or a successor state.

	Marshall Islands	<i>of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)</i>
	Marshall Islands	<i>Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)</i>
Mohammed Bedjaoui (Algeria)	Marshall Islands	<i>Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)</i>
Mohamed Bennouna (Morocco)	Benin	<i>Frontier Dispute (Benin/Niger)</i>
Sir Franklin Berman (Great Britain)	Liechtenstein	<i>Certain Property (Liechtenstein v. Germany)</i>
Alphonse Boni (Cote d'Ivoire)	Morocco	<i>Western Sahara</i>
Charles Brower (United States of America)	Colombia	<i>Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)</i>
Ian Brownlie (Great Britain)	Liechtenstein	<i>Certain Property (Liechtenstein v. Germany)</i>
Antônio Augusto Cançado Trindade (Brazil)	Costa Rica	<i>Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)</i>
Jean-Yves de Cara (France)	Republic of the Congo	<i>Certain Criminal Proceedings in France (Republic of the Congo v. France)</i>
David Caron (United States of America)	Colombia	<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)</i>
Jorge Castañeda (Mexico)	Malta	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i>
Hilary Charlesworth (Australia)	Guyana	<i>Arbitral Award of 3 October 1899 (Guyana v. Venezuela)</i>
Joseph Chesson (Liberia)	Ethiopia	<i>South West Africa (Ethiopia v. South Africa)</i>
Claude-Albert Colliard (France)	Nicaragua	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i>

Jean-Pierre Cot (France)	Colombia	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>
	Romania	<i>Maritime Delimitation in the Black Sea (Romania v. Ukraine)</i>
	Colombia	<i>Aerial Herbicide Spraying (Ecuador v. Colombia)</i>
	Burkina Faso	<i>Frontier Dispute (Burkina Faso/Niger)</i>
	Thailand	<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)</i>
	Timor-Leste	<i>Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)</i>
	United Arab Emirates	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)</i>
	Burkina Faso	<i>Frontier Dispute (Burkina Faso/Niger)</i>
	Bolivia	<i>Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)</i>
	Nicaragua	<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)</i>
	Bolivia	<i>Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)</i>
	Qatar	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)</i>
	Qatar	<i>Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)</i>
		<i>Appeal Relating to the Jurisdiction of the ICAO Council under Article</i>

Yves Daudet (France)	Qatar	<i>II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)</i>
	Democratic Republic of the Congo	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>
Igor Daxner (Czechoslovakia)	Albania	<i>Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)</i>
Christopher J. R. Dugard (South Africa)	Rwanda	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)</i>
	Rwanda	<i>Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)</i>
	Malaysia	<i>Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)</i>
	Costa Rica	<i>Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)</i>
	Costa Rica	<i>Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)</i>
	Malaysia	<i>Application for Revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i>
	Malaysia	<i>Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i>
	Libyan Arab Jamahiriya	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)</i>
		<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab</i>

Ahmed Sadek El-Kosheri (Egypt)	Libyan Arab Jamahiriya	<i>Jamahiriya v. United States of America)</i>
Jens Evensen (Norway)	Tunisia	<i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</i>
Bohuslav Ečer (Czechoslovakia)	Albania	<i>Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)</i>
Yves L. Fortier (Canada)	Bahrain	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>
	Colombia	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>
Thomas Franck (United States of America)	Indonesia	<i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)</i>
Giorgio Gaja (Italy)	Nicaragua	<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i>
	Nicaragua	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>
	Georgia	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i>
Julio Diego Gonzáles Campos (Spain)	Honduras	<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i>
Paul Guggenheim (Switzerland)	Liechtenstein	<i>Nottebohm (Liechtenstein v. Guatemala)</i>
	Nicaragua	<i>Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)</i>
	Peru	<i>Maritime Dispute (Peru v. Chile)</i>
	Nicaragua	<i>Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)</i>
	Cambodia	<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)</i>
	Nicaragua	<i>Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)</i>
	Kenya	<i>Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)</i>

Gilbert Guillaume (France)	Singapore	<i>Application for revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i>
	Singapore	<i>Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)</i>
	Palestine	<i>Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)</i>
Eduardo Jiménez de Aréchaga (Uruguay)	Libyan Arab Jamahiriya	<i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</i>
	Libyan Arab Jamahiriya	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i>
	Libyan Arab Jamahiriya	<i>Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)</i>
James L. Kateka (Tanzania)	Uganda	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>
	Equatorial Guinea	<i>Immunities and Criminal Proceedings (Equatorial Guinea v. France)</i>
Elihu Lauterpacht (Great Britain)	Bosnia and Herzegovina	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i>
François Luchaire (France)	Burkina Faso	<i>Frontier Dispute (Burkina Faso/Republic of Mali)</i>
	Bosnia and Herzegovina	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i>

