

The Law and Politics of ‘Recognised Competence in International Law’: (S)electing Judges/Arbitrators and Controlling the International Bench

Dr Mando Rachovitsa

Assistant Professor of Public International Law, University of Groningen

Outline

- 1. Introduction**
- 2. The Evolution of ‘Recognised Competence in International Law’ as an Individual Requirement for Nomination and Election**
 - 2.1 Inventing ‘Recognised Competence’ and ‘Recognised Jurisconsults’ in International Law
 - 2.2 Compartmentalising between National Judges and Scholars: Still Relevant?
 - 2.3 International Legal Scholars, Diplomats and the New “Hybrids”
- 3. Leveraging the Recognised Competence in International Law in the Composition of the Body**
 - 3.1 Recognised Competence in the Law of the Sea: The Fear of the Specialised Judge
 - 3.2 Recognised Competence in Human Rights Law *vis-à-vis* Recognised Competence in International Law: Avoiding a “Militant” Human Rights Court?
 - 3.3 The WTO Appellate Body: Keeping International Law Expertise Unwelcome in Order to Retain the WTO System Self-contained from International Law
 - 3.4 Investor-State Dispute Settlement Reform: International Law Expertise as the New “Pro-State” Bias?
 - 3.5 The PCA Panel of Experts for Natural Resources and/or Environment-related Disputes: Specialised Expertise Makes it to the PCA?
 - 3.6 Is It a Good Idea to Quantify the Recognised Competence in International Law in the Composition of a Court?
- 4. Conclusions**

1. Introduction

If ‘sensitivity and secrecy’¹ surround all aspects of the nomination and (s)election of international judges and arbitrators, the quality of the membership of a court is a particularly ‘delicate’² and ‘indiscreet’³ matter to address. Yet evidence from different corners of the dispute settlement universe suggests that concerns exist regarding the level of expertise and competence of women and men deciding cases brought before international courts and tribunals. Although the UN has never questioned the credentials of a judge nominated and elected at the ICJ,⁴ Thirlway reluctantly writes that ‘all that can be said is that there has in the

¹ M. Wood, ‘The Selection of Candidates for International Judicial Office: Recent Practice’, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes - Liber Amicorum Judge Thomas A. Mensah* (Koninklijke Brill NV, 2007) 357, 358.

² H. Thirlway, *The International Court of Justice* (OUP, 2016) 206.

³ *Ibid.*, 11.

⁴ C. F. Amerasinghe, ‘Judges of the International Court of Justice – Election and Qualifications’ (2001) 14 *LJIL* 335, 344.

past undoubtedly been members of the Court, whose contribution to its work [...] ha[s] given rise to doubts'.⁵ In a more direct manner the Institute of International Law found vote trade practices concerning the selection procedures for judges sitting at the ICJ to be 'particularly reprehensible when they lead to support candidates recognized by all as mediocre and it has happened that national groups of the Permanent Court of Arbitration let the government authorities know. In one case, a group even collectively resigned for this reason'.⁶ Many CVs of nominated candidates for the ECtHR are not of 'Nobel prize winning quality'⁷ while the recent, all-too-public spat over who would preside the *Gbagbo* appeal raises the issue of competence of judges (either as a genuine concern or as a pretext).⁸ It cannot go unnoticed either that the ongoing negotiations in the UN Commission on International Trade (UNCITRAL) on investor-State dispute settlement reform concern, among other things, the competence of arbitrators in connection to a perceived "pro-investor" bias.

Due to the sensitivities involved, legal scholarship infrequently addresses issues of competence of international judges in international law.⁹ This is despite the fact that expertise, background and competence are instrumental when discussing the legitimacy of international courts, issues of interpretation of international law or the difficulties arising from the so-called fragmentation of international law. Not many ask directly the question of who is called upon

⁵ Thirlway (n 2) 206. See also R. Kolb, *The International Court of Justice* (Hart Publishing, 2013) 112.

⁶ Institut de Droit International, 6th Commission, Resolution on *The Position of the International Judge*, 9 September 2011 (Rapporteur: G. Guillaume; Membership: M. Bernhardt, Dame R. Higgins, M. Kirsch, Sir E. Lauterpacht, M. M. Makarczyk, M. Rangel, T. Meron, O. Vicuña, R. Ranjeva, G. Ress, S. M. Schwebel, C. Tomuschat, T. Treves, L. Wildhaber), deliberations in *Annuaire de l'Institut de Droit International*, Séssion de Rhodes, volume 74, 15-17, available at http://www.idi-iil.org/en/sessions/rhodes-2011/?post_type=publication.

⁷ J. Hedigan, 'The Election of Judges to the European Court of Human Rights', in M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Koninklijke Brill NV, 2007) 235, 241. Flauss also noted that as of 2000 (when the first election of judges after the entry into force of the 11th Additional Protocol took effect) 'almost one third of the candidates found it impossible to mention any human rights related activity worthy of the name in their CVs'; J.-F. Flauss, *Analysis of the Election of the New European Court of Human Rights* as reproduced in International Centre for the Legal Protection of Human Rights (Interights), *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, 2003 (this is a study prepared by Professor Dr Jutta Limbach, Professor Dr Pedro Cruz Villalón, Mr. Roger Errera, The Rt. Hon. Lord Lester of Herne Hill QC, Professor Dr Tamara Morshchakova, The Rt. Hon. Lord Justice Sedley and Professor Dr Andrzej Zoll) 73, available at <http://www.familieslink.co.uk/papers/appendix%20%20interights%20report.pdf>.

⁸ Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (Appeals Chamber), Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the oral decision of Trial Chamber I taken pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15 OA14, 18 January 2019, available at <http://www.legal-tools.org/doc/a97417/pdf/>; *ibid*, Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza, available at <http://www.legal-tools.org/doc/558552/pdf/>. K. J. Heller, *The ICC and Appeals Division Presidents Defend the Presiding Judge Decision*, Opinion Juris, 22 January 2019, <http://opiniojuris.org/2019/01/22/the-icc-and-appeals-division-presidents-defend-the-presiding-judge-decision/>.

⁹ P. Sands, 'Global Governance and the International Judiciary: Choosing Our Judges' (2003) 56 *Current Legal Problems* 481, 484.

to interpret international law and decide international disputes and whether one's expertise has an impact on these exercises.¹⁰

This paper explores the meaning and evolution of the statutory requirement 'recognised competence in international law'.¹¹ The discussion compares across diverse international courts and (quasi)adjudicative bodies, namely the ICJ, the PCA Specialised Panel on Natural Resources and/or Environment-related disputes, the ITLOS, the ICC, investor-State arbitral tribunals, the WTO AB, the ECtHR, the future African Court of Justice and Human Rights, and the Caribbean Court of Justice. Contextual and institutional differences among these courts should not be disregarded but patterns among seemingly unexpected quarters of international adjudication need to be identified and discussed.

The recognised competence in international law has evolved from a craft to be learned up to a disciplinary category of expertise encapsulating today the force of specialisation and the pressing need to retain an overall grasp of international law. Three core elements intrinsic in the competence in international law may be discerned. First, the expert knowledge of international law. Second, the overall grasp of international law and the ability to forge connections between different areas therein. Third, the inclinations and disciplinary biases that come along with one's training and background in international law. The analysis shows how States leverage competence in international law against competence in specialised areas of international law when forming the composition of an international court and, in doing so, it unpacks the underpinning politics of the otherwise objective and apolitical expertise requirements. One may start with the assumption that parties ask judges and arbitrators to put aside biases and, on the basis of their neutral and objective expertise, to apply the facts of a case to the applicable law.¹² However, each particular sub-discipline of international law, including public international law, sees different things, worries about different things, brings in different solutions to differently defined problems.¹³ Judges too are conditioned to the politics of their expertise.

Following the Introduction, Part 2 of the paper discusses the evolution of 'recognised competence in international law' as an individual requirement for nomination and election. The

¹⁰ E. Voeten, 'International Judicial Behavior', in C. P. R. Romano, K. J. Alter and Y. Shany (eds.), *The Oxford Handbook on International Adjudication* (OUP, 2014) 550, 562-563.

¹¹ Personal qualities of nominated individuals, such as high moral standing, integrity or independence, or issues of representation in the composition of a court are not addressed in this paper.

¹² S. D. Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA J. Int'l. & Comp. L.* 499, 505-507.

¹³ D. Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' [2001] *EHRLR* 463, 478-479. M. Prost, 'The Division of Expert Labor in the International Law Discipline: Genealogies of Fragmentation' (2011) 105 *ASIL Proc* 127; S. Puig, 'Blinding International Justice' (2016) 56 *Va. J. Int'l L.* 647, 660.

categories of *recognised competence* and *recognised jurisconsults* were essentially invented as forms of expertise and professionalism at a particular historical conjuncture. Article 2 of the ICJ Statute forms the prototypical provision upon which States based the competence requirements of judges for most international courts. The discussion re-examines the relevance of two distinctions grounded on Article 2 which are related to the construction of the meaning of recognised competence in international law: on the one hand, the distinction of the recognised jurisconsults from individuals who possess the qualifications required in their respective countries for appointment to the highest judicial offices and, on the other hand, the distinction between international legal scholars and diplomats. These two distinctions will be revisited when addressing other international courts.

Part 3 of the paper turns to demonstrate how competence in international law is leveraged by States in the composition of a body in order to steer a given court toward a specific direction. In certain contexts, it may be easy to identify (at least on paper) the way in which States introduce requirements regarding specialised expertise in international law and respectively leverage competence in international law. These are instances in which States design new expertise requirements some of which contain detailed criteria for the combination of required expertise(s) in public international law and other areas therein. In other contexts, even if the relevant statutory requirements of many courts/bodies date back decades, there are informal developments indicating the choices of States.

The practice of States manifests that the absence/presence of international law expertise in/from the bench is leveraged in different ways serving different interests. Competence in international law is not welcome in the WTO AB in order to retain the WTO related rights and obligations as self-contained as possible from international law; conversely, expertise in international law is being (re)introduced in investment arbitration to side-line the influence of investment law expertise. Competence in international law is also used to mitigate any negative implications of specialised expertise, such as preventing the ECtHR from becoming a “militant” human rights court. However, it needs to be stressed that States see the recognised competence in international law not only as a form of expert knowledge but also as the intellectual qualities, skills, inclinations and professional biases that come along with the professional background(s) of international lawyers. One may argue that, in certain contexts, States rely upon these skills and inclinations more heavily than on the element of expert knowledge. For example, there is evidence to support that judges/arbitrators with public international law expertise are more inclined toward according a broad margin of appreciation

to national authorities (e.g. ECtHR) or accommodating public interest and policy space of States (e.g. investor-State arbitral tribunals).

The paper concludes by sketching out a profile of the species of the recognised jurisconsults in international law and what it is expected of them. Certain aspects of this profile go against conventional wisdom whereas other aspects confirm what is generally accepted. States' practice does not cease to surprise with novel designs in statutory requirements concerning the expertise of judges or with introducing old designs in unexpected quarters of dispute settlement. The composition of an international court is conditioned to what States expect of it. In certain instances, one may see flaws, failings or room for improvement but States see conscious choices serving specific interests and competence in international law is another tool at their disposal.

2. The Evolution of the Recognised Competence in International Law as an Individual Requirement for Nomination and Election

2.1 Inventing 'Recognised Competence' and 'Recognised Jurisconsults' in International Law

Since 1899, when the Permanent Court of Arbitration was established, State parties select four persons 'of known competency in questions of international law' to be included in a list of Arbitrators.¹⁴ The expertise requirement ('known competency') does not refer directly to international law but rather to *questions of international law*. In 1899 the solidification of international law as a discipline was still work-in-progress and international law was relatively undeveloped.¹⁵ 1907 marks the establishment of the short-lived but novel Central American Court of Justice - the first permanent (on a regional basis) international court enjoying compulsory jurisdiction.¹⁶ The five justices had to be 'selected from among the jurists who possess the qualifications which the laws of each country prescribe for the exercise of high judicial office, *and who enjoy the highest consideration, both because of their moral character*

¹⁴ 1899 Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) (1907) 1 *AJIL* 103, Article 23 (emphases added). See also <https://pca-cpa.org/en/about/structure/members-of-the-court/>.

¹⁵ J. G. Merrills, 'The Contribution of the Permanent Court of Arbitration to International Law and to the Settlement of Disputes by Peaceful Means', in P. Hamilton et al (eds.), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution* (Kluwer Law International, 1999) 3.

¹⁶ General Treaty of Peace and Amity (adopted 20 December 1907) **206 CTS 72** (adopted by Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica); Convention for the Establishment of a Central American Court of Justice (adopted 20 December 1907) (1908) 2 *AJIL Supplement* 231; Regulations of the Central American Court of Justice (1914) 8 *AJIL Supplement* 179.

and their professional ability’ (emphases added).¹⁷ The Central American Court was entrusted with a distinctively broad material and personal jurisdiction and it was authorised to rely on principles of international law.¹⁸ Despite this, judges were not required to have a known competence in international law but to enjoy, in general, the highest consideration of their professional ability. Persons of known competence (PCA formulation) or jurists who enjoy the highest consideration of their professional ability (Central American Court of Justice formulation) are the predecessors of the concepts of *recognised competence* and *jurisconsults* in international law.¹⁹

The 1920 Statute of the PCIJ, whose formulation regarding the individual requirements for nominated judges was left intact when drafting the ICJ Statute, essentially invents the recognised *jurisconsults* in international law as a new form of expertise.²⁰ The invention of the international law expertise took place against the background of the scientification of legal knowledge in the second half of 19th century and the emergence of the Geneva-based knowledge networks (e.g. League of Nations, International Labour Organisation).²¹ The precise qualifications that needed to be fulfilled by members of the PCIJ were a point of contention.²² Should existence of a *specific* province of international law - one distinct from politics - be recognised at a point in time that law and diplomacy were not separated?²³ Interestingly, it was decided to deviate from the Central American Court of Justice’s formula and to lean closer to the PCA formulation by introducing the recognised *jurisconsults* in international law.

