THE EVOLUTION AND APPLICATION OF RULES CONCERNING INDEPENDENCE OF THE "INTERNATIONAL JUDICIARY"

CHESTER BROWN*

INTRODUCTION

Recent years have seen much judicial and scholarly debate on the issue of the proliferation of international courts and tribunals.¹ The phenomenon of

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this multiplication of international juridical institutions raises systemic questions for the international legal order. These questions relate, inter alia, to the coordination (or lack of coordination) of the functions of these bodies, the possibility of competition between them, and the spectre of divergent jurisprudence. An equally important issue raised by the proliferation pertains to the composition of these international courts and tribunals. The increase in the number of international courts and tribunals entails a corresponding increase in the number of judges sitting on them, and it may now be said that there is a true "international judiciary". This body of judges differs in some respects from a domestic judiciary, but there are also many similarities in their functions. In light of the similarities, and with the attention currently given to issues related to proliferation, it is an opportune moment to consider the requirements demanded by each international court and tribunal of those being appointed to judicial office. In particular, questions may be asked concerning whether the relevant provisions in the statutes and rules of procedure of each international court and tribunal have a common origin, whether members of the international judiciary must comply with standards which are broadly similar, and whether international law requires of members of the international judiciary the same standards of independence, impartiality and accountability as it demands of judges on national courts.

The aim of this article is to answer the first of these questions, which concerns the historical development of provisions concerning the independence of international judges. In addition, this article seeks to provide a description of how these international standards have been


See, in particular, Charney, "Is International Law Threatened by Multiple International Tribunals?", above note 1.


See, in particular, Universal Declaration on the Independence of Jurists (Montréal, 10 June 1983), Articles 1.01–1.20.

For a summary of these standards, see Ben Olbourne, "Independence and Impartiality: International Standards for National Judges and Courts", in this volume.
applied in practice by international courts and tribunals. There are several aspects of the statutes and rules of procedure of international courts and tribunals which could be considered relevant to the independence of their judges. These include the method of judges' election or appointment, whether re-election is possible, and whether provision is made for the appointment of judges ad hoc in individual cases. Also relevant is whether each statute provides a list of functions which are deemed incompatible with the judges' role as members of the court, and whether the judges can be challenged and disqualified from sitting on a matter, or from continuing as a judge. Furthermore, the question of the judges' enjoyment of privileges and immunities is pertinent, as is the confidentiality of judges' deliberations. In addition, the adequate remuneration of judges, as well as the financing of the court, are also relevant issues. Each of these questions may be considered germane to an inquiry into the independence of judges on international courts and tribunals. However, as a review of the evolution of each of these issues would produce a large amount of material, the focus of this article is restricted to the historical development and application of those provisions which most squarely address the questions of independence, impartiality and accountability. These are perceived to be the basic requirement of independence and impartiality; the composition of the court, including the manner of election or appointment of judges, and whether judges ad hoc may be appointed; the proscription of any "incompatible" functions; and the ability of judges to be challenged and disqualified.

Part I of this article reviews the historical development of these standards which apply to judges of the principal international courts and tribunals from the creation of the Permanent Court of Arbitration ("PCA") in 1899 up to the present day. It also notes the efforts of Elihu Root at the Second Peace Conference in 1907 to further the impartial administration of international justice by creating a truly permanent international court. Part II examines the debates surrounding the fulfilment of Root's dream at the establishment of the Permanent Court of International Justice ("PCIJ") in 1920, and the drafting of the provisions relating to independence in the PCIJ Statute. Special attention is given to the consideration of issues relating to independence in the creation of the PCIJ, for the PCIJ Statute (1922), reborn as the ICJ Statute (1945), has been influential in the drafting of the statutes and rules of procedure of other international courts and tribunals. The establishment of these other international courts and tribunals, whose statutes and rules contain comparable provisions on the independence, impartiality and accountability of their judges, is also briefly noted. Finally, in Part III, the practice of international courts and
tribunals in applying these provisions is examined. The article concludes that the drafters of the Hague Conventions, the Draft Convention Relative to the Creation of a Court of Arbitral Justice of 1907 and the PCIJ Statute laid foundations which have largely been followed by those who have established later international courts and tribunals, although statutes and rules have become more detailed. While these provisions may have different applications before different international courts and tribunals, it is suggested that a broadly uniform approach to ensuring independence and impartiality in the administration of international justice is an achievable and desirable outcome.

I. THE DESIRE FOR INDEPENDENCE AND IMPARTIALITY IN INTERNATIONAL ADJUDICATION: FROM AD HOC ARBITRATION TO THE CREATION OF A PERMANENT MECHANISM

A. The First Peace Conference of 1899

The first permanent mechanism for the settlement of international disputes by a form of adjudication was the PCA, which was established under the Convention for the Pacific Settlement of International Disputes of 1899. Prior to the creation of the PCA, international arbitration could only take place on an ad hoc basis. The Jay Treaty claims of 1794 are usually regarded as representing the beginnings of modern international arbitration, although in the resolution of these (and other) claims, the arbitration often more closely reflected a diplomatic rather than judicial exercise, and arbitrators acted more as party-appointed agents rather than independent arbiters. Although later arbitrations more closely followed a judicial process, such as the Alabama Arbitrations of 1871, a desire to encourage the resort to peaceful methods of dispute settlement, as well as the need to reduce armaments, led to the Tsar of Russia’s call for the first

7 Convention for the Pacific Settlement of International Disputes, opened for signature 29 July 1899, 1 Bevans 230 (entered into force 4 September 1900) (“1899 Convention”).
9 The Alabama Arbitrations took place under the Washington Treaty, signed 8 May 1871, (Great Britain-United States), 12 Bevans 170 (entered into force 17 June 1871); Collier and Lowe, above note 8, 32.
of the Hague Peace Conferences. On 12 August 1898, the Russian Foreign Minister, Count Mouravieff, circulated a letter to foreign diplomatic representatives at St. Petersburg, in which he spoke of "the maintenance of general peace and a possible reduction of the excessive armaments" as "the ideal towards which the endeavours of all Governments should be directed."\(^\text{10}\) In this respect, it should be noted that the chief "raison d'\'être" of the First Peace Conference was "not dispute resolution but, rather, the avoidance of war."\(^\text{11}\) One of the subjects submitted for international discussion at the conference was

"[a]cceptance, in principle, of the use of good offices, mediation and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations; understanding in relation to their mode of application and establishment of a uniform practice employing them."\(^\text{12}\)

At the end of the First Peace Conference, the States present adopted three declarations and three conventions, including the 1899 Convention. In this convention, the 26 signatory powers agreed "[w]ith a view to obviating, as far as possible, recourse to force in the relations between States [...] to use their best efforts to insure the pacific settlement of international differences."\(^\text{13}\) Article 15 provided that:

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle."\(^\text{14}\)

In order to facilitate "an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy", the States Parties undertook "to organise a Permanent Court

\(^\text{10}\) Count Mouravieff, "Russian Circular Note Proposing the First Peace Conference (12 August 1898)", in James Brown Scott (ed.), Reports to the Hague Conferences of 1899 and 1907 (1917) 1.


