

**Agents, Trustees, and International Courts:  
Nomination and Appointment of Judicial Candidates  
in the WTO Appellate Body**

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## 1. Introduction

One of the most significant developments of the past several decades has been the legalization, or more precisely the judicialization, of international politics, with a growing number of international courts and tribunals with regional or global jurisdiction over issues such as trade, human rights, and international peace and security.<sup>1</sup> With this development has come an academic debate over the most useful way to theorize the decision by states to create and delegate judicial authority, as well as the subsequent authority, independence and behavior of international courts and tribunals.

One approach, that of principal-agent (PA) analysis, draws from rational-choice theories of domestic and international politics, arguing that instrumentally rational actors (voters or legislators at the domestic level, states at the international level) delegate powers to executive and judicial agents systematically in order to lower the transaction costs of policy-making, and that in doing so they tailor the discretion of their agents, again systematically, as a function of several factors including the demand for credible commitments, the demand for policy-relevant information, and the expected gap between the preferences of the principals and the agents. Following the initial act of delegation, some PA accounts go on to make predictions about the autonomy and influence of executive and judicial agents, which are typically theorized to vary as a function of the administrative and oversight mechanisms available to the principals. As such, the PA approach has been a limited but fruitful middle-range theory, allowing us to problematize and generate multiple, testable hypotheses about delegation and agency in a remarkably wide array of empirical contexts.<sup>2</sup> With respect to international courts and tribunals, PA analysts suggest, states are motivated primarily by a desire to establish an impartial third-party dispute resolution system, and in so doing typically create judicial bodies that are largely insulated from day-to-day political pressures, enjoying considerable independence as a result.

Despite its purported benefits, the PA approach to international delegation in general, and judicial delegation in particular, has come under sustained criticism from scholars who suggest that delegation to international courts and tribunals is different not simply in degree but also in kind from other acts of delegation. In this view, formulated most fully by Karen J. Alter (2008),

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<sup>1</sup> On legalization, see Abbott et al. 2000; on judicialization, see Stone Sweet 1999.

<sup>2</sup> A complete list of citations would be prohibitively long. Key works and reviews in American politics include Epstein and O'Halloran 1999, and Bendor, Glaser and Hammond 2001. Applications to international relations have been most common in the study of the European Union (see Franchino 2002, Majone 2001, Pollack 2003, Tallberg 2007), but have increasingly moved into mainstream international relations (see e.g. the essays in Hawkins et al. 2006, Elsig 2011).

delegation to international courts is guided by a distinct “logic of delegation,” with international jurists theorized not as agents but as “trustees” largely or entirely beyond the influence of the member-state principals that created them. For adherents of this trusteeship approach, the various control mechanisms explored by PA analysts, which are hypothesized to allow principals varying degrees of control over their judicial agents, are either ineffective or unavailable, rendering member-state principals, *qua* principals, essentially irrelevant to international judicial behavior, which is instead guided primarily by distinctive rhetorical and legitimacy politics.<sup>3</sup> This logic of trusteeship is purported by its advocates to apply to all international courts and tribunals, but is most evident with respect to powerful standing courts such as the WTO Appellate Body.

Such trusteeship arguments have made a useful contribution, by pointing to the difficulty for principals of controlling international courts, the multiplicity of interlocutors and sources of influence for such courts, and the distinctive nature of legal argumentation as a decision-making mode that places severe limits on the naked exercise of state power. Nevertheless, we argue, the designation of international courts and tribunals as trustees that are *by definition* beyond the control of its member-state principals is counter-productive, needlessly dichotomizing international courts and arbitrators into mutually exclusive camps as trustees and agents, and rejecting by assumption PA hypotheses that should instead be subject to systematic empirical testing as part of any coherent research program on international judicial politics.

Against this backdrop, we seek in this paper to test a core hypothesis of the PA approach, namely that member-state principals systematically attempt to utilize their powers of judicial nomination and appointment to influence the endogenous preferences of international judges, and thereby judicial behavior. Unlike the trusteeship view, which holds that principals select international judges for their expertise and personal reputations, we hypothesize that individual member-state principals will attempt to influence international courts by attempting to nominate and appoint international judges whose nationality, judicial philosophy, and views on individual questions most closely approximate their own substantive preferences. This effort by principals to shape *ex ante* the endogenous preferences of judges is well established in the literature on domestic judicial appointments, and we hypothesize that the same effort takes place, in modified form, with respect to international courts and tribunals.

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<sup>3</sup> For strong statements of the trustee approach, see e.g. Majone 2001; Grant and Keohane 2005; and Alter 2008, reviewed below.

Our empirical focus in the paper is on the Appellate Body (AB) of the World Trade Organization (WTO). There is widespread agreement among scholars that the AB is among the strongest international courts in the world, with far-reaching powers to interpret the often vague provisions of WTO trade law, and with the power to authorize retaliatory measures (e.g. an increase in tariffs) for noncompliance with judicial decisions that give “teeth” to those decisions. Furthermore, the AB’s member-state principals face an extraordinarily high hurdle either in overruling its decisions (which would require consensus among 153 disparate Members) or in “recontracting” with the AB by changing its mandate through a new treaty. As such, the AB closely approximates the ideal type of a trustee-court. If we can demonstrate that member-state principals systematically employ nomination and appointment procedures as a means to influence the endogenous preferences of AB members, then it seems even more likely that weaker courts, such as the International Court of Justice, are subject to the same sorts of efforts to influence international jurisprudence through nomination and appointment of international judges.

Concretely, we present a detailed case study of the nomination and appointment procedures for members of the WTO AB during the first decade and a half of its existence, from the initial appointment of seven AB members in 1995 through the most recent appointments in 2009. Drawing on both written primary sources and interviews with former and present AB members, former staff of the AB Secretariat, official candidates who were not elected, Geneva-based Ambassadors and high-ranking officials in Washington DC and Brussels, we present a view of an AB selection process that, far from representing the pure search for expertise, is deeply politicized and offers member-state principals opportunities to influence AB members both *ex ante* and *ex post*. *Ex ante*, WTO member states can and do influence the endogenous preferences of the members of the AB through a rigorous screening process that pays close attention to the views of candidates on specific issues of interest to those states. In addition, the reselection process, which typically occurs at the end of each member’s four-year renewable term, provides member states with a potential source of *ex post* leverage over the AB, albeit subject to significant obstacles that we analyze below.

Furthermore, we demonstrate, the WTO’s consensus rule, which protects the AB as a whole from overruling or a change in its mandate, has very different implications in the AB selection process, when a consensus among the member governments is required to appoint or reappoint any given candidate. Unlike the European Court of Justice, where nomination and appointment of judges is dramatically decentralized and in practice requires only the consent of

the member state nominating a candidate, candidates for AB appointment must survive a grueling screening process which subjects candidates to 153 potential veto players – making the AB selection process challenging even by comparison to the legendarily difficult process of appointment to the US Supreme Court.

We further demonstrate that the AB nomination process has become *progressively more politicized* during the first decade and a half of the EU’s life. During the earliest nominations to the AB, we demonstrate, WTO member states certainly attempted to secure the appointment of members of the AB from their own member state, but otherwise opted for extensive legal and policy experience, largely consistent with Alter’s view of trustees. With the passage of time, however, as the AB began to adopt controversial decisions with profound implications for member states’ sovereignty and economic interests, WTO member governments became far more concerned about judicial activism and more interested in the substantive opinions of AB candidates, regularly promoting candidates whose views on key issues (antidumping, amicus curiae briefs) most closely approached their own, and rejecting candidates perceived to be activist or biased against members’ substantive preferences.

To be clear, we do not seek to replace the trusteeship view with a crude PA view depicting the WTO AB as the puppet of the US or other powerful states. We agree that the AB is one of the strongest international courts in history and that its decisions have been enormously consequential for international trade and international trade law. However, we argue that a version of trusteeship view, which assumes the unavailability or ineffectiveness of any and all member-state control mechanisms by definition, ends up directing our attention away from one of the most important developments of the past 15 years, namely the increasing politicization of the AB selection process. Rather than bluntly dichotomizing obedient “agents” and autonomous “trustees,” we argue for a more subtle, discriminating approach to international courts and tribunals, which problematizes and studies empirically the specific mechanisms whereby states are – or are not – able to influence the preferences and the behavior of the international courts they create.

The paper is organized in five parts. Following this introduction, the second section reviews the theoretical debate between PA analysis and the trusteeship approach. The trusteeship approach, we suggest, offers important insights that we consider to be central to any overarching theory of international judicial politics, yet we argue that Alter and others err in needlessly dichotomizing international actors into mutually exclusive categories of agents and trustees, and

in rejecting by assumption the notion that principals might be able to exert any significant influence over international courts by virtue of their status as trustees. We opt instead for a complementary approach, in which mid-range PA models are compatible with and are tested alongside other theoretical claims about the nature of international judicial politics. In the third section, we focus on one specific and thus far understudied aspect of international judicial delegation, namely the nomination and appointment of international judges. We draw on theories and empirical findings from the literature on domestic judicial appointments in the United States and other countries, explore the analytic similarities and differences between the domestic and international levels, and derive five hypotheses for empirical testing. The fourth section presents our empirical analysis of judicial nomination and appointment to the WTO AB, demonstrating the extensive and growing use of judicial selection as a means whereby member-state principals attempt to influence the endogenous preferences of AB members. A brief fifth section concludes.

## **2. Theory: Agents, Trustees, and International Courts**

In this section, we examine briefly the recent theoretical challenge to PA analysis from scholars who posit that international courts should be theorized as “trustees,” different in kind from “agents” and largely or entirely immune from the influence of their principals *qua* principals. We focus in particular on the critique posed by Karen Alter, acknowledging the contributions but also the pitfalls of her approach, and then focus on judicial appointment as a potential source of member-state principals’ leverage over international courts. While Alter suggests that the unique feature of international courts make judicial appointment a weak control mechanism for member-state principals, we argue that the member-state principals of international courts have both the incentive, and in some cases the ability, to use the judicial appointment process to shape the endogenous preferences of the international judiciary – a phenomenon that we expect to grow over time as member states gain additional information about the stakes and the substantive issues raised by international dispute settlement.

### **2.1 Trustees and Agents**

In the study of international politics, the notion of international organizations and courts as trustees can be traced largely to the work of Giandomenico Majone, and to that author’s distinction between what he refers to as two distinct “logics of delegation”: one logic informed by the demand for policy-relevant expertise, in which principals delegate executive functions to

agents within relatively constraining control mechanisms; and a second logic, guided by the logic of credible commitments, in which principals deliberately insulate their agents – or, in Majone’s terms, “trustees” – so that those trustees may implement policies to which the principals themselves could not credibly commit. At the extreme, Majone suggests, such a “fiduciary relationship” may lead principals to undertake a “complete, and in some cases irrevocable,” transfer of their “political property rights” in a given issue-area to their trustees (Majone 2001: 113). In his primary case of the European Union (EU), Majone argues, member state principals have delegated powers in EU treaties primarily to ensure credible commitments, and in these areas the EU’s supranational organizations (e.g., the European Court of Justice [ECJ], and the Commission in some of its regulatory and enforcement capacities) approximate trustees, with substantial amounts of discretion. By contrast, he suggests, member states delegate primarily technical and informational functions in EU secondary legislation, and design traditional oversight mechanisms to limit their discretion.

Majone’s account is useful in distinguishing between two rationales for delegation – one informational, the other based on credibility of commitments – but in doing so, we argue, it unnecessarily dichotomizes the two logics of delegation, creating two entirely separate categories of agents/trustees and hypothesizing entirely distinctive motivations for delegation in each case.<sup>4</sup> In the case of a true trustee – one to whom political principals had ceded a complete and irrevocable transfer of political property rights – we might indeed be able to jettison PA analysis, which would be useful in explaining the act of delegation but not the subsequent behavior of the trustee, who would subsequently be free to act entirely without regard to the principals who had surrendered their political property rights. As an empirical matter, however, Majone’s scenario of a complete and irrevocable transfer of political property rights is a theoretical limiting condition (Discretion = 1, in Epstein and O’Halloran’s [1999] metric), which is rarely if ever realized in practice, particularly in international politics. Even in the areas of extensive, treaty-based delegation to courts such as the ECJ and the AB, member-state principals typically specify a detailed and constraining mandate, and retain for themselves the power to appoint and (in some cases) reappoint individual judges, the power to remove individuals from power for criminal

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<sup>4</sup> Put differently, Majone conflates in his definition both the causes of delegation (commitments vs. information) and the effects of delegation (high vs. low discretion), making it difficult to disentangle these two variables. Nevertheless, both Franchino (2002) and Pollack (2003:91-107) have attempted to operationalize Majone’s categories, and both found that the discretion of EU supranational institutions varies more continuously, and less dichotomously, than Majone’s categorization suggests.

behavior, the possibility (albeit difficult) of overruling court decisions through a new treaty or new secondary legislation (in the WTO by non-acceptance by consensus or an authoritative interpretation by a 3/4 majority), and the ultimate (but even more difficult) power to recontract with the court as a whole by changing its statute or the treaty establishing it. If we define trustees as enjoying complete and/or irrevocable transfers of political property rights, then these actors are not quite trustees; if, on the other hand, we define trustees as simply those actors who are granted great discretion and broad mandates, then actors like the ECJ and the AB seem to fit within the definition of agents as understood in the existing literature.<sup>5</sup>

In recent years, variants on Majone's agent/trustee dichotomy have been employed in a number of subsequent studies of international delegation. Grant and Keohane (2005:31), for example, distinguish clearly between what they call "discretionary authorities" and "instrumental agents." In the case of discretionary authorities, they argue, principals "do not expect to direct the power-wielders' behavior beyond defining official duties," and fall back exclusively on *ex post* mechanisms for sanctioning abuses of power. In the case of instrumental agents, on the other hand, "mechanisms to direct the actions of power wielders *ex ante* are also employed."