Ahmed Mahiou (Algeria)	Guinea	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i>
	Bosnia and Herzegovina	<i>Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)</i>
	Niger	<i>Frontier Dispute (Burkina Faso/Niger)</i>
Louis Mbanefo (Nigeria)	Ethiopia	<i>South West Africa (Ethiopia v. South Africa)</i>
	Liberia	<i>South West Africa (Liberia v. South Africa)</i>
Kéba Mbaye (Senegal)	Cameroon	<i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)</i>
	Cameroon	<i>Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)</i>
Donald M. McRae (Canada)	Chile	<i>Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)</i>
	Colombia	<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)</i>
Thomas A. Mensah (Ghana)	Nicaragua	<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>
Bernard H. Oxman (United States of America)	Ukraine	<i>Maritime Delimitation in the Black Sea (Romania v. Ukraine)</i>
Felipe H. Paolillo (Uruguay)	El Salvador	<i>Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)</i>
		<i>Jurisdiction and Enforcement of Judgments in Civil and</i>

Fausto Pocar (Italy)	Belgium	<i>Commercial Matters (Belgium v. Switzerland)</i>
	Ukraine	<i>Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)</i>
Pemmaraju Sreenivasa Rao (India)	Singapore	<i>Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)</i>
François Rigaux (Belgium)	Iran	<i>Oil Platforms (Islamic Republic of Iran v. United States of America)</i>
Willem Riphagen (Netherlands)	Belgium	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)</i>
José María Ruda (Argentina)	Qatar	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>
Jean Salmon (Belgium)	Burundi	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)</i>
José Sette-Camara (Brazil)	Libyan Arab Jamahiriya	<i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>
Mohamed Shahabuddeen (Guyana)	Bahrain	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>
	Indonesia	<i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)</i>
Bruno Simma (Germany)	Costa Rica	<i>Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)</i>
	Chile	<i>Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)</i>
	Costa Rica	<i>Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)</i>
Leonid Skotnikov (Russian Federation)	Nicaragua	<i>Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)</i>
	Portugal	<i>East Timor (Portugal v. Australia)</i>

Krzysztof Skubiszewski (Poland)	Slovakia	<i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i>
Max Sorensen (Denmark)	Netherlands	<i>North Sea Continental Shelf (Federal Republic of Germany/Netherlands)</i>
Serge Sur (France)	Senegal	<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)</i>
Hubert Thierry (France)	Guinea-Bissau	<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)</i>
Santiago Torres Bernárdez (Spain)	Honduras	<i>Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)</i>
	Qatar	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>
	Honduras	<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i>
	Honduras	<i>Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)</i>
	Uruguay	<i>Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i>
Francisco Urrutia Holguin (Colombia)	Nicaragua	<i>Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)</i>
Nicolas Valticos (Greece)	Malta	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i>
	El Salvador	<i>Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)</i>
	Bahrain	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>

Joe Verhoeven (Belgium)	Democratic Republic of the Congo	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)</i>
	Democratic Republic of the Congo	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>
	Democratic Republic of the Congo	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)</i>
Raúl Emilio Vinuesa (Argentina)	Ecuador	<i>Aerial Herbicide Spraying (Ecuador v. Colombia)</i>
Michel Virally (France)	Honduras	<i>Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)</i>
Christopher Gregory Weeramantry (Sri Lanka)	Malaysia	<i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)</i>
Mohamed Yaqub Ali Khan (Pakistan)	Ethiopia	<i>South West Africa (Ethiopia v. South Africa)</i>
	Liberia	<i>South West Africa (Liberia v. South Africa)</i>
Abdulqawi Ahmed Yusuf (Somalia)	Djibouti	<i>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)</i>
Muhammad Zafrulla Khan (Pakistan)	Ethiopia	<i>South West Africa (Ethiopia v. South Africa)</i>
	Liberia	<i>South West Africa (Liberia v. South Africa)</i>
Yaroslav Zourek (Czechoslovakia)	Bulgaria	<i>Aerial Incident of 27 July 1955 (Israel v. Bulgaria)</i>
	Bulgaria	<i>Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)</i>

