

Selection and Appointment in International Adjudication: Insights from Political Science

Olof Larsson

Theresa Squatrito

Øyvind Stiansen

Taylor St John

Academic Forum on ISDS Concept Paper 2019/10

Version 2: 17 September 2019

Citation: Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, 'Selection and Appointment in International Adjudication: Insights from Political Science', *Academic Forum on ISDS Concept Paper 2019/10*, 17 September 2019.

Academic Forum on ISDS Website:
www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/

Disclaimer: This work represents the views of the individual authors and not necessarily those of the Academic Forum on ISDS and its members. The Academic Forum on ISDS does not take positions on substantive matters. The paper has been distributed within the Forum for comment.

Selection and Appointment in International Adjudication: Insights from Political Science

Olof Larsson,^{*} Theresa Squatrito,[†] Øyvind Stiansen,[‡] and Taylor St John[§]

Academic Forum on ISDS Concept Paper 2019/10

Paper prepared for the ISDS Academic Forum, in advance of the 38th Session of UNCITRAL
Working Group III, 14-18 October 2019

Abstract

This paper summarizes insights from political science and empirical legal scholarship concerning selection and appointment of adjudicators to permanent international courts. This scholarship suggests that designers of international courts face challenging trade-offs in balancing judicial independence and accountability, as well as in promoting descriptive representation and necessary qualifications on the bench. The paper considers different institutional design features related to appointment procedures: representation, reappointment, screening procedures, and procedures for removing judges. Representation is discussed in a series of sections considering full or selective representation, voting rules, and geographic and gender quotas and aspirational targets. Throughout, we draw on data on 24 international courts to illustrate the different appointment procedures and institutional features. The paper concludes with two shorter sections covering issues closely related to appointment procedures. Appointments are only one means through which states convey their preferences or communicate with international courts, so the paper briefly considers other means, including withholding funding, obstruction, and interpretive statements, which states may use alongside or in place of appointments.

^{*} Department of Political Science, University of Gothenburg.

[†] Department of International Relations, London School of Economics.

[‡] PluriCourts, University of Oslo.

[§] School of International Relations, University of St Andrews.

Abbreviations for International Dispute Resolution Bodies

AfCHPR	African Court of Human and Peoples' Rights
ATJ	Andean Tribunal of Justice
BCJ	Benelux Court of Justice
CACJ	Central American Court of Justice
CCJ	Caribbean Court of Justice
CEMAC CJ	Central African Economic and Monetary Community Court of Justice
CJEU	Court of Justice of the European Union
COMESA CJ	Common Market for Eastern and Southern Africa Court of Justice
EACJ	East African Court of Justice
ECCIS	Economic Court of the Commonwealth of Independent States
ECOWAS Court	Economic Community of West African States Court of Justice
ECtHR	European Court of Human Rights
EFTA Court	European Free Trade Agreement Court of Justice
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
ITLOS	International Tribunal for the Law of the Sea
Mercosur PRT	Mercosur Permanent Review Tribunal
OHADA CCJA	Organization for the Harmonization of Business Law in Africa Common Court of Justice and Arbitration
SADC Tribunal	Tribunal of the Southern African Development Community
WAEMU CJ	Western African Economic and Monetary Union Court of Justice
WTO AB	World Trade Organization Appellate Body

1 Introduction

At the thirty-seventh session of Working Group III, states requested that the UNCITRAL Secretariat undertake preparatory work on the selection and appointment of adjudicators, including “compiling, summarizing and analyzing relevant information as one of the important topics for structural reform, in cooperation with the Academic Forum” (UNCITRAL 2019, 15). This paper, prepared for the Academic Forum, summarizes and analyzes insights from the academic literature on the selection and appointment of adjudicators to permanent international courts. There is much that can be learned from studying how states have designed appointment procedures for other international courts, what considerations have led to different design choices, and what empirical research can tell us about the likely effects of different design choices.

In this paper we review selection and appointment rules for 24 permanent international courts¹ and summarize insights from political science and empirical legal studies concerning the expected and observed effects of different design choices. We consider four sets of design choices: First, we consider choices related to representation on the bench. Here we emphasize the choice between a full and selective representation court and the voting rules governing the election of judges. These design choices have important implications for the ability of each state to control the appointment of one or more judges and in this way influence decision-making on the court. We also consider the use of quotas and aspirational targets to ensure representation of both genders as well as different geographic regions and legal systems. Such rules are likely to matter not only for the perceived legitimacy of a court, but also for judicial outcomes as judges’ backgrounds and experiences are likely to influence decision-making in cases with competing plausible conclusions.

Second, we discuss the use of renewable judicial terms. Renewable terms are relatively common for international courts. Renewable terms can improve what we refer to as judicial accountability as states can base reappointment decisions on the past performance of the judges. However, such accountability may come at the expense of judicial independence as judges wishing to be reappointed face incentives to satisfy the actors in control of reappointment decisions (see also Dunoff and Pollack 2017). In addition, reappointment

¹ These 24 courts include nearly all international courts that became operational at any point between 1945 and 2010 and have judges that serve a fixed term of office, as opposed *ad hoc* appointments.

opportunities may be expected to influence other desirable outcomes, such as the ability to attract high-quality candidates and the accumulation of experience and expertise on the court.

Third, we consider the screening procedures and appointment committees that have been introduced for some international courts to ensure that judges have necessary qualifications. The causal effects of these reforms have been subject to little empirical scrutiny, but there are examples of advice from screening committees leading to the rejection of unqualified candidates. The existence of such committees may also have contributed to some states improving their domestic nomination procedures.

Fourth, we consider rules for the involuntary and premature removal of judges. Although we are aware of few cases in which international court judges have been involuntarily removed from office, (implicit) threats of removal may be expected to undermine judicial independence. Partly for this reason, removal decisions can only be taken by the other judges at most international courts, making states unable to discipline judges during their terms.

Our goal is not to advocate for a specific set of design choices. Instead, we suggest designers of international courts face a series of tradeoffs when seeking to optimize the level of judicial independence, judicial accountability, fair descriptive representation, and the selection of judges with necessary qualifications on the bench. In particular, we emphasize that independence and accountability are features that are in conflict with each other: the more independent judges are the less accountable they will be, and *vice versa*. High independence and low accountability may increase sovereignty costs for states by allowing judges to develop legal doctrines independently of state interests or independently of what states originally intended when concluding the treaty. Low independence and high accountability may lead to politicization of courts and reduce the ability of judges to resolve specific disputes and clarify the law independently from the interests of powerful political actors. A balance therefore has to be struck between independence and accountability, and appointment procedures are important in this respect.

Finally, we note that while rules concerning appointment are fundamental to the independence and accountability of international courts, the appointment process cannot be understood independently from other institutional features. Importantly, these can mitigate the costs of the

balance chosen in the trade-off described above, but also exacerbate them. We therefore conclude by briefly considering other ways in which states can react to an international court or specific decisions, such as by reducing funding, making interpretive statements, overriding the court, or threatening non-compliance. Even if states are not able to use the appointment process to influence judicial decision-making, these other strategies may effectively reduce the managerial or interpretive autonomy of international courts.

2 Design Features Related to Appointments and Appointment Procedures

This section discusses different design features relevant to appointments and appointment procedures and reviews extant theoretical and empirical scholarship that evaluates how different institutional choices influence independence, accountability, and other factors relevant for the performance of international courts.

In discussing research findings concerning the effects of different design choices, we focus primarily on scholarship concerning permanent international courts. However, where similar institutional choices are relevant for domestic high courts, we also refer to the insights of the broader judicial politics literature. Where relevant, we also point out differences and similarities between the design choices and the current investor-state dispute settlement (ISDS) system.

Representation

A first important set of questions concerns representation on the bench. Representation can be an important means by which concerns about a lack of accountability can be alleviated. In a low-accountability system, the risk that a court systematically diverges from states' interests, concerns and intentions can be alleviated by ensuring that the judges represent a broad set of interests, experiences and views. Here we highlight three important design choices. First, should the number of judges be proportional to the number of member states or should the bench be composed of a fixed number of judges not proportional to the number of member states? Second, what voting rules should govern the election of judges? Third, should there be rules or targets governing representation on the bench, related to criteria such as gender, geography or legal tradition, to ensure descriptive representation?

Full vs. Selective Representation

Eight regional courts, such as the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the Andean Tribunal of Justice (ATJ) have full representation, meaning that they are composed of a number of judges that is equal to or proportional to the number of member states. Full representation may, however, be impractical for international courts with a very large number of member states and with relatively low caseloads. Perhaps for this reason, two-thirds of international courts, and all courts with a global reach, are selective representation courts (Mackenzie 2013; Squatrito 2018). Selective representation occurs when the number of judges is fixed by the treaty and is not proportional to the number of member states for these courts.² For example, the International Court of Justice (ICJ) has 15 judges. The treaties for selective representation courts most often require that no two judges can be nationals of the same state. Also, three selective representation courts, like the ICJ, feature a system for *ad hoc* judges, allowing each state to have one of their nationals preside over disputes to which they are respondents.

