


Selection and Appointment in International Adjudication: Insights from Political Science

Olof Larsson¹, Theresa Squatrito², Øyvind Stiansen ³,
Taylor St John⁴

¹Department of Political Science, University of Gothenburg, Sweden Email: olof.g.larsson@gu.se

²Department of International Relations, London School of Economics, UK

³Department of Political Science, University of Oslo, Norway

⁴School of International Relations, University of St Andrews, UK. The authors thank Malcolm Langford, Daniel Naurin, Anthea Roberts and Geir Ulfstein for helpful comments.

Stiansen's work was supported by the Research Council of Norway through its Centres of Excellence funding scheme, project number 223274 (PluriCourts). Financial support for Larsson's work was provided by the Swedish Research Council, project no. 2018-01693.

ABSTRACT

This article summarizes insights from political science and empirical legal scholarship concerning selection and appointment of adjudicators to permanent international courts (ICs). This scholarship suggests that designers of ICs face challenging trade-offs in balancing judicial independence and accountability, as well as in promoting descriptive representation and necessary qualifications on the bench. The article 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 ICs to illustrate the different appointment procedures and institutional features.

1. INTRODUCTION

As structural reform of investor–state dispute settlement (ISDS) has gained traction, an important question has arisen: How should the selection and appointment of arbitrators be designed?¹ We shed light on this question by summarizing insights from political science and empirical legal scholarship concerning the impact of different rules governing selection and appointment as well as reviewing the selection and appointment

¹ For example, see UNCITRAL 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York 1–5 April 2019)' (9 April 2019) UN Doc A/CN.9/970, 15.

procedures of 24 permanent international courts (ICs).² There is much that can be learned from studying how states have designed appointment procedures for other ICs and what empirical research can tell us about the likely 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 each state's ability to control the appointment of one or more judges and in this way influence judicial decision making. 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.

Second, we discuss renewable judicial terms. Renewable terms are relatively common for ICs and may improve what we refer to as judicial accountability since states can base reappointment decisions on judges' past performance. However, such accountability may come at the expense of judicial independence as judges seeking reappointment may have incentives to satisfy the actors in control of reappointment decisions.³

Third, we consider the screening procedures and appointment committees introduced to evaluate the qualifications of judicial candidates. The causal effects of these reforms have not been subject to much empirical scrutiny, but a few examples suggest that screening committees do lead to the rejection of unqualified candidates. The introduction of such committees may also contribute 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 IC judges have been involuntarily removed from office, (implicit) threats of removal may undermine judicial independence. Partly for this reason, removal decisions can only be taken by the other judges at most ICs, 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 that designers of ICs face a series of trade-offs when seeking to optimize the level of judicial independence, judicial accountability, fair descriptive representation and the selection of judges with necessary qualifications. In particular, we emphasize that independence and accountability 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 judges' ability 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. Appointment procedures are important in this respect.

Although selection and appointment mechanisms are important avenues through which states can influence ICs, we caution that they are not the only means of state influence. If states are unable to influence judicial decision making through appointments, they may rely on other strategies such as reducing funding,⁴ making interpretive statements,⁵ overriding

² These 24 courts include most international courts that became operational at any point between 1945 and 2010 and have judges with fixed terms, as opposed to *ad hoc* appointments. We also refer to literature on domestic judicial politics where relevant.

³ See Jeffrey Dunoff and Mark Pollack, 'The Judicial Trilemma' (2017) 111 *American Journal of International Law* 225.

⁴ Theresa Squatrito, 'Resourcing Global Justice: The Resource Management Design of International Courts' (2017) 8 *Global Policy* 62.

⁵ Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *The American Journal of International Law* 179.

the court⁶ or threatening non-compliance.⁷ Moreover, when states use appointments to shape a court, they often do so in combination with other strategies. The trade-offs between independence and accountability are also present in other aspects of court design. In practice, the effects of design features relating to appointments are likely conditional on a number of other design choices affecting the managerial and interpretive autonomy of the court.

