

“JUDICIAL NATIONALISM” IN INTERNATIONAL LAW

NATIONAL IDENTITY AND JUDICIAL AUTONOMY AT THE ICJ

Adam M. Smith*

PART I: INTRODUCTION

While most States have come to view judicial independence vital to the dispensation of justice in the domestic sphere,¹ States do not have the same expectations of detached jurisprudence when facing disputes under international law. In fact, while a judge associated with a party to a domestic suit may be *required* by municipal law to recuse herself,² in “international adjudication...[it has been assumed that] each State in

* Chayes Fellow, Harvard Law School; special assistant to Legal Counselor at United States Embassy—The Hague (2004).

¹ While it is true that the definition of judicial independence varies culturally, and that the standards for independence differ among common law and civil law States (see below), the basic premise has found widespread, cross-cultural support. Cf. C.G. Weeramantry, *ISLAMIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE* (1988), J. Widner, *International and Comparative Law: Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa*, 101 MICH. L. REV. 1622-1634 (2003). Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 747. (1994). Ramseyer quotes the American Bar Association’s canon, stressing that in the United States, “[a]n independent... judiciary is indispensable to justice in our society.” Further, though Ramseyer problematizes the concept of “judicial independence” he posits that most scholars see “all freedom-loving nations [being] faithful, after their fashion, to the principle of judicial independence.” In the NGO community, the importance of judicial independence to “freedom” and economic growth have made it a *cause celebre* for many. Cf. Freedom House’s annual “Freedom in the World Survey” includes the independence of the judiciary as a prime factor in assessing true freedom and democracy. (www.freedomhouse.org, last visited June 21, 2004); the World Economic Forum’s Global Competitiveness Report also incorporates judicial independence as a key independent variable correlated with growth. (www.weforum.org, last visited June 28, 2004).

² Cf. in the United States: 28 USC §455 mandates that “[a]ny justice...of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” In South Africa: the Constitutional Court has held that “a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds...for apprehending that the judicial officer...will not be impartial.” *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT16/98) 1999 (4) SA 147; 1999 (7) BCLR 725; [1999] ZACC 9 (4 June 1999); in Australia, the High Court found that a judge should be recused if there is a “reasonable apprehension of bias.” *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. Despite this breadth of international acceptance, as MacKenzie and Sands note, “the standards governing judicial independence in common law countries differ markedly from the Roman, civil law, and Islamic traditions. The common law approach will often find itself in a minority on the international bench.” Ruth MacKenzie and Phillippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 275 (2002).

the litigation should be permitted to have a judge of its own nationality on the bench.”³

The rationale for this arrangement, and the demands of States that it continues, rests on a usually unspoken assumption: States believe that national judges will view fellow countrymen with greater sympathy than foreigners.⁴ Thus, though in almost every international forum there are regulations and customs limiting judicial conflicts of interest, and adjudicators have regularly removed themselves from proceedings for such reasons,⁵ the vast majority of the fora allow, and even encourage, the existence of a base level of partiality which States believe stems from a judge’s nationality.

³ Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM.J.INT’L L. 224-36, 224 (1969). However, in a notable departure from the norm, the “dispute resolution provisions annexed to the World Trade Organization Agreement provide in Article 8(3) that “[c]itizens of Members whose governments are parties to the dispute...shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.” Detlev Vagts, *The International Legal Profession: A Need for More Governance?* 90 AM.J.INT’L L. 261, 257, (1996) [hereinafter *Need for More Governance?*] citing Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, reprinted in ILM 1144, 1226 (1994). See below for a discussion of the different trends in judicial independent that exist in the private international versus the public international legal realms.

⁴ “Sympathy,” in these circumstances, is based on the “assumption...that it is useful for the voice of a State party to be heard inside the councils of the judges, that this hearing will assure that its arguments are taken seriously and that, where relevant, its national legal system will be understood.” See Vagts, *supra* note 3, at 257.

⁵ Vagts notes that the history of judicial recusal at the ICJ is “extensive,” but because the reasoning of such removals is rarely made public, it remains an obscure process. Still, Vagts provides the following brief early history of such recusals—or decisions not to recuse—and the rationales behind them:

A judge recused himself from *Certain Phosphate Lands in Nauru* (Nauru v. Australia) because he had previously chaired a committee of inquiry Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) because he had served on the panel that made the challenged award. Similarly, Sir Benegal Rau did not sit in the case between Britain and Iran involving the *Anglo-Iranian Oil Company* because he had been a member of the Security Council in the early stages of the dispute. Sir Muhammed Zafrullah Khan did not sit in the merits part of the *South West Africa* litigation, apparently because he had been appointed an ad hoc judge in that case, although he had never acted in that role. The circumstances of his recusal, which reportedly involved personal pressure on him from the President of the Court, have been controversial. In the same case, the Court rejected a South African attempt to obtain the recusal of Judge Luis Padilla Nervo of Mexico on account of his Statements in United Nations debates on South West Africa. Prior contacts with Liechtenstein persuaded Sir Hersch Lauterpacht not to sit in the *Nottebohm* case and Judge Philip Jessup similarly withdrew from the *Temple of Preah Vihear* case because of prior consultations. But neither Green Hackworth nor Jules Basdevant felt compelled to withdraw from the *Morocco* case because they had been legal advisers of their respective governments during the early stages of the dispute. And Judge Helge Klaestad took part

Though the importance of judicial nationality has become visceral for many, its near-axiomatic status among States remains curious. States have by and large failed to question the assumption of judicial partiality, presuming that their judges will vote with them, and others' judges will similarly follow their masters. By concentrating on the record of the International Court of Justice (ICJ), this paper contends that while a continuing focus on nationality is understandable in the ICJ, the "nationality" bias of judges on the Court was never as powerful as claimed by alarmists, and today seems to be breaking down even further.

For both critics and supporters of international justice, any existence of national⁶ judicial allegiance would be important—for the former it would buttress one of its most cogent critiques, and for the latter it would prove another hindrance to the development of a truly transnational system of law. Part II of this article proceeds by first briefly examining the history of this "judicial nationalism," and the Permanent Court of International Justice's (1920-1942) and the ICJ's (1946-Present) tendencies to *de facto* and *de jure* assume national bias among their respective judges. The statutes, institutional structures and practices of both organizations have been fundamentally

in the *Norwegian Fisheries* case, although his tenure on the Supreme Court of Norway had brought him into contact with the issues that came before the Court. See Vagts, *supra* note 3, at 255-6. Further, the matter of judicial bias has even led to violence on the bench: concerns about his putative bias led two Iranian judges on the Iran-United States Claims Tribunal to physically attack Judge Mangard, a "neutral" serving on the tribunal. Charles N. Brower and Jason D. Brueschke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 169 (1998).

⁶ This article leaves aside the issue of regional biases that do or do not exist within the ICJ. For an analysis of the posited Western bias of ICJ decisions, see, Richard Falk, *REVIVING THE WORLD COURT* (1986). For an argument positing the anti-Western (and in particular anti-United States) bias of the Court, see, W. Michael Reisman, W. Michael Reisman, Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court, in *The United States and The Compulsory Jurisdiction of the International Court of Justice*, Aug. 1985, at 73.

impacted by the belief in judicial allegiance.⁷ Despite this, Part III will show, via a quantitative analysis of the Court's voting record from its inception through 2000, including a cross-tabulation of alliance voting on the body, that the power of nationality is indeterminate at best, rarely dispositive, and likely fleeting. Linking nationality with expected voting behavior is an over-simplified and blunt heuristic. Finally, Part IV looks to the future, both normatively and positively. It examines both why the nationality assumption seems to have failed, and how such failure is being implicitly acknowledged among States, manifest by the increasing inconsistency with which it is applied in fora apart from the ICJ. In particular, a substantial rift is emerging between public international law and private international law in this regard; the most recent regulations of the World Trade Organization (WTO) actually prohibit co-nationals from serving on arbitrations.⁸ It is this return to—and mounting importance of—the commercial, *non*-State roots of international litigation (when it was conducted solely between commercial actors) that is ironically changing the landscape of *inter*-State disputes.

Arguably, there remain important components of nationality that ought to be recognized. However, the claim that nationality matters in international jurisprudence, as a positive assertion, is so overbroad as to be inaccurate, while the claim that nationality *should* matter in such jurisprudence, as a normative assertion, seems unattractive in today's world.

⁷ Cf. Shabtai Rosenne, *Note and Comment: The Election of Five Members of the International Court of Justice in 1981*, 76 AM.J.INT'L L. 364; Shabtai Rosenne, *Current Development: The Election of March 1982 to Fill One Vacancy in the International Court of Justice*, 76 AM.J.INT'L L. 863.

⁸ Vagts, *supra* note 3, at 261.

PART II: THE BIRTH OF THE IDEA

A. BRIEF HISTORY

The roots of the practices and beliefs surrounding “judicial nationalism” are somewhat murky.⁹ Ancient Greek law, and in particular Athenian practices, provided for formal binding arbitration proceedings which, though allowing parties to choose their arbiters, insisted that the judges be neutral.¹⁰ Roman law was more restricted, greatly limiting party choice in non-judicial litigation: “the...practice of [any] third party, helping disputants transact an agreement or compose an accord conflicted with...formal Roman law...concepts....”¹¹ Finally, canon law, the root of so much modern legal thinking,¹² provides injunctions for reconciliation in order to be at “peace with one’s neighbors,”¹³ but offers little support for doing so via a tribunal composed of judges of the parties’ choosing. In fact, the dispute resolution systems developed by major religions uniformly frown on biased arbiters.¹⁴

⁹ The elucidation of this is made all the more difficult due to the fact that “[For] most of their history, arbitral tribunals, unlike the courts, did not rely on and therefore did not produce written records of their operation.” Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 938 (2004).

¹⁰ Kaja Harter-Uibopuu, *Anthropological and Historical Foundations: Ancient Greek Approaches Toward Alternative Dispute Resolution*, 10 WILLAMETTE J. INT’L L. & DISPUTE RES. 47 (2002).

¹¹ Yarn, *supra* note 9, at 945.

¹² “...religious legal systems have had, and continue to have a monumental influence on the lives and institutions of the faithful....They also have had...a pronounced influence on the secular legal systems around them.” Charles J. Reid, Jr. and John Witte, Jr. *Review Essay: In the Steps of Gratian: Writing the History of Canon Law in the 1990s*. 48 EMORY L.J. 647, 688 (1999).

¹³ Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. OF PA. L. R. 132 (1934).

¹⁴ Eg. James A. Brundage, *MEDIEVAL CANON LAW*, 125-26 (1995), discussing the development of courts of appeals in the Catholic Church. The most common modality for keeping bias out of such proceedings is via ensuring that only spiritual leaders sit on tribunals; the understanding is that the religious judges would necessarily be divorced from having any interest in the profane matters brought before them. By design, these religious arbiters provide the interpretation of divine law, with scant human interference between the divine provenance of the law and the secular implementation of decisions. Theoretically there is thus little ability to be biased. Sam Feldman, *Reason and Analogy: A Comparison of Early Islamic and Jewish Legal Institutions*, 2 UCLA J. ISLAMIC & NEAR E.L. 129-154, 130 (2002). Jewish religious courts, Beths Din, are somewhat different in that they allow laypeople to serve on tribunal bodies; however, they too demand the removal of arbiters if they have specific interests at stake in a proceedings. See GUIDE TO RULES AND

The only clear roots of the practice of party-appointed, non-neutrals is that its foundations lie in “conciliatory” or “mediatory” practices, rather than “adjudicative” practices.¹⁵ That is, having a party-appointed judge is historically a practice of arbitration not litigation. Though shades of the practice were present in various fora, this ability to name arbitrators appeared first most clearly and consistently in commercial arbitration.¹⁶ Archeological and anthropological evidence exists of very early arbitrations conducted between individuals in “highly interdependent communities” in England and Continental Europe in pre-Norman times. In such communities, the divisiveness of legal proceedings and the entrenchment of such divisions often remaining after judgment, were anathema to the close cooperation necessitated by the political economy of pre-Norman sustenance agriculture. Consequently, in order to ensure a conciliatory and convivial environment, disputants shied away from State involvement, preferring for civil society-based resolution of disagreements. The tradition of party-appointed arbitrators was thought to not only engender compromise, but also clearly separated the process from State mandate.¹⁷

This tradition was carried forward into the world of parish and commercial guilds during Medieval times, in which extrajudicial dispute resolution was found “more convenient...and more profitable, than [the] process and rigour of the law.”¹⁸ The ability for each party to name judges was critical to their agreeing to keep the dispute within the

PROCEDURE OF THE BETH DIN OF AMERICA, June 1997 Version. Available at: <http://www.bethdin.org/rules.htm> (last visited October 31, 2004).

¹⁵ Yarn, *supra* note 9, at 932.

¹⁶ See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-56 (1961). But see Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PENN. L. REV. 132 (1934-35) (finding no evidence of arbitration among the commercial communities of England’s medieval period).

¹⁷ These third parties were often “friends” of the disputants. Daniel E. Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 ARB. J. 193, 196 (1961).

¹⁸ Yarn, *supra* note 9, at 941

guild and outside the State system. This, in turn, served guilds' purposes of buttressing their own power at the expense of formal legal institutions which often worked against expanding arbitration.¹⁹

Though State judicial organs often bridled at the expansion of arbitration, States were not entirely averse to these developments. The early importance of commercial efficiency led to the appearance of legislative provisions for arbitrations as early as the Anglo-Norman period²⁰ and into Medieval times,²¹ with many systems allowing for a modicum of control by the parties over the composition of the panel.²² International commerce grew more quickly than international law, which made the model of non-law litigation especially useful when conflicts arose between two entities from different jurisdictions. In these cases it became evident that “while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum.”²³ In such cases it made sense “for parties to...refer their disputes to a mutually acceptable... decisionmaker.”²⁴ This requirement

¹⁹ *Id.*, at 974.