One argument in favor of full representation is that it ensures that each state can have at least one judge on the bench familiar with its own legal system and politics. In the ECtHR, panels always include the judge from the respondent state (or else an *ad hoc* judge). These so-called national judges often play an important role in ensuring that the Court has a correct understanding of the relevant domestic law. Having this specialized knowledge on the Court is particularly important when documents relevant for establishing the facts and applicable domestic law are not available in a language all judges command and when a large case load would make it challenging to provide translations for all cases. In roughly half of all international courts, cases are heard by panels that include a national of the respondent state, while other international courts, like the African Court of Human and Peoples' Rights (AfCHPR) prohibit judges from presiding over cases involving their national state.

Full representation courts provide for a decentralized appointment process where each state controls the appointment of one or more judges, although voting rules may enable other states to block appointments (Alter 2008; Elsig and Pollack 2014, 400). Each judge may thus also be expected to primarily require the support of and be accountable to one state.

² Most often there is a treaty provision that allows a governing body to modify the number of judges.

Evidence from the ECtHR shows that judges are less likely to vote in favor of a violation against the state responsible for their nomination, but otherwise do not appear to vote primarily in line with the “national interest” of the appointing state (Voeten 2008). There is some evidence that governments use appointments to signal commitment to the principles of the legal regime. For instance, candidates for EU membership appear to have appointed relatively activist ECtHR judges to signal their commitment to human rights and the rule of law (Voeten 2007). In the investment setting, appointing judges expected to be favorable to investors may serve a similar purpose for governments eager to demonstrate their commitment to property rights. A full representation court may thus – at least as long as states do not use opportunities to block other states’ candidates – give states control over the appointment of one judge and the ability to use this appointment for political purposes.

The degree to which appointments can be used by states to influence the jurisprudence of a court will however vary with (1) the number of states who participate in the system; (2) the degree to which all of these or groups among them share the same preferences; and (3) the panel composition of the court. First of all, the individual impact of one state’s appointments will naturally decrease the larger the number of states and judges in the system – to have appointed one judge in a chamber of 28 will result in less influence than in one of three. Secondly, the degree to which states can influence jurisprudence via appointments will likely vary with the degree to which larger groups of states share the same preferences. When each state only controls the appointment of one judge, judicial decision-making may still be relatively isolated from the influence of individual states (Alter 2008, 46), if the preferences of these states are unique to each state. For instance, while some states critical of the perceived human rights activism of the ECtHR have started appointing more restrained judges, other states appoint relatively activist judges (Stiansen and Voeten 2018).

Thirdly, the ability of any single state to influence the jurisprudential development of a full representation court may be further decreased if cases are heard by smaller panels of judges and court presidents (or other internal actors) are free to allocate judges and panels in ways that minimize the influence of judges that are “preference outliers” (Kelemen 2012). Extant scholarship has, however, not investigated empirically whether chamber systems are used to isolate outliers in this way.

Judges on selective representation courts will require the support of multiple states to be appointed. Generally speaking, when multiple actors' assent is required to take a decision, the outcome will tend to reflect a centrist position among the decision-making group. In general, a selective representation court is likely to increase the importance of states' collective decision-making at the election stage (Elsig and Pollack 2014, 400). Candidates for selective representation courts such as the ICJ and the World Trade Organization Appellate Body (WTO AB) therefore tend to be extensively screened by multiple states and groups of states. As a result, states may also behave differently when they nominate candidate judges: Rather than acting in accordance with their primary preference, they face incentives to nominate candidates that will be acceptable to the necessary majority of states (Elsig and Pollack 2014).

An important trade-off in the choice between full representation and selective representation thus concerns how much influence each state should have over the appointment of *a single* judge relative to allowing the collective of states to influence the appointment of *all judges*. It is worth noting that the design of some selective representation courts addresses this tradeoff by allowing states that do not have a national on the bench to appoint an *ad hoc* judge when they are party to a case.³ The appointment of such *ad hoc* judges can ensure that there will always be at least one judge familiar with the legal system of the respondent state even if the regular bench has fewer judges than respondent states. This institutional feature may thus help alleviate concerns that states may have about not being represented on the bench when cases are brought against them.

Analysis of voting patterns on courts such as the ICJ and the Inter-American Court of Human Rights (IACtHR) suggest *ad hoc* judges have a strong tendency to favor the state that appointed them (Posner and De Figueiredo 2005; Naurin and Stiansen forthcoming). The behavior of *ad hoc* judges appointed to ensure representation from the respondent state is thus similar to party-appointed arbitrators in ISDS. Puig and Strezhnev (2017) find evidence of an affiliation effect, or a cognitive predisposition that lead arbitrators to favor the party that appointed them. They use an experimental design to show that the impact of this affiliation effect is in addition to the litigant strategically choosing an arbitrator likely to be favorable to them. This finding supports

³ Three courts feature this compromise: IACtHR, ICJ and Mercosur Permanent Review Tribunal (PRT). Four full representation courts have *ad hoc* systems to ensure a national can preside over disputes for each respondent state: ATJ, Central American Court of Justice (CACJ), Economic Court of the Commonwealth of Independent States (ECCIS), and ECtHR.

observational findings of bias introduced by party appointment, for instance that dissents in ISDS are “overwhelmingly issued by party appointees (94%), never against the interest of the nominating party” (Puig 2016, 681).

It is perhaps out of concern for such tendencies, whereby national judges, party appointments or *ad hoc* judges show affiliation toward their appointers, that some courts forbid the *ad hoc* appointment of nationals to preside over disputes. For example, the International Tribunal for the Law of the Sea (ITLOS) Statute makes clear that each party is able to appoint one member to the *ad hoc* chamber of the Seabed Dispute Chambers, while the third arbitrator is agreed upon by both parties; yet “Members of the *ad hoc* chamber must not be in the service of, or nationals of, any of the parties to the dispute” (Article 36(3) of the ITLOS Statute). In the CJEU, there is an informal norm not to allocate cases as Judge Rapporteur to the judge appointed from the state from which the case originates, but this judge may otherwise participate in the decision making. The purpose of this norm appears to be to safeguard the Court’s perceived impartiality. Nationality is mentioned in Article 15 of the Statute of the European Free Trade Agreement (EFTA) Court. This Article provides for the replacement of judges on specific cases, such as when there is a conflict of interest, but “[a] party may not apply for a change in the composition of the Court on the grounds of either nationality of a Judge or the absence from the Court of a Judge of the nationality of that party.” However, it should be noted that a judge from each of the three EFTA states sits on each case.

It is also worth noting that even if selective representation means that candidate judges will need the support of a coalition of states to be elected, the home state of a judge is likely to continue to be a significant predictor of the judge’s voting behavior. For instance, Posner and De Figueiredo find evidence that ICJ judges tend to favor both their home states and states that share political and economic characteristics with their home state (Posner and De Figueiredo 2005). Similarly, Arias find that members of the WTO AB are biased towards their home state and, due to random case allocation, it is reasonable to interpret this bias as evidence of a causal relationship (Arias 2019).⁴

This is similar to findings in ISDS that arbitrators favor states that share their home state’s level of development: arbitrators from developing countries are significantly less likely to affirm

⁴ However, this finding is primarily driven by cases involving the United States.

jurisdiction and liability (Waibel and Wu 2017). In the ISDS context, Waibel and Wu (2017, 7) suggest “arbitrators from developing countries are less likely to hold host countries liable because they are more familiar with the economic and social conditions in developing countries.” Other studies of nationality in ISDS, using different samples of cases, have generated different results: one early study of 47 cases found that the development status of the presiding arbitrator did not have a statistically significant effect on the amount awarded (Franck 2009). A recent study on arbitrator nationality using 421 cases in their models generated mixed findings, which do not suggest clear, statistically significant patterns between nationality and outcomes (Langford, Behn, and Usynin 2018).

In a court context, alignments between judges and their home states may in part be explained by the fact that judges will usually benefit from the support of their home state either for reappointment or for appointment to future offices. However, an equally important explanation may be the fact that judges often decide issues that have competing plausible answers (Segal and Spaeth 2002). Even if judges do their utmost to rule only on the basis of the law, personal backgrounds, experiences, and ideological leanings are still likely to influence judicial decision-making (Harris and Sen 2018). One possible implication is that a diversity in backgrounds needs to be ensured, for instance by geographic quotas. We return to such quotas below.