2.2 Compartmentalising between National Judges and Scholars: Still Relevant?

Common Article 2 of the PCIJ and ICJ Statutes draw the distinction between individuals who possess the qualifications required in their respective countries for

¹⁷ Court Convention, Article VI.

¹⁸ Court Convention, Articles I, II, XXI, XXIII; Court Regulations, Article 16.

¹⁹ For discussion A. Vauchez, *The International Way of Expertise. The First World Court and the Genesis of Transnational Expert Fields*, Robert Schuman Centre for Advanced Studies Global Governance Programme, Working Paper 2014/80, 8; F. Baetens, ‘First to Rise and First to Fall: The Court of Cartago (1907-1918)’, in I. de la Rasilla and J. E. Viñuales (eds.) *Experiments in International Adjudication: Historical Accounts* (CUP, 2019) 211.

²⁰ Vauchez (n 19) 3. Article 2 PCIJ Statute provides 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 appointment to the highest judicial offices, or are *jurisconsults* of recognized competence in international law’; League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920.

²¹ *Ibid.*, 5-7. See also A. Orford, ‘Scientific Reason and the Discipline of International Law’ (2014) 25 *EJIL* 369.

²² Vauchez (n 19) 8-13.

²³ *Ibid.*

appointment to the highest judicial offices *and* those who are jurisconsults of recognised competence in international law. The compartmentalisation between these two categories envisages two different professional profiles and it serves a twofold aim. First, the two alternatives intended to reconcile the preference in civil law jurisdictions for the appointment of non-judges as international judges, and the preference of the common law system for national judges.²⁴ Second, this distinction aimed at retaining a balance between the judicial and scholarly elements on the bench.

The absence of the judicial element from the PCIJ/ICJ benches was a recurring concern. During the discussions in the Informal Inter-Allied Committee on the Future of the PCIJ it was suggested that a certain balance should be maintained between those judges possessing previous general judicial experience (then underrepresented) and those having a specialised knowledge of international law.²⁵ Subsequently, in 1928, Sir Cecil Hurst, while working as the principal legal adviser to the British Foreign Office, shared the criticisms made upon the PCIJ that ‘it contains too many professors’.²⁶ The difference of views on what the optimal composition was of the PCIJ bench was conditioned to the fact that international law started to grow into a solid discipline but it was still a specialised subject. International law was treated as a subject that it may have ‘pretty wide ramifications, [but] one which can always be learnt up’²⁷ and, hence, a national judge would have presumably been able to “catch up” with the international law specificities of a dispute. In light of the contemporary widening and specialisation of international law this presumption does not seem to be valid today.

Although it is generally accepted that national judges and international law scholars bring different qualities and skills on the bench,²⁸ one needs to ask the question of whether this compartmentalisation between judges and scholars is losing its relevance today - at least with regard to the ICJ. The number of national judges on the ICJ bench has significantly decreased.²⁹

²⁴ ‘Presentation by Professor 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: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff Publishers, 1997) 166, 167; R. Mackenzie et al, *Selecting International Judges: Principles, Process, and Politics* (OUP, 2010) 15. See also Vauchez (n 19) 14.

²⁵ Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 10 February 1944, reproduced in (1945) 39 *AJIL Supplement* 1, para. 118 See also K. J. Keith, ‘International Court of Justice: Reflections on the Electoral Process’ (2010) 9 *Chinese JIL* 49, 64.

²⁶ As quoted in Keith (n 25) 62. *Cf ibid.*, 63.

²⁷ Letter to Viscount Simonds from Selwyn Lloyd, 25 May 1954, British Foreign Office 3711/112419/255/38, as quoted in Sands (n 9) 491-492. This was stated when Professor H. Lauterpacht QC was being considered as a nomination for a judge at the ICJ. Different views existed supporting either the position to nominate *any* person in the country who has the greatest qualification in the field of public international law or the position that the nomination should concern a *British* (by origin and not naturalisation) judge.

²⁸ Mackenzie et al (n 24) 52-57.

²⁹ Keith (n 25) 65.

Since 1966 there have been no elected national judges (except perhaps Weeramantry)³⁰ and, of course, the recently elected judge Dalveer Bhandari. The lowering of the number of national judges is also explained by the growing trend of recirculating international judicial experience across different benches. For example, as far as the ICJ is concerned, presently seven out of fifteen judges have had other international judicial experiences before getting elected to the ICJ.³¹ This comes to reinforce the existing trend during the last twenty years.³² This trend is not so strong at the ITLOS, although some circulation across benches in the area of the law of the sea is also occurring. ITLOS judges though sit at other international benches mostly after they get elected at ITLOS.³³ Judge Amerasinghe goes so far as to submit that it may be time to eliminate the first leg of the qualifications in Article 2 ICJ Statute.³⁴ However, even if one accepts that the compartmentalisation between national judges and international legal scholars is not particularly meaningful in itself with regard to the ICJ, the overall developments across international courts suggest otherwise concerning the value or even prioritisation of the judicial element in the composition of a court.

The ICJ Statute's basic "template" contained in Article 2 is adopted by other international courts, including the ECtHR, the CJEU and the (future) African Court of Justice and Human Rights: individuals need to either possess the qualifications required in their respective countries for appointment to the highest judicial offices or to be jurisconsults of recognised competence. The benches of these courts witness that the judicial element is highly appreciated. The national judiciary is the most represented category on the benches of the

³⁰ Amerasinghe (n 4) 338. See Keith (n 25) 65; M. J. Aznar-Gmez, 'Article 2', in A. Zimmermann et al (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP, 2012, 2nd ed) 233, 245-247.

³¹ These are: President Abdulqawi Ahmed Yusuf, Judge Julia Sebutinde, Judge Mohamed Bennouna, Judge Giorgio Gaja, Judge Patrick Lipton Robinson, Judge Yuji Iwasawa and Judge James Richard Crawford. Their judicial and arbitral experience varies from judges *ad hoc* at the ICJ; judges at the Special Court for Sierra Leone or the ICTY; judge at administrative tribunals (Organisation for Economic Cooperation and Development, Asian Development Bank); arbitrators in international investment disputes under the auspices of the ICSID or the PCA; arbitrator at the Court of Arbitration for Sport.

³² Of the twenty-three judges who have served at the ICJ over the last twenty years (as of 2011) ten had international judging experience: Aznar-Gmez, (n 30) 245-247. In 2012 three of the fifteen judges sitting at the ICJ bench had prior experience on another international court (Mohamed Bennouna, Antônio Augusto Cançado Trindade and Julia Sebutinde): L. Swigart and D. Terris, 'Who are International Judges?', in Romano, Alter and Shany (n 10) 619, 631.

³³ Chandrasekhara Rao and Gautier state that many ITLOS judges sit as judges *ad hoc* before ICJ cases and they are also appointed as arbitrators in tribunals constituted under Annex VII UNCLOS; see P. Chandrasekhara Rao and P. Gautier, *The International Tribunal for the Law of the Sea* (Edward Elgar, 2018) 293. Presently, however, only five out of twenty-one members of the tribunals seem to have experience on other benches (President Jin-Hyun Paik, Vice-President David Joseph Attard and Judges Jean-Pierre Cot, James L. Kateka and Alonso Gómez-Robledo).

³⁴ Amerasinghe (n 4) 338.

ECtHR³⁵ and the CJEU.³⁶ In addition to this, the Statutes of the IACtHR and ACtHPR explicitly require that nominated judges meet *both* requirements.³⁷

Many of the recently established international courts adopt different variations of the ICJ Statute's "template" by way of prioritising the judicial element. Distinctive features of their Statutes include, first, that judicial qualifications/experience are not valued on an equal basis to competence in international law (or an area thereof). For example, the 1992 Statute of the Central American Court of Justice provides that 'The Magistrates must be persons who [...] meet the conditions required in its country for the exercise of the highest judicial functions. The age requirement may be dispensed for jurisconsults of recognised competence [...]'.³⁸ For judges to be elected at the ICTY and ICTR possessing the qualifications required in their respective countries for appointment to the highest judicial offices was the only qualification whereas experience in specific areas of law is given due account in the overall composition of the Chambers and sections of the Trial Chambers.³⁹ Second, the requirement that nominees possess the qualifications for appointment is lowered from the highest judicial offices to judicial offices in general. This is the case with the List A candidates for the ICC, nominated judges at the ACtHPR and the Caribbean Court of Justice. Third, certain Statutes explicitly prioritise real bench experience instead of formal qualifications for appointment at the highest judicial offices. The ICC,⁴⁰ the ACtHPR⁴¹ and the Caribbean Court of Justice⁴² fall within this category.

³⁵ For further discussion of the composition of the ECtHR see section 3.2. Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, Final Activity Report for the Attention of the Committee of Ministers (2010-2013), Advisory Panel(2013)12EN, 11 December 2013, para. 33; Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, Second Activity Report for the Attention of the Committee of Ministers (2014-2015), Advisory Panel(2016)1, 25 February 2016, para. 42; Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, Third Activity Report for the Attention of the Committee of Ministers (2015-2016), Advisory Panel(2017)2, 30 June 2017, para. 41.

³⁶ Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 28 February 2018, 16, 21, available at https://curia.europa.eu/jcms/jcms/p1_1072665/fr/.

³⁷ The Statute of the ACtHPR includes any judicial competence as relevant and sufficient. See Article 11(1) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

³⁸ Article 9 Statute Convention of the Central American Court of Justice, 11 December 1992, available at <http://portal.ccej.org.ni/ccj/wp-content/uploads/Convenio-de-Estatuto-de-la-CCJ.pdf> (in Spanish) (translation by the author).

³⁹ Article 13 Statute ICTY; Article 12 Statute ICTR.

⁴⁰ List A candidates shall have either established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. Article 36(3)(b) ICC Statute.

⁴¹ Judicial competence is required. See Article 11(1) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

⁴² Real bench experience is required. See Article 4(10)(a) Agreement Establishing the Caribbean Court of Justice, 14 February 2011.

On the other side of the spectrum, the constitutive instruments of the PCA, ITLOS, the WTO AB, the PCA Panels for Environmental Disputes and Space-related Disputes and investment arbitration panels forged a different path: they focus only on the nominated individuals' recognised competence in international law or in the fields that may be the respective subject matter of disputes. The absence of the requirement for judicial experience or qualifications for appointment to the highest judicial offices resonates with the arbitration function of the PCA, the PCA specialised Panel and investment arbitration tribunals, although in the case of the latter, as it will be discussed in section 3.5, there is a revival of the traditional ICJ Statute "template". As for the WTO AB despite its *de facto* judicial-like function, it equally leans toward arbitration.⁴³ Finally, although the judicial function of the ITLOS is beyond any doubt, the absence of a requirement for having acquired the qualifications to be appointed at the high(est) court of one's country could be perhaps explained by the fact that the settlement of disputes concerning the law of the sea has traditionally been arbitration oriented.

2.3 International Legal Scholars, Diplomats and the New "Hybrids"

Besides the explicit compartmentalisation between national judges and recognised jurisconsults in international law, a less obvious distinction exists between the international legal scholar and the diplomat. The meaning of a jurisconsult of recognised competence in international law consists of a jurist of recognised competence and reputation in the field of public international law.⁴⁴ Particular importance is attached to the criterion of significant contribution to international legal scholarship.⁴⁵ Nonetheless, this concept has been given a liberal construction so as to include qualities which go beyond scholarship and reputation as a scholar thereby encompassing categories of international lawyers other than legal scholars. This should not come as a surprise. If during the years of the PCIJ and the early years of the ICJ, international law was still a specialised province in the making intertwining law and diplomacy, the same applies to the recognised jurisconsults in international law: they were (and are) not only international legal scholars *stricto sensu* but also legal advisors.⁴⁶ The category of legal advisors includes individuals with experience in giving legal advice to States and international and individuals who have diplomatic (legal) experience and, general speaking, UN experience in some capacity (e.g. membership of the International Law Commission, the

⁴³ M. Elsig and M. A. Pollack, 'Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization' (2014) 20 *European Journal of International Relations* 391, 402-403, 407.

⁴⁴ Amerasinghe (n 4) 338.

⁴⁵ *Ibid.*, 341.