This distinction seems more useful than Majone's, defining the two categories strictly in terms of the structure of delegation and not conflating principals' motives with agents' (or trustees') discretion. Nevertheless, even Grant and Keohane's distinction needlessly dichotomizes what should be a continuous variable, "discretion," since in practice the mandates of "discretionary authorities" are not dichotomous with those of instrumental agents but can vary along a continuum. Consider the US Federal Reserve and the European Central Bank, two widely cited trustees that have been granted fiduciary powers by their respective principals to adopt monetary policies, often in the face of considerable short-term displeasure among their principals. Despite these similarities, neither the Fed nor the ECB enjoy a complete and irrevocable transfer of property rights. Nor do the two central banks enjoy the same degree or type of discretion, despite both being "trustees." The Fed, for example, enjoys a relatively broad mandate, while the ECB has a more constraining mandate that clearly prioritizes price stability over other considerations such as economic growth; yet the mandate and the powers of the Fed can be altered by a majority vote of Congress, while the ECB Statute can be changed only by a

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<sup>5</sup> It is for this reason that international relations scholars such as Pollack (2003) and Franchino (2007), have relied on Epstein and O'Halloran's (1999) continuous 0-1 scale of discretion, rather than on Majone's dichotomous distinction between agents and trustees.



unanimous agreement of the member states, a situation that approximates – but still falls short of – a complete and irrevocable transfer of political property rights. By labeling these organizations dichotomously as “trustees, not agents,” we lose sight of the central fact that the discretion of these “trustees” is not absolute but variable, and should be subject to systematic analysis. PA analysis is not irrelevant to such cases – on the contrary, it provides a useful starting point by explaining and establishing the sources and the potential limits of the extraordinary discretion enjoyed by central banks, courts, and other “trustees.”

## **2.2 International Courts as Trustees**

Perhaps the most systematic statement of the trusteeship argument comes from Karen Alter, who argues that international courts and tribunals should not be construed as agents of their member states, because the control mechanisms (“recontracting tools”) emphasized by PA analysts are likely to be unavailable or ineffective as a means to influence the international judiciary. In Alter’s alternative conception, international courts as trustees “... are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary” (Alter 2008: 33). In such instances, member-state principals cannot hope to influence courts through actual or threatened “recontracting,” placing courts outside the realm of PA analysis.<sup>6</sup>

By contrast with PA approaches, which theorize principals in a hierarchically privileged position, Alter (2008: 47) argues that, “judges are in a privileged position (at least once a case is in court) because they ultimately decide the case and there is a heavy presumption that their decision is legally authoritative.” Furthermore, “the venue and deliberative style in which interpretive politics takes place is very different from the negotiating table dominated by state actors. Courtroom politics take place in an environment highly constrained by law and legal procedure, where judges have a privileged position because they get to ask the questions, decide what is and is not relevant, and determine the outcome” (Alter 2008: 47). Under such conditions,

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<sup>6</sup> PA theory, Alter (2008:34) acknowledges, “expects political control to be incomplete (...) if only because recontracting is harder to orchestrate with respect to courts compared to administrative agencies. But,” she continues, “recontracting tools should nonetheless provide significant influence over IC decision-making.” Later, Alter (2008:47) elaborates on this point, noting that “states may have more resources than non-state actors in (...) interpretive politics (...). But being a member of the collective Principal does not lead to unique influence let alone political control over the rhetorical politics of persuasion or over how the legal ruling will be understood by the so-called ‘international community.’”

efforts by member-state principals or indeed by any other actor to influence judicial interpretation will be channeled away from traditional control mechanisms and toward either “rhetorical politics,” in which actors attempt to persuade judicial actors in the language of the law, or “legitimacy politics,” in which actors attempt to influence the public perception of the legitimacy of a court’s decision, or indeed of the court itself.

Alter’s contribution is insightful, recognizing as it does the deliberate efforts of many states to insulate international courts from most threats of principal control or recontracting; the distinctiveness of legal proceedings and legal reasoning as a decision-making mode in which political considerations and naked political pressures are delegitimized and legal arguments privileged; and the willingness of international judges to defy political pressures and follow legal reasoning even where it results in principals’ dissatisfaction and even the very rare political reversal of judicial decisions. Furthermore, Alter’s discussion of rhetorical and legitimacy politics directs our attention to legal and political processes that do indeed fall outside the purview of a simple, dyadic PA model. For these reasons, we applaud the insights that Alter brings to the study of international judicial politics. Nevertheless, we would argue, Alter’s analysis goes wrong in three respects: (1) reducing PA analysis to a strawman; (2) offering at best a vague theoretical definition and operationalization of trustees; and (3) needlessly dichotomizing international agents, with all arbitrators reduced to “mere agents” (Alter 2008: 34) and all international courts elevated to the status of trustees. We consider each of these issues briefly, before moving on to a discussion of judicial appointment as a potential control mechanism.

### ***2.2.1 Principal-Agent Analysis as a Strawman***

One striking feature of Alter’s article is that the author does not present her analysis as a *complement* to PA analysis, but as a competitor or alternative. In doing so, Alter not only misses the potential for complementarity between PA analysis and her broader conception of international judicial politics, she also repeatedly mischaracterizes PA analysis, presenting the theory (a) as biased in favor of the hypothesis of principals’ control; (b) as ruling out alternative sources of influence on agents other than recontracting; and (c) as unfalsifiable.

With regard to the first issue of bias, Alter (p. 36) begins fairly, characterizing the core of PA analysis as follows:

P-A theory posits that the size and extent of discretion/slippage is a function of (1) informational disparities that allow Agents to obscure their slippage and (2) recontracting decision-rules that create costs and difficulties associated with recontracting. By focusing on these factors, P-A theory generates hypotheses that locate different Agents along a continuum of highly ‘controlled’ Agents to highly ‘autonomous’ Agents.

Elsewhere in the article, however, Alter subtly associates PA analysis with the assumption that principals (in her case, states) can indeed control agents (international courts). On page 38, for example, Alter cites the influential definition of delegation by Hawkins et al., arguing that, “By this definition, the Principal *will have* the power to revoke or change the contract, and thus it will have contracting power over the Agent.” This claim is strictly speaking consistent with the assumption by Hawkins et al. that a grant of authority “must be revocable by the principal” (2006:7), yet it ignores the authors’ subsequent discussion of the variable and potentially high costs of recontracting and revocation that can, in practice, create considerable autonomy for the agent. PA analysis, here, is subtly equated with the assumption of principal control – an assumption made more explicit in Alter’s conclusion (p. 55) which states that:

The thrust of this argument is that the presumption should be in favor of IC independence rather than Principal control. Giving up the idea that states are the hidden puppet masters of ICs allows us to instead focus on how international politics is being transformed by the existence of an alternative venue of international politics – namely international legal arenas.

Here again, Alter’s arguments mischaracterize PA analysis, which is associated with “the idea that states are the hidden puppet masters of ICs.” More disturbing here is the language of “presumption.” Properly understood, PA analysis does not offer *any* presumption about either IC independence or principal control, but rather offers a set of tools to understand the determinants and the extent of agents’ independence and principals’ control. In fact, unlike Alter’s approach, which *presumes* the ineffectiveness of recontracting or other control mechanisms, a PA approach *problematizes* and generates testable hypotheses about the *conditions* under which such control

mechanisms will, or will not, serve as an impediment to the independence of any agent – including, in this instance, an international court.<sup>7</sup>

Moving to the second issue, Alter (p. 38) explicitly presents PA analysis as being incompatible with any richer or more nuanced theory of judicial politics:

Because the Principal constitutes the Agent, and is the only actor with contracting power to appoint, fire, cut the budget, or rewrite the mandate of the Agent, P-A theory suggests that being a Principal confers a unique, privileged, and hierarchical source of leverage over the Agent. This shrunken universe, in which there are only Principals and Agents united by a contract, does not allow other actors to matter, or concerns other than recontracting to animate the Agent. Since recontracting is a power source that only a Principal can wield, sanctioning via recontracting becomes emphasized to the exclusion of other sources of power.

At one level, Alter’s critique is entirely correct: PA analysis is a mid-level theory about the dyadic relationship between a principal (or principals) and its agent (or agents), abstracting almost entirely away from third parties. Furthermore, PA models do often black-box the internal workings of both state principals and IO agents (e.g. bureaucracies and courts), adopting simplifying assumptions about both actors in order to model the relationship between them.<sup>8</sup>

For this reason, it is quite true that PA models cannot claim to offer a complete theory of judicial or monetary politics, and that any such complete theory must in that sense “go beyond” PA analysis. These features would be fatal if PA analysts put forward simple PA models as complete and inclusive theories of international judicial politics, or if PA models were

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<sup>7</sup> This is not the only instance in which Alter mischaracterizes PA analysis. For example, she suggests (on page 37) that the literature is unclear about which actors deserve the status of principal. “Who the ‘Principal’ is should be ascertainable by looking at which actors have authority to change the delegation contract. Yet P-A studies sometimes label the wider public, national governments, national parliaments, or other political bodies as the Principal, shifting the political actors the Agent should be responding to.” It is difficult to respond to this claim, since Alter provides no citations to any specific works, yet it is worth noting that the most widely cited formulations of PA analysis in international relations (Hawkins et al. 2006, Pollack 2003) specifically rule out such a nebulous conception of “principals” in favor of the narrower definition that Alter herself seems to prefer.

<sup>8</sup> Much the same is true, incidentally, of Alter’s analysis of international courts, which are implicitly assumed to be unitary actors, with no discussion of intra-court disputes or of the preferences and incentives of individual judges. By contrast, recent work in the PA tradition has begun to examine the inner workings of international agents, as well as the internal politics of collective principals (see e.g. Nielson and Tierney and Nielson 2003; Hawkins and Jacoby 2006; Elsig 2010a, 2010b). In the same spirit, we relax this unitary-actor assumption below, examining the efforts of states to influence the preferences of individual judicial nominees *ex ante*, as well as the incentives of individual judges *ex post*.

dramatically incompatible with a broader theory like Alter's. Yet neither of these is the case. Notwithstanding a few early and oft-cited PA analyses (Garrett 1992; Garrett and Weingast 1993) that made simple and unsustainable claims about member-state control of the ECJ, more recent PA analyses have been sensitive to the obstacles to member-state control of the judiciary, and to the multiple interlocutors of international courts like the ECJ, eschewing any view that PA analysis constitutes a comprehensive theory of international judicial politics (Garrett Kelemen and Schulz 1998; Pollack 2003). Rather, we argue, PA analyses, if incomplete, provide a useful starting point for theorizing about both delegation decisions and subsequent relations between principals and agents – *including* the possibility that international agents like courts enjoy extensive discretion from their principals, and hence that the primary influences on those agents may come from third-party actors like public opinion, markets, lower courts, or individual litigants. Furthermore, PA models, as rationalist theories, are compatible with a wide range of other mid-level theories, and thus can easily serve as one of several building blocks of a more ambitious theory of international judicial politics (Moravcsik 1998).

Perhaps the most damning attack on PA analysis in Alter's (2008: 36) critique, however, is her claim that,

while P-A theory seems to generate clear predictions, as a bundle the predictions of P-A theory are highly fungible. (...) What if the nature of the delegation contract makes it highly transparent if the Agent is slacking (a) and includes short appointment terms (c), but there are high thresholds needed to recontract? The theory does not prioritize its claims, which allows scholars employing P-A theory to make contradictory claims in support of the theory.

This is a puzzling assertion. As a body of theory, PA analysis may indeed generate multiple hypotheses about potential sources of principal control over agents: indeed, Epstein and O'Halloran (1999) famously identify fourteen potential control mechanisms that might determine the discretion of a given agent. Taken "as a bundle," such alternative, overlapping, or even incompatible hypotheses may indeed be unfalsifiable. PA analysis, however, is hardly alone in generating multiple hypotheses to account for a given dependent variable, and the proper

response to such a situation is not to abandon the theory,<sup>9</sup> but to test hypotheses individually, rather than “as a bundle,” controlling wherever possible for alternative explanations. This is the approach we shall take below, focusing on a single control mechanism, judicial appointment, and its use by political principals with respect to members of the WTO AB.

### ***2.2.2 Defining and Operationalizing Trustees***

In formulating her categories, Alter is inconsistent in specifying whether her “Agent” and “Trustee” categories are dichotomous – either/or – or continuous, a matter of degree. On the one hand, her title (“Agents or Trustees?”) suggests that the categorization is indeed dichotomous, and in theorizing the difference she cites with approval the dichotomous formulation of Giandomenico Majone, for whom delegation to agents and trustees, respectively, is motivated by entirely distinct “logics of delegation,” with (1) a transaction-cost logic motivating delegation to agents and (2) a credible-commitments logic motivating delegation to trustees. Agents, she suggests, enjoy delegated authority, while trustees “can have” moral authority, rational-legal authority, and expert authority as well (Alter 2008:39). All of this suggests a dichotomous, either/or, conception of principals and agents as non-overlapping domains governed by fundamentally different logics.

Yet, at a very few points in the article, Alter (2008:41) suggests that, “The two categories sit at opposite ends of a continuum,” and indeed her very useful Table 1 is titled “Agents and Trustees -- Two ends of a Continuum in Delegation.” Here, Alter delivers a more nuanced and less dichotomous set of arguments, noting, for example, that Agents “may develop” a reputation for rational-legal, expert, or moral authority, and that in those situations “rhetorical and legitimacy politics will become more important” (Alter 2008:42-3). Such a continuous characterization of agents and trustees, however, begs the question of when, and under what conditions, trustees *become* trustees.

The distinction matters, moreover, because in Alter’s own words, “delegation to Trustees changes the nature of the political game,” which becomes “different because the Trustee is independent” (Alter 2008: 44). In such situations, recontracting threats emphasized by PA analyses become almost entirely ineffective, and the politics of trustee decision-making is dominated by rhetorical and legitimacy politics. This raises a non-trivial question: *What are the*

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<sup>9</sup> Alter (2008:38) suggests that, “Since we cannot empirically falsify the expectations of the Principal control thesis, we must move to the level of ontology to question the theory.”