\(^\text{12}\) Count Mouravieff, "Russian Circular Note Proposing the Programme of the First Conference (30 December 1898)", in Scott (ed.), Reports to the Hague Conferences of 1899 and 1907, above note 10, 2, 3.

\(^\text{13}\) 1899 Convention, Article 1.

\(^\text{14}\) Ibid., Article 15.
of Arbitration, accessible at all times”.\textsuperscript{15} Crucial to the PCA’s establishment was agreement on the method of constituting PCA tribunals. Under Article 23 of the 1899 Convention:

“Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.”\textsuperscript{16}

These four persons were appointed to a “list”, which was held at the PCA’s International Bureau, for six years. Appointment to the “list” did not mean that the members would sit on PCA tribunals; they then had to be appointed to adjudicate in individual cases in accordance with the procedure outlined in the 1899 Convention. The number of arbitrators on each tribunal could be agreed by the parties to the dispute, but under the default procedure, each party was to appoint two arbitrators to the tribunal, and an “umpire” would be selected by the party-appointed arbitrators or by a third party.\textsuperscript{17} This, accordingly, basically reflected the arbitral procedure which had been employed in the \textit{Alabama Arbitrations}, in that it provided for the constitution of an international collegiate court with an “umpire” appointed by a neutral party.\textsuperscript{18}

The 1899 Convention contained no express requirement that the arbitrators perform their duties with “impartiality” or “independence”, although this was perhaps implied in the stipulation that the arbitrators be of “the highest moral reputation”. The question of the arbitrators’ qualifications was not addressed by James Brown Scott in his \textit{Reports to the Hague Conferences}.\textsuperscript{19} Neither did the 1899 Convention contain a provision proscribing any “incompatible” functions of members of the PCA.

\textsuperscript{15} Ibid., Article 20.
\textsuperscript{16} Ibid., Article 23.
\textsuperscript{17} Ibid., Article 32.
\textsuperscript{18} See, e.g., Simpson and Fox, above note 8, 8.
\textsuperscript{19} Scott (ed.), \textit{Reports to the Hague Conferences of 1899 and 1907}, above note 10, 67–68, 329–331. Now, see the PCA Optional Rules for Arbitrating Disputes Between States, 1992 Version, available at \texttt{<www.pca-cpa.org>}, which provides in Article 9 that: “A prospective arbitrator shall disclose to those who approach him/her in connection with his/her possible appointment any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances.”
B. The Second Peace Conference of 1907

The resolution of several questions had been deferred in the First Peace Conference,\(^{20}\) and on 12 April 1906, Russia called the Second Conference, and it emphasised, \textit{inter alia}, the need for improvements to the 1899 Convention.\(^{21}\) In 1907, the States reconvened at The Hague and commenced negotiations. As well as seeking to conclude other conventions, such as on the laws of war, the diplomats present endeavoured to agree on a new convention which would act as a substitute for the less developed structure of the 1899 Convention. Various delegations sought different outcomes from the Second Peace Conference. The desired result of the U.S. was the creation of a truly permanent international court, with full-time judges. This was clear from the instructions given to the U.S. delegates by the Secretary of State, Elihu Root:

"There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrators to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honourable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to subject its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process."\(^{22}\)

\(^{20}\) See, e.g., the closing address of M. de Beaufort, Minister of Foreign Affairs of the Netherlands, 29 July 1899, in Scott (ed.), \textit{Reports to the Hague Conferences of 1899 and 1907}, above note 10, 13.


\(^{22}\) Elihu Root, "Instructions to the American Delegates to the Hague Conference of 1907", in James Brown Scott (ed.), \textit{Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports} (1916), 69, 79.
For Root, the remedy for the problem of States’ reluctance to submit to arbitration was clear:

“If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your effort to bring about in the Second Conference a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments.”

The Second Peace Conference, held from 15 June 1907 until 18 October 1907, was attended by 44 States, and its outcome was the adoption of 13 conventions and one declaration. A new Convention on the Pacific Settlement of International Disputes was adopted, which expanded the 1899 Convention from 61 to 97 provisions. The differences between the 1899 Convention and the 1907 Convention are not great;

23 Ibid., 79–80.
24 Present were Germany, the United States of America, Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, the Dominican Republic, Ecuador, Spain, France, Great Britain, Greece, Guatemala, Haiti, Italy, Japan, Luxembourg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Romania, Russia, Salvador, Serbia, Siam, Sweden, Switzerland, Turkey, Uruguay, and Venezuela: Scott (ed.), Reports to the Hague Conferences of 1899 and 1907, above note 10, 205–214.
26 Convention for the Pacific Settlement of International Disputes, opened for signature 18 October 1907, 1 Bevans 577 (entered into force 26 January 1910) ("1907 Convention").
Jackson Ralston notes differences in "arrangement and such alterations as were necessary because of the fact that the first related to a court to be established and the second to what may be styled 'a going concern'." With respect to the independence of members on PCA tribunals, two developments are noteworthy. First, the 1907 Convention recorded the agreement of the parties to selecting only one of their nationals as a member of a tribunal; the 1899 Convention had permitted States to appoint two of their own nationals as members of PCA tribunals, which were usually composed of five members. Second, experience in the early years of the PCA led to the inclusion of Article 62 in the 1907 Convention. This provides that:

"The members of the Permanent Court may not act as agents, counsel or advocates except on behalf of the Power which appointed them members of the Court."

Jackson Ralston explains that "[t]he reason for this prohibition is to be found in the fact that M. Beernaert of Belgium, a member of the Permanent Court, acted as counsel for Mexico in the Pious Fund case", while later, "Renault, another member of the Permanent Court, acting on behalf of his own nation, France, was challenged in the Venezuela Preferential case."

With respect to the question of compulsory jurisdiction, however, the 1907 Convention made no progress, and it also did not provide for a truly permanent court; Mr. Root's dream was thus not realised. The U.S. had clearly desired such a development, and many other States had given their support. A Draft Convention Relative to the Creation of a Court of Arbitral Justice – being separate from the PCA – was recommended, but

27 Jackson Ralston, International Arbitration from Athens to Locarno (1929), 259, see also Caron, above note 11, 18–22.
28 1907 Convention, Article 45; cf. 1899 Convention, Article 32.
29 1907 Convention, Article 62.
30 Pious Fund of the Californias (United States v. Mexico), 2 American Journal of International Law (1908), 898.
31 Preferential Treatment of Claims of Blockading Powers Against Venezuela (Germany, Great Britain and Italy v. Venezuela), 2 American Journal of International Law (1908), 907; Ralston, above note 27, 259.
this never entered into force. This Draft Convention included several provisions relating to the independence of the Court’s judges, including Article 2, which provided that the Court was to be composed of judges “chosen from persons of the highest moral reputation”. The expression “of highest moral reputation” reflected the same requirement in the Hague Conventions.\(^3\) Article 2 of the Draft Convention further provided that these people should possess the qualifications required in their respective countries for appointment to high legal posts, or they were to be jurists of recognised competence in international law.\(^3\) This provision was a significant influence on the PCIJ Statute, where it is in large part reproduced.\(^3\) In addition, Article 7 of this Draft Convention had provided:

“A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.”\(^3\)

James Brown Scott’s commentary on this provision states that the Draft Convention “looks to the impartial administration of justice, for partiality is as unpardonable and objectionable in an international as in a municipal court.”\(^3\) The authors of the Draft Convention had “devoted themselves with singleness of purpose to secure and safeguard that impartiality, without which an international court would be without business as it would be without respect.”\(^3\) In order to “secure this

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34 Manley Hudson, *The Permanent Court of International Justice: A Treatise* (1934), 125; Article 23 of the 1899 Convention and Article 44 of the 1907 Convention.
35 Draft Convention, Article 2.
36 Hudson, above note 34, 147.
39 Ibid.
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impartiality and to prevent even the breath of suspicion", the judges are "forbidden to take part in the decision of the case, if [they have] officiated as a judge in its former disposition [...] Human nature is prone to justify itself, and experience shows that judges are not wholly free from the frailties of mankind." Scott added that "the provisions of the article in its present form were adopted by the committee without observation."

However, despite the "enthusiastic support" of many States for a permanent Court of Arbitral Justice, agreement on the Draft Convention proved to be impossible. This was due to "the problem of the appointment of the judges - the Great Powers requiring permanent representation, and the other States insisting on equal rights." All the Second Peace Conference could do was to "draw attention to the advisability of adopting a draft convention for the creation of a Judicial Arbitration Court, as soon as agreement had been reached respecting the selection of judges and the constitution of the Court." The Court of Arbitral Justice was not the only permanent dispute settlement body considered at the Second Peace Conference; a Convention Relative to the Creation of an International Prize Court was also adopted, although this, too, did not enter into force.

II. REALISING ROOT'S DREAM: THE ESTABLISHMENT OF PERMANENT INTERNATIONAL COURTS AND TRIBUNALS

A. The Permanent Court of International Justice

The horrors of the First World War brought about the "almost universal realisation of the urgent need of the community of nations for an institution capable of deciding international disputes judicially." The Covenant of the League of Nations, which formed part of the Peace Treaties, provided in Article 14 that "the Council [of the League of

40 Ibid.
41 Ibid., 253.
42 Alexander Fachiri, The Permanent Court of International Justice (2nd ed., 1932), 3. See also Simpson and Fox, above note 8, 15.
43 Simpson and Fox, above note 8, 15.
44 "Convention Relative to the Creation of an International Prize Court", in Scott (ed.), Reports to the Hague Conferences of 1899 and 1907, above note 10, 746.
45 Fachiri, above note 42, 1.
46 The Covenant of the League of Nations is found in Part I of the Treaty of Versailles, signed 28 June 1919, 2 Bevans 43 (entered into force 10 January 1920); the Treaty of St. Germain, signed 10 September 1919, 112 British and Foreign State Papers 317 (entered into force 16 July 1920); the Treaty of Trianon, signed 4 June 1920 (entered into force 26 July 1921), reproduced in Lawrence
Nations] shall formulate, and submit to the members of the League for adoption, plans for the establishment of a Permanent Court of International Justice." 47 Its Statute was drafted by an Advisory Committee of Jurists, 48 and the draft was in large part later adopted by the Assembly of the League of Nations. 49

With respect to the independence of the judges, it has been noted above that Article 2 of the PCIJ Statute was substantially influenced by Article 2 of the Draft Convention relative to the Creation of a Court of Arbitral Justice of 1907, although the Advisory Committee of Jurists added, significantly, that the judges be "independent" and be "elected regardless of their nationality". In its entirety, Article 2 of the PCIJ Statute provided that:

"The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character who possess the qualifications required in their respective countries for


47 Covenant of the League of Nations, Article 14.

48 The Advisory Committee of Jurists was composed of Mineichiro Adatci (Japan), Rafael Altamira (Spain), Clovis Bevilaqua (Brazil), Baron Descamps (Belgium), Francis Hagerup (Norway), Albert de Lapradelle (France), Dr. Loder (Netherlands), Lord Phillimore (Great Britain), Arturo Ricci-Busatti (Italy), and Elihu Root (United States of America). Also present were Raoul Fernandes (Brazil), legal adviser to Mr. Bevilaqua, whom he later replaced, and James Brown Scott (United States of America), legal adviser to Mr. Root. The official documentary record of the work of the Advisory Committee of Jurists and the organs of the League of Nations that dealt with the question subsequently is contained in three volumes: PCIJ/Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice (1920); PCIJ/Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th – July 24th 1920 (1920); and League of Nations/PCIJ, Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and Adoption by the Assembly of the Statute of the Permanent Court (1920).

49 Resolution Concerning the Establishment of a Permanent Court of International Justice Passed by the Assembly of the League of Nations at Geneva on December 13th, 1920, in League of Nations/PCIJ, Documents Concerning the Action Taken by the Council of the League of Nations, above note 48, 257.
appointment to the highest judicial offices or are jurisconsults of recognised competence in international law.\(^{50}\)

In addition to this requirement of independence, every member of the Court, before taking up their duties, was to make a solemn declaration in open court that they will exercise their powers "impartially and conscientiously".\(^{51}\) At this point, it is worth noting the distinction between "independence" and "impartiality". While the two terms are often used in tandem, they do not have the same meaning; essentially, judges are independent if there is no external source of control or influence which prevents them from acting in an autonomous fashion; and they fulfil their role with impartiality if there is no bias in the disposal of a case.

At the time, scrutiny of Article 2 focussed more on the qualifications for appointment to the PCIJ rather than the requirement of independence. Manley Hudson noted that "the expression 'a body of independent judges' occasioned little debate in the Committee of Jurists, which desired to make the judges, so far as possible, independent of the Governments of which they were nationals."\(^{52}\) Hudson explained that the lack of such independence "had been one of the factors which wrecked the Central American Court of Justice."\(^{53}\) The requirement that judges be elected "regardless of their nationality" seems to have been partly due to a desire of the Committee of Jurists "to make it clear that the Great Powers were not to be entitled to special representation in the Court."\(^{54}\) Hudson also noted that the qualification of "high moral character" derived from the Hague Conventions.\(^{55}\) Lord Phillimore had pointed out in the Committee of Jurists that the essential qualities of a good judge of an international court were "loyalty, probity, a certain breadth of vision, patience and courage".\(^{56}\) More recently, a judge of the ICJ has stated that:

"[A]part from the stipulations of Article 2 of the Court's Statute, two requirements are overriding: integrity and independence.