⁴⁶ *Ibid.*, 344, 347.

sixth committee of the UNGA and diplomatic conferences preparing law-making treaties or addressing legal aspects within the broad UN agenda).⁴⁷

A difference of opinion exists as to whether this type of experience complements one's qualification as an international jurist or it may also compensate for the lack of juristic qualifications.⁴⁸ Some find the practice to elect persons who have some training in law with an acquaintance with, or exposure to, public international law not desirable.⁴⁹ In a similar spirit, Judge Kellogg, a former US Secretary of State, highlighted that the PCIJ was a court of justice and not a branch of a foreign office or a chancellery.⁵⁰ Others think that the fact 'that the former legion of international law professors has declined since the 1950s is not necessarily a cause for regret'.⁵¹ Judges, according to this point of view, must be adequately conversant with - and not necessarily trained in - public international law.⁵² The fact is that since the drafting of the PCIJ Statute, the question of the weight to be attached 'to the various factors of judicial standing, academic or forensic attainments, political, administrative or diplomatic experience in choosing the Judges of the Court is one which cannot satisfactorily be dealt with in the Statute of the Court and is left to the judgment of those responsible for the nomination and election of candidates'.⁵³

However, the distinction between international legal scholars and international legal diplomats/advisors becomes increasingly blurred. Georges Abi-Saab noted since the late nineties that a third "breed" is becoming more visible: neither the pure scholar nor the pure legal practitioner but the legal diplomat whose background usually comprises of having studied law and international law without, however, necessarily or usually attained the status of a jurisconsult. The legal diplomat practices international law not through the bar and the courts of his/her own country but in the Ministries of foreign affairs and the fora of multilateral diplomacy.⁵⁴ Therefore, besides acknowledging that other practitioners, including diplomats and civil servants, bring to the ICJ bench different and equally valuable professional qualities,⁵⁵

⁴⁷ *Ibid.*, 343; Keith (n 25) 65.

⁴⁸ Amerasinghe (n 4) 342-343.

⁴⁹ e.g. *ibid.*, 347.

⁵⁰ Keith (n 25) 63.

⁵¹ R. Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar, 2014) 108.

⁵² Kolb (n 5) 113. Rosenne kept the same view throughout the years on the meaning of the requirements in Article 2 ICJ Statute: '...is broad enough to include both persons who have had practical experience of international law in the course of a diplomatic career and those whose qualifications are for the most part academic or whose experience is more secluded'; S. Rosenne, *The World Court: What It is and How It Works* (A.W. Sythoff-Oceana Publications, 1962, 1st ed.) 52-53; and T. D. Gill, *Rosenne's The World Court: What It is and How It Works* (Martinus Nijhoff, 2003, 6th ed.) 48.

⁵³ Report of the Informal Inter-Allied Committee (n 25) para. 118.

⁵⁴ Presentation by Professor Georges Abi-Saab (n 24) 167.

⁵⁵ Kolb (n 51) 109; Mackenzie et al (n 24) 58.

it is also the case that mix career paths are becoming increasingly common for ICJ judges.⁵⁶ In this sense it may be a fact that far more foreign office legal advisers and ambassadors or foreign ministers are represented on the ICJ than previously,⁵⁷ but one needs to also consider that some of them today have this “hybrid” background. As it will be further discussed, this hybrid background is becoming visible across the benches of other international courts and bodies too.

3 Leveraging the Recognised Competence in International Law in the Composition of the Bench/Body

Competence in international law has relatively quickly evolved from a craft to be learned up to a broad category of expertise encompassing many specialisations. The multiplication of international courts reflects this force of specialisation when envisaging the material jurisdiction of courts and sometimes in the requirements for judges/arbitrators to be nominated and (s)elected. Pursuant to either formal statutory requirements or their informal development, judges and arbitrators need to be competent in international law and/or competent in specialised areas of international law, such as law of the sea, human rights, environmental law, international humanitarian law, investment law, trade law. On the one hand, one may say that the need for specialised expertise led to a progressive marginalisation of public international law expertise⁵⁸ but, on the other hand, specialised expertise increased demand for competence in public international law. Depending on the statute of a court and its jurisdiction *ratione materiae*, competence in international law may be taken as including specialised areas while also retaining its autonomy; in fact, the latter has gained pronounced value in the composition of a court/body. The discussion in this Part is divided into six sections demonstrating the different ways that competence in international law is designed to be present/absent from the composition of different courts and bodies. In doing so, the analysis tackles down the three core elements of competence in international law, as identified in the Introduction (namely the expert knowledge of international law, the ability to forge connections between different areas therein and the inclinations and overall mindset that comes along with one’s expertise in international law) and it shows how States leverage this competence with the aim to steer the body into a specific direction.

⁵⁶ Swigart and Terris (n 32) 626-628.

⁵⁷ *Ibid.*; Sands (n 31) 499. Of the twenty-three judges who have served over the last twenty years (as of 2011) only four had national judicial experience, but ten had international judging experience. Ten had experience as counsels. Almost all had governmental including diplomatic experience and a record of published scholarship. Nine had been members of the International Law Commission, see Aznar-Gmez, (n 30) 245-247.

⁵⁸ Prost (n 13) 128.

3.1 Recognised Competence in the Law of the Sea: The Fear of the Specialised Judge

Recognised competence in the field of the law of the sea is the only requirement envisaged in the Statute of the ITLOS for members to be elected at the Tribunal.⁵⁹ The absence of a reference to a requirement of recognised competence in international law caused controversy. The ITLOS case is interesting precisely because other courts are more well-known in international judicial practice for raising specialisation concerns, such as the ECtHR which is discussed in the next section. However, the ITLOS Statute is one of the first to envisage a specialised expertise for the members of the Tribunal whereas the Statutes of other courts did not (and many of them still do not). When finalising the text of UNCLOS, Ian Brownlie found the requirement for election to ITLOS to be questionable.⁶⁰ Other scholars echoed this criticism. Oda disapproved that members of the ITLOS do not need to have a background in public international law highlighting the risk for the ‘development of the law of the sea to be separated from the genuine rules of international law which [...] could lead to the destruction of the very foundation of international law’.⁶¹ However, not everybody shared these concerns.⁶²

Chandrasekhara Rao, who was one of the longest-serving judges of the ITLOS,⁶³ argues that a candidate’s competence in the law of the sea may be taken as necessarily involving competence in international law, especially since, pursuant to Article 293 UNCLOS, the ITLOS may apply not only UNCLOS but also other rules of international law not incompatible with the Convention.⁶⁴ States in practice, elect judges to the ITLOS, who have recognised competence and practical experience (preferably including litigation experience) in international law.⁶⁵ The ITLOS bench consists of ‘persons from different walks of international

⁵⁹ Article 2(1) ITLOS Statute.

⁶⁰ I. Brownlie, ‘Problems of Specialisation’, in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens, 1982) 109, 112.

⁶¹ S. Oda, ‘The International Court of Justice from the Bench’ (1993) 244 *Recueil de Cours* 9, 144-145.

⁶² H. Caminos, ‘The Growth of Specialised International Tribunals and the Fears of Fragmentation of International Law’, in N. Boschiero et al (eds.), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves* (T. M. C. Asser Press/Springer, 2013) 55.

⁶³ He was elected to the ITLOS in 1996 and he was re-elected twice. He served as president of ITLOS from 1999 to 2002.

⁶⁴ P. Chandrasekhara Rao, ‘ITLOS: The Conception of the Judicial Function’, in H. P. Hestermeyer et al (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff, 2012) 1725, 1727-1728.

⁶⁵ M. Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (2007) 22 *Int’l J. Marine & Coastal L.* 351, 367.

law and international relations⁶⁶ and it seems that it is quite similar to the ICJ bench - taking the specific subject matter of the law of the sea into account.⁶⁷

3.2 Recognised Competence in Human Rights Law *vis-à-vis* Recognised Competence in International Law: Avoiding a “Militant” Human Rights Court?

According to Article 21(1) ECHR, which stands the same since 1950, nominated judges to be elected at the ECtHR must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. The statutory requirements follow the ICJ Statute’s formulation without providing for required or desirable competence in a specific area of (international) law.⁶⁸

Significant efforts have been made in the last two decades to improve the processes of nominating and selecting judges,⁶⁹ including the upgrade of the Parliamentary Assembly’s Sub-Committee on the Election of Judges to a permanent general committee⁷⁰ and the creation of an independent body to advise the (now permanent general) committee of the Parliamentary Assembly regarding the suitability of nominated candidates (this is the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights).⁷¹ In the context of these reforms the question of what the appropriate competence and expertise for judges is holds an important role bringing to the forefront a (seemingly) competitive relationship between the recognised competence in international law and the recognised competence in human rights law.

⁶⁶ A. Yankov, ‘The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea’, in P. Chandrasekhara Rao and R. Khan (eds.), *The International Tribunal for the Law of the Sea* (Kluwer Law International, 2001) 33, 43.

⁶⁷ Yankov writes that (as of 2011) ‘out of twenty-one Judges fourteen are professors of international law, some of them with special qualifications and experience in the law of the sea. About eight held leading diplomatic positions or were senior officials in their governments. About six judges were heads or depute heads of legal offices of their respective foreign ministries. About fourteen judges took part in the Third UN Conference on the Law of the Sea in their capacity of heads or members of national delegations. Two Judges were members of the ILC and seven are members of the Institute of International Law’; *ibid.*, 42-43.

⁶⁸ The provision requires qualifications required for appointment to high (and not the highest) judicial offices.

⁶⁹ See W. A. Schabas, *The European Convention on Human Rights – A Commentary* (OUP, 2015) 650-654.

⁷⁰ There are two phases to the election process for judges at the ECtHR: first, the national selection procedure, in which each State party chooses a list of three qualified candidates and, second, the election procedure by the Council of Europe’s Parliamentary Assembly following the advice by a parliamentary committee on the qualifications of these candidates.

⁷¹ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, para. 25; Committee of Ministers, Resolution 26/2010, CM/Res(2010)26, 10 November 2010 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. The Panel has already found in numerous instances that the candidates were not sufficiently qualified for nomination; see ECtHR Advisory Panel 1st Activity Report (n 35) paras. 38-42; ECtHR Advisory Panel 2nd Activity Report (n 35) paras. 49-56; ECtHR Advisory Panel 3rd Activity Report (n 35) paras. 47-53.

It may come as a surprise that former judges and registrars of the ECtHR as well as academics criticise the level of competence and expertise in human rights of nominated and/or elected judges. Former Judge Hedigan opined that many CVs of nominated candidates are not of ‘Nobel prize winning quality’.⁷² According to Flauss, as of 2000 (when the first election of judges after the entry into force of the 11th Additional Protocol took place), almost one third of the candidates found it impossible to mention any human rights related activity worthy of the name on their CVs.⁷³ In 1999 the Parliamentary Assembly of the Council of Europe brought to the spotlight the issue of the judges’ competence in human rights. The Assembly noted with concern that the nominees do not always meet the ECHR criteria and it recommended that the Committee of Ministers invites member States to draw up lists of candidates by ensuring that they have experience in human rights.⁷⁴ In 2000 the Committee of Ministers took note of the Assembly’s Recommendation but it did not pass an opinion on the issue of competence in human rights.⁷⁵

Interestingly, ten years after the Committee of Ministers decided not to act upon the Parliamentary Assembly’s recommendations, the High-Level Conference on the Future of the Court stated in the 2010 Interlaken Declaration that State parties need to ensure that the selection procedure of judges includes the criterion of knowledge of public international law.⁷⁶ The 2012 Guidelines of the Committee of Ministers on the selection of candidates⁷⁷ emphasise that candidates need to have knowledge of the national legal system(s) and public international law. It was opined that although this criterion does not supersede Article 21 ECHR, a high level of knowledge in these fields should be taken as an implicit criterion. Expertise in human rights, notably the ECHR and the ECtHR’s case-law, is considered *generally advantageous - among*

⁷² Hedigan (n 7) 241. See also P. Mahoney, ‘The International Judiciary – Independence and Accountability’ (2008) 7 *The Law and Practice of International Courts and Tribunals* 313, 327; D. Kosař, ‘Selecting Strasbourg Judges - A Critique’, in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP, 2015) 120, 124.

⁷³ Flauss (n 7) 73.

⁷⁴ National procedures for nominating candidates for election to the European Court of Human Rights, Parliamentary Assembly Recommendation 1429 (1999) paras. 5.4, 6.2

⁷⁵ Committee of Ministers, Reply from the Committee of Ministers to Recommendation 1429 (1999) on National procedures for nominating candidates for election to the European Court of Human Rights, Doc. 8835 revised, 10 October 2000. Candidates for the European Court of Human Rights, Parliamentary Assembly Recommendation 1649 (2004), para. 19.2.

⁷⁶ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, point 8(a). See also Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM(2012)40 Final, 29 Mar 2012, para. II.4.

⁷⁷ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, paras. 21-25.

*other forms of legal expertise.*⁷⁸ The Advisory Panel sides with the Committee of Ministers by adopting the working presumption that a professor of European and/or public international law as well as constitutional law might normally be regarded as having competence in the field covered by the jurisdiction of the Court, even if he/she has not specialised in human rights. Nonetheless, the Panel introduces the caveat that professors in these and other fields are expected to demonstrate a real engagement during their career with questions of human rights related to their own field of main expertise.⁷⁹ Furthermore, in assessing a candidate's aptitude for exercising the judicial function at a high level 'knowledge of human rights law is only one, albeit important, component'.⁸⁰

It may be the case that the introduction of knowledge of public international law as an implicit requirement for ECtHR's judges reflects States' concerns over the significant reduce of the number of judges at the ECtHR with competence in public international law. The early compositions of the ECtHR (1959 to the mid 1980's) witnessed a high number of public international law scholars as well as international lawyers exposed to international affairs. Two prominent examples are the British judge, Gerald Fitzmaurice, who was a legal adviser in the British Foreign Office, a well-known academic and an ICJ judge before joining the ECtHR in 1973 and the Austrian judge, Franz Matscher, who led a long career in the Austrian diplomatic service before joining the ECtHR in 1977.⁸¹ International law competence accompanied by diplomatic background continued to be well represented among judges elected in 1998 but between 1999 and 2011 the number of these judges dropped.⁸² Overall, the last two decades judges with international law background have been reduced causing regret among international law quarters.⁸³ However, there are reasonable reasons of why this happened.

