

# THE ROLE OF JUDGES *AD HOC* ON INTERNATIONAL PERMANENT COURTS: A CRITICAL ANALYSIS

*El papel de los jueces ad hoc en las  
cortes permanentes internacionales:  
un análisis crítico*

GUSTAVO LUIZ VON BAHTEN\*

**ABSTRACT:** The scope of this study is analyzing the institution of judges ad hoc, since its origin on the Permanent Court of International Justice (PCIJ) until its treatment on the most important present international permanent courts: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR), among others. Furthermore, this work brings up considerations about the necessity and importance of judges ad hoc on the contemporary international legal system, and their relation with essential topics such as legitimacy, nationality, the States' consent and the principle of the *jus cogens*. Moreover, the present paper aims to clarify that justifications presented to include this old rule on the current legal system are not valid on a globalized multi-lateral society, being absolutely essential abolishing the figure of the

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\* Brazilian attorney. PhD in Labour Studies (University of Milan). LLM in International Law, Trade, Investments and Arbitration (University of Chile - University of Heidelberg). <gbahten@gmail.com>.

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judges ad hoc and to innovate the international order, adequating it to the dramatic changes occurred on the last 50 years, and inserting it on a post-habermasian paradigm.

**KEY WORDS:** judges ad hoc – international courts – consultive competences – legal judge

**RESUMEN:** El objetivo de este estudio es el análisis de la institución de los jueces *ad hoc*, desde sus orígenes en la Corte Permanente de Justicia Internacional hasta su tratamiento en los más importantes tribunales internacionales permanentes de la contemporaneidad: la Corte Internacional de Justicia, el Tribunal Internacional para el Derecho del Mar, la Corte Interamericana de Derechos Humanos y la Corte Europea de Derechos Humanos, entre otros. Por otro lado, este trabajo nos lleva a consideraciones sobre la necesidad e importancia de los jueces *ad hoc* en el actual ordenamiento jurídico internacional, y su relación con temas esenciales como la legitimidad, la nacionalidad, el consentimiento y el principio del juez natural. Más, el presente trabajo tiene por objeto aclarar que las justificaciones presentadas para incluir esta regla anacrónica en el sistema legal actual no son válidas en una sociedad multilateral y globalizada. Así, es imprescindible la abolición de la figura de los jueces ad hoc, de modo a adecuar el orden internacional a los dramáticos cambios ocurridos en los últimos 50 años, insertándole en un paradigma post-habermasiano.

**PALABRAS CLAVE:** jueces *ad hoc* – tribunales internacionales – competencia consultiva – juez natural

## OVERVIEW

In the last few years it is undeniable that the increment on the globalization process, for better or not, brought significant epistemic changes<sup>1</sup> and challenges<sup>2</sup>, particularly on fields related to International Law. In this current "multilateralized" world, the internationalization of many subjects - which were before exclusive competences of internal law - and the relativization of the concept of sovereignty<sup>3</sup> were still not able to bring up a general international jurisdiction<sup>4</sup>, but, in spite of that, the contemporary society is marked by the

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<sup>1</sup> SOROS (2002).

<sup>2</sup> STIGLITZ (2003).

<sup>3</sup> SEIDL-HOHENVELDERN (1992).

<sup>4</sup> MÉRIGNHAC (1905) p. 78.

strengthening of an international order, with a relevant increase in the number of international institutions, many of them with jurisdictional scope.

Therefore, this present international jurisdictional panorama –characterized by the emergence of new subjects and a brand new structure on international relationships– deserves an appropriate reflection, capable to overcome an archaic conception of International Law based on the concept of absolute sovereignty, incompatible with the principles of interdependence, harmonic mutual growth, sustainable development and cooperation.<sup>5</sup>

If the judges' role on international courts is not anymore being merely *bouches de la loi* –in accordance to the classic Montesquieu's lesson–, in a world where there is an increasing active posture from the magistracy on the construction of an International Law with a real *effet utile*, on a dworkinian attitude<sup>6</sup>, all questions related to who our judges are and what do we wish on that subject assume greater relevance.

Following this premise, the scope of this paper is presenting the institution of judges *ad hoc* on the main international Tribunals, and analyzing their compatibility with the most recent developments on International Law.<sup>7</sup>

On the first part of this study, it will be constructed an objective analysis of the theme of judges *ad hoc*. This work begins with a historical background, looking for the roots of the institution of judges *ad hoc* on the PCIJ Statute, and its influence on the main contemporary international permanent Courts, such as the ICJ, the ITLOS, the ICHR and the IEHR, besides of an analysis *en passant* about the main rules concerning the nationality of the adjudicators in other decisory organs, as the European Court of Justice (ECJ), the Panel's structure on the World Trade Organization (WTO), the International Criminal Court and also on arbitration rules, such as the ones stated by the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID).

Moreover, it will be laid out a presentation of some important issues concerning to the present treatment of this matter, as the role of judges *ad hoc* in consultive proceedings (*Namibia case*), their nomination as a faculty of the parties (*Aegean Sea case*) and the main rights and duties of those members,

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<sup>5</sup> DELOS (1950) p. 305.

<sup>6</sup> MURPHY and PRITCHETT (1961) p. 107, CORDERO (1987) p. 255.

<sup>7</sup> JIMENEZ DE ARÉCHAGA (1980) p. 180.

analyzing particular aspects like the requirements for their nomination, their remuneration, their immunities and privileges, the oath and the incompatibilities of that function.

On its second part, this paper will introduce considerations about the importance and necessity of the constitution of judges *ad hoc* on a pragmatist paradigm, through a criterious analysis of the main arguments pro and against such institution. The research will raise the idea that many aspects used to justify the intervention of judges *ad hoc* on international permanent tribunals do not resist to a deeper investigation, when considered as parts of a post-habermasian paradigm with inspiration on the transmodernity proposed by Dussel.

Furthermore, it will be offered some considerations about the role of judges *ad hoc* and its relations with the principle of the *juge naturel*, as well as a discussion concerning some difficulties on this subject, such as the case of the evolution of the conception of nationality.

In sum, this study has the scope to bring up a complete panorama of the judges *ad hoc*'s performance on the main international permanent courts, their purposes, and their role on the persecution of a brand new concept of International Law on a contemporary globalized and transnational society.

## **I. JUDGES *AD HOC* ON THE MAIN INTERNATIONAL PERMANENT COURTS**

### ***1. The origin of the modern concept of judges ad hoc – the PCIJ***

In order to precisely understand the importance of this subject, it is necessary going back in time to find the roots of the institution of judges *ad hoc*, which are stated on the PCIJ Statute, in the beginning of the 20<sup>th</sup> century.

It was perfectly understandable that, on a post-World War I scenario, when international society was occupied trying to solve the States' internal problems and looking for a way to guarantee the peace and to take up again economic development—which had achieved its efflorescence on the *Belle Époque*—States kept reticent to accept a new international legal system which obliged them to abdicate from its own sovereignties in favor of a unique international order.

So, it is clear, when analyzing the structuration of the PCIJ Statute, on the early 20's, the concern of making the dream of an efficient international system and the challenge to keep intact the sovereign power of each State agrees. As a result of that thought, the plan elaborated by Lord Root and Lord Phillimore for the PCIJ Statute tried to add in a same legal order this ambivalent posture

which was prevalent in those times. The PCIJ Statute was so, an attempt to make feasible on the international praxis the intervention of a Court with universal scope.

An example of that concern in maintaining the identities of the States on this new legal panorama is the rule of the article 31 of the PCIJ Statute<sup>8</sup>, which creates the basis of the institution of judges *ad hoc* on international permanent Courts. As a result of intense debates<sup>9</sup>, the inclusion of that article is the root of this work, since it is based on that clause that, later, the ICJ and several other contemporary international jurisdictional organs –such as the ITLOS, the ICHR and the ECHR– incorporated similar rules in their own statutes.

Accordingly to the logic that prevailed on the PCIJ's norms, the equality between the parties should be expressed not only on the application of material norms, but also on the proceeding rules.<sup>10</sup>

So, in cases when one State which was party on an international controversy had already an own national between the judges and the other party had not, it was configured a huge disproportion among the litigants, which would be inconceivable for the whole system.

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<sup>8</sup> PCIJ, Statute, article 31: *"Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court. If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in articles 4 and 5. If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph. / The present provision shall apply to the case of articles 26, 27 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court ./ Judges selected as laid down in paragraphs 2, 3 and 4 of this article shall fulfill the conditions required by articles 2, 17 (paragraph 2), 20 and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues"*.

<sup>9</sup> LEAGUE OF NATIONS / ADVISORY COMMITTEE OF JURISTS (1920), SCHWEBEL (1999) p. 320.

<sup>10</sup> SCOBIE (2005) p. 428.

There was a proposal, when jurists were discussing the elaboration of the Statute, to avoid this disparity simply preventing the nationals of judging in cases related to their countries of origin, declaring their incompetence on those specific demands. However, the great powers did not agree with the fact of having to give up from their nationals as judges precisely when their own interests were being discussed.<sup>11</sup>

After that negative, it was necessary taking another way to guarantee the equality between the litigants. The solution found to preserve the stability and fairness was not excluding a magistrate, but adding another one, nominated by the party which had no nationals between the judges.<sup>12</sup>

Furthermore, once the Tribunal accepted the institution of judges *ad hoc*, that same understanding had to be extended also to situations when no party had a national among the titular bench of judges.

It comes up, on this way, the figure of the judge *ad hoc*, appointed by one party to serve as judge on a specific *litis*, possessing, however, the same rights and obligations imposed to the other members of the Tribunal.

Besides guaranteeing the isonomy, other reasons were pointed to justify the insertion of this article on the PCIJ Statute, *exempli gratia*, the strengthening on the Tribunal's legitimacy, the possibility for the parties to explain their points of view before a national which is able to have a better understanding of their internal circumstances, their specificities, their language and their internal law, besides stimulating the States' participation on the agenda of those relevant international *fori*.

In brief, the justification for the insertion of this rule on the PCIJ Statute, given by Lord Phillimore is that "*it would be necessary to make it possible for parties to be represented on the Court by a member of their nationality; or that at any rate it would be necessary to prevent one party being represented if the other party were not. There were several ways of obtaining this end; the judge of the nationality of one party might be excluded, or a judge of the nationality of the other might be added, but, in his opinion, it would be preferable to give a national representative for both parties, not only to protect their interests, but to enable the Court to understand certain questions which require highly*

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<sup>11</sup> JIMENEZ DE ARÉCHAGA (1980) p. 180.

<sup>12</sup> *Ibidem*.

*specialized knowledge and relate to the differences between the various legal systems*".<sup>13</sup>

## **2. The contemporary courts**

### A) THE INTERNATIONAL COURT OF JUSTICE

Later, after the World War II, when there was the foundation of the United Nations<sup>14</sup> and, subsequently, the creation of the ICJ<sup>15</sup>, the historical moment was very similar to the one happened when the PCIJ's Statute was elaborated. In those times, there was also a great lack of confidence on the real *effet utile* of international organizations, because of the concrete inefficaciousness of organizations such as the League of the Nations<sup>16</sup> and the PCIJ on avoiding international conflicts.