²⁰ *Id.*, at 943.

²¹ *The History of Arbitration in Sweden*, on the website of the ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (http://www.sccinstitute.com/uk/About/The_history_of_arbitration_in_Sweden (last visited Nov 2, 2004)). Some historians claim that the trade guilds in 12th Century England were an even earlier incarnation of legislatively mandated arbitral bodies. However, their nature as bodies of mandatory jurisdiction make them seem more akin to aspects of the English judicial system than true examples of arbitration. See Earl Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 135-36 (1934).

²² In 1698 English Merchants were provided implicit power to accept arbiters—in that they had to the power to refuse to submit their suits to “arbitration...or umpirage.” ACT FOR DETERMINING DIFFERENCES BY ARBITRATION, 9 William III, c. 15 (1698). An 1854 act provided more explicit rights stating that matters referred by a court to arbitration are to be taken up—in first instance—by “an Arbitrator appointed by the Parties...” COMMON LAW PROCEDURE ACT, 17 and 18 Victoria, c. 125 (1854).

²³ W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT’L L.J. 1, 2 (1995).

²⁴ Paul H. Haagen, *New Wineskins for New Wine: The Need To Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1052 (1998).

of “mutual acceptability” of the decisionmaker moved arbitration decidedly out of a purely legal realm—in which the ability for parties to choose judges and fora is severely constrained²⁵—into a much looser “quasi-legal” arena in which parties have a great degree of control in determining the contours and methodology of tribunals to which they put disputes.²⁶

The move from arbitration as a commercial endeavor, to arbitration involving States was first formalized in the Jay Treaty of 1794, between the United States and Britain.²⁷ Article Five of the Treaty, describing the establishment of an arbitral body to settle certain disputes that remained following the American Revolution, appears to adopt the idea of party-appointed arbitrators as a matter of course:

²⁵ Historically, civil systems, operating under the principle of “party autonomy,” and have provided litigants much greater freedom of such choices than have common law systems. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 330-31 (1990); E. Rabel, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, 359-431 (2d ed. 1960). However, neither provide for the almost unlimited flexibility of modern arbitration processes. Depending upon the arbitral system used, this flexibility can extend to judge, forum, procedure and even law—with parties able to stipulate rules that do not derive from national law. Historically, there were only minimal requirements necessary for arbitration, and in modern proceedings parties have a wide degree of freedom in designing arbitration clauses, and still gain State enforcement of such decisions. For example, see the International Chamber of Commerce, *RULES OF CONCILIATION AND ARBITRATION*, art. 13(3) which states: “The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.” Some systems, however, such as those under ICSID control, have jurisdictional requirements. AMAZU ASOUZO, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES* 262 (2001).

²⁶ Parties could usually even opt out of arbitration proceedings as in many early English contracts such clauses were revocable. See Wolaver, *supra* note 13, at 138. The “quasi-judicial” aspects of arbitration concerned common law lawyers and judges who worried about arbitration as a means to supplant their roles. This explains, in some measure, why common law courts were originally so hostile to arbitration, as the practice limited the ability of the courts to establish/institutionalize their powers and also ate into their “case-based” salaries.

²⁷ Srecko Vidmar, *Compulsory Inter-state Arbitration of Territorial Disputes*, 31 DENV. J. INT’L L. & POL’Y 87, 91 (2002); J. L. Simpson and Hazel Fox, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 1 (1959); JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* 191 (1929). See also INT’L COURT OF JUSTICE, “BLUEBOOK”—HISTORY OF THE COURT (1946-1996) “HISTORY” SECTION (1996), available at <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>.

One [arbitrator]...shall be named by His Majesty, and one by the President of the United States,...and the said two Commissioners shall agree on the choice of a [neutral] third....²⁸

Article Five provided no further details as to who should be chosen to serve on the Commission, allowing the States free reign. This allowance of complete freedom of choice in arbiters was new to inter-State arbitrations. Though historians can trace *ad hoc* inter-State arbitral proceedings to antiquity,²⁹ the only evidence of States or other public entities having any ability to choose arbiters was when they were choosing among avowedly neutral judges.³⁰ It appears that the tradition of permitting States to select openly partial judges in inter-State disputes was only adopted after essentially *commercial* arbitration practices became the means of choice for settling *public*, inter-State disagreements.

As inter-State disputes like those covered in the Jay Treaty³¹ migrated from arbitration to the Permanent Court of International Justice (PCIJ) and then the International Court of Justice (ICJ), the new “judicial” institutions inherited³² “judicial

²⁸ THE TREATY OF AMITY, COMMERCE AND NAVIGATION (THE JAY TREATY), signed at London, Nov 19, 1794. Available at: <http://www.yale.edu/lawweb/avalon/diplomacy/britian/jay.htm> (last visited Nov 2, 2004). Interestingly, in analyzing all historical cases of inter-state arbitration prior to the Jay Treaty,

²⁹ Such inter-State arbitrations were a staple of early-Hellenic history. Famous arbitrations include the 600 BC dispute between Athens and Megara over the possession of Salamis—which was decided by a panel of five Spartan arbitrators, the 480 BC controversy between Corinth and Corcyra over Leucas and the 117 BC dispute over boundary lines between the Genoese and Viturians which was also submitted to arbitration. Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. R. 155, 156 (1970) and GREGORY NAGY, PINDAR’S HOMER Chapter 11 (1997).

³⁰ For instance, the 5 BC treaty between Sparta and Argos, provided:

If there should arise a difference...there shall be an arbitration...[The] dispute will be brought before a *neutral* town chosen by common agreement. Ralston, *supra* note 27, at 147 (quoting Thucydides, emphasis added).

³¹ A key component of the issues dealt with under arbitration were territorial disputes unresolved by the Revolutionary War. Such disputes have since become the most common case presented before the PCIJ/ICJ. See Jay Treaty, *supra* note 28, and the Decisions of the International Court of Justice.

³² This inheritance was most clearly transmitted via the 1920 Committee of Jurists (involved in the establishment of the PCIJ) which “put its decision to permit participation by judges of the nationality of the parties on the ground that this would protect the character of the Court as a World Court, and would ‘avoid

nationalism” and some of the other “quasi-legal” aspects of arbitration.³³ It was this unwitting cohering of law and arbitration that led to judicial nationalism being seen both as an “obvious” component in international litigation and as an affront to the notion of “legalism.”³⁴ Yet, despite the concerns of some that allowing party-appointed judges on a court would debase the rule of law,³⁵ States would come to require it. As one observer put the issue: “Why...is a judge permitted to participate when his government is a party? Because States...would have it no other way.”³⁶

Once States entered the fray officially, the necessities of international prestige (especially for new States like the United States and recently weakened states like Britain) made it evident that their appointees, as an initial requirement, would be chosen on the basis of nationality. Indeed, it quickly was recognized that “the success of an arbitral panel largely [depended] on the ability of [these partisan] arbitrators to reach an agreement without recourse to the neutral member of the panel.”³⁷ In the early nineteenth century, it was not uncommon for States to ignore arbitral findings when such panels did not have State representation.³⁸

ruffling national susceptibilities’...” MANLEY HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942* 354-355 (1943).

³³ The arbitration-like components brought into international law included entirely consensual jurisdiction, a sense that the international judge—like an arbitrator—“is not entitled to do anything unauthorized by the parties,” and consequently “a purported award which is accomplished in ways inconsistent with the shared contractual expectations of the parties is something to which they had not agreed...[and]... may be ignored by the ‘losing’ party.” W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1989).

³⁴ Evidence for this contention also comes from the fact that States have maintained their right to appoint arbitrators in inter-State disputes they submit to arbitration, rather than the ICJ. See PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES, Article 6-8.

³⁵ *Proces-Verbaux of the Proceedings of the Advisory Committee of Jurists*, 24th Meeting, 14 July 1920, pp. 528-529.

³⁶ William Samore, *World Court Statute and the Impartiality of the Judges*, 34 NEB. L. REV. 618, 628 (1955).

³⁷ Vidmar, *supra* note 27, at 92.

³⁸ As occurred in a territorial arbitration following the War of 1812, in which the United States chose not to accept the arbitral determination of a panel absent United States representation. *Id.*

Regardless its initial instigation, the trend of judicial nationalism born from the Jay Treaty and then the PCIJ has continued unabated across international courts ranging from those covering public law questions, such as the International Court of Justice (ICJ), to those addressing humanitarian law such as the *ad hoc* United Nations tribunals in Rwanda and the former Yugoslavia (ICTR, ICTY), and the nascent International Criminal Court (ICC) to the quasi-judicial human rights treaty bodies. In almost all cases, the vacancy of a seat on any international panel causes States to use whatever leverage they can muster in order to assure that one of their own citizens is appointed to the post.³⁹ Concerning the ICC, belief in the political importance of judicial nationality is also a part of the criticism allayed against the organization; critics are fearful that politically-aligned judges will engage in politically-motivated prosecutions.⁴⁰

³⁹ The election of State members of the United Nation's Human Rights Committee has long been a highly political/contentious affair, with States often jockeying for votes with the State-electorate and the results of the elections frequently criticized. See *Parodie à l'ONU* [Parody at the UN], LE MONDE, Apr. 28, 2003, *U.S. to Demand Vote on Libya's Leadership of Rights Panel*, N.Y. TIMES, Jan. 20, 2003, at A4. For politics concerning the ICTY judicial selection process, see *Judges in Electoral Campaign for Bosnia War Crimes Tribunal*, AGENCE FRANCE PRESSE, May 8, 1997; *Battle Looms over UN Posts*, NIKKEI WEEKLY (Japan) Jan 25, 1993, page 2. The 2001 elections to the ICTY were noted for their extreme politicization, marked by the "amount of money spent on campaigning, as well as [the fact that] political considerations, were reportedly much greater factors in the outcome of the elections than the qualifications of the candidates." M2 PRESSWIRE, August 1, 2002. Competition can also be *within* States, such as the domestic argument between various parties in the Czech Republic over who should be nominated to the ICTY. See *Coalition Leaders Meet First Time This Year*, CZECH NEWS AGENCY, Jan 6, 2004. Such battles have been a long part of international tribunals. In the initial "race" to appoint the first 15 ICJ judges, nearly eighty candidates were put forward by member States. See Sydney Gruson, *Three Americans in UNO Court Race*, NEW YORK TIMES, Jan. 13, 1946, at 2.

⁴⁰ In a 1999 report to the Commission on Human Rights, the Special Rapporteur on the independence of judges and lawyers expressed concern that the institutional structure of the ICC undermined judicial independence. See REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS (Param Kumaraswamy). UN Doc. E/CN.4/1999/60, Jan 13, 1999 ¶38-40.

B. THE THEORY COMES TO THE ICJ

Nowhere is the assumption of determinacy via nationality clearer than in the charter and operation of the ICJ. In addition to its “permanent” bench of fifteen judges,⁴¹ parties to a dispute are able to appoint additional judges to the bench if they are not otherwise represented among the fifteen.⁴² The existence of these “*ad hoc*” judges, in addition to the assumed partiality of the permanent judges on the bench towards protecting their own States’ interests (even if not party to a specific case), has led many to bemoan a “fatal lack of rationality” within the Court’s mechanics, and claim that national partiality is one of the “most urgent problems of the political organization of the international community.”⁴³ Still others have complained that the system corrupts justice and impedes the development of international law.

Though this paper problematizes the assumption of national partiality on the ICJ bench, and questions the veracity of its underlying rationale, it is evident why States first developed the assumption, and in some senses why they continue to hold fast to it. The assumption fits neatly into the Westphalian model of Statehood, and takes into account the uniquely amorphous contours of international law. Under the Westphalian system the State is sacrosanct in the international sphere and consequently the prime mode of identification for actors in a multinational context.⁴⁴ As the Fourth Annual Report of the PCIJ argued:

⁴¹ Judges are elected for a period of 9 years; see below for details on the process.

⁴² As Schwebel notes, “[I]n the current parlance of the Court, a sitting judge of the nationality of a party to the case is called a “national judge.” Stephen Schwebel, *Judges of the International Court of Justice*, 48 INT’L & COMP. L. Q. 889, 891 (1999).

⁴³ Shabtai Rosenne, *Sir Hersch Lauterpacht’s Concept of the International Judge*, 55 AM.J.INT’L L. 855-6 (1961).

⁴⁴ Though writers including Grotius, Pufendorf and Hobbes held that individuals, as well as States, were subjects under international law, the inability for individuals to gain standing in international legal fora

Of all influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honors and preferments for which they are so ready to spend their fortunes and to risk their lives.⁴⁵

The importance of this allegiance is magnified in international law due to the fact that it is a system without a defined corpus, relying more on custom, the laws of “civilized nations” and the teachings of “qualified publicists”⁴⁶ than on formal “black letter law.” Unlike domestic legal systems (and particularly civil law systems) international judicial debate is often as much about whether a law exists (and if so, exactly what the law is),⁴⁷ as it is about how to apply law to a particular case. Consequently, when faced with a difficult issue, about which the international legal regime is ambiguous, it seems logical that judges would return to their domestic judicial roots for guidance, and even err on the side of their States if possible.

i. Institutional Mechanics and the Potential for Jingoism

Though a provision for national judges exists in various fora in the international legal system,⁴⁸ and concerns about the independence of international judges predate

(until recently) effectively deprived them of any internationally cognizable status. See Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM.J.INT’L L. 533 (1956).