\(^{50}\) PCIJ Statute, Article 2.
\(^{51}\) Ibid., Article 20. See also the Rules of Court, Article 5, at <www.icj-cij.org>.
\(^{52}\) Hudson, The Permanent Court of International Justice, above note 34, 125, referring to the comments of Francis Hagerup: Procès-Verbaux of the Proceedings of the Committee, above note 48, 120–121.
\(^{53}\) Hudson, The Permanent Court of International Justice, above note 34, 125.
\(^{54}\) Ibid.
\(^{55}\) Ibid.
A judge – as needs no emphasis – is bound to be impartial, objective, detached, disinterested and unbiased. [...] [States] must have the certainty that their jural relationship will be properly defined and that no partiality will result in injustice towards them.”

It was the method of election of the judges which had “baffled and defeated the Hague Conference in 1907”, and the resolution of this issue by the Advisory Committee of Jurists in 1920 “was one of the bases of success which attended the effort to establish the Court”. The solution, which emerged in the “Root-Phillimore plan”, lay largely in the Court’s organic connection with the League of Nations, for Article 4 of the PCIJ Statute provided that judges were to be elected by the Assembly and the Council of the League of Nations. Various methods of nominating and electing the judges on the Court had been made prior to the Committee of Jurists commencing their deliberations; it was Elihu Root who suggested that the power of election should be vested in the Assembly and the League.

There are two aspects to Article 4: the nomination of judges, and the election of judges. The judges are elected “from a list of persons nominated by the national groups in the Court of Arbitration”. These “national groups” were the members of the PCA appointed under Article 44 of the 1907 Convention, and, where States were not party to the 1907 Convention, the list of candidates was to be drawn up by national groups appointed for this purpose by their governments. Each national group was allowed to nominate up to four persons, no more than two of whom were to be of that group’s nationality. Once the list of nominees was prepared, the Assembly and Council were to proceed “independently of

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58 Manley Hudson, The Permanent Court of International Justice: 1920–42 (1943), 149.
60 Hudson, The Permanent Court of International Justice: 1920–42, above note 58, 150.
61 Ibid., 151.
62 PCIJ Statute, Article 4.
63 Ibid., Article 5(2).
one another" to elect the members of the Court. If a nominee received an absolute majority in both organs, they were elected; if not all places were filled, then further meetings were held. A device was created to break any deadlock: this was that a "joint conference" of representatives of the Assembly and Council would attempt to agree on a candidate for each seat still vacant, and these candidates had to be accepted by the Assembly and Council. If this joint conference failed to agree on a candidate, the existing members of the Court would "proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council." 

Under Article 13 of the PCIJ Statute, judges were elected for a term of nine years, but were eligible for re-election, and this continues to be the case for the ICJ. Fachiri said that three considerations were involved in the duration of a judge's term of office: the irremovability of the judge; continuity of the Court's jurisprudence; and the possibility of eliminating unsatisfactory judges. Fachiri stressed that "[t]he judges of an international Court, like those of municipal courts, must be independent. They must not hold office at the pleasure of any power or authority whatever." However, Fachiri recognised that "in the case of an international Court, some provision must be made for periodical renewals of the Bench in order to assure the proper distribution of representation." In addition, he noted that "[i]t is also needful to guard against the continued exercise by a judge of his functions when he has become unfit to do so", these considerations weighing against life appointments. Fachiri argued that "the term of nine years, during which each member of the Court enjoys absolute security of tenure, except by the unanimous decision of his brethren, is long enough to fulfil the essential conditions of independence and continuity of jurisprudence."

On the other hand, Antonio de Bustamante argued that judges should have life tenure, as it would "free the judges from all personal ambitions for the future, and would allow them to devote the rest of their lives to

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64 Ibid., Article 8.  
65 Ibid., Article 11.  
66 Ibid., Article 12(1).  
67 Ibid., Article 12(3).  
68 Fachiri, above note 42, 40.  
69 Ibid.  
70 Ibid., 40–41.  
71 Ibid., 41; see also Georges Abi-Saab, "Ensuring the Best Bench: Ways of Selecting Judges", in C. Peck and R.S. Lee (eds.), Increasing the Effectiveness of the International Court of Justice (1997), 165, 184.
carrying out their functions, free from preoccupation over material considerations"; it would likewise eliminate any temptation to render judgments in a certain way to ensure re-election to the Court. In addition, it can be submitted that the independence of the judges would be enhanced by the assurance of life tenure. Yet another approach has been advocated by the Institut de Droit International. In 1954, the Institut recommended a one-time election for a longer term of 15 years, combined with an age limit, which could be 75 years. According to Georges Abi-Saab, this proposal ensures “maximum independence and security for the judges”.

The independence and impartiality of judges is also addressed in Article 16 of the PCIJ Statute. This provision prohibits the judges from carrying out any incompatible function. Fachiri observed that:

“[I]t is clear that a man may possess [the relevant] qualifications and yet hold some office or exercise some function which is incompatible with the position of an international judge. The problem as envisaged by those who drew up the Statute was to reconcile the principle of independence with the desire not to debar the best men from accepting judgeships which, as it was then supposed, would not occupy anything like the whole of their time.”

For Fachiri, there was “no doubt” that no judge of the Court could be a member of a Government, a member of the diplomatic or civil service, a

72 Antonio Sanchez de Bustamante, The World Court (1925), 135.
73 Resolution of the Institut de Droit International, 1954, Aix-en-Provence session, Article 4, cited by Abi-Saab, above note 71, 186:
“Durée des functions des juges
En vue de renforcer l’indépendance des juges, il est proposé de porter la durée des functions à quinze ans en supprimant la rééligibilité. Une limite d’âge devrait, dans ce cas, être prévue; elle pourrait être fixée à soixante-quinze ans.
Il devrait être également prévu que, contrairement au texte actuel de l’article 15 du Statut, tout membre nouveau de la Cour serait élu pour le terme de quinze ans, sauf limite d’âge, quelle que fût la durée pendant laquelle son prédécesseur a exercé ses functions.
Il n’est pas dans l’esprit de l’Institut que les dispositions nouvelles puissent entrer en application en ce qui concerne les juges actuellement en fonction, sauf en cas de réélection pour une nouvelle période.”
74 Abi-Saab, above note 71, 185–186.
75 See further Dinah Shelton, “Legal Norms to Promote the Independence and Accountability of International Tribunals”, in this volume.
76 Fachiri, above note 42, 42.
representative on the Council or Assembly of the League, or a member of the Secretariat.\textsuperscript{77} This view accords with that expressed by M. de Lapradelle in the Report of the Committee of Jurists.\textsuperscript{78} The question whether a judge could be a member of a national legislature, however, was considered more delicate. Fachiri observed that the Sub-Committee of the Assembly which had drafted the present text had "rejected an amendment providing that the functions of a member of Parliament should not be regarded as incompatible, but expressly declared that it was not intended to exclude members of a Parliament who exercised judicial functions, like the Law Lords."\textsuperscript{79} For instance, it was never suggested that Lord Finley's membership of the House of Lords was in any way incompatible with his membership of the Court. In addition, when M. Altamira sought a ruling with regard to his position as a Senator in Spain, the PCIJ decided that the holding of that office was not contrary to Article 16.\textsuperscript{80} Fachiri concluded that it was clear that "membership of a legislature [was] not, in itself, incompatible with membership of the Court, but it [was] obvious that it would be otherwise if an active part were taken in the political activities of a popular Chamber."\textsuperscript{81} In addition, the PCIJ gave a number of other rulings "to the effect that functions of a judicial or quasi-judicial nature, such as those of arbitrator and president or member of a conciliation commission..."
may be undertaken by the judges of the Court.” As the PCIJ became more and more busy, it became difficult to see how in practice “a judge could carry on regular professional work and at the same time devote requisite time to his judicial duties.”