2. REPRESENTATION

Ensuring that judges represent a broad set of interests, experiences and views can improve judicial accountability. Here, we highlight three important design choices related to representation. 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?

A. Full vs. Selective Representation

Eight regional courts, including 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 ICs with a very large number of Member States and with relatively low caseloads. Perhaps for this reason, two-thirds of ICs, and all courts with a global reach, are selective representation courts.⁸ 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.⁹ For example, the International Court of Justice (ICJ) has 15 judges. 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 favour of full representation is that it enables each state to 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 correctly understands 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 in a language accessible to all judges and when a large caseload hinders translations for all cases. In roughly half of all ICs, cases are heard by panels that include a national of the respondent state, while other ICs, like the African Court of Human and Peoples' Rights (AfCHPR) prohibit judges from presiding over cases involving their national state.

Evidence from the ECtHR shows that judges are less likely to support the finding of a legal violation by the state which nominated them, but they do not otherwise vote according

⁶ Olof Larsson, 'Political and Constitutional Overrides: The Case of the Court of Justice of European Union' (2021) 28 *Journal of European Public Policy* 1932.

⁷ Clifford James Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems' (2009) 71 *The Journal of Politics* 55.

⁸ Ruth Mackenzie, 'The Selection of International Judges' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013); Theresa Squatrito, *Conceptualizing, Measuring and Mapping the Formal Judicial Independence of International Courts* (2018) <<https://ssrn.com/abstract=3131557> or <http://dx.doi.org/10.2139/ssrn.3131557>> accessed 19 February 2019.

⁹ Typically there is a treaty provision that allows states to modify the number of judges.

to the nominating state's interest.¹⁰ Analysis of voting patterns on courts such as the ICJ and the Inter-American Court of Human Rights (IACtHR) suggest that *ad hoc* judges have a strong tendency to favour their nominating state.¹¹ The behaviour of *ad hoc* judges, appointed to ensure representation of the respondent state, is thus similar to party-appointed arbitrators in ISDS. Puig and Strezhnev find evidence of an affiliation effect, or a cognitive predisposition that leads arbitrators to favour the party that appointed them.¹² Using experimental survey data, they show that this affiliation effect is in addition to the litigant strategically choosing an arbitrator likely to decide in their favour. Their results support findings from observational data that party appointment introduces bias, for instance dissents in ISDS are 'overwhelmingly issued by party appointees (94%), never against the interest of the nominating party'.¹³

At the same time, empirical studies show that the home state of a judge is likely to continue to be a significant predictor of judicial votes. For instance, Posner and De Figueiredo find that ICJ judges tend to favour both their home states and states that share political and economic characteristics with their home state.¹⁴ Similarly, Arias finds that members of the World Trade Organization Appellate Body (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.¹⁵ One possible implication of these findings is that diversity on the bench, for instance by geographic quotas, can minimize bias in judicial decision making. We return to quotas below.

This is similar to findings in ISDS that arbitrators favour states that share their home state's level of development: arbitrators from developing countries are significantly less likely to affirm jurisdiction and liability.¹⁶ For instance, Waibel and Wu 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.'¹⁷

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 provides that each party can 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, a standard practice to safeguard impartiality is to not assign judges as the 'rapporteur judge' on cases originating from their nominating state, even though this judge otherwise participates in decision making.

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

¹⁰ Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 *American Political Science Review* 417.

¹¹ Eric Posner and Miguel De Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 *The Journal of Legal Studies* 599; Daniel Naurin and Øyvind Stiansen, 'The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary' (2020) 53 *Comparative Political Studies* 959.

¹² Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 *European Journal of International Law* 731.

¹³ Sergio Puig, 'Blinding International Justice' (2016) 56 *Virginia Journal of International Law* 647, 681.

¹⁴ Posner and De Figueiredo (n 11).

¹⁵ Eric Arias, *Impartiality in International Courts: Evidence from a Natural Experiment at the WTO* (2019) <https://www.peio.me/wp-content/uploads/2019/01/PEIO12_paper_102.pdf> accessed 15 August 2019. However, this finding is primarily driven by cases involving the United States.