*specific features of agents and trustees* – or, alternatively, if Alter’s theoretical framework does describe a continuum, what is the “tipping point” on the continuum where an agent becomes a trustee and PA theories become inapplicable? Is it the motivation of the principals that is determining? Apparently not, since agents can develop new forms of authority and thereby increase the importance of rhetorical and legitimacy politics that are the hallmark of trustee status. Is it the specific rules governing the mandate of the agent/trustee, the length of the appointment and possibility of reappointment, or any of the other potential control mechanisms? Apparently not, since Alter (2008:46-7) makes no mention of these rules in her definition of trustees, and emphasizes repeatedly that such rules are unlikely to be effective in dealing with trustees.

Instead, if we want to distinguish in practice between agents and trustees, we need to return to the three factors that, Alter tells us, define a trustee. Trustees, in this view are: “(1) selected because of their personal and/or professional reputations; (2) given authority to make meaningful decisions according to the Trustee’s best judgment; and (3) is making these decisions on behalf of a beneficiary.” These are at one level sensible factors to emphasize, yet they are also arguably undertheorized and poorly operationalized, making it difficult in practice to distinguish the characteristic features of a trustee from those of an agent. To take each of these three elements in turn:

1) Trustees are, in the first instance, defined in terms of their characteristics, “their personal and professional reputations,” rather than (as in a PA approach) their mandates, appointment procedures, or the rules governing their conduct. This raises some tough questions. On the one hand, Alter’s definition suggests that many officials with significant expertise in some issue-area should be considered candidates for trustee status, including not just judges but also arbitrators, central bankers, and independent regulatory agencies. By contrast, we are left to wonder whether judges on a domestic or international court *fail* to meet the definition of trustees to the extent that they lack strong “personal or professional reputations” – which are, in any event, not clearly defined or operationalized. This last point is not a trivial one, since, as we shall demonstrate, the personal and professional reputations of international judges, while generally high, are characterized by considerable variation, and the most distinguished, experienced and brilliant candidates for international judicial posts are frequently passed in favor of less qualified candidates whose judicial views or nationality are more to the liking of powerful member states.

Whether such individuals would give up their trusteeship status as a result is unclear in Alter's theory

2) The second criterion, that the trustee is "given authority to make meaningful decisions according to the Trustee's best judgment," is again somewhat fuzzy in both theory and practice. Once again, not just courts but independent regulatory agencies and central banks as well as international arbitrators would seem to meet this criterion, since both are delegated powers to take decisions according to their respective types of expertise, consistent with a broad mandate set out by the principals.

3) Finally, the last criterion for recognizing a trustee is that it acts on behalf of a vaguely defined "beneficiary" that differs from the principal. "The beneficiary may be an entirely artificial construction; what is important is that there is a third party who the Trustee supposedly is serving." Alter does not define the beneficiary in any greater detail than this, leaving the reader to guess how we are to operationalize such a criterion. Nevertheless, defined as broadly as it is here, one can construct a "beneficiary" for nearly any act of public delegation, domestic or international. Independent regulatory agencies and central banks, yet again, presumably regulate on behalf of the affected public. The same would seem to be true for an international organization with operational responsibilities toward specific constituencies or indeed toward the international community as a whole.

In sum, if we take Alter's three criteria as the defining features of a trustee, then political life should be replete with trustees, since the label of trustee would seem to apply to a remarkably wide range of actors, including not just courts but central banks and independent regulatory agencies and international organizations whose leaders possess and take decisions based on their expertise and judgment, and in the name of a third-party beneficiary such as the domestic public or the international community. Because she only considers international courts and tribunals in her article, it is not clear whether Alter would accept or reject this characterization of a much wider range of actors as trustees, or the implication that traditional control mechanisms are irrelevant for these actors as well.

### ***2.2.3 Needlessly Dichotomizing Agents and Trustees, and Losing Analytical Leverage***



The vagueness of Alter's distinction between agents and trustees is relevant for still another reason, which is that, despite the absence of a clear theoretical distinction between the two groups, Alter in practice makes strong empirical claims about the classification and behavior of various judicial bodies as either trustees or agents. This is most striking in her discussion of the distinction between international arbitrators and mediators, which are theorized as mere "agents" of their member-state principals, and standing courts and tribunals, all of which are elevated to the exalted status of trustees. In Alter's words,

Arbitrators and mediators can (...) provide some distance [from the respective interests of the parties to a dispute], but the process of dispute resolution is still political by design. The arbitration process takes place in secret (as in diplomatic negotiations); third party appointments and settlements are pretty much one-shot deals for the arbiters and the parties alike; and there is no requirement that settlements cohere with the requirements of law or even bear the scrutiny of others. Delegation to courts is different (Alter 2008:45).

She continues,

In delegation to courts, judges are selected because of their qualifications as experts in the law and given multi-year (as opposed to ad hoc) appointments. The legal process allows for settlements along the way and aims at facilitating compromise (...). But negotiation (...) takes place in the shadow of the law. Legal rulings are subject to review – by higher courts, or through publication and popular scrutiny. (...) Thus judicial decision-making is by intent expert decision-making, undertaken by disinterested actors. Unlike mediation or arbitration where the goal is to reach a settlement, judicial decision-making uses a rational-legal method of applying pre-existing rules to resolve disputes (Alter 2008: 45).

Alter's distinction between arbitrators and mediators, she hastens to add, "implies no naïveté about who judges are or what they actually do (...). But even if one does not accept that judges better represent the public interest than elected politicians, one can still believe that judges who are not out for hire on a case-by-case basis are more likely than politicians or non-judicial

decision-makers (e.g. mediators and arbitrators) to consider the long term consequences of their actions” (Alter 2008:45-6).

On the one hand, Alter’s point about arbitrators, or “judges for hire,” being less independent than judges on standing courts makes intuitive sense, and indeed is quite consistent with the basic assumptions of PA analysis, which typically equates longer terms of office with greater judicial independence. And yet, we would argue, her sharp distinction between arbitrators, such as WTO panelists, and judges, such as the members of the AB, ignores Alter’s most compelling argument, which is about the distinctive features of law as a form of discourse, which limits appeals to naked power and compels all actors – including WTO panelists and other arbitrators in legalized arbitration systems – to argue and reason in the language of the law.

For this reason, we would be wary of assuming that international arbitrators are all of a type – all “out for hire on a case-by-case basis” with no significant differences among them. In some, indeed many cases, international arbitrators are as political and as secretive as Alter suggests, guided primarily by a desire to settle the case rather than by any commitment to legal reasoning or to overarching legal principles. In other settings, however, arbitration, while still relying on individual arbitrators or panels rather than a standing court, may indeed be guided by established and institutionalized legal principles and legal argument, with decisions issued by arbitrators with considerable professional expertise and commitment to the rule of law; examples here would include the International Center for Dispute Resolution in New York, as well as the dispute resolution panels established under the WTO (and previously under the GATT). Hence, while the differences between international courts and arbitrators are important, their commonality as legal professionals and upholders of the law may in practice weaken the sharp distinction between them in both traditional PA analysis and in Alter’s work.

### **3. The Politics of International Judicial Appointments**

Where does all this leave us? Our own position is nuanced, as indeed any theory of international judicial politics should be. On the one hand, we agree with Alter that PA analysis alone is woefully inadequate as a theory of international judicial politics, which should be sensitive to the nature of the legal profession and legal argumentation as a mode of decision-making; to the multiple interlocutors (including states, NGOs, the international interpretative community, and in some cases national courts and private litigants) of international courts; and to the rhetorical and legitimacy politics of which Alter writes.

On the other hand, however, we disagree with Alter about the usefulness or the wisdom of classifying all international courts as trustees, adopting a presumption in favor of their complete independence, and rejecting by fiat any possibility that traditional PA control mechanisms might play even the slightest role in influencing the legal interpretation and the judicial behavior of international courts and judges. We consider it a theoretical possibility that a given international court (or its judges) might attain such a degree of independence that its member-state principals, *qua* principals, become completely irrelevant, as in Alter’s trustee model – but we also consider it unlikely, and a question that is better left to empirical analysis rather than being decided by assumption.

Fortunately, we need not follow Alter in making an either-or choice between PA analysis on the one hand, and a richer, more inclusive theory of judicial politics on the other hand. Rather, we believe that legal and social-science scholars should aim to incorporate the relevant features and hypotheses of PA analysis into the broader study of international judicial politics, subjecting them to rigorous tests and provisionally accepting or rejecting them in light of empirical findings.

We therefore focus, in the rest of this paper, on the use of one specific control mechanism highlighted by PA analysis, namely the right of member-state principals to individually nominate and collectively appoint (and reappoint) candidates for international judgeships. In doing so, we are able to draw upon a large body of scholarship that emphasizes the political significance of judicial nomination and appointment as a means whereby political principals attempt to shape the preferences and the jurisprudence of *domestic* judges.

### **3.1 Domestic Judicial Appointments**

Our understanding of the judicial appointment process owes much to the study of US judicial politics, where a community of scholars has examined and established clear empirical findings about the nature of the process of appointing federal judges to the Supreme Court and to lower (district and appellate) courts. US federal judges, as is well known, are appointed for life terms, subject to removal only for impeachable offenses, and in this sense closely approximate Alter’s ideal of judges as trustees. And yet, the American judicial politics literature points clearly to a picture of the judicial appointment process as profoundly “political,” in the sense that political actors with the power to nominate and confirm judicial candidates are guided in large part

(although not exclusively) by partisan and ideological concerns.<sup>10</sup> Put more formally, political actors seek to influence public policy through their judicial appointments, and seek to appoint candidates whose judicial philosophies and ideological views are likely to move a court in the direction of their own preferences.<sup>11</sup> Furthermore, there is substantial evidence from the study of judicial behavior that the ideological preferences of judicial candidates at the time of their nomination really *do* shape the subsequent behavior of those judges, suggesting that, at least in the US context, judicial appointment is an *effective* means whereby political actors shape subsequent judicial outcomes.<sup>12</sup> Although a complete review of this huge literature is beyond the scope of this paper, its essential outlines can be summarized for our purposes in terms of the “four I’s” – interests, interactions, institutions, and information – emphasized in rational-choice theories common to American, comparative, and international politics (see Table 1).<sup>13</sup>

First, with respect to *interests*, the key players in the judicial appointment process are the president and members of the US Senate, all of whom have complex preferences. With respect to the president, American judicial scholars have demonstrated clearly that presidential nominating behavior is shaped by a variety of motivations, which include not only a desire to nominate well qualified candidates, but also efforts to appease political allies, interest groups, and the electorate; to provide a source of patronage for friends and allies; to remove potential adversaries from the political process; *and* as a means to shape the ideological balance of courts by nominating candidates who have been screened and determined to share the liberal or conservative views of the presidents who nominate them.<sup>14</sup> Senators have similarly complex preferences, combining concerns about patronage with ideological, policy, electoral and interest-group considerations in

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<sup>10</sup> See e.g. the discussions in Moraski and Shipan 1999; Chemerinsky 2003; Gerhart 2003a, b; Epstein and Segal 2005; Davis 2007; and Silverstein 2007.

<sup>11</sup> See e.g. the formal model presented by Moraski and Shipan (1999: 1073), who hypothesize that the US President (and by extension other political actors) is “motivated by policy concerns,” and attempts to use judicial appointments “to move the median of the Court as close as possible to his own ideal point,” subject to the constraints of the judicial confirmation process.

<sup>12</sup> See e.g. Epstein and Segal 2005: 117-141, and the review of the “attitudinal model” of judicial behavior in Segal 2008: 24-28.

<sup>13</sup> See e.g. the effort by Lake, Frieden and Schultz (2010) to apply an “interests, interactions and institutions” approach to the study of a variety of issues in world politics, as well as Lake’s (2008) effort to apply a similar framework to the “emerging interdisciplinary” of international political economy. See also Moravcsik 1997, who attempts to situate competing theories of international relations with respect to their respective emphases on interests, institutions, information, and ideas. While we recognize the potential importance of causal and normative ideas in world politics, as emphasized by constructivist theorists, we focus here on the “four I’s” emphasized by rational-choice and principal-agent analyses.

<sup>14</sup> Epstein and Segal 2005: Chapter 3.

deciding how to vote on a given judicial nomination.<sup>15</sup> Nevertheless, this same literature points clearly to ideological and partisan concerns as primary considerations for presidents in nominating judicial candidates, and for Senators in voting to confirm or deny those candidates. Hence, theoretical models of judicial appointments typically assume that both the President and Senators seek to use judicial appointments to move the court toward their own policy or ideological preferences (see e.g. Moraski and Shipan 1999), and empirical evidence similarly points to partisan and ideological factors as being among the most important predictors of both Presidential and Senatorial choices (Esptein and Segal 2005: 47-116).<sup>16</sup>

Second, however, examining the sincere preferences or interests of Presidents and Senators is insufficient. We must in addition understand the strategic *interactions* among Presidents and Senators in the two-stage “nominating game,” with the President having the constitutional right to nominate judges, subject to the advice and consent of the United States Senate.<sup>17</sup> Presidents, in the US system, have the exclusive right to nominate candidates to the federal judiciary (including both the Supreme Court and lower courts), which gives the President formal agenda-setting power vis-à-vis the Senate, which is given only a straight up-or-down vote on the president’s nominee. However, the President must anticipate the likely reception of his candidate in the Senate, and is therefore unlikely to select nominees based on his sincere preferences, but should rather select the candidate closest to his preferences who is likely to be confirmed by the Senate.<sup>18</sup> Senators in turn may vote to confirm or to veto a candidate, with the

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<sup>15</sup> Ibid, Chapter 4. There is also, of course, a sizable normative literature on the types of considerations that the president and especially the Senate *should* consider when taking decisions about judicial candidates, with some (Carter 1994) arguing that political actors should focus only on the professional qualifications of candidates, rather than prying into the judicial philosophies of candidates or engaging in a “results-oriented” focus on candidates views on specific issues. Other legal scholars (Kagan 1995, Cherminsky 2002-2003), however, argue that political actors historically have and indeed *should* consider the ideological views of judicial candidates in the appointment process.

