I. Introduction

While most states have come to view judicial independence as vital to the dispensation of justice in the domestic sphere, states do not have the same expectations of detached jurisprudence when facing disputes under international law. As interstate disputes like those covered in the Jay Treaty migrated from arbitration to the PCIJ and then the ICJ, the new "judicial" institutions inherited "judicial nationalism" and some of the other "quasi-legal" aspects of arbitration. 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, or the provision of justice. 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.

TEXT:

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in judicial allegiance. n7 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 [*200] 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, as manifested 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. n8 It is this return to - and mounting importance of - the commercial, nonstate roots of international litigation (when it was conducted solely between commercial actors) that is ironically changing the landscape of interstate 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 broad as to be inaccurate, while the claim that nationality should matter in such jurisprudence, as a normative assertion, seems unattractive in today's world.

II. The Birth of the Idea
A. Brief History

The roots of the practices and beliefs surrounding "judicial nationalism" are somewhat murky. n9 Ancient Greek law, and in particular Athenian practices, provided for formal binding arbitration proceedings that allowed parties to choose their arbitrators. n10 Roman law was more restricted, greatly limiting party choice in nonjudicial litigation: "the ... practice of [any] third party, helping disputants transact an agreement or compose an accord conflicted with ... formal Roman law ... concepts." n11 Finally, canon law, the root of so much modern legal thinking, n12 provides injunctions for reconciliation in order to be at "peace with one's neighbors," n13 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 frowned on biased arbiters. n14

*201 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. n15 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. n16 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. n17 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. n18

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." n19 The ability for each party to name judges was critical to their agreeing to keep the dispute within the 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. n20

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 period n21 and into Medieval times, n22 with many systems allowing for a modicum of control by the parties over the composition of the arbitral panel. n23 International commerce grew [*202] 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." n24 In such cases it made sense "for the parties to ... refer their disputes to a mutually acceptable ... decisionmaker." n25 This requirement of "mutual acceptability" of the decision maker moved arbitration decidedly out of a purely legal realm - in which the ability for parties to choose judges and fora is severely constrained n26 - into a much looser "quasi-legal" arena in which par-
ties have a great degree of control in determining the contours and methodology of tribunals to which they put disputes. n27

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. n28 Article 5 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: "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." n29

Article 5 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 arbitrators was new to interstate arbitrations. Though historians can trace ad hoc interstate arbitrarial proceedings to antiquity, n30 the only evidence of states or other public entities having any ability to choose arbiters was when they were choosing among avowedly neutral judges. n31 It appears that the tradition of permitting states to select openly partial judges in interstate disputes was only adopted after essentially commercial arbitration practices became the means of choice for settling public, interstate disagreements.

As interstate disputes like those covered in the Jay Treaty n32 migrated from arbitration to the PCIJ and then the ICJ, the new "judicial" institutions inherited n33 "judicial nationalism" and some of the other "quasi-legal" aspects of arbitration. n34 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." n35 Yet, despite the concerns of some that allowing party-appointed judges on a court would debase the rule of law, n36 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." n37

Once states entered the fray officially, the necessities of international prestige (especially for new states like the United States and recently weakened ones like Britain) made it evident that their appointees, as an initial requirement, would be chosen on the basis of nationality. Indeed, it was quickly 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." n38 In the early nineteenth century, it n39 was not uncommon for states to ignore arbitral findings when such panels did not have state representation.

Regardless of its initial instigation, the trend of judicial nationalism born from the Jay Treaty and the PCIJ has continued unabated across international courts ranging from those covering public law questions, such as the ICJ, to those addressing humanitarian law such as the ad hoc U.N. tribunals in Rwanda and the former Yugoslavia (the ICTR and the ICTY, respectively) 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. n40 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. n41

B. The Theory Comes to the ICJ

Nowhere is the assumption of determinancy via nationality clearer than in the charter and operation of the ICJ. In addition to its permanent bench of fifteen judges, n42 parties to a dispute are able to appoint additional judges to the bench if they are not otherwise represented among the fifteen. n43 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" n44 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." n45 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. n46 As the Fourth Annual Report of the PCIJ argued:
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. n47

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" n48 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) n49 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.

1. Institutional Mechanics and the Potential for Jingoism

Though a provision for national judges exists in various fora in the international legal system n50 and concerns about the independence of international judges predate international courts, n51 it was the statute of the PCIJ that solidified the notion. n52 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 "judges of the nationality of each of the parties ... to sit in the case before the Court." n53

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 belonging to arbitration," rather than the dispensation of justice. n54 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." n55 Though this was a concern for the entire tenure of the League of Nations and in all of the League's workings, it was especially so for the PCIJ, which saw many of the League's largest Member States balk at consenting to the body. n56 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 United Nations and some of its sister institutions including its "principal judicial organ," the ICJ). n57 A contentious issue in the conference concerned whether ICJ judges ought to be "independent" or "impartial" n58 with regard to their nationalities. In the end, the Statute requires judges to exercise their duties "im impartially," but is silent on whether or not judges should be independent. n59 The subtext is evident: a judge can at once be impartial and yet remain nonautonomous.

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 groups n60 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." n61 Far from being independent, the process arguably mandates that judges bring with them the cultural preconceptions and biases extant in their national groupings. Moreover, the fact that the developed custom has had the five permanent members n62 of the Security Council always 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 U.N. 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. n63 Thus, judges are theoretically accountable for their decisions under pain of nonreappointment by the Assembly and Council - both bodies implicitly and historically charged with representing national interest. While appointments of ad hoc jurists are manifestly political and nationally oriented, n64 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) separately, choosing from among a list of nominees chosen by the national groups mentioned above. This process, combined with a voting system that allows for the possibility of more than five judges to receive the requisite majority, n65 has historically made the votes very contentious. n66
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. In addition to the technical election process, the process has also come to include formal and informal meetings between U.N. diplomats, with influential states playing a large role in the process, cajoling, coaxing, and bargaining with other states for their support of specific candidates. n67 Reelection of judges can even focus on cases that the judge has decided. n68 Increasingly, [*208] and especially as charged concerning the ICC, judicial appointments have become an element of domestic political patronage, explicitly rewarding national/governmental loyalty and service. n69 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. n70

In addition to judicial 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 United Nations (who are automatically members of the ICJ), only sixty-five have standing acceptance of ICJ jurisdiction. n71 The 127 other states have lodged reservations and allow jurisdiction solely on a case-by-case basis. As the Nicaragua v. United States n72 case demonstrated, the provision and withdrawal of jurisdiction inherently politicizes and nationalizes proceedings. That the only judge to fully 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. n73 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. n74

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 [*209] least attempts to placate, latent national interests. So too does the fact that in some cases the entirety of the fifteen judges have not sat; in fact, the ICJ has the power to change the composition of its bench for specific cases. n75 According to Stephen Schwebel, the 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." n76 Thus, 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.