On selective representation courts, rotation among member states may be used to ensure that all states get the chance to have one of their own nationals appointed to the court. Such an arrangement is used for the seven-judge Economic Community of West African States (ECOWAS) Court, where the positions on the Court rotate among the 15 ECOWAS states. With such an arrangement there is, however, no guarantee that a state will have a judge on the bench when a case is brought against it. Moreover, for courts with a relatively large number of member states and relatively few judges, it will be relatively rare for each state to be represented on the court. Alter, Helfer, and McAllister (2013, 760-761) suggest the desire to allow more states the opportunity to be represented on the ECOWAS Court motivated the 2006 shortening of the judicial tenures from five to four years and a move from single-renewable to non-renewable terms.

For the ICJ, each member of the UN Security Council traditionally has a national as a judge on the Court, although currently the United Kingdom is not represented after Sir Christopher

Greenwood was not reappointed in 2017. For the remaining ten judges, there are traditionally two from each of the United Nation's five regional groupings (Mackenzie and Sands 2003, 278). This arrangement means that the most powerful states will be represented on the bench and that there is some diversity concerning which other states have judges on the Court.

Finally, it should be noted that another way that the designers of courts have addressed the tradeoffs between full versus selective representation is by ensuring that no two judges can be nationals of the same member state. Half of the 24 courts we reviewed have an explicit provision prohibiting more than one judge from any one state in their treaties or founding statutes. These provisions ensure that no state has excessive overrepresentation on the court. Also, to address concerns that there should be familiarity with all respondents' legal systems, seven selective representation courts require there be adequate representation on the bench of member states' legal systems. These seven instances all occur where there is significant diversity of legal systems among the membership. For example, the ICJ, International Criminal Court (ICC), ITLOS and AfCHPR all feature such provisions in their statutes.

Voting Rules

International court judges are selected according to one of the following rules: (1) direct appointments by individual states, (2) member states nominate candidates who are subsequently voted on by an international body,⁵ or (3) judges are appointed by an independent commission. The third option is only used for appointments to the Caribbean Court of Justice (CCJ) (Squatrino 2018) and the use of direct appointments is also relatively infrequent.⁶ For most international courts, judges are elected by an intergovernmental body voting from a list of nominated candidates. Voting rules are therefore important.

In principle, the voting rules can matter both for full representation and selective representation courts. However, on full representation courts states will often choose not to veto each other's nominees (Elsig and Pollack 2014). For instance, CJEU judges are formally appointed by

⁵ The most relevant types of international bodies are intergovernmental organs (such as the Assembly of State Parties for the ICC) or an international parliamentary assembly (such as the Council of Europe's Parliamentary Assembly for the ECtHR). ICJ judges require a majority in both the UN General Assembly and in the UN Security Council.

⁶ For example, four of the five judges on the Permanent Review Tribunal for Mercosur are direct appointments by states. The fifth is collectively appointed by election of an intergovernmental body. The ECCIS is another court that features direct state appointments.

consensus, but in practice each state gets to appoint one candidate. For selective representation courts, voting rules determine how large a support coalition each candidate judge requires to be appointed.

Some international judicial elections require consensus among the member states. A consensus rule means that candidate judges need be acceptable to all member states, which may have the effect of making the international court less independent from state interests. Consensus rules can also make international courts vulnerable to backlash from a single state, at least when there are no institutional safeguards that would keep the court functional if states fail to reach agreement over appointment decisions. There are at least two examples of states exploiting consensus requirements to undermine international courts. Zimbabwe has blocked the appointment and reappointment of judges to the Southern African Development Community (SADC) Tribunal and has thus rendered the Tribunal unable to accept new complaints (Alter, Gathii, and Helfer 2016, 311).

Similarly, the United States has since 2016 used the consensus requirement to block appointments and reappointments to the WTO AB. As a result, the WTO AB, which is supposed to have seven members, currently has only three members. When the mandate of two of these remaining members expires in December 2019, the WTO AB will no longer be able to hear cases (Petersmann 2019).

The experiences of the SADC Tribunal and WTO AB thus illustrate that while a consensus rule means that all member states are able to influence all appointments, such a rule also enables individual states to undermine the court. One way to avoid single states being able to undermine an international court by blocking new appointments is to allow judges to remain in office until they are successfully replaced. Such an institutional reform has been recommended (but not implemented) for the SADC Tribunal (Alter, Gathii, and Helfer 2016).

Alternatively, international court judges may be elected by qualified or simple majorities of the member states. In such cases, judges will not necessarily need the support of every single state. However, if a relatively large supermajority is needed, candidates may still require the support of broad coalitions of states. Qualified majority rules may thus ensure that judges who are appointed are acceptable to most states, while reducing the ability of any single state to use the appointment process to undermine the court.

Finally, judges may be elected by majority vote. One example is the election of judges to the ECtHR, where the Parliamentary Assembly of the Council of Europe elect one of the nominating states' three candidates based on a majority of votes cast. In the case of the ECtHR, each member state is in control of the candidates that are voted on, but the use of a simple majority at the election stages may, at least in theory, increase the ability of the Parliamentary Assembly to reject clearly unsuitable candidates.⁷ At the same time, it means that states have to convince only a simple majority to have their candidate elected. This is particularly so because it is often only subset of the representatives that cast votes in the elections (Lemmens 2015, 108).

The CCJ is an anomaly insofar as the selection process is not dominated by member states or their representatives.⁸ Instead ordinary judges are appointed by an independent commission, the Regional Judicial and Legal Services Commission, while the CCJ president is appointed by a qualified majority of member states upon the advice of the same commission (Tsereteli and Smekal 2018, 2151). The commission deciding appointments includes representatives from bar associations, civil society, and academics. While the effects of this model for the selection of judges is not clear, legal elites in the region believe that it significantly enhances the independence of the CCJ (Squatrito 2018). The CCJ has on numerous occasions ruled in favor of complainants, which might be indicative of independent behavior. Scholars argue that introducing a selection commission or panel would be one way to increase the judicial independence of investment arbitrators while accommodating the principle of party autonomy (Devaney 2019). Conversely, accountability decreases.

The CCJ appears to be the only example of non-state actors, such as civil society and bar associations, being formally involved in the selection of judges for an international court. Across the universe of international courts, and across the universe of international organizations more generally, there are very few instances in which non-state actors are involved in the appointment of international officials, such as Secretaries-General or judges. One exception is the International Labour Organization, which has a tripartite structure, with

⁷ In this respect, it is also worth noting that the members of the Parliamentary Assembly are not under direct governmental control.

⁸ The use of independent commissions or councils is nevertheless frequently used for the appointment of judges at the domestic level (Garoupa and Ginsburg 2009). Garoupa and Ginsburg (2009) suggest that judicial councils do not necessarily ensure greater judicial independence.

states, employers, and labor unions represented formally on its Governing Body. The Secretary-General of the International Labour Organization is elected by the 56 members of the Governing Body, which is composed of 28 Governments, 14 Employers, and 14 Workers. The Employer and Worker members are elected to the Governing Body in their individual capacity.

For most selection processes, however, the assumption has been that governments represent views from a broad range of stakeholders and that governments are responsive to varying domestic interests when they make appointment decisions. It is, however, worth noting that even if non-state actors are not formally involved in the selection process, they often play important informal roles. Such involvement may focus on scrutinizing proposed candidates to make sure that they have the desired backgrounds and qualifications. Prior to the 2018 election of three judges to the IACtHR, civil society organizations convened an “independent panel” to assess the proposed candidates.⁹

Consultative appointment committees are one way of enabling non-actors to participate during the selection process, while reserving the final decision for governments. For example, an “Article 255 Panel” was established to assess nominated candidates for the CJEU in 2010. The panel is strictly consultative, and it is composed of “seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament” (Article 255 of the Treaty on the Functioning of the European Union). The membership of an appointment committee could be designed to ensure representation for a range of stakeholders, including non-state actors. Appointment committees are discussed further in the section below on screening procedures.

Among the 24 permanent international courts we reviewed, the judges of 12 courts are either appointed directly or elected by consensus of an international body. Judges are selected by supermajorities to four courts, and by majority vote in seven courts. As mentioned above, only one court relies on an independent commission to select judges.

⁹ See e.g. <https://cejil.org/en/independent-experts-launch-report-evaluating-candidates-inter-american-court-human-rights> (last retrieved September 19, 2019).

Geographic and Gender Quotas and Aspirational Targets

The discussion so far has focused on how appointment rules influence the ability of states to ensure the appointment of judges with preferences that align with state interests. Important additional concerns relate to descriptive representation, meaning the representation of both genders and different geographic backgrounds.