<sup>16</sup> This is not to say, of course, that the qualifications of candidates are completely unimportant; indeed, empirical evidence supports the claim that candidates’ qualifications also exert an independent causal effect on the likelihood of confirmation by the Senate (Moraski and Shipan 1999: 1089; Epstein and Segal 2005: 102-106).

<sup>17</sup> See Moraski and Shipan 1999 for a theoretical model of the “nominating game” between the President and the Senate. From a principal-agent perspective, the appointment of a judge by political actors is the first move in an ongoing principal-agent relationship – although of course the substantial independence enjoyed by US federal judges has led Alter and others to reject the term “agent” entirely. Our focus here, however, is on a second strategic interaction, not between political principals and judicial agents, but between the President and the Senate with respect to the initial appointment of those agents.

<sup>18</sup> See e.g. Moraski and Shipan (1999: 1074), arguing that, “The president will choose a nominee who, if approved, will bring the Court’s median closer to his own ideal point” in public policy terms. “His goal will be to choose the nominee who will produce the best new median and *who will also be approved by the Senate*” (emphasis in original). (The constraints on the president, in the authors’ simple majoritarian model, depend on the constellation of preferences in the Senate, where the median voter may support or oppose the president’s policy goals.) Elena Kagan (1995: 934), although writing in a normative mode, takes a similar position, arguing that, “The critical inquiry as to

latter outcome setting off the process anew with another presidential nomination. This two-stage process means that no single actor can dominate the process, and judicial appointments always represent the outcome of a strategic interaction between a president with agenda-setting power and a Senate with veto power.

Third, the outcome of this strategic interaction will be shaped in very large part by the *institutional rules* imposed not only by the Constitution but also by Senatorial rules and traditions. Three sets of rules in particular have emerged as pivotal in determining the fate of judicial nominations in the US Senate. Under Senate rules all judicial nominations originate in the Judiciary Committee, which has the power to make recommendations in favor or opposed to confirmation, by a majority of its members; in addition, the committee has “gatekeeping” power, in that it may delay action on judicial nominations indefinitely, thereby preventing a floor vote on the candidate. Second, with respect to lower court nominations, presidents are constrained by the tradition of “Senatorial courtesy,” according to which Senators of the President’s party are able to block, without supplying a reason, nominations for judges who will serve in the Senator’s home state; this is a significant constraint on the President, but does not apply to Supreme Court nominations. Third, the candidate must receive the votes of a simple majority of 51 Senators, although the possibility of a filibuster raises the effective threshold to 60 votes in order to bring a candidate to a successful confirmation on the floor of the Senate. These are imposing institutional obstacles, which become particularly so when the Senate (and hence a majority on both the Judiciary Committee and the floor) is controlled by the party in opposition to the President (Epstein and Segal 2005: 85-116; Moraski and Segal 1999).

Fourth, information – its availability and its distribution among the various actors – plays an important role in both the nomination and confirmation processes.<sup>19</sup> In terms of the availability of information, at the establishment of a given court or tribunal, political actors are likely to be uncertain about the types of issues likely to come before the court, about the true preferences and the likely behavior of judges (whether deferential or activist, and ideologically liberal or conservative), and about the nature and outcomes of future cases to come before the court. With the passage of time, however, political actors are likely to become aware of the

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any individual [candidate]... concerns the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution.”

<sup>19</sup> Moraski and Segal’s (1999: 1072) model of judicial appointment assumes that all players have perfect information about the preferences of the other actors and the sequence of the “nomination game.” While defensible as a simplifying device to make the authors’ model tractable, we believe that relaxing the assumption of perfect information reveals important aspects of the judicial appointment process as well as its evolution over time.

stakes of judicial processes, and hence to update their beliefs about the significance of judicial appointments in general and about the specific issues likely to come before judges, and adjust their behavior accordingly.<sup>20</sup> In addition, scholars agree that the availability of information about judicial appointments among interest groups and in the media varies both across types of nominees, with Supreme Court candidates receiving far more attention and press coverage than district and appeals court candidates, and over time, with the rise of electronic media dramatically increasing public scrutiny of all candidates. This increased public scrutiny of judicial candidates has, in turn, complicated an already difficult US judicial appointment process, leading to a growing number of scholarly and popular works decrying the judicial appointment process as dysfunctional or broken (see e.g. Carter 1994; Kagan 1995; Davis 2006). Finally, as in any act of delegation, the principals (in this case, the President and the Senate as collective principals) possess only imperfect information about the true preferences of any given judicial candidate – information that would allow the principals to predict, however imperfectly, how the candidate might behave in judicial office. This situation provides the candidate with an incentive to utilize information strategically, revealing information that is appealing to the President and to a majority of Senators, while concealing information likely to elicit opposition.<sup>21</sup> Conversely, both the President and Senators should exert considerable efforts to collect independent sources of information about judicial candidates, both at the nominating stage where candidates are screened or vetted with ever-increasing diligence by the executive branch, and at the confirmation stage where Senate hearings have become increasingly detailed and intrusive efforts to elucidate the political preferences and judicial philosophies of nominees.<sup>22</sup>

We should not, of course, make the mistake of assuming that judicial appointment processes in all political systems take the same form as US federal appointments, and indeed

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<sup>20</sup> This phenomenon is often noted in the United States, where landmark decisions such as *Brown v. Board of Education* or *Roe v. Wade* have increased political attention to judicial nominations, as well as raising specific issues or “litmus tests” for judicial candidates. A similar phenomenon has been identified in other political systems in both the developed and developing countries: “Once judges are recognized as having a discretionary kind of power on controversial issues of public policy there is bound to be more concern about who they are and how they are chosen” (Russell 2006: 421). The result, according to Russell, has been not only greater political attention to judicial appointments, but widespread reforms of judicial appointment systems over the past several decades.

<sup>21</sup> See e.g. the now-infamous analysis by Elena Kagan (1995), who illustrates the ways in which recent Supreme Court nominees have attempted to withhold information about both their general judicial philosophies and their views on specific issues likely to come before the court. Kagan herself, of course, would later be criticized for her own unrevealing responses in her own confirmation hearings in 2009.

<sup>22</sup> Note, however, the debate between Carter (1994), who believes that Senators undertake a “results-oriented” and intrusive effort to flush out the judicial philosophies and ideological views of candidates on specific issues, thereby compromising their future judicial independence, and Kagan (1995), who accuses the Senate of abdicating its responsibility to question judicial candidates effectively about their positions on important issues.

there is evidence that appointment procedures vary substantially across political systems, both at the state level within the United States, and among the common-law and civil-law systems among nation-states.<sup>23</sup> Within the United States, we see dramatic variation both across states and over time, with different states employing a dizzying array of procedures including executive appointment, legislative appointment, hybrid systems of executive appointment with legislative confirmation, partisan and nonpartisan direct election of judges by the general public, and the creation of non-political judicial appointment commissions (Epstein, Knight and Shvetsova 2002).

Looking beyond the United States, we again see enormous variation in judicial appointment procedures across established democracies, transitional democracies and authoritarian regimes, as well as between and within countries with common-law and civil-law traditions. Many countries make distinctions between and have different nomination procedures for ordinary trial courts on the one hand, and constitutional or “top review” courts on the other hand, and appointment procedures vary cross-nationally for both types of courts. Maleson and Russell (2006), in their review of judicial appointment procedures across established and transitional democracies, find a huge range of variation in appointment procedures as well as in the aims of political actors in these countries. Furthermore, they demonstrate, judicial appointment procedures have proven highly malleable over time, with many established democracies (responding to perceptions of past judicial activism) undertaking reforms to make their judiciaries more politically accountable, while many transitional democracies (seeking to establish the credibility of courts previously under the thumb of autocratic regimes) have moved to adopt procedures to increase the political independence of their highest courts, most commonly by creating Judicial Selection Commissions to nominate and appoint judges outside the political process.<sup>24</sup> Epstein, Knight and Shvetsova (2001, 2002) find a similar variety of appointment procedures even in (the) advanced industrial democracies of Europe.<sup>25</sup> Furthermore, these

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<sup>23</sup> The literature on comparative judicial appointments is small and mostly recent. See e.g. the comparative study of France and the US by Volcansek and Lafon (1987); the surveys of constitutional court nomination in both US states and established European democracies by Epstein, Knight and Shvetsova (2001, 2002); and the extensive selection of case studies in Maleson and Russell (2006).

<sup>24</sup> In theoretical terms, the authors’ survey of judicial appointment procedures demonstrates some evidence of “diffusion” of institutional practices (Simmons et al. 2006), mostly notably in the spread of the British Judicial Selection Commission model to a number of transitional democracies such as South Africa and Namibia; however, the authors find little evidence of convergence in appointment processes, with different countries moving adopting a wide variety of reforms.

<sup>25</sup> Indeed, Epstein, Knight and Shvetsova (2002: 192-93) note strikingly that the successor states of the former Soviet Union, despite their similar starting points, adopted no fewer than five different approaches: “(a) executive-



authors (2002: 194) point out, the scant comparative literature on judicial appointment procedures is “unbalanced,” focusing on identifying cross-national institutional differences in such procedures, and to a lesser extent on exploring the implications of institutional differences for the accountability and independence of judges. By contrast, they argue, the existing literature “has devoted almost no time to addressing questions of institutional choice,” i.e. how and why political actors adopt particular selection systems and why they frequently reform them over time.

The huge and still understudied institutional variation in judicial appointment procedures should make us wary of simply “scaling up” the U.S. model, or indeed any domestic model, uncritically to international courts and tribunals. Nevertheless, our central point here is that even in the United States, where federal judges serve life terms and closely approximate Alter’s ideal type of a trustee, there is overwhelming evidence that political (partisan and ideological) factors play a crucial role both in judicial appointment and in shaping the subsequent judicial behavior of judges. Furthermore, as we shall see presently, the two-stage model of judicial nomination and confirmation corresponds surprisingly closely to the appointment process to most international courts and tribunals, including our case of the WTO AB, albeit with different actors in the central roles. Under these circumstances, it is at least worth asking whether similar phenomena take place with respect to international courts and tribunals as well.

### **3.2 International Judicial Appointments**

What *can* we learn, then, from the experience of domestic judicial appointments, in the US or elsewhere? Very little, Alter suggests, arguing that international courts and tribunals are different in fundamental ways from domestic courts, rendering the appointment and reappointment process almost insignificant as a control mechanism for political principals:

In the domestic realm, the appointment and promotion process is often a potent tool to influence the judiciary, wielded by whoever has dominant control of the executive and legislative branches of government. The international constitutional order established after World War II, however, was tailor-made to ensure that any “international”

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legislative parity (each able to appoint a specified number of judges); (b) executive-judicial (along with, in some instances, legislative) parity; (c) executive nomination (usually) with legislative confirmation; (d) executive-legislative-judicial parity in nomination with parliamentary confirmation; (e) judicial appointment.”

decision requires the political support of multiple states. Thus in contrast to the domestic process where political branches can control the nomination process, in the international realm each country chooses which individuals it nominates for international positions. Selecting from among international judicial nominees is certainly politicized; the larger point is that the overall nomination and appointment process cannot be controlled by any one state or organized group of states. While states did choose to keep the international judiciary beyond the control of the most powerful states, the probably unintended result is that international judges are institutionally less subject to appointment politics than their domestic counterparts (Alter 2008:46).

Given the decentralized nature of the appointment process, together with the lack of a clear career path for the international judiciary, Alter (2008:56-7) suggests, nomination and appointment politics are highly unlikely to influence the rulings of international courts and tribunals, as they are likely to do with respect to both domestic judges as well as international arbitrators and mediators (see below).

Alter is, of course, correct about the important differences distinguishing international judicial appointments from their domestic counterparts, including not least the decreased significance of a traditional liberal/conservative dimension of political contestation and the large number of state actors involved in both the nomination and selection process for most international courts. Nevertheless, while we agree that an indiscriminate scaling up of domestic models would be a mistake, we disagree with Alter on at least two key points. First, we note that Alter's discussion focuses almost entirely on the use of reappointment as an instrument of *ex post* influence over judicial decisions.<sup>26</sup> Here, Alter makes a strong argument about the difficulties for

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<sup>26</sup> Alter's endnote 8 elaborates on her skepticism about the significance of appointment and reappointment as control mechanisms, and makes clear her exclusive focus on judicial reappointment as an *ex post* incentive: "This argument [... that that international judges are institutionally less subject to appointment politics than their domestic counterparts...] is uncontested by those who understand the international judicial appointment process. More contested is the idea that reappointment politics are unlikely to provide political leverage over judicial decision-making. Erik Voeten has found some evidence that shorter term lengths for judges moderate judicial activism (Voeten, 2008), and there is certainly a concern that a perception that judges might be vying for reappointment can sow seeds of doubt regarding the independence of international judges.... Voeten's finding could be explained by factors other than judges angling for reappointment — for example shorter terms on courts in a context where judges are on staggered appointments may affect activism by limiting the socialization time of judges on a court. I am skeptical that reappointment concerns matter because often IC judges are not reappointed, but rarely if at all is it because of the decisions they made on the bench. IC judges on universal legal bodies are regularly rotated out to

member-state principals of using promises of renomination or reappointment (or threats to withhold these) as leverage over international judges – and this is particularly true in cases, such as the ECJ or the WTO AB, where judges deliberate in secret, making the votes of individual judges difficult (if not impossible) to divine. Nomination and appointment procedures, however, are not only or even primarily useful as an *ex post* sanction for judges, they are also and especially useful a means for shaping *ex ante* the endogenous preferences of judicial candidates. Indeed, in our example of the US federal courts above, the constitutional mandate of life tenure takes the option of *ex post* sanctioning through reappointment off the table, meaning that controversies over judicial appointments have as their stake only the *ex ante* preferences of candidates. Similarly, we hypothesize below that individual states will seek to influence the nomination and appointment of international judges by nationality (hoping that judges of one’s own nationality or those of allied countries might produce friendly rulings), judicial philosophy (activist or deferential), or even positions on specific issues likely to come up before the court.