This rule against incompatible functions was amplified in Article 17, which provided that members of the Court were not permitted to “act as agent, counsel or advocate in any case of an international nature”, or in “any case in which he has previously taken an active part, as agent, counsel or advocate [...] or as a member of a national or international Court, or of a commission of inquiry, or in any other capacity.” Any doubt was to be settled by decision of the Court.

Hudson argued that Article 17(1) stated “a disability, as distinguished from an incompatibility or a disqualification.” It is noteworthy that the President of the Committee of Jurists, Baron Descamps, even proposed a draft article which provided that judges “may not take part in the decision of any case in which they, members of their family, their connections up to and including the third degree, have a direct personal interest.”

Under Article 18, a member of the Court could not be dismissed “unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.” Article 24 provided that if a member of the Court considers that he should not take part in the decision of a particular case, he shall inform the President. Similarly, if the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly. If in either of these alternatives the member of the Court and the President disagree, the point is settled by the decision of the Court. Article 24 was designed to cater for what may be called a “particular incompatibility” between the judge’s judicial position and his extraneous activities, other

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83 Fachiri, above note 42, 44.

84 PCIJ Statute, Article 17.

85 Hudson, The Permanent Court of International Justice, above note 34, 143–144.

86 Baron Descamps, “Draft Scheme Concerning the Permanent Court of International Justice”, in Procès-Verbaux of the Proceedings of the Committee, above note 48, 373, 376.

87 PCIJ Statute, Article 18.
Evolution and Application of Independence Rules of International Judiciary

than the situations outlined in Article 17. Fachiri noted that it was "difficult in practice to draw a hard and fast line between the two", and argued that this provision applied to "personal reasons", and "cannot be used by parties for the purpose of suggesting that a judge should not sit", although it seems that at least one State has in practice invoked Article 24 to seek the recusal of a judge. Fachiri offered an illustration of the application of Article 24, being that "one of the persons involved in an international incident submitted to the Court was a relative of the judge".

A final issue with respect to independence concerns the participation of national judges. Article 31 of the PCIJ Statute provided that "[j]udges of the nationality of each contesting party shall retain their right to sit in the case before the Court." If the Court includes a member of the nationality of one of the parties, the other party may choose a judge of its nationality. If the Court included "no judge of the nationality of the contesting parties", each of these were entitled to choose a judge of its nationality. Finally, Article 31 clarified that if there are several parties having the same interest, "they shall be reckoned as one party only"; and any judges so chosen have to fulfil the conditions required by the PCIJ Statute.

This facility for the appointment of national judges is somewhat analogous to the system of appointing arbitrators, and De Bustamante viewed it as "a not entirely plausible arrangement" for a permanent Court of Justice. Here he agreed with Dr. Loder of the Advisory Committee, who was concerned that it was "a characteristic essentially belonging to arbitration", and wanted to restrict their role as being advisory. M. de Lapradelle also expressed concern, assuming that "a national judge should always record his disapproval of a sentence unfavourable to his country". Fachiri noted that in drafting this provision, the Advisory Committee of Jurists essentially had four options:

Fachiri, above note 42, 49. Instances where these provisions have been invoked are described in Part III.
PCIJ Statute, Article 31.
Ibid.
Ibid.
De Bustamante, above note 72, 149.
Ibid., 531.
(i) To retain the usual composition of the court, regardless of
whether or not one or both of the parties were represented;

(ii) To require the judge belonging to the nationality of a party to
retire;

(iii) To appoint a national judge *ad hoc* to sit, where the party
would otherwise lack representation on the Bench; or

(iv) To appoint a national assessor *ad hoc* with advisory powers,
but no voting powers.\(^{96}\)

For Fachiri, the first method had "much to recommend it, inasmuch as
by Article 2 of the Statute the Court is a body of independent judges
elected regardless of their nationality, and, moreover, bound by a solemn
declaration to act impartially."\(^{97}\) However, an appeal to pragmatism
prevailed, as he explained:

"[T]he principles applicable to national tribunals do not extend
integradly to an international court — some modifications are
involved by the differences inherent in the nature of their
respective functions. The parties before the international Court are
sovereign States; in order that its decisions should be effective
they must be not only just in themselves but acceptable to the
public conscience and opinion of the countries concerned; it is not
sufficient that justice should be done, it must also appear to have
been done. For this purpose, the presence of judges belonging to
the nationality of the parties may well be desirable. Their presence
will not only inspire confidence in the peoples of the litigating
states, it will enable the point of view of those states to be fully
presented and understood."\(^{98}\)

Fachiri observed that in practice, judges *ad hoc* had voted for
judgments adverse to their States, which had increased the force of the
judgment.\(^{99}\) Most importantly, he thought that the presence of judges *ad
hoc enabled the judgment to be shaped "so that it may avoid, as far as possible, wounding national susceptibilities." For Hudson, Article 31 was one of the "principal achievements" of the Committee of Jurists, for "the scheme for electing the judges would probably never have been adopted without it."

B. The International Court of Justice

With the outbreak of the Second World War, the League of Nations and the PCIJ effectively ceased functioning. Towards the end of the war, the Allies considered the PCIJ's post-war role. A "United Nations Committee of Jurists" was convened, which ultimately submitted a proposal to the San Francisco Conference on International Organisation on 25 April 1945. At the Conference, a further committee was formed to "draw up the chapter of the Charter enunciating the general principles relating to the text of the new Court and to prepare the text of its Statute." One option open to this committee had been to maintain in existence the PCIJ, but it considered that "the creation of a new Court was the simpler and more practical course to adopt." The committee called it the "International Court of Justice" ("ICJ") and described it as the "principal judicial organ" of the United Nations, thus retaining the organic connection which had existed between the PCIJ and the League of Nations. After making some amendments, the final text of the ICJ Statute was annexed to the UN Charter and signed on 26 June 1945, and they both entered into force on 24 October 1945. The provisions relating to the independence, impartiality and accountability of the Court and its judges remained essentially the same as those applying to the PCIJ. These provisions have been invoked on a number of occasions; these instances are considered in Part III.

Perhaps in order to strengthen further the operation of these provisions, the Court has recently issued two Practice Directions which


100 Fachiri, above note 42, 57.
101 Hudson, above note 58, 181.
103 Yearbook of the International Court of Justice (1946–1947), 20.
104 Ibid.
105 Ibid., 22.
outline instances in which it would be inappropriate for persons to be appointed as judges *ad hoc*, or as counsel, agents or advocates before the ICJ.  