Descriptive representation may matter for the perceived legitimacy of a court. Moreover, there are reasons to believe that descriptive representation can influence judicial outcomes. Because the type of questions judges decide often can have competing plausible answers, judges' backgrounds and experiences are likely to influence their decision-making in cases where they are relevant (Harris and Sen 2018). Empirical scholarship finds that female judges decide cases somewhat differently from their male colleagues, but that this effect may be limited to cases with a salient gender dimension (Boyd, Epstein, and Martin 2010). Voeten (2019) finds that female ECtHR judges decide discrimination cases differently than their male colleagues, but the finding does not extend to other types of legal issues. There is also evidence of so-called panel effects, meaning that female representation influences the decision-making of male colleagues on cases with a gender dimension (Boyd, Epstein, and Martin 2010). One reasonable interpretation of the latter finding is that the representation of both genders on the bench matters in part by making a richer array of relevant experiences available to the judges.¹⁰

It is likely that these findings on the relationship between gender and judging can be extended to other types of judge characteristics such as country origin. While gender representation is a relevant concern for all international courts, selective representation courts (and particularly those with a global reach) face additional concerns related to the representation of different regions, country backgrounds, and legal systems.¹¹ Indeed, and as noted above, there is some evidence of international judges and arbitrators being inclined to rule in favor of states that share important characteristics with their home state (Posner and De Figueiredo 2005; Waibel and Wu 2017). In the remainder of this section, we discuss the links between quotas and aspirational targets and descriptive representation.

¹⁰ This interpretation is supported by the finding that male judges with daughters tend to judge differently in gendered cases than male judges with sons (Glynn and Sen 2015).

¹¹ On full representation courts, the representation of different regions and legal systems may still be an important concern if cases are heard by smaller panels rather than the full court.

International courts vary widely with regard to the proportion of female judges on the bench, and the design of selection processes is a primary explanation for this variation. In a 2016 survey, 15 per cent of judges were female on the eight international courts with no representativeness requirements, while 32 per cent of judges were female on the five courts with either aspirational representativeness language or targets built into their selection procedures (Grossman 2016, 342). Targets or explicit goals may be necessary, but studies of national high courts show they are not sufficient for realizing the goal of more diverse judiciaries; they are most effective when they interact in positive ways with other institutional features and alongside sustained mobilization efforts (Hoekstra 2010, 482).

The designs of the ICC, AfCHPR and the ECtHR include targets and selection processes designed to increase the likelihood of a gender-balanced bench. The ICC has a unique procedure for electing judges, designed to nudge states toward electing a bench of judges that is balanced in terms of regional representation, gender, and legal expertise (Barriga 2017). The voting procedure starts with minimum criteria for nominations, including a minimum of six male and six female candidates, a minimum of three candidates from each region as defined by the UN system, as well as a minimum of nine candidates with a criminal law background and a minimum of five candidates with an international law background. Then, there are minimum voting requirements for region, gender, and legal expertise during the first four rounds of voting: ballot papers are distributed specifying that each state must vote for x candidates with criminal law experience, for instance, in order for their ballot to be valid.¹² The candidates with the least votes are eliminated after each round, and every successful candidate must achieve a two-thirds majority of voting states, which often requires several rounds of voting. While these election procedures are seen as “complicated”, they are also widely perceived as “successful in achieving their goal” of a more representative bench (Barriga 2017). Roughly half of ICC judges have been women since it was created in 2003. There is “a strong link” between the design of the procedure and female judicial representation, and, importantly, there was sustained pressure and advocacy from feminist groups and others for a gender-balanced court (Chappell 2010, 488).

¹² After four rounds of voting, the legal expertise minimum voting requirements remain, but the gender and region minimum voting requirements are dropped.

The AfCHPR is by design required to consider gender in the nomination process. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights provides that "Due consideration shall be given to adequate gender representation in the nomination process" (Article 12(2)). Moreover, the Protocol requires that "[i]n the election of the judges, the Assembly shall ensure that there is adequate gender representation" (Article 14(3)). As of today, six of the eleven judges at the AfCHPR are women. In its earlier years, the AfCHPR did not achieve gender parity in its appointments, although it has always had female judges.

At the ECtHR, targets were added to the institutional design over time. In 2004, the Parliamentary Assembly introduced a requirement that states must include at least one woman in their list of three candidates. Although some states, such as Malta, resisted the requirement and claimed that it was challenging to find qualified female candidates, it was effective in increasing the number of female judges: every state list after 2004 has included female candidates, with only four exceptions (Hennette Vauchez 2015). One remaining challenge in the ECtHR system is that some governments strategically nominate female candidates that are less qualified than their preferred male candidates. Even after 2004, it is relatively rare to have majority-female panels, but most panels now include at least one female judge (Voeten 2019).

Screening committees are another design feature associated with more equitable representation. Generally, international courts with institutionalized screening mechanisms have had higher percentages of women on the bench since 1999, such as the ICC (47%), ECOWAS Court (40%), and ECtHR (29%), while courts with the least screening have had lower percentages (Grossman 2016, 383).¹³ While screening is correlated with more gender-equal court benches, there has not been empirical scholarship demonstrating that judicial councils or appointments commissions actually cause or lead to more equitable gender representation. At the national level, high-profile examples show limited effectiveness: making the judiciary more representative was a driving force behind the creation of the Judicial Appointments Commission for England and Wales in 2003, but this reform did not generate any improvement within five years (Malleon 2009, 379-380). Empirical research on state

¹³ Figures are for 1999-2015, or establishment-2015, if the court was established after 1999. The WTO AB is a partial exception to this finding. Despite having screening, only 17 per cent of AB members have been women since its establishment, but the screening procedure at the WTO has taken a backseat to bilateral interviews, as discussed in the section on screening procedures.

courts in the U.S., which use a variety of selection mechanisms including elections, appointment by governors, and appointment by commissions, has led to mixed evidence and no clear finding that commissions generate more diverse judiciaries (Bratton and Spill 2002; Reddick, Nelson, and Paine Caufield 2009). While there is evidence that more formalized processes and more transparency generally lead to more gender-equal representation in other professions, there is insufficient evidence to conclude that appointment commissions lead to more gender-equal courts.

In addition to gender representation, representation by geography and legal traditions is also a concern for international courts. Typically, geographic representation is addressed by designers of international courts that have a larger number of member states and selective representation. For example, ITLOS has selective representation of 21 judges. To address concerns of representation the ITLOS statute requires: “the representation of the principal legal systems of the world and equitable geographical distribution shall be assured” (Article 2(2)). Moreover, there may be “no fewer than three members from each geographical group as established by the General Assembly of the United Nations” (Article 3(2)). Of the 24 courts we reviewed, eight of the 16 selective representation courts have requirements that geographic or legal representation is considered in appointments.¹⁴ As mentioned previously, these rules can help to ensure adequate familiarity with the legal tradition of respondent states and that respondent states will have “like-minded” judges on the court, in the absence of full representation. As with gender representation, representation in terms of geography and legal systems may boost the perceived legitimacy of a court.

Another context in which representation concerns arise is if states that are not party to a court’s jurisdiction participate in the selection of judges to that court. These sorts of concerns may become relevant if, for instance, some states accept the jurisdiction of an appellate body but not the jurisdiction of a first instance court, and therefore the memberships of the appellate body and first instance court differ.¹⁵ One approach could be to have separate selection procedures for judges at the two levels; the EACJ and several national jurisdictions follow this approach. It could be decided that states that accept only the appellate body’s jurisdiction

¹⁴ In the other eight, geographic and legal diversity is less prominent given they are sub-regional courts.

¹⁵ Appeal mechanisms are relatively common among international courts, out of the 24 international courts we surveyed, some form of appeal mechanism is available at the CJEU; COMESA Court of Justice; EACJ; ECCIS; ECtHR; ICC; Mercosur PRT; and WTO Appellate Body. However, we are not familiar with instances in which state membership of the appeal mechanism differs from membership of the first instance court.

would participate in appointments to the appellate body but not participate in appointments to the first instance court.

Another approach is to designate a collective body of states as the organ for selection and appointment of judges, even if the membership of that body and the membership of the court do not perfectly align. There are several courts in which judges are selected by treaty parties or by a collective body of states, even if that membership is larger than the group of states that accept the court's jurisdiction. For instance, member states of the African Union select judges for the AfCHPR, even though not all African Union member states accept the court's jurisdiction. The UN General Assembly elects judges for the ICJ, even though not all General Assembly member states accept the ICJ's compulsory jurisdiction. Another example, which may be particularly relevant for investment law, is ITLOS. The Convention on the Law of the Sea provides for four dispute resolution mechanisms: ITLOS, ICJ, or arbitration tribunals constituted through one of two procedures (Article 287, United Nations Convention on the Law of the Sea). States are free to choose one or more of these four means, by making a written declaration. Judges at ITLOS are selected by the member state parties of the Convention of the Law of the Sea, even if they do not in general accept ITLOS as a forum for dispute settlement. We are not aware of empirical scholarship that evaluates the consequences of arrangements like these on perceptions of a court's representativeness or legitimacy.