⁴⁵ *Fourth Annual Report of Permanent Court of International Justice*, Series E, No. 4, pp. 75-76. In today’s world the ties to one’s home and kin may actually not equate with citizenship (see below); however, in the early twentieth century, “land of their homes” was essentially equated with citizenship.

⁴⁶ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art 38.

⁴⁷ See Mariano J. Aznar-Gomez, *The 1996 Nuclear Weapons Advisory Opinion and Non-Liquet in International Law*, 48 INT’L & COMP. L. Q. 3 (1999); Prosper Weil, “*The Court Cannot Conclude Definitively...*” *Non Liquet Revisited*, 36 COLUM. J. TRANSNAT’L L. 109 (1997). The existence of lacunae in international law, and the motley ways in which the ICJ has filled it in the past (via reference to “equity,” for example), means that such gaps are potentially exploitable by nationality-considering judges.

⁴⁸ Eg. UNITED NATIONS CONVENTION ON LAW OF THE SEA, art. 2, Annex V, Dec. 10, 1982, 1833 U.N.T.S. 397 (calling for each State party to a dispute to appoint four “conciliators”), STATUTE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, art. 10, O.A.S. Res. 448 (IX-0/79) (1980) (allowing State parties to appoint “*ad hoc*” national judges to hear specific disputes).

international courts,⁴⁹ it was the statute of the PCIJ that solidified the notion.⁵⁰ Article 31 of the PCIJ statute, written in response to substantial national pressure, and converted verbatim into Article 31 of the current court's statute, provides a right for "[j]udges of the nationality of each of the parties...to sit in the case before the Court."⁵¹

Gaining the representation of litigants on the adjudicating panel was a hard fought battle during the drafting of the PCIJ statute. A chief antagonist of the proposal was Bernard Loder, who would become the PCIJ's first president. He claimed that having a co-national as a judge "would give the proceedings a characteristic essentially belong to arbitration," rather than the dispensation of justice.⁵² However, the pragmatists won the day arguing that "if [States] cannot be assured of representation on the Court it will prove impossible to obtain their assent."⁵³ This was a concern for the entire tenure of the League of Nations in all of the League's workings, but it was especially so for the PCIJ which saw many of the League's largest member States balk at consenting to the body.⁵⁴ As a result, national interest, and the assumption of national bias, was preserved in the PCIJ, significantly quelling State objections.

The expectation of national bias was manifest even more clearly—and with substantially less dissent—during the post World War II debates at Dumbarton Oaks and then during the San Francisco Treaty Conference (which resulted in the formation of the

⁴⁹ FREDERICK DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW*, 106-107 (1932). Dunn spoke in connection with the mixed claims commissions. (Quoted in Thomas R. Hensley, *National Bias and the International Court of Justice*, 12 *MIDWEST JN'L OF POL. SCI.* 568, 569 (1968)).

⁵⁰ At meetings of the Committee of Jurists in 1920 it was argued that, without judges from the Great Powers, the Court would be impracticable, and that the people of litigating States would not accept decisions of the Court if their countries were not represented. See PCIJ, *Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Committee*, June 16-July 24, 1920, with Annexes, pp. 28-29, 105, 120, 134.

⁵¹ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 31.

⁵² *Supra* note 36

United Nations and some of its sister institutions including its “principal judicial organ,” the ICJ).⁵⁵ A contentious issue in the conference concerned whether ICJ judges ought to be “independent” or “impartial”⁵⁶ with regard to their nationalities. In the end, the statute requires judges to exercise their duties “impartially,” but is silent on whether or not judges should be “independent.”⁵⁷ The subtext is evident: a judge can at once be impartial and yet remain non-autonomous.

In many respects, the process by which ICJ judges are selected supports this view. Term judges (those that do not sit for a single case as *ad hoc* judges do) are nominated by the national groups⁵⁸ of the Permanent Court of Arbitration, ensuring that no State has more than one seat, and that “the persons to be elected should individually possess the qualifications required, [and] the body as a whole [should represent]...the main forms of civilization and... principal legal systems of the world.”⁵⁹ Far from being independent, the process arguably mandates that judges bring with them the cultural preconceptions and biases extant in their national groupings. Moreover, that the developed custom has had the five permanent members⁶⁰ of the Security Council always

⁵³ *Id.*, at 638.

⁵⁴ Cf Edwin L. James, *Adopt World Court but with Protest*, NEW YORK TIMES, Dec. 14, 1920, 1.

⁵⁵ UN CHARTER, Article 7; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 1

⁵⁶ William Samore, *National Origins v. Impartial Decisions: A Study of World Court Holdings*, 34 CHI.-KENT L. REV. 193 (1956), 197. The distinction between the two concepts was elucidated in a 1985 report by the sub-commission of the Human Rights Commission focusing on judicial administrations.

“Independence” refers to freedom from any restrictions, inducements, pressures, threats or interference, direct or indirect....” (¶ 77)... Impartiality implies freedom from bias, prejudice and partisanship; it means not favoring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favor in order to do right . . .” UN document: E/CN.4/Sub.2/1985/18 and Add. 1-6. Interestingly, the ICC statute calls for judges to be *both* impartial and independent. See STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at art. 40-41.

⁵⁷ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 20.

⁵⁸ “National groups” are representatives of States made up of four jurists. These jurists can propose up to five candidates for election. Provisions are also made for those States not part to the Permanent Court of Arbitration to participate in the election process. *Id.* at art. 4.

⁵⁹ *Id.* at art. 9.

⁶⁰ The five permanent Security Council members are: China, France, Russia, United Kingdom and United States.

holding a seat, has insured that the ICJ at least appears to be an as nationally-interested body as the Security Council itself.

Once nominated, the fifteen term judges are then voted upon by the United Nations General Assembly and the Security Council for renewable terms of nine years, with an election for one-third of the bench held every three years.⁶¹ Thus, judges are theoretically accountable for their decisions under pain of dismissal by the Assembly and Council—both bodies that represent national interests. While appointments of *ad hoc* jurists are manifestly political and nationally-oriented,⁶² the result of the system mandated in the ICJ statute is that the nominating process and the triennial ICJ judicial elections of term judges are highly-political affairs as well. In each election cycle, the General Assembly and the Security Council elect five judges (one-third of the bench) in separate, choosing from among a list of nominees chosen by the national groups mentioned above. This, combined with a voting system which allows the possibility for more than five judges to receive the requisite majority,⁶³ has historically made the votes very contentious.⁶⁴

⁶¹ *Id.*, at art. 13.

⁶² See HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933). The ICJ is not alone in this regard: See also STATUTE OF THE INTERNATIONAL TRIBUNAL OF THE LAW OF THE SEA, at art. 17 and John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109 (1998).

⁶³ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at arts. 10, 12. See also, Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 291 (1971), W. N. Hogan, *The Ammoun Case and the Election of Judges to the International Court of Justice*, 59 AM. J. INT'L L. 908 (1965).

⁶⁴ The ICJ's first election in 1948 was an indication of how political the judicial appointment process could become. The re-election of Yugoslav judge Milovan Zoricitch required the holding of night sessions for both the General Assembly and the Security Council, with the Soviet and Ukrainian electors making clear that if Zoricitch were not re-appointed, they would only support the appointment of another Slav to the post. See *Five Re-elected to World Court*, NEW YORK TIMES, Oct 23, 1948, at 3.

National interest, and the search for a “safe pair of hands” in which to entrust national interests at the Court, are key concerns for States during such elections.⁶⁵ In addition to the technical election process, the process has also come to include formal and informal meetings between UN diplomats, with influential States playing a large role in the process, cajoling, coaxing and bargaining with other States for their support of specific candidates.⁶⁶ Re-election of judges can even focus on cases that the judge has decided.⁶⁷ Increasingly, and especially evident in the nascent ICC, judicial appointments have become an element of domestic political patronage, explicitly rewarding national/governmental loyalty and service.⁶⁸ The more direct the linkage between appointment and patronage, and the more prestige associated with remaining on the bench once appointed, the greater the potential for the interests of the patron State to play a significant role throughout a judge’s tenure.⁶⁹

⁶⁵ *Id.*

⁶⁶ “Everything in the United Nations tends to be politicized in the sense that everything, including elections to the Court, becomes stakes in the never-ending process of bargaining for whatever is on the market.” Gross, *supra* note 63, at 287.

⁶⁷ See Mackenzie and Sands, *supra* note 2, at 278-9.

⁶⁸ The ranks of ICJ judges have historically been full of former government ministers and others close with the ruling government. Among the first 15 to serve were former foreign ministers, justices of supreme courts and a president of the national bank. See Five Re-elected to World Court, *supra* note 37. In the current court, the trend continues. For example, Hisashi Owada, the Japanese representative on the court was a career diplomat, Japanese ambassador to the United Nations and is also the father of the Crown Princess. ICJ website (www.icj-cij.org; last visited July 10, 2004); website of the Imperial Household Agency (<http://www.kunaicho.go.jp/e02/ed02-04.html>) (last visited Nov 1, 2004). Regarding the ICC, concerns of such political appointments, and the role of judges in having to approve what could be highly politicized decisions to prosecute, have risen the ire of even some of the Court’s prime supporters. See Henry Kissinger, DOES AMERICA NEED A FOREIGN POLICY?: TOWARD A DIPLOMACY FOR THE 21ST CENTURY 273 (2001); Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 5 STAN. L. REV. 1633 (2003).

⁶⁹ This would fit a traditional patron-client relationship, and would elucidate the initial selection, voting and reappointment of specific judges. See generally James C. Scott, *Political Clientalism: A Bibliographical Essay*, in FRIENDS, FOLLOWERS AND FACTIONS 305-323 (S. Schmidt, et al. eds., 1977). Though analyses of these relationships are common in the political science literature, there has been no work specifically on the patron-client phenomenon in the international judiciary. However, it would be reasonable to believe that some aspects of this relationship are present, especially among judges from States which have government bureaucracies run in accordance with a patron-client model.

In addition to judge selection, the operation of the court also provides room for national interests to be furthered by the ICJ. Both the court's jurisdiction, and the fact that it is privy to hear two classes of cases (contentious and advisory), have been "nationalized" by some parties. Turning to jurisdiction, of the 191 members of the UN (who are automatically members of the ICJ) only 64 have standing acceptance of ICJ jurisdiction.⁷⁰ The 127 other States have lodged reservations, and allow jurisdiction solely on a case-by case basis. As the *United States v. Nicaragua*⁷¹ case manifested, the provision and withdrawal of jurisdiction inherently politicizes and nationalizes proceedings. That the only judge to support the United States position in the jurisdictional phase of that case happened to be the American sitting on the bench, only intensified the assumption of judicial bias.⁷² These jurisdictional machinations undertaken by States have been based on the fear that ICJ judges would make nationally-driven decisions on the merits of a matter if it were allowed to proceed that far.⁷³

A component of the jurisdictional debate also concerns the makeup of the bench that hears any specific case. The existence of *ad hoc* judges—appointed by national parties involved in the dispute for the sole purpose of hearing the case—evidently plays into, or at least attempts to placate, latent national interests. So too does the fact that in many cases the entirety of the fifteen judges do not sit; in fact, the ICJ changes the composition of its bench for specific cases regularly.⁷⁴ According to Schwebel, the

⁷⁰ See ICJ website, www.icj-cij.org.

⁷¹ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America, Nv 1984); see also Herbert W. Biggs, *Nicaragua v. United States: Jurisdiction and Admissibility*, 79 AM.J.INT'L L. 373 (April 1985).

⁷² Judge Stephen Schwebel.

⁷³ This was especially so during the Cold War; see Soviet judicial commentary below.

⁷⁴ Article 26 allows the Court to "from time to time form one or more chambers, composed of three or more judges...for dealing with particular categories of cases." STATUTE OF THE INTERNATIONAL COURT OF

reasoning behind the ICJ's statutory allowance of these "*ad hoc* chambers" was "to permit the parties to the case to influence both the size and the composition of the Chamber." A State was to be given the ability to fashion not only the identity of the adjudicators (via *ad hoc* judges), but also the number of adjudicators who would get to hear the case.⁷⁵

The Court's hearing of advisory cases, in addition to contentious matters, also allows national politics to be a part of judicial administration. The existence of "advisory" jurisdiction is foreign to many legal systems (especially most common law jurisdictions) which hold that only issues "ripe" for adjudication can be heard by a court.⁷⁶ Advisory issues are legal questions about which a political entity in the government wishes judicial input; such questions do not require an existing legal conflict. That a political organ (the presidency or parliament in the case of many municipal systems, and the General Assembly⁷⁷ in the case of the ICJ) asks for judicial

JUSTICE, at art. 26. See also Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM.J.INT'L L. 831 (1987).

⁷⁵ *Id.* at 833.

⁷⁶ *Cf* in the United States system: Gene R. Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987), LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 356, § 3-10, at 77 (2d ed. 1988) (explaining that in the United States system a case may be dismissed for lack of ripeness if future events would make the case more suitable for adjudication). Despite this, there remains some debate in the United States regarding the exact powers of the federal and state courts to deliver such "advisory" (rather than "judicial") decisions. See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990). For details on the Australian system see HILARY ASTOR, *DISPUTE RESOLUTION IN AUSTRALIA* 280 (2002) (describing the ripeness requirement in Australian courts for judicial action). This comparative judicial restraint in the United States and Australia is in contrast with the advisory opinions tendered by judges in both Germany and Canada (which has a mixed civil and common law system). See DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 15 (1989) and PETER RUSSELL, *THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT* 91-2 (1987). See also generally, STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997).