First, as is the case with most international courts in the early stages of their functioning, States generally prefer to nominate and elect individuals who are exposed to and, even trained in, international affairs and diplomacy (or participated in the negotiations of the treaty which is under the supervision of said court).⁸⁴ The early benches of the ECtHR confirm this

⁷⁸ Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, Committee of Ministers, Resolution 44/2012, CM(2012)40-final, 29 March 2012, as amended by Committee of Ministers, Resolution 44/2014, CM/Res(2014)44, 26 November 2014, para. 4.

⁷⁹ ECtHR Advisory Panel 2nd Report (n 35) para. 45.

⁸⁰ *Ibid.*, para. 36.

⁸¹ E. Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 *International Organization* 669, 687.

⁸² These included Ineta Ziemele, David Thór Björgvinsson, Mark Villiger, Işıl Karakaş, and Ledi Bianku.

⁸³ Institut de Droit International, Deliberations on the Resolution on *The Position of the International Judge* (n 6) 87. After 2011 there are, among others, Helen Keller, Linos-Alexander Sicilianos (currently serving as the president of the Court), Erik Møse, and Iulia Motoc; see Kosař (n 73) 147.

⁸⁴ This was the case with the composition of the PCIJ and the early compositions of the ICJ (see section 2).

tendency.⁸⁵ Yet in the course of developing human rights law, reinforcing the authority of the ECtHR as well as judicialising the ECHR system, fewer international lawyers sat on the ECtHR's bench. Second, one needs to bear in mind that from 1959 to the mid 1980's human rights law did not exist as a specialised area and, accordingly, there were very few recognised experts in this area. In contrast, today we have a well-developed *European* human rights law as a distinct sub-area of international law and many recognised jurists therein.⁸⁶ Consequently, the force of specialisation had its impact on the composition of the ECtHR's bench. Third, individuals with different professional backgrounds found their way on the ECtHR bench, such as civil servants/governmental officials or practitioners; their number is relatively small but it is still notable.⁸⁷

Although the reduce of the number of judges with recognised competence in public international law remains a fact that should not be disregarded, it is curious that States insist on introducing an implicit expertise requirement concerning high level knowledge of public international law while not treating human rights law expertise on an equal footing. To be clear, human rights law and international law expertise reflect complementary needs of the ECtHR's bench. International law has, and should have, a substantial weight in the composition of the bench. Such background and expertise are necessary in order to adequately international law questions before the Court. Even if the ECtHR's jurisdiction *ratione materiae* is restricted to the interpretation and application of the ECHR, the applicable law may be broader and, in many instances, the court has to address a number of (incidental) questions in order to decide a case, as is the case with other international courts too.⁸⁸ Such questions include general issues of international law (e.g. jurisdiction, responsibility of states, interpretation of treaties, implementation of UN Security Council resolutions, state immunity) or the interaction of the ECHR with other treaties and/or specialised areas of international law (e.g. international humanitarian

⁸⁵ M. R. Madsen, 'The Legitimation Strategies of International Judges - The Case of the European Court of Human Rights', in Bobek (n 73) 259, 271-272.

⁸⁶ *Ibid.*, 278.

⁸⁷ Traditionally, the breakdown of professional backgrounds of ECtHR judges is as follows: law professors are the second biggest group of individuals following members of the national judiciary who lead the way and, finally, senior officials and diplomats who are less well represented on the bench comparing to its early years. See ECtHR Advisory Panel 2nd Report (n 35) para. 50; ECtHR Advisory Panel 3rd Report (n 35) para. 49. Flauss (n 7) 81-82. See also N. Valticos, 'Quel Juges Pour la Prochaine Cour Européenne des Droits de l'Homme?', in *Liber Amicorum Marc-André Eissen* (L.G.D.J./Bruylant, 1995) 415, 421-422.

⁸⁸ For the ITLOS see Wood (n 66) 353; T. A. Mensah, 'The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes', in Rao and Khan (n 67) 21, 30; L. Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', in A. Del Vecchio and R. Virzo (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer, 2019) 383.

law, the law of armed conflict, or the law of the sea).⁸⁹ Consequently, the indispensable value of public international law as a competence among judges at the ECtHR consists of, first, addressing international law issues relevant to the cases and, second, placing and developing human rights law and the ECHR within the corpus of international law and other areas therein.⁹⁰

There is, however, a third facet of the competence in international law that may explain more convincingly why States insist on this expertise requirement not only as a factor when nominating and electing judges but as a formal, implicit criterion when electing judges. In the eyes of member States, competence of a judge in international law is also associated with a certain grasp when deciding cases. Madsen identifies this as the grasp of individuals who are exposed to international affairs enabling the ECtHR to contextualise cases within international affairs and ‘move fairly easily between law and politics’.⁹¹ Such a grasp also brings along the receptiveness to accord a considerable margin of appreciation to States in specific cases brought before the Court. In this sense, competence in international law is also employed by States as a specific tool to control the bench from turning into a “militant” human rights bench.⁹²

3.3 The WTO Appellate Body: Keeping International Law Expertise Unwelcome in Order to Retain the WTO System Self-contained from International Law

The WTO Appellate Body (WTO AB) is composed of seven persons who are appointed to a four-year term. Their appointment is subject to a decision by the DSB by consensus.⁹³ Nominated individuals shall be persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements.⁹⁴ The Preparatory

⁸⁹ E.g. A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (OUP, 2018); Kosaf (n 73) 147-149.

⁹⁰ This also relates to the so-called “human rightism”, a term coined by Allain Pellet. He identifies two specific issues: first, believing that a particular legal technique belongs specifically to human rights and, second, that human rightists tend to treat emerging trends or aspirations as legal facts; A. Pellet, ‘*Human Rightism*’ and *International Law*, Lecture delivered on 18 July 2000, United Nations, Geneva, 5. This is a concern pertinent in other contexts and bodies of international law too, including international economic law or the law of the sea; *ibid.*, 14.

⁹¹ See also Madsen (n 86) 271-272, 276.

⁹² *Ibid.*, 276-278.

⁹³ The decision by the DSB to appoint Appellate Body members could be made on the basis of a proposal formulated jointly, after appropriate consultations, by the Director-General, the Chairman of the DSB, and the Chairmen of the Goods, Services, TRIPS and General Council; Decision Establishing the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1 (dated 19 June 1995) para. 13.

⁹⁴ Article 17(3) WTO Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement.

Committee to the decision to establish the WTO AB stressed that the expertise should be of a type that allows the WTO AB members to resolve ‘issues of law covered in the panel report and legal interpretations developed by the panel’.⁹⁵ Consequently, persons of recognised authority with expertise in law and not just international trade or the content of the WTO treaties are essential in the composition of the WTO AB.⁹⁶ That being said, the WTO AB nomination process progressively became more politicised and the absence of international law expertise from the WTO AB, in particular, is instrumental, in this regard (among other factors).⁹⁷

The WTO Handbook states that WTO AB members have thus far been university professors, practicing lawyers, former government officials or senior judges⁹⁸ but the story is more nuanced. The AB members’ trade policy experience in their capacity as former State representatives and their overall familiarity with/knowledge of the WTO system are highly valued. More than half of the AB members are former government officials. Practitioners and academics are more or less of equal number, and without a doubt a minority across all appointments to the AB.⁹⁹ Even though the expertise of the AB members should allow them to resolve issues of law, three of the twenty-five members appointed as of 2015 (12%) have no law degree.¹⁰⁰ In general, academics and judges do not get the red carpet on their way to nomination or selection to the AB,¹⁰¹ but there is something particularly not welcoming about a candidate’s competence in public international law.¹⁰² The selection of Georges Abi-Saab in 2000 serves as a notable exception.

Member States select WTO AB members who are prone *not* to use international law and *not* to engage with forms of “judicial activism” which are partly linked to international law too.¹⁰³ The choice not to have AB members who have a recognised competence in, or a good knowledge of, international law is obvious not only from the absence of such competence across all appointments to the AB but also from the screening interviews of potential nominees

⁹⁵ Decision Establishing the Appellate Body, Recommendations by the Preparatory Committee (n 94) para. 5.

⁹⁶ R. Howse, ‘The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power’, in T. Cottier and P. C. Mavroidis (eds.), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press, 2003) 28, 35.

⁹⁷ Elsig and Pollack (n 43) 391.

⁹⁸ WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (CUP, 2017, 2nd ed.) 32.

⁹⁹ L. Johannesson and P. C. Mavroidis, ‘Black Cat, White Cat: The Identity of the WTO Judges’ (2015) 49 *Journal of World Trade* 685, 692; J. Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus’ (2015) 109 *AJIL* 761, 801.

¹⁰⁰ Pauwelyn (n 100) 786.

¹⁰¹ Only four of the twenty-five had any prior court experience as judges; see J Pauwelyn (n 100) 786, 801. Elsig and Pollack (n 43) 402-404, 407-408; Johannesson and Mavroidis (n 100) 692;

¹⁰² Elsig and Pollack (n 43) 402-404, 407-408; Johannesson and Mavroidis (n 100) 692; Pauwelyn (n 100) 801.

¹⁰³ Elsig and Pollack (n 43) 405.

or nominees. Certain States make sure to ask nominees many and concrete questions about the role of international law in the WTO and the interpretation of the WTO covered agreements.¹⁰⁴ More specifically, States are interested in the AB members not using international law, to the extent possible, and not drawing connections between WTO and other bodies of law or the practice of other international bodies. Two prominent examples illustrate these points.

The first example consists of the highly contested matter of the interpretative use of other international law to construe States' rights and obligations under the WTO. Many member States are adamant regarding the non-consideration of other international law/obligations in the WTO dispute settlement system.¹⁰⁵ Overall, the WTO AB keeps a very reserved attitude towards the relevance and weight of non-WTO law in the WTO legal order.¹⁰⁶ Other agreements are employed either as means of interpretation or as a means to establish a wide agreement on issues of fact which may be relevant to a dispute.¹⁰⁷ Non-WTO law is mostly used as factual information or to support an interpretation already reached by the WTO AB.¹⁰⁸ The WTO AB's approach is characteristic with regard to the pronounced emphasis on the ordinary meaning of the text by using dictionaries and without any active engagement with the contextual elements of the WTO covered agreements (Article 31(2), (3) VCLT).¹⁰⁹ The second example concerns the severely criticised by States WTO AB's position that WTO panels have the power to accept and consider *amicus curiae* briefs from non-governmental organisations.¹¹⁰ Among others, the US is firm in discouraging the WTO AB from taking international law and the practice of other bodies into account when answering procedural

¹⁰⁴ As well as the “judicialisation” of the system (e.g. the role of precedent and the expression of dissent opinions attached to WTO AB reports); Elsig and Pollack (n 43) 406, 408-409.

¹⁰⁵ WTO DSB, Special Session, ‘Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding - Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement’, Communication from the United States, TN/DS/W/82, 24 October 2005.

¹⁰⁶ *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, Appellate Body Report, WT/DS316/AB/R, 18 May 2011, paras. 845-855.

¹⁰⁷ M. Matsushita et al, *The World Trade Organization – Law, Practice, and Policy* (OUP, 2015, 3rd ed.) 78-79. An example is the interpretative use of multilateral environmental agreements in order to establish whether a species is endangered or whether certain resources are exhaustible; see *US-Shrimp*, Appellate Body Report (AB-1998-4), WT/DS58/R, 12 October 1998, paras. 124-130. Another example is the use of WHO agreements to establish the toxicity of asbestos and its seriousness as a public health challenge; see *EC-Asbestos*, Appellate Body report (AB 2000-11), WT/DS135, AB/R, 12 March 2001, paras. 124-135.

¹⁰⁸ Matsushita et al (n 107) 79; A. Lang, ‘The Judicial Sensibility of the WTO Appellate Body’ 27 (2016) *EJIL* 1095, 1100-1101.

¹⁰⁹ Matsushita et al (n 107) 81.

¹¹⁰ *US-Shrimp*, WTO AB (n 107) para. 104. Matsushita et al (n 107) 99-100.

questions: ‘such consideration is not a question of interpreting a covered agreement in accordance with public international law’.¹¹¹

3.4 Investor-State Dispute Settlement Reform: International Law Expertise as the New “Pro-State” Bias?

This section discusses how and why public international law expertise is gaining relevance and, in fact, a prominent position when selecting arbitrators in investment disputes. The discussion first sets out the scene by briefly recapping certain recent developments in international investment law and policy in order to provide the necessary context. The analysis then proceeds to explain what the expertise of the small investment arbitration community is and the interests served by introducing the competence in international law as a mandatory requirement for selecting arbitrators. Expertise in public international law is being presented by States as part of the solution to the (perceived) “pro-investor” bias problem among arbitrators and it is used to leverage or even side-line expertise in other areas of law. In this way, international law expertise introduces a new, *de jure* “pro-State” bias and it falls short of grasping the contemporary needs of investment arbitration.