Thus, the foundation of the United Nations did not try to establish a real supranational order, but it was a clear attempt to create a forum where all the States would be able to express their points of view and, through multilateral efforts, to keep peace, order and justice.<sup>17</sup> The UN was not elaborated to act as a vertical power over the States<sup>18</sup>, but as a possibility of a multilateral institution guaranteeing the material isonomy between different countries, independently of their wealth, size or location.

By this notion, it is perfectly understandable why the ICJ preserved the referred clause of the article 31 of the PCIJ's Statute on its own rules.<sup>19</sup> And it was exactly on the ambit of the ICJ that the main discussions specifically about that norm were brought up, as what happened at the *Aegean Sea case (Turkey vs. Greece)* and at the *Namibia case (Namibia vs. South Africa)*. There is also, on the ICJ, a vast jurisprudence which counts with the relevant and decisive participation of judges *ad hoc*, as will be exposed later on this study.

<sup>13</sup> LEAGUE OF NATIONS / ADVISORY COMMITTEE OF JURISTS (1920) p. 528.

<sup>14</sup> STEINER in AMBOS and CHOUKR (2000) p. 293.

<sup>15</sup> GHEVONTIAN (1992) p. 136.

<sup>16</sup> ALBRECHT-CARRIÉ (1958) p.604.

<sup>17</sup> MELLO (1995) p. 159.

<sup>18</sup> HEGEL (1997) p. 303.

<sup>19</sup> GUILLAUME (1992) p. 10.

The rules of the PCIJ's Statute on this topic were practically copied *ipsis literis* on the ICJ Statute, elaborated in 1945.<sup>20</sup>

Nonetheless, the inclusion of that rule which allows the nomination of judges *ad hoc* seems to be no more adequate on the globalized world configured in the beginning of a new millennium. As discussed before, this rule has roots on the classic constitutionalism of the 19<sup>th</sup> century<sup>21</sup>, when the concept of sovereignty was absolute, and it shall not be applied in present times, when the concept of sovereignty is relativized, particularly on fields such as human rights and environmental protection. The institution of judges *ad hoc* is not compatible with the attempts to set up an international system based on cooperation, harmony and interdependence, when the rights do not belong only to States, but also when the international society imposes duties to all nations.

In spite of that, it is also useful stressing that, for the reason of being for a long time the only international court with a universal scope, the ICJ Statute (1945) had a deep influence on a great amount of statutes of contemporary international organisms with jurisdictional range, spreading the institution of judges *ad hoc* on several international jurisdictional institutions.

#### B) *THE INTERNATIONAL TRIBUNAL OF THE LAW OF THE SEA*

Many jurisdictional international organs were deeply influenced by the ICJ Statute, which brought up the classic institution of judges *ad hoc*.

This is the case, *exempli gratia*, of the ITLOS<sup>22</sup>, which is able to resolve controversies sprang up of the interpretation or application of the United Nations Convention on the Law of the Sea, signed at Montego Bay.

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<sup>20</sup> MELLO (2001) p. 647.

ICJ Statute, article 31: "1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. / 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in articles 4 and 5. / 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this article".

<sup>21</sup> MARTINS (1998) p. 14.

<sup>22</sup> BARRAL (2004) p. 90.



On the ITLOS, when one of its 21 judges<sup>23</sup> is a national of one of the parties, he/she is still able to judge, retaining his/her original and regular competence. The other litigant party, however, has the right to point a judge *ad hoc*. When there is no national judge on a particular *litis*, both parties are able to nominate one judge *ad hoc* of their own trust.<sup>24</sup>

Furthermore, the ITLOS's Statute guarantees isonomy between regular judges and judges *ad hoc*, regarding subjects such as remuneration<sup>25</sup>, incompatible activities<sup>26</sup>, conditions relating to participation<sup>27</sup>, privileges, immunities<sup>28</sup>, oath<sup>29</sup>, among others<sup>30</sup>, which will be better described on a posterior chapter on this study.

### C) THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The ICHR is an international independent permanent tribunal placed in Costa Rica and part of the system of the Organization of the American States. Its main scope is preserving and boosting fundamental human rights on the American ambit.

The treatment of judges *ad hoc* in the ICHR<sup>31</sup> is exactly the same which happens in the ICJ and in the ITLOS. There are also statements about the gua-

<sup>23</sup> REZEK (2002) p. 357.

<sup>24</sup> Cfr. ITLOS Statute, article 17: "1. Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal. 2. If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal. 3. If the Tribunal, when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal".

<sup>25</sup> Vid. *Ídem.*, article 18.4.

<sup>26</sup> Vid. *Ídem.*, article 7.

<sup>27</sup> Vid. *Ídem.*, articles 2 and 8.

<sup>28</sup> Vid. *Ídem.*, article 10.

<sup>29</sup> Vid. *Ídem.*, article 11.

<sup>30</sup> *Exempli gratia*, *Ídem.*, articles 17.4, 17.5, 17.6.

<sup>31</sup> BARRAL (2004) p. 297.

ICHR Statute, article 10: "1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case. /2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an *ad hoc* judge. / 3. If among the judges called upon to hear a case, none is a national of the States Parties

rantees of equality between the magistrates, besides of rules related to rights, duties and responsibilities of judges *ad hoc*<sup>32</sup>, which also will be presented on a posterior chapter on this article.

#### D) EUROPEAN COURT OF HUMAN RIGHTS

The ECHR, based in Strasbourg and bound to the Council of Europe, is an international jurisdictional organ responsible to assure the rights stated on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.<sup>33</sup>

In cases related to a specific State, the judge pointed by it must be part of the Committee or the Chamber competent to settle that controversy. Nevertheless, when the *national judge* is not able to serve as a judge on that specific case, for any reason, the State has the faculty to nominate a judge *ad hoc*.<sup>34</sup>

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*to the case, each of the latter may appoint an ad hoc judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions. In case of doubt, the Court shall decide. / 4. The right of any State to appoint an ad hoc judge shall be considered relinquished if the State should fail to do so within thirty days following the written request from the President of the Court. / 5. The provisions of articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges”.*

<sup>32</sup> *Exempli gratia*, in the ICHR Statute, articles 2 (qualifications), 11 (oath), 15 (immunities and privileges), 16 (service), 17 (emoluments), 18 (incompatibilities), 19 (disqualification), 20 (disciplinary regime).

<sup>33</sup> GUILLAUME (1992) p. 17.

<sup>34</sup> This rule is stated on the article 27, paragraph 2, European Convention for the Protection of Human Rights and Fundamental Freedoms: “1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time. / 2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge”.

The discipline of judges *ad hoc* on the ECHR is also expressed on the ECHR Statute, article 29: “1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall invite that Party to indicate within thirty days whether it wishes to appoint to sit as judge either another elected judge or an *ad hoc* judge and, if so, to state at the same time the name of the person appointed. / (b) The same rule shall apply if the person so appointed is unable to sit or withdraws. / (c) An *ad hoc* judge shall possess the qualifications required by article 21 § 1 of the Convention, must not be unable to sit in the case on any of the grounds referred to in Rule 28 of these Rules, and must be in a

Furthermore, many other articles of the ECHR Statute refer to that norm, ensuring the real *effet utile* of that main rule. *Exempli gratia*, article 13<sup>35</sup> prohibits a national from one of the parties to act as the President of a Section/Chamber and article 1 (i)<sup>36</sup> guarantees the equality between regular judges and the *ad hoc* ones, what is confirmed by other rules, as the ones contained on articles 1 (h) and 5, paragraph 4.<sup>37</sup>

#### E) OTHER INTERNATIONAL ORGANS USED TO THE SETTLEMENT OF DISPUTES

In spite of not having particular rules concerning to the designation of judges *ad hoc* -the main facet of this research- it is useful stressing that many international organizations with the scope to settle disputes deal with questions related to the nationality of the judges and arbitrators as a relevant matter.

##### a) The European Court of Justice

On the ECJ there are absolutely no restrictions concerning to the judges' nationalities, based on the continuous strengthening of trust on their

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*position to meet the demands of availability and attendance provided for in paragraph 5 of this Rule. / 2. The Contracting Party concerned shall be presumed to have waived its right of appointment if it does not reply within thirty days or by the end of any extension of that time granted by the President of the Chamber. The Contracting Party concerned shall also be presumed to have waived its right of appointment if it twice appoints as ad hoc judge persons who the Chamber finds do not satisfy the conditions laid down in paragraph 1 (c) of this Rule. / 3. The President of the Chamber may decide not to invite the Contracting Party concerned to make an appointment under paragraph 1 (a) of this Rule until notice of the application is given to it under Rule 54 § 2 of these Rules. In that event, pending any appointment by it, the Contracting Party concerned shall be deemed to have appointed the first substitute judge to sit in place of the elected judge. / 4. An ad hoc judge shall, at the beginning of the first sitting held to consider the case after the judge has been appointed, take the oath or make the solemn declaration provided for in Rule 3. This act shall be recorded in minutes. / 5. Ad hoc judges are required to make themselves available to the Court and, subject to Rule 26 § 2, to attend the meetings of the Chamber".*

<sup>35</sup> ECHR Statute, article 13: "Judges of the Court may not preside in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party, or in cases where they sit as a judge appointed by virtue of Rule 29 § 1(a) or Rule 30 § 1 of these Rules".

<sup>36</sup> *Ídem.*, article 1 (i): "The terms "judge" and "judges" mean the judges elected by the Parliamentary Assembly of the Council of Europe or ad hoc judges".

<sup>37</sup> *Ídem.*, article 5, paragraph 4: "Ad hoc judges shall take precedence after the elected judges according to age".

independence and impartiality. There is no rule precluding a judge neither to decide on a case involving his State of origin nor to compel the presence of a *national judge* on a certain bench.<sup>38</sup>

*b) International Criminal Court*

The International Criminal Court is responsible to adjudicate individuals who are accused of the gravest crimes on the international level, as crimes against humanity, war crimes and genocide.

The Rome Statute, which constituted the International Criminal Court, brings no specific rule concerning "national judges", what, in practice, has the effect to allow the participation of nationals on judgements and to preclude the designation of judges *ad hoc*.

*c) The World Trade Organization*

The WTO's dispute settlement system has jurisdiction to decide about controversies related to its members and derived from agreements signed on the WTO's sphere, including the constitutive one.<sup>39</sup>

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<sup>38</sup> GUILLAUME (1992) p. 26.

The statute of the ECJ clearly states that: "*article 18: No Judge or Advocate General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity. If, for some special reason, any Judge or Advocate General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate General should not sit or make submissions in a particular case, he shall notify him accordingly. Any difficulty arising as to the application of this article shall be settled by decision of the Court. A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party*".