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. n77 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 Assembly n78 in the case of the ICJ) asks for judicial determination directly imbues any decision made with political content. In the past, national interests have been expressed by reference to advisory opinions, n79 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 [*210] before the body. n80 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 v. 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 U.S. 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." n81

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 Union of Soviet Socialist Republic (USSR) with an objective examination of legal issues, and that the entire ICJ bench was in the hands of ""imperialist"" powers. n82 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. n83

2. 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 War 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 a party line. 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 whole or in part against the contentions of his government. 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" 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. In addition to this anecdotal evidence, the few empirical studies conducted during this time (Suh, 1969 and Hensley, 1968) found some correlation between national positions and judicial voting. 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. Based on his own service on the PCIJ bench, Hudson "concluded that ... judicial impartiality ... [was] an established fact." Further, scholars promoting the importance of national identity were charged with the fallacy of post hoc ergo propter hoc; an alignment of votes is not necessarily based on a preceding alignment of national identity or interest. 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" and that the impact of PCIJ and ICJ judges' nationalities on decisions was, at best, indeterminate.

3. Recent Work on Judicial (In)dependence

Since 1969 there has been surprisingly scant examination of 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 subject of the independence of the international judiciary." 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, in particular in the United States. 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. Consequently, the process is manifestly political and has arguably become more so over the past twenty years. Second, in response to the rapid growth of the international judiciary since the end of the Cold War, questions have arisen, and in some cases qualitative work has been published and/or jurisprudence has developed, examining the independence of judges sitting on trade dispute panels, the ICTY and ICTR, the European Court of Human Rights, and the nascent ICC. Despite these cursory examinations, there remains surprisingly little scholarship on international judicial independence.

a. Domestic Studies: The U.S. 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." 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." The result of these studies has been the formalization of various theories of judicial behavior, with the key construct being Jeffrey Segal and Albert Cover's "attitudinal model." Now widely held, this model has consistently found that expressions of ideology are closely linked with voting patterns on the U.S. Supreme Court. Simply put:
Courts decide disputes in light of the facts of the case vis-a-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. n113

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, Roy Fleming and Dan 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. n114 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. n115 This argument has been made by critics of the European Court of Human Rights, whose judges also face external reappointment (see Part II.B.3.b below). Second, though still silent with respect to the election of ICJ judges, the selection of U.S. federal judges has become increasingly and overtly political, with party members and ideological factions demanding leadership appoint like-minded judges to the bench. n116

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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. n117 However, though a research agenda has been laid out by various scholars, n118 as of yet, studies conducted have been either introductory or qualitative n119 in nature.

Given the sophistication and history of their multinational 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 several 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 ...

... .

[3.]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.

[4.]The current possibility of re-appointing sitting judges renders them particularly susceptible to unacceptable interference from their governments and risks obedience to their governments.

[5.]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. n120

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 issues of judicial independence in the international realm. First, an especially contentious debate has begun concerning the "effectiveness" of international adjudication. The [*215] 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, n121 while Laurence Helfer and Anne-Marie Slaughter have argued otherwise. n122

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 an ex ante basis - based on its structure, mandate, and process of nomination. n123 While ex post 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 opaque-ness - 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 inquiry. n124 Second, scholarship is expanding regarding the Court's ability to provide decisions in highly political cases. n125 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." n126 An ICJ jurist's recent questioning of the independence of a fellow jurist in the highly political Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case represents another facet of this issue, in which doubts as to the ability of the ICJ bench to adjudicate impartially are beginning to be expressed from within the organization. n127

III. Analysis

The initial difficulty with researching how nationality matters to 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 [*216] the end of the twentieth century, the findings of the 1960s - that, 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. n128 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 nontrivial 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." n129 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. n130 Consequently, this paper uses alliance voting as a proxy. Evidence of the importance of judicial nationality would derive from a record of judges 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, n131 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 eighty-three n132 contentious n133 cases heard by the body since its [*217] founding in 1949 until 2000. The data is bound by the Corfu Channel case in 1949 and the Case Concerning the Arrest Warrant of 11 April 2000 in 2000. n134 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 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 seventy-nine countries. Table I lists those countries, organized by how many votes "their" judges cast between 1949 and 2000.

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

This table elucidates the first limitation of the claim about the importance of nationality. Though seventy-nine states have been represented on the Court, only 40% of those states have voted in significant numbers (twenty-one 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 Voting

Before disaggregating the data, it is enlightening to examine the macroresults. 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%. n135

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

However, this aggregate data is somewhat opaque. In line with the 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 Il Roh Suh undertook in his seminal 1969 study, 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. Table III 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.