¹⁶ Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper <<http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>> accessed 15 August 2019.

¹⁷ *ibid* 7.

(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 suggest the desire to allow more states the opportunity to be represented on the ECOWAS Court motivated the change in 2006 from 5-year single-renewable terms to 4 years non-renewable terms.¹⁸

For the ICJ, each member of the UN Security Council traditionally has a national as a judge on the Court, although since 2017 the UK is not represented. For the remaining 10 judges, there are traditionally 2 from each of the UNs' five regional groupings.¹⁹ This arrangement means that the most powerful states are represented on the bench but there is also some diversity of states with judges on the Court.

Finally, another way that the designers of courts have addressed the trade-offs between full versus selective representation is by ensuring that no two judges can be nationals of the same Member State. The founding statutes of half of the 24 courts we reviewed have an explicit provision prohibiting more than one judge from any one state. These provisions prevent overrepresentation. 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.

B. Appointment Procedure

IC judges are selected according to one of the following rules: (i) direct appointments by individual states; (ii) Member States nominate candidates who are subsequently voted on by an international body²⁰; or (iii) judges are appointed by an independent commission. The third option is only used for appointments to the Caribbean Court of Justice (CCJ)²¹ and the use of direct appointments is also relatively infrequent.²² For most ICs, judges are elected by an intergovernmental body voting from a list of nominated candidates. Voting rules are therefore important.

The question of appointment systems is closely linked to the choice between full and selective representation. Full representation courts enable a decentralized system, where each state gets to appoint one judge. Selective representation necessitates that judges be chosen collectively by the states or that the allotted seats rotate between states. In practice, full representation courts often combine decentralized nomination procedures with collective appointment procedures, i.e. systems where each state gets to nominate one judge, but the final appointment decision is taken collectively. Conversely, most selective representation courts use collective appointment decisions, often combined with rotation rules. On full representation courts, states rarely veto each other's nominees, leading to a *de facto* decentralized

¹⁸ Karen Alter, Laurence Helfer and Jacqueline McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 760.

¹⁹ Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271.

²⁰ 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.

²¹ Squatrito (n 8).

²² 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 Economic Court of the Commonwealth of Independent States (ECCIS) is another court that features direct state appointments.

appointment system.²³ For instance, CJEU judges are formally appointed by consensus, but in practice each state appoints one candidate. These systems are designed to strike a balance between representation, accountability and independence.

The degree to which states can use appointments to influence the jurisprudence of a court varies with (i) the number of Member States, (ii) the degree to which states share the same preferences and (iii) the panel composition of the court. First, the impact of any one state's appointments decreases as the number of states and judges increases—eg, appointing one judge to a chamber of 28 provides the appointing state with less influence than appointing one of three judges. Second, the degree to which states influence jurisprudence via appointments varies with the degree to which states share 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,²⁴ if the preferences of states are unique. For instance, while some states critical of the perceived human rights activism of the ECtHR have started appointing more restrained judges, other states continue to appoint relatively activist judges.²⁵

Third, the ability of any single state to influence the jurisprudential development of a full representation court may be 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'.²⁶ Extant scholarship has, however, not investigated empirically whether chamber systems are used to isolate outliers in this way.

On selective representation courts, the support of multiple states is required for a judge to be appointed, which increases the importance of states' collective decision making.²⁷ Candidates for selective representation courts such as the ICJ and the WTO AB tend to be extensively screened by 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 in an election.²⁸

Some international judicial elections require consensus among the Member States. A consensus rule means that candidate judges need be acceptable to all Member States. Consensus rules can make ICs vulnerable to backlash from a single state, especially when there are no institutional safeguards to 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 ICs. Zimbabwe blocked judicial (re)appointments to the Southern African Development Community (SADC) Tribunal and thus rendered the Tribunal unable to accept new complaints.²⁹ Similarly, the United States has since 2016 used the consensus requirement to block (re)appointments to the WTO AB. As a result, members whose terms have expired have not been replaced and the WTO AB has been paralyzed.³⁰

The experiences of the SADC Tribunal and WTO AB illustrate that while a consensus rule means that all Member States are able to influence all appointments, such a rule also

²³ Manfred Elsig and Mark Pollack, 'Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization' (2014) 20 *European Journal of International Relations* 391, 398.