3.4.1 Setting Out the New Scene in International Investment Law and Policy

International investment law and policy are in a state of flux. Recurring concerns involve inconsistencies among awards by investment tribunals and the absence of mechanisms to ensure correctness and/or consistency of the awards;¹¹² increasing costs for the resolution of disputes; insufficient regard by some arbitral tribunals to the host state’s right to regulate; and charges of (perception of) “pro-investor” bias.¹¹³ Following a first wave of backlash toward existing institutions and dispute settlement mechanisms,¹¹⁴ many States have found their way

¹¹¹ WTO DSB, Special Session, ‘Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding - Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement’, Communication from the United States, TN/DS/W/82, 24 October 2005.

¹¹² For three examples of inconsistent annulment rulings: *Sempra Energy Int'l. v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007; *Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *CMS Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 14 ICSID Rep. 152 (2009) and for discussion see J. E. Alvarez, ‘The Return of the State’ (2011) 20 *Minn. J. Int'l L.* 223, 241-250.

¹¹³ S. W. Schill, ‘Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework’ (2017) 20 *Journal of International Economic Law* 649, 650.

¹¹⁴ Certain Latin American States withdrew from the ICSID Convention (Bolivia, Ecuador, Venezuela) or threatened to do so (e.g. Argentina, El Salvador, and Nicaragua). Other countries terminated BITs with dispute settlement clauses (e.g. Ecuador, Indonesia, and South Africa) or withdrew from investment agreements (South Africa, the Czech Republic, Indonesia, Ecuador, Venezuela).

back to the drawing board. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III has been seized to discuss in an intergovernmental format possible institutional reform, an amendment/reform procedure is ongoing in ICSID and certain influential actors, including the EU, are revising and renegotiating existing investment substantive standards as well as dispute settlement mechanisms.¹¹⁵ Innovations in recently adopted or under negotiation treaties include substantive provisions clarifying that investment protection should not be pursued at the expense of public policy objectives¹¹⁶ and new standards regarding the required expertise of arbitrators.¹¹⁷

3.4.2 The (Perception of) “Pro-Investor” Bias in Investment Arbitration Practice

States are particularly concerned with the limited number of individuals who are repeatedly appointed as arbitrators in investor-State cases.¹¹⁸ This fact gives rise to a lack of diversity¹¹⁹ and (a perception of) bias.¹²⁰ The small community of arbitrators which recirculating investment arbitration panels has a specific expertise, background and experience in the field of commercial arbitration arguably affecting the interpretation of investment standards and the ability and sensibility (or lack thereof) to appreciate the weight of public interest in investor-State disputes.¹²¹

The legal expertise required of the arbitrator in investment disputes is the subject of debate¹²² and the vague qualifications prescribed in the ICSID Convention leave considerable

¹¹⁵ Schill (n 113) 653.

¹¹⁶ Many influential States have revised their Model BITs, including the US, Canada and China, with a view to accord more restricted investor rights and a more expansive list of state exceptions; Alvarez (n 112) 235-236. For specific legal techniques regarding new provisions see R. Echandi, ‘Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements’, in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements* (OUP, 2018) 3, 16-18.

¹¹⁷ A. Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *AJIL* 45, 88.

¹¹⁸ For an overview of the reforms’ discussions see A. Roberts, ‘Incremental, Systemic and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 *AJIL* 410. See also United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, UN Doc A/CN.9/935, 14 May 2018; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Arbitrators and decision makers: appointment mechanisms and related issues, Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.152, 30 August 2018; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.149, 5 September 2018.

¹¹⁹ UNCITRAL, UN Doc A/CN.9/WG.III/WP.152 (n 118) paras. 20-24.

¹²⁰ UNCITRAL, UN Doc A/CN.9/935 (n 118) paras. 53, 54, 61, 70.

¹²¹ UNCITRAL, UN Doc A/CN.9/WG.III/WP.152 (n 118) para. 31; D. Gaukrodger, and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

¹²² J. Crawford, ‘The Ideal Arbitrator: Does One Size Fit All?’ (2017) 32 *Am. U. Int’l L. Rev.* 1003, 1013.

room.¹²³ Some investment treaty specialists may have a background in, or dual specialisation with, a related area of law, such as commercial arbitration or public international law.¹²⁴ Although a few international lawyers receive important and repeated appointments, the majority of arbitrators do not have a thorough knowledge of international law.¹²⁵ Overall, the arbitral community is largely monopolised by experts with a commercial law background.¹²⁶ This may be explained by the fact that already since the drafting of the ICSID Convention it was thought that the causes of action in investor-State disputes would arise under contracts rather than treaties and, thus, the commercial arbitrators' know-how and expertise proved critical.¹²⁷ In the course of the next decades investors and arbitral institutions favoured arbitrators with a commercial background and this resulted in the commercial paradigm having a strong influence within investment arbitration.¹²⁸ States too started to regularly appoint commercial law arbitrators. As Roberts insightfully notes, since commercial law background became the mainstream, 'states [were] cognisant of the need to appoint arbitrators who will carry weight with the chair and the other party-appointed arbitrator'.¹²⁹ The fact that the ICSID roster is not 'an unmitigated success'¹³⁰ and contracting States frequently designate to the ICSID Panel of arbitrators individuals who are not properly diversified and highly-qualified did not help either with providing better alternatives for potential arbitrators.¹³¹

The ramifications of over-relying upon commercial expertise became prominent when many investment disputes started to involve significant matters of public interest, including the provision of public services or interferences with a State's action to protect broader public interests such as healthcare, the environment, human rights, or the economy.¹³² Certain States

¹²³ Article 14 ICSID Convention sets out the primary qualifications required of Panel members. Persons designated to serve on the Panels shall be persons of recognised competence in the fields of law, commerce, industry or finance. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. Article 14 ICSID Convention, Regulations and Rules, as amended and effective 10 April 2006.

¹²⁴ Roberts (n 117) 54.

¹²⁵ A. J. van den Berg, 'Qualified Investment Arbitrators? - A Comment on Arbitrators in Investment Arbitrations' in **XX**, 53, 54-55.

¹²⁶ S. R. Ratner, 'International Investment Law through the Lens of Global Justice' (2017) 20 *Journal of International Economic Law* 747, 770.

¹²⁷ Crawford (n 122) 1013.

¹²⁸ UNCITRAL, UN Doc A/CN.9/935 (n 118) paras. 72, 85.

¹²⁹ Roberts (n 117) 87.

¹³⁰ A. K. Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes', in N. Grossman et al (eds.), *Legitimacy and International Courts* (CUP, 2018) 234, 259.

¹³¹ This is due to the lack of willingness and due diligence in retaining a list of diversified and highly qualified investment arbitrators and many States' mentality that the designation is an appointment in honour of 'a long-lasting official or academic career, an official decoration or worse a "**cementario de elefantes**"; see van den Berg (n 125) 54-55.

¹³² Roberts (n 117) 65. Cf. J. Caddel and N. M. Jensen, *Which Host Country Government Actors Are Most Often Involved in Disputes with Foreign Investors?* (2014) *Columbia FDI Perspectives* No. 120; F. Baetens, 'The Rule

and scholars argue that the commercial arbitration paradigm, namely the community of arbitrators who are trained in, and experienced with, disputes of a private law nature, does not offer due consideration of public interests.¹³³

3.4.3 Public International Law Expertise: Introducing a Statutory “Pro-State” Bias?

Against this background, the arbitrators’ competence in public international law is being presented by States as part of the solution to the “pro-investor” bias problem and as highly relevant for reclaiming their sovereign policy space.¹³⁴ This is illustrated in the UNCITRAL Working Group III debates and in novel provisions inserted in recently concluded or under negotiation treaties, as they will be discussed below.

It is generally accepted that differences between the two professional groups of commercial arbitrators and public international lawyers arise not only because they draw from different sources of law but also because their training and experience give them a different outlook on the role of the actors in a dispute.¹³⁵ A public international lawyer focuses her attention on treaty parties and gives deference to the State whereas an arbitrator with a commercial (law) expertise focuses her attention on the disputing parties and equality of arms. States share this perspective and they associate the arbitrators’ competence in public international law (and public law) with the *ability* and *inclination* to duly appreciate considerations of public interest and weigh them appropriately in investment cases.¹³⁶ States are not just interested in arbitration panels being able to properly identify, interpret and apply international law, when relevant to a case. More importantly, States are interested in the abilities and certain professional inclinations (or biases, if you will) usually associated with acquiring competence, training and experience as a public international lawyer, including approaches to treaty interpretation, balancing competing interests in a certain manner and according deference to States’ policy space. In other words, competence in public international law is not just an issue of expertise but also a matter of the abilities and overall professional

of Law or the Perception of the Beholder? Why Investment Arbitrators Are Under Fire and Trade Adjudicators Are Not: A Response to Joost Pauwelyn’ (2015) 109 *AJIL Unbound* 303 who argue that in spite of some rare high-profile cases, very few ISDS claims are brought against public laws and regulations but most claims are brought against administrative or executive decisions affecting a particular investor.

¹³³ Roberts (n 117) 77.

¹³⁴ Alvarez (n 112) 226.

¹³⁵ S. W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 *EJIL* 875, 888; Roberts (n 117) 54; Crawford (n 122) 1015.

¹³⁶ UNCITRAL, UN Doc A/CN.9/935 (n 118) para. 83; UNCITRAL, UN Doc A/CN.9/WG.III/WP.152 (n 118) para. 31; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union, UN Doc A/CN.9/WG.III/WP.145, 12 December 2017, para. 32.

mindset that comes along with the expertise. Although inclinations, predispositions and areas of expertise are always significant in the party appointed system of arbitrators,¹³⁷ the explicit introduction of specific and narrow expertise requirements in investment treaties is notable.

The European Union (EU)-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore FTA, bring relevant revisions in this regard: arbitrators are appointed by State parties from a pre-established list and they need to have expertise in international law. More specifically, the CETA Joint Committee shall appoint fifteen Members of the Tribunal mandated to hear disputes concerning the interpretation and application of chapter 8 on investment.¹³⁸ The Members of the Tribunal

shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.¹³⁹

The EU-Singapore Investment Protection Agreement (IPA), which was recently adopted by the European Parliament,¹⁴⁰ prescribes identical expertise requirements for appointing arbitrators.¹⁴¹ These newly introduced requirements are to be contrasted with the expertise criteria for arbitrators appointed to resolve disputes under the trade-related chapters of the CETA and the EU-Singapore IPA. There is no reference to expertise in public international law – neither as a mandatory nor as a desirable requirement. Arbitrators are expected to have specialised expertise in the respective subject matter of the dispute and, in certain instances, experience in dispute resolution as an alternative criterion.¹⁴² This evidences that the above-

¹³⁷ D. Bishop and L. Reed, ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration’ (1998) 14 *Arbitration International* 395, 395.

¹³⁸ Article 8.27(2). On 21 September 2017, the agreement provisionally entered into force. It will enter into force fully and definitively when all EU Member States’ parliaments ratify the agreement. The full text of the CETA is available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

¹³⁹ Article 8.27(4) CETA. The same expertise requirements are applicable for appointing members of the Appellate Tribunal which is mandated to review awards rendered by the tribunal (Article 8.28).

¹⁴⁰ The EU-Singapore IPA received the consent of the European Parliament on 13 February 2019. Following this, the IPA will enter into force when Singapore concludes its own internal procedures and EU Member States ratify the agreement according to their own national procedures. The full text of the IPA is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

¹⁴¹ Article 3.9(4). The same expertise requirements apply for the six Members of the permanent Appeal Tribunal which will hear appeals from provisional awards issued by the Tribunal (Article 3.10).

¹⁴² See Articles 13.20(4), Article 23.10(3), (6) and (7), Article 24.15(6) and (7), and Articles 29.2 29.8(1) CETA. In a similar vein, see Articles 14.5, 14.20(1), (2) and (4) EU-Singapore FTA. Following the European Parliament’s consent, the FTA shall enter into force once Singapore concludes its own internal procedures and both sides complete the final formalities. The full text of the agreement is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

mentioned specific expertise requirements are tailored-made for investment disputes and that parties saw no need or desirability in transplanting them to other disputes under the same agreements.

The international law expertise requirements under the CETA and the EU-Singapore IPA create a series of new problems.¹⁴³ First, the introduction by the State parties of a pre-established roster from which arbitrators will be chosen sets up a *numerus clausus* which not only does not reflect the interests of the investors but also substantially limits the options in selecting diverse arbitrators.

Second, the mandatory requirement that arbitrators have the qualifications required in their respective countries for appointment to judicial office (or be jurisconsults with recognised competence) is a revival of the ICJ Statute’s “template” which may go dormant in specific corners of dispute settlement but it is being brought anew to life. The qualifications do not refer to the *highest* judicial office and arbitrators chosen on the basis of this requirement do not need to be judges (as long as they have the respective qualification) but it may be as well that State parties appoint judges. In fact, in a 2015 concept note, the EU communicated its intentions with regard to shifting the investment dispute settlement system towards a more traditional court like system (e.g. pre-established list of arbitrators by the State parties, creation of appellate tribunal) and specifically moving towards assimilating the arbitrators’ qualifications to those of national judges.¹⁴⁴ The background and professional mindset of judges (part of the so-called public law paradigm) elides certain aspects of the investment treaty system by disregarding the underpinning state-state treaty relationships and focusing only on the state-investor regulatory relationship.¹⁴⁵ The drafters of the CETA and the EU-Singapore IPA thought that this shortcoming may be addressed by complementing the qualification with the mandatory requirement for the arbitrator to have expertise in public international law.