Reappointment

One design feature that is commonly perceived as particularly important for the accountability and independence of judges is whether judges will be eligible for reappointment. In line with broader insights from principal-agent theory, reappointment opportunities are expected to make judges more accountable to (and therefore less independent from) states in control of their (re)appointment (Elsig and Pollack 2014; Dunoff and Pollack 2017).

The basic insight is that judges eligible for reappointment may be tempted to change their decision-making if they desire reappointment and believe their previous voting behavior will influence the likelihood of being reappointed. Judges eligible for reappointment are therefore expected to be less independent from the state(s) controlling the reappointment decision. Such concerns may be particularly strong on courts that are transparent about how individual judges voted, such as by allowing dissenting opinions, because such transparency increases the ability

of member states to monitor how judges have adjudicated past cases (Dunoff and Pollack 2017).

Of course, the exact effects will depend on the voting rules discussed above. On full representation courts where each state controls the appointment of one judge, judges may be expected to primarily seek to maintain support from “their own” state. By contrast, if judges are elected through majority voting, they will need to maintain the support of a larger coalition of states.

Reappointment is also a central design feature of ISDS. If the accountability of WTO AB members, for instance, is “high” given their renewable four-years terms and need to secure re-nomination by their home country and reappointment by the WTO membership as a whole (Dunoff and Pollack 2017), then the accountability of an ISDS arbitrator is even higher since each arbitrator serves only for one case and may be appointed in the future, or not, depending on how satisfied the appointing party is with their performance.¹⁶ Correspondingly, independence or perceived independence is diminished to the extent that arbitrators appear beholden to their appointing parties for future appointments. This problem is less acute on permanent international courts, where fixed-term appointments provide a baseline of independence, but it is worth noting that the career incentives created by renewable terms are similar to the incentives currently facing ISDS arbitrators.

The link between retention incentives and reduced independence of individual judges has also received attention in scholarship on domestic courts, particularly in the U.S. states. In this context there is empirical evidence that the desire to secure reappointment can influence judges decision-making, at least in high salience cases (Canes-Wrone, Clark, and Kelly 2014; Canes-Wrone, Clark, and Park 2010; Huber and Gordon 2004; Shepherd 2009; Hall 2014). Although the political context of judicial appointments in the U.S. states is different from the international court context in many respects, these studies may strengthen the hypothesis that reappointment opportunities increase judicial accountability at the expense of judicial independence.

¹⁶ Dunoff and Pollack (2017) note this in an earlier draft of their article. They also note that an arbitrator may be seen as highly accountable to the party that appointed them (or to the type of party that appointed them).

Reappointment opportunities thus create career incentives that may threaten judges' decisional independence, especially when term lengths are shorter. It is possible that similar career considerations may motivate judges to work harder if they believe that the likelihood of reappointment depends on their previous performance. Such an effect would, however, require that states are able to observe indicators of the performance of individual judges (*e.g.* how efficiently they are able to dispose of cases) and that performance assessments will influence reappointment decisions.

Even if reappointment opportunities reduce judicial independence, it is important to note that making judicial terms non-renewable is unlikely to make judges immune from career considerations. Assuming judges will not retire after their term ends, they will be on the market for new employment (Kosař 2015; Lemmens 2015). Support from their home state will often be crucial for instance for securing new international appointments or prestigious positions in the domestic judiciary.

While the accountability/independence trade-off is perhaps the most salient consideration when deciding whether judges should be eligible for reappointment, there are other important concerns. First, making judicial terms non-renewable reduces the ability of courts to retain valuable expertise on the bench. Being unable to reappoint judges means that valuable experience is lost and there may be less continuity of leadership. One possible consequence is that the internal influence of bureaucrats in court registries is increased at the expense of the judges. Similarly, one might expect a court unable to retain experienced judges for multiple terms to be less able to develop coherence in its case law over time. It should, however, be noted that we are not aware of any scholarship that investigates these conjectures empirically.

Another potential problem is that non-renewable terms may reduce the pool of available candidates. Candidate judges that know that they will only be able to serve a single term may be more reluctant to forego other career opportunities to serve as judge than those that envision potential reappointment. It is thus at least theoretically possible that non-renewable terms can make a court less likely to attract some types of candidates, but again we note that we are not aware of empirical scholarship that assesses the importance of these types of challenges.

Of the 24 permanent international courts we examined, reappointment is expressly possible for 16 courts. Those with explicitly non-renewable terms of judicial office are: East African Court

of Justice (EACJ), ECtHR, ECOWAS Court, ICC, and the Organization for the Harmonization of Business Law in Africa Common Court of Justice and Arbitration (OHADA CCJA). The statute for the ECCIS does not explicitly state whether terms are renewable. Finally, judges on the Benelux Court of Justice (BCJ) and CCJ serve until retirement, so there is no provision pertaining to reappointment.

One way to limit the risk that non-renewable terms reduce the experience on the court and the pool of available candidates is to provide for relatively long and staggered judicial terms. Indeed, when the judicial terms on the ECtHR were made non-renewable in 2010, they were also extended from six to nine-years. Moreover, because only a small number of ECtHR judges are replaced each year, new judges decide cases together with more experienced colleagues. While several international courts rely on staggered terms, the average term length is 6 years (based on a review of 24 courts). Those with terms longer than 6 year are, in increasing order: EACJ and OHADA CCJA (7 years); ECtHR, ICC, ICJ and ITLOS (9 years); CACJ and ECCIS (10 years); and BCJ and CCJ (until retirement).

Formal Screening Procedures and Appointment Committees

Some international courts have screening committees that assess candidate judges prior to their election to ensure that they possess sufficient expertise and (perceived) impartiality. Even if states retain control over appointments, this design feature may be expected to lead to the appointment of more qualified and more independent judges. In cases where the international court or its leadership has considerable influence over who will sit on the screening committee, the introduction of screening committees might also represent a development towards increased judicial self-governance (Dumbrovský, Petkova, and Sluis 2014; Tsereteli and Smekal 2018, 2140).

One prominent example of a screening committee is the so-called Article 255 Panel established in 2010 to assess nominated candidates for the CJEU. This panel consists of former judges from the CJEU and judges from the domestic supreme courts of selected member states (Sauvé 2015, 80). It reviews candidates proposed by member states, including those proposed for reappointment and reports confidentially to the collective of member states on whether each candidate has the necessary expertise and experience to serve on the CJEU. Although the opinions of the Article 255 Panel are not formally binding, the advice of the panel appears to

be sufficient for the states to reject unqualified candidates. While causal effects of the panel on judicial independence and performance have not been subject to much empirical scrutiny, it is worth noting that the Panel's reports have led to the rejection of several candidates and some observers posit that it has strengthened domestic appointment procedures in member states (Dumbrovský, Petkova, and Sluis 2014).

Motivated by concerns about the qualifications of some ECtHR judges and the quality of national nomination procedures (see e.g. Limbach et al. 2003) an independent screening procedure was introduced for the ECtHR in 2010 (Çalı and Cunningham 2018, 1982).¹⁷ The Advisory Panel of Experts receives the list of candidates from the nominating state before it is sent to the Parliamentary Assembly and confidentially advises the nominating state and the Parliamentary Assembly on whether the candidates have the necessary qualifications. The seven members of the Panel are appointed by the Council of Europe's Committee of Ministers upon the advice of the ECtHR president, and the Panel has so far included both former ECtHR judges and national judges. Unlike the Article 255 Panel for the CJEU, the Advisory Panel of Experts does not conduct its own interview of candidates (Tatham 2018, 16). There have also been challenges in adequately financing the work of the Advisory Panel of Experts (Tatham 2018, 17). Although its impact has not been subject to rigorous empirical scrutiny, it is worth noting that there are at least some instances of its recommendations not being followed by the nominating states and the Parliamentary Assembly and of governments failing to consult the Advisory Panel of Experts *prior* to formally submitting their list to the Parliamentary Assembly (Lemmens 2015, 106-107, Tatham 2018, 17). There are, however, signs of these problems becoming less pronounced over time and at least according to the Panel's own assessments, it has had some success in improving appointment practices (Çalı and Cunningham 2018, 1986).

For the ECOWAS Court, a Judicial Council was created in 2006 in part to screen candidates. The Judicial Council is composed of chief justices from states not represented on the seven-judge court (Alter, Helfer, and McAllister 2013, 760). The Judicial Council assesses candidate judges and submits a list of three ranked candidates to the ECOWAS Authority (composed of the member states), which makes the appointment decision. In addition to helping increasing the quality of candidate judges, it has been suggested that the involvement of national courts

¹⁷ In addition, the Parliamentary Assembly has a specialized legislative committee which assesses the list of candidates and the national selection procedure prior to the vote.

at the vetting stage has helped reduce national judges' discontent with the ECOWAS Court (Tsereteli and Smekal 2018, 2150). Again, it is hard to find strong evidence concerning the effects of the screening procedure, but this assessment of the ECOWAS Court experience at least suggests that screening procedures can be designed in ways that help enhance trust in the international court among important compliance constituencies, such as national judiciaries.