⁷⁷ Though the UN Charter also allows "other organs of the United Nations and specialized agencies" to request advisory opinions from the Court, this right has very rarely been exercised. Of the 25 advisory cases referred to the Court, only four were not referred by the General Assembly: *Legality of the Use of Nuclear Weapons in Armed Conflict* (1993—referred by the World Health Organization), *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980—World Health Agency), *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative*

determination evidently imbues any decision made with political content. In the past, national interests have been expressed by reference to advisory opinions,⁷⁸ much to the chagrin of many observers who worry that advisory rulings effectively circumvent a State's right to deny the court jurisdiction.

State action, especially during the Cold War, served to buttress the institutional and statutory structure of the ICJ in promoting judicial nationalism. In the United States, in response to fears of acceding control to a "court of foreigners," the Senate pushed through the Connally Amendment, a wide-ranging reservation to ICJ jurisdiction that theoretically allowed the United States the final determination as to whether a specific issue could go before the body.⁷⁹ Noting the Communist party membership of most of the Warsaw Pact judges, many Western States assumed that party ideology would infiltrate the process. In the *Nicaragua vs United States* case, the respondent used national judicial bias as an explicit rationale for objecting to ICJ jurisdiction over the matter:

We will not risk US national security by presenting... material...before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice.⁸⁰

Organization (1959—Inter-Governmental Maritime Consultative Organization), Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (1955—UNESCO). See UN CHARTER, at. art. 96(2) and ICJ website.

⁷⁸ A common example mentioned is the "court's 1971 advisory opinion deeming the presence of South Africa in Namibia illegal—a ruling that [though "legally" non-binding] contributed to the imposition of international sanctions against South Africa." Catherine Cook, *Israel, the Wall and the Courts: Sending the Wrong Message*, GLOBAL BEAT SYNDICATE (New York University) (2004) (available at: <http://www.nyu.edu/globalbeat/syndicate/cook030104.html> (last visited Nov 3, 2004)).

⁷⁹ See Margaret Rague, *The Reservation Power and the Connally Amendment*, 11 N.Y.U. JNL OF IN'L L. & POL. 323 (1978).

⁸⁰ *US Statement on Withdrawal of Case Before the World Court*. NEW YORK TIMES, Jan. 19, 1985, at 4.

The Soviet view of the ICJ was equally doctrinaire, claiming *inter alia*, that external, political pressure on Western ICJ judges from their respective capitals could be decisive to their decision making, that the membership of the ICJ bench did not guarantee the USSR with an objective examination of legal issues, and that the entire ICJ bench was in the hands of “imperial powers.”⁸¹ The first Soviet judge on the court, Sergei Krylov, did little to ease the fears of Western States, often using his opinions to voice political rhetoric seemingly dictated from the Kremlin.⁸²

ii. Lack of Empirical Evidence

Despite this history, empirical data concerning the veracity of the underlying assumption is both limited and inconclusive. The halcyon days of the academic literature on this issue were during the early Cold War⁸³ when the determinative force of nationality—and related spheres of interest—became a preoccupation of many scholars and practitioners before the Court. The thought was not just that the ideological gulf between the East and West would be reflected in Court decisions, but also that the judges selected by States were chosen *because* of their allegiance to party line.⁸⁴

From the historical record, there appeared reason for this belief. It was noted that during the tenure of the PCIJ, there were only ten instances in which a judge voted in

⁸¹ See Zigurds L. Zile, *A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy*, 58 AM.J.INT'L L. 359 (1964).

⁸² *Id.*

⁸³ However, observers like Lauterpacht raised concerns about judicial nationality much earlier. See Lauterpacht, *supra* note 62, at 215.

⁸⁴ One of the reasons the United States provided the court when it withdrew jurisdiction during the Nicaragua case was the danger of information leakages from judges hailing from Warsaw Pact countries. Statement on the US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, 24 ILM 246, 248 (1985)

whole or part against the contentions of his government.⁸⁵ To those certain of the power of nationality, this was dispositive; after all, these results seem to show that the initial aim of establishing a court “composed of a body of independent judges”⁸⁶ was fundamentally frustrated. Once the ICJ was established, some commentators explicitly charged that judges were not independent, and decisions in which national judges voted against their governments were reported with a mix of incredulity and bewilderment.⁸⁷ In addition to this anecdotal evidence, the few empirical studies conducted during this time (Suh 1969⁸⁸ and Hensley 1968⁸⁹) found some correlation between national positions and judicial voting.⁹⁰

However, as quickly as scholars were able to show partiality, others cast doubt on the validity of the studies. For example, while Hersch Lauterpacht claimed that correlations between national votes and States party to a particular case, could not be “accidental,” others, such as Manley Hudson, argued that mere tabulation of votes was not persuasive without a closer examination of the substance of views behind the votes.⁹¹ Based on his own service on the PCIJ bench, Hudson “concluded that...judicial impartiality...[was] an established fact.”⁹² Further, scholars promoting the importance of national identity were charged with the fallacy of *post hoc ergo propter hoc*; an

⁸⁵ Further, Samore notes that the PCIJ propagated a “fiction of independence” for some jurists, in the face of clear evidence to the contrary. See Samore, *supra* note 56, at 200, 193.

⁸⁶ Advisory Committee of Jurists, *Proces-Verbaux* of the Proceedings of the Committee iii (1920), art. 2, at 699.

⁸⁷ Samore noted that observers remarked with amazement when the British judge decided to vote against his own government, the first time in the history of the post war court. Samore, *supra* note 56, at 195.

⁸⁸ *Supra* note 3.

⁸⁹ Hensley, *supra* note 49.

⁹⁰ The results were somewhat mixed, with some arguing that national judges on the whole “favorable attitudes towards the contentions of their states,” (Suh) and others claiming that national interest was of only marginal importance.(Hensley). See Suh, *supra* note 3, at 235; Hensley, *supra* note 49, at 585.

⁹¹ Samore, *supra* note 56, at 202 (quoting Manley Hudson).

⁹² Carl Q. Christol, *The United States and the Prospects for a World Rule of Law*, 7 S’TH DAK. L. R. 7, 34 (1962).

alignment of votes is not necessarily based on a preceding alignment of national identity or interest.⁹³ Indeed, these writers argued both that despite the evidence of national concurrence in voting, it was “never thought during PCIJ years that the quality of the court’s justice was impeded by the national origins of its judges,”⁹⁴ and that the impact of PCIJ and ICJ judges’ nationalities on decisions was, at best, indeterminate.⁹⁵

iii. Recent Work on Judicial (In)dependence

Since 1969 there have been no empirical studies examining judicial nationalism on the ICJ, and recent literature on the subject notes that while much attention has been paid to the independence of national judicial systems, “relatively little” has been written on the independence of the international judiciary.⁹⁶

However, two analytic trends have emerged. First, using statistical and qualitative analyses, there has been a raft of work on the independence of judges in domestic systems, and in particular in the United States.⁹⁷ Judges to the federal bench, and in some instances to State courts, are appointed by the executive branch and require approval of at least one branch of the legislature.⁹⁸ Consequently, the process is

⁹³ Hardy C. Dillard, *A Tribute to Philip C. Jessup and Some Comments on International Adjudication*, 62 COLUM. L. R., 1145 (1962).

⁹⁴ Christol *supra* note 92, at 35. Christol also argues that “national differences and varied legal systems do not have any material bearing on a given judge’s view of international law.”

⁹⁵ Dillard, *supra* note 93, 1145. He wrote that “observations suggest that the characterization of a national judge as a “national” judge is neither accurate nor inaccurate.” This, however, did not imply that there were not ever clearly political decisions rendered. *See* Samore, *supra* note 56, at 202.

⁹⁶ *See* Mackenzie and Sands, *supra* note 2 at 276. The authors describe a “research program” for assessing independence, rather than provide any answers on the issue.

⁹⁷ Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L.REV 95 (1997).

⁹⁸ UNITED STATES CONSTITUTION, §2, Clause 2.

manifestly political, and has arguably become more so over the past twenty years.⁹⁹

Second, in response to the rapid growth of the international judiciary since the end of the Cold War,¹⁰⁰ questions have arisen, and in some cases qualitative work has been published¹⁰¹ and/or jurisprudence has developed, examining the independence of judges sitting on trade dispute panels,¹⁰² *ad hoc* international criminal tribunals for the former-Yugoslavia¹⁰³ and Rwanda,¹⁰⁴ the European Court of Human Rights,¹⁰⁵ and the nascent ICC.¹⁰⁶ Despite these cursory examinations, there remains surprisingly little scholarship on international judicial independence.¹⁰⁷

⁹⁹ Cf. Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998); *Consult on Judges*, Washington Post, A34 (2002); Scott Shepard, *Fight Over Bush Nominee Reflects Growing Partisanship over Judiciary*, COX NEWS SERVICE (2002).

¹⁰⁰ Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 710, 711–23 (1999).

¹⁰¹ Cf. Allen N. Sultan, JUDICIAL AUTONOMY UNDER INTERNATIONAL LAW, 21 U. DAYTON L. REV. 585 (1996).

¹⁰² Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT (Laurence Boisson de Chazournes, Cesare Romano, and Ruth Mackenzie, eds. 2002).

¹⁰³ For example, the purported lack of independence of the tribunal was a basis for the formal appeal of the Furundzija case in the International Criminal Tribunal for the Former-Yugoslavia. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1A, Judgment (July 21, 2000). Additional jurisprudence was established via an interlocutory appeal of Vojislav Seselj in which the accused claimed *inter alia* that the nationality of a judge should disqualify him from presiding. The court held that the “nationalities...of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them...” See *Prosecutor v. Sesejl*, Case No. IT-03-67-PT, Decision on Motion for Disqualification (June 10, 2003) ¶ 3.

¹⁰⁴ ICTR judges have vigorously defended their judicial autonomy. In 2000 in response to assertions of political meddling, Judge Nieto-Navia argued that he refuted “the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure cooperation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity.” See ICTR Press Release, *Barayagwiza to be Tried by ICTR*, ICTR/INFO-9-2-226EN.

¹⁰⁵ The February 2003 London meeting organized by NGO Interights focused on judicial independence in the body. The resulting document: JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS, is available at: http://www.nchr.gr/downloads/Judicial_Appointments_to_ECHR.pdf (last visited July 1, 2004).

¹⁰⁶ *Supra* note 27.

¹⁰⁷ In addition to works by Schwebel, Suh, Samore and Hensley listed elsewhere, some of the few other works include, Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 123 (Lori Fisler Damrosch ed., 1987); and Arthur Rovine, *The National Interest and the World Court*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 313 (Leo Gross ed., 1976).

a. Domestic Studies: The US Federal Bench

Due to the political components of the process, and the evident desire of the executive to leave a permanent stamp on the judiciary (appointments to the Federal bench are for life), many scholars have long held that the independence of judges was compromised both by their ideology and their allegiance to the party/individual that placed them in office. Indeed, a “burgeoning body of research has identified a consistent link between the politics of federal judicial appointments and subsequent judicial rulings across a variety of dispute categories.”¹⁰⁸ In all, “one hundred forty books, articles, dissertations, and conference papers are identified in the legal and political-science literatures between 1959 and 1998 reporting empirical research pertinent to a link between judges' political-party affiliation and judicial ideology in the United States.”¹⁰⁹

The result of these studies has been the formalization of various theories of judicial behavior, with the key construct being Segal and Cover’s “Attitudinal Model.”¹¹⁰ Now widely held, this model has consistently found that expressions of ideology are closely linked with voting patterns on the court. Simply put:

Court[s] decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of [their] justices...[Thus, on the U.S. Supreme Court,] Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.¹¹¹

¹⁰⁸ STEVE ALUMBAUGH AND C. K. ROWLAND PLATFORM BASED APPOINTMENT CRITERIA AND DECISIONS (1990).

¹⁰⁹ Daniel Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta Analysis*, 20 THE JUSTICE SYSTEM JOURNAL, 219, 219 (1999).

¹¹⁰ Jeffrey A. Segal and Albert D. Cover. *Ideological Values and Votes of U.S. Supreme Court Justices* AM. POL. SCI. REV., 557 (1989); Jeffrey A. Segal and Harold J. Spaeth. THE SUPREME COURT AND THE ATTITUDINAL MODE (1993).

¹¹¹ Segal and Spaeth, *supra* note 110, at 65.

Of even greater consequence to the ICJ have been two more recent trends. First, despite the fact that Supreme Court justices are appointed for life, Fleming and Wood found that external public opinion impacts the decisions of individual members of the court, thereby pressuring decisions that may not have otherwise been made.¹¹² If such a desire for public acceptance is present in those who do not have to face an electorate, ICJ judges—fearful of losing their seat after their terms—may be even more impacted by such external stimuli.¹¹³ This argument has been made by critics of the European Court of Human Rights (ECHR), whose judges also face external re-appointment (see below). Second, though still silent with respect to the election of ICJ judges, selection of US federal judges has become manifestly political, with party members and ideological factions demanding leadership appoint like-minded judges to the bench.¹¹⁴

b. International Legal Independence

As the size of the international judiciary has grown, scholarship seeking to evaluate the “credibility, legitimacy and efficacy” of the judicial corps has begun to expand. However, though a research agenda has been laid out by various scholars,¹¹⁵ as of yet, studies conducted have been either introductory or qualitative¹¹⁶ in nature.