<sup>39</sup> DREYZIN DE KLOR et al. (2004)

Besides being independent from their States of origin<sup>40</sup>, on the Panel's structure of the WTO nationals simply cannot analyze cases when their countries of origin are parts<sup>41</sup>, unless there is an expressed agreement of the parties.<sup>42</sup>

To avoid criticisms that the WTO structure is dominated by developed countries, and to improve the legitimation of the WTO's system<sup>43</sup>, however, some measures have been taken, as, for example, the right assured to developing countries - involved on a controversy against a developed country - to require the nomination of a Panel's member who is national from another developing State.<sup>44</sup>

#### d) MERCOSUL

In the MERCOSUL's dispute settlement, the arbitral Tribunal should be constituted by three arbitrators. Each member of the controversy is able to nominate one of them, and the third one must not be a national from any of the parties.<sup>45</sup>

#### e) *International Centre for Settlement of Investment Disputes*<sup>46</sup>

The *Convention on the settlement of investment disputes between States and nationals of other States* (Washington Convention, of 1965) imposes relevant rules concerning to arbitral proceedings.

<sup>40</sup> *Understanding on rules and procedures governing the settlement of disputes Annex 2 of the WTO Agreement*, Art. 8 (9): "Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel".

<sup>41</sup> BARRAL (2004) p. 47.

<sup>42</sup> NORONHA (1991) p. 63.

In accordance with the *Understanding on rules and procedures governing the settlement of disputes* (Annex 2 of the WTO Agreement), article 8 (3): "Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise".

<sup>43</sup> MERCURIO (2004) p. 811.

<sup>44</sup> *Understanding on rules and procedures governing the settlement of disputes* (Annex 2 of the WTO Agreement), article 8 (10): "When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member".

<sup>45</sup> BECHARA (2001) p. 48.

<sup>46</sup> HUNTER and REDFERN (1986) p. 32.

The arbitral tribunals should be composed by an uneven number of arbitrators or by a sole one, nominated by the parties. The majority of arbitrators must not be nationals of the State which is a party; neither have the same nationality of the other party, unless whether both parties agree on that.<sup>47</sup> As usually the tribunals are composed by three members, in *praxis*, national arbitrators could be pointed only through a consensus.<sup>48</sup>

Furthermore, in accordance to the ICSID rules, when it is necessary for the Chairman to nominate the members of a Tribunal, he is not able to choose them among nationals of the State party neither of the State whose national is a party.<sup>49</sup>

#### *F) The International Chamber of Commerce*

The ICC, placed in Paris, is one of the world's most important organs in offering the administration of international arbitral proceedings.

Under the ICC rules it is allowed that each party on a controversy designates a co-arbitrator, who may be chosen without restrictions concerning to nationality. However, when nominating a sole arbitrator or the Chairman, the ICC rules recommend indicating a non-national arbitrator. Nevertheless, when it is not possible to act in conformity to that recommendation, or when the circumstances allow and there is no opposition from any party, it is possible nominating a national member. It is important stressing that, accordingly to the

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<sup>47</sup> LEW *et al.* (2003) p. 784.

<sup>48</sup> *Vid. Convention on the settlement of investment disputes between States and nationals of other States*, article 39: "The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties".

<sup>49</sup> *Vid. Convention on the settlement of investment disputes between States and nationals of other States*, article 38: "If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed.

*Arbitrators appointed by the Chairman pursuant to this article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute".*

ICC rules, when one party does not point its co-arbitrator, the ICC will nominate one, rather among the nationals of the country where the party is from.<sup>50</sup>

g) *The UNCITRAL Model Law on international commercial arbitration*

The *UNCITRAL Model Law* states that there must be no restrictions concerning to the nationality of the arbitrators, but, coherently with its scope of liberalization of the arbitral structure in accordance to the parties' will, an agreement may preclude the actuation of nationals on the composition of an arbitral tribunal.<sup>51</sup>

Nonetheless, when an authority must appoint a sole arbitrator or a Chairman, the article 11.5 states that this nomination must be preferably among arbitrators of a nationality different from the parties.<sup>52</sup>

<sup>50</sup> ICC rules, article 9: "(5) *The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national. (6) Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment upon a proposal of the National Committee of the country of which that party is a national. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, or if the country of which the said party is a national has no National Committee, the Court shall be at liberty to choose any person whom it regards as suitable. The Secretariat shall inform the National Committee, if one exists, of the country of which such person is a national.*"

<sup>51</sup> UNCITRAL model law on international commercial arbitration, Chapter III, article 11 – (1): "*No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*"

<sup>52</sup> *Ídem.*, article 11 (5): "*The Court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.*"

## II. THE CONTEMPORARY TREATMENT OF THE SUBJECT

### 1. *Rights and duties of judges ad hoc*

Judges *ad hoc* must receive the same treatment dispensed to regular judges<sup>53</sup>, and that is assured by the main Court's Statutes.<sup>54</sup>

This equality is applied for rights, duties and responsibilities<sup>55</sup>, common to all categories of magistrates in the international level, and reflected in particular topics concerning, *exempli gratia*, the requirements for their nomination, the incompatibilities, their immunities and privileges, their earnings and the requisiteness of a solemn oath.

#### A) REQUIREMENTS

To be designated as a judge *ad hoc*, the candidate must fulfill the same requirements<sup>56</sup> which are necessary to be elected as a regular judge on an International Court.<sup>57</sup> Those high standards are usually the same that are required to exercise the highest judicial functions under municipal laws, *exempli gratia*, to be a member of a Supreme Court.

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<sup>53</sup> MOSQUERA (1988) p. 33.

<sup>54</sup> ITLOS Statute, article 17.6: "They shall participate in the decision on terms of complete equality with their colleagues"; ICJ Statute, article 31, paragraph 6: "Judges chosen as laid down in paragraphs 2, 3, and 4 of this article shall fulfill the conditions required by articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues".

<sup>55</sup> ICHR Statute, article 20: "In the performance of their duties and at all other times, the judges and staff of the Court shall conduct themselves in a manner that is in keeping with the office of those who perform an international judicial function. They shall be answerable to the Court for their conduct, as well as for any violation, act of negligence or omission committed in the exercise of their functions. 2. The OAS General Assembly shall have disciplinary authority over the judges, but may exercise that authority only at the request of the Court itself, composed for this purpose of the remaining judges. The Court shall inform the General Assembly of the reasons for its request. 3. Disciplinary authority over the Secretary shall lie with the Court, and over the rest of the staff, with the Secretary, who shall exercise that authority with the approval of the President. 4. The Court shall issue disciplinary rules, subject to the administrative regulations of the OAS General Secretariat in so far as they may be applicable in accordance with article 59 of the Convention".

<sup>56</sup> SCHWEBEL (1999) p. 325.

<sup>57</sup> SCOBIE (2005) p. 427.



There is no rule compelling States to constitute an own national to serve as a judge ad hoc. In fact, frequently smaller and/or least developed States point foreign judges of their trust to act in specific cases, as judges ad hoc.

Some international tribunals allow that a State points a judge ad hoc regardless to his/her nationality<sup>58</sup>, as what happens in the ICJ<sup>59</sup> and in the ECHR.<sup>60</sup> On the other hand, there are courts with specific criteria, such as the ICHR<sup>61</sup>, that obliges the States to appoint a national of an Organization of American States (OAS) member.<sup>62</sup>

Judges *ad hoc* must be independent<sup>63</sup> on the exercise of their functions, being autonomous and impartial, just as titular judges. A judge ad hoc is not representing a government or a State<sup>64</sup>, he/she is “merely” a judge.

Also, judges ad hoc must possess recognized competence<sup>65</sup> on the field that he will judge<sup>66</sup>, usually with a high reputation on the academic area, or experience occupying high offices on the internal judicial structure.<sup>67</sup>

<sup>58</sup> ARAUJO (2002) p. 46.

<sup>59</sup> ICJ Statute, article 2: *“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”.*

<sup>60</sup> BARRAL (2004) p. 279.

<sup>61</sup> ICHR Statute, article 4: *“The Court shall consist of seven judges, nationals of the member states of the OAS, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates”.*

<sup>62</sup> NIETO (1993) p. 76.

<sup>63</sup> ITLOS Statute, article 2.1: *“The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”.*

<sup>64</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, article 21.2: *“The judges shall sit on the Court in their individual capacity”.*

<sup>65</sup> CARNELUTTI (2002) p. 255.

<sup>66</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, article 21.1 *“The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence”.*

<sup>67</sup> MOSQUERA (1988) p. 35.

Moreover, it is necessary that judges *ad hoc* have "high moral authority", "reputation for fairness and integrity". Those are abstract concepts, but they try to ensure the Court's legitimation with the presence of members which are capable to emit fair and reliable sentences.

B) *INCOMPATIBILITIES*

Judges *ad hoc*, as the regular ones, are not able to be involved in any kind of activity which is not compatible with their independence, dignity, prestige or impartiality.<sup>68</sup>

*Exempli gratia*, a jurist cannot participate of a case as a judge *ad hoc* in which he/she, or someone close to him/her, have direct interest, or in one in which he already participated as an attorney, consultant, judge, or "in any other

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<sup>68</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 21.3: "During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court." article 19: "1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.2. If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide.3. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide.4. When one or more judges are disqualified pursuant to this article, the President may request the States Parties to the Convention, in a meeting of the OAS Permanent Council, to appoint interim judges to replace them".

capacity".<sup>69</sup> Political, administrative<sup>70</sup> or commercial<sup>71</sup> relationships with the object of the controversy would also put under suspicion his/her decisions and deslegitimate the Court as a whole. The judges, by their own, may also allege other reasons to not be assigned on a specific demand. The cases of incompatibility must be decided by the respective Courts.

<sup>69</sup> ICJ Statute, article 16: "1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. 2. Any doubt on this point shall be settled by the decision of the Court". article 17: "1. No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity. 3. Any doubt on this point shall be settled by the decision of the Court".

<sup>70</sup> ICHR Statute, article 18: "1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities: a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states; b. Officials of international organizations; c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office. 2. In case of doubt as to incompatibility, the Court shall decide. If the incompatibility is not resolved, the provisions of article 73 of the Convention and article 20(2) of the present Statute shall apply. 3. Incompatibilities may lead only to dismissal of the judge and the imposition of applicable liabilities, but shall not invalidate the acts and decisions in which the judge in question participated".

<sup>71</sup> ITLOS Statute, article 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. 2. No member of the Tribunal may act as agent, counsel or advocate in any case. 3. Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present." article 8: "1. No member of the Tribunal may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity. 2. If, for some special reason, a member of the Tribunal considers that he should not take part in the decision of a particular case, he shall so inform the President of the Tribunal. 3. If the President considers that for some special reason one of the members of the Tribunal should not sit in a particular case, he shall give him notice accordingly. 4. Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present".