At the WTO AB, a committee is tasked with recommending candidates to the Dispute Settlement Body after consulting with member states as well as vetting and interviewing the candidates. The six committee members include the WTO Director-General, chairperson of the Dispute Settlement Body, and the chairpersons of each council within the WTO. In the early rounds, the committee proved itself an effective broker, able to find a balance between different regions, legal systems, and backgrounds (Elsig and Pollack 2014, 403-4). Over time, member states began to screen the candidates put forward by other states independently, including for their views on specific issues, through bilateral interviews; candidates routinely met with officials from many member states in Geneva and visited Washington DC and Brussels in support of their candidacy (Elsig and Pollack 2014, 404-409). After states started screening candidates more intensely, arguably the committee's screening took a backseat to bilateral interviews.

Procedures for Removing Judges

Rules concerning the involuntary and premature removal of judges are likely to be important to judicial independence and accountability. Although actual removal of international court judges is very uncommon, a perceived threat of removal may be expected to reduce judicial independence. Yet, having a removal procedure is critical in cases where judges become unfit to serve on the court but refuse to resign or engage in behavior incompatible with holding judicial office.

As described by Tsereteli and Smekal (2018, 2154), removal procedures for international courts vary with respect to who can request a removal, who makes the decision about removal, and on what grounds a judge can be removed. Most statutes for international courts refer to misconduct and inability to perform duties due to illness as grounds for removal.

With respect to requests for and decisions on removal, there is variation between systems that leave this authority with the judges and systems where states are involved or control the removal process. Most frequently, the international court is completely in control of removal decisions (Squatrino 2018).¹⁸ When courts retain the capacity to remove judges from office, the voting rules vary. Some require a unanimous decision of remaining judges and others a majority or supermajority. For instance, in the ECtHR any judge can request the removal of another judge and the decision on removal has to be taken by a two-third majority of the judges. Such a procedure increases judicial independence by making states unable to use the threat of removal to discipline judges (Çalı and Cunningham 2018, 1997). In some instance, states have the capacity to override the decision of the courts by common accord. One potential danger is, however, that judges may be reluctant to remove one of their colleagues even if this would be called for as removal attempts might damage the reputation of the Court or undermine collegiality among the judges (Tsereteli and Smekal 2018, 2157).

For some international courts, both states and courts are involved in the decision to remove a judge. Typically, this entails the court (or a specially constituted tribunal) reviewing a complaint against a judge by a state or international organ, which then makes a recommendation to an intergovernmental body. The intergovernmental body then takes the final decision. The courts that features this sort of removal procedure are the Central African Economic and Monetary Community Court of Justice (CEMAC CJ), ECOWAS Court, IACtHR, and ICC.

Finally, in six international courts states are completely in control of removal decisions (Squatrino 2018). The courts where states control the removal of judges are: ATJ, BCJ, Common Market for Eastern and Southern Africa Court of Justice (COMESA CJ), EACJ, ECCIS, and Mercosur PRT. In the case of the ECCIS, where judges are directly appointed by states, the appointing state alone retains control over the removal of their appointee.

¹⁸ In some instances, another tribunal is constituted to review whether a judge should be removed. Courts which retain the responsibility for the removal of judges are: AfCHPR, CACJ, CJEU, ECtHR, EFTA Court, ICC, ICJ, International Criminal Tribunal of Rwanda (ICTR), International Criminal Tribunal of former Yugoslavia (ICTY), ITLOS, OHADA CCJA, SADC Tribunal, Western African Economic and Monetary Union Court of Justice (WAEMU CJ), WTO AB.

3 Other Mechanisms of Interaction between States and International Courts

Selection and appointment mechanisms are an important means through which states can shape courts, but they are only one of many possible mechanisms. This section discusses other means that states can use to interact with courts, including actions to constrain or “curb” a court. We include this section in our paper on appointments to underline that tradeoffs between independence and accountability are present in other aspects of court design and in practice. If states are unable to use appointments to influence a court, they may instead rely on a range of other strategies. Moreover, when states use appointments to shape a court, they often do so in combination with other mechanisms. The effects of design features relating to the appointment process will therefore be conditional on a number of other design choices affecting the managerial and interpretive autonomy of the court. The list of actions provided here is not exhaustive, and these mechanisms can be used independently or in combination with each other and with appointments.

Managerial Autonomy

A first important design feature is the managerial autonomy of international courts. Managerial autonomy concerns the extent to which a court is able to administer its operations independently. A court has more managerial autonomy when it is able to administer its operations with less external influence or control. While there are several components of managerial autonomy, here we highlight funding, since it is the primary means through which states curtail the managerial autonomy of international courts. Other aspects of managerial autonomy include selecting staff and determining rules of procedure, for instance. In general, if a court is able to select its own staff, it has higher managerial autonomy, and if a court is able to determine its own rules of procedure, it has higher managerial autonomy.

Withholding funding, or threatening to, can be a powerful accountability or control mechanism. It is a relatively common way in which states express dissatisfaction with a court (Kelemen 2012, 44; see also Ingadottir 2013; Squatrito 2017). States can withhold funding to express disapproval of a particular decision, which occurred for instance after the ICJ declined to exercise jurisdiction in the South West Africa case (Ingadottir 2013, 610). States can also refuse funding increases, impose funding ceilings, or take other actions to limit funding, which can have the effect of slowing a court’s work or leaving it unable to manage its caseload. Thus,

even if a disgruntled state is unable to influence the jurisprudence of a court through the appointment mechanism, it may undermine the court's ability to hear cases by limiting funding.

States play a central role in approving the budget of 23 out of the 24 permanent international courts (Squatrino 2017, 64), yet there are still design differences that shape the managerial autonomy of courts. We highlight three budgetary design differences, before discussing the CCJ, the court with the most managerial autonomy, since its budget does not require state approval.

First, a court's budget can be adopted by a parent international organization, or a court can be an international organization in its own right. When a court's budget is adopted by a parent organization, states not subject to the jurisdiction of a court may have budgetary authority over the court and contribute to its expenditure, such as the United States with respect to the IACtHR, whose budget is adopted by the Organization of American States, or several states with respect to the ICJ, whose budget is adopted by the UN General Assembly (Ingadottir 2013, 608). On the other hand, the ICC is an international organization in its own right, so its budget is adopted and paid for by the Assembly of States Parties. There is no evidence that one of these designs necessarily leads to more budgetary autonomy for a court, as state scrutiny can be high in either scenario. For instance, the Committee on Budget of Finance of the ICC reviews the budget proposed by the court and makes recommendations to the Assembly, almost exclusively for cuts (Ingadottir 2013, 609).

Second, state contributions to courts can be assessed or voluntary. Most international courts are funded with assessed contributions, and the experience of courts with a high dependence on voluntary funding has shown this funding to be "volatile and unreliable" (Ingadottir 2013, 605). There are concerns that donor priorities can exert undue influence and create a perceived or real loss of independence (Ingadottir 2013, 605).

Third, international adjudication can be financed by the disputing parties. Just as parties usually pay the costs of an ISDS tribunal, some international courts, for example the Mercosur PRT, rely on party funding. This type of funding arrangement is most likely to be efficient when there are minimal administrative overhead costs for a court, or when it can be combined with other funding arrangements. In the early years of the International Centre for Settlement of

Investment Disputes (ICSID), for instance, administrative overheads were paid out of the World Bank's general budget, until party funding was sufficient to cover them.

While not directly concerning the financing of a court *per se*, several trust funds exist to help litigants (most often states) with the cost of litigation. In 1989, a trust fund to assist states in the settlement of disputes at the ICJ was established; in 1994, a Financial Assistance Fund at the Permanent Court of Arbitration was established; and in 2001, a trust fund to assist states in the settlement of disputes through ITLOS was established (Ingadottir 2013, footnote 44). A similar fund exists for disputes in the WTO. In general, these trust funds have not been widely used.

The CCJ's budget is not subject to state approval, which makes it an outlier in terms of managerial autonomy. When establishing the CCJ, member states, with the assistance of the Caribbean Development Bank, established a Trust Fund with an initial capital investment of \$100 million (Squatrino 2017, 67). The investment income of the Trust Fund provides the financial resources for the CCJ (Squatrino 2017, 67). The budget is primarily prepared by the Court's registry, but formally governed through a tripartite relationship between the Court, Regional Judicial and Legal Services Commission, and the Board of Trustees of the CCJ's Trust Fund. Both the Regional Judicial and Legal Services Commission and the Board of Trustees have a combination of public officials, legal professionals and academics, and civil society representatives. The Trust Fund finances the CCJ in perpetuity and ensures that the CCJ's funding is not dependent upon the capacity and willingness of states to provide resources (Squatrino 2017, 67). This provides the CCJ with high managerial autonomy.