Second, Alter assumes that the judicial appointment procedure is radically decentralized, with any given member state able to influence only its own nomination to an international court. This is indeed the case for the European Court of Justice that Alter has studied most extensively, but in other international courts state nominations are only the beginning of a winnowing process whereby a larger intergovernmental body picks and chooses from among judicial nominees. More generally, as we shall see in a moment, the institutional rules governing judicial appointment vary considerably across international courts and tribunals, with important consequences for the ability of states to influence the final selection of judges either individually or collectively.

Put simply, we find important analytic similarities between the domestic and international judicial appointment processes across all of the “four I’s,” i.e. (a) the complex, and at least partly “political,” interests or motivations of the key actors; (b) the nature of the appointment process as

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create geographic representation on the court. Even where there is a permanent national seat international judges are regularly rotated out because new national leadership wants a chance to appoint their own judge. While IC judges could in theory still worry about their life after they serve their term, in practice the international judges Mark has interviewed have not been very worried about this. There is no international judicial career trajectory because the pool of international judicial appointments is simply too small, and many IC judges are near retirement or see an appointment to an IC as a short term professional experience in any event. While there may well be isolated examples where a person did not get a job they wanted because of their association with an IC (though we know of no examples), whether a judge could anticipate these situations, let alone moderate their behavior to avoid the situation, is highly questionable. Even Richard Steinberg who believes that the US and Europe veto AB judges who they suspect will be activist does not argue that the concerns about reappointment lead judges to follow the wishes of the US or Europe (Steinberg, 2004: 264).

a two-stage strategic interaction between an agenda-setting parties that nominate judicial candidates and an electorate that confirms them; (c) the importance of institutional rules that shape the process and the power of the nominator(s) and the electorate; and (d) the importance of information, including its strategic use by judicial candidates as well as states' efforts to acquire and respond to new information over time.

Until very recently, both legal scholars and political scientists had neglected the study of international judicial appointments, despite their importance for the integrity and independence of international courts, largely because of the empirical difficulties of studying what has been (and generally remains) a largely opaque process. As Daniel Terris, Cesare Romano and Leigh Swigart point out in their pioneering study of international judges:

Generalizations about the selection process for international judges are difficult for form because every court has a different procedure to recruit international judges, and sometimes huge variations exist in the way individual governments approach the challenge. In addition, while the formal outlines of the process are public, relatively little information is available about the inside machinations leading to international judicial appointments. No systematic and comprehensive study of this process has yet been carried out. While some countries are more thorough than others in documenting the process, many others never release the information about the process to the public. In any case, as in any political matter, the heart of the story often lies in handshakes and conversations that are off the official record (Terris et al. 2007: 15).

Nevertheless, several preliminary studies have appeared over the past several years<sup>27</sup>, offering important insights into the interests of state actors, the strategic interactions of states and the importance of institutions in the appointment process, and the strategic use of information by both states and judicial candidates. Let us say a few words, very briefly, about each, before proceeding to lay out our own hypotheses and our WTO case study.

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<sup>27</sup> In addition to Terris et al. 2007, who devote Chapter 2 primarily to the judicial appointment process, see also Mackenzie et al. 2010, which provides illuminating empirical studies of judicial appointments to the ICJ and the ICC; Voeten 2007 and 2008, which examine the appointment of judges to the ECtHR and the correlations between the professional backgrounds of judges and their behavior on the bench, respectively; Voeten 2009, which provides an excellent theoretical framework problematizing both the complex motivations of states and the importance of international institutions in shaping the appointment processes in different international courts; and Wood (2007), who focuses on changes in domestic nominating processes in the UK and elsewhere .

First, with respect to the *interests* or preferences of states, Erik Voeten (2009) usefully distinguishes among six potential motivations for states in their choice of judicial candidates: (a) a law-driven concern to recruit the most qualified and competent candidates; (b) a sovereigntist concern to recruit judges who would resist judicial activism and respect the intent and the sovereignty of states; (c) a concern to maximize the credible commitments of states to an agreement; (d) a concern for the distributive implications of dispute settlements<sup>28</sup>; (e) international norms associated with either liberalism or the appropriate qualifications of states; and (f) the use of international judicial appointments as a source of patronage for one's political allies. Voeten's (2009: 389) central point in this exercise is that previous models of international judicial politics have adopted overly simplistic, one-dimensional assumptions about state preferences, which are more complex than previous legal or political-science theories have assumed. Alter (2008) makes the similar point that the complexity of member-state preferences complicates the ability of states individually or collectively to use the judicial appointment process as a means of influence over international courts (see also Terris et al. 2007: 16).

We agree with this core insight, but we would argue that complex preferences are not unique to international appointments, but are a feature of US Presidential and Senatorial preferences as well. Our claim here is not that member-state preferences are simple or one-dimensional, but rather that, just as US presidents manage to nominate like-minded judicial candidates much of the time despite complex preferences and significant institutional constraints, so states may be expected, *ceteris paribus*, to attempt to influence international jurisprudence in the direction of their own substantive preferences, subject to the strategic and institutional constraints. Furthermore, we would expect the preferences of judicial candidates to matter most, and hence possibly to dominate over other considerations such as patronage, for politically insulated, independent courts making high-stakes rulings with significant distributive implications – in other words, international “trustee” courts like the WTO AB.

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<sup>28</sup> In Voeten's (2009: 394-95) model, the delegation of dispute settlement powers to a court rather than to a political or diplomatic process is likely to have distributive consequences among different kinds of states. More precisely, Voeten assumes that court-based settlement of disputes will benefit small states relative to large ones, and export-oriented states relative to import-competing states (on the assumption that international courts like the ECJ and the WTO Appellate Body have a bias toward international trade liberalization). We find these hypotheses plausible, but consider them more applicable to the decision to delegate dispute-settlement powers to a court in the first instance, than to the choice of specific judicial candidates, which is our central question here. Following Voeten, however, we assume that dispute-settlement decisions do indeed have distributive consequences, and we hypothesize that states may, without necessarily interfering with the *ex post* independence of international judges, nevertheless use the appointment process to secure influence the *ex ante* preferences or legal philosophies of judges, and thereby increase the likelihood of judicial decisions favorable to their substantive preferences.

Second, in terms of the core strategic *interactions* among the players, international judicial appointment procedures vary considerably across the various courts and tribunals, but nearly all of them follow the same basic two-stage model in which individual member states nominate one or more candidates in the first stage, with confirmation or election of judges, typically by a larger group of member states, in the second stage.<sup>29</sup> At the nomination stage, a few international courts specify precise requirements for judicial candidates, including the type of law in which they must be expert (e.g., the ICC) as well as linguistic competence (e.g., the ECJ); however, in most cases, international court statutes state the required characteristics of international judges in very general terms, as in the case of the ICJ, whose statute provides that:

... the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective jurisdictions to the highest judicial offices, or are jurisconsults of recognized competence in international law.

These formal requirements are not trivial, yet they leave member states considerable discretion in their choice of an individual nominee. Different states arrange their domestic nomination process in various ways, but in most states, the process of selecting national nominees is an informal one, undertaken within the executive branch, often by senior civil servants who identify qualified and desirable candidates (Terris et al. 2007: 25-27). The extent to which potential candidates are domestically vetted also varies considerably across states, with some engaging in extensive study of candidates' writings as well as interviews and background checks. Although some scholars have criticized the lack of care and transparency with which individual states identify their judicial nominees (see e.g. Mackenzie et al. 2010: 1), Terris et al. (2007: 23) point out that, in the end, "National governments have total control over who will be put forward for an international judicial position and who will not." Our expectation, spelled out further below, is that states will

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<sup>29</sup> Mackenzie et al. 2010: 2. Note, however, the few exceptions to this rule, such as nominations to the hybrid tribunal for Kosovo, to which international organizations such as the UN can make nominations; nominations to the ICC, which are made collectively by the UN Security Council and feature unusually detailed specifications as to the qualifications and experience of nominees; and nominations to the EU Civil Service Tribunal, whose members are nominated by a judicial appointments commission. Such exceptions to what had been a general rule of state nominations and multilateral election, it might be noted, call out for theoretical explanation through theories of diffusion and/or institutional choice. For good discussions of these new procedures, see e.g. Mackenzie et al. 2010; Voeten 2009.

use this control to press for the appointment of judges whose substantive preferences are close to their own.

Third, however, the agenda-setting power of any given nominating state depends fundamentally on *institutions*, i.e. the formal and informal rules of the international court or tribunal in question. Here, we can distinguish three fundamental institutional rules that shape the power of nominating states and the ultimate choice of judges.<sup>30</sup> First, following Mackenzie et al. (2010: 7), we distinguish between:

... full representation courts, where each state has a judge of its own nationality on the court permanently, and “selective representation” courts, where there are fewer seats than the number of states that are parties to the court’s statute. In the latter type of court, a choice has to be made between candidates from different states, thus giving rise to a greater degree of competition in which political influences, among other factors, can and do hold sway.

In full representation courts, such as the ECJ, each member state is guaranteed a seat on the court, and the various members typically rubber-stamp each other’s nominees, giving the nominating states near-total agenda-setting power and making the confirmation or election stage a formality.<sup>31</sup> By contrast, in selective representation courts, the initial nomination of candidates by the member states is only the first stage in a longer process in which national nominees are weighed and a selection made from a potentially very large number of candidates.

For such selective representation courts, a second institutional consideration is the existence of formal or informal rules relating to the geographic distribution of seats among the member states, including the possibility of guaranteed or permanent seats for certain countries or regions. In the ICJ, for example, long-standing informal rules stipulate guaranteed seats for the five permanent members of the UN Security Council, while the remaining seats are reserved on a rotating basis for states from particular world regions, again drawing on the formula for the

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<sup>30</sup> Voeten’s (2009) review identifies three institutional features of international courts that can help shape the politics of judicial appointment: the length and renewability of the mandate; the procedures for electing the candidate; and the observability of the subsequent behavior of individual judges. We agree about the importance of all three of these features for judicial *independence*, and in the case of observability for the reappointment of judges, but we focus here on two key features of the election phase that seem most relevant for judicial appointment *per se*.

<sup>31</sup> The ECtHR, although a full representation court, features a slight variation on this model, since each member state is required to nominate three candidates in rank order, and the electorate, the Parliamentary Assembly of the Council of Europe, may change the rank ordering among each states’ candidates. Mackenzie et al. 2010: 8.

distribution of Security Council seats. In such cases, countries with guaranteed seats are in a strong agenda-setting position, with their candidates virtually guaranteed acceptance, while other member states must (much like the President in the US federal case) consider the likely reception of their nomination among the member-state electorate, thereby reducing those countries' ability to nominate their sincere first choices. In the ensuing elections, member states typically engage in extensive lobbying, bargaining and "horse-trading" on behalf of their national candidates, and final appointments are often the result of messy compromises among the members (Terris et al. 2007: 34-36). For our purposes here, however, the important point is that, in selective representation courts, the judicial appointment process is not as radically decentralized as Alter suggests, since a collective decision determines the ultimate choice of judges on the court. Furthermore, as we shall see below in the WTO case, the election process gives powerful states in particular opportunities to screen or vet other states' candidates, to lobby for or against their own and others states' candidates, and, in the extreme, to veto candidates to whose views they are opposed.

A final, and perhaps the most obvious, institutional rule is the voting rule governing the election of judges from among the various nominees. The statutes of the various international courts and tribunals specify varying voting rules among the electorate – typically a plenary of all signatory states – required for the final appointment of judicial nominees. As we have seen, the *de jure* threshold of 51 Senators, as well as the *de facto* threshold of 60 votes to break a filibuster, have proven crucial in the US confirmation process, as has the gatekeeping power of the Senate Judiciary Committee. The statutes of the various international courts and tribunals similarly lay down specific voting thresholds for the appointment of international judges. Appointment of judges to the International Tribunal on the Law of the Sea, for example, requires a two-thirds vote among the states-parties to the Convention, while nominations to the WTO AB call for a consensus among the membership, which sets a much higher threshold and effectively grants the more powerful member states in particular with an effective veto over other states' nominees.<sup>32</sup>

Fourth and finally, *information* plays a significant role in the judicial appointment process at the international level, albeit in slightly different ways from the domestic level. By contrast with the domestic level, both the national nomination process as well as the final election of judges are remarkably nontransparent, with national nominations typically taking place according

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<sup>32</sup> On the relationship between consensus and influence in international economic organizations, see Stone 2011, Elsig and Cottier 2011.



to an informal process within the executive branches of the various member states, and with elections taking place behind closed doors among national ambassadors to bodies such as the United Nations or the WTO (Terris et al. 2007, Mackenzie et al. 2010). For this reason, public opinion and even interest-group pressures are less constraining on international court appointments than on domestic court appointments. That said, however, the essential principal-agent logic of judicial appointments, in which judicial candidates attempt to reveal only favorable information while their principals attempt to screen, vet and otherwise determine the true preferences of candidates, should operate at the international level as it does at the domestic level, as we hypothesize below.

In sum, international courts and tribunals are different in several ways from the US federal experience that has shaped theorizing about domestic judicial appointments, not least because the key actors in the decision are sovereign states and the dimensions of contestation are more multidimensional than the conservative/liberal cleavage in domestic politics. Nevertheless, as we have argued here, *both* domestic and international appointment processes are characterized by complex preferences, by a two-stage strategic interaction among nominators and electors, by institutional rules that specify the balance of power among these actors, and by imperfect information among the member states and between member states and judicial candidates. For all these reasons, we believe that principal-agent models of delegation and domestic models of judicial appointment, modified to take account of the specificities of the international context, can provide important insights and generate testable hypotheses about the behavior of both states and nominees to international courts and tribunals.