C) *IMMUNITIES AND PRIVILEGES*

Judges *ad hoc* must receive exactly the same diplomatic immunities<sup>72</sup> which are offered to the other judges<sup>73</sup>, while they are exercising their functions in an international Court. <sup>74</sup>

D) *OATH*

All members of the Court, including judges *ad hoc*<sup>75</sup>, must make a public solemn declaration, promising that they will exercise their functions impartially and independently<sup>76</sup>, exercising their legal powers conscientiously<sup>77</sup>, keeping

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<sup>72</sup> MELLO (2001).

<sup>73</sup> GHEVONTIAN (1992) p. 137.

ICHR Statute, article 15: *"The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents under international law. During the exercise of their functions, they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties. 2. At no time shall the judges of the Court be held liable for any decisions or opinions issued in the exercise of their functions. 3. The Court itself and its staff shall enjoy the privileges and immunities provided for in the Agreement on Privileges and Immunities of the Organization of American States, of May 15, 1949, mutatis mutandis, taking into account the importance and independence of the Court. 4. The provision of paragraphs 1, 2 and 3 of this article shall apply to the States Parties to the Convention. They shall also apply to such other member states of the OAS as expressly accept them, either in general or for specific cases. 5. The system of privileges and immunities of the judges of the Court and of its staff may be regulated or supplemented by multilateral or bilateral agreements between the Court, the OAS and its member States"*.

<sup>74</sup> ITLOS Statute, article 10: *"The members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities"*, ICJ Statute, article 19: *"The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities"*.

<sup>75</sup> MOSQUERA (1988).

<sup>76</sup> ITLOS Statute, article 11: *"Every member of the Tribunal shall, before taking up his duties, make a solemn declaration in open session that he will exercise his powers impartially and conscientiously"*.

<sup>77</sup> ICJ Statute, article 20: *"Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously"*.

secret when it is necessary.<sup>78</sup> This oath makes all judges legally and morally bound to act without any kind of partisanship.<sup>79</sup>

#### E) REMUNERATION

Judges *ad hoc* must be remunerated accordingly to their functions, usually by the number of days<sup>80</sup> dedicated to a judgement<sup>81</sup>, on a value correspondently to the earning of the other judges.<sup>82</sup>

### 2. Judges *ad hoc* and consultive competences

The international permanent Courts, besides their regular competence with jurisdictional character (settlement of controversies, solving a specific *litis*), have also competency over consultive issues. This competence<sup>83</sup> is provided, *exempli gratia*, on the statutes of the ICJ<sup>84</sup>, the ICHR<sup>85</sup>, the ECHR<sup>86</sup> and the ITLOS<sup>87</sup>.

That consultive competence is not bound to any specific case, but it is a discussion, *in abstratu*, about the elucidation of possible interpretations of International Law. On the ICJ, for example, this consultive task is realized by

<sup>78</sup> ICHR Statute, article 11: "1. Upon assuming office, each judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations." 2. The oath shall be administered by the President of the Court and, if possible, in the presence of the other judges".

<sup>79</sup> SCHWEBEL (1999) p. 327.

<sup>80</sup> ICJ Statute, article 32: "4. The judges chosen under article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions".

<sup>81</sup> ITLOS Statute, article 18.4 : "The members chosen under article 17 of this Annex, other than elected members of the Tribunal, shall receive compensation for each day on which they exercise their functions".

<sup>82</sup> ICHR Statute, article 17: "The *ad hoc* judges shall receive the emoluments established by Regulations, within the limits of the Court's budget".

<sup>83</sup> REZEK (2002) p. 355.

<sup>84</sup> MELLO (2001) p. 653

<sup>85</sup> BARRAL (2004) p. 298.

<sup>86</sup> *Ídem.* p. 284.

<sup>87</sup> *Ídem.* p. 100.

request of the UN General Assembly, the Security Council or other organs and specialized bodies<sup>88</sup> which are authorized to inquire those legal briefs.<sup>89</sup>

Notwithstanding, it is worthy pointing out that it is not rare that those who bring a case *in abstractu* before the Courts, are interested, *de facto*, in establishing a Tribunal's understanding for a later use in a certain concrete situation.

Then, commonly, various States have a special stake on the resolution of a consultive opinion in one direction or another. The question presented, on those conflicts, is whether those States have or not the right to indicate a judge *ad hoc* to assist on its resolution.

There is an explicit rule, stated on article 102, paragraph 3, of ICJ's Rules<sup>90</sup>, that compels the utilization of the norms related to judges *ad hoc*<sup>91</sup> when the consultive function is bound with a legal controversy which is pending between two or more States.<sup>92</sup>

Even so, this rule has not been applied, in praxis, by the Court. This hypothesis was already analyzed by the ICJ when South Africa presented a solicitation to put up a judge *ad hoc* on the *Namibia Advisory Opinion*<sup>93</sup>, because of the fact that the decision of that consultive issue would have a huge impact on the resolution of a *causa in concreto*, the *Namibia case*, pending between South Africa and Namibia.

The ICJ's conclusion was in the sense of denying this possibility to South Africa<sup>94</sup>, alleging that article 31 was not applied to all proceedings which have

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<sup>88</sup> *Exempli gratia*, the International Labour Organization (ILO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the World Health Organization (WHO); the International Monetary Fund (IMF) and the World Bank.

<sup>89</sup> GHEVONTIAN (1992) p. 138.

<sup>90</sup> ICJ's Rules, article 102, par. 3: "When an advisory opinion is requested upon a legal question actually pending between two or more States, article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that article".

<sup>91</sup> JIMENEZ DE ARÉCHAGA (1980) p. 182.

<sup>92</sup> MELLO (2001) p. 653, SCOBIE (2005) p. 436.

<sup>93</sup> SCOBIE (2005) p. 437

<sup>94</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971): "The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States. (There was therefore no necessity to apply article 83 of the Rules of Court, according to which, if an advisory opinion

consultive character, but only for those which deals about “a legal question actually pending between two or more States”. Furthermore, the ICJ’s conclusion about the definition of “legal questions actually pending” is very strict.<sup>95</sup> For the Court, it is necessary a *strictu sensu* interpretation to avoid that the Tribunal’s consultive competence becomes a real non-sanctionative instance in concrete contentious cases. And so, the Court justifies the non-interference of judges *ad hoc* on those cases because the subject analyzed on the attribution of its consultive competence is merely hypothetical, without the investigation of concrete facts, what, in practice, is a *conditio sine qua non* for the characterization and recognition of a “national interest”.

*Data maxima venia*, which is not the best understanding about the theme. Applying article 68 of the ICJ’s Statute<sup>96</sup>, the conclusion is that the inclusion or not of judges *ad hoc* is a matter of Tribunal’s discretionary competence.

On this sense, it was presented the dissident opinion stated by Judge Gerald Fitzmaurice, in the *Namibia case*.<sup>97</sup>

The Court’s preponderant posture, however, is on the sense that the allowance of the participation of judges *ad hoc* is not a discretionary measure, precisely because inserting judges is not a provision which is applied in contentious cases. The Tribunal’s understanding is -once more- restrictive, since the ICJ interprets that “provisions of the present Statute which apply in contentious cases” are in fact provisions which apply exclusively in contentious cases. Thus, because it is a topic concerning to the Tribunal’s organization, the application of article 31 would not be included on the Court’s discretionary competence, what, in practice, vetoes the nomination of judges *ad hoc*, unless when it is configured the hypothesis of article 102, paragraph 3, when, more than a special interest of a party, it is at risk the essence of a certain *litis*.<sup>98</sup>

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*is requested upon a legal question “actually pending between two or more States”, article 31 of the Statute, dealing with judges ad hoc, is applicable; the Government of South Africa having requested leave to choose a judge ad hoc, the Court heard its observations on that point on 27 January 1971 but, in the light of the above considerations, decided by the Order of 29 January 1971 not to accede to that request”.*

<sup>95</sup> HEINZE and FITZMAURICE (1998) p. 377.

<sup>96</sup> ICJ Statute, article 68: “In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable”.

<sup>97</sup> JIMENEZ DE ARÉCHAGA (1980) p. 182.

<sup>98</sup> *Ídem*. pp. 182 y 183.

The consultive competence of the international courts could be improved, converting it on an efficient mechanism for the protection and uniformization of principles of International Law.<sup>99</sup> There is no inconvenient to admit judges *ad hoc* in consultive tasks, because the decision is not binding, the principle of *juge naturel* is not applicable and the decision is *in abstractu*. Therefore, it seems to be natural and worthy to extend the legitimacy of the decisions accepting the nomination of judges *ad hoc*, which are representing different points of view, and may contribute a lot to the continuous development of this legal area.

### **3. The nomination of judges *ad hoc* as a faculty of the parties**

It is significant noting that the permission given to a State to designate a judge of its own trust for a specific case (*ad hoc*) *in concretu* must never be converted on an obligation to nominate a judge.

In other words, the rule that allows the assignment of judges *ad hoc* has the status of a faculty, a discretionary power that can be exercised or not. As long as legal requirements are fulfilled, the nomination of judges *ad hoc* is qualified as a unilateral act, a single manifestation of the State's will which must not be bound neither to the Court's actuation nor to the contrary part's conducts.

When one of the States parties on a controversy has already an own national among the regular judges and the other party does not appoint a judge *ad hoc* for serving on that *litis*, the permanent judge must remain on his position. There is no reason to preclude a regular judge because of the individual conduct of one of the parties.

Nevertheless, there could be a situation when both parties have the right to constitute a judge *ad hoc*. There are no problems if no party decides to constitute a national judge.<sup>100</sup> However, there would be a great controversy if only one of the litigants wants to exercise this faculty. That hypothesis was already presented to the ICJ at the *Aegean Sea case*, when both parties had the right to point a judge *ad hoc* for the *litis*, but while Turkey effectively nominated a judge *ad hoc*, Greece preferred not to designate one.

On this case, justifiably, the Court decided to consent that the Turkish judge should be able to exercise normally his role, because the discretionary power non-exerted by one party must not harm the other party to put in use

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<sup>99</sup> VICUÑA (2004) p. 20.

<sup>100</sup> SCHWEBEL (1999) p. 329.



its own right.<sup>101</sup> Otherwise, the right to nominate a judge *ad hoc* would not be considered discretionary, but conditioned or subordinated to the behavior of the contrary party on a *litis*.

#### 4. Provisional measures

Because of their urgent character (*periculum in mora*), it is possible to an international Court to decide about a provisional measure<sup>102</sup> even before the nomination of judges *ad hoc*.<sup>103</sup> Provisional measures are temporary, and besides being legally binding (*La Grand case*), may be granted even *inaudita altera parte*, because their scope is assuring the process's *effet utile*.

That was already the understanding of the Permanent Court of International Justice, and it is, nowadays, a consensus on the jurisprudence of the main contemporary Courts.