¹¹² Roy B. Fleming and B. Dan Wood. *The Public and the Supreme Court: Individual Justice Responsiveness to American Public Moods*, 41 AM. J. POL. SCI., 468 (1997).

¹¹³ ICJ judges are *de facto* shielded from *internal* ouster. Article 18 of the ICJ Statute allows removal of a judge only if “in the *unanimous* opinion of the other members, he has ceased to fulfill the required conditions.” (Emphasis added) THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 18.

¹¹⁴ This has been true of many recent appointees who rank-and-file party members have claimed have not been liberal/conservative enough. For example, some Republicans view Justice Souter, a U.S. Supreme Court justice appointed by the first President Bush—a Republican—in 1991, on the bench as disappointingly liberal, and wish the president had nominated a more tried-and-true judicial conservative. The same was said about Justice Brennan, the very liberal justice who was appointed by the Republic Dwight Eisenhower. See: David Alistar Yalof, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999).

¹¹⁵ Mackenzie and Sands argue that questions of judicial legitimacy play out over motley dimensions: “...including the procedures for the nomination, selection, and re-election of international judges; the

Given the sophistication and history of their multi-national judicial system, it is not surprising that member States of the Council of Europe have led the way in such analysis. In particular, the nomination procedures of judges to the ECHR have been under particularly intense scrutiny. A 2003 report discussed six major problems with the process, most of which could be attributed to the ICJ selection system as well.

1. States have absolute discretion with respect to the nomination system they adopt. Governments are not given guidelines on procedures, nor are they required to report on or account for their national nomination processes....Nominees often lack...necessary experience....
2. The Committee of Ministers, while on paper the body that should be empowered to engage with governments on their nomination procedures and reject unacceptable lists, is concerned more with safeguarding State sovereignty than with ensuring the quality of nominated candidates....
4. At the final stage, the Parliamentary Assembly is provided with limited information on candidates and...political groups appear to dictate voting patterns. Lobbying by States, and occasionally by judicial candidates, jeopardizes the future independence (actual and apparent) of judges.
5. The current possibility of re-appointing sitting judges renders them particularly susceptible to unacceptable interference from their governments and risks obedience to their governments.
6. The result is a Court less qualified and less able to discharge its crucial mandate than it might otherwise be. The Court also suffers from gender imbalance, at least in part due to the opaque and politicized nature of the nomination and election procedure.¹¹⁷

Though the ECHR work is the only targeted analysis of a particular court that has been conducted, there are three other emerging branches of scholarship broadly addressing

relationship between the international judge and the parties or issues before the court the outside activities of international judges; and finally, the relationship between judicial and political organs.” See Mackenzie and Sands, *supra* note 2, at 276.

¹¹⁶ The only truly quantitative study conducted the independence of ICJ judges was by Hensley in 1968 who claimed to be able to use mathematical coding of cases and the national interests represented in them, in order to finely parse the national-bias impact of judicial voting. He even argued that his coding could differentiate between “the influence of culturally inculcated values and the effect of national interests.” See Hensley, *supra* note 49, at 570.

issues of judicial independence in the international realm. First, an especially contentious debate has begun concerning the “effectiveness” of international adjudication. The independence of the international bench is a key component of this debate, with Eric Posner and John Yoo arguing that effective international courts are more likely to consist of dependent jurists,¹¹⁸ while Laurence Helfer and Anne-Marie Slaughter have argued otherwise.¹¹⁹

The present paper does not buttress either finding, but it does question their shared initial assumption that being “dependent” (based on national identity) is actually a status that significantly impacts judicial decisionmaking. Both sides of the debate analyze independence of a court on a *ex ante* basis—based on its structure, mandate and process of nomination.¹²⁰ While *ex poste* compliance is also examined, the step prior to enforcement—an investigation of the actual votes cast by members of the bench—is absent from both. By examining the voting record, the current article will hopefully provide added nuance to the ongoing discussion.

Two further branches of scholarship are worthy of brief note for their reference to nationality and independence. First, there is nascent work on the governance of international legal institutions due to the recognition that their opacity—primarily in their decision making processes—precludes a clear understanding of the problems and potential solutions in governance. The regulation of judges is a central element in this

¹¹⁷ See *supra* note 105; as a result some eminent jurists have called for the reform of the nomination system. See David Pannick, *There Needs to be Reform at the European Court of Human Rights*, TIMES (OF LONDON), Oct 21, 2003.

¹¹⁸ See Laurence R. Helfer and Ann-Marie Slaughter, *Of States, Bargains and Judges: The Limited Role of Dependence in International Adjudication* 93 CAL. L. REV. (forthcoming May 2005), which responds to Eric A. Posner and John C. Yoo, *A Theory of Adjudication*, THE CHICAGO WORKING PAPER SERIES INDEX (<http://www.law.uchicago.edu/Lawecon/index.html>), February 2004. (last visited Nov 1, 2004).

¹¹⁹ Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997);

inquiry.¹²¹ Second, scholarship is expanding regarding the Court’s ability to provide decisions in highly-political cases.¹²² This work brings to light the “obvious problems of the international legal system: its basis of consensual jurisdiction and the reluctance, and at times the recalcitrance, of States to comply with the Court’s decisions.”¹²³ An ICJ jurist’s recent questioning of the independence of a fellow jurist in the highly-political Israel Wall case represents another facet of this issue, in which doubts as to the ability for the ICJ bench to adjudicate impartially are beginning to be expressed from within the organization.¹²⁴

PART III: ANALYSIS

The initial difficulty with researching how nationality matters on the ICJ rests on the equivocal meaning of the word “matter.” There are at least three primary ways in which the word can be assessed—this tripartite analysis forms the basis of the investigation that follows. First, nationality could “matter” if it were shown that judges consistently vote for their own States when they are party to a case. It was this aspect of “matter” that prior research seems to have implied. Such an analysis, replicated in part below, suggests that by the end of the twentieth century, the findings of the 1960s—that,

¹²⁰ *Id.*

¹²¹ Vagts argues that various aspects of professional behavior are not well regulated, and in particular is the “anomalous role assigned to national judges and party-appointed arbitrators.” See Vagts, *supra* note 3, at 261.

¹²² Andrew Coleman, *The ICJ and Highly Political Matters*, MEL. J. OF INT’L L. (2003), 29-75. See also Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT’L L.J. 81 (1999).

¹²³ See Coleman, *supra* note 122, at 29.

¹²⁴ Dissenting opinion of Justice Thomas Buergenthal in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Regarding Composition of the Court, (Int’l Ct. Justice Jan. 30, 2004).

by-and-large, national judges tend to support the interests of their own States—finds support, though its presumed “absolute” nature is quickly diminishing.

A second manner in which nationality could be said to “matter” goes beyond the parties to any particular case and recognizes that a judge’s nationality is theoretically a constant, existing in cases other than those in which he decides on his own nation’s fate. Indeed, those cases in which a judge is ruling regarding his own State, or even his own State’s interests, represent a very small proportion of votes.¹²⁵ If judges’ citizenships are important, should we not also expect judges to not only vote for their States, but also at times to vote *as* their States? That is, if nationality matters, the amities and animosities present between nations in the wider political realm should be replicated, to a non-trivial degree, within ICJ decision making. This was the contention held by Warsaw Pact judges on the ICJ throughout the Cold War, during which they argued that limiting parties to be represented by a single judge on the bench was ineffective because “a whole line of Western States completely subordinate their foreign policies to the directives of the Anglo-American bloc.”¹²⁶ Further, if countries were only concerned about the direct impact a judge had on their fortunes, the rarity of countries appearing before the court, would likely strip ICJ elections of much of their political import. Evidence of voting “as a country” is difficult to show definitively, especially in cases in which national interests are hard to identify.¹²⁷ Consequently, this paper uses “alliance” voting as a proxy.

Evidence of the importance of judicial nationality would derive from a record of judges

¹²⁵ Hensley attempted to account for this by coding decisions by national interest. This seems a dubious process, especially for assessing smaller state interests. See Hensley, *supra* note 49.

¹²⁶ Zile, *supra* note 81, at 382.

¹²⁷ On today’s court there are several representatives of “minor” States—such as Sierra Leone and Madagascar—the interests of which are only indirectly impacted by most of the decisions rendered by the Court. For example, in the recent case *Certain Property (Liechtenstein v. Germany)* it would be hard to assess which side best represents/protects Sierra Leone’s interests.

casting votes alongside judges from States sharing their own nation's interests, and against those judges whose States have interests antithetical to their own State's.

A third, more institutionally-important interpretation of "matter" would analyze whether national identity not only leads judges to vote with their States, but that such votes impact the *outcome* of court decisions. If a decision is rendered with a vote of fourteen judges ruling for the plaintiff and one ruling for the defendant, that the sole dissenter is a co-national of the defendant may be interesting from an academic perspective, but does not actually impact the work of the court, the formation of international law,¹²⁸ or the provision of justice.

A. DATA

To examine the judicial independence of the ICJ bench, a dataset was established covering nearly all of the 83¹²⁹ contentious¹³⁰ cases heard by the body since its founding in 1949 until 2000. The data is bound by the *Corfu Channel* case in 1949 and the *Case Concerning the Belgian Arrest Warrant* in 2000. The data does not distinguish between votes made on the merits of a case and those on procedural or "preliminary measures." In so doing this study follows the precedent of the work done in the 1960s, allows for a far-greater number of votes to be analyzed, and recognizes that especially in the ICJ

¹²⁸ There are exceptions to this; for instance, regarding "universal jurisdiction" the most referenced definition of the concept does not come from the majority opinion rendered, but from a dissenting opinion. See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, in *Arrest Warrant of 11 April 2000* (ICJ).

¹²⁹ Six of these cases are not included due to incomplete data or conflicting data from various sources. Data comes from ICJ voting records in Bimal N. Patel (ed), *THE WORLD COURT REFERENCE GUIDE* (2002). Works also consulted include Nagendra Singh, *THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE* (1989), Shabtai Rosenne, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE, 1920-1996* (1997).

¹³⁰ Only contentious cases are being examined for two reasons. In order to make the analysis comparable with those undertaken in other jurisdictions, a demand that the adjudication be made on "ripe" issues was

context votes that occur before the merits (and in particular votes to assert or deny ICJ jurisdiction) are often more determinative and more “politically” and “judicially” important than is the final vote on a matter. In all the dataset includes 163 instances of voting.

Each instance of voting is examined independently and disaggregated by the vote of each judge. Thus, in the 163 instances of voting, the data comprises 992 independent votes by judges from 79 countries. Table I lists those countries, organized by how many votes “their” judges cast between 1949 and 2000.

Table I

Vote Participation by Country						
<i>5 or Fewer Votes</i>		<i>6 to 20</i>	<i>21 to 35</i>	<i>36 to 50</i>	<i>51 or more</i>	
Albania	Lebanon	Australia	Egypt	Guyana	Algeria	Nigeria
Bahrain	Libya	Belgium	Nicaragua	India	Argentina	Poland
Benin	Liechtenstein	Bosnia	Syria	Netherlands	Brazil	Russia
Bulgaria	Malaysia	& Herzegovina	W. Germany	Norway	China	Sierra Leone
Burkina Faso	Mali	Cameroon	Yugoslavia	Senegal	France	Sri Lanka
Burundi	Malta	Canada			Germany	UK
Chad	New Zealand	Chile			Hungary	US
Colombia	Panama	El Salvador			Italy	USSR
Croatia	Peru	Greece			Japan	Venezuela
Denmark	Philippines	Honduras			Madagascar	
DR Congo	Portugal	Mexico				
Ethiopia	Qatar	Pakistan				
Guatemala	Rwanda	Slovakia				
Guinea-Bissau	South Africa	Spain				
Indonesia	Sweden	Uruguay				
Iran	Switzerland					
Israel	Tunisia					
Jordan	Uganda					

critical. Second, though advisory opinions are inherently political, the ICJ’s legal/judicial muscle is only supposed to be felt in its binding, contentious decisions.

This table elucidates the first limitation of the claim about the importance of nationality. Though 79 States have been represented on the Court, only 40 percent of those States have voted in significant numbers (21 or more times). Consequently, though instances of voting by those States with only minimal experience on the bench may or may not indicate a national bias, the selectivity of the sample means that extrapolation would be highly uncertain. Moreover, there may be a selection bias within those States; the majority of States who have voted infrequently received their few votes from the *ad hoc* judges they appointed for cases to which they were party. As *ad hoc* judges often vote for the States that appoint them (see below), analyzing the nationalism of judges representing these States may distort reality.

B. INTERPRETATION I: NATIONALITY AS A PREDICTOR OF JUDICIAL VOTE

Before disaggregating the data, it is enlightening to examine the macro-results. As Table II indicates, on its face the concern about a lack of judicial autonomy appears somewhat warranted. Eighty percent of the time in which they were able to do so, national judges voted with their countries when they were party to a case. Though this number falls slightly when examining term judges—indicating a modicum of independence, especially when compared with *ad hoc* judges—the amount of agreement is still substantial at 70 percent.

Table II

Voting in Line with National Interests when a Judge's State is Party to a Case					
<i>Total Agreement</i>		<i>Disaggregated</i>			
		<i>Solely Term Judges</i>		<i>Solely Ad Hoc Judges</i>	
Votes in Line	Votes Cast	Votes in Line	Votes Cast	Votes in Line	Votes Cast
223	278	91	130	132	148
80%		70%		89%	

However, this aggregate data is somewhat opaque. In the line with *post hoc ergo propter hoc* fallacy mentioned above, it is not immediately apparent what a vote in accord with a judge's national interests actually means. It is too easy to establish a causation argument from seeing such a vote, when it is equally possible that a judge of a specific nationality voted in a certain manner not because of his citizenship but because of his detached judicial reasoning.