Appendix D

**ITLOS: JUDGES AD HOC OF A NATIONALITY OTHER THAN THE NATIONALITY OF THE NOMINATING STATE (AS OF 1 NOVEMBER 2019)<sup>378</sup>**

<b>Judge ad hoc</b>	<b>Nominating state</b>	<b>Dispute</b>
Ronny Abraham (France)	Côte d'Ivoire	<i>Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)</i>
David H. Anderson (Great Britain)	The Netherlands	<i>The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures</i>
Gudmundur Eiriksson (Iceland)	Panama	<i>The M/V "Norstar" Case (Panama v. Italy)</i>
Kamal Hossain (Bangladesh)	Malaysia	<i>Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures</i>
Thomas Mensah (Ghana)	Bangladesh	<i>Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)</i>
Sean David Murphy (United States of America)	Nigeria	<i>The M/T "San Padre Pio" Case (Switzerland v. Nigeria), Provisional Measures</i>
Bernard H. Oxman (United States of America)	Singapore	<i>Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures</i>
	Myanmar	<i>Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)</i>
	Maldives	<i>Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)</i>
José Manuel Sérvulo Correia (Portugal)	Guinea-Bissau	<i>The M/V "Virginia G" Case (Panama/Guinea-Bissau)</i>
Alberto Székely (Mexico)	Ireland	<i>The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures</i>
Mr Tullio Treves (Italy)	Panama	<i>The M/V "Virginia G" Case (Panama/Guinea-Bissau)</i>

<sup>378</sup> Excludes judges ad hoc chosen by a group of states for the same dispute including the state of the judge's nationality.

Appendix E

**ITLOS: JUDGES AD HOC AND VOTING (AS OF 2 JANUARY 2020)**

<b>Case</b>	<b>Nationality of judge ad hoc in relation to nominating state</b>	<b>Judge ad hoc</b>	<b>Vote of judge ad hoc</b>	<b>Judge of the other party (national or ad hoc)</b>
<b><i>Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures</i></b>	National of one of the two states. Parties ‘in the same interest’	Ivan Shearer (Australia) was jointly nominated by Australia and New Zealand	Votes in favour of nominating state with the majority of the tribunal	Soji Yamamoto (Japan) votes with the minority in favour of the state of his nationality as to main claim
<b><i>Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/EU)</i></b>	National	Francisco Orrego Vicuña (Chile) was chosen by Chile	NA. Case discontinued by agreement of the parties	Rüdiger Wolfrum (Germany). Case discontinued
<b><i>The ‘Grand Prince’ Case (Belize v. France), Prompt Release</i></b>	National	Jean-Pierre Cot (France) was chosen by France	Votes in favour of nominating state	Edward Arthur Laing (Belize) votes against the state of his nationality
<b><i>The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures</i></b>	Non-national	Alberto Székely (Mexico) was chosen by Ireland	Votes against nominating state with the rest of the tribunal (unanimous decision). Appends separate opinion disagreeing with main decision.	David Anderson (United Kingdom) votes in favour of the state of his nationality with the rest of the tribunal (unanimous decision)
<b><i>The ‘Volga’ Case (Russian Federation v. Australia), Prompt Release</i></b>	National	Ivan Shearer (Australia) was chosen by Australia	Votes in favour of nominating state with the minority of the tribunal	Anatoly Lazarevich Kolodkin (Russia) in favour of the state of his nationality with the majority of the tribunal
<b><i>Case concerning Land Reclamation by Singapore in and around the</i></b>	Non-national	Kamal Hossain (Bangladesh) was chosen by Malaysia	Votes in favour of compromise solution with the rest of the tribunal	Bernard H. Oxman (United States of America) judge ad hoc