### III. REASONS USUALLY USED TO JUSTIFY THE INSTITUTION OF JUDGES AD HOC

#### 1. Legitimation of the process

On Bobbio's definition, legitimacy consists on the presence, in a significative part of the population, of a consensus degree which is able to assure the obedience without the necessity of recurring to the use of force, unless on sporadic cases. That is the reason why every power tries to achieve the consensus being recognized as legitime, converting obeisance in adherence.<sup>104</sup> When this definition is applied on the field of International Law, it is easily remarkable that the consensus which is necessary to assure the efficaciousness of an international sentence is a real *conditio sine qua non* to justify the existence of an international jurisdictional order. It is precisely the States' adhesion to the international legal system and their submissiveness to the International Law which justify the existence of International Tribunals.

<sup>101</sup> JIMENEZ DE ARÉCHAGA (1980) p. 181.

<sup>102</sup> ICJ Statute, article 41: "*The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. (...)*"; ITLOS Statute, article 25: "*In accordance with article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures (...)*".

<sup>103</sup> RIDRUEJO (1962) p. 233.

<sup>104</sup> BOBBIO (2000) p. 675.

In other words, in a jurisdictional system which requires the States' consent to make possible bringing a case relative to it under international Tribunals, simply there is no obedience to the Tribunal's imperatives without a previous adherence to the system. This prior attachment to the international legal order, on the same time, requests and guarantees the legitimacy of the system as a whole.

This previous consent increases the system's credibility because the States' participation on the international Courts make the decisions more legitimate, representing the consensus of a larger number of States. At the same time, the prior consent is conditioned by the system's legitimacy, because, following the Weber's thought<sup>105</sup>, a State will never be submitted to the jurisdiction of a Tribunal which it believes is not lawful.

Therefore, it is remarkable the huge importance of assuring the legitimacy of the decisions on international tribunals, because it is crucial to a permanent development on an international legal system with a universalizing scope.

The first step to insure the international Court's legitimacy is ensuring that the parties feel represented by it, better said, that the parties trust that their points of view and particularities will be taken in account on the Court's proceedings and resolutions.

For that, it is necessary to break up with the old European and North American traditions on those Courts, ensuring the effective representation of the other legal systems. That is the reason of several contemporary criticisms suffered by many international dispute settlement systems, specially from African and Asiatic States.<sup>106</sup>

The increment of representativity, however, is not only interest of the States which have no members on the regular composition of the Courts, but also it is a worry of the in Tribunals and of the international society as a whole.

A first topic in the search of a real multilateral legal view, assuring an expressive and well-balanced geopolitical representativeness is the fact that the main international Courts present proportional systems on the judges' election.<sup>107</sup> On the ICJ, *exempli gratia*, it is prohibited that two individuals of

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<sup>105</sup> CADEMARTORI (1999) p. 95.

<sup>106</sup> MELLO (2001) p. 649.

<sup>107</sup> *Exempli gratia*, the ITLOS Statute, article 2 (2): "In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall

the same nationality serve as judges at the same time, and, furthermore, the Court's composition must reflect the world's main legal systems.<sup>108</sup>

Notwithstanding, it is worthy pointing that the representativeness and identification<sup>109</sup> from the parties with the Tribunals does not come from the mere geopolitical composition of benches. The legitimacy, accordingly to a habermasian perspective<sup>110</sup>, would be dependent on the Tribunal's ability to promote agreements, with an effective application of a juridical order able to respect the regional particularities, attesting the nonpartisanship and autonomy of those Courts, insuring the efficaciousness of the decisions, stimulating the States' adherence and obedience.

On this context, it is relevant the analysis about the role of judges *ad hoc* on the legitimation of the international legal order.

From any theoretical framework adopted as a reference to analyze the concept of legitimacy on the international courts, it is remarkable that it is never dependent on the existence or not of judges *ad hoc*.

The main argument to defend the legitimacy of the international jurisdiction comes from the impartiality of the judges, not from their nationalities. It would be unconceivable a legitimated legal system without autonomous and unprejudiced judges when exercising their jurisdictional functions.

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*be assured*", article 3 (2): "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations". Also, *International Criminal Court Statute*, article 36: "7. La Cour ne peut comprendre plus d'un ressortissant du même État. (...) 8. a) Dans le choix des juges, les États Parties tiennent compte de la nécessité d'assurer, dans la composition de la Cour : i) La représentation des principaux systèmes juridiques du monde; ii) Une représentation géographique équitable; et iii) Une représentation équitable des hommes et des femmes; b) Les États Parties tiennent également compte de la nécessité d'assurer la présence de juges spécialisés dans certaines matières, y compris, mais sans s'y limiter, les questions liées à la violence contre les femmes ou les enfants».

<sup>108</sup> ICJ Statute, article 9: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

<sup>109</sup> LEWISCH (2003) p. 447.

<sup>110</sup> CADEMARTORI (1999) p. 125.

It may be true that nowadays the constitution of judges *ad hoc* could stimulate the States' access to international Courts, on a paradigm strongly marked by the consent.

Nevertheless, certainly the decisions taken by those Courts would be, anyhow, "contaminated" by an apparentness of partiality. It is not only about being independent and impartial; it must necessarily look like it.<sup>111</sup>

International judges often prove to deserve the trust of the whole international community with an independent actuation, with a real commitment to establish and develop an isonomic and fair international legal order. That is the legitimation as a constant construction, accordingly to Luhmann's proposition.<sup>112</sup>

We must trust on our judges, on the contrary, we should abolish international Tribunals, which would become senseless. If there is a lack of confidence on the international legal system, there is no doubt that this situation should not be permanent and legitimated, it must be modified.

The constitution of judges *ad hoc*, on this perspective, is a way to decrease the merit on the performance of the regular judges and specially, it puts in doubt the nonpartisanship of the permanent judges who are nationals of one of the parties on a controversy. The idea raised to the international society with the designation of those members *ad hoc* is that a national judge would be more qualified to decide fairer than his peers.<sup>113</sup>

Should an Italian be afraid of being judged by and Mexican? In the same idea, on the internal plan, should a muslim be afraid of being judged by a catholic? Or, a woman be afraid of being judged by a man? Or, a black citizen be afraid of being judged by a white judge? The answers for those questions must be negative; otherwise the failure is not on the judges, but on the whole legal system.

It is not the judges' nationalities, but the trust of the international community, allied to the nonpartisanship and independency manifested by the judges on the discharge of their functions, the respect for the regional particularities, and a good application of international Law which assures the legitimacy of the international legal order.

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<sup>111</sup> MOSQUERA IRURITA (1988) p. 34.

<sup>112</sup> LARENZ (1997) p. 276.

<sup>113</sup> LEAGUE OF NATIONS / ADVISORY COMMITTEE OF JURISTS (1920) p. 531.

## 2. Judges *ad hoc* are reciprocally annulled

The existence of 'partial members' is a main characteristic of the old arbitral tribunals, when each party used to select a partial arbitrator and the Chairman was chosen by those two arbitrators.<sup>114</sup> Notwithstanding, on the contemporary arbitral structure the partial arbitrators were banned<sup>115</sup>, and the members nominated by the parties are necessarily independent.

Some defenders of the existence of judges *ad hoc* sustain that, in practice, they are reciprocally annulled, and the difference will still be the vote of the other judges. Of course that supporting this argument is contradictory with the affirmation that *ad hoc* judges are able to act independently from the country that designated them.

What comes about, in practice, is that how judges *ad hoc* are selected directly by the litigant parties, States have a great tendency to indicate a jurist who has a point of view which will be interesting for them on a decision, as a real precondition for its invitation.<sup>116</sup> *Exempli gratia*, if the State wants to defend a nationalization, certainly it would be catastrophic to nominate a liberal judge.

Consequently, it is very frequent that judges *ad hoc* decide pro their States of origin.<sup>117</sup> That occurs, however, not derived from impartiality or lack of independence, of the judges, but in coherence to their prior thoughts.

On the other hand, the regular judge who is national from one of the parties not necessarily has the same legal understanding than his State of origin. Then, it is very common that a regular national judge votes against the interests of the State of his nationality<sup>118</sup>, and the "expected" nullification between those two judges does not occur.<sup>119</sup>

Jurisprudence shows that, in several opportunities, the participation or the absence of judges *ad hoc* was decisive on the resolution of a particular controversy. That took place at the *Lotus case*, at the *South West Africa case - second phase* and at the *Customs Regime between Germany and Austria case*.<sup>120</sup>

<sup>114</sup> MELLO (2001) p. 1386.

<sup>115</sup> MURPHY AND PRITCHETT (1961) p. 106.

<sup>116</sup> SCOBBI (2005) p. 440.

<sup>117</sup> SCHWEBEL (1999) p. 327, SCOBBI (2005) p. 439.

<sup>118</sup> SCHWEBEL (1999) p. 327.

<sup>119</sup> MELLO (2001) p. 650.

<sup>120</sup> SCHWEBEL (1999) p. 327, SCOBBI (2005) p. 461.

Less frequent, nevertheless, is the hypothesis of judges *ad hoc* who voted against the countries that designated them, as happened, *exempli gratia*, at the *Arbitral award of the 31 July 1989 case*, at the *Application of the Convention on the prevention and punishment of the crime of genocide case*, at the *Land, Island and Maritime Frontier dispute case*, and at the *Application for revision and interpretation of the judgement of 24 February 1982 in the case concerning the Continental Shelf case*.<sup>121</sup> Those cases show the independence that must be applied by judges on international courts.

This argument, frequently used to support the maintenance of judges *ad hoc* on international courts is, in fact, a proof that the judge's nationality does not (and must not) influence a judgment, being senseless all kinds of prejudice against judges of any nationality.

### **3. Judges *ad hoc* are more familiarized with the internal law, circumstances and customs**

There is also an argument that the presence of judges *ad hoc* could help on the interpretation of municipal law, because they would be more familiarized with the specificities of one of the parties on a controversy, and they would have a better understanding about internal costumes, language and legal practice.<sup>122</sup>

Primarily, it is necessary apprehending that the main scope of the international courts is the uniformization of international law beyond general principles, notwithstanding, respecting the specificities of each region. That is the reason of the inclusion of rules, on the statutes of International Courts, enforcing that their composition must reflect the most important legal systems in the world, being able to understand those different legal points of view.

So, there is a consensus that the judge's precise understanding about the circumstances of a specific situation on a State, which may be decisive on a judgment, is a real *conditio sine qua non* for the Court's *effet utile* in the international legal system.

In spite of these considerations, nothing ensures that the nomination of judges *ad hoc* is the best method to inspire the whole Court to understand those particularities.

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<sup>121</sup> SCHWEBEL (1999) p. 329.

<sup>122</sup> JIMENEZ DE ARÉCHAGA (1980) p. 181, HUNTER and REDFERN (1986) p. 158, SCOBBIE (2005) p. 434.