[*219]

Table III

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Voting Against Government's Position</td>
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<td></td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As Only Dissenter</td>
<td>0.0</td>
<td>2.8</td>
<td>0.0</td>
<td>0.4</td>
<td>0.0</td>
<td>3.3</td>
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<tr>
<td>With Other Dissenters</td>
<td>0.0</td>
<td>6.5</td>
<td>2.0</td>
<td>0.0</td>
<td>2.0</td>
<td>6.5</td>
</tr>
<tr>
<td>Total</td>
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<td>9.3</td>
<td>2.0</td>
<td>0.4</td>
<td>2.0</td>
<td>9.8</td>
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<tr>
<td>With the Majority of the Court</td>
<td></td>
<td></td>
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<tr>
<td>Unanimous</td>
<td>3.0</td>
<td>1.6</td>
<td>5.9</td>
<td>3.7</td>
<td>8.9</td>
<td>5.3</td>
</tr>
<tr>
<td>Simple Majority</td>
<td>2.5</td>
<td>6.5</td>
<td>4.4</td>
<td>2.0</td>
<td>6.9</td>
<td>8.5</td>
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<tr>
<td>Total</td>
<td>5.4</td>
<td>8.1</td>
<td>10.3</td>
<td>5.7</td>
<td>15.8</td>
<td>13.8</td>
</tr>
<tr>
<td>Voting For Government's Position</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>With the Majority of the Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unanimous</td>
<td>3.4</td>
<td>2.4</td>
<td>2.5</td>
<td>3.7</td>
<td>5.9</td>
<td>6.1</td>
</tr>
<tr>
<td>Simple Majority</td>
<td>24.1</td>
<td>23.8</td>
<td>17.7</td>
<td>16.7</td>
<td>41.9</td>
<td>40.2</td>
</tr>
<tr>
<td>Total</td>
<td>27.6</td>
<td>26.0</td>
<td>20.2</td>
<td>20.3</td>
<td>47.8</td>
<td>46.3</td>
</tr>
<tr>
<td>Against the Majority of the Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>As Only Dissenter</td>
<td>4.9</td>
<td>3.3</td>
<td>0.5</td>
<td>5.3</td>
<td>5.4</td>
<td>8.5</td>
</tr>
<tr>
<td>With Other Dissenters</td>
<td>20.7</td>
<td>10.2</td>
<td>8.4</td>
<td>11.4</td>
<td>29.1</td>
<td>21.5</td>
</tr>
<tr>
<td>Total</td>
<td>25.6</td>
<td>13.4</td>
<td>8.9</td>
<td>16.7</td>
<td>34.5</td>
<td>30.1</td>
</tr>
<tr>
<td>Grand Total</td>
<td>58.6</td>
<td>56.9</td>
<td>41.4</td>
<td>43.1</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Suh's work analyzed four voting patterns, 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 dissent, show only a modicum of change from Suh's study to the present inquiry. In fact, there are only two significant alterations, both indicating the 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% in 1969 to 10.2% in 2004. Further, the proclivity for term judges to be the sole dissent in favor of their national position more than quintupled from 0.5% to 5.3%.

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." n140 These figures remain robust; while Suh found almost 18% of the judge's votes were against their state interests, by 2000 it was found that approximately 24% 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.

[*220]

Table IV

<table>
<thead>
<tr>
<th>National Judges Voting with . . .</th>
<th>. . . the majority (votes cast)</th>
<th>. . . the minority (votes cast)</th>
<th>If in the minority, was it the sole dissent? (votes cast)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>157</td>
<td>131</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>55%</td>
<td>45%</td>
<td>22%</td>
</tr>
</tbody>
</table>

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.

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

<table>
<thead>
<tr>
<th>Percentage of Vote Agreement Between Judges from Various States</th>
<th>Agreement with . . .</th>
<th>Agreement with . . .</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>. . .</td>
<td>. . .</td>
</tr>
<tr>
<td></td>
<td>USSR</td>
<td>Russia</td>
</tr>
<tr>
<td>United States</td>
<td>50%</td>
<td>57%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>66%</td>
<td>60%</td>
</tr>
<tr>
<td>France</td>
<td>84%</td>
<td>69%</td>
</tr>
<tr>
<td>Germany*</td>
<td>81%</td>
<td>54%</td>
</tr>
<tr>
<td>Italy</td>
<td>85%</td>
<td>83%</td>
</tr>
</tbody>
</table>

* 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 that were 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% of the time. The disagreement that pervaded the Security Council, and the whole United Nations, 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 manifested in Table VI, this does not appear to have always been the case.
Table VI

Percentage of Vote Agreement Between Judges from Various States

<table>
<thead>
<tr>
<th>Western Bloc</th>
<th>United States</th>
<th>United Kingdom</th>
<th>France</th>
<th>Italy</th>
<th>Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>82%</td>
<td>72%</td>
<td>63%</td>
<td>77%</td>
<td></td>
</tr>
<tr>
<td>U.K.</td>
<td>73%</td>
<td>85%</td>
<td>92%</td>
<td>89%</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>63%</td>
<td>87%</td>
<td>92%</td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>77%</td>
<td>97%</td>
<td>89%</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Eastern Bloc</th>
<th>USSR</th>
<th>Russia</th>
<th>Poland</th>
<th>Hungary</th>
<th>China</th>
</tr>
</thead>
<tbody>
<tr>
<td>USSR</td>
<td>-</td>
<td>-</td>
<td>96%</td>
<td>55%</td>
<td>84%</td>
</tr>
<tr>
<td>Russia</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>55%</td>
<td>92%</td>
</tr>
<tr>
<td>Poland</td>
<td>96%</td>
<td>-</td>
<td>-</td>
<td>40%</td>
<td>87%</td>
</tr>
<tr>
<td>Hungary</td>
<td>55%</td>
<td>55%</td>
<td>40%</td>
<td>-</td>
<td>64%</td>
</tr>
<tr>
<td>China</td>
<td>84%</td>
<td>92%</td>
<td>87%</td>
<td>64%</td>
<td>-</td>
</tr>
</tbody>
</table>

While there is a general high level of agreement, for most country pairs, vote accordence is far from absolute and in some cases reveals a surprising degree of judicial autonomy. For instance, on the Western Bloc side, while the United States and French agreement of 72% 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% 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 multinational power bloc with which the superpowers must contend. n141 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 United Kingdom - 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. n142
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 U.N. representative) before emigrating to the United States. n144 The United States ICJ incumbent was born in Slovakia [*223] and migrated to the United States. n145 Other judges on the ICJ represent similar multiple national histories; of the fifteen, only four were both born and educated entirely in the country they represent. n146 If nationality is determinant, it is unclear which of a judge's nationalities - the place of her birth? her education? her current residence? n147 - moves her to decide in a specific manner. The ICJ's determination that citizenship of judges be defined as of the state in which they "ordinarily exercise['] civil and political rights" n148 is somewhat anachronistic, given the expanding civil and political rights accorded to noncitizens in many states. n149