²⁴ Karen Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 *European Journal of International Relations* 33, 46.

²⁵ Øyvind Stiansen and Erik Voeten, 'Backlash and judicial restraint: Evidence from the European Court of Human Rights.' (2020) 64 *International Studies Quarterly* 4, 770–784.

²⁶ R Daniel Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) 19 *Journal of European Public Policy* 43.

²⁷ Elsig and Pollack (n 23) 400.

²⁸ *ibid.*

²⁹ Karen Alter, James Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law* 293, 311.

³⁰ Ernst-Ulrich Petersmann, 'How Should WTO Members React to Their WTO Crises?' (2019) 18 *World Trade Review* 503.

enables individual states to undermine the court. One way to avoid single states from being able to undermine an IC by blocking appointments is to require judges to remain in office until they are successfully replaced. Some court statutes include provisions to this effect, including the CJEU statute (Article 5), and this reform has been recommended (but not implemented) for the SADC Tribunal.³¹

Alternatively, international judges may be elected by a qualified or simple majority of Member States. In such cases, judges do not necessarily need the support of all states. However, if a relatively large supermajority is needed, candidates will require support from 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 paralyze the court.

One court in which judges are elected by a simple majority is the ECtHR, where the Parliamentary Assembly of the Council of Europe elects one of the nominating states' three candidates by majority vote. In the ECtHR, each Member State controls their list of candidates, but the use of a simple majority for final appointment, at least in theory, increases the Parliamentary Assembly's ability to reject clearly unsuitable candidates.³² At the same time, states have to convince only a simple majority to have their candidate elected. This is particularly so because votes are often cast only by a subset of the representatives.³³

Finally, judges can be appointed by an independent commission. This occurs at the CCJ, where ordinary judges are appointed by an independent commission, while the CCJ president is appointed by a qualified majority of Member States upon the advice of the same commission.³⁴ The CCJ is an anomaly insofar as the selection process is not dominated by Member States.³⁵ The commission deciding appointments includes representatives from bar associations, civil society, and academics. While Garoupa and Ginsburg suggest that judicial commissions do not necessarily ensure greater judicial independence, regional legal experts believe that the CCJ's model does enhance independence.³⁶ The CCJ has on numerous occasions ruled in favour of complainants, which might be indicative of independence. Scholars argue that introducing a selection commission would be one way to increase the judicial independence of investment arbitrators while accommodating the principle of party autonomy.³⁷ Conversely, accountability decreases.

The CCJ appears to be the only example of non-state actors, such as civil society and bar associations, having formal involvement in the selection of international judges. Across the universe of ICs, and 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 states, employers, and labour 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.

³¹ Alter, Gathii and Helfer (n 29).

³² In this respect, it is also worth noting that the members of the Parliamentary Assembly are not under direct governmental control.

³³ Koen Lemmens, '(S)Electing Judges for Strasbourg. A (Dis)Appointing Process?' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 108.

³⁴ Nino Tsereteli and Hubert Smekal, 'Judicial Self-Government at the International Level—A New Research Agenda' (2018) 19 *German Law Journal* 2137, 2151.

³⁵ The use of independent commissions or councils is nevertheless frequently used for the appointment of judges at the domestic level. Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *The American Journal of Comparative Law* 103.

³⁶ Garoupa and Ginsburg *ibid*; Squatrito (n 8).

³⁷ James Devaney, 'An Independent Panel for the Scrutiny of Investment Arbitrators: An Idea Whose Time has Come?' (2020) 18 *The Law & Practice of International Courts and Tribunals* 369.