### **3.3. Judicial Appointments at the WTO: Five Hypotheses**

Against this background, we attempt, in the next section of this paper, to analyze the use of one PA control mechanism – the nomination and appointment of international judges – as a potential source of influence by member-state principals over international courts and tribunals. More specifically, we put forward five hypotheses about the behavior of both states and judicial candidates in the appointment process, corresponding to the foregoing discussion of interests, interactions, institutions and information, respectively.

First, with respect to the interests or preferences of member-state principals, we acknowledge the basic insight of both the domestic and international judicial literatures that the political principals of international courts have complex and multidimensional preferences,

including *inter alia* preferences for credible commitments, judicial independence, and the rule of law. Nevertheless, we hypothesize that the governments of a court's member states, in nominating their own judicial candidates and in evaluating the candidates of other countries, will attempt to secure the appointment of judges whose judicial philosophies and preferences on substantive issues likely to come before the court are as close as possible to their own. Of course, even powerful states cannot hope to exert more than marginal influence on the court through their own nominations or through their votes on the nominations of others; however, like US Presidents who may get to name only one or two justices to the Supreme Court during their term in office, we would expect states to use their limited power over judicial appointment to move the court, however, modestly, toward their own ideal points (H1).<sup>33</sup>

Second, in cases of courts with selective representation, member-state principals must operate within the constraints of the two-stage "nomination game." Nominating states, therefore, are unlikely to act upon their sincere preferences in their choice of judicial candidates in the first stage of the game, but will instead behave strategically, anticipating the likely reaction of other member states to their nominations and putting forward candidates closest to their preferences who are also likely to receive the endorsement of the confirming body in the second stage. By the same logic, member states at the second stage should attempt to use such influence as they have to secure the confirmation of candidates who are most likely to move the court toward their substantive preferences, and reject or campaign against candidates with conflicting preferences (H2).

Third, the outcomes of the strategic interactions among member-state principals, and the relative power of those states in both stages of the game, will be shaped by institutional features such as (a) the full or selective representation of member states on the court; (b) the formal and informal rules about (geographic) distribution of seats on the court; and (c) the decision rule governing the final selection of judges. In the case of the WTO AB, the substantial hurdle posed by the consensus rule empowers states at the second stage, while forcing states to be strategic in their nominations, proposing candidates that are likely to secure support in highly competitive elections. The logic here is, of course, precisely parallel to that in the US case, where a

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<sup>33</sup> To the extent that the statute of an international court allows for reappointment, we hypothesize that states may attempt to use the promise or threat of such reappointment to influence judicial behavior *ex post*; however, given the decentralized nature of the appointment process, the lack of a single career path for international judges, and the difficulty of identifying the positions of specific judges in courts that issue unsigned rulings, we would hypothesize (with Alter) that such efforts may indeed be largely ineffective, and this is not the primary focus of our analysis.

demanding decision rule in the Senate (e.g., the possibility of a filibuster) increases the power of Senators with the power to confirm, while reducing the agenda-setting power of the President; in the case of the WTO, however, the consensus rule poses a threshold even higher than the much-reviled filibuster. However, we hypothesize further that member states with a *de jure* or *de facto* right to a judge on the court, like the five permanent members with respect to the ICJ, will enjoy greater leeway to nominate candidates closest to their individual preferences. In the WTO case, we would expect the United States and the European Union, and possibly Japan, to have greater agenda-setting power than other members, given their informal right to nominate a judge to the AB (H3).

Our final two hypotheses both arise from the foregoing discussion of the role of information in the appointment process. Fourth, following principal-agent models, we expect would-be agents – i.e., judicial candidates – to follow the lead of their domestic counterparts, providing highly selective information to both nominating governments at the first stage, and to the broader set of electing governments at the second stage, designed to convince Members that the candidates are not activists, and that they share (or at least do not oppose) the core substantive preferences of the Members themselves (H4).

Fifth and finally, we hypothesize that this strategic use of judicial appointment powers is likely to increase over time, as member states encounter unexpected and often unwelcome instances of judicial activism, as well as specific adverse rulings, and revise their views and their behavior in the appointment process in response to this new information. In the EU, for example, scholars have amply demonstrated that the activism of the ECJ was largely unexpected, and that EU member states, with the obscurity of law generating a “mask and shield” against criticism from EU member states. Over time, however, as member states became aware of the nature and the stakes of ECJ activism, those states increased their efforts to influence, and in a very few cases overturn, unwelcome judicial decisions (Mattli and Slaughter 1998). Similarly, we expect that WTO Members will make increasing use of the judicial nomination and appointment process as a control mechanism over the AB over time, as information about the AB’s preferences and decisions improves. Concretely, therefore, we expect screening of judicial candidates to increase progressively over time, focusing on issues whose salience becomes clear as a result of the court’s developing case-law (H5).

Put simply, then, the dependent variable of our study is the behavior of principals (and, for H4, of judicial candidates as potential agents) in the nomination and appointment of

international judges, and our central expectation is that Members of the WTO will attempt to use their powers as principals to shape the endogenous preferences of the judiciary, rather than (*pace* Alter) basing their decisions solely on the personal reputation and expertise of judicial candidates. We do not, by contrast, purport to test the hypothesis that nomination and appointment decisions actually influence judicial behavior, an effort that would require us to establish a correlation between the *ex ante* views of judicial appointees and the *ex post* judicial interpretations or voting behavior of those same judges.<sup>34</sup> Nor do we attempt to explain variation in institutional design and reform of appointment processes across international courts and tribunals, although we strongly concur with Epstein, Knight and Shvetsova that such an analysis would be highly desirable.

Our empirical focus is on the WTO AB. There is widespread agreement among scholars that the AB is among the strongest international courts in the world, with far-reaching powers to interpret the often vague provisions of WTO trade law, and with the power to authorize retaliatory tariffs for noncompliance with judicial decisions that give “teeth” to those decisions. Furthermore, as former AB member Claus-Dieter Ehlermann (2003) has argued, the AB’s member-state principals face an extraordinarily high hurdle either in overruling AB decisions (which would require consensus among 153 disparate member states) or in “recontracting” with the AB by changing its mandate. Guided by the hypotheses laid out above, the next section empirically traces whether, and how, WTO Members are able employ nomination and appointment as potential control instruments over the AB.

#### **4. Judicial Nomination and Appointment for the WTO AB**

In this section we focus on nominations and appointments for the WTO’s AB. It provides for an empirical discussion of the hypotheses outlined above.<sup>35</sup> This section is organized as follows: First, we briefly describe how the system works. Second, we discuss the intentions of the creators (principals) of the system reflected in the design of the AB and show how the overall profile of AB members (ABMs hereafter) has changed over time. Third, we describe the processes of nomination and appointment as developed in the first round of selection and we focus on how

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<sup>34</sup> For such an effort in the context of the European Court of Human Rights, see Voeten 2008.

<sup>35</sup> We rely on primary and secondary sources and have conducted more than 30 interviews with involved actors in order to process-trace various selection processes over time. We have paid particular attention to triangulation.

processes and criteria for selecting ABMs (agents) have changed over time and discuss a number of specific appointments in more detail.

#### **4.1 The New System**

The WTO dispute settlement system consists of two stages: first, disputes can be brought by WTO Members to expert groups composed of three individuals (panels). These individuals are chosen by the disputing parties; if parties to the dispute cannot agree, the Director-General (DG) of the WTO appoints panel members.<sup>36</sup> Second, parties have the possibility of turning to another institution to demand a review of a panel decision by appealing (selected) panel findings: the AB. This institution, created in 1995, is composed of 7 members, 3 of whom serve on appeals defined by a rotating principle. They are appointed for a period of 4 years, renewable once. Appointment and reappointment to the AB follow the usual WTO decision-making mode – consensus of the members. In the following, we focus on how ABMs are nominated and appointed.

The reason why the AB scores high on “legalization” (Abbott et al. 2000) is that its recommendations cannot be overturned easily. There are, however, two potential avenues for this: first, WTO Members could reject the report written by the AB by consensus (which would also require the winner of the case to abstain from blocking such a decision); or second, WTO Members, by a ¾ majority, may engage in an “authoritative interpretation” of the provisions of a covered agreement thereby challenging the interpretation of the AB (Art. 3.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)). But this does not amount to a direct overturn.<sup>37</sup> The other element that contributes to high legalization is that any panel recommendation (or subsequent AB report that upholds, modifies or reverses a panel report) is “binding” on Members, and the DSU allows for the authorization of adoption of retaliatory sanctions (or, in technical terms, the withdrawal of concessions) against Members that fail to comply with rulings. Although research on implementation is limited, the dominant view is that implementation is significant (e.g. Members modify policies that are inconsistent with WTO law) (Bernauer, Elsig and Pauwelyn 2011).

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<sup>36</sup> Over time, the need for the DG to get involved in the selection process of panel members has increased.

<sup>37</sup> See also Article 9.2 WTO Agreement which states “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements”. For a discussion related to the difficulties of legislative response, see Cottier and Takenoshita 2003, Footer 2006: 264.

## 4.2 The Designers' Intentions and the Changing Profile of the AB

In the old GATT times, dispute settlement developed as a quasi-diplomatic tool based solely on the panel system (Hudec 1990). At the start of the Uruguay Round (UR) negotiations, a special group was created with the mandate to improve the existing practice. Two major flaws needed to be addressed: first, in the GATT system, there was no right to a panel (a panel was only constituted if both parties agreed); second, panel opinions and recommendations had to be accepted by both parties (and de facto by the entire membership) to be binding on contracting parties. During the UR negotiations both issues were tackled. This led to concerns during the second half of the negotiations that bad panel reports would have to be controlled for. One proposal, which received growing support towards the end of the negotiations, was the creation of an additional institution that would hear appeals. While for some this was an appropriate way to address the quality of panel reports which were written by trade policy practitioners (with the support of the WTO Secretariat); others saw this as an additional institutional check in order to sell the systemic change towards automatic adoption at home.<sup>38</sup>

Most designers originally expected few cases to be appealed (they were proven wrong).<sup>39</sup> The dominant view was that ABMs would be able to carry out their function part time. Yet, negotiators were also aware of the potential importance of this body, limiting its mandate and, to some extent, its discretion, through the use of six specific design features, the first four of which relate to the AB as a whole, while the last two, of particular interest to us here, relate to the appointment and qualifications of individual members:

First, the treaty states that “an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel” (Art. 17.6 DSU). The objective of this condition was that the AB abstained from reviewing facts or introducing new issues of law that had not been addressed at the panel stage. The concern reflected in this specific formulation was that the AB would use additional sources of WTO or external public international law to interpret cases.

Second, similar to the above, Art. 3.2 of the DSU includes a general provision that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” This passage reflects a general uneasiness among

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<sup>38</sup> Van den Bossche 2005, Interview with a DSU negotiator, 12 June 2009.

<sup>39</sup> Interview with DSU negotiator, 19 June 2009.

contracting parties that panels or the AB would interpret agreements in ways that impact on principals' expected concessions or benefits agreed through negotiations.

Third, there is a strong emphasis in the DSU on the idea that Members shall try to settle disputes by consultation instead of using third party litigation. Even when WTO Members officially inform the membership that they have decided to bring a case, parties will first have to engage in a period of consultation to resolve the issue on a bilateral basis. Art. 3.7 of the DSU stresses that: "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute (...) is clearly to be preferred."

Fourth, we also witness some attempt at discursive control in the language of the DSU. Contracting parties did not want to create an international court and limit any judicial autonomy from the beginning. Not by accident was the appeal instance called a body (and not a court), and it is composed not of judges but of members. The AB writes reports (not judgments) and it makes recommendations to the Dispute Settlement Body (DSB) (comprising Ambassadors) that accepts (or rejects) the report.<sup>40</sup> The WTO Members, in other words, delegated powers to the AB in a way that limits the scope of that body's collective mandate, and denies it the trappings of a "trustee" high court.

Fifth, turning from the AB in general to the individual members, the mandate of the individual ABM is restricted to 4 years, with the possibility of re-appointment once (Art. 17.2 DSU). It is a widely held belief that longer, non-renewable judicial terms maximize judicial discretion, while shorter and renewable terms increase judicial accountability to political principals (Epstein and Segal 2005: 8). Compared to other domestic and international courts, the states negotiating the DSU opted for a system of terms that were both short and renewable for ABMs, suggesting a concern for judicial accountability. Furthermore, while appointment procedures were not clearly defined in the treaties, given the decision-making processes in the GATT/WTO it was clear that the consensus rule would apply. This rule meant that each individual member state could, albeit at a diplomatic cost, exercise a potential veto over the nomination or re-appointment of individual judges, although in practice we might expect major trading powers to exert greater influence over the process (Steinberg 2004).<sup>41</sup>

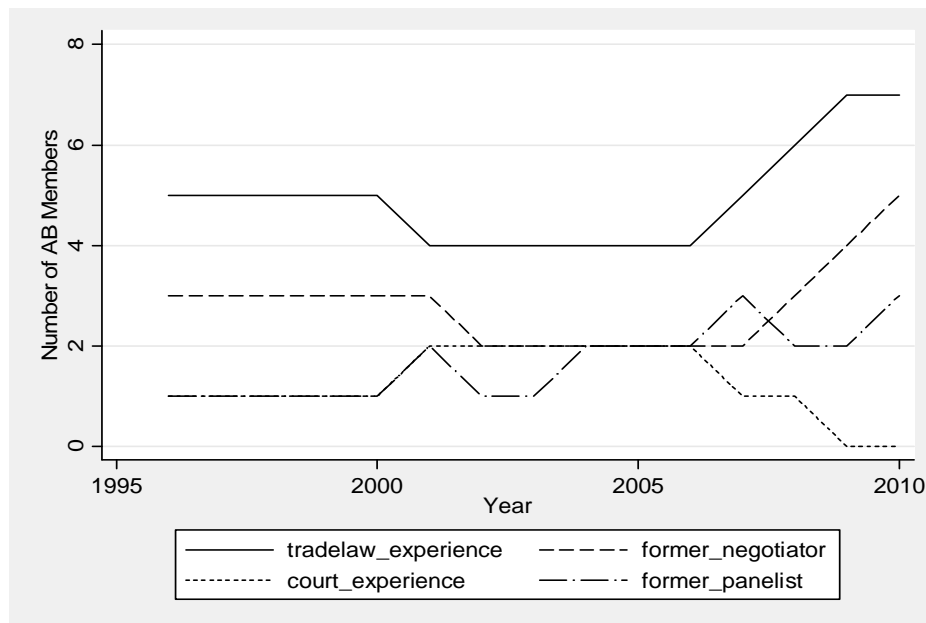
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<sup>40</sup> ABM Georges Abi-Saab, statement at a conference organized by the Graduate Institute, Geneva, 27 May 2008.