Consequently, it is highly likely that the soaring percentages seen in the aggregated figures overstate the amount of national bias at work. Disaggregating the votes, as Suh undertook in his seminal 1969 study,¹³¹ should provide greater clarity on the possible impact of national preference on judicial decision making. Suh analyzed four particular voting patterns, which aim to extract the degree to which national judges have been inclined to vote for or against the contentions of their governments. The Table below replicates Suh's findings, and juxtaposes the 1969 figures with those from the present study. To normalize for different numbers of votes, the table replicates Suh's methodology but provides the percentage of total votes represented by each category

Table III

<i>Suh 1969 vs. Smith 2004 (in percent)</i>						
	Suh	Smith	Suh	Smith	Suh	Smith
	Ad Hoc		Term		Total	
<i>Voting Against His Govt's Position</i>						
<u>Against the Majority of the Court</u>						
As Only Dissenter	0.0	2.8	0.0	0.4	0.0	3.3
With Other Dissenters	0.0	6.5	2.0	0.0	2.0	6.5
Total	0.0	9.3	2.0	0.4	2.0	9.8
<u>With the Majority of the Court</u>						
Unanimous	3.0	1.6	5.9	3.7	8.9	5.3
Simple Majority	2.5	6.5	4.4	2.0	6.9	8.5
Total	5.4	8.1	10.3	5.7	15.8	13.8
<i>Voting For His Govt's Position</i>						
<u>With the Majority of the Court</u>						
Unanimous	3.4	2.4	2.5	3.7	5.9	6.1
Simple Majority	24.1	23.8	17.7	16.7	41.9	40.2
Total	27.6	26.0	20.2	20.3	47.8	46.3
<u>Against the Majority of the Court</u>						
As Only Dissenter	4.9	3.3	0.5	5.3	5.4	8.5
With Other Dissenters	20.7	10.2	8.4	11.4	29.1	21.5
Total	25.6	13.4	8.9	16.7	34.5	30.1
Grand Total	58.6	56.9	41.4	43.1	100.0	100.0

Suh's work analyzed four voting patterns, with two that the author claimed manifested judicial independence, and two claimed to demonstrate judicial adherence to national contentions. The latter two patterns, described as votes in line with a judge's national interests and either falling alongside the majority of the Court or as dissents show only a modicum of change from Suh's study to the present inquiry.¹³² In fact there are only two significant alterations, both indicating growing comfort of judges (both *ad hoc* and term) to cast a vote as the sole dissent. The proportion of *ad hoc* votes that were cast with other dissenters fell from 20.7 percent in 1969 to 10.2 percent in 2004. Further,

¹³¹ *Supra* note 3.

¹³² *Id.*

the proclivity for term judges to be the sole dissent in favor of their national position more than quintupled from 0.5 percent to 5.3 percent.

While these two voting patterns are in line with government interests, Suh used the robustness of voting in his initial voting patterns—against government interests—to demonstrate as fundamentally flawed the “contention that national judges, even *ad hoc* judges, will *always* support the case of their governments.”¹³³ These figures remain robust; while Suh found almost 18 percent of the judge’s votes were against their State interests, by 2000 it was found that approximately 24 percent of judicial votes were cast *against* State interests. Though it remains rare for a national judge to be the sole dissent in such cases, the trend does appear to reflect a growing independence of judicial voting, on behalf of both *ad hoc* and term judges.

Table IV

<i>National Judges Voting with...</i>		
...the Majority (votes cast)	...the Minority (votes cast)	If in Minority, was it sole Dissent? (votes cast)
157 55%	131 45%	29 22%

C. INTERPRETATION II: NATIONALITY AS A PREDICTOR OF ALLIANCE VOTING

If nationality is a factor in judicial decision making, it would be logical that it would impact voting patterns in cases, in addition to those in which a judge rules on the fate of his own State. As mentioned above, the proxy used is “alliance” voting, which analyzes voting agreement (or discord) among judges from specific States.

¹³³ *Id.* at 228. (Emphasis added).

There are two hypotheses with which this paper examines alliance voting. First, due to the ideological chasm between East and West during the Cold War, the degree of agreement between Cold War adversaries should likely be less than the degree of agreement between the same players after the Cold War. However, as Table V indicates, this hypothesis is belied by the history of vote agreement between judges from the major Western powers and Soviet judges, and then the same Western States and their Russian counterparts after 1989.

Table V

<i>Percentage of Vote Agreement Between Judges from Various States</i>		
	Agreement with... USSR	Agreement with... Russia
US	50%	57
UK	66	60
France	84	69
Germany*	81	54
Italy	85	83

* “Germany” refers to the Federal Republic of Germany (West Germany) prior to 1990, and to unified Germany after that year.

Indeed, it is only the United States that manifests any increase in voting agreement following the transfer of power from the USSR to Russia. Perhaps even more surprising is the degree to which States arrayed against one another during the Cold War nonetheless agreed on votes. West German, French and Italian judges agreed with their Soviet counterparts more than 80 percent of the time. The disagreement that pervaded the Security Council during the Cold War—during which time a veto from an opposing power was almost guaranteed—clearly did not carry over into the majority of ICJ decisions.

The second hypothesis looks at voting agreement among putative allies. Here too, if nationality is an important predictor of voting behavior, allies should tend to agree with one another. Again, as manifest in Table VI, this does not appear to have always been the case.

Table VI

<i>Percentage of Vote Agreement Between Judges from Various States</i>					
Western Bloc	US	UK	France	Italy	Netherlands
US	-	82%	72%	63%	77%
UK	82%	-	85%	87%	97%
France	73%	85%	-	92%	89%
Italy	63%	87%	92%	-	100%
Netherlands	77%	97%	89%	100%	-
Eastern Bloc	USSR	Russia	Poland	Hungary	China
USSR	-	-	96%	55%	84%
Russia	-	-	-	55%	92%
Poland	96%	-	-	40%	87%
Hungary	55%	55%	40%	-	64%
China	84%	92%	87%	64%	-

While there is a general high level of agreement, for most country pairs vote accordance is far from absolute, and in some cases reveals a surprising degree of judicial autonomy. For instance, while high Polish-Soviet accord should be expected, the discord between USSR and Hungarian voting is contrary to the control Moscow exerted over Budapest from 1956. Similarly on the Western Bloc side, while the United States and French agreement of 72 percent seems in accord with their fluctuating diplomatic relationship, it is hard to explain from a national-interest perspective the comparatively low level of agreement between Italy and the United States, or between The Netherlands and the United States.

While national-interest may not explain the low level of agreement between judges from some Western European states and those from the United States, it is possible that the high level of agreement between the “middle-level” powers in the Western grouping (Netherlands, Italy and France—all of whom agreed with each other more than 80 percent of the time) can be explained in the terms of *regional* power. The international relations literature speaks of alliances among such middle powers as a key strategy for non-superpowers to further their interests by establishing a multi-national power bloc with which the superpowers must contend.¹³⁴ The high-level of agreement among Continental European states—who have historically been far more committed to each other and the “European” enterprise than has the U.K.—would provide “judicial” support to this claim and may be a manner in which national interest *writ-large* does play a role in ICJ deliberations.

D. INTERPRETATION III: NATIONALITY AS A DETERMINANT FACTOR IN CASES

The analysis suggests that the findings of the 1960s about judicial nationalism were never unconditional. Moreover, any existing nationalism seems to have moderated as judges, sitting both as *ad hoc* and term jurists, have begun to assert greater independence. Moreover, even if judges were to become more nationalistic the data indicate that the ability for national judges to direct court outcomes is more than mitigated by the presence of other judges on the bench. Of the 163 voting instances under examination, only four consisted of votes in which the difference between votes for

¹³⁴ The search for a strong Europe as a counterweight against the United States has been a clear element in the foreign policies of many European states since World War II, and most intensively since the end of the Cold War. *See generally*, John van Oudeneran, *Unipolar Versus Unilateral*, POL. REV. 63 (April 2004), Don Melvin, *Europeans Debate Relations with the U.S.*, ATL. JN’L CONSTIT, Aug. 10, 2003, at 2B.

the plaintiffs and defense was one. For the vast majority of ICJ decisions, the existence of a blatantly nationalist vote would not sway the actual outcome of a decision, even if it would impact the vote totals.¹³⁵ Moreover, given the very few votes in which the majority and dissent were nearly equally split, even the impact of the regional judicial blocs (discussed above in reference to the seeming Western European voting bloc) would have little bearing on final outcomes.

PART III: THE WEAKENING OF JUDICIAL “NATIONALISM”

The UN Charter and the ICJ Statute were written to reflect a Westphalian world in which States were the only legitimate transnational actors, and nationality, in turn, was a prime aspect of individual definition. As this reality has broken down—and non-State actors and individuals have increasingly operated in the international sphere outside the realm of State control—any focus on “nationality” as a determinant of behavior becomes problematic. The changing nature of “nationality,” international action, and especially international disputes, has made citizenship an imprecise instrument of analysis and potentially an anachronistic tool with which to analyze “independence.” The result, as the data above indicate, is that “nationality” is a relatively poor predictor of voting on the ICJ, other than in the rare incidences in which a judge is ruling on his own country’s fate.

¹³⁵ Suh argues that the impact of *ad hoc* judges on end results is even more diffused. Writing in 1969 he claimed that there were only two cases (in both ICJ and PCIJ history) “that the vote of an *ad hoc* judge was definitive in deciding a case...,(S.S. Lotus and Southwest Africa).” Suh, *supra* note 3, at 232.

A. JUDGE-BASED CHALLENGES TO NATIONAL BIAS

The inaccuracy of “nationality” as a driver of voting stems from an adherence to archaic views about the stability of individual citizenship, and the role of the State as the prime source for individual values.

Indeed, a belief in the determinative force of judicial nationality assumes that nationality has a constancy, let alone immutability, increasingly belied by facts. Current United States judges on both the ICTY and ICJ were foreign born, and in the case of the ICTY the United States judge actually had a substantial professional life in the Israeli foreign ministry (rising to the rank of ambassador and UN representative) before emigrating to the United States.¹³⁶ The United States ICJ incumbent was born in Slovakia and migrated to the United States. Other judges on the ICJ represent similar multiple national histories; of the 15, only four were both born and educated entirely in the country they represent.¹³⁷ If nationality is determinant, it is unclear *which* of a judge’s nationalities—the place of her birth? her education? her current residence?—moves her to decide to in a specific manner.

In addition to ascribing a degree of permanence to nationality, for judicial nationalism to matter, States would have to assume a predictability and stability to judicial belief and decision making contradicted by history and domestic evidence. As justices in the United States such as Brennan and Souter have shown,¹³⁸ the outward appearance of a judge’s specific ideology while he is a candidate for appointment may

¹³⁶ Thomas Adcock, *International Law Professor Takes On War Crimes Abroad: NYU’s Meron Assumes Duties as Chief Judge of War Crimes Tribunal*, N.Y. LAW J. (2003); Michael D. Goldhaber, *War and Justice--Two American Holocaust Survivors Arrive in The Hague This Year, Where They’ll Make History by Judging It*, AM. LAWYER (2001).

¹³⁷ See ICJ website.

¹³⁸ *Supra* note 114.

not translate into consistent voting in line with his professed ideology once he is chosen. As in domestic systems, once a judge is on the international bench, it is often hard to accurately predict a judge's decisions. At times, international judges have chosen to rely on precedent, trumping personal views; at other times personal prejudice (and perhaps even national bias) is expressed, contrary to established court findings. The uncertainty of both the limits of customary international law,¹³⁹ and the role of precedent in the international system—due to the system's dual “civil” and “common” law roots—makes it even more difficult to make predictions about judicial decision making.¹⁴⁰

Related to the inherent fluidity of “nationality,” an additional source of the weakness of “judicial nationalism” comes from the fact that the idea has as a base premise an increasingly questionable understanding of “nationalism.” In this context “nationalism” relies on two inter-linked theories of citizenship: first, there is a long-held notion that co-nationals bring needed “local” insight into the judicial decision making process;¹⁴¹ and, second, there is an even stronger view that co-nationals will tend to side

¹³⁹ Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L.J. 1, 20 (1997). Tiefenbrun argues that these factors lead to a fundamental unpredictability in the Court's decisions. *Id.*

¹⁴⁰ For example, the Appeals Judgment in the ICTY case *The Prosecutor vs. Zlatko Aleksovski* cogently states the confused status of precedent in international humanitarian law:

The Chamber recognizes that in both the common law and civil law systems, the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances. This is to preserve the principles of consistency, certainty and predictability. The need to preserve these principles is particularly great in criminal law where the liberty of the individual is implicated. The same principles apply in International Tribunals.

The fundamental purpose of this Tribunal is the prosecution of persons responsible for serious violations of international humanitarian law. The Appeals Chamber considers that this purpose is best served by an approach which, while recognizing the need for certainty, stability and predictability, also recognizes that there may be instances in which the strict, absolute application of that principle may lead to injustice.

The Prosecutor v. Aleksovski, Appeals Chamber Judgment, 24 March 2000.