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 making 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.³⁸

Consultative appointment committees are one way of enabling non-state actors to participate in judicial selection, while reserving the final decision for governments. The membership of an appointment committee could be designed to ensure representation for a range of stakeholders, including non-state actors.

Among the 24 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. Only one court relies on an independent commission to select judges.

C. Geographic and Gender Quotas and Aspirational Targets

We have focused so far on how appointment rules influence the ability of states to appoint 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 affect the perceived legitimacy of a court. Moreover, descriptive representation may influence judicial outcomes. Because the type of questions judges decide often have competing plausible answers, judges' backgrounds and experiences are likely to influence their decision making at times.³⁹ Empirical scholarship finds that female judges decide cases somewhat differently from their male colleagues when cases have a salient gender dimension.⁴⁰ Female ECtHR judges decide discrimination cases differently than their male colleagues, but this finding does not extend to other legal issues.⁴¹ There is also evidence of the so-called panel effects, meaning that female representation influences the decision making of male colleagues on cases with a gender dimension.⁴² 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.⁴³

These findings on the relationship between gender and judging most likely extend to other judge characteristics. While gender representation is a relevant concern for all ICs, selective representation courts (particularly those with a global reach) face additional concerns related to the representation of different regions, country backgrounds and legal systems.⁴⁴ Indeed, there is some evidence that international judges and arbitrators tend to rule in favour

³⁸ See, eg, Center for Justice and International Law, 'Independent Experts Launch Report Evaluating Candidates for the Inter-American Court of Human Rights' (31 May 2018) <<https://cejil.org/en/independent-experts-launch-report-evaluating-candidates-inter-american-court-human-rights>> accessed 19 September 2019.

³⁹ Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP 2002); Allison Harris and Maya Sen, 'Bias and Judging' (2019) 22 *Annual Review of Political Science* 241.

⁴⁰ Christina Boyd, Lee Epstein and Andrew Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 *American Journal of Political Science* 389.

⁴¹ Erik Voeten, 'Gender and judging: evidence from the European Court of human rights' (2021) 28 *Journal of European Public Policy* 9, 1453–1473.

⁴² Boyd, Epstein and Martin (n 40).

⁴³ Adam Glynn and Maya Sen, 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?' (2015) 59 *American Journal of Political Science* 37.

⁴⁴ 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.

of states that share important characteristics with their home state.⁴⁵ In the remainder of this section, we discuss the links between quotas and targets and descriptive representation.

ICs vary widely regarding 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% of judges were female on the eight ICs with no representativeness requirements, while 32% of judges were female on the five courts with aspirational representativeness language or targets built into their selection procedures.⁴⁶ Targets may be necessary, but studies of national high courts show they are not sufficient for ensuring more diverse judiciaries; they are most effective when complemented with other institutional features and alongside sustained mobilization efforts.⁴⁷

The designs of the ICC, AfCHPR and the ECtHR include targets and selection processes designed to increase a gender-balanced bench. The ICC has a unique procedure for electing judges, designed to nudge states towards electing a bench of judges that is balanced in terms of regional representation, gender and legal expertise.⁴⁸ 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 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.⁴⁹ 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.⁵⁰ Roughly half of ICC judges have been women since its creation in 2003. There is ‘a strong link’ between the design of the procedure and female judicial representation, complemented by sustained pressure from feminist groups and others for a gender-balanced court.⁵¹

States are also required to consider gender for judicial appointments to the AfCHPR.⁵² Currently, 6 of the 11 AfCHPR judges 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 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, it was effective in increasing the number of female judges: Every state list after 2004 has included female candidates, with only four exceptions.⁵³ One remaining challenge in the ECtHR system is that

⁴⁵ Posner and De Figueiredo (n 11); Waibel and Wu (n 16).

⁴⁶ Nienke Grossman, ‘Shattering the Glass Ceiling in International Adjudication’ (2016) 56 *Virginia Journal of International Law* 339, 342.

⁴⁷ Valerie Hoekstra, ‘Increasing the Gender Diversity of High Courts: A Comparative View’ (2010) 6 *Politics & Gender* 474, 482.