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 Supreme Court justices in the United States, such as Justice Brennan and Justice Souter, have shown, n150 the outward appearance of a judge's specific ideology while he is a candidate for appointment may 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 n151 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. n152

[*224] 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 interlinked theories of citizenship: first, there is a long-held notion that co-nationals bring needed local insight into the judicial decision-making process n153 and second, there is an even stronger view that co-nationals will tend to side 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. n154 The posited Strasbourg Effect, n155 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" n156) are potent examples of this trend. n157

Concerning the allegiance of shared citizenship, there is a branch of political philosophy that both identifies and supports such "liberal nationalism." n158 However, globalization and the increasing porosity of borders (manifested by the SARS epidemic, financial flows, and other phenomena) suggest that such particularistic modes of identity are fast being replaced by more universalistic modes.

B. Institution-Based Challenges to National Bias

Apart from the denationalizing tendencies of judges themselves, the ICJ itself has proven too institutionally complex to allow nationality-based voting real power in its chambers. Most prosaically, the ICJ has adopted many of the same safeguards present in municipal systems to protect the autonomy of judges, n159 barring them from engaging in [*225] certain activities while on the bench, demanding recusal n160 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. n161
Further, recent decisions have shown 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, appear to regularly trump national interests. n162 Further, the most important institutional pressure is the same one that exists in all courts: how far should the ICJ 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 - 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. n163

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." n164 The ICJ saw different parts of its bench make each claim in Legality of the Threat or Use of Nuclear Weapons. n165 The internationalization of the political question doctrine, n166 present in many municipal systems, n167 has seen the ICJ refuse to hear "highly political disputes - that is, those disputes where the national interests ... are threatened." n168 When refusing jurisdiction under the political question doctrine, the Court [*226] 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 contribution to the peaceful resolution of highly political disputes" n169 or, even more basically, the low likelihood of the Court ensuring enforcement of its decisions. 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. n170 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. n171 The lack of anonymity with which dissents are filed has also been thought to "guarantee against any subconscious intrusion of political considerations." n172 Such anonymity "may spur a judge to vote invariably in support of the cause of his State without incurring the odium of partisanship." n173 Moreover, it has been suggested that published, dissenting opinions act "as a safeguard of the individual 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." n174

IV. Conclusion: Toward 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 [*227] 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 Part II.A 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. n175 Moreover, since the passage of the New York Convention in 1958 recognizing the domestic enforcement of foreign arbitral awards, n176 governments and private investors have increasingly employed various, non-state-based dispute settlement systems in their disagreements. n177 When appointing arbitrators, litigants have chosen to best serve their corporate interests, which has increasingly meant the selection of individuals without regard to their nationalities. n178 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. n179

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, n180 the most significant departure from a judicial nationality requirement has come in the dispute resolution process of the WTO. Article 8, Section 3 of the WTO's Annex
Governing the Settlement of Disputes states that "Citizens of Members whose governments are parties to the dispute or third parties ... shall not serve on a panel concerned with that dispute." n181

[*228] International law outside the commercial realm has been much slower to embrace such "borderless" globalization and a wider "nonstate" world. The insistence on maintaining national judges in public international fora is a key element of this reticence. There are two basic distinctions between 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, 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. n182 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 pursue leads on their territories, provide physical resources to build cases, and provide facilities for the convicted to serve out their sentences.

The nonstate-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. n183 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 U.N. tribunals in Rwanda and the former Yugoslavia, created under the U.N.'s binding Chapter VII authority, have seen only meek support from many U.N. Member States. n184 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 changing nature of global commerce and the declining power of states in financial matters has produced the opposite reality. n185

[*229] 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 better 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. n186 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 successfully supported by the United States for a judgeship at the ICJ. A similar, still nascent court, the African Court 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 case." n187 The nationality requirement may also be breaking down in quasi-judicial bodies. For example, the United States has recently supported the nominations of two non-Americans to be special rapporteurs to the U.N. Human Rights Commission. n188 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 removed. n189 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. n190 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. n191 Yet these choices, and the even rarer
case where one party chooses to appoint an ad hoc judge and the opposing party neither chooses an ad hoc judge nor has a co-national on the bench, n192 have been anomalous. n193

[*230] 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 adjudication n194 - concerns about biased, politicized judges have been raised in ICTY and ICTR proceedings, have provided fodder for critics of the ICC, n195 and have also recently been arrayed anew against the ICJ, both from within and outside the institution. n196 As international judicial bodies continue to proliferate, n197 this concern is likely to increase, bringing with it a potential to retard the development of international law.

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 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. n198 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" n199 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:

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. n200

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 n201 or whether 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, n202 the ICJ and similar institutions may be forced to reassess their age-old attachments to judicial nationalism.

Legal Topics:
For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationTribunals

Footnotes:

n1. 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: An International Perspective 79-81 (1988); Mary L. Dudziak, Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa, 101 Mich. L. Rev. 1622 (2003) (book review); J. 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, ""an independent ... judiciary is indispensable to justice in our society."" Id. at 721. 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."" Id. (quoting Edward Dumbauld, Book Review, 81 Am. J. Int'l L. 567, 568 (1987)). In the nongovernmental organization (NGO) community, the importance of judicial independence to freedom and economic growth have made it a cause celebre for many. Compare Freedom House, Freedom in the...

n2. In the United States, see 28 U.S.C. 455(a) (2000), which mandates that "any 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." 1999 (4) SALR 147, 177 (CC). In Australia, the High Court found that a judge should be recused if there is a "reasonable apprehension of bias." Livesey v. New S. Wales Bar Ass'n (1983) 57 A.L.J.R. 420, 422. Despite this breadth of international acceptance, as Ruth MacKenzie and Phillippe 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 & Phillippe Sands, International Courts and Tribunals and the Independence of the International Judge, 44 Harv. Int'l L.J. 271, 275 n.26 (2002).