¹⁴¹ This was the basis behind the Root-Phillimore Plan that influenced the drafting of the statute of the Permanent Court of International Justice, which was subsequently transposed onto the International Court of Justice. Schwebel, *supra* note 42, at 889. See also, *Proces-verbaux supra* note 35, at 721, 722.

with one another out of an allegiance fomented through shared citizenship. Regarding the provision of “local” knowledge, the growth of an international legal ethic, and the creation of a larger, increasingly homogenous epistemic community of international jurists, suggests that any “local” conception is quickly becoming internationalized.¹⁴² The posited “Strasbourg Effect,”¹⁴³ by which trans-Atlantic jurists are coming to reason in the same manner, and the wider collegial and intellectual intermingling among the world’s jurists (via “Transjudicial Communication”¹⁴⁴) are potent examples of this trend.¹⁴⁵

Concerning the allegiance of shared citizenship, there is a branch of political philosophy that both identifies and supports such “liberal nationalism.”¹⁴⁶ However, globalization, and the increasing porousness of borders (manifest by the SARS epidemic, financial flows and other phenomena) suggest that such “particularistic” modes of identity are fast being replaced by more universalistic modes.

¹⁴² Moreover, H. Lauterpacht claims that it is not the role of the judge to “inform” the court of any of the specific, culturally/nationally relevant components of the case; rather, that task is left to the pleadings. Lauterpacht, *supra* note 62, at 215.

¹⁴³ Michael C. Dorf, FINDLAW FORUM: *The International Influence on the Supreme Court Decision on Executions* (June 19, 2002), at <http://writ.news.findlaw.com/dorf/20020626.html> (last visited Nov 1, 2004).

¹⁴⁴ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

¹⁴⁵ Whereas observers in the early 1960s were keen to analyze the legal backgrounds of sitting judges (common, law, Roman law, Asian law, etc.), it is clear that today’s international jurists have had a wide exposure to many different types of law, and the increasingly individualized “international” branch. See Christol, *supra* note 92, at 32. This trend renders quaint early observations of the influence felt by international officials due to their “culturally inculcated values”: “He carries with him the whole collection of habitual ways of acting, of fixed ideas and value judgments of his own community, which he is prone to expand into ideas of universal validity.” Dunn, *supra* note 49, at 105. (Quoted in Hensley, *supra* note 49, at 581).

¹⁴⁶ For details on such Liberal Nationalism see David Miller, ON NATIONALISM (1995), Yael Tamir, LIBERAL NATIONALISM (1993), Samuel Scheffler, BOUNDARIES AND ALLEGIANCES (2001).

B. INSTITUTION-BASED CHALLENGES TO NATIONAL BIAS

Apart from the de-nationalizing tendencies of judges themselves, the ICJ itself has proven too institutionally complex to allow nationality-based voting real power in the Chambers. Most prosaically, the ICJ has adopted many of the same safeguards present in municipal systems to protect the autonomy of judges,¹⁴⁷ barring them from engaging in certain activities while on the bench, demanding recusal¹⁴⁸ if a judge has taken part in the issue in another capacity, and ensuring that judges' travel reimbursements and tax-free salaries are not reduced during their tenures.¹⁴⁹

Further, recent decisions have manifest that the ICJ does not operate in a judicial vacuum, and especially in the rendering of advisory opinions, it is integrated into the public and the political; consequently, expectations of those outside the Chamber clearly weigh on decision making. Judicial deference to one another, a norm with few exceptions in international fora, combined with the goal of most Court presidents to build strong majorities on decisions, appears to regularly trump national interests.¹⁵⁰ Further, the most important institutional pressure is the same one that exists in all courts: how far should the ICJ should go in determining the law? That is, are ICJ adjudicators judges of existing law, or the creators/developers of international law? It is this separation—

¹⁴⁷ Cf. Brazil's constitution which bars judges from engaging in certain activities while on the bench. (Lei Organica da Magistratura Nacional Interpretada (Rio de Janeiro, Livraria Freitas Bastos S.A., 1983.) §II and III; Samore, *supra* note 36 at 623. Samore points to various features of the court safeguarding impartiality after appointment regarding compensation, rules on incompatibility, disqualification etc.

¹⁴⁸ THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at arts. 16, 17, 23; NB, these are very similar safeguards adopted by other international judicial bodies. Eg. See, e.g., UNCLOS, *supra* note 5, art. 7(1) ("No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.").

¹⁴⁹ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 32.

¹⁵⁰ This contention is inferred from the large proportion of decisions that have few, if any, dissents. See above.

between the reactive and proactive judges—that seems to most impact ICJ decisions, and in particular the initial decision whether or not to accept a case.¹⁵¹

Additionally, in certain instances, the Court itself has held that it either does not have the requisite law to decide a matter, or does not have the jurisdiction to hear specific matters it deems “inherently political.” The ICJ saw different parts of its bench make each claim in *Legality of the Threat or Use of Nuclear Weapons*.¹⁵² The internationalization of the “political question” doctrine¹⁵³ present in many municipal systems¹⁵⁴ has seen the ICJ refuse to hear “highly political disputes – that is, those disputes where the national interests...are threatened.”¹⁵⁵ When refusing jurisdiction under the political question doctrine, the Court technically denies the hearing of a case because it implicates a legislative rather than judicial function; however, there are also pragmatics at stake, including the likely inability for the Court to “make a significant

¹⁵¹ For Hersch Lauterpacht this issue “arose out of the question: How far should the Court go, in deciding a concrete issue before it, not only in acting on legal principles but in stating those principles, in specifying the broader legal principle underlying the rule actually applied.” Rosenne, *supra* note 43, at 834.

¹⁵² Regarding an absence of law on the matter, Justice Higgins wrote in her dissent that “the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of law....” Dissenting Opinion, ICJ Rep. 1996, 226, 583, ¶ 2. Judge Shi’s Declaration and Judge Oda’s Dissent, made the claim that the issue was more appropriately addressed by legislative/executive, rather than judicial, means. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996. <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>. (last visited Nov 3, 2004).

¹⁵³ See David, *supra* note 122.

¹⁵⁴ Though there is academic debate on the existence of the “political question” doctrine, components of it are evident in many systems. Cf. J. Peter Mulhern, *In Defense of the Political Question Doctrine* 137 U. PA. L. REV. 97 (1988) and *Goldwater v Carter* *supra* note 95 (In his concurrence in *Goldwater v. Carter*, 444 U.S. 996, 998 (1979), Justice Powell summarized the criteria for “political question” into three inquiries: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?” Any one of these characteristics may be sufficient to preclude judicial review.”); James A. Thomson, *Non-justiciability and the Australian Constitution*, in *POWER, PARLIAMENT AND THE PEOPLE* (Michael Coper and George Williams (eds.) 1997), 56; debates on the justiciability vs. non-justiciability of issues was also heavily present in the Quebec Secession case (Reference re Secession of Quebec from Canada (1998) 161 DLR (4th) 385.

¹⁵⁵ Coleman, *supra* note 122, at 31.

contribution to the peaceful resolution of highly political disputes.”¹⁵⁶ Moreover, the Court’s decision in many cases could be interpreted as denying jurisdiction because a case could give rise to nationalist passions on its bench.

Finally, though the judges’ votes are simplified into binary agreement or disagreement with the majority, in truth the positions of judges are almost always more nuanced. The existence of dissenting and concurring opinions and declarations, provides scope for judges to express more finely crafted views that may neither fully support nor condemn the findings of the majority.¹⁵⁷ Such ancillary opinions allow a judge to “split” his vote, casting a ballot for his “national interest,” while maintaining certain reservations in the decision, or vice-versa.¹⁵⁸ The lack of anonymity with which dissents are filed has also been thought to “guarantee against any subconscious intrusion of political considerations.”¹⁵⁹ Such anonymity “may spur a judge to vote invariably in support of the cause of his State without incurring the odium of partisanship.”¹⁶⁰ Moreover, it has been suggested that published, dissenting opinions act “as a safeguard of the individual

¹⁵⁶ *Id.* This trend has developed through a “more realistic appreciation” of the Court’s role and an understanding that “[rather] than thinking of the Court as a forum for the settlement of all international disputes, it is more realistic to accept that some disputes require political decisions by a political body.” Tiefenbrun, *supra* note 139, at 23. Despite this, based on the Court’s recent acceptance of advisory jurisdiction on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in the face of widespread national boycott of the proceedings—for fear of politicizing the court—suggests that this may be changing.

¹⁵⁷ The separate opinions issued by judges in the recent *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* illustrate the complexities lying behind agreement or disagreement with the court’s vote. For instance, though, for example, Justices Higgins, Elaraby and Al-Khasawneh all voted in accord, their separate opinions demonstrate significant differences both in underlying reasoning and the strength of their convictions behind their vote.

¹⁵⁸ The roots of this practice go to the arbitration agreements of the Hague Conference of 1899; though no formal, written dissents were allowed by the agreement, as arbitrations were governed by majority vote, “it was felt justified that an arbitrator who was required to affix his signature to an instrument, of whose terms he disapproved, should be allowed to exonerate himself of responsibility by indicating his dissent....” R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT’L & COMP. L.Q. 788, 795 (1965).

¹⁵⁹ Judge Bernard Loder, League of Nations, Doc. No. C, 166 M. 66, 1929, V at 52. Cited in *Id.* at 792.

¹⁶⁰ *Id.*

responsibility of the judge as well as the integrity of the Court as an institution,” precluding “any charge of reliance on mere alignment of voting.”¹⁶¹

C. CONCLUSION: TOWARDS A NEW PARADIGM?

Recent moves away from strict nationality requirements for international judges suggest that it is possible to imagine an international justice system fundamentally divorced of nationality. However, in this regard, it is clear that international law is bifurcated: States and other parties have been much more willing to give up citizenship requirements for judges when they are parties in private international legal fora, than when they appear before public international fora. Much as at the beginning of State involvement in arbitration following the Jay Treaty, the interplay between commercial methodology and political requirements is slowly changing the landscape. However, in today’s world, it is the commercial that is coming to trump the political.

It is not surprising that the demise of nationality would be first seen in the commercial world. Private international law has set the pace for legal globalization *writ-large* and for international corporate actors such adjudication has a centuries-long history (see above). Such practices intensified following World War II and the establishment of the Bretton Woods organizations; since then commercial actors (and various governmental agencies) have subscribed to a broad array of restrictive policies—complete with sanctions—regulating activities.¹⁶² Moreover, since the passage of the

¹⁶¹ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 68-69 (1958). Cited in *Id.*

¹⁶² Controls on setting up cartels, and other anti-competitive measures have been key aspects of these restrictions. See Joel I. Klein, Address at Fordham Corporate Law Institute 26th Annual Conference on Internatioanl Antitrust Law & Policy (Oct. 14, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/3747.pdf>.

New York Convention in 1958 recognizing the domestic enforcement of foreign arbitral awards,¹⁶³ governments and private investors have increasingly employed various, non-State-based dispute settlement systems in their disagreements.¹⁶⁴ When appointing arbitrators, litigants have chosen to best serve their corporate interests, which have increasingly not necessarily corresponded with any particular nationality.¹⁶⁵ For many of the reasons suggested above, the determinant-power of “nationality” has been replaced by reference to an individual’s educational, professional and/or economic backgrounds as markers used by appointing powers interested in protecting their interests.¹⁶⁶

While all arbitral systems tend to treat nationality lightly, and indeed the international arbitration system as a whole has come to frown on the partisan, party-appointed arbitrator,¹⁶⁷ the most significant departure from a judicial nationality requirement has come in the dispute resolution process of the WTO. Article 8§3 of the WTO’s Annex Governing the Settlement of Disputes states that “Citizens of Members

¹⁶³ CONVENTION AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (*available at*: <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm> (last visited Nov 2, 2004)).

¹⁶⁴ Key among these systems are the rules followed by the International Center for the Settlement of Investor Disputes (ICSID), the International Chamber of Commerce, UNCITRAL, the American Arbitration Association, the London Court of International Arbitration and the Stockholm Chamber. For examples of these rules, see, for ICSID, Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 and <http://www.worldbank.org/icsid/>; for the Stockholm Chamber, <http://www.chamber.se/arbitration/english/>; and for the London Court of International Arbitration, <http://www.lcia-arbitration.com/> (last visited all sites Nov 1, 2004).

¹⁶⁵ *Eg.* in ICSID Case No. ARB/02/12 between the State of Jordan and a British engineering firm, the parties agreed on a German, an Italian and an Australian arbitrator; in Case ARB/01/13 between the State of Pakistan and a Swiss inspection/verification firm, the two sides chose a Filipino, Belgian and Canadian as arbitrators. See ICSID-List of Concluded Cases at <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Nov 3, 2004).

¹⁶⁶ Such factors can include “tangible” and “intangible” elements, “including industry expertise, legal training, prior arbitration experience, [arbitration]...training, and demeanor.” James E. Meason and Alison G. Smith, *Current Issues in International Commercial Arbitration: Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW. J. INT’L L. & BUS. 24, 33 (1991).

¹⁶⁷ Robert H. Smit, *General Commentary on the WIPO Arbitration Rules, Recommended Clauses, General Provisions and the WIPO Expedited Arbitration Rules: Articles 1 to 5; Articles 39 and 40*, 9 AM. REV. INT’L ARB. Note 29 3 (1998).

whose government...parties to the dispute or third parties shall not serve on a panel concerned with that dispute...”¹⁶⁸

International law outside the commercial realm has been much slower to embrace such “borderless” globalization, and a wider “non-State” world. The insistence on maintaining national judges in public international fora is a key element of this reticence. There are two basic distinctions between the public law, and the private legal systems that are germane to this residual judicial nationalism, shedding light on how States have managed to protect this prerogative. Both speak to the contention that the prime reason States demand and receive such representation in their public international disputes is because they can,¹⁶⁹ and the public system—unlike significant aspects of the private international system—would not function without active State participation.