Third, turning to the requirement of having expertise in public international law, it may address the need for knowledge to apply international law as contained in a given investment treaty¹⁴⁶ but it does not sufficiently deal with the need to account for the particularities of international investment law. Having downgraded the expertise in international investment law to a merely desirable requirement, it may be the case that an arbitral tribunal decides investment

¹⁴³ Cf M. N. Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (BRILL/Nijhoff, 2017) 214.

¹⁴⁴ EU Concept Paper, Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, 2015, 4, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

¹⁴⁵ Roberts (n 117) 68-71.

¹⁴⁶ 2015 EU Concept Paper (n 144) 7-8.

disputes without having in its composition an expert in investment law.¹⁴⁷ It thus becomes clear that the intention of State parties is to privilege certain aspects of the dispute by steering the framing of a dispute, the interpretation of investment standards and the balancing of investor-host State rights in a specific direction. Imposing the qualifications required in respective countries for appointment to judicial office and expertise in public international law as mandatory requirements while side-lining expertise in investment law forms a singular framework.¹⁴⁸ Such a singular mindset – originally motivated by the dissatisfaction with the perception of “pro-investor” bias of arbitrators¹⁴⁹ - comes to now introduce a different, *de jure* expertise bias. International law is being prioritised over, and leveraged against, other areas of expertise (first and foremost investment law as well as other possible specialised areas of expertise, such as human rights, environmental law, public law). The EU admits that the public (international) law expertise requirement and the respective absence of a mandatory investment law expertise do not only serve the need for interpreting a given treaty but also ‘frame the exercise of [the arbitrators’] functions and reduce drastically the risk of unforeseen interpretation of the rules on investment protection’.¹⁵⁰ In this way, States fall back to the old “toolkit”: the competences as formulated in the ICJ Statute and arbitrators who ‘can be trusted to decide in accordance with known and predictable legal principles’.¹⁵¹ Crawford notes that States ‘unsurprisingly mandated the selection of arbitrators with qualities and qualifications that the States know and trust’¹⁵² (e.g. public international law expertise, qualifications for appointment to judicial office). States see in a public international lawyer and in someone who has attained the qualifications for appointment at judicial office in their home country as the arbitrators with expertise, background and mindset who will most likely acknowledge and respect regulatory space in investment disputes. Nonetheless, this may prove to be short-sighted and counterproductive. Removing the agency and not adequately representing the interests of investors during the arbitrators’ selection can pose challenges to the independence of arbitrators in favour of the State.¹⁵³ Moreover, in the long run since the appointment of the arbitrators now revolves around States only as appointing authorities from a pre-established

¹⁴⁷ F. Baetens, ‘The European Union’s Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges’ (2016) 43 *Legal Issues of Economic Integration* 367, 372; Crawford (n 122) 1021.

¹⁴⁸ Roberts (n 117) 68-71.

¹⁴⁹ 2015 EU Concept Paper (n 144) 5.

¹⁵⁰ *Ibid.*, 7-8.

¹⁵¹ *Ibid.*

¹⁵² Crawford (n 122) 1020.

¹⁵³ *Ibid.*

numerus clausus the process could become politicised, similar to the ongoing crisis concerning the WTO AB.¹⁵⁴

Fourth, there is no indication of the necessity or desirability of representing other specialised legal backgrounds in the composition of a tribunal. Crawford cautions against a ‘single species of international lawyer’¹⁵⁵ which offers no diversity within the corpus of public international lawyers. Bringing in additional expertise enables a tribunal to decide complex questions in a more balanced fashion when States raise regulatory, human rights or environmental counterclaims against investors.¹⁵⁶ Therefore, the membership of an arbitral (or appellate) body should include a mix of expertise including public international law¹⁵⁷ as well as other relevant specialised areas.¹⁵⁸ This does not necessarily mean that, for example, human rights lawyers are more qualified to decide an investment dispute. What is rather required is to include on the arbitration panel people with diverse expertise in order to explore and develop the cross cuts of different areas of law, exchange ideas and appreciate (counter)claims pertaining to these areas.¹⁵⁹ A dual specialisation or a very good understanding of another relevant area of law is good starting point. For instance, an investment lawyer with a specialisation or a solid background in human rights law or public law; or, conversely, a human rights lawyer with background in investment issues;¹⁶⁰ or a public international lawyer with an expertise in human rights law, public health, protection of the environment.¹⁶¹ In other words, potential arbitrators should have a well-developed awareness of, and sensitivity to, identifying the relevant to the dispute issues and framing and legally appreciating them in the arbitration context. Public international lawyers are not excluded from this category but they need to show that they have the background, expertise, skills and ability to draw connections across different areas of law and construe legal regimes.¹⁶² Not all public international lawyers can do this.

Nonetheless, States’ practice thus far indicates that arbitrators’ selection may be going toward the opposite direction: a single species public international lawyer who will not necessarily be able and/or willing to draw connections with other areas of law. This may be a

¹⁵⁴ S. Puig and G. Shaffer, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ (2018) 112 *AJIL* 361, 400.

¹⁵⁵ J Crawford (n 122) 1017.

¹⁵⁶ Ratner (n 126) 770; Crawford (n 122) 1017; Roberts (n 117) 77, 78, 88.

¹⁵⁷ S. D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L. Rev.* 1521, 1623.

¹⁵⁸ Baetens (n 147) 372.

¹⁵⁹ Crawford (n 122) 1021.

¹⁶⁰ Ratner (n 126) 770.

¹⁶¹ e.g. S. Ganguly, ‘The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health’ (1999) 38 *Colum. J. Transnat'l L.* 113, 164.

¹⁶² Ratner (n 126) 775. **See also Simma.**

flaw in designing the new expertise requirements or it may be a conscious choice of States leaning toward arbitrators who will in an uncomplicated manner simply accord deference to the State.¹⁶³ Yet there is still leeway within the new expertise requirement for States to appoint individuals with a rich grasp of things: jurists of recognised competence as a general category and a broad construction of public international law expertise are able to accommodate specialised/mixed expertise and diverse perspectives.

The competence in international law requirement, in certain instances, is being replicated in different variations across new treaties whereas, in other instances, ongoing debates among States have not reached consensus on this matter. The ASEAN States as well as Australia and New Zealand agreed in 2009 to appoint arbitrators who ‘shall have expertise or experience in public international law, international trade or international investment rules’.¹⁶⁴ The renewed emphasis in public international law is present but comparing to the CETA and the EU-Singapore IPA the areas of expertise (public international law, international trade and international investment) are in the alternative and, hence, there is no rigid prioritisation – at least not on paper – between mandatory and desirable expertise. This formulation leaves more manoeuvre but it really depends on how State will put the formulation in practice when selecting arbitrators. On the other hand, the EU-Vietnam Investment Agreement provides that ‘arbitrators shall have demonstrated expertise and experience of law and international trade’.¹⁶⁵ Requiring that arbitrators have demonstrated expertise and experience of law and international trade it is a typical formulation for trade-related disputes and it does not seem appropriate for investment disputes.

In the content of the UNCITRAL Working Group III, despite the fact that many States seem genuinely concerned about addressing the arbitrators’ competence in international law, there is no consensus on how to ensure this. One view supports that there is no single solution and that, although qualifications of the decision makers are important, this particular issue does

¹⁶³ Alvarez (n 112) 258.

¹⁶⁴ Article 35(2), Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, 26 February 2009; full text of the agreement is available at https://asean.org/?static_post=asean-comprehensive-investment-agreement-cha-am-thailand-26-february-2009. Chapter 11 on Investment, Article 23(2), Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, 27 February 2009; full text of the agreement is available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/asean-australia-new-zealand-free-trade-agreement-aanzfta/aanzfta-text/>.

¹⁶⁵ Article 3.23(3). The EU-Vietnam IPA having been formally approved by the European Commission is currently being reviewed by the European Council. The full text of the agreement (authentic text as of August 2018) is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>. It is unclear why the EU and Vietnam agreed upon this variation given the common 2007 EU negotiating directives for all ASEAN States. The EU agreed a different standard of expertise for arbitrators with Singapore and Vietnam respectively.

not deserve the development of a specific tool.¹⁶⁶ The proposal to develop requirements for qualifications of arbitrators encoded in a code of conduct remains on the negotiations table.¹⁶⁷

The ICSID secretariat in a 2018 note on setting out relevant considerations for States when designating arbitrators confirmed that expertise is an issue.¹⁶⁸ Knowledge of and experience with public international law feature as one of two competence requirements in this note (alongside knowledge of and experience with international investment law). The note justifies the presence of international law expertise in the composition of a panel on the basis that many international arbitrations raise questions under public international law (e.g. State liability, attribution of conduct to a State, and principles of treaty interpretation) without of course making any reference to issues of bias. Besides this practice guidance, no changes were proposed to the rule on the qualifications of arbitrators (Article 14 ICSID Convention) in the amendment process of the ICSID Convention launched in 2016.¹⁶⁹ States do not seem willing to suggest relevant amendments to the ICSID Convention. This may be due to the fact that the discussions in UNCITRAL Working Group III are still ongoing or due to a lack of agreement among States regarding expertise requirements or because certain States prefer to address the issue of expertise of arbitrators in an *ad hoc* fashion when concluding specific trade and investment treaties with specific States.

To sum up, it remains to be seen how these developments will unfold in other trade/investment agreements and how States will decide to apply the new expertise requirement when selecting arbitrators given the fact that there is room for some flexibility.¹⁷⁰ The discussion demonstrated that the expertise in international law introduces a new bias and it is underpinned by politics. First, it is being framed as part of the solution to (perceived) “pro-investor” bias problem among arbitrators by way of side-lining expertise in investment law or

¹⁶⁶ UNCITRAL, UN Doc A/CN.9/935 (n 118) para. 88; UNCITRAL, UN Doc A/CN.9/WG.III/WP.152 (n 118) para. 36.

¹⁶⁷ UNCITRAL, UN Doc A/CN.9/935 (n 118) para. 65; UNCITRAL, UN Doc A/CN.9/WG.III/WP.149 (n 118) para. 48.

¹⁶⁸ *Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels*, ICSID Newsletter January 2018, available at <https://icsid.worldbank.org/en/Documents/about/Considerations%20for%20States%20on%20Panel%20Designations-EN%20final.pdf>.

¹⁶⁹ Contracting parties are expected to vote on the amendments in October 2019. Proposals for Amendment of the ICSID Rules - Working Paper, Volume 3, ICSID Secretariat, 2 August 2018, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf#page=152; Proposals for Amendment of the ICSID Rules, Working Paper 2, Volume 1, March 2019, available at https://icsid.worldbank.org/en/Documents/Vol_1.pdf. Only one State requested a practice note on the qualifications required for the appointment of an arbitrator. the ICSID Secretariat simply referred the State to its 2018 note on setting out relevant considerations for States when designating arbitrators. See Proposals for Amendment of the ICSID Rules, Working Paper 2, Volume 1, *ibid.*, 122.

¹⁷⁰ For an overview of FTA and other trade negotiations by the EU (updated as of May 2019) see http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

in other areas of law. Expertise in international law is further employed by States not only to ensure sound and consistent interpretations of relevant international law but most importantly to prioritise the arbitrators' inclination to give due regard to policy and regulatory space.

3.5 The Panel of Experts for Natural Resources and/or Environment-related Disputes: Specialised Expertise Makes it to the PCA?

In 2001, the member States of the PCA adopted by consensus the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA Environmental Arbitration Rules).¹⁷¹ This marks the first time (along with the subsequent 2011 Optional Rules for Arbitration of Disputes Relating to Outer Space Activities) that the PCA adopts optional rules concerning disputes of specialised subject matter.¹⁷²

In the aftermath of the unsuccessful experiment of the ICJ chamber for environmental matters,¹⁷³ the PCA Environmental Arbitration Rules attempt to address one of the main features of disputes relating to natural resources and/or the environment: their legal characterisation. The mere characterisation of a dispute as *environmental* has critical implications for a case,¹⁷⁴ including whether a given court shall have jurisdiction to hear the case, the law to be applied and the expertise required on the bench. The PCA Environmental Arbitration Rules essentially circumvent the need to characterise the dispute. Although the jurisdiction *ratione materiae* focuses on disputes relating to natural resources and/or the environment, 'the characterization of the dispute as relating to the environment or natural resources is not necessary for jurisdiction' (Article 1(1)).

Of particular interest for present purposes is the fact that the PCA Environmental Arbitration Rules make available to parties a panel of arbitrators and experts for environmental disputes. The specialised panel of arbitrators brings to the fore the crucial question of who has the relevant expertise and capacity to evaluate complex matters of environmental law, policy, and science while these intersect with other substantive areas of the law, such as trade law,

¹⁷¹ The Rules are available at <https://pca-cpa.org/en/documents/pca-conventions-and-rules/>.

¹⁷² In the past, the PCA has adopted other optional rules which pertained to the personal jurisdiction of disputes potentially brought before the PCA). See the 2012 PCA Arbitration Rules; the 1996 Optional Conciliation Rules; and the 1997 Optional Rules for Fact-finding Commissions of Inquiry.

¹⁷³ Article 26(1) ICJ Statute. In 1993 the ICJ for the first time made use of its power to establish a specialised chamber for Environmental matters. In 2006, after thirteen years of no case having been submitted to the chamber, the ICJ decided not to hold election for a bench of this chamber. See P. Palchetti, 'Article 26', in Zimmermann et al (n 30) 474, 490-491.