<b><i>Straits of Johor (Malaysia v. Singapore), Provisional Measures</i></b>			(unanimous decision)	chosen by Singapore. The two ad hoc judges append a joint declaration.
	Non-national	Bernard H. Oxman (United States of America) was chosen by Singapore	Votes in favour of compromise solution with the rest of the tribunal (unanimous decision)	Kamal Hossain (Bangladesh) judge ad hoc chosen by Malaysia. The two ad hoc judges append a joint declaration.
<b><i>Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)</i></b>	Non-national	Thomas Mensah (Ghana) was chosen by Bangladesh	Votes with the majority of the tribunal. No clear winner	Bernard H. Oxman (United States of America) judge ad hoc chosen by Myanmar. The two ad hoc judges append a joint declaration.
	Non-national	Bernard H. Oxman (United States of America) was chosen by Myanmar	Votes with the majority of the tribunal. No clear winner	Thomas Mensah (Ghana) judge ad hoc chosen by Bangladesh. The two ad hoc judges append a joint declaration.
<b><i>The M/V 'Virginia G' Case (Panama/Guinea-Bissau)</i></b>	Non-national	Tullio Treves (Italy) was chosen by Panama	Votes broadly in favour of nominating state	José Manuel Sérvulo Correia (Portugal) judge ad hoc chosen by Guinea-Bissau votes broadly in favour of nominating state.
	Non-national	José Manuel Sérvulo Correia (Portugal) was chosen by Guinea-Bissau	Votes broadly in favour of nominating state	Tullio Treves (Italy) judge ad hoc chosen by Panama votes broadly in favour of nominating state.
<b><i>The 'Ara Libertad' Case (Argentina v. Ghana), Provisional Measures</i></b>	National	Thomas A. Mensah (Ghana) was chosen by Ghana	Votes against nominating state with the rest of the tribunal (unanimous decision)	Elsa Kelly (Argentina) votes in favour of the state of her nationality with the rest of the tribunal

				(unanimous decision)
<b><i>The ‘Arctic Sunrise’ Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures</i></b>	Non-national	David H. Anderson (Great Britain) was chosen by the Kingdom of the Netherlands	Votes in favour of nominating state with the majority of the tribunal	Vladimir Vladimirovich Golitsyn (Russia) votes with the minority in favour of the state of his nationality
<b><i>Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte D’Ivoire in the Atlantic Ocean (Ghana/Côte D’Ivoire)</i></b>	National	Thomas A. Mensah (Ghana) was chosen by Ghana	Votes in favour of nominating state with the rest of the tribunal (unanimous decision)	Ronny Abraham (France) judge ad hoc chosen by Côte d’Ivoire votes against some claims of nominating state with the rest of the tribunal (unanimous decision)
	Non-national	Ronny Abraham (France) was chosen by Côte d’Ivoire	Votes against some claims of nominating state with the rest of the tribunal (unanimous decision)	Thomas A. Mensah (Ghana) judge ad hoc chosen by Ghana votes in favour of nominating state with the rest of the tribunal (unanimous decision)
<b><i>The ‘Enrica Lexie’ Incident (Italy v. India)</i></b>	National	Francesco Francioni (Italy) was chosen by Italy	Votes in favour of nominating state with the majority of the tribunal	P. Chandrasekhara Rao (India) votes in favour of the state of his nationality with the minority of the tribunal
<b><i>The M/V ‘Norstar’ Case (Panama v. Italy)</i></b>	Non-national	Gudmundur Eiriksson (Iceland) was chosen by Panama	Votes broadly in favour of nominating state with the majority of the tribunal, with some exceptions	Tullio Treves (Italy) judge ad hoc chosen by Italy votes in favour of nominating state
	National	Tullio Treves (Italy) was chosen by Italy	Votes in favour of nominating state	Gudmundur Eiriksson (Iceland) judge ad hoc chosen by Panama votes broadly in favour of nominating

				state with the majority of the tribunal
<b><i>The M/T 'San Padre Pio' Case (Switzerland v. Nigeria), Provisional Measures</i></b>	National	Anna Petrig (Switzerland) was chosen by Switzerland	Votes in favour of nominating state with the majority of the tribunal	Sean David Murphy (United States of America) judge ad hoc chosen by Nigeria votes against nominating state with the majority of the tribunal. The two judges ad hoc cast the same votes.
	Non-national	Sean David Murphy (United States of America) was chosen by Nigeria	Votes against nominating state with the majority of the tribunal	Anna Petrig (Switzerland) judge ad hoc chosen by Switzerland votes in favour of nominating state with the majority of the tribunal. The two judges ad hoc cast the same votes.
<b><i>Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)</i></b>	NA	'Mauritius will make its choice of judge ad hoc in due course'	<i>Pending</i>	<i>Pending</i>
	Non-national	Bernard H. Oxman (United States of America) has been chosen by Maldives	<i>Pending</i>	<i>Pending</i>