⁴⁸ Stefan Barriga, ‘Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas’ *EJIL: Talk! Blog of the European Journal of International Law* (4 December 2017) <<https://www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/>> accessed 10 July 2019.

⁴⁹ After four rounds of voting, the legal expertise minimum voting requirements remain, but the gender and region minimum voting requirements are dropped.

⁵⁰ Barriga (n 48).

⁵¹ Louise Chappell, ‘Gender and Judging at the International Criminal Court’ (2010) 6 *Politics & Gender* 484, 488.

⁵² Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and People’s Rights (entered into force 25 January 2004). OAU Doc OAU/LEG/MIN/AFCHPR/PROT.1 rev.2. arts 12(2) and 14(3).

⁵³ Stéphanie Hennette Vauchez, ‘More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights’ (2015) 26 *European Journal of International Law* 195.

some governments strategically nominate less qualified female candidates 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.⁵⁴

Screening committees are another design feature associated with more equitable representation. Generally, ICs with institutionalized screening mechanisms have had higher percentages of women on the bench since 1999, including the ICC (47%), ECOWAS Court (40%) and ECtHR (29%), while courts with the least screening have had lower percentages.⁵⁵ While screening is correlated with more gender-equal court benches, no empirical scholarship has demonstrated that judicial councils or 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 improvements within 5 years.⁵⁶ Empirical research on state courts in the United States, which use various selection mechanisms including elections, appointment by governors and appointment by commissions, has generated mixed evidence and no clear finding that commissions generate more diverse judiciaries.⁵⁷ While there is evidence that more formalized and transparent processes 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.

Representation by geography and legal traditions is also a concern for ICs. Typically, geographic representation is addressed by designers of ICs that have a larger number of Member States and selective representation. For example, ITLOS has selective representation of 21 judges and its statute requires: 'the representation of the principal legal systems of the world and equitable geographical distribution' (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)). Eight of the 16 selective representation ICs require that geographic or legal representation be considered in appointments.⁵⁸ As mentioned previously, these rules can help to ensure adequate familiarity with the legal tradition of respondent states and that respondent states 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.⁵⁹ One approach could be to have separate selection

⁵⁴ Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication' (2016) 56 *Virginia Journal of International Law* 339, 383; Voeten (n 41).

⁵⁵ 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% 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.

⁵⁶ Kate Malleon, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376, 379.

⁵⁷ Kathleen Bratton and Rorie Spill, 'Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts' (2002) 83 *Social Science Quarterly* 504; Malia Reddick, Michael Nelson and Rachel Paine Caulfield, 'Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?' [2009] *American Judicature Society Working Paper* <<https://dx.doi.org/10.2139/ssrn.2731012>> accessed 20 July 2019.

⁵⁸ In the other eight, geographic and legal diversity is less prominent given they are sub-regional courts.

⁵⁹ 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.

procedures for judges at the two levels; the East African Court of Justice (EACJ) and several national jurisdictions follow this approach. It could be decided that states accepting appellate jurisdiction only would participate in appointments to the appellate body but would not participate in appointments to the first instance court.

Another approach is to designate an intergovernmental body to select and appoint judges, even if the membership of that body and membership of the court do not perfectly align. There are several courts in which judges are selected by treaty parties or an intergovernmental body, 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. ITLOS is another example. The Convention on the Law of the Sea provides four dispute resolution mechanisms: ITLOS, ICJ or arbitration tribunals are constituted through one of two procedures (Article 287). States are free to choose one or more of these four mechanisms through 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 declare 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.