First of all, *in concreto*, almost half of the judges ad hoc on the ICJ are not nationals of the countries which pointed them<sup>123</sup>, and not necessarily know the country's internal situation better than the other ones. That situation is similar on other international tribunals, and it is more common on issues related to small States, which frequently do not have enough qualified staff to act as judges on international Courts.

Of course this fact is distorting the whole international legal system, because those small States, which should be the most beneficiaries of the inclusion of judges *ad hoc*, have to nominate foreigners to present their internal situation to the other judges.

Secondly, it is necessary rejecting that a regular judge does not understand the situation of other regions. As discussed above, they are selected among qualified jurists, and during their experience on Courts they are necessarily studying different legal systems, and being presented to different circumstances all around the world. It is vital to international judges to integrate themselves on a global culture<sup>124</sup> and, autonomously, to exercise their jurisdictional powers.<sup>125</sup>

More than that, there is the argument that the language is, sometimes, an obstacle, and translations are not always perfect and may generate some trouble for the judges. The Courts, however, have a high-qualified group of translators, and there is no doubt about their independence, impartiality and commitment with a fair trial.

Thirdly, about the specificities of municipal laws, the principle of the *jura novit curia* is not applicable for international tribunals when the subject regards to internal laws. So, it is unconceivable that a national judge must be the person responsible to present or explain the municipal Law to the other judges. In an accusative legal system, that is precisely the role of attorneys, who must be able to introduce the particularities of internal norms and jurisprudence to the international judges, which should take that on account when emitting a fair decision.

And more, if there are uncertainties particularities of national legislations or circumstances, it would be perfectly acceptable that the Court simply requires a consultant to help the understanding of the internal juridical systems and societies, in the same manner that happens on the internal plan when

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<sup>123</sup> SCHWEBEL (1999) p. 329.

<sup>124</sup> CORDERO (1987) p. 19.

<sup>125</sup> COUTINHO (1996) p. 58.

national judges have to apply international law, *exempli gratia*, with *affidavits* and legal briefs. This idea of an advisory opinion was already supported by Mr. De Lapradelle<sup>126</sup> when discussing the PCIJ Statute, in 1920.<sup>127</sup> This advisory opinion must be a faculty of the Tribunal, asking for independent jurists or legal bodies, when the regular judges find useful or necessary.

The best solution, notwithstanding, seems to be the creation of a permanent body, which should be able to analyze the causes independently from the parties and from the judges. Acting free from the judgement's pression, they should be able to state a non-binding opinion which could be very important on the resolution of cases, similar to the structure of the ECJ and the nomination of the advocates-general.<sup>128</sup>

This advisory group should be settled by qualified jurists from different States, as representative as possible, called *ad hoc* for the case related to its State of origin. That solution would fulfill the requirements to introduce the internal specificities to the Court without the harmful presence of the figure of judges *ad hoc* and their lack of legitimation.

#### **4. Stimulation of the states' participation on the international legal system**

The international legal system is usually based on consent<sup>129</sup>, it is not compulsorily imposed to any State.<sup>130</sup> It is always necessary to a State to be in accordance to be judged by the international jurisdictional system.<sup>131</sup>

In accordance to Kelsen's respectable lesson: "*A permanent tribunal may have compulsory jurisdiction. Such compulsory jurisdiction exists if the treaty establishing the Tribunal imposes upon the contracting parties the obligation to recognize the jurisdiction of the tribunal in every case in which they are*

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<sup>126</sup> LEAGUE OF NATIONS / ADVISORY COMMITTEE OF JURISTS (1920) p. 535.

<sup>127</sup> SCOBIE (2005) p. 430.

<sup>128</sup> BARRAL (2004) p. 161, *Consolidated version of the treaty establishing the European Community*, article 222: "*The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General. It shall be duty of the Advocate-General, acting with complete impartiality and independence, to make, in open Court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement*".

<sup>129</sup> RIDRUEJO (1962) p. 174.

<sup>130</sup> SCOBIE, IAIN (2005) p. 422.

<sup>131</sup> MELLO (2001) p. 651.



*involved, whether the case is brought before the Tribunal by one of the parties or by an organ of the international community of which the Tribunal is an organ, or in any other way determined by the treaty. Under general international law no State is obliged to submit a dispute with another State to an international Tribunal. Such submission requires agreement of the parties to the dispute*".<sup>132</sup>

The possibility raised by the eminent Austrian jurist, of an acceptance *ex ante* of a mandatory international jurisdiction may be done through a facultative clause of the compulsory jurisdiction which, however, admits reservations.<sup>133</sup> A *post facto* agreement<sup>134</sup> is always harder to get, because the parties are already hostile and belligerent.

In accordance to the defenders of the existence of judges *ad hoc*, the possibility to designate a judge to a Court would be stimulation to different States for the acceptance of the jurisdictional powers of an international tribunal on a *litis*.<sup>135</sup>

This thought, apparently reasonable, does not resist to a deeper reflection. That is because even nominating a judge *ad hoc* to be part of the Court's composition, the State must, above everything, rely on the other members of the Tribunal, once the decisions are taken in a collegiate manner.

Therefore, besides having an importance on the growth of the international institutions, it is not the mere nomination of judges *ad hoc* which may be the fundamental element to increase the States' adherence on the international legal system.

Supporting the idea that a State should feel safer when designating an own national to serve on an international court is to corroborate with an outmoded and protectionist conception of the International Law and to sustain the maintenance of the *status quo*.

The increase of the States' participation on the international legal system must be followed by the strength on the Court's legitimation, and cannot be done at any price, but responsibly, carefully and gradually.

<sup>132</sup> KELSEN (1967) p.524.

<sup>133</sup> MELLO (2001) p. 651.

<sup>134</sup> KELSEN (1967) p. 524.

<sup>135</sup> HUNTER and REDFERN (1986) p. 158.

Even keeping a system based on the States consent<sup>136</sup>, the tendency is that with the development of the International Law, the establishment of a consolidated jurisprudence<sup>137</sup> and the uniformization of international rules, it will be natural that States increase their confidence on the international systems of dispute settlement, and crescently recognize the competence of international courts.

#### IV. OTHER RELEVANT ISSUES

##### 1. *The problem of how precisely define the nationality of an international subject*

The rules concerning nationality<sup>138</sup> and its relations with the designation of judges *ad hoc* involve two distinct aspects: (1) the nationality of the individual named as a judge on a specific controversy and (2) the parties' nationalities.

###### A) *THE JUDGE'S NATIONALITY*

The settlement of a judge's nationality has several important implications, *exempli gratia*: (1) the most part of international courts does not accept more than one national from a specific State serving as a judge at the same time; (2) the nomination of judges sometimes must follow some specific criteria regarding to their nationalities, as what happens on the ICHR, which only accepts judges who are nationals of OAS member States<sup>139</sup>; (3) the necessity, or not, of the constitution of judges *ad hoc*.

Commonly there is no inconvenient on the definition of a judge's nationality, once it is a subject which depends exclusively on the internal Law of each State.<sup>140</sup>

The uncertainties related to the judges' nationalities happen only when it involves some kind of pathological status, like judges with more than one nationality or even stateless ones (*apatrides*).

On the case of stateless judges, there must be no problems, because a judge who is not national of any State is, in any situation, equiparable to a foreigner. The same occurs in the case of citizens without State, as Palestinians and Kurds.

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<sup>136</sup> VICUÑA (2004) p. 19.

<sup>137</sup> WALDRON (2005) p. 138.

<sup>138</sup> JONES (1956) p. 3.

<sup>139</sup> About this requirement, see specific chapter, "*Right and duties of the judges ad hoc*".

<sup>140</sup> ACCIOLY (2000) p. 357.

Moreover, in cases when a judge has multiple nationalities, the rule stated by the main courts is that the judge is considered national of the State where he unremarkably exercises his civil and political rights.<sup>141</sup>

In brief, the issues related to judges' nationalities are usually unproblematic and possible controversies have an elementary resolution.

*B) THE PART'S NATIONALITY: THE CHANGING ROLE OF THE DIPLOMATIC PROTECTION*

On the other hand, it is far from being pacific the understanding about how should be done the characterization of the parties' nationalities on an international controversy, peculiarly because of the recent popping up of new subjects on that ambit, many of them with transnational features of a vast structural complexity. From this point of view, the delineation of the concept of nationality has a crucial and growing importance on the development of the international legal system.<sup>142</sup>

Specifically dealing with the theme of this article, a relevant argument against the nomination of judges *ad hoc* is precisely the difficulty of finding a clear and definitive concept for nationality, what makes unfeasible the *effet utile* of the constitution of judges *ad hoc*, destabilizing the system as a whole.

In order to understand this position and to apprehend how it is possible to apply the classic institute of judges *ad hoc* on a contemporary society full of intrinsic transnational relationships, it is necessary grasping how the parties should be represented on a *litis* before an international tribunal.

<sup>141</sup> ICJ Statute, article 3: "(1) The Court shall consist of fifteen members, no two of whom may be nationals of the same state. (2) A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights"; ITLOS Statute, article 3: "No two members of the Tribunal may be nationals of the same State. A person who for the purposes of membership in the Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights"; International Criminal Court Statute, article 36: "7. La Cour ne peut comprendre plus d'un ressortissant du même État. À cet égard, celui qui peut être considéré comme le ressortissant de plus d'un État est censé être ressortissant de l'État où il exerce habituellement ses droits civiles et politiques".

<sup>142</sup> VICUÑA (2001) p. 525.

In a globalized world<sup>143</sup>, it is increasing the overcoming of a positivist paradigm which recognized the States as the exclusive subjects of International Law<sup>144</sup>, since "*the role of individuals and non-state actors in the international system has become significant*".<sup>145</sup>

Nevertheless, on important international courts, such as the ITLOS and the ICJ<sup>146</sup>, the *jus standi* of non-State actors is still not admissible, being always necessary the State representation of an individual interest.

It is significant stressing that it is no longer applicable the old concept of diplomatic protection, in which there was a real endorsement by the State which was able to act discretionarily claiming for its own right, assuming the individual's place on a controversy, and even receiving the indenizations as their own right. Nowadays, the legitimacy of a State on an international *litis* comes from the existence of a legal bond of nationality with the particular which has the interest *in concreto*.

On the international jurisprudence there are innumeros cases in which the resolution of conflicts regarding to nationality's facets was vital to the final decision of controversies. Since the PCIJ, until contemporary jurisdictional organisms, on arbitration and on the judicial spheres, that occurred. *Exempli gratia*, *Canevaro case*, *Salem case*, *Flegenheimer case*, *Mergé claim*, and *Iran-US A/18 case*.

Some specific decisions, notwithstanding, established new precedents on that subject, setting up new paradigms regarding the concept of nationality.