<sup>41</sup> For a discussion on how power status affects the actual use of the veto option in WTO consensus decision-making, see Elsig and Cottier 2011.

Sixth and finally, the issue of “profile” of an ABM was discussed at length during the negotiations. What would be the professional background of an agent? It was agreed that the AB “shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally” (Art. 17.3 DSU).<sup>42</sup> The negotiated text also proposed that “they shall be unaffiliated with any government” as negotiators anticipated that Members were inclined to have candidates elected who had close relations with economic ministries.<sup>43</sup>

Figure 1: Composition of AB over time



Source: WTO, worldtradelaw.net

Notes: We coded four characteristics based on the CVs of ABMs (www.wto.org) and information from participation as GATT or WTO panelist (worldtradelaw.net): 1) exposure in the field of trade law (as academic or practitioner); 2) former GATT or WTO negotiator; 3) experience as member of a court (beyond international arbitration), 4) experience as panelist.

What can be seen from studying the profile of past and current ABMs is that subtle changes have been taking place over time. In terms of overall expertise and standing, it is noteworthy that average age declined from 65.4 years in 1996 to 58 years in 2010. Over time, Members have put more emphasis on trade law experience, familiarity with the system gathered through trade

<sup>42</sup> It has remained ambiguous whether the word “and” would refer to individual candidates or the AB as a whole.

<sup>43</sup> It was never defined what unaffiliated meant exactly. Increasingly ABMs are former trade negotiators.



negotiations and participation as a panelist, and have de-emphasized expertise in international public law and prior judicial activities (see figure 1). Over time, principals have thus changed the balance within the AB through appointments. The data suggests that WTO Members prefer to select trade policy experts and those who have a familiarity with the WTO system and its particularities, gained through negotiation and panel activities, to the disadvantage of other key characteristics (e.g. public international law background, court experience). The seven currently serving ABMs, prior to their appointment, have all gathered experience in the field of trade law (in 1995: five) and five are former trade negotiators (in 1995: three). None of the seven has experience as a judge (in 1995: one, from 2001–2006: two) and the number of former panelists has risen to three (in 1995 only one ABM had previous GATT panel experience).

In order to better understand the politics behind a change in the composition of the AB, we focus on nomination and appointment procedures in the following sub-section. We empirically trace variation over time by focusing first on the selection of the original seven ABMs in 1995 after which we describe the changing context for the second and third group of ABMs and illustrate this by looking at specific appointments.<sup>44</sup> We show how the process has been politicized from the very beginning; however, over time, the nature of politicization has changed, reflecting increasing concerns of principals trying to shaping *ex ante* the endogenous preferences (on trade policy and law) of one or more members of the AB. This change in AB screening and appointment, we argue, can be read as a response by Members to emerging WTO case law and to what some Members have perceived as judicial activism.

### **4.3 Nomination and Appointment over Time**

The DSU did not lay down in detail the procedures to nominate and appoint members of the AB. It only stated that a standing body was to be created by the Council for Dispute Settlement (DSB) (Art. 17.1 DSU). As to the profile, in addition to “expertise in law, international trade and the subject matter of the covered agreements”, the original designers inserted the principle that the AB “shall be broadly representative of membership” (Art. 17.3 DSU). In 1994, a preparatory Committee was mandated to focus on how best to organize the process of appointment and how to implement the broad criteria regarding the profile as stipulated by the treaty. The preparatory Committee made a number of recommendations on both the profile and the process. It urged

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<sup>44</sup> The second group of ABMs was selected in the years 2000-2003, the third wave of appointments occurred during 2006-2009, see figure 2.

Members to select highly experienced individuals. “The success of the WTO will depend greatly on the proper composition of the AB, and persons of the highest calibre should serve on it.”<sup>45</sup> This was a reflection of the growing expectation of the potential importance the AB. The members of the preparatory Committee urged the Membership to bear in mind that expertise and integrity should serve as important criteria for AB membership. Yet, on the notion of expertise the guidance provided by the Committee remained fuzzy. It was stated that it should be of a type that allows ABMs to resolve “issues of law covered in the panel reports and legal interpretations developed by the panel.” On the question of what was meant by “broadly representative,” it was suggested that, “factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account.”<sup>46</sup> On the issue of how to organize the process, it was proposed that a Group of 6 comprising the Director-General (DG) and the chairpersons of five important bodies (General Council, DSB, Goods, Services, TRIPS) should elaborate jointly a proposal after “appropriate consultation” with Members. From the first selection onwards it became established practice that the Chair of the DSB acted as coordinator of the selection procedure, as the DSB was also the body to decide on the selection.

#### ***4.3.1 The First Seven***

On the basis of the above-mentioned recommendations, the chairman of the DSB (Ambassador Donald Kenyon from Australia) organized the first round of appointments in Geneva. On 28 February 1995, at the first DSB Meeting, the process and general criteria were laid out.<sup>47</sup> Members were encouraged to propose candidates by 24 March and by mid-May the Committee of the Six (C6 hereafter) would recommend to the DSB the seven candidates for acceptance. Members agreed on the process and emphasized the importance of finding the “right balance.” The US was quoted as saying that “the AB would benefit from having candidates with a wide variety of backgrounds to ensure objective assessment of the appeals it would hear.” But it also warned that Members should allow for sufficient legal expertise on this board by emphasizing that, “(...) in this regard, individuals with juridical credentials should be considered at least as seriously as those with direct involvement in GATT work and negotiations.” In a subsequent meeting of the DSB Kenyon reminded Members that governments should not sponsor candidates

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<sup>45</sup> WT/DSB/1 (approved on 10 February 1995).

<sup>46</sup> The accession of China has had a slight impact on this balance.

<sup>47</sup> WT/DSB/M/1

but make suggestions only “to allow a process of selection of names on the basis of personal and professional merit alone.”<sup>48</sup> In April a first list of candidates was made available. There were overall 32 candidates from 23 countries (13 alone from EU states). Kenyon explained that the C6 would make itself available during the first ten days of May to hear Members’ views. He emphasized that Members “should focus (not on those they don’t like) but on those they considered the most appropriate.”<sup>49</sup>

A total of 54 separate delegations provided their views to the C6. While Kenyon was quoted as saying that the Committee “has now a very good idea of the expectations of the collectivity of the WTO about the composition of the AB,”<sup>50</sup> demands by the EU and the US started to derail the process. The EU signaled that two seats should go to nationals from EU countries to reflect the Community’s importance as a trading entity. Similarly, the US argued that it wanted two seats given its role in world trade. In addition, many other countries campaigned behind the scenes for their candidates. Most delegations criticized the US and EU positions and clearly indicated that they would not accept four out of seven members coming from Europe and the US. Over time, the US accepted that they would only have one member as long as the EU did not get two.<sup>51</sup> This brought back movement towards a solution. It was not until November that agreement was reached not to block the suggested list prepared by the C6 and the first group of ABMs was finally approved in a session by the DSB.<sup>52</sup> Many delegations voiced disappointment, in particular the EU which argued that the list did not sufficiently take into account the EU interests (5 seats went to candidates from APEC countries and one member was from a close ally to the US). In addition, India and Brazil were disappointed that their candidates were not among the original seven. The Indian delegation had suggested a trade negotiator; instead the C6 proposed a judge from the Philippines.<sup>53</sup> The Latin American seat went to Mister GATT (Ambassador Julio Lacarte) who had already participated in the Havana Conference in 1947. Kenyon re-emphasized during the session that the “initial appointments in no way compromised the scope for different regional or national compositions on future occasions.” The EU announced that they would consider a new proposal on the issue of balance for the upcoming

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<sup>48</sup> WT/DSB/M/2 (29 March 1995)

<sup>49</sup> WT/DSB/M/4 (25 April 1995).

<sup>50</sup> WT/DSB/M/5 (31 May 1995)

<sup>51</sup> Interview 19.

<sup>52</sup> WT/DSB/M9 (1 and 29 November); the original members of the AB were: James Bacchus from the US, Christopher Beeby from New Zealand, Claus-Dieter Ehlermann from Germany, Said El-Naggar from Egypt, Florentino Feliciano from the Philippines, Julio Lacarte-Muró from Uruguay, and Mitsuo Matsushita from Japan.

<sup>53</sup> India lamented that experience in the area of covered agreements is underrepresented.

Singapore Ministerial in 1996.<sup>54</sup> The Swiss complained that their candidate had no chance as Europe was seen as one regional bloc.<sup>55</sup>

As to the context of the first selection process, the key objective of many powerful Members was to have one of their nationals elected. Therefore, politicization was along “national dimensions.”<sup>56</sup> For one thing, it was generally accepted that the EU, the US and Japan (given their role in the system) would each get a seat. EU states put forward candidates, many of whom had an academic, trade law or general law background. The US did not nominate any trade law practitioner or an academic working on trade law. The Office of the US Trade Representative (USTR) suggested to the Membership two candidates with quite different profiles: a former Congressman and a professor of international economic law not specialized in trade law.<sup>57</sup> As to the US internal nomination, Bacchus was nominated by the White House as he had helped in “getting NAFTA through Congress.”<sup>58</sup> The selected EU candidate (Ehlermann) joined the race later but quickly gained widespread support. It helped that he was from an important EU Member State and highly respected in Brussels. In addition, he impressed the C6.<sup>59</sup>

The C6 realized that given the member-driven character of the WTO (and the experience with the weak panel system), it was important to have an excellent group of eminent persons. In addition, as the first selection meant filling seven seats at the same time, the C6 had some discretion (itself an agent of the collective group of principals) to suggest a “balanced” group (taking into consideration that they needed one member from the US, one from the EU and one from Japan). A leading member of the original C6 summarized the choice: “It was clear that three seats were taken. The rest of the field was open. We needed a balance in regional representation, legal systems, experience and developed and developing countries.”<sup>60</sup> In terms of individual candidates he continued:

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<sup>54</sup> Such a proposal did not materialize.

<sup>55</sup> The Swiss candidate was not recommended by the C6 as the Members would have not accepted two European members (interview 19).

<sup>56</sup> One interviewee recalled that “It was political in the sense that countries wanted to be represented; (...) it was a question of prestige, (...) and ambassadors worked hard for pushing one of their nationals through” (interview 17).

<sup>57</sup> The Members felt much more comfortable with a more pro-WTO Congressman with some legal background than with a law professor, interview 17, interview 26.

<sup>58</sup> A legal officer at the Geneva office of the USTR recalled accompanying the unsuccessful US candidate to a couple of bilateral meetings: “I thought that the professor was ridiculously more qualified! Yet, personal dynamics were important and the professor came across as a very serious person (...) and ambassadors don’t like it if they are not seen as the smartest in the room” (interview 17).”

<sup>59</sup> Interviews 5, 19. Ehlermann was a former Director-General of the Legal Service of the Commission and had acted as Director-General of the Directorate-General Competition.

<sup>60</sup> See also Ehlermann (2002:608).

“Bacchus did very well in the discussions; we were more impressed by him than by the other American candidate. Ehlermann was an excellent candidate among a number of very good candidates from Europe. Japan at that time was economically strong and was the target of many disputes. We considered the Japanese candidate (*Matsushita*) strong and expected him to play an important role. Then we needed someone from a developing country in Asia. Feliciano from the Philippines was very good – much better than the Indian Candidate who was a former Ambassador. Feliciano was the only judge (...) and we wanted that element. He stood out and was very smart. El-Naggar was the best of a group of weaker candidates (but we wanted to have Africa represented). As to South America, Brazil had two candidates, both trade policy experts, Brazil put a lot of pressure on us, but Lacarte had impressed us and we wanted someone to be there who knew the GATT system so well (...) and Beeby represented Oceania.”<sup>61</sup>

As to the screening, participants remembered few bilateral meetings in Geneva with delegations. The key interview took place with the C6.<sup>62</sup> The screening process did not focus on positions on trade policy issues or WTO law.<sup>63</sup> One candidate remembered: “The questions were very general, not like (...) would you vote against the US in an AD case, on case-law or on filling gaps.”<sup>64</sup> Candidates were asked about their view of how the dispute settlement system “should” work in practice. One candidate remembered: “We were asked about the approach the AB should take? (...) I told them that the AB was a slender tender plant that should be protected from too strong winds, the AB should also act cautiously (...) I think the Ambassadors probably liked that.”<sup>65</sup> Another candidate similarly reported few questions of content, remembering a brief exchange on the relationship between the International Labour Organization (ILO) and WTO, and whether the AB could be instrumentalized by obligations emanating from the ILO regime.<sup>66</sup>

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<sup>61</sup> Interview 19, italics added.

<sup>62</sup> Interviews 5, 17, 18.

<sup>63</sup> One interviewee clarified: “I had some writings in the past, and I worked on antidumping and subsidies and had some writing on the GATT system, but that did not seem to be an issue (interview 18).”

<sup>64</sup> Interview 17.

<sup>65</sup> Interview 18.