These Practice Directions essentially provide that a person should not be nominated as judge *ad hoc* if that person has acted as agent, counsel or advocate in another case before the Court in the preceding three years, or is presently acting as judge *ad hoc* in another case before the Court; and a person should not be nominated as agent, counsel or advocate if they were a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court in the preceding three years.  

C. Other International Courts and Tribunals

Since the creation of the ICJ in 1945, many other international courts and tribunals have been established. This phenomenon of “proliferation” is examined elsewhere, and it would serve no purpose to engage in this discussion here. Nevertheless, it is pertinent to note that the constitutive documents of many of the newer international courts and tribunals prescribe that their judges are to be “independent”, “impartial” or must possess “high moral character”. Many also indicate functions which are incompatible with the position of judge or member of that international court or tribunal. In addition, most statutes and rules of procedure provide for a method of challenging or disqualifying judges or arbitrators. These international courts and tribunals, and their constitutive documents, include the Court of Justice of the European Communities ("ECJ"), the European Court of Human Rights ("ECHR"), the Inter-American Court of Human Rights ("IACHR"), the International Criminal Court

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106 Shabtai Rosenne, “International Court of Justice: Practice Directions on Judges *ad hoc*; Agents, Counsel and Advocates; and Submission of New Documents”, *The Law and Practice of International Courts and Tribunals* (2002), 223.

107 Shabtai Rosenne, op. cit.; see also Shelton, above note 75.

108 See, e.g., the materials in above note 1.

109 EC Treaty, Article 223 (ex Article 167); ECJ Statute, Articles 2, 4, 16.


the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),\textsuperscript{113} the International Criminal Tribunal for Rwanda ("ICTR"),\textsuperscript{114} the International Tribunal for the Law of the Sea ("ITLOS"),\textsuperscript{115} the Dispute Settlement Body ("DSB") of the World Trade Organisation ("WTO"),\textsuperscript{116} the Iran-U.S. Claims Tribunal,\textsuperscript{117} and tribunals established under the aegis of the International Centre for the Settlement of Investment Disputes ("ICSID").\textsuperscript{118} The content of the relevant provisions in the statutes and rules of procedure of these international courts and tribunals is largely reviewed by Professor Shelton in her contribution to this issue.\textsuperscript{119} In addition to provisions concerning the judges' independence, the incompatibility of other functions, and methods of electing and disqualifying judges, Shelton also notes the inclusion of provisions relating to the remuneration of international judges, the financing of the courts and tribunals, the privileges and immunities enjoyed by international judges, the role played by judicial assistants and staff, and the judges' integrity and control over the proceedings. In her article, Professor Shelton notes an increasing "judicialisation" with more detailed rules appearing and less ad hoc rule-making taking place.\textsuperscript{120} This article now considers the application


\textsuperscript{113} ICTY Statute, Articles 12–13, adopted pursuant to SC Res. 827 (1993), UN Doc. S/RES/827 (1993); Rules of Procedure and Evidence of the ICTY, Rule 15.

\textsuperscript{114} ICTR Statute, Articles 11–12, adopted pursuant to SC Res. 955 (1994), UN Doc. S/RES/955 (1994); Rules of Evidence of the ICTR, Rule 15.


\textsuperscript{119} Shelton, above note 75.

\textsuperscript{120} Ibid.
of these increasingly detailed statutory provisions and rules by international courts and tribunals. It should be noted that some of the institutions considered, such as the ITLOS, are very new, and as such, there is to date little experience with these provisions.

III. THE APPLICATION OF STATUTORY PROVISIONS AND RULES CONCERNING INDEPENDENCE

A. The International Court of Justice

Articles 17 and 24 of the ICJ Statute, relating to incompatible functions and the disqualification of judges, have been relevant in several cases. Detlev Vagts notes that a judge recused himself from sitting in the case concerning *Certain Phosphate Lands in Nauru* because "he had previously chaired a committee of inquiry into the matter," another judge recused himself from the case concerning the *Arbitral Award of 31 July 1989* because he had served on the panel that made the challenged award." In the *Anglo-Iranian Oil Co.* case, Sir Benegal Rau did not sit as he had been on the Security Council while it was considering the dispute, and perhaps most famously, Sir Muhammed Zafrullah Khan of Pakistan did not sit in the second phase of the *South West Africa* case. It has been mooted that he did not voluntarily withdraw, but recused himself due to pressure from the President of the Court, Sir Percy Spender. The reasons for his non-participation may be that he had been a member of the Security Council when it voted against South Africa on issues relating to South West Africa; in addition, he had at one time been nominated by Ethiopia and Liberia as their intended judge *ad hoc* in the case, although he never actually acted in that capacity. In the same case, the Court

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123 Vagts, above note 121, 255.
125 Vagts, above note 121, 255–256.
126 *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *I.C.J. Reports* 1952, 93.
127 Vagts, above note 121, 256.
130 Higgins, above note 129, 590.
apparently rejected an attempt by South Africa to seek the recusal of Judge Padilla Nervo on the basis of his participation in the same Security Council debates on the issue. Vagts notes several other cases where judges have recused themselves, including the *Nottebohm* case, where Sir Hersch Lauterpacht had had previous consultations with Liechtenstein, and in the *Temple of Preah Vihear* case, Judge Jessup withdrew due to his prior involvement in the matter. An exception can be found in *Rights of Nationals of the United States of America in Morocco*, where Judges Hackworth and Basdevant did not recuse themselves, although they had been legal advisers of their respective governments prior to the dispute coming before the Court. Perhaps most recently, Judge Higgins was excluded from further participation in two cases, being the *Lockerbie* case and the *Gabcikovo-Nagymaros* case.

The ICJ Statute’s provisions relating to independence and impartiality appear to have worked reasonably well in practice. Indeed, no instance is known in which the independence of the PCIJ or ICJ as such has credibly been doubted. Accusations have, however, occasionally been made against individual judges, such as the U.S. efforts to cast doubt on the impartiality of some judges in the *Nicaragua* case.

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131 Vagts, above note 121, 256.
135 Vagts, above note 121, 256.
139 Ibid., 268, fn. 16. In a statement indicating its intention to take no further part in the proceedings, the U.S. stated that it had the impression that “the Court is determined to find in favor of Nicaragua in this case”, and that the U.S. was unwilling to “risk U.S. national security by presenting such sensitive material in public or before a Court that includes two judges from Warsaw Pact nations”: U.S. Department of State, “Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice”, 24 *I.L.M.* (1985), 246, 248; referred to in Thomas Franck, “Icy Day at the ICJ”, 79 *American Journal of International Law* (1985), 379, 379.
B. Regional Courts

Under Article 4 of the ECJ Statute, judges may not “engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council.” In 1985, Judge Rozes of the ECJ observed that the Council had never been asked for such exemption, although “[i]n practice, scientific activities and university teaching [had] not been considered to be occupations under these rules”, but she did note that it was standing practice for judges “to ask leave of the court before engaging in such activities.”