n3. Il Ro Suh, Voting Behavior of National Judges in International Courts, 63 Am. J. Int'l L. 224, 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 "citizens 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. 250, 257 (1996) (alterations in original) (quoting the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994) [hereinafter WTO Dispute Settlement Understanding]). See infra notes 177-81 for a discussion of the different trends in judicial independence that exist in the private international versus the public international legal realms.

n4. "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." Vagts, supra note 3, at 257.

n5. 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. Id. at 255. 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 in that matter. Recently, another recused himself from the Case Concerning the 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 Lauterbach 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 Klaeestad took part 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. Id. at 255-56 (footnotes omitted). 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 Mang<a-ring>rd a-rd, a "neutral" serving on the tribunal. Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 169 (1998).

n6. 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-U.S.) bias of the Court, see 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 Ju-
risdiction of the International Court of Justice 71 (examining the implications of a withdrawal of the United States from the ICJ vis-a-vis Article 26(2) (the Optional Clause)).


n8. Vagts, supra note 3, at 257. While this is true of WTO dispute settlement panels, the WTO Appellate Body does not operate under a similar restriction.

n9. 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).


n11. Yarn, supra note 9, at 945.

n12. "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. & John Witte, Jr., In the Steps of Gratian: Writing the History of Canon Law in the 1990s, 48 Emory L.J. 647, 688 (1999).


n14. E.g., 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 by 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. See generally Sam Feldman, Comment, Reason and Analogy: A Comparison of Early Islamic and Jewish Legal Institutions, 2 UCLA J. Islamic & Near E.L. 129 (2002).

n15. Yarn, supra note 9, at 932 (internal quotation marks omitted) (quoting Dictionary of Conflict Resolution 6, 108 (Douglas H. Yarn ed., 1999)).


n17. Yarn, supra note 9, at 939-43.

n18. 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).


n20. Id. at 975-77.

n21. Id. at 943.

n22. See Arbitration Institute of the Stockholm Chamber of Commerce, The History of Arbitration in Sweden, at http://www.sccinstitute.com/About/The_history_of_arbitration&u score=in_Sweden (last visited Jan. 13, 2005). Some historians claim that the trade guilds in twelfth-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 Wolaver, supra note 13, at 135-36.
n23. In 1698, English merchants were provided implicit power to accept arbiters - in that they had the power to refuse to submit their suits to "arbitration ... or umpirage." Act for Determining Differences by Arbitration, 1698, 9 Will. 3, c. 15. 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, 1854, 17 & 18 Vict., c. 125, 6.


n26. Historically, civil systems, operating under the principle of "party autonomy," 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); 2 Ernst 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 Arbitration, art. 17(1) (Jan. 1, 1998), http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Jan. 13, 2005), which states: "The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate." Some systems, however, such as those under the International Center for the Settlement of Investor Disputes’s (ICSID) control, have jurisdictional requirements. Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development 262 (2001).

n27. 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.


n30. Such interstate arbitrations were a staple of early-Hellenic history. Famous arbitrations include the 600 B.C. dispute between Athens and Megara over the possession of Salamis - which was decided by a panel of five Spartan arbitrators; the 480 B.C. controversy between Corinth and Corecyra over Leucas; and the 117 B.C. 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. Rev. 155, 156 (1970); Gregory Nagy, Pindar's Homer: The Lyric Possession of an Epic Past ch. 11 (1997).

n31. For instance, the 418 B.C. 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 28, at 157 (emphasis added) (quoting Thucydides).

n32. A key component of the issues dealt with under arbitration were territorial disputes unresolved by the Revolutionary War. See, e.g., Jay Treaty, supra note 28. Such disputes have since become the most common cases presented before the PCIJ/ICJ.

n33. 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 ruffling national susceptibilities."

n34. 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

n35. Evidence for this contention also comes from the fact that states have maintained their right to appoint arbitrators
in interstate disputes they submit to arbitration, rather than the ICJ. See Permanent Court of Arbitration, Optional

n36. See Advisory Comm. of Jurists, Permanent Court of Int'l Justice, Proces-Verbaux of the Proceedings of the
Committee: June 16th-July 24th 1920, at 528-32 (1920).

[hereinafter Samore, The World Court Statute].

n38. Vidmar, supra note 28, at 92 (emphasis added).

n39. This occurred in a territorial arbitration following the War of 1812, in which the U.S. chose not to accept the
arbitral determination of a panel absent United States representation. Id. at 91-92.

n40. For example, the election of Member States of the U.N.'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 a l'ONU, Le Monde (Fr.), Apr. 27, 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; Battles Loom over
U.N. Posts, Nikkei Weekly (Japan), Jan. 25, 1993, at 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 considera-
tions[] were reportedly much greater factors in the outcome of the elections than the qualifications of the candidates." Civil Society Organizations Express Concerns About the Upcoming Election to International Criminal Court NGO, M2
Presswire, Aug. 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 long been a part of international tribunals. In the initial race to ap-
point the first fifteen ICJ judges, nearly eighty candidates were put forward by Member States. See Sydney Gruson,

n41. 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. Report of
the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, U.N. ESCOR, Comm'n

n42. Judges are elected for a period of nine years. See infra Part II.B.1 for details on the process.

n43. As Schwebel notes: "In the current parlance of the Court, a sitting judge of the nationality of a party to the
case is called a "national judge."' Stephen M. Schwebel, National Judges and Judges Ad Hoc of the International Court

n44. Id.


n46. 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 (until recently) effec-
tively 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).

n47. Permanent Court of Int'l Justice, Fourth Annual Report of the Permanent Court of International Justice (June
15th, 1927-June 15th, 1928), (ser. E) No. 4, at 75. In today's world, the ties to one's home and kin may actually not
equate with citizenship. See infra Part IV.A. However, in the early twentieth century, "land of their homes" was essentially equated with citizenship.


n49. See, e.g., 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.


n52. 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 Advisory Comm. of Jurists, supra note 36, at 28-29, 105, 120, 134.

n53. ICJ Statute, supra note 48, art. 31(1).

n54. Advisory Comm. of Jurists, supra note 36, at 531.

n55. Id. at 538.


n57. ICJ Statute, supra note 48, art. 1.