¹⁷⁴ P. Sands, 'International Environmental Litigation and Its Future' (1999) 32 *U. Rich. L. Rev.* 1619, 1638; D. P. Ratliff, 'The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (2001) 14 *LJIL* 887, 891.

competition law, human rights law or the law of state responsibility.¹⁷⁵ It is argued that a bench composed solely of experts in international environmental law might not fare well and that a body of judges with a mix of general and specialised expertise is preferable.¹⁷⁶ The Rules do not provide any concrete guidance regarding the expertise required.¹⁷⁷ In appointing arbitrators pursuant to the PCA Environmental Arbitration Rules, the parties and the appointing authority are free to designate persons who are not Members of the PCA or the specialised panel. Still the specialised list of arbitrators is informative for furnishing insights on the States' choices and perceptions regarding the competence and expertise required in these disputes. A good number of States has already designated members of the Panel.

Twenty-one States (as of 15 May 2019) have designated members on the list of arbitrators.¹⁷⁸ The designees may be divided into two categories. In the first category, which includes the great majority of the designees, the following profile may be described: a long-standing career in academia (professors of international law and a few of them in environmental law) who also hold positions as senior public officials or legal advisors to ministries and who have extensive diplomatic experience as being members of governmental delegations to UN conferences and negotiations on the protection of the environmental, climate change, law of the sea, trade and development. Five of the foregoing designees do not have an academic career. Four of the designees have background and experience only in public international law (one of them has a complementary strong profile on investment law). Four of the designees have experience in serving as judges/arbitrators before international courts and tribunals and one of them also served as a member of the ILC. Overall, the States' choices suggest a preference for individuals who have a hybrid background bringing together academia and policy-making and sometimes international judicial experience. It is also clear that States' have a strong preference for designating individuals with strong governmental or former governmental professional background. In terms of expertise, the great majority, if not all, have recognised competence in public international law complemented with specialised background

¹⁷⁵ T. Stephens, *International Courts and Environmental Protection* (CUP, 2009) 58-61; Sands (n 175) 1638; C. Qiong Wu, 'A Unified Forum - The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration' (2002) 3 *Chi. J. Int'l L.* 263.

¹⁷⁶ Sands (n 175) 1638.

¹⁷⁷ Nor do the Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements; see P. Sands and R. MacKenzie, *Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements*, 2001, 25.

¹⁷⁸ PCA, Panels of Arbitrators and Experts for Environmental Disputes, available at <https://pca-cpa.org/wp-content/uploads/sites/6/2017/07/Current-List-Annex-2-SP-ARB-update-20181004.pdf>. These States are: Argentina, Austria, Chile, Czech Republic, Finland, Germany, Ireland, Israel, Italy, Republic of Korea, Latvia, Madagascar, Malta, Mauritius, Netherlands, Norway, Philippines, Romania, Slovak Republic, Thailand, Viet Nam.

and knowledge in one or two areas of law, including environmental law, climate change, law of the sea, trade and development (a few have only competence in international law). The list of experts confirms that environmental claims are not raised in isolation of other international legal arguments and States overall prefer environmental law not to be compartmentalised.¹⁷⁹ Consequently, international law expertise, in this instance, is part and parcel of the designees' educational background, training and experience. Such expertise is complemented, however, in most cases, with a specialisation or strong background in other areas of international law.

The second category of designees sketches out a different profile. One designee is a national judge and no further information is provided regarding qualifications/expertise (Republic of Korea). Three States (Chile, Czech Republic and Ireland) chose to designate as Members of the Panel practitioners: they are partners at law firms working on environmental law, energy law, natural resources. One of them has a specialisation and an academic career in mining law (Chile). Philippines designated a veteran environmental and human rights scholar who has considerable policy experience. Mauritius designated a non-lawyer who is a public official with a specialisation in ichthyology and fish culture. The second category of designees may not contain a large number of experts with this profile but it may set a notable trend among States to designate practitioners with a litigation background and even a non-lawyer who could bring an inter-disciplinary perspective on board.¹⁸⁰ Therefore, compared to the profile of the first category of designees discussed earlier, in this instance we have the concurrent (small) trend of public international law background and expertise not being considered necessary/desirable.

The specialised panel of arbitrators regarding the PCA Environmental Arbitration Rules has certainly interest and potential but one should be cautious bearing in mind that, since the early history of the PCA until present time, States infrequently select arbitrators from the PCA panel of arbitrators.¹⁸¹ The precise number of disputes under the PCA Environmental Arbitration Rules is not clear from the PCA annual reports and there are no details in public about these disputes. The absence of information leaves little room to assess the use of the PCA specialised panel of arbitrators for environmental disputes and the choice of arbitrators and

¹⁷⁹ Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations, 26 October 2006, available at <http://www.icj-cij.org/files/press-releases/9/13149.pdf>; P. Sands (n 175) 1638.

¹⁸⁰ This latter choice is interesting since the non-lawyer designee could have been appointed instead on the Panel list of scientific and technical experts for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

¹⁸¹ M. O. Hudson, 'The Permanent Court of Arbitration' (1933) 27 *AJIL* 440, 443; J. J. van Haersolte-van Hof, 'The Revitalization of the Permanent Court of Arbitration' (2007) LIV *Netherlands International Law Review* 395.

their expertise in these disputes. From the little data available,¹⁸² it may be provisionally said that the PCA is gradually given the opportunity to develop relevant substantive expertise in this area.¹⁸³

3.6 Is It a Good Idea to Quantify the Recognised Competence in International Law in the Composition of a Court?

The statutory designs of recently established international courts - including specialised courts of a global scope (e.g. ICC) and regional and specialised courts (e.g. future African Court of Justice and Human Rights, Caribbean Court of Justice) – reveal a growing trend toward specifying and quantifying the recognised competence in international law in the composition of the bench. The creation of separate lists for distinct expertise (in international law) and the introduction of quantitative requirements for these lists are appealing to States. This is a way to shape the overall composition of expertise on the bench and to specify criteria concerning expertise that it may not be realistic or desirable for *all* members of the bench to have.¹⁸⁴ On the other hand, such detailed schemes providing specific quantification of the judges with competence in international law run the risk of being inflexible and hence, being rendered partly redundant in the future. It is not clear either whether, in certain instances, the number of judges on the bench who need to have competence in international law may be exaggerated - unless it is accepted that competence in international law also includes other specialised areas of international law.

¹⁸² In 2009, the PCA provided administrative support for the first two cases conducted under the PCA Environmental Arbitration Rules; see PCA, 109th Annual Report, 2009, 11 (all reports are available at <https://pca-cpa.org/en/about/annual-reports/>) One of these cases resulted in a final award dated 30 November 2010; PCA, 110th Annual Report, 2010, 14. In 2014 it is reported that there are eight disputes under the PCA Environmental Arbitration Rules and the PCA Conciliation Rules (combined) which formed 8% of the disputes pending before the PCA. Of these eight cases, it is known that one arbitration concerned a commercial contract dispute involving Asian hydroelectric power companies and a European company and another arbitration concerned an Emissions Reduction Purchase Agreement; PCA, 114th Annual Report, 2014, 9, 14-15, 16. In 2015, the parties to an arbitration brought to the PCA relating to the Kyoto Protocol's Clean Development Mechanism commenced under these rules decided to move the case to conciliation under the PCA Environmental Conciliation Rules; PCA, 115th Annual Report, 2015, 15.

¹⁸³ van Haersolte-van Hof (n 182) 413.

¹⁸⁴ Mackenzie et al (n 24) 46-47.

3.6.1 The International Criminal Court

For the purposes of election of judges at the ICC, the Statute values highly competence in international law by introducing a concrete quantitative scheme.¹⁸⁵ The Statute creates two lists of candidates. List A contains candidates with an established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.¹⁸⁶ List B includes candidates with an established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the ICC.¹⁸⁷ At the first election to the ICC, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.¹⁸⁸ The ICC Statute also requires State parties to ‘take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children’.¹⁸⁹ The List A and List B quotas are mandatory whereas the inclusion of legal expertise on specific issues is discretionary.

These fairly detailed arrangements can be explained by the challenges encountered in ensuring a fair trial as well as the politicisation of the elections ICC judges.¹⁹⁰ The two lists attempt to strike a balance between the need for judges with criminal law experience for the pre-trial and trial divisions of the ICC, on the one hand, and the need for international law experience in the appeals division, on the other hand.¹⁹¹ However, the requirement of international law expertise is contentious. The onus of the debate does not concern the question of whether the presence of international law expertise is necessary to the ICC judiciary - it is. Concerns are raised with regard to the question of whether the *specific* quantification of competence in international law (five judges from List B) reflects real needs of the ICC bench. Schabas points out that the statutory requirement was exaggerated given the influence of

¹⁸⁵ Cf. Article 13 Statute ICTY and Article 12 Statute ICTR which provide that nominated judges to be elected had to possess the qualifications required in their respective countries for appointment to the highest judicial offices. The requirement of established experience in international law alongside criminal law was not part of the requirements to be fulfilled by a nominated judge but a factor to be considered when deciding the composition of the Chambers and sections of the Trial Chambers.

¹⁸⁶ Articles 36(3)(b)(i) and 36(5) ICC Statute.

¹⁸⁷ Articles 36(3)(b)(ii) and 36(5) ICC Statute.

¹⁸⁸ Article 36(5) ICC Statute.

¹⁸⁹ Article 36(8)(b) ICC Statute.

¹⁹⁰ Wood (n 1) 362-363.

¹⁹¹ Triffterer/Ambos, *The Rome Statute of the International Criminal Court – A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed) 1220; Mackenzie et al (n 24) 46-47.

Antonio Cassese and that, in practice, international law expertise is infrequently used.¹⁹² Dov Jacobs, who is exposed to the inner workings of the ICC, recently stated that List B requirements are unconvincing and knowledge of international law should become a subsidiary criterion for the selection of judges (instead of having a separate list of candidates).¹⁹³

In this regard, the precise meaning of *international law* expertise merits clarification and some further discussion. One should distinguish between recognised competence in public international law, on the one hand, and competence in related areas of international law, on the other hand. When Allain Pellet and other members of the Institute of International Law refer to the need for recognised competence in international law, they mean predominantly general issues of international law, such as State responsibility, treaty interpretation. This form of expertise is indeed very much relevant to the ICC.¹⁹⁴ Ironically enough given the sophistication of the statutory requirements and nomination/election process dividing judges in separate lists, in the recent judgment *Jordan Referral re Al-Bashir*,¹⁹⁵ which was expected to involve difficult international law issues and which is now heavily suspicious for shortcomings, all of the judges assigned to the case were drawn from List A and there was no judge from List B with competence in international law. Moreover, it should be stressed that recognised competence in international law also refers to specialised areas of international law. Article 36 ICC Statute gears specifically toward the fields of human rights and international humanitarian law. These areas as mentioned by way of example ('such as') but the provision reads in the first place as 'established competence *in relevant areas of* international law' (emphases added). Consequently, the ICC Statute is strongly oriented also towards expertise in specialised areas of international law which are informative to the ICC bench.¹⁹⁶

The assessments of the ICC Advisory Committee from 2012 to 2017 furnish some insights on how the requirement of 'established competence in relevant areas of international law such as international humanitarian law and the law of human rights' is construed in practice by nominating States and the Advisory Committee itself. The profile of suitable nominated judges under List B strongly suggests a scholar or at least someone who also has an extensive academic and research career. Most List B nominations seem to have little judicial experience

¹⁹² W. A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (OUP, 2016) 531-532.

¹⁹³ D. Jacobs, *Some Reactions to Douglas Guilfoyle's Posts on the Troubles of the ICC*, EJIL:Talk!, 1 April 2019, available at <https://www.ejiltalk.org/some-reactions-to-douglas-guilfoyles-posts-on-the-troubles-of-the-icc/>.

¹⁹⁴ Institut de Droit International, Deliberations on the Resolution on *The Position of the International Judge* (n 6) 87 (comment by Pellet).

¹⁹⁵ ICC-02/05-01/09-397-Corr, 6 May 2019 (Appeals Chamber, Decision).

¹⁹⁶ Schabas (n 197) 531-532.

to show with certain exceptions being candidates who have served as judges at the ICTY¹⁹⁷ or constitutional courts.¹⁹⁸ This profile is in contrast to candidates under List A for whom scholarly expertise is not necessary but a strong complement to the mandatory judicial experience.¹⁹⁹ The expertise of nominees relates to international law but expertise and experience in international human rights law coupled with considerable knowledge in the fields of international criminal law and international humanitarian law seem to be the defining criteria for nomination/election.²⁰⁰ Significant research experience in human rights relating to the criminal justice system, fair trial rights, and rights of the defence is a weighty consideration.²⁰¹

Furthermore, the established competence in relevant areas of international law needs to be accompanied by extensive experience in a professional legal capacity which is of relevance to the judicial work of the ICC. Nominating States and the Advisory Committee construe *extensive experience* broadly - not necessarily working as a practising lawyer only.²⁰² Examples of how the Committee approaches this criterion as being met are: having field experience in several African countries with victims of mass violations of human rights, including violence against women and girls;²⁰³ having gained some experience in working on victims' rights in the criminal process;²⁰⁴ litigating complex criminal cases before the Inter-American Commission on Human Rights;²⁰⁵ and having been listed as counsel qualified for appointment at the ICC.²⁰⁶ Having gained a practitioner's perspective either at the national or international level is important. A practitioner's perspective at the national level for particularly well qualified nominations means, for instance, presiding relevant national expert committees;²⁰⁷ participating in the implementation of criminal law standards at the national level;²⁰⁸ or working in a legal capacity in the Ministry of Foreign Affairs.²⁰⁹ A practitioner's perspective at the international level for particularly well qualified nominations means having

¹⁹⁷ International Criminal Court - Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its third meeting, ICC-ASP/13/22, 29 September 2014, 11-12.