3. REAPPOINTMENT

One design feature that is commonly perceived as important for judicial accountability and independence is whether judges can be reappointed. In line with broader insights from principal-agent theory, reappointment opportunities are expected to make judges more accountable to (yet less independent from) states who control their (re)appointment.⁶⁰

The basic insight is that judges eligible for reappointment may be tempted to adjudicate insincerely if they desire reappointment and believe their previous voting behaviour will influence reappointment decisions. Judges eligible for reappointment are therefore expected to be less independent from the state(s) controlling their reappointment. Such concerns may be particularly strong on courts that are transparent about how individual judges vote, such as by allowing dissenting opinions, because such transparency increases the ability of Member States to monitor how judges have adjudicated past cases.⁶¹

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. In 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, was 'high' given their renewable terms and need to secure re-nomination by their home country and reappointment by the WTO membership as a whole, 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.⁶² Correspondingly, independence or perceived

⁶⁰ Elsig and Pollack (n 23); Dunoff and Pollack (n 3).

⁶¹ Dunoff and Pollack (n 3). Notably, for the ECtHR, terms were made non-renewable in 2010 with immediate effect for judges serving on the Court. Analysis of affected judges' voting patterns shows that the introduction of non-renewable terms reduced the affected judges' tendency to favour their nominating states. See Øyvind Stiansen, '(Non)Renewable Terms and Judicial Independence in the European Court of Human Rights' (2022) 84 *The Journal of Politics* 992.

⁶² Dunoff and Pollack (n 3) 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).

independence is diminished to the extent that arbitrators appear beholden to their appointing parties for future appointments. This problem is less acute on permanent ICs, 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 US states. In this context, empirical evidence illustrates that the desire to secure reappointment can influence judges' decision making.⁶³ Although the political context of American judicial appointments is different from the IC context in many respects, these studies lend support to the hypothesis that reappointment opportunities increase judicial accountability at the expense of judicial independence.

Reappointment opportunities thus create career incentives that may threaten judges' decisional independence, especially when term lengths are shorter. Another possible effect could be to motivate judges to work harder, if they believe that reappointment depends on their previous performance. Such an effect, however, requires that states are able to observe the performance of individual judges (eg 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.⁶⁴ Support from their home state will often be crucial for securing new international appointments or prestigious domestic positions.

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 and there may be less continuity of leadership. One possible consequence is that the influence of bureaucrats in court registries increases at the expense of judges. Another possibility is that a court unable to retain experienced judges due to non-renewable terms may be less able to develop coherence in its jurisprudence over time. While these conjectures are plausible, we are not aware of any scholarship that investigates them empirically.

Another potential problem is that non-renewable terms may reduce the pool of available candidates. Candidate judges who know that they can only serve a single term may be more reluctant to forego other career opportunities to serve as judge than those that envision potential reappointment. While this is theoretically possible, we are unaware of empirical scholarship assessing such dynamics.

Of the 24 ICs we examined, reappointment is expressly possible for 16 courts. Those with non-renewable terms of office are: 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.

⁶³ Brandice Canes-Wrone, Tom Clark and Jason Kelly, 'Judicial Selection and Death Penalty Decisions' (2014) 108 *American Political Science Review* 23; Joanna Shepherd, 'The Influence of Retention Politics on Judges' Voting' (2009) 38 *The Journal of Legal Studies* 169; Melinda Gann Hall, 'Representation in State Supreme Courts: Evidence from the Terminal Term' (2014) 67 *Political Research Quarterly* 335.

⁶⁴ David Kosař, 'Selecting Strasbourg Judges: A Critique' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015); Lemmens (n 33).

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 6 to 9 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 ICs rely on staggered terms, the average term length is 6 years (of the 24 courts we reviewed). Those with terms longer than 6 years 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).

4. FORMAL SCREENING PROCEDURES AND APPOINTMENT COMMITTEES

Some ICs 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.⁶⁵

One prominent example of a screening committee is the 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 select Member States.⁶⁶ It reviews candidates proposed by Member States, including those proposed for reappointment, and reports confidentially to the Member States on whether candidates have the necessary expertise and experience. Although the opinions of the Article 255 Panel are not formally binding, the panel's advice appears to be sufficient for states' rejection of 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.⁶⁷

Motivated by concerns about the qualifications of some ECtHR judges and the quality of national nomination procedures, an independent screening procedure was introduced for the ECtHR in 2010.⁶⁸ The Advisory Panel of Experts receives the list of candidates from nominating states before it is sent to the Parliamentary Assembly and confidentially advises the nominating state and the Parliamentary Assembly on whether 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. There have also been challenges in adequately financing the work of the Advisory Panel of Experts.⁶⁹ Although its impact has not been subject to rigorous empirical scrutiny, it is worth noting that there are some instances of its recommendations not being followed by the

⁶⁵ Tomáš Dumbrovský, Bilyana Petkova and Marijn Van Der Sluis, 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States' (2014) 51 *Common Market Law Review* 455.