n58. William Samore, National Origins v. Impartial Decisions: A Study of World Court Holdings, 34 Chi.-Kent L. Rev. 193, 197 (1956) [hereinafter Samore, National Origins]. The distinction between the two concepts was elucidated in a 1985 report by the U.N. Sub-Commission of the Human Rights Commission focusing on judicial administrations. The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, U.N. ESCOR, 38th Sess., Agenda Item 9(c), U.N. Doc. E/CN.4/Sub.2/1985/18 & Add.1-6 (1985). "Independence" refers to "freedom from any restrictions, influence, inducements, pressures, threats or interference, direct or indirect ...." Id. para. 76. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring 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 favour in order to do right.


n59. ICJ Statute, supra note 48, art. 20. However, while some may argue that the phraseology of Article 2, which calls for the Court to be "composed of a body of independent judges" provides this injunction, this seems far from clear. In context, it could be argued that the independence demanded by Article 2 is the independence of judges vis-a-vis one another, and not vis-a-vis any government.

n60. "National groups" are representatives of states made up of four jurists. Id. art. 4. These jurists can propose up to four candidates for election. Id. art. 5(2). Provisions are also made for those states not party to the Permanent Court of Arbitration to participate in the election process. Id. art. 4(2).

n61. Id. art. 9.
n62. The five permanent Security Council members are China, France, Russia, the United Kingdom, and the United States. U.N. Charter art. 23.

n63. ICJ Statute, supra note 48, art. 13.


n66. The ICJ's first election in 1948 was an indication of how political the judicial appointment process could become. The reelection 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 reappointed, they would only support the appointment of another Slav to the post. See Five Re-elected to World Court, N.Y. Times, Oct. 23, 1948, at 3.

n67. "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 65, at 287.

n68. See Mackenzie & Sands, supra note 2, at 278-79.

n69. The ranks of ICJ judges have historically been full of former government ministers and others close with the ruling government. Among the first fifteen to serve were former foreign ministers, justices of supreme courts, and a president of a national bank. See Five Re-elected to World Court, supra note 66. 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. International Court of Justice, Biographies of Members of the Court: Hisashi Owada, at http://www.icj-cij.org/icj/www/igeneralinformation/icjvjudge/Owada.htm (last visited Feb. 1, 2005); Imperial Household Agency, Personal Histories of Their Imperial Highnesses the Crown Prince and Crown Princess, at http://www.kunaicho.go.jp/e02/ed02-04.html (last visited Feb. 1, 2005). 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 273-82 (2001); Allison Marston Danner, Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel, 5 Stan. L. Rev. 1633, 1665 (2003) ("Without direct accountability to either the Security Council or to any other external institution, the ICC's legitimacy is fragile and could be jeopardized by an irresponsible or misguided prosecutor.").

n70. 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 Clientelism: A Bibliographical Essay, in Friends, Followers and Factions: A Reader in Political Clientelism 483 (Steffen W. 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 that have government bureaucracies run in accordance with a patron-client model.


n73. This was Judge Stephen Schwebel. Five other ICJ judges, however, appended separate opinions to the majority ruling, supporting certain central elements of the U.S. position, especially regarding the American objection that Nicaragua had never perfected its acceptance of compulsory jurisdiction under Article 36(2). See Military and Paramilitary Activities in and Against Nicaragua, 1984 I.C.J. 392.

n74. This was especially so during the Cold War. See the Soviet judicial discussion infra Part III.C.
n75. 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." ICJ Statute, supra note 48, art. 26; see also Stephen M. Schwebel, Ad Hoc Chambers of the International Court of Justice, 81 Am. J. Int'l L. 831, 832 (1987).

n76. Id. at 834.

n77. In the U.S. system, see Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153 (1987); Laurence H. Tribe, American Constitutional Law 3-10, at 77-82 (2d ed. 1988) (explaining that in the U.S. 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 Cal. L. Rev. 263 (1990). 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 P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 15 (1989); Peter H. Russell, The Judiciary in Canada: The Third Branch of Government 91-92 (1987). See also generally Stewart Jay, Most Humble Servants: The Advisory Role of Early Judges (1997).

n78. Though the U.N. 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. U.N. Charter art. 96(2). Of the twenty-five advisory cases referred to the Court, only four were not referred by the General Assembly or directly related agencies (such as the Security Council, the Economic and Social Council, or a U.N. Committee): Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (July 8) (referred by the World Health Organization); Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 20) (referred by the World Health Agency); Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8) (referred by the Inter-Governmental Maritime Consultative Organization); and Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against Unesco, 1956 I.C.J. 77 (Oct. 23) (referred by UNESCO).

n79. 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" nonbinding] 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) (Mar. 1, 2004), available at http://www.nyu.edu/globalbeat/syndicate/cook030104.html (last visited Jan. 5, 2005).


n83. See id. at 381-88.

n84. However, observers like Lauterpacht raised concerns about judicial nationality much earlier. See Lauterpacht, supra note 64, at 215-20.

n85. One of the reasons the United States provided judges to 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 U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 24 I.L.M. 246, 248 (1985).

n86. See Samore, National Interest, supra note 58, at 200. Further, Samore notes that the PCIJ propagated a "fiction" of independence for some jurists in the face of clear evidence to the contrary. Id. at 193 (internal quotation marks omitted).


n88. Samore noted that when the British judge decided to vote against his own government, it marked the first time such a thing had occurred in the history of the postwar court. Samore, National Interest, supra note 58, at 193-94.

n89. Suh, supra note 3.

n91. The results were somewhat mixed, with some arguing that national judges on the whole take "favorable attitudes towards the contentions of their states" (Suh) and others claiming that national interest was of only marginal importance (Hensley). Suh, supra note 3, at 235; see Hensley, supra note 90, at 585.

n92. Samore, National Interest, supra note 58, at 202-03.


n94. See Hardy C. Dillard, A Tribute to Philip C. Jessup and Some Comments on International Adjudication, 62 Colum. L. Rev. 1138, 1145 n.19 (1962) (warning "writers who draw inferences of "national' bias because of the alignment of judges on specific issues" to "guard against the familiar logical fallacy of indulging in hasty generalization").