Although permission was usually granted, there had been “cases in which the court has advised some of its members not to engage in activities which might be detrimental to their independence or arouse misunderstandings.” In similar fashion to the ICJ Statute, Article 16 of the ECJ Statute provides that if “any Judge […] considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President.” Judge Rozes noted that judges had “disqualified themselves when it appeared to them that an objection might be made by one of the parties to the composition of the court.” In one case, a judge “recused himself on the grounds that he had in his capacity as a legal adviser acted for one of the parties in a matter remotely connected to the case before the court.”

Article 19 of the IACHR Statute provides a mechanism for disqualification of judges from taking part in matters in which “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.” This provision was invoked by Judge Hernández Alcerro, who disqualified himself under Article 19(2) in the cases of Velásquez Rodríguez, Godínez Cruz and Fairen Garbi and Sollis Corrales.

141 Ibid.
142 Ibid., 509.
143 IACHR Statute, Article 19.
C. The Ad Hoc International Criminal Tribunals

Rule 15 of the Rules of Procedure of the ad hoc international criminal tribunals establishes a mechanism for the disqualification of judges "in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." Various challenges have been made to the impartiality or independence of judges under this provision of the Rules of Procedure of the ICTY, including a challenge to Judge Odio Benito. In this case, Judge Odio Benito was elected as one of the two Vice-Presidents of Costa Rica prior to the conclusion of the Celebici case on which she was sitting. The issue was considered by the Bureau of the ICTY, and a decision was rendered on 4 September 1998. The Bureau held that the challenge to her independence was unfounded. Judge Odio Benito had sought the approval of the President of the ICTY, Judge Cassese, before seeking the nomination for Vice-President of Costa Rica, and the approval of all judges had been obtained. Moreover, she had undertaken not to assume any of the functions of Vice-President until the completion of her duties as a member of the Trial Chamber hearing the Celebici case. In its decision, the Bureau referred to case law of the ECHR, which supported the proposition that "the mere fact that a person who exercises judicial functions is to some extent subject, in another capacity, to executive supervision, is not by itself enough to impair judicial independence."
The Appeals Chamber has only considered the application of Rule 15 on one occasion, being a challenge made to Judge Mumba in Prosecutor v. Anto Furundzija, where it was alleged that her extra-curial involvement in the case gave the appearance of bias.\textsuperscript{151} The allegation was based on her association with the UN Commission on the Status of Women, and her association with authors of an \textit{amicus curiae} brief. The Appeals Chamber reviewed the jurisprudence of various national courts and of the ECHR, and, without discussing why such standards at the national level might be equally applicable to international courts and tribunals, found that “there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.”\textsuperscript{152} The Appeals Chamber set out the following principles to direct it “in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

1. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or

2. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”\textsuperscript{153}

The Appeals Chamber rejected each of the allegations of an apprehension of bias on the part of Judge Mumba, and affirmed the applicant’s conviction.

\textit{D. The Iran-U.S. Claims Tribunal}

The Iran-U.S. Claims Tribunal is perhaps one of the most experienced international courts in considering its rules on independence and impartiality. Under Article 9 of its Arbitration Rules, which are an amended version of the UNCITRAL Arbitration Rules, members can recuse themselves from cases if there are circumstances “likely to give rise
to justifiable doubts as to [their] impartiality or independence with respect to that case", and over the years, members have disqualified themselves in various cases.\footnote{Presidential Order No. 19 (12 January 1984); Presidential Order No. 21 (19 January 1984); Presidential Order No. 57 (8 October 1987).} Under Article 10 of the Rules, "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” This provision has been invoked on at least eight occasions.

In the first year of the Tribunal’s operation, Iran challenged Judge Mangard, a third-country appointed arbitrator, as it no longer believed in his neutrality.\footnote{Charles Brower and Jason Brueschke, The Iran-United States Claims Tribunal (1998), 166; this incident is also referred to by Shelton, above note 75.} When he declined to resign, Iran wrote to him and stated that it “hereby disqualifies your Honour as a ‘neutral’ arbitrator”, since it “opposes your participation in deciding huge number [sic] of highly controversial and politically sensitive disputes between the Islamic Republic of Iran and the United States of America.”\footnote{Letter of Mohammed K. Eshragh, Agent of the Islamic Republic of Iran, to Judge Mangard (1 January 1982), quoted in Re Judge Mangard, 1 Iran-U.S. C.T.R. (1982), 111, 115–116.} The Appointing Authority dismissed the proceedings challenging Mangard. The dismissal of this challenge by the Appointing Authority led to a physical attack on Judge Mangard by two Iranian arbitrators – Kashani and Shafeiei – on 3 September 1984, and to a crisis which threatened the existence of the Tribunal.\footnote{Brower and Brueschke, above note 155, 171.} On 17 September 1984, the U.S. formally challenged Judges Kashani and Shafeiei under Articles 10 and 13 of the Tribunal Rules based on their attack on Judge Mangard and their continuing threats of violence towards him. Before the Appointing Authority made a ruling on this challenge, the Government of Iran replaced the arbitrators in question.\footnote{Ibid., 171.}

The Iranian Government also challenged Judge Briner – another third-party arbitrator – three times. First, in Amoco Oil Company v. Iran,\footnote{Case No. 55, referred to in Brower and Brueschke, above note 155, 171.} Iran argued that his involvement as a director of a Swiss subsidiary of Morgan Stanley and Co. raised “justifiable doubts as to his impartiality and independence.”\footnote{Brower and Brueschke, above note 155, 169.} He denied this charge, but he later stepped down as he believed it was in the “overall best interest of the tribunal” to do so. Second, Judge Briner was challenged following the award in Phillips
Petroleum Company Iran v. Iran,\(^{161}\) due to alleged improper conduct regarding the issue of the award. The challenge stated that “the circumstances prompting the challenge raise such serious doubts about his impartiality and independence that he is no more worthy of trust by any standards, and therefore no longer fit to serve as the President of the Tribunal or as a member of it.”\(^{162}\) This challenge was dismissed by the Appointing Authority.\(^{163}\) Third, a general challenge was made after allegations surfaced regarding Judge Briner’s alleged involvement in a breach of Indian foreign exchange regulations.\(^{164}\) This challenge was also dismissed.\(^{165}\)

In 1990, the U.S. challenged an Iranian arbitrator, Judge Noori, for his involvement in the Organisation of Nationalised Industries of Iran.\(^{166}\) This challenge was also dismissed by the Appointing Authority,\(^{167}\) as was an Iranian challenge of Judge Arangio-Ruiz for his alleged “failure to act as his demanding position requires” in being absent from the proceedings of the tribunal.\(^{168}\)

