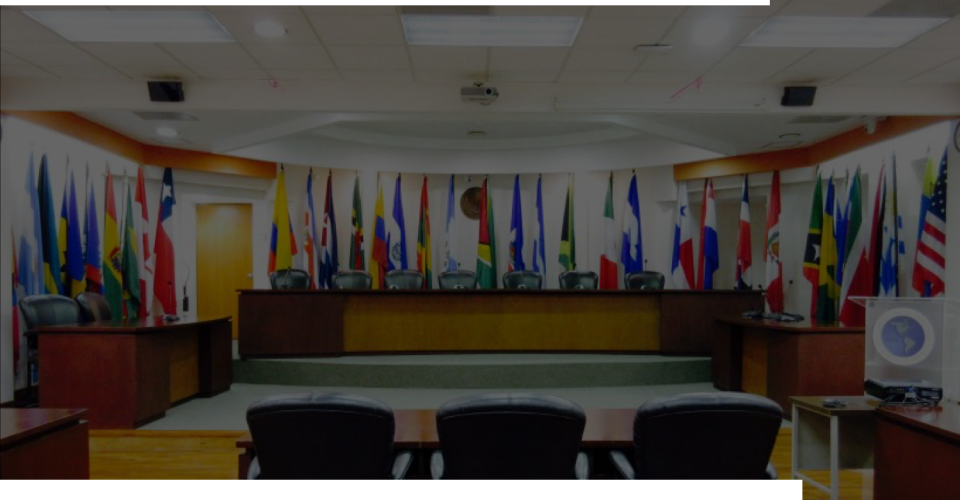
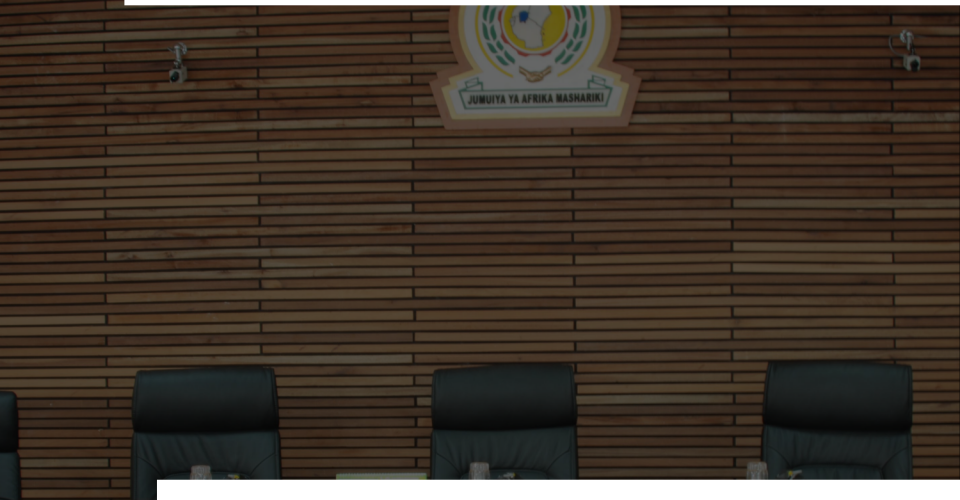




SELECTION AND APPOINTMENT IN INTERNATIONAL ADJUDICATION



Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John.
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OUTLINE

- Tradeoff: Independence and Accountability
- Choices about: Representation
 - Full versus Selective Representation
 - Voting Rules
 - Geographic Quotas and Aspirational Targets
- Choices about: Reappointment
- Choices about: Screening Procedures & Appointment Committees
- Beyond Appointments: Managerial and Interpretive Autonomy

INDEPENDENCE AND ACCOUNTABILITY

- Court designers face several tradeoffs.
 - Most important tradeoff is between independence and accountability.
 - The more independent judges are, the less accountable they will be.
 - High independence (and low accountability) allows judges to develop legal doctrines independently of state interests or independently of what states 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 must be struck between independence and accountability.
- Appointment procedures are a key means of striking this balance. But not the only means!

CHOICES ABOUT: REPRESENTATION

- First Choice: Full or Selective Representation?
 - Full Representation: The court has one judge for each member state.
 - 8 international courts are 'full representation courts.' All are regional courts: CJEU, ECtHR, ATJ, etc.
 - Benefit: each state can have at least one judge familiar with its own legal system and politics.
 - Selective Representation: The court has a fixed number of judges, not related to the number of member states.
 - 16 international courts are 'selective representation courts.' All courts with international reach are selective representation courts: ICJ, WTO AB, ICC, etc.
- Consideration: Should one judge from the respondent state sit in investment cases, to ensure the Court has a correct understanding of relevant domestic law?
 - This occurs in half (12/24) of all international courts.

CHOICES ABOUT: REPRESENTATION

- Second Choice: Voting Rules

- 1) Direct appointment by individual states.
 - 2) Member states nominate candidates who are then voted on by an international body.
 - Used for most international courts.
 - Election by consensus? → vulnerable to a single state blocking appointments. US at WTO; Zim at SADC.
 - Election by majority? Used for 7 courts. Or election by super-majority? Used for 4 courts.
 - 3) Judges are appointed by an independent commission.
 - Used only at the Caribbean Court of Justice, where judges are appointed by a commission that includes representatives of bar associations, civil society, and academics.
 - Legal elites in Caribbean believe this model enhances the independence of the Court.
- Consideration: Who would you want to sit on an independent commission to appoint adjudicators in investment cases?