n95. Christol, supra note 93, 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." Id.

n96. See Dillard, supra note 94, 1145 (stating 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, National Interest, supra note 58, at 202; Eric A. Posner, The Decline of the International Court of Justice (U. Chi. L. & Econ., Olin Working Paper Series No. 233, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341, last visited Mar. 13, 2005.

n97. Edith Brown Weiss's Judicial Independence and Impartiality: A Preliminary Inquiry, is perhaps the most recent work, but even that was conducted almost two decades ago. See infra note 109.

n98. Mackenzie & Sands, supra note 2, at 276. The authors describe a "research agenda" for assessing independence rather than provide any answers on the issue. Id.


n100. U.S. Const. art. 2, 2, cl. 2.


n105. For example, the purported lack of independence of the tribunal was a basis for the formal appeal of the Furundzija case in the ICTY. Prosecutor v. Furundzija, Judgment, No. IT-95-17/1-A, para. 164 (ICTY App. Chamber July 21, 2000), http://www.un.org/ictr/furundzija/appeal/judgement/fur-aj000721e.pdf (last visited Jan. 28, 2005). 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. Prosecutor v. Seselj, No. IT-03-67-PT (ICTY Trial Chamber June 10, 2003), http://www.un.org/ictr/seselj/trialc/decision-e/030610.htm (last visited Jan. 28, 2005). 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." Id. para. 3.

n106. 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 assure 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. Press Release, ICTR, Barayagwiza to be Tried by ICTR (Mar. 31, 2000) (internal quotation marks omitted), http://www.ictr.org/ENGLISH/PRESSREL/2000/226.htm (last visited Jan. 13, 2005).

n108. See supra note 41 and accompanying text.


n112. Jeffrey A. Segal & Albert D. Cover, Ideological Values and Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 557 (1989) (Segal and Cover "use content analytic techniques ... [to] derive independent and reliable measures of ... Supreme Court justices ... [which] correlate highly with the votes of the justices, providing strong support for the attitudinal model"); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993).

n113. Segal & Spaeth, supra note 112, at 65.


n115. 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." ICJ Statute, supra note 48, art. 18 (emphasis added).

n116. 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 Republican Dwight Eisenhower. See generally David Alistar Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees (1999).

n117. Mackenzie & Sands, supra note 2, at 274.

n118. 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 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." Id. at 276.

n119. The only truly quantitative study conducted on 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. See Hensley, supra note 90, at 570. He even argued that his coding could differentiate between "the influence of culturally inculcated values and the effect of national interests." Id.

n120. Limbach et al., supra note 107, at 9. 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 (London), Oct. 21, 2003, Law, at 4.


n123. Id.

n124. Vagts argues that various aspects of professional behavior are not well regulated, in particular, the "anomalous roles assigned to national judges and party-appointed arbitrators." Vagts, supra note 3, at 261.


n126. See Coleman, supra note 125, at 29 (emphasis omitted).


n128. Hensley attempted to account for this by coding decisions by national interest. See Hensley, supra note 90. This seems a dubious process, especially for assessing smaller state interests.

n129. Zile, supra note 82, at 382.

n130. 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, it would be hard to assess which side best represents/protects Sierra Leone's interests. Certain Property (Liech. v. F.R.G.), 2001 I.C.J. (Application Instituting Proceedings of June 1, 2001), http://www.icj-cij.org/icjwww/idocket/ila/ilaapplication/ila_iapplication__20010601.PDF (last visited Feb. 1, 2005).

n131. 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 separate opinion. Arrest Warrant of 11 April 2000 (Democratic Rep. of the Congo v. Belg.), 2002 I.C.J. 3, 35 (Feb. 14) (separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

n132. Six of these cases are not included due to incomplete data or conflicting data from various sources. Data comes from ICJ voting records in The World Court Reference Guide: Judgments, Advisory Opinions and Orders of the Permanent Court of Justice and the International Court of Justice (1922-2000) (Bimal N. Patel ed., 2002). Works also consulted include Nagendra Singh, The Role and Record of the International Court of Justice (1989) and Shabtai Rosenne, The Law and Practice of the International Court, 1920-1996 (3d ed. 1997).

n133. Only contentious cases are examined for two reasons. First, in order to make the analysis comparable with those undertaken in other jurisdictions, a demand that the adjudication be made on ripe issues was 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.


n135. It is to macrostatistics such as this that critics of the ICJ, like Eric Posner, point to. See Posner, supra note 96. However, analyses of individual voting preferences only tell part of the story. See below for alternative methods for determining if nationality "matters" in the ICJ.

n136. Suh, supra note 3.

n137. Id. at 227-30.

n138. See id.

n139. Id. at 229-30.

n140. Id. at 228-29 (second emphasis added).

n141. 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.

n142. Posner derives a contrary interpretation by unpacking the relationship between judges and parties. He argues that if their own nation is not a party to a case, judges are apt to vote for parties whose home countries are most similar to their own - this similarity is measured primarily by size of the country's economy and their type of political system. Posner, supra note 96; see also Eric Posner, All Justice, Too, Is Local, N.Y. Times, Dec. 30, 2004, at A23. However, not only does Posner fail to address whether these "similarity" votes are actually determinative of outcome - given, inter alia, the institutional pressures to create large majorities in decisions - but he also does not explain why the similarity linkages only exist between judges and parties and not among judges themselves. Why don't judges who are from "similar" states appear to follow Posner's conclusions? This paper's findings, especially those regarding the long-standing tepid vote agreement between judges from the United States and many "similar" Western European Powers, and the increasing agreement of Russian judges with those from communist China after Moscow left the Communist fold in 1989 (see Table VI), are unaccounted for by Posner's economic/political similarity thesis.

n143. 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[ ] [the S.S. "Lotus" and the second South West Africa Case]." Suh, supra note 3, at 232 (footnote omitted).


n145. Goldhaber, supra note 144.


n147. The author recognizes that place of education or residence has not historically played a role in nationality as used in international law. However, it is unclear why this should continue to be so; for centuries, the "place of one's birth" was almost synonymous with the place of her education and her residence. In other words, the culture, mores, traditions, and values of one's place of birth were inculcated throughout one's life. As people are increasingly less tied to their places of birth (especially in the industrialized world), it seems that the understanding of nationality (in international law and elsewhere) may be ripe for change.

n148. ICJ Statute, supra note 48, art. 3(2).


n150. See supra note 116.

n151. See 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.

n152. For example, the appeals judgment in the ICTY case Prosecutor v. Aleksovski cogently states the confused status of precedent in international humanitarian law:

... Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby 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, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals .... The ... Chamber also acknowledges that that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated.