The first distinction relates to enforcement. While enforcement of arbitration awards by States is naturally welcome, most commercial arbitral tribunals deal with matters for which markets will provide effective enforcement of judgments, even if States or other parties attempt to subvert decisions.¹⁷⁰ Public international law does not have the luxury of such *ultra vires* enforcement. Public law tribunals must rely on the world community to construct and enforce their rulings. For example, for the ICC, States must not only fund its operations, but must agree to allow the prosecutor to investigate and

¹⁶⁸ Vagts, *supra* note 3, 257.

¹⁶⁹ *Supra* note 23.

¹⁷⁰ If a party ignores decisions they do so at the risk *inter alia* of their credit rating, controlled by non-governmental ratings institutions Moody’s, Fitch and Standard & Poors’. Maintaining a high rating is critical to corporations and countries alike. The power of these agencies in determining a country’s fortunes, and the independence with which they can do so, is substantial. See *Is There Accountability to Moody’s Moods?* EMERGING MARKETS DATAFILE (1998); *Rating the Agencies*, FINANCIAL TIMES (London) 25 (1998); Lawrence J. White, *Bond-Raters’ Troika*, 112 US BANKER 58 (2002); *Moody’s Makes Up Little for Poor Standards*, FINANCIAL EXPRESS (India) (2003); Chee Yoke Heong, *Rating Agencies Under Fire from Crisis-Hit Nations*, IPS-INTER PRESS SERVICE (1999).

pursue leads on their territories, provide physical resources to build cases, and facilities for the convicted to serve out their sentences.

The non-State based discipline under which private international law works relates to the second distinction: jurisdiction. The nature of “inviolable” Westphalian sovereignty differs greatly between private and public international law. In the private context, the same forces that provide for enforcement of decisions demand jurisdiction over private law matters. States have little choice but to accede, facing severe financial risks if they choose to reject jurisdiction—to do so would be to essentially opt for financial isolation. Consequently, States have by-and-large “volunteered” to enter into arbitral agreements.¹⁷¹ State players in the public international legal realm do not seem to suffer such great harms if they choose to withhold jurisdiction to transnational legal bodies. This choice to withhold jurisdiction can be seen as directly descendant from commercial arbitration, in which jurisdiction has historically been at least nominally consensual. With little penalty, States have withdrawn jurisdiction—or heavily cabined their acceptance of it—to bodies such as the ICJ. Even the *ad hoc* UN tribunals in Rwanda and the former-Yugoslavia, created under the UN’s binding Chapter VII authority, have seen only meek support from many UN States.¹⁷² Consequently, the irony of public international law and commercial arbitration is that while the latter had long been thought based on jurisdiction via agreement of the parties, and the former—in line with legal proceedings—was thought to have a more mandatory jurisdiction, the

¹⁷¹ This voluntary component is a key distinction of arbitral systems. See Emerson, *supra* note 18, at 157.

¹⁷² UN Security Council Presidential Statement, Aug 4, 2004. UN Doc S/PRST/2004/28.

changing nature of global commerce and the declining power of States in financial matters, has produced the opposite reality.¹⁷³

Despite the diluted incentives for States to forego judicial nationalism in the public law realm, at the margins it seems that here too they are slowly coming to realize the weakness of relying on nationality as an indicator of allegiance, and have begun looking to other factors to best protect their interests at international tribunals. Such realizations are occurring most apparently in regional international courts. For instance, the American judge on the ICJ, Thomas Buergenthal, previously served on the Inter-American Court of Human Rights, a position for which he was nominated by Costa Rica.¹⁷⁴ Interestingly, at no point in his tenure was he viewed by his Costa Rican nominators as having harmed Costa Rican interests due to an “American” judicial perspective. Nor was he branded anti-American for accepting the nomination of a foreign State—indeed, he was subsequently appointed by the United States as the American judge at the ICJ. A similar, still nascent court, the African Court of on Human and People’s Rights, has gone even further, holding that 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

¹⁷³ As more commercial arbitration is engaged in, the power of States will likely decrease even further in international law, if only do to source of power had by commercial arbitrators, compared with national judges. “Unlike the national judge, the arbitrator’s authority does not derive from -- nor is his ultimate responsibility to -- the State...[His] authority derives, at least in first instance, from party agreement and his ultimate responsibility is not to a State but to the parties.” Mehren, *supra* note 14, at 1057.

¹⁷⁴ The statute of that Court only allows State parties to the Court to nominate candidates for the bench; only 19 States have ratified the statute, the U.S. not among them. However, despite the limited nominating pool, the requirement for potential judges is that they be nationals of any Organization of American States member, a much larger pool of 35 States including the U.S. See CHARTER OF THE ORGANIZATION OF AMERICAN STATES (available at: <http://www.oas.org/juridico/english/charter.html>) and STATUTE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (available at: <http://www1.umn.edu/humanrts/oasinstr/zoas6cts.htm>); (last visited both sites Nov 1, 2004).

case.”¹⁷⁵ The nationality requirement may also be breaking down in quasi-judicial bodies. For example, the United States has recently nominated two non-Americans to be Special Rapporteurs to the UN Human Rights Commission.¹⁷⁶ It is important to note that none of these changes suggest that nationality, per se, is becoming less important for States; rather, they suggest that certain pressures are forcing States to give up this once inviolable requirement for their appointees.

At first blush, change within the ICJ also seems to be occurring; however, a closer analysis of the reforms reveals that they were catalyzed by a desire to further, rather than diminish, the role and power of nationality. For example, the requirement that an *ad hoc* judge be a national of the appointing State has been disbanded.¹⁷⁷ However, rather than an acknowledgement of national partiality, the rule change was instigated by small States, which could not always find a suitable national to sit.¹⁷⁸ Moreover, Schwebel points to several cases in which no national party had a member on the court, and where neither party in a case chose to appoint *ad hoc* judges.¹⁷⁹ Yet, these choices, and the even rarer case where one party chooses to appoint an *ad hoc* judge and the opposing party chooses neither an *ad hoc* judge nor has a co-national on the bench,¹⁸⁰ have been anomalous.¹⁸¹

¹⁷⁵ PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLE’S RIGHTS, art. 11(1), art. 22, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

¹⁷⁶ Information provided to author; US Representative to UN Offices in Geneva. July, 2004.

¹⁷⁷ Schwebel *supra* note 42, at 896.

¹⁷⁸ Schwebel notes that “about half of the 60-odd judges *ad hoc* of the ICJ have not been of the nationality of the appointing States.” *Id.*, at. 897.

¹⁷⁹ *Id.* at 897. Schwebel mentions cases including *Certain Phosphate Lands in Nauru*, *Temple of Preah Vihear* and *Sovereignty over Certain Frontier Land*.

¹⁸⁰ *Id.* This was the position of Portugal in its case against Yugoslavia in *Legality of the Use of Force*.

¹⁸¹ It is interesting to note that while it remains unusual for a State to agree to not have one of its own on the bench, by reference to the nationality of the counsel chosen by States to appear on their behalf, it is evident that litigants do not find nationality important in the presentation of their cases. Yet, here too, the rationale for choosing specific counsel may not stem from any reduced attachment to nationality; rather, certain professors/specialists of international law have consistently appeared before the Court, becoming counsel of choice not due to their nationality, but rather their intimacy with the judges and Court procedures. For

The cosmetic nature of any ICJ reforms suggests that the public international judiciary, at least at the ICJ, if not in most other similar fora, will likely remain mired in increasingly dubious questions of nationality, citizenship and consequent doubts about judicial “independence.” Rather than a quaint anachronism, this concentration may hinder the growth and application of transnational adjudication¹⁸²—concerns about biased, politicized judges have been raised in ICTY and ICTR proceedings, have provided fodder for critics of the ICC,¹⁸³ and have also recently been arrayed anew against the ICJ, from both within and outside the institution.¹⁸⁴ As international judicial bodies continue to proliferate¹⁸⁵ this concern is likely to increase, bringing with it a potential to retard the development of international law.

instance, as of this writing Australian James Crawford has been counsel in sixteen cases before the ICJ, representing States as varied as Nauru, Libya and Croatia. Notably, he has been counsel both *for* some States in certain cases, and *against* the same States in other proceedings. Other prolific ICJ counsel who have also represented motley States include Ian Brownlie, Christopher Greenwood and Alain Pellet. The same lack of concern for nationality also permeates the selection of *ad hoc* judges; it is not uncommon for States to pick judges who either have served previously on the Court, or are otherwise well-known to the Court, regardless judges’ nationalities.

¹⁸² “The questionable... impartiality of the judges [undoubtedly] weakens the Court [and international law *writ large*].” Tiefenbrun, *supra* note 139, at 23. Moreover, it is apparent that a “tribunal which satisfies the political instincts and reflects the political deals of the members, but is not the kind of court to which they would entrust the settlement of their disputes, is... of no use to anybody.” Gross, *supra* note 63, at 289.

This concern, however, is not new. In the 1960s, Jenks argued that there have been “remarkable advances... in virtually every sector of international organization except the judicial sector.” C. Wilfred Jenks, *The Prospects of International Adjudication 1* (1964). (Quoted in Leo Gross, *supra* note 63, at 259).

¹⁸³ Arguably, even the vaunted the notion of “complementarity,” the doctrine of assuring domestic jurisdiction of first instance under which the ICC works, is based, at least in part, on the fear of national, political judging of domestic affairs. Cf. Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 A.J.I.L. 120 (2001).

¹⁸⁴ *ICJ Ruling Another Example of UN Bias Towards Israel*, CANBERRA TIMES (Australia), Jul. 15, 2004, at A17; Clifford D. May, *U.N. Judges Issue License to Kill*, SCRIPPS HOWARD NEWS SERVICE, Jul. 14, 2004; Buergenthal, *supra* note 109.

¹⁸⁵ For a discussion on the recent proliferation of international judicial bodies, see generally IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION, PROCEEDINGS OF AMERICAN SOCIETY OF INTERNATIONAL LAW FORUM CO-SPONSORED WITH THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES (L. Boisson de Chazournes ed., 1995); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848 (1995). Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in Lucius Cafilisch, *THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES: UNIVERSAL AND EUROPEAN PERSPECTIVES* 25-41 (1998). For some articulated arguments (mostly by judges of the International Court of Justice) against the proliferation of international judicial bodies, see *The Court and Other International Tribunals*, in Connie Peck and Roy S. Lee, *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL*

However, despite the benefits that may accrue from greater judicial independence, proponents of removing nationality are stuck in a contradiction. Increasing judicial independence may seem a valiant goal, but it is not clear that further increasing judicial autonomy on the ICJ or in other public international institutions would be as beneficial as hoped. Not only do the data analyzed above provide only meek support for the benefits of doing so, but State players remain by-and-large attached to such nationalism, fighting for “their” nations to be represented on international judicial bodies.¹⁸⁶ Demanding a removal of State identification for judges could strip the ICJ of significant legitimacy in the eyes of many of its State supporters.

Moreover, it is not certain what such a reform would do to the provision of “justice” as envisioned by the framers of the ICJ. After all, the ICJ statute calls for judges to represent the “principal legal systems”¹⁸⁷ of the world, a goal that has been implemented with judges from a diverse set of fifteen States. Though it is already questionable whether their diverse nationalities reflect true diversity, eliminating nationality requirements—the extreme result of demanding such autonomy—may actually lead to an even greater degree of judicial homogenization than at present. Further, there remain good practical reasons to keep nationality as a factor in judicial nominations; doing so provides some psychic “ownership” to States in the ICJ process and can potentially promote compliance with Court decisions.

As Oscar Schachter notes:

COURT OF JUSTICE 280-323 (1997); Robert Jennings, *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 RECIEL 240-44 (1992); Manfred Lachs, *Some Reflections on the Settlement of International Disputes*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INT’L LAW 323-31 (1974); Philip C. Jessup, *Do New Problems Need New Courts?*, in K. Rao and M. Nawaz, ESSAYS IN HONOR OF KRISHNA RAO 206-213 (1976).

¹⁸⁶ *Supra* note 39

¹⁸⁷ STATUTE OF THE INTERNATIONAL COURT of Justice, at art. 9.

“the fact that judges often reflect particular State interests is of course at variance with the ideal of objectivity of the judicial function. Yet it is not unreasonable to regard the reflection of national or group interests as appropriate and advantageous for an international court in a divided and heterogeneous world.”¹⁸⁸

Consequently, it may be possible to make ICJ judges more independent, but based on the voting records examined above it is unclear that doing so is entirely necessary. Moreover, it remains dubious whether the ICJ could survive if a demand was made to take nationality out of the judicial calculus,¹⁸⁹ or that doing so would be beneficial either to the court itself or to the development of international law and the provision of global “justice.” However, as private international law continues to expand, and arguably comes to subvert public international law,¹⁹⁰ the ICJ and similar institutions may be forced to re-assess their age-old attachments to judicial nationalism.

¹⁸⁸ Oscar Schachter, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 43 (1991).

¹⁸⁹ The WTO model will be a useful test of the ability to engage in independent judicial reasoning when interests of States are at stake. “Divorcing” nationality is even more difficult because, “national bias transcends the legal sphere,” and impacts all operations of any organization in which States are the member units. *See Hensley, supra* note 49, at 569.

¹⁹⁰ It has long been thought that the proliferation of non-ICJ international litigation/arbitration bodies may well take jurisdiction of cases that would otherwise have gone to the ICJ. That most of these new international bodies deal with commercial/private law matters, provides an even stronger suggestion that private law (outside the ICJ), rather than public law, will be setting the international law agenda in the near term. *Gross, supra* note 63, at 267.