CHOICES ABOUT: REPRESENTATION

- Third Choice: Geographical (and gender) Quotas and Aspirational Targets
 - 1) Requirements that geographic or legal representation be considered in appointments.
 - 8 out of 16 selective representation courts have such requirements. (The other 8 are subregional, so diversity concerns are less prominent.)
 - These rules help ensure adequate familiarity the legal tradition and contexts of respondent states and that respondent states will have 'like-minded' judges on the court.
 - Example: ITLOS.
 - 2) Aspirational (gender) targets or explicit goals.
 - Language appears in the statutes of 5 courts. They are correlated with better gender balance, but language like this is insufficient for realizing the goal of more diverse judiciaries.
 - More effective when paired with other institutional features (+ sustained mobilization efforts).
 - 3) Beyond inserting language in the court statutes, geography (and gender) considerations can be built into elections or appointment *procedures*.
- Consideration: What types of diversity are most important for your country's interests in investment cases? What traits do you want represented?

EXAMPLE: THE INTERNATIONAL CRIMINAL COURT

- The International Criminal Court (ICC) procedure for electing judges is designed to nudge states toward electing a bench of judges that is balanced in terms of regional representation, gender, and legal expertise (Barriga 2017).
- Step 1: Minimum Criteria for Nominations
 - Minimum of 6 male and 6 female candidates
 - Minimum of 3 candidates from each region as defined by the UN system
 - Minimum of 9 candidates with a criminal law, 5 with international law backgrounds
- Step 2: Minimum Voting Requirements (first four rounds)
 - Ballot papers say: for a ballot to be valid, each state must vote for x candidates with criminal law experience; y male/female candidates; z candidates from each region
- Step 3: Voting Rules
 - Candidates with the least votes are eliminated after each round
 - Every successful candidate must achieve a two-third majority of voting states, which often requires several rounds of voting

WHY REPRESENTATION MATTERS

- Representation matters for perceived legitimacy.
 - Representation matters for outcomes.
 - Judges often decide issues that have competing plausible answers. Even if judges do their utmost to rely only on the basis of law, personal backgrounds, experiences, and ideological leanings are still likely to influence judicial decision-making (Harris and Sen 2018).
- Implication: a diversity in backgrounds (regions, legal systems, languages, development status) needs to be ensured, so that outcomes are not biased.

CHOICES ABOUT: REAPPOINTMENT

- Should judges serve for renewable terms or non-renewable terms?
- Renewable terms are expected to make judges more accountable to (and therefore less independent from) states.
 - Concerns about independence may be particularly strong on courts that are transparent about how individual judges vote, such as by allowing dissents.
 - Reappointment is possible on 16 out of 24 international courts.
- Reappointment is a central design feature of ISDS.
 - If the accountability of WTO AB members, for instance, is “high” given their renewable four-year terms, then the accountability of an ISDS arbitrator is “super-high.” Correspondingly, independence is diminished.
- If you support non-renewable terms but are worried about a limited pool of qualified judges, then long and staggered judicial terms can be a way forward.

CHOICES ABOUT: SCREENING PROCEDURES

- Some international courts have screening committees that assess candidate judges prior to their election to ensure they possess sufficient expertise and (perceived) impartiality.
- Judicial Council, ECOWAS Court
 - Judicial Council composed of chief justices from ECOWAS states not currently represented on the seven-judge court.
 - Assesses candidate judges and submits a list of three ranked candidates to the ECOWAS authority (member states) which makes appointment decisions.
- Article 255 Panel, Court of Justice of the European Union
 - Former judges from the CJEU and judges from the domestic supreme courts of selected member states.
 - Reviews proposed candidates and reports confidentially to the collective of member states on whether each candidate has the necessary expertise and experience to serve on CJEU.
- Advisory Panel of Experts, European Court of Human Rights

OTHER MECHANISMS OF INTERACTION

- Managerial autonomy: the extent to which a court is able to administer its operations independently.
- Withholding funding (or threatening to) can be a powerful accountability or control mechanism.
- Trust funds exist to help litigants (most often states) with the cost of litigation.
 - ICJ trust fund set up in 1989
 - PCA Financial Assistance Fund set up in 1994
 - ITLOS trust fund set up in 2001
- While the budgets of most courts (23/24) require state approval, the Caribbean Court of Justice is funded entirely through the investment income of a trust fund.

OTHER MECHANISMS OF INTERACTION

- Interpretive autonomy: the extent to which a court is able to issue judgments without concern for how other actors, notably states, will react.
 - Obstruction or Noncompliance
 - Override
 - Issuing a joint interpretation
 - Renegotiating the substantive content of the relevant treaty
 - 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.
 - Example: Filing non-disputing party submissions in ISDS (US gov does frequently)
 - Restricting the jurisdiction of a court
 - ‘Dejudicialize’ or withdraw previously judicialized policy issues from the purview of international courts or tribunals.

If you have any questions or would like
recommendations of academic literature
on a particular issue,

please feel free to email me, and I can
relay the question to other authors:

taylor.stjohn@st-andrews.ac.uk