First of all, nowadays there is no doubt that the nationality must be effective. The principle of effectiveness – recognized at the classic *Nottebohm case (Liechtenstein vs. Guatemala)* – states that the nationality must not be merely apparent, but a real bond between the subject and the State is necessary.<sup>147</sup>

Secondly, it is unquestionable that with the relativization of the concept of sovereignty and the strengthening of a brand new jurisdictional order, the

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<sup>143</sup> VICUÑA (2004) p.3.

<sup>144</sup> JIMENEZ DE ARÉCHAGA (1980) p.204.

<sup>145</sup> VICUÑA (2004) p. 2.

<sup>146</sup> MELLO (2001) p. 650.

<sup>147</sup> HARRIS (1998) p. 594.

contemporary tendency is to soft the concept of diplomatic protection<sup>148</sup>, as came about at the *Letelier-Moffit case*, and at the *Helms Burton act* and even on the fiduciary representation.

If the Law must reflect a certain society<sup>149</sup> inserted on a certain historical period<sup>150</sup>, it is essential establishing a real *effet utile* to an epistemic change from a paradigm which used to assign value to the State sovereignty to a new model, in which the most important issue is the valorization of individual rights, through a brand new configuration of the conceptions of nationality and diplomatic protection.

Then, extending the hypothesis of access to diplomatic protection, its employment (besides still remaining progressively residual) becomes a strong tool to make possible an universalization of the international legal system, specially in complex situations which would not be contemplated by the jurisdictional protection under its classic perspective.

Coming back to the specific theme of this article, on the conjectures in which it is necessary defining the presence of national judges on international courts, a judge is considered a *national judge* when he/she has the same nationality of one of the parties of the controversy.

The more flexible the definition of the diplomatic protection, the harder is the task to adapt this new configuration to the nomination of judges ad hoc, specially when the situation involves legal people, whose nationality may be characterized by distinguishable manners, as demonstrated by the international jurisprudence.

The absolute concept of societary protection stated at the *Barcelona Traction case*, in 1970, was already overcome.<sup>151</sup> Accordingly to that statement, only the country where the legal person is legally constituted is legitimated to protect its interests on the international sphere.

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<sup>148</sup> In the context of the ICSID, there is also the tendency to extend the coverage of diplomatic protection to a greater number of cases, such as what happened in the *Fedax vs. Venezuela* and *Maffezini vs. Spain* cases. In this sense, see the recommendations of the International Law Association Conference (2006).

<sup>149</sup> DIEZ DE VELASCO (2005) p. 55.

<sup>150</sup> JO (2000) p. 41.

<sup>151</sup> VICUÑA (2004) p. 42.

At the *Elettronica Sicula* case a new panorama starts to be configured, because the ICJ confirms the existence of rights that belong to shareholders' States of origin, even against the State where the society is legally established.<sup>152</sup>

Moreover, nowadays there are already cases in which even the minoritarian shareholders<sup>153</sup> have access to diplomatic protection, having their rights guaranteed, as, *exempli gratia*, at the ICSID's *CMS v. Argentina* case.

So, there is an enormous diversity of criteria that try to fundament the institution of diplomatic protection of legal people, as the shareholders' nationality (protecting even the minoritarian ones), the domicile (local of incorporation, "paper nationality"), the *siège social*, the main place of business, among others.

Those difficulties occur independently of the existence of judges *ad hoc*, but it is clear that with this institution the problem is even more exacerbated. The problem's core is that if many States are able to represent the interests of a certain company before international tribunals, then judges from several nationalities may be considered "national judges", bringing up the necessity to nominate more members *ad hoc* to preserve the isonomy on the courts.

*Exempli gratia*, assuming that a company is constituted under the laws of a State A and has its *siège social* on a country B. This same company has majoritarian shareholders with the nationality of C, and minoritarian ones who are nationals of D. In a particular controversy, it is possible to claim that, in accordance to the international contemporary jurisprudence, States A, B, C or D have *locus standi* to argue for the same interests.

Supposing, also, that a certain international court possesses, in its regular composition, nationals of A and B, both independent and unprejudiced, without any link with the cause unless of their nationalities.

And then, if A represents the society, it is feasible that the other part nominates a judge *ad hoc* if it has no national among the regular magistrates. On this first hypothesis, the judge from B (where is the company's *siège social*) is not affected by the rules regarding to his nationality, and keeps normally his seat on the Bench.

Notwithstanding, if country B is representing the society's interests, it is the judge from B who becomes the *national judge*, and the judge from A,

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<sup>152</sup> VICUÑA (2004) p. 41.

<sup>153</sup> On a *latu sensu* definition of investor, especially regarding BITs.

on the preview conjecture considered as a *national judge*, is considered as a judge without any connection to the cause (even A being the State where the company is legally constituted).

A more serious situation may occur if State C (origin of the majoritarian shareholders) takes the main position, offering its own judge to the role of *national judge*. On this third possibility, the judges from A and B (on the other suppositions considered as “national judges”) remain their right to judge as a regular member of the court.

Then, it may exist a hypothesis when several judges from an international tribunal have, in some way, bonds of nationality with one of the parties.

Furthermore, in a world full of intense international relationships it is very probable that judges who are nationals of some countries, in special the developed ones, would be always considered as “suspects”, because of the existence of direct or indirect interests of their countries of origin on a plenty of cases.<sup>154</sup>

On those situations, it would not be practicable to try to respect the isonomy through the nomination of more judges *ad hoc*, which would simply collapse the whole legal system because of its total lack of international legitimation.<sup>155</sup> Although, preventing those judges to act is also not feasible, because some judges will be always considered as partial ones. The best to do is keeping all judges on the cases, with the trust that they will exercise their functions autonomously and impartially, independently from their nationalities.

Through this relevant argument, it is possible to show another incompatibility between the nomination of judges *ad hoc* and the contemporary rules of international Law, inserted on a globalized and multilateral reality truly diverse from the circumstances when the institution was created.

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<sup>154</sup> SCOBIE (2005) p. 432.

<sup>155</sup> On this sense, there is good analogy between this contemporary situation and the statement defend by Mr. Loder on the discussion of the PCIJ Statute. LEAGUE OF NATIONS / ADVISORY COMMITTEE OF JURISTS (1920) p. 537.

## 2. *The principle of the legal judge*

### A) SOURCES

The principle of the legal judge (*juge naturel*) has its origin in the Magna Carta, of 1215, which stated that “no freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free costums, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgement of his peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right”.

This understanding was also presented in the French law on August 16th-24th<sup>156</sup>, and in the French Constitution in 1791.<sup>157</sup> Furthermore, the rule was expressed on the sixth amendment of the American Constitution, also promulgated in 1791, inspired by the English Bill of Rights, in 1689.<sup>158</sup>

However, only on the French Constitution of 1814 the principle had been formulated with its contemporary name, *juge naturel*<sup>159</sup>, influencing either the next Constitution, on August 14<sup>th</sup>, 1830<sup>160</sup>.

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<sup>156</sup> GARCÍA DE ENTERRÍA (2001) p. 167.

<sup>157</sup> MÉRIGNHAC (1905) p. 54.

Tít. III, Chap. V, Art. 4: “Les citoyens ne peuvent être distraits des juges que la loi leur assigne par aucune comission, ni par d’autres attributions et évocations que celles qui sont determines par les lois”.

<sup>158</sup> Amendment VI: “In all criminal prosecutions, the accused shall enjoy to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defense”.

<sup>159</sup> article 17: “nul ne pourra être distrait de ses juges naturels”.

<sup>160</sup> article 54 had added the idea that “il ne pourra, en conséquence, être crée des comissions et des tribunaux extraordinaires à quelque titre et sous quelque dénomination que ce puisse être”.



This principle was, after then, spread to many classic legal systems, *exempli gratia*, to the *Statuto Albertino* (Albertine Statute), in Sardegna<sup>161</sup> and to the Weimar Constitution, 1919.<sup>162</sup>

Nowadays, the principle of the *juge naturel* is assured by contemporary legislations all around the world, such as in Italy<sup>163</sup>, Spain<sup>164</sup>, Portugal<sup>165</sup>, Austria<sup>166</sup>, Argentina<sup>167</sup> and Germany.<sup>168</sup>

<sup>161</sup> MARQUES (2000) p. 215, art.71: “Nessuno può essere distolto dai suoi Giudici naturali. Non potranno perciò essere creati tribunali e Commissioni straordinarie”.

<sup>162</sup> Art. 105: “Extraordinary courts are inadmissible. Nobody may be deprived of his ordinary judge. Legal regulations concerning military jurisdiction and court martial are not affected hereby. Military courts of honour are abolished herewith”.

<sup>163</sup> Italian Constitution, Art. 25: “No one may be moved from the normal judge preestablished by law. No one may be punished except on the basis of a law already in force before the offence was committed. No one may be subjected to security measures except in those cases provided for by law”. Translation of: “Nessuno può essere distolto dal giudice naturale preconstituito per legge. Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso. Nessuno può essere sottoposto a misure di sicurezza se non nei casi previsti dalla legge”.

<sup>164</sup> As prescribed on the Spanish Constitutions of 1876 (art. 16), 1931 (art. 28) and 1978 (Título I, Cap. II, Sección 1ª, art. 24: “Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión. Asimismo, todos tienen derecho al Juez ordinario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusación formulada contra ellos, a un proceso público sin dilaciones indebidas y con todas las garantías, a utilizar los medios de prueba pertinentes para su defensa, a no declarar contra sí mismos, a no confesarse culpables y a la presunción de inocencia. / La ley regulará los casos en que, por razón de parentesco o de secreto profesional, no se estará obligado a declarar sobre hechos presuntamente delictivos”).

<sup>165</sup> Vid. Figueiredo (2004) p. 324.

<sup>166</sup> Art. 83, paragraph 2: “No one may be deprived of his lawful judge”.

<sup>167</sup> Argentinean Constitution. 1994, Article 18: “Ningún habitante de la Nación puede ser penado sin juicio previo fundado en ley anterior al hecho del proceso, ni juzgado por comisiones especiales, o sacado de los jueces designados por la ley antes del hecho de la causa (...)”.

<sup>168</sup> Weimar Constitution, Article 101.1: “(I) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge”. Translation of “Ausnahmegerichte sind unzulässig. Niemand darf seinem gesetzlichen Richter entzogen werden”).

In the same way, several international treaties deal with this theme and establish the principle of the *juge naturel*, *exempli gratia*, on the Universal Declaration of Human Rights, of 1948, which, on its article 10, states that "everyone is entitled in full equality to a fair and public hearing by a independent and impartial Tribunal, in determination of his rights and obligations and of any criminal charge against him".

#### B) CONTENT

The principle of the *juge naturel* is a guarantee of legality<sup>169</sup> to all citizens, once it is an important consequence of the principle of the due process of law. The preservation of the *juge naturel* assures that everyone who are under a certain jurisdiction must have, at any time, "the limits of their own freedom" well-established. Moreover, the "*astrattezza dell'ordinamento giudiziario*"<sup>170</sup> disallows the election of judges based on partial criteria, *ad personam*, which could vitiate the necessary judicial autonomy and nonpartisanship.<sup>171</sup>

In the same way, on the municipal sphere, that principle is a guarantee for a fair trial, on the international ambit the States have the interest that the proceedings before international courts be endowed with legality and legitimacy. Therefore, the principle of the *juge naturel* can and must be applied also on that range, ensuring the effectiveness and the development of the international dispute settlement system.