Most recently, the U.S. issued a challenge to the independence and impartiality of Judge Broms, a third-country appointed arbitrator. The challenge was made on the grounds that there were “justifiable doubts about his impartiality and independence based on an alleged breach of the Tribunal’s rules of procedure relating to the secrecy of deliberations”; and the U.S. also alleged that “the performance of his judicial function was a de facto impossibility as a result of the attitude of partiality” demonstrated in his opinion in Case A/28.\(^{169}\) The Appointing Authority, Sir Robert

\(^{169}\) Sean Murphy, “Challenge of Iran-U.S. Claims Tribunal Judge Bengt Broms”, 95 American Journal of International Law (2001), 895, 896.
Jennings, stated that Judge Broms had indeed committed "a serious breach of the secrecy of the deliberations," and then considered whether this revealed a lack of impartiality and lack of independence. He found that there was no suggestion that Judge Broms was in any way "beholden to the Iranian Government", but that the question of impartiality was more difficult. Sir Robert held that there was no doubt that Judge Broms "strongly sympathise[d] with the Iranian position." However, Sir Robert held that "any judge [...] is required as a matter of judicial duty eventually and on the basis of the presented arguments to become partial to one side or the other." Sir Robert concluded that on the basis of this single opinion, the U.S.' doubts about whether Judge Broms' partiality could not be justified, and dismissed the U.S. challenges in their entirety.

E. ICSID Tribunals

The Washington Convention essentially provides for "the settlement of disputes between host states and foreign investors through arbitration or conciliation." Under Article 14(1), ICSID "panelists", who may be appointed to tribunals to determine individual cases, should be "persons of high moral character", echoing Article 2 of the ICJ Statute, and panelists should also be of --

"recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

A procedure for disqualification is found in Article 57 of the Washington Convention, which provides that a member may be disqualified "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14". The decision on any proposal to disqualify an arbitrator is to be taken by the other members of the tribunal.

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170 Decision of the Appointing Authority to the Iran-U.S. Claims Tribunal, 5–6 May 2001.
171 Ibid., 8.
172 Ibid.
173 Sean Murphy, above note 169, 897.
175 Ibid., 56–57.
176 Washington Convention, Article 14(1).
177 See also ICSID Rules, Article 9.
178 Washington Convention, Article 58.
The question of the independence of an arbitrator arose in the first ICSID case, being *Holiday Inns/Occidental Petroleum v. Morocco*. In that case, an arbitrator had become an outside director of Occidental, and he resigned from the tribunal. A second instance arose in *Amco v. Indonesia*, where an arbitrator appointed by the claimants was challenged under Article 57. Here, the challenged arbitrator had given “tax advice” to the person in control of the corporate claimants. In addition, the arbitrator’s law firm had an office- and profit-sharing arrangement with the counsel for the claimant in the ICSID proceedings. While not all of these arrangements continued during the proceedings, it was argued that the arbitrator could not be relied on “to exercise independent judgment”, in the meaning of Article 14(1) of the Washington Convention. According to Tupman, the claimants argued that “a party-appointed arbitrator should be considered differently from an arbitrator appointed by mutual consent of the parties or by the arbitral institution.”

In their decision, the two remaining arbitrators held that “no distinction can and should be made, as to the standard of impartiality, between members of an arbitral tribunal, whatever the method of their appointment.” They then held that in a system where arbitrators are appointed by the parties, there is a presumption that the party and arbitrator will have had prior dealings, and accordingly, arbitrators should not be disqualified “for the only reason that some relationship existed between that person and a party, whatever the character – even professional – or the extent of said relations.”

Most recently, Article 57 came under scrutiny in *Compañía de Aguas del Aconquija SA & Vivendi Universal v. Argentine Republic*. In this case, an ICSID tribunal had dismissed a claim made by CAA and Vivendi, and the claimants had subsequently sought annulment of the award under Article 52 of the Washington Convention. A panel of three arbitrators was

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180 ICSID Case No. ARB/81/1, referred to by Tupman, above note 179, 44.
181 Tupman, above note 179, 44.
182 Ibid.
184 Ibid., 7.
constituted to consider the request, including as President Mr. Yves Fortier. The Argentine Republic decided to challenge his appointment, and the issue centred on “the question of his independence and impartiality with respect to the parties to the dispute, specifically the Claimants, i.e., on whether he ‘may be relied upon to exercise independent judgment’. ”

The Argentine Republic’s concern was based on the fact that one of the partners in Mr. Fortier’s law firm had previously advised Vivendi’s corporate predecessor on aspects of Quebec taxation law. Mr. Fortier had not been involved in the matter, nor was he in any way related to the dispute between the Argentine Republic and Vivendi. In their decision, the other two members of the *ad hoc* Committee discussed two previous instances where ICSID tribunal members had been challenged, and held (following those decisions) that “the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or committee member.” They concluded that, in the present case, the connection between another partner of Mr. Fortier’s law firm and Vivendi was not significant enough “to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently.” They emphasised, *inter alia*, three facts: first, that the retainer was wholly unrelated to the dispute; second, that it did not involve a general retainer to advise, but concerned a specific task under the law of a third State; and third, that the work was substantially completed before the annulment proceeding began. They did not need to decide the case on the basis that the conflict was *de minimis*, but implied that they would have done so had it been necessary.

**CONCLUSION**

This article has provided an overview of the historical development of provisions relating to the independence, impartiality and accountability of international judges. It has reviewed the evolution of these provisions from the drafting of the Hague Conventions, the Draft Convention and the PCIJ Statute, to the subsequent adoption of many of these provisions in the

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186 Ibid., 5–6.
189 Ibid.
founding documents of other international courts and tribunals. The practice of international courts and tribunals in applying these provisions has, where relevant and available, also been discussed.

This article has not sought to assess the effectiveness of these provisions, or the validity of their interpretation or application; these are matters for further investigation. Also outside the scope of this article – but another pertinent inquiry – is the degree of independence, impartiality and accountability required of other court officials, such as the Registrar of the ICJ or the Secretary-General of ICSID. What has been submitted is that each of the principal international courts and tribunals requires independence and impartiality of its judges or arbitrators, and that these standards generally have their origin in the efforts of the drafters of the Hague Conventions, the failed 1907 Draft Convention, and the PCIJ Statute. To this extent, at least, the aims of Elihu Root in creating permanent international courts and tribunals – and the greater independence that this entails for their judges – have been realised. What this means in practice, however, may differ between the various bodies; international courts and tribunals have rules which are more and more detailed, and the increasing number of part-time judges who may act as judge in one matter and counsel in another – before different institutions, if not before the same – further complicates efforts to ensure the absence of bias, whether actual or merely apparent. One questions, for example, whether the principles laid down by the ICTY Appeals Chamber in Prosecutor v. Anto Furundzija, if applied in two of the ICSID cases – Amco and Vivendi – would have seen the same results reached. Notwithstanding the different roles of different institutions, however, common overarching principles are apparent. In light of the proliferation of international courts and tribunals, and the consequent increase in the number of international judges, it is timely that attention is devoted to these questions. A uniform approach to standards for the international judiciary may be an idea whose time has come.