Interpretive Autonomy

Interpretive autonomy concerns the extent to which a court is able to issue judgments without concern for how other actors, notably states, will react.¹⁹ As discussed above, most political science scholars subscribe to the view that international courts act with "bounded discretion" or "constrained independence" in relation to governments (Ginsburg 2005; Helfer and Slaughter 2005). This view presumes that if a court hands down a decision that states consider as an overreach or otherwise acts imprudently, states may react. Anticipation of such reactions

¹⁹ This echoes how (Voeten 2012, 421-2) defines judicial independence, as "the set of institutional and other factors that, to a lesser or greater extent, allows judges autonomy from the preferences of other political actors when these judges issue legal opinions."

may make courts sensitive to states' interests even if states are not actively using appointment processes to influence the court (or if institutional design makes such efforts relatively unsuccessful).

State reactions to court decisions are likely to be relatively rare, in part because international courts are sensitive to their political environment. Strategic models of judicial decision-making expect judges to pay attention, anticipate, and strategically respond to the likely actions of other relevant actors (Epstein and Knight 1998). If a court is concerned about non-compliance or other types of political reactions, it may show more restraint than it would have otherwise (Carrubba and Gabel 2014; Creamer 2016; Larsson and Naurin 2016; Vanberg 2004). International courts do exercise strategic restraint; Stiansen and Voeten (2018) show that as criticism of the ECtHR intensified in consolidated democracies, the deference that the ECtHR shows to consolidated democracies has also increased (and the ECtHR's deference is especially pronounced toward the United Kingdom). Moreover, they show that the appointment of more restrained judges is not the primary explanation for this change. Rather, the ECtHR – as an institution – has responded to criticism by strategic restraint. Creamer (2016) demonstrates that WTO panels signal less deference to governments' regulatory choices when they enjoy relatively greater support among the membership as a whole; she argues these panels simultaneously seek to maximize their support among their legal and political audiences.

If a state believes that a court has overreached, they may be able to affect proceedings through obstruction or affect the policy implications of a judicial decision through noncompliance or override (Carrubba, Gabel, and Hankla 2008). International courts often rely on cooperation from national governments, and governments can obstruct proceedings through non-cooperation; Kenya's refusal to cooperate with the ICC case against Uhuru Kenyatta is a high-profile example of this (ICC 2016).

Courts also rely on states for compliance and perhaps particularly when other states have few incentives to try to enforce compliance, partial or delayed compliance can be a serious problem. For instance, while the IACtHR commonly offers little in terms of deference to respondent states, it also struggles with low compliance rates (Huneeus 2011; Naurin and Stiansen forthcoming).

Finally, states may be able to act collectively and override a court's decision. Override could take the form of renegotiating the substantive content of the relevant treaty, issuing a joint interpretation, or other actions. The NAFTA Free Trade Commission's 2001 Notes of Interpretation is a well-known instance of override in investment law. WTO members could issue "authoritative interpretations" authorized by a three-fourths vote of member states but have not ever done so. Forging the agreement necessary for a formal override among treaty parties can be difficult, so overrides are likely to be rare, while other means through which states provide information about their preferences to courts and tribunals are more common, for instance filing non-disputing party submissions in ISDS (which certain governments, notably the American government, do frequently), or member state observations at the CJEU. These actions can be part of a productive dialogue between states and tribunals, since states have roles as both treaty parties and litigants in investment law (Roberts 2010).

States can also react by attempting to restrict the jurisdiction of courts. Recent developments show that judicialization is not a one-way street, and states have the ability to "dejudicialize" or withdraw previously judicialized policy issues from the purview of international courts or tribunals (Abebe and Ginsburg 2018). The EACJ, ECOWAS Court, and SADC Tribunal all faced credible threats to narrow their jurisdiction in recent years, ultimately these threats were scaled back in the EACJ, ineffective in ECOWAS, and largely succeeded in SADC. These different outcomes have been explained by variations in the mobilization of secretariats, civil society groups, and other actors to support each of the three courts (Alter, Gathii, and Helfer 2016). States can also remove particular areas of law from a court's jurisdiction or exempt certain states. EU states kept particular areas of law, such as asylum, out of the CJEU's jurisdiction for a period of time, and protocols limited CJEU jurisdiction for particular issues for particular member states, such as Protocol 30 to the Lisbon Treaty exempting the UK and Poland from the Application of the Charter of Fundamental Rights (Kelemen 2012, 46).

Courts, like all dispute settlement bodies, both domestic and international, are asked to decide important and politically salient questions, so it is not surprising that governments and other actors often disagree with, or have concerns about, their rulings. The design choices outlined here, and the interaction between them, can exacerbate or diffuse tensions arising from adverse decisions. If states or other actors receive adverse decisions from an institution within which they do not feel represented, based on treaty provisions they cannot change, the risks of non-compliance or a loss of legitimacy or exit increase. For example, it may be easier for actors to

accept adverse decisions in salient cases if they believe that their perspectives are adequately represented. States may find it easier to delegate dispute resolution if they believe that they have means of holding the dispute resolution body accountable in the long run, that is, they can take actions attempting to re-align the dispute resolution body with their preferences if necessary. At the same time, too much accountability undermines independence. For a court, or any dispute settlement body, to generate stability demands careful balancing of accountability, independence, and other desired traits.

4 Conclusion

In this paper, we summarize and analyze insights from the academic literature on the selection and appointment of adjudicators to permanent international courts. We also review the selection and appointment rules for 24 permanent international courts, highlighting aspects of these courts' institutional designs that may be useful examples in the investment context. We note that some less-studied international courts have design innovations that may provide particularly useful examples, although, since there has been less scholarship on these courts, less is known about the effects of these design innovations.

Our aim is not to advocate for a specific set of design choices. Rather, we believe that designers of international courts face a series of tradeoffs and must strike a balance between competing objectives such as independence and accountability. Our aim is to clarify what we know about these tradeoffs from the academic literature and discuss the choices made by the designers of various international courts.

We focus on four sets of design choices. The first set of choices relate to representation: the choice between full and selective representation court, voting rules governing the election of judges, and the use of quotas and aspirational targets to ensure representation of both genders as well as different geographic regions and legal systems. "Global" courts with a large number of member states tend to be selective representation courts, coupled with criteria to balance legal traditions and geographic distribution, and in these instances, decision rules (consensus, majority, supermajority) for appointments are particularly important. In general, representation matters not only for the perceived legitimacy of a court, but also for judicial outcomes as judges' backgrounds and experiences are likely to influence decision-making in cases with competing plausible conclusions.

The second set of design choices relate to renewable judicial terms. Renewable terms can improve what we refer to as judicial accountability as states can base reappointment decisions on the past performance of the judges. However, such accountability may come at the expense of judicial independence as judges wishing to be reappointed face incentives to satisfy the actors in control of reappointment. The third set of design choices involve the screening procedures and appointment committees that have been introduced for some international courts to ensure that judges have necessary qualifications. The fourth set of design choices concern rules for the involuntary and premature removal of judges.

The discussion in this paper shows that while international courts share many traits, the design of their selection and appointment procedures also vary markedly, often in ways that relate to their purposes and memberships. Surveying this diverse array of designs suggests possible innovations that could be adapted to the context of investment law, even to address challenges often seen as unique to investment law.

References

- Abebe, Daniel, and Tom Ginsburg. 2018. *The Dejudicialization of International Politics?* Rochester, NY: Social Science Research Network. SSRN Scholarly Paper. <https://papers.ssrn.com/abstract=3293261> (July 13, 2019).
- Alter, Karen J. 2008. "Agents or Trustees? International Courts in Their Political Context." *European journal of international relations* 14(1): 33–63.
- Alter, Karen J, James T Gathii, and Laurence R Helfer. 2016. "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences." *European Journal of International Law* 27(2): 293–328.
- Alter, Karen J, Laurence R Helfer, and Jacqueline R McAllister. 2013. "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice." *American Journal of International Law* 107(4): 737–779.
- Arias, Eric. 2019. *Impartiality In International Courts: Evidence from a Natural Experiment at the WTO*. https://www.peio.me/wp-content/uploads/2019/01/PEIO12_paper_102.pdf.
- Barriga, Stefan. 2017. "Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas." *EJIL: Talk! Blog of the European Journal of International Law*. <https://www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/>.
- Boyd, Christina L, Lee Epstein, and Andrew D Martin. 2010. "Untangling the Causal Effects of Sex on Judging." *American journal of political science* 54(2): 389–411.
- Bratton, Kathleen A., and Rorie L. Spill. 2002. "Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts." *Social Science Quarterly* 83(2): 504–18.
- Çalı, Başak, and Stewart Cunningham. 2018. "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights." *German Law Journal* 19(7): 1977–2006.
- Canes-Wrone, Brandice, Tom S. Clark, and Jason P. Kelly. 2014. "Judicial Selection and Death Penalty Decisions." *American Political Science Review* 108(1): 23–39.
- Canes-Wrone, Brandice, Tom S. Clark, and Jee-Kwang Park. 2010. "Judicial Independence and Retention Elections." *The Journal of Law, Economics, & Organization* 28(2): 211–234.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102(04): 435–452.
- Carrubba, Clifford J., and Matthew J. Gabel. 2014. *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union*. Cambridge: Cambridge University Press.