...
nising the need for certainty, stability and predictability... also recognises that there may be instances in which the strict, absolute application of that principle may lead to injustice.


n153. 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 43, at 889; see also Advisory Comm. of Jurists, supra note 36, at 721-22.

n154. Moreover, Hersch 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 64, at 212-14.


n157. 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 93, at 31-32. 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 51, at 105.

n158. For details on such liberal nationalism, see David Miller, On Nationality (1995); Yael Tamir, Liberal Nationalism (1993); Samuel Scheffler, Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought (2001).

n159. Samore, The World Court Statute, supra note 37, at 623 (pointing to various features of the Court that safeguard impartiality after appointment, such as compensation, rules on incompatibility, disqualification, etc.). Compare Brazil's constitution, which bars judges from engaging in certain activities while on the bench. A.A. Contreiras de Carvalho, Lei Organica da Magistratura Nacional Interpretada 83-92 (1983).

n160. See ICJ Statute, supra note 48, arts. 16, 17, 23. These are very similar safeguards adopted by other international judicial bodies. See, e.g., ITLOS Statute, supra note 50, 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.").

n161. ICJ Statute, supra note 48, art. 32.

n162. This contention is inferred from the large proportion of decisions that have few, if any, dissents. See discussion infra Part III.B.

n163. 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 45, at 834.

n164. Though in some cases, the ICJ has held that it will not refuse to hear a case just because it may have a political character. Liz Heffernan, The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice, 28 Stetson L. Rev. 133, 149 (1998).

n165. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8). 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 the law." Id. at 583 (dissenting opinion of Judge Higgins). Judge Shi's declaration, id. at 277, and Judge Oda's dissent, id. at 332, made the claim that the issue was more appropriately addressed by legislative/executive, rather than judicial, means.

n166. See David, supra note 125.

n168. Coleman, supra note 125, at 31.

n169. 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 151, 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 protests by more than half of the states who submitted written briefs to the Court - imploring the body not to take the case - and the subsequent boycott of the oral proceedings by many countries, for fear of politicizing the Court, suggests that this may be changing. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. (July 9), http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/im_wp_advisory_opinion_20040709.pdf (last visited Feb. 1, 2005).

n170. 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 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 votes. The opinions can be found on the ICJ website, at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited Feb. 1, 2005).

n171. 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) (footnote omitted).


n173. Id.


n177. Key among these systems are the rules followed by the ICSID, the International Chamber of Commerce, the U.N. Commission on International Trade Law (UNCITRAL), the American Arbitration Association, the London Court of International Arbitration, and the Stockholm Chamber. For examples of these rules for the ICSID, see the Convention on 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 Rules, see http://www.chamber.se/arbitration/english/; and for the London Court of International Arbitration, see http://www.lcia-arbitration.com/ (all sites last visited Jan. 13, 2005).

n178. For example, in ICSID Case No. ARB/02/12 between the state of Jordan and a British engineering firm, the parties agreed on a German, Italian, and Australian arbitrator. ICSID, List of Concluded Cases, at
http://www.worldbank.org/icsid/cases/conclude.htm (last visited Feb. 1, 2005). In Case No. 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. Id.


n181. WTO Dispute Settlement Understanding, supra note 3, art. 8(3).

n182. If a party ignores decisions, they do so at the risk, inter alia, of their credit rating, controlled by nongovernmental 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, Apr. 6, 1998; Simon Davies, Rating the Agencies, Financial Times (London), Mar. 23, 1998, at 25; Lawrence J. White, Bond-Raters' Troika, 112 U.S. Banker 58 (2002); Moody's Makes Up Little for Poor Standards, Financial Express (India), Feb. 9, 2003; Chee Yoke Heong, Rating Agencies Under Fire from Crisis-Hit Nations, IPS, Mar. 9, 1999.

n183. This voluntary component is a key distinction of arbitral systems. See Emerson, supra note 30, at 157.


n185. As more commercial arbitration is engaged in, the power of states will likely decrease even further in international law, if only due to the 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." Arthur Taylor von Mehren, International Commercial Arbitration: The Contribution of the French Jurisprudence, 46 La. L. Rev. 1045, 1057 (1986).

n186. The statute of that Court only allows state parties to the Court to nominate candidates for the bench; only nineteen states have ratified the statute, the United States not among them. See Inter-American Court Statute, supra note 50, art. 7. 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 thirty-five states, including the United States. See id. art. 4.


n188. U.S. Representative to U.N. Offices in Geneva, July, 2004 (information provided to author).

n189. Schwebel, supra note 43, at 896. It is an enlightening fact regarding the importance of "nationality" that such a requirement actually never existed de jure, but state parties felt compelled to appoint co-nationals. ICJ Statute, supra note 48, art. 31.

n190. Schwebel notes that "about half of the 60-odd judges ad hoc of the [ICJ] have not been of the nationality of the appointing State." Schwebel, supra note 43, at 897.

n191. Id. (mentioning specifically the cases of Certain Phosphate Lands in Nauru, Temple of Preah Vihear, and Sovereignty over Certain Frontier Land).

n192. Id. This was the position of Portugal in its case against Yugoslavia in Legality of the Use of Force. Id.

n193. 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 coun-
sel 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 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 of judges' nationalities.

n194. "The questionable ... impartiality of the judges [undoubtedly] weakens the Court [and international law writ large]." Tiefenbrun, supra note 151, 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 65, 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).


n198. See supra note 40.

n199. ICJ Statute, supra note 48, art. 9.


n201. 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. Hensley, supra note 90, at 569.

n202. 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. See Gross, supra note 65, at 267.