The principle is constituted by four distinct features: the competence (the law must conferee the powers to the jurisdictional organ, also known as the principle of the 'legal judge'), the independence (the judge must be prominent, not subordinated to the parties), the impartiality (the judge must be a third, able to act objectively) and anteriority (the law which constitutes the judge must be prior to the facts on judgment, ensuring the system's previsibility).

To be able to develop a critical examination of the paper's main topic, it is absolutely essential to apprehend if the constitution of judges *ad hoc* is compatible with those facets of the principle of the *juge naturel*.

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<sup>169</sup> FIGUEIREDO (2004) p. 321.

<sup>170</sup> CALAMANDREI apud MARQUES (2000) p. 216.

<sup>171</sup> MARQUES (2000) p. 216.

### a) Competence

On an effective international legal system, just the Law is able to establish the jurisdiction on a case *in concreto*.<sup>172</sup> The only way to settle who will have the “power to enforce the Law in a bondable and cogent manner”<sup>173</sup> is through a legal determination of competences.<sup>174</sup>

Actually, it is the competence attributed by law that legitimate the magistrate’s activity - and prevent doubts concerning their autonomy and nonpartisanship – what is an important evolution and radical change from the old precept of the *nemo iudex nisi qui inter adversarios convenisset*.<sup>175</sup>

Nowadays, any other method to choose a judge would characterize an attempt against the legality, which is not compatible with the efforts to exclude the discretionarity and arbitrariness, which unfortunately are still present on international courts<sup>176</sup>, of the international legal order.

Nevertheless, in the designation of judges *ad hoc* on international permanent courts there is no breach of legality, because it is the Law (expressed, *exempli gratia*, by treaties, Statutes or Conventions) which confers competences to those members. The institutional figure of judges *ad hoc* is already constituted by law, even when the individual which will hold the judge’s *locus* could only be known *a posteriori*.

Therefore, the competency of judges *ad hoc* on permanent courts is always assured by a legal command, without any violation of this aspect in the principle of the *judge nature*<sup>177</sup>, the *legal judge*.

### b) Anteriority

The issue of anteriority is related to the competence.<sup>178</sup> In the same time that the statement of the judge’s jurisdictional powers must be established by law, that law must be *previa* in relation to the facts which will be judged.<sup>179</sup>

<sup>172</sup> FIGUEIREDO (2004) p. 322.

<sup>173</sup> CHIOVENDA (1949) p. 354.

<sup>174</sup> GIFIS (1998) p. 85.

<sup>175</sup> PESSINA, *Storia delle leggi sul procedimento penale*, Napoli, 1912, p.7, in LEONE (1963) p. 21.

<sup>176</sup> KELSEN (1967) p. 526.

<sup>177</sup> CORDERO (1987) p. 260.

<sup>178</sup> *Ídem.*, p. 282.

<sup>179</sup> LEONE (1963) p. 274.

Unfortunately, it is still common that some international tribunals are constituted without the respect for this rule, in a clear violation of the *Stato di diritto*.<sup>180</sup> Examples of that undesirable discretionary behavior are the establishment of Tribunals *ad hoc* constituted *post factum*, with exclusive competence to certain subjects, such as the criminal Courts related to the tragedies which happened in the ex-Yugoslavia and in Rwanda.<sup>181</sup>

However, on the case of judges *ad hoc* on international permanent tribunals, the international legal texts which allow their nomination have always a prior character which, in that perspective, is also harmless to the principle of the *juge naturel*.

### c) *Independence*

The judge's independence on international Courts is characterized by the fact that they are not representing governments or States, but only concerned with the best exercise of their jurisdictional functions.<sup>182</sup>

The judges' autonomy<sup>183</sup> in relation to their States of origin (or in relation to any other State)<sup>184</sup> is a real *conditio sine qua non* for the development of a trustful international legal order, which may provide the constitution of a jurisdictional system based on the equality between States.<sup>185</sup>

Judges *ad hoc* are oftentimes labeled as real representants of the parties on a certain controversy. It is not unreasonable that they are also known as "national judges". In many cases judges *ad hoc* show their independence (see specific chapter related to judges *ad hoc* that had decided against the interest of the countries which nominated them), but, even though, there is a huge mistrust about them on the international society.<sup>186</sup>

Hence, there is a real paradox between the judges' independence and the establishment of judges *ad hoc*.

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<sup>180</sup> CORDERO (1987) p. 257.

<sup>181</sup> CAÑADO (1999) p. 386.

<sup>182</sup> GHEVONTIAN (1992) p.13.

<sup>183</sup> CARNELUTTI (2002) p. 249.

<sup>184</sup> LEONE (1963) p. 269.

<sup>185</sup> KELSEN (1967) p. 523.

<sup>186</sup> FOUCHARD (1991) p. 176.

If the system ensures that there is an independent performance of the judges (considering the Court as a whole) there would be no reason to nominate a judge *ad hoc* based on that. On the other hand, if there is the assumption that there is no independence on the international tribunals<sup>187</sup>, then the whole legal systems loose its meaning, and the international courts would be mere political *fori*, opened to all kinds of pressure.

#### d) Impartiality

The judges' impartiality must not be mixed up with the concept of neutrality. The neutrality is a subjective characteristic, bound to personal impressions that an individual (on this case, the judge) has about different aspects of a society. So, it is possible to declare that it is inconceivable that somebody could be perfectly neutral regarding to a subject, once the background knowledge, the idiosyncrasies, the reflections and the emotions of a particular individual are always present on his/her world's perception.<sup>188</sup>

The nonpartisanship, from another standpoint, is an objective issue, what makes the judges overcome their lack of neutrality and act as an observer, facing up the controversy by an objective point of view, equidistant from the parties.<sup>189</sup>

Judges *ad hoc* are, certainly, not neutral, as no other judge or individual. The question is to perceive until which point their impartiality is harmed by the fact that they are nominated *ad hoc* by a certain State.

The true is that the task of judges *ad hoc* is really herculean. This extreme difficulty comes from the fact that the State which designates him/her will certainly base its choice on the previous discernments demonstrated by the candidate, to constitute as a judge *ad hoc* somebody who has already a prior tendency to decide in some specific direction.

What frequently occurs is that this prior understanding, the reason of his nomination to exercise his functions on a specific controversy, is confused with partiality.<sup>190</sup>

On the other hand, the permanent judge which is national of one of the parties not necessarily has the same point of view of his State of origin. This

<sup>187</sup> MOSQUERA (1988) p. 35.

<sup>188</sup> COUTINHO (1996) p. 72.

<sup>189</sup> CARNELUTTI (2002) p. 249.

<sup>190</sup> MURPHY and PRITCHETT (1961) p. 108

lack of convergence, therefore, makes the State which has a national between the regular judges be, in a certain way, penalized.

So, even assuming that judges *ad hoc* are exercising their functions impartially, the mere existence of that institution does not help to corroborate the nonpartisanship of the Tribunal as a whole, which, in praxis, has one of the votes priory defined.<sup>191</sup> As stated by Scobbie, "*the paradox is that in international law, the maintenance of impartiality is the principal reason for the provision of judges ad hoc*".<sup>192</sup>

## CONCLUSION

If judges *ad hoc* already played a significant role on the development of international courts, this is not a tendency anymore. Indeed, their importance will be continuously decreasing on the next few decades, since judges *ad hoc* are now just memories from a past when international society was still making its first efforts in order to guarantee a world of integration, peace and justice.

Obviously, the current international legal order is still facing a plenty of obstacles, specially because States are still reticent about being judged beyond their borders. Nevertheless, undoubtedly, the international legal system is already firmly constituted as an important tool on the development of the international society as a whole, and the legal praxis during the last fifty years shows that the nationality of judges is not an aspect that should be taken into account by States.

In fact, the present globalized world must be understood as a part of a concrete paradigm, and, on this sense, understanding Dussel's thought may be a very effective tool on the system's development. The transmodernity proposed by him is not compatible with rhetorical figures which were inserted on a habermasian structure<sup>193</sup> and that nowadays remain as obstacles to objective developments. On this perspective, it is essential perceiving the concrete outcomes of the participation of judges *ad hoc*, and their explicit pragmatic posture must influence the international legal order.

Reflecting that neo-aristotelean conception, recent developments on the efficaciousness of international Law are bound specially to the crescent trust of

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<sup>191</sup> SCHWEBEL (1999) p. 325.

<sup>192</sup> SCOBIE (2005) p. 428.

<sup>193</sup> HABERMAS (1997) p. 170.

the international community on the contemporary dispute settlement systems, which can be perceived by objective data.

The system's legitimacy is strengthened by the discernible independent and impartial attitude of international judges and by the application of the international Law focused mainly on the respect for the human dignity. Regional particularities have been increasingly taken into account by international Law, as a real *conditio sine qua non* for the development of the international legal structure, still based on the States' consent.<sup>194</sup>

The discussion concerning the presence of judges *ad hoc* on international permanent tribunals has a great importance, because in *praxis*, their participation have been decisive on several cases, as demonstrated on this paper.

This article also proposed that judges *ad hoc* must be abolished from the international legal structure, because they are outdated remains of a time when there was a great lack of confidence on the *effet utile* of a multilateral order. Nevertheless, the inclusion of an advisory body, similar to the advocates-general's structure of the ECJ, could be important to increase the system's efficiency and legitimacy.

Moreover, this study proved that judges *ad hoc* are disadvantageous because of their preconceived logic affects the system as a whole. Titular judges are seen as partial ones, when in *praxis*, their actuation demonstrated that they are not representing a country or a government, being able to decide free of external influences. Also, judges *ad hoc* have a tendency to vote in accordance with the view of the countries which nominated them, and that is not because they are not independent or impartial subjects, but since their prior inclination to judge on a specific direction is a real prerequisite to be invited to serve as a judge on a certain case.

Furthermore, several developments on International Law had a negative impact on the institution of judges *ad hoc*, as the relativization of the concept of sovereignty and the evolution of the notion of nationality, bringing up an unbalanced legal structure which is not compatible with the principles of interdependence, harmonic development and isonomy between States, which have a universal scope.

In brief, judges *ad hoc* are overcome tools, which in spite of being perfectly understandable on a fragmentary system, must not remain on a contemporary

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<sup>194</sup> MELLO (2001) p. 651.

multilateral society with universal interests and general objectives. As stated by Scobbie, "*the claim that a judge ad hoc is capable of making a decision more 'acceptable' is based on presuppositions which lack foundation*".<sup>195</sup>

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<sup>195</sup> SCOBBIE (2005) p. 456.



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