- Chappell, Louise. 2010. "Gender and Judging at the International Criminal Court." *Politics & Gender* 6(3): 484–95.
- Creamer, Cosette D. 2016. "Between the Letter of the Law and the Demands of Politics: Judicial Balancing of Trade Authority within the WTO." . Working Paper. https://scholar.harvard.edu/files/cosettecreamers/files/creamers_jls_v2.pdf.
- Devaney, James. 2019. "Selecting Investment Arbitrators: Reconciling Party Autonomy and the International Rule of Law." In *KFG Working Paper Series*, Berlin Potsdam Research Group "The International Rule of Law -- Rise or Decline?" <https://papers.ssrn.com/abstract=3388903> (July 20, 2019).
- Dumbrovský, Tomáš, Bilyana Petkova, and Marijn Van Der Sluis. 2014. "Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States." *Common market law review* 51(2): 455–482.
- Dunoff, Jeffrey L., and Mark A. Pollack. 2017. "The Judicial Trilemma." *American Journal of International Law* 111(2): 225–276.
- Elsig, Manfred, and Mark A. Pollack. 2014. "Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization." *European Journal of International Relations* 20(2): 391–415.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press. <https://trove.nla.gov.au/version/29289450> (July 13, 2019).
- Franck, Susan D. 2009. "Development and Outcomes of Investment Treaty Arbitration." *Harvard International Law Journal* 50: 435–89.
- Ginsburg, Tom. 2005. "Bounded Discretion in International Judicial Lawmaking." *Virginia Journal of International Law* 45(3): 631–73.
- Glynn, Adam N, and Maya Sen. 2015. "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" *American Journal of Political Science* 59(1): 37–54.
- Grossman, Nienke. 2016. "Shattering the Glass Ceiling in International Adjudication." *Virginia Journal of International Law* 56(2): 339–406.
- Hall, Melinda Gann. 2014. "Representation in State Supreme Courts: Evidence from the Terminal Term." *Political Research Quarterly* 67(2): 335–346.
- Harris, Allison P., and Maya Sen. 2018. "Bias and Judging." *Annual Review of Political Science*.
- Helfer, Laurence, and Anne-Marie Slaughter. 2005. "Why States Create International Tribunals: A Response to Professors Posner and Yoo." *California Law Review* 93(3): 899–956.
- Hennette Vauchez, Stéphanie. 2015. "More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights." *European Journal of International Law* 26(1): 195–221.

- Hoekstra, Valerie. 2010. "Increasing the Gender Diversity of High Courts: A Comparative View." *Politics & Gender* 6(3): 474–84.
- Huber, Gregory A., and Sanford C Gordon. 2004. "Accountability and Coercion: Is Justice Blind When It Runs for Office?" *American Journal of Political Science* 48(2): 247–263.
- Huneus, Alexandra. 2011. "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights." *Cornell International Law Journal* 44(3): 493–533.
- ICC. 2016. "ICC Trial Chamber V(B) Refers Non-Cooperation of the Kenyan Government to the Assembly of States Parties to the Rome Statute." <https://www.icc-cpi.int/Pages/item.aspx?name=pr1239> (July 14, 2019).
- Ingadottir, Thordis. 2013. "The Financing of International Adjudication." In *The Oxford Handbook of International Adjudication*, eds. Cesare P. R. Romano, Karen J. Alter, and Chrisanthi Avgerou. Oxford University Press.
- Kelemen, R Daniel. 2012. "The Political Foundations of Judicial Independence in the European Union." *Journal of European Public Policy* 19(1): 43–58.
- Kosař, David. 2015. "Selecting Strasbourg Judges: A Critique." In *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek. Oxford University Press.
- Langford, Malcolm, Daniel Behn, and Maksim Usynin. 2018. "Arbitral Background and the Universality of the International Investment Regime." Presented at the 2018 ESIL Annual Conference, Manchester. <https://www.jus.uio.no/ior/english/people/aca/malcolml/paper---does-nationality-matter---esil-2018-%2820-august%29.pdf>.
- Larsson, Olof, and Daniel Naurin. 2016. "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU." *International Organization* 70(2): 377–408.
- Lemmens, Koen. 2015. "(S)Electing Judges for Strasbourg. A (Dis)Appointing Process?" In *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek. Oxford University Press; Oxford.
- Limbach, Jutta et al. 2003. *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*. London: Interights.
- Mackenzie, Ruth. 2013. "The Selection of International Judges." In *The Oxford Handbook of International Adjudication*, eds. Cesare Romano, Karen Alter, and Yuval Shany.
- Mackenzie, Ruth, and Philippe Sands. 2003. "International Courts and Tribunals and the Independence of the International Judge." *Harvard International Law Journal* 44(1): 271–285.
- Malleson, Kate. 2009. "Diversity in the Judiciary: The Case For Positive Action." *Journal of Law and Society* 36(3): 376–402.

- Naurin, Daniel, and Øyvind Stiansen. forthcoming. “The Dilemma of Dissent. Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary.” *Comparative Political Studies*.
- Petersmann, Ernst-Ulrich. 2019. “How Should WTO Members React to Their WTO Crises?” *World Trade Review Online* first: 1–23.
- Posner, Eric A., and Miguel F.P. De Figueiredo. 2005. “Is the International Court of Justice Biased?” *The Journal of Legal Studies* 34(2): 599–630.
- Puig, Sergio, and Anton Strezhnev. 2017. “The David Effect and ISDS.” *European Journal of International Law* 28(3): 731–761.
- Reddick, Malia, Michael Nelson, and Rachel Paine Caufield. 2009. “Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?” *American Judicature Society Working Paper*.
- Roberts, Anthea. 2010. “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States.” *The American Journal of International Law* 104(2): 179–225.
- Sauvé, Jean-Marc. 2015. “Selecting the European Union’s Judges The Practice of the Article 255 Panel.” In *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek. Oxford University Press, USA.
- Segal, Jeffrey A, and Harold J Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.
- Shepherd, Joanna M. 2009. “The Influence of Retention Politics on Judges’ Voting.” *The Journal of Legal Studies* 38(1): 169–206.
- Squatrito, Theresa. 2017. “Resourcing Global Justice: The Resource Management Design of International Courts.” *Global Policy* 8(S5): 62–74.
- . 2018. *Conceptualizing, Measuring and Mapping the Formal Judicial Independence of International Courts*. <https://ssrn.com/abstract=3131557> or <http://dx.doi.org/10.2139/ssrn.3131557> (Accessed February 19, 2019).
- Stiansen, Øyvind, and Erik Voeten. 2018. *Backlash and Judicial Restraint: Evidence From the European Court of Human Rights*. Rochester, NY: Social Science Research Network. SSRN Scholarly Paper. <https://papers.ssrn.com/abstract=3166110> (July 13, 2019).
- Tatham, Allan F. 2018. “Selecting Judges for Regional Courts Europe: A Short Study in the Use and Practice of Judicial Panels.” *Revija za evropsko pravo* 20: 5.
- Tsereteli, Nino, and Hubert Smekal. 2018. “The Judicial Self-Government at the International Level—A New Research Agenda.” *German Law Journal* 19(7): 2137–2164.
- UNCITRAL. 2019. *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1–5 April 2019)*. United Nations General Assembly. <https://undocs.org/en/A/CN.9/970>.

- Vanberg, Georg. 2004. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press.
- Voeten, Erik. 2008. "The Impartiality of International Judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102(04): 417–433.
- . 2012. "International Judicial Independence." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack. Cambridge: Cambridge University Press, 421–44.
- . 2019. "Gender and Judging: Evidence from the European Court of Human Rights." *Available at SSRN 3322607*.
- Waibel, Michael, and Yanhui Wu. 2017. "Are Arbitrators Political? Evidence from International Investment Arbitration." . Working Paper. <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>.