¹⁹⁸ *Ibid.*

¹⁹⁹ For example, *cf.* 2014 ICC Advisory Committee (n 202) 7-9.

²⁰⁰ International Criminal Court - Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, ICC-ASP/16/7, 10 October 2017, 11, 12; 2014 ICC Advisory Committee (n 202) 10-12.

²⁰¹ 2014 ICC Advisory Committee (n 202) 11.

²⁰² Mackenzie et al (n 24) 51.

²⁰³ 2017 ICC Advisory Committee (n 205) 11.

²⁰⁴ 2014 ICC Advisory Committee (n 202) 11.

²⁰⁵ 2017 ICC Advisory Committee (n 205) 12.

²⁰⁶ *Ibid.*, 11.

²⁰⁷ *Ibid.*, 11 (presiding and providing several legal opinions on human rights and criminal matters at the national level); *ibid.*, 12 (presiding the National Institution of Human Rights and Ombudsman).

²⁰⁸ 2014 ICC Advisory Committee (n 202) 11.

²⁰⁹ *Ibid.*, 12 (working as the director of Legal Affairs at the Ministry of Foreign Affairs); *ibid.*, 11 (working in relevant areas in the said Ministry).

served as legal officer at international courts;²¹⁰ having participated in relevant international expert committees;²¹¹ or having engaged in policy-making and law-making activities.²¹²

The foregoing discussion suggests that the meaning of international law expertise before the ICC is (and should be) inclusive of public international law and related areas, such as human rights and international humanitarian law. The Advisory Committee refers to the desirability of public international law expertise but the latter is considered sufficient as long as it is complemented with a specialisation in an area of international law of interest to the ICC as well as extensive professional legal experience in different capacities (e.g. field work, policy-making, litigation, participation in expert committees) which are of relevance to the judicial work of the ICC.

3.6.2 The Future African Court of Justice and Human Rights

The African Court of Justice and Human Rights will merge the Court of Justice of the African Union and the African Court on Human and Peoples' Rights into one court.²¹³ The Statute of the future African Court of Justice and Human Rights differs from the Statute of the ACtHPR with regard to the qualifications for judges to be nominated and elected. According to the present Statute of the ACtHPR nominated judges can be individuals of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.²¹⁴ In contrast, the Statute of the future African Court of Justice and Human Rights creates two separate lists of candidates: List A concerns candidates who have recognised competence and experience in international law and List B relates to candidates who possess recognised competence and experience in human rights law.²¹⁵ At the first election, eight judges will be elected from amongst the candidates of List A and eight candidates from among the candidates of list B; the same proportion of judges elected on the two lists should be

²¹⁰ The ICJ and the ICTR; *ibid.*, 10 and 11-12 respectively.

²¹¹ *Ibid.*, 11.

²¹² E.g. participation in the negotiations leading up to the Rome Statute; serving as the Ambassador to the UN; or heading a national delegation to the UN Human Rights Commission; *ibid.*, 11-12.

²¹³ Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the eleventh ordinary session of the African Union Assembly, 1 July 2008 (not in force), available at https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

²¹⁴ Article 11(1) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

²¹⁵ Article 4 Protocol on the Statute of the African Court of Justice and Human Rights (Qualifications of Judges) reads: 'The Court shall be composed of impartial and independent Judges elected 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 juris-consults of recognized competence and experience in international law and /or, human rights law'.

maintained in subsequent elections.²¹⁶ The reason that the individual requirements for electing judges at the future African Court of Justice and Human Rights changed to include international law expertise concerns is the Court's broad jurisdiction *ratione materiae* extending over disputes which relate to, among others, acts of the African Union law, the African Charter on Human and Peoples' Rights as well as any question of international law.²¹⁷ Yet, it is not clear whether the specific quantification of judges with competence in international (half the bench of the Court) is exaggerated and whether such competence when nominating and electing judges will also include specialised areas of international law which could be of relevance to the Court's work, such as international criminal law.

3.6.3 The Caribbean Court of Justice

Finally, the Statute of the Caribbean Court of Justice also presents certain interesting features amongst international courts.²¹⁸ Elected judges need to have served as a judge for at least five years and distinguished oneself in that office²¹⁹ or to have taught law for a period of at least fifteen years and distinguished oneself in the legal profession.²²⁰ The Court will be composed of the President and not more than nine other judges of whom at least three (including the President) need to possess expertise in international law, including international trade law.²²¹ Presently, the bench comprises of seven judges (including the President) two of whom have expertise in international human rights law and one has expertise in international trade law.²²²

4. Conclusions

Public international law has, and should have, a substantial weight in the composition of an international court/tribunal. The requirement for judges/arbitrators to have a recognised competence in international law can be an explicit formal requirement (e.g. ICJ, ICC, future African Court of Justice and Human Rights, new treaties on investment arbitration) or an implicit requirement (e.g. ITLOS, ECtHR). One may find also loose guidelines, such as the

²¹⁶ Article 6 Protocol on the Statute of the African Court of Justice and Human Rights.

²¹⁷ *Ibid.*, Article 28.

²¹⁸ K. Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58 *ICLQ* 671, 674.

²¹⁹ Article 4(10)(a) Agreement Establishing the Caribbean Court of Justice.

²²⁰ *Ibid.*, Article 4(10)(b).

²²¹ *Ibid.*, Article 4(1).

²²² Judges Winston Anderson, Justice Denys Barrow and Judge Andrew Burgess respectively. Their brief bios are available at <https://www.ccj.org/about-the-ccj/judges>.

2018 ICSID note setting out relevant considerations for States when designating arbitrators.²²³ The concrete quantification of international law expertise in recent statutory designs runs the risk of being proven in the future to be inflexible or exaggerated.

One needs to be cognisant of what competence in international law entails and how it may be changing. The distinction embodied in the prototypical Article 2 ICJ Statute between possessing a recognised competence in international law and possessing the qualifications required in their respective countries for appointment to the highest judicial offices seems to have partly lost its relevance, at this point in time, with regard to the ICJ bench. This conclusion cannot be transposed to other international courts which value or prioritise these qualifications and/or real bench experience. The introduction of the requirement for similar qualifications with regard to the selection of arbitrators in investment disputes evidences its revival in an unexpected quarter.

The different walks from which judges come increasingly converge. What *Abi-Saab* coined as the new breed of the *legal diplomat* becomes more mainstream. There is a strong tendency to nominate and (s)elect international law scholars who have been exposed to diplomatic affairs, policy-making, negotiating or field work relevant to the work of a court. Such exposure to the inner workings of international affairs was always welcome on the bench but it concerned some of the judges who did not necessarily have a formal training and background in international law. In contrast, at present, this hybrid background concerns an increasing number of judges and arbitrators who do have training and background in international law.²²⁴ Judges and arbitrators are likely to cross paths on different benches. The circulation of international judicial experience is a regular phenomenon and it is expected to intensify.

The analysis in the paper discerned three core elements intrinsic in the competence in international law, namely the expert knowledge of international law, the ability to forge connections between different areas therein and the inclinations and overall mindset that comes along with one's expertise in international law. This set of substantive knowledge, skills and mindset enable us to think in more concrete terms the meaning and value of competence in international law and, accordingly, test any assumptions about its contribution to the composition of a body. Expert knowledge of international law is necessary on all benches in order to adequately address international law issues relevant to the disputes brought before a

²²³ Mackenzie et al (n 24) 46.

²²⁴ Cf. Mackenzie et al (n 24) 62.

court/tribunal. A body's jurisdiction *ratione materiae* may be restricted to the interpretation and application of a treaty or a set of treaties but the applicable law may be broader and many times courts have to address (incidental) questions. This means that both the material jurisdiction of a court and the (increasingly diverse) subject matter of disputes brought before that court co-determine the expertise required in the composition.²²⁵

Competence in public international law is not just a matter of expert knowledge but also associated skills and abilities. A jurisconsult in international law is expected to help with avoiding negative implications of (over)specialisation - commonly known as “tunnel-vision” or “category blindness”.²²⁶ Judges should have and nurture a fundamental sensitivity to forging connections between areas of international law. These connections are justified by principle and by policy.²²⁷ The working presumption is that someone with competence in international law is able to bring on the bench the perspective and tools to avoid this “tunnel vision”.²²⁸ This presumption is subject, however, to having not only solid knowledge of international law but also a good knowledge of the specialised area falling under the material jurisdiction of a court/body and the skills to construct legal regimes and place a rule/treaty within international law as well as other specialised regimes.²²⁹ Not all public international lawyers have this skillset and knowledge. Even those who have a competence in “general” international law may suffer from “category blindness”.²³⁰ A single species of international lawyer offers no diversity within the corpus of public international lawyers,²³¹ even though the so-called “generalists” ‘attempt to define international law in terms that privilege the skills and attributes of [...] themselves’.²³² What is relevant for present purposes is to stress the need for diversity on the bench and dual specialisations. The strength of an international court or an arbitral panel lies in its composition and its collective intelligence.²³³ It is welcome to have a diverse representation of legal experience and specialisations in international law, as appropriate to the

²²⁵ Keith (n 25) 66-67; P. Sands, ‘Introduction and Acknowledgments’, in Mackenzie et al (n 24), xii-xiii. Cf. Mackenzie et al (n 24) 51.

²²⁶ Brownlie (n 61) 111.

²²⁷ *Ibid.*

²²⁸ A. Pellet, ‘Should We (Still) Worry about Fragmentation?’, in A. Follesdal and G. Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (OUP, 2018) 228, 240.

²²⁹ Ratner (n 126) 775.

²³⁰ Brownlie (n 61) 111.

²³¹ Crawford (n 122) 1017.

²³² Prost (n 13) 127. See also Roberts (n 117) 90.

²³³ This is a valid point both for standing courts and for party-appointment arbitrations, although the dynamics are admittedly different.

jurisdiction of a given court and/or the nature of the dispute(s).²³⁴ There is also the need for a public international lawyer to have one specialisation in a substantive area of international law relevant to a court's work or at least to be able to demonstrate a real engagement with this area. The possibility of bringing in a dual specialisation is not a prerogative of the public international lawyer. A specialist in a given area of international law may have a demonstrable background/expertise in international law.

Finally, competence in international law inevitably brings in the professional mindset, inclinations and biases that cement with one's formal education, training and experience over the years. The discussion unpacked the politics underlying the international law expertise by demonstrating that States are well aware of this mindset and that they heavily rely upon it. States leverage the recognised competence in international law against competence in other areas of (international) law with the aim to direct the overall orientation of a court/tribunal. Competence in international law is leveraged against human rights law expertise in the ECtHR so as to avoid a "militant" human rights court and foster judges' receptiveness to according a broad margin of appreciation to States. Competence in international law is used to side-line expertise in investment law and other areas of international law in investment disputes by way on institutionalising a "pro-State" bias of the arbitrators and reclaiming policy space. On the other hand, expertise in international law may be excluded from a body (e.g. WTO AB) in order to keep it as self-contained as possible from international law.

Deciding who will sit on the court as a judge is one of the ways that States control courts.²³⁵ Consequently, the composition of an international court is conditioned to what States expect of its function in international affairs. Such expectations are subject to change.²³⁶ Different constituencies, including scholars, we may see flaws in the design of the statutory requirements for nomination and (s)election of judges or inadequacies, setbacks, missed opportunities in applying these requirements when (s)electing specific individuals.²³⁷ Such

²³⁴ 'Presentation by Professor Georges Abi-Saab (n 24) 172-173; G. Ulfstein, 'The International Judiciary', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (OUP, 2009) 126, 130; Ratner (n 126) 775; Crawford (n 122) 1017; Roberts (n 117) 88; Institut de Droit International, *Deliberations on the Resolution on The Position of the International Judge* (n 6) 88-89, 105.

²³⁵ Sands (n 9) 485.

²³⁶ B. Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in J. Crawford, M. Koskenniemi and S. Ranganathan (eds.), *The Cambridge Companion to International Law* (CUP, 2012) 203, 215-222; Sands (n 9) 502; Comment by Professor Georges Abi-Saab in General Discussion Chaired by Judge Shigeru Oda regarding the topic 'Ensuring the Best Bench: Ways of Selecting Judges', in Peck and Lee (n 24) 204.

²³⁷ In the area of investment arbitration, Anthea Roberts reasonably predicted a likely increase in demand by States for arbitrators with backgrounds in public international law, human rights law, trade law, and public law and accordingly the introduction of expertise requirements in specialised areas of law; Roberts (n 117), 77, 78, 88. However, States' practice at the moment points to the opposite direction.

flaws and failings may be the result of the bureaucratic, managerial mind of a public official²³⁸ but they can equally be conscious choices of States serving specific interests.²³⁹ Judicial appointments cannot be insulated from political considerations.²⁴⁰ The discussion showed how competence in international law is changing and that it is not insulated from politics either. Politics are intrinsic in the construction of the meaning of recognised competence of international law as well as in how States use this competence to leverage the composition and function of international courts.

²³⁸ M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *MLR* 1.

²³⁹ Alvarez (n 112) 258.

²⁴⁰ Chandrasekhara Rao (n 65) 1732.