⁶⁶ Jean-Marc Sauvé, 'Selecting the European Union's Judges: The Practice of the Article 255 Panel' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 80.

⁶⁷ Dumbrovský, Petkova and Van Der Sluis (n 65) 455.

⁶⁸ Başak Çalı and Stewart Cunningham, 'Judicial Self Government and the Sui Generis Case of the European Court of Human Rights' (2018) 19 *German Law Journal* 1977, 1982. 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.

⁶⁹ Allan Tatham, 'Selecting Judges for Regional Courts Europe: A Short Study in the Use and Practice of Judicial Panels' (2018) 20 *Revija za Evropsko Pravo* 17.

nominating states or the Parliamentary Assembly and of governments failing to consult the Advisory Panel of Experts prior to formally submitting their list to the Parliamentary Assembly.⁷⁰ 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.⁷¹

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 currently represented on the seven-judge court.⁷² 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 to increase the quality of candidate judges, it has been suggested that the involvement of national courts at the vetting stage has helped reduce national judges' discontent with the ECOWAS Court.⁷³ Again, it is hard to find strong evidence concerning the effects of the screening procedure, but this assessment of the ECOWAS Court's experience suggests that screening procedures can be designed in ways that enhance trust in the IC 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.⁷⁴ 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 Member States in Geneva and visited Washington DC and Brussels in support of their candidacy.⁷⁵ After states started screening candidates more intensely, arguably the committee's screening took a backseat to bilateral interviews.

5. PROCEDURES FOR REMOVING JUDGES

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

As described by Tsereteli and Smekal, removal procedures for ICs vary with respect to who can request a removal, who makes the decision about removal, and the grounds on which a judge can be removed.⁷⁶ Most IC statutes 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

⁷⁰ Koen Lemmens, '(S)Electing Judges for Strasbourg. A (Dis)Appointing Process?' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 106–07; see also Tatham (n 69) 17.

⁷¹ Çali and Cunningham (n 68) 1986.

⁷² Alter, Helfer and McAllister (n 18) 737.

⁷³ Tsereteli and Smekal (n 34) 2150.

⁷⁴ Elsig and Pollack (n 23) 403–04.

⁷⁵ Elsig and Pollack (n 23) 404–09.

⁷⁶ Tsereteli and Smekal (n 34) 2154.

removal process. Most frequently, the IC is completely in control of removal decisions.⁷⁷ When courts retain the capacity to remove judges from office, the voting rules vary. Some require a unanimous decision of the remaining judges and others a simple or super-majority. For instance, in the ECtHR any judge can request the removal of another judge and the decision on removal has to be supported 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.⁷⁸ 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.⁷⁹

For some ICs, states and courts are jointly 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 feature 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 ICs states are completely in control of removal decisions.⁸⁰ 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.

6. CONCLUSION

The discussion in this article shows that while ICs share many traits, the design of their selection and appointment procedures 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 in the context of investment law, even to address challenges often seen as unique to investment law. In particular, we note that some less-studied ICs have design innovations that may provide particularly useful examples, although 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 ICs face a series of trade-offs and must strike a balance between competing objectives such as independence and accountability. Our aim is to clarify what we know about these trade-offs from the academic literature and discuss the choices made by the designers of various ICs.

⁷⁷ Squatrito (n 8). 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.

⁷⁸ Çalı and Cunningham (n 68) 1997.

⁷⁹ Tsereteli and Smekal (n 34) 2157.

⁸⁰ Squatrito (n 8).