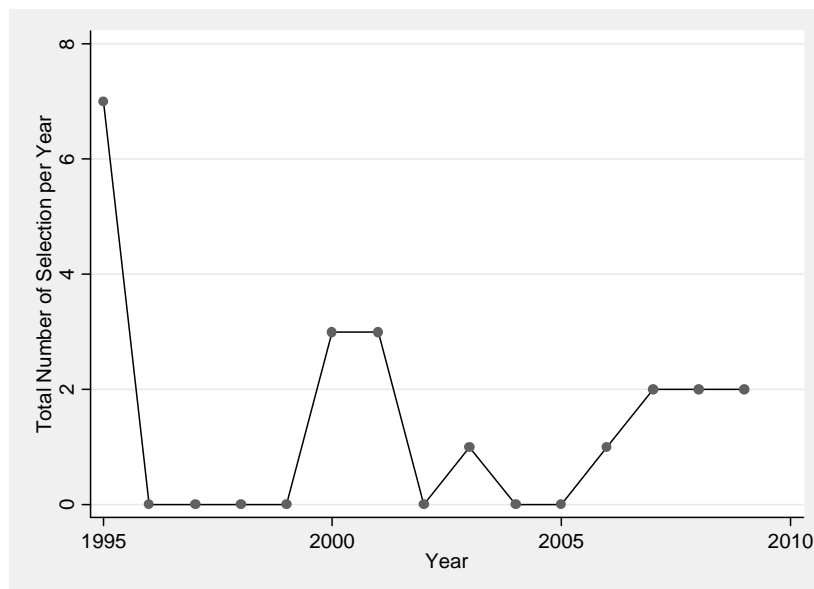
<sup>66</sup> Interview 5.

In sum, the selection of the first seven members of the AB demonstrates a concern (strongly held in the C6 and by some WTO Members) for the eminence and expertise of the candidates, although these considerations interacted (as they often do in international appointment processes) with concerns about national representation and geographic diversity. Politicization of the process was present primarily in terms of Members pressing for appointment of “their” candidates, but there appears to have been relatively little screening of candidates with respect to their views on specific issues likely to come up before the AB; as we shall see, this latter feature changes over time.

#### 4.3.2 First Reappointments and the Second “Generation” of ABMs

One can differentiate three “waves” or “generations” of new appointments (see figure 2). After the first selection, a second group of 6 ABMs were appointed in the years 2000–2001 and an additional member in 2003, while a third generation of ABMs were appointed in the years 2006–2009 (see figure 2). In the following we will focus on these two particular time periods to discuss stability and change over time.

Figure 2: Three waves of AB appointments



Source: WTO

Notes: Graph shows total number of new AB selections per year

The first reappointment process began in summer 1997. Article 17.2 of the DSU stipulated that the first term for three of the seven members would end after two years, thus producing a staggered nomination process thereafter. This first process was not controversial.<sup>67</sup> The AB had just started its work and there had been too little output to be criticized until then. Hence, three of the seven AB members were chosen by lot and were reappointed without notable discussion for their second 4-year term.<sup>68</sup>

In 1999 Members were called upon to reappoint the remaining four of the original group of ABMs for a second term. Their first term was to expire by December 1999. Yet, the membership did not have a clear process for reappointment in place and in addition, and something which came as a surprise, two of the original members did not seek a second term.<sup>69</sup> As late as 27 October 1999, a couple weeks before the start of the infamous Seattle Ministerial Conference, the chairman of the DSB informed the membership that the system could face a worst-case scenario. If Members could not quickly agree on re-appointment of two ABMs who signaled willingness to continue and to agree on two new members “three members of the AB would be left to rule on the ever-increasing number of appeals.”<sup>70</sup> The chair suggested renewing the terms of office for ABMs Bacchus and Beeby and starting a process of selecting two new members by establishing a new selection Committee (C6). Some WTO Members were concerned about allowing such a speedy renewal of ABMs’ terms. However, given the grim scenario and the upcoming Seattle Ministerial which took most of the Members’ time and attention, they refrained from blocking this decision. Yet, many delegations emphasized that they did not support the automatic re-appointment of ABMs and this should be seen as a special case that should not become the norm. India for instance, having failed to secure the appointment of one of its nationals the first time around, indicated its preference “that the AB members who had expressed their willingness to be reappointed, were considered with other new candidates.” At the same time the Indian representative proposed a change in the rules to allow for “the possibility to appoint the AB members for a fixed and non-renewable term. (...) That would ensure their

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<sup>67</sup> Interview 25.

<sup>68</sup> Ehlermann, Feliciano and Lacarte-Muró (WT/DSB/M/35).

<sup>69</sup> El-Naggar and Matsushita did not seek reappointment for personal reasons. “Matsushita did not want a renewal because he was a professor at Tokyo University and it was very difficult to juggle his work commitments there and his AB responsibilities (...) El Naggar was in a different situation – he was turning 80 at that point in time and felt that he had a mission to complete at home in Egypt. He had founded an NGO dedicated to promoting democracy and human rights in his country (interview 24).”

<sup>70</sup> If one member for whatever reason was not available, the system could no longer function (WT/DSB/M/70).

independence and no renewal from the DSB would have to be sought.”<sup>71</sup> This statement captures Members’ slowly developing ambivalent position vis-à-vis the new institution. On the one hand, delegations (especially from powerful trading nations) pushed hard to have their nationals appointed to the AB, even considering re-appointment to fulfill this aim. On the other hand, Members acknowledged that re-appointment also affected the “independence” of the court as this could potentially constrain the court’s autonomy.

After agreeing to renew the mandate of two continuing ABMs without further debate, the Geneva process was launched to appoint two new ABMs. In total there were seven candidates for the two seats.<sup>72</sup> During the selection process, ABM Beeby died suddenly. Therefore a new selection process for a single vacancy started, which overlapped with the ongoing process. In place of the two original candidates (El-Naggar and Matsushita) the DSB selected, on 7 April 2000, Georges Abi-Saab from Egypt and A.V. Ganesan from India.<sup>73</sup> For the third vacancy, there were only 2 official candidates. The Japanese candidate Yasuhei Taniguchi was finally proposed by the C6 and accepted by the DSB.<sup>74</sup>

The first re-appointments and new selections were characterized by Members taking decisions under time pressure. Overall, the original regional balance shifted slightly (as Oceania was no longer represented) and some of those that had lost out in the first round, pushed hard for their nationals to be represented (e.g. India). In addition to this continuing concern about national representation among the Members, however, the overall political context also started to shift. While Members would continue to lobby for their nationals, there was increasing concern in Geneva that the original seven were pushing the limits and showed some judicial activism. Along with the increased case-load came a number of contentious decisions taken by the AB that led to some outrage. However, it was largely over a procedural issue that an overwhelming majority of WTO Members started to organize opposition: on the issue of Amicus Curiae Briefs.<sup>75</sup> The matter over which divisions had arisen was whether panels or the AB had the right to accept or reject unsolicited briefs from non-governmental organizations. A panel held that unsolicited communications should be disregarded.<sup>76</sup> The AB overruled this view and argued that the DSU

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<sup>71</sup> Ibid.; This proposal never received sufficient support. Similarly, Japan suggested increasing the number of AB members.

<sup>72</sup> WT/DSB/M/77 (17 April 2000)

<sup>73</sup> WT/DSB/M/74; WT/DSB/M/77 India, was among those that criticized the original distribution of the 7.

<sup>74</sup> Taniguchi was already nominated by Japan for the replacement of Matsushita (WT/DSB/M/82).

<sup>75</sup> For an excellent discussion, see Mavroidis 2001.

<sup>76</sup> Ibid.



allows for an interpretation that would give panels the option to “receive” such briefs.<sup>77</sup> An overwhelming majority of Members was furious about this type of interpretation. One leading Ambassador and Chair of the DSB recalled: “Amicus curiae was a big issue, because members felt they should have been consulted.”<sup>78</sup> While the AB engaged in a number of clarifications (including concessions to address the criticism) as to the legal basis and process requirement to submit and to accept briefs through additional recommendations in cases that followed, at its core the AB sustained its position (Mavroidis 2001). On 22 November 2000, Members convened an extraordinary meeting of the General Council, the main decision-making body in Geneva, where they voiced sharp disagreement (WT/GC/M/60). The main criticism suggested that the AB decision changed the balance of rights and obligation by allowing special rights to private actors and organizations and therefore “trespassing its own mandate and becoming a legislator” (Mavroidis 2001:9). Only the US took the floor and supported the practice. While Members were unable to overturn the AB’s decision, they gave a strong warning to the AB to abstain from actively pushing the boundaries. This debate continued, and influenced the next AB appointments.

In 2001, the end of the terms of office for the ABMs from the EU, Uruguay and the Philippines prompted another selection exercise. Given past experience with nomination procedures that took longer than expected and an increasing interest in the output of the AB, Members started the process as early as March (WT/DSB/M/101). Generally, screening intensified during this time, and bilateral meetings with delegations in Geneva increased. Candidates had to answer more detailed questions during their bilateral meetings and meetings with the C6. One of the successful candidates remembered:

“Two points were important during the many meetings I had (including around 50 bilateral meetings). First, the amicus curiae brief issue and the related question of how transparent processes should become. Second, I was asked specific question, how I would rule certain cases. I answered on amicus curiae/transparency that this was a cultural issue (courts differ on this across countries), and on cases I stressed that I could not answer these questions before I had seen the case. Finally, what members

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<sup>77</sup> WT/DS58/AB/R, 12 October 1998 (US – Import Prohibition of Certain Shrimp and Shrimp Products).

<sup>78</sup> Interview 11.

liked was that I acted as an arbitrator, and an arbitrator does not change anything the parties have already agreed upon.”<sup>79</sup>

At the end of the selection process, Brazil finally got a seat at the table as well as Australia. The European seat was uncontested from the beginning.<sup>80</sup> In September of 2001, the chair of the DSB announced that, of 12 initial candidates, they would propose the following three: Luiz Olavo Baptista (Brazil); John Lockhart (Australia) and Giorgio Sacerdoti (EU).<sup>81</sup>

The last appointment of this second group of ABMs concerned the US seat in 2003. It was an odd contest, as the US nominated two former USTR negotiators, with publicly known different views on the AB and on case law. The successful candidate (Merit Janow) was a law professor from Columbia University more engaged in academic debates and less dogmatic on issues; the other candidate represented US import-competing industries (e.g. steel) and had publicly criticized the WTO and the AB on various occasions. Given his views, many Members voiced concerns and the G6 opted for Janow.<sup>82</sup> But this US nomination was also a reflection of growing criticism in the US over AB opinions (see Barfield 2001). In the following we focus on the EU selection process in Brussels and Geneva to discuss how internal EU nomination proceeded and how the screening in Geneva increased in comparison to the first selection process.

#### 4.3.2.1 The EU vacancy

In the original appointment procedure in 1995, the EU had put forward 13 candidates. The Commission was sidelined as countries nominated their candidates and championed them in Geneva. This time, there was general agreement within the EU that there shouldn't be too many candidates.<sup>83</sup> In the end, the EU Members of the WTO put forward fewer candidates.<sup>84</sup> The Commission was also somewhat more involved this time. Those candidates nominated by the Member States went to Brussels for meetings with Commission officials “over a cup of coffee not taking more than 30 minutes.”<sup>85</sup> In Geneva, the EU delegation assisted in coordinating the

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<sup>79</sup> Interview 16.

<sup>80</sup> Interview 28.

<sup>81</sup> Close to 60 delegations shared their views with the Selection Committee (WT/DSB/M/110).

<sup>82</sup> The USTR had a preference for Janow (Interview 29 with former USTR), check more evidence.

<sup>83</sup> Interview 28.

<sup>84</sup> Interview partners recalled candidates from Belgium, Germany and Italy.

<sup>85</sup> Interview 22.

process. The informal campaigning was left to delegations (and the capital) of those EU countries with nominees.<sup>86</sup> While the Commission developed some preference for certain candidates, it abstained from influencing other Ambassadors in Geneva about their priorities.<sup>87</sup>

The screening process examining candidates' views and positions also increased for EU candidates. This was reflected by the fact that the candidates' writings were consulted by those delegations that had the necessary resources.<sup>88</sup> As it was not contested that the EU would get a seat, Members could focus on the question of agents' views. One candidate remembered that in bilateral meetings with Ambassadors and their legal advisors, he was asked questions on the functioning of the DSB, his view on *amicus curiae*, his position on taking developing countries' concerns more on board, or on how to apply non-WTO legal principles. The US wanted to know in more detail about "my views towards the judiciary and on judicial activism and restraint, my position on interpretative methods and general view on environmental principles."<sup>89</sup>

The individual profiles of the three main contenders were quite different. The successful candidate, Giorgio Sacerdoti, was an outsider to the WTO world. He was not known in Geneva.<sup>90</sup> He was a professor with general expertise in international economic law. He also had experience of working with the Organization for Economic Co-operation and Development (OECD) on anti-bribery issues and had been an arbitrator in investment disputes. As he was less well known than the other nominees from the EU, he was asked more detailed questions. The other candidates had worked for the Commission, were experienced trade law experts and panelists and had written widely, as academics, on the WTO. Both faced considerable criticism, in particular from the US. One candidate recalled that he was involved in a number of panels on rules (e.g. anti-dumping), "where the decision went against the US, after the last one – and that was before I was a candidate to succeed Ehlermann – I was never asked again to serve on a panel (...) I also had some firm opinions about reform issues and judicialization of the system, whether the selection process was transparent enough, whether we needed the participation of parliaments (...) and I liked to write and talk about that. I can imagine that didn't fly very well."<sup>91</sup> The other candidate recalled a very intense meeting with the US Ambassador in Geneva. "My impression was that

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<sup>86</sup> Interview 4.

<sup>87</sup> Interview 28.

<sup>88</sup> Interview 6. One interviewee recalled his meeting with the US: "They had very specific questions, they had constituted a file, and they even translated texts I had written in another language (interview 18)."

<sup>89</sup> Interview 6.

<sup>90</sup> Interviews 6, 28.

<sup>91</sup> Interview 22.

they had a case against me. I was later told that one Washington DC based law firm that works on trade defense lobbied that my appointment should be avoided by all costs and that I had bad ideas about dumping and countervailing duties”.<sup>92</sup>

In the end, two trade law experts with views that the US and some other Members didn’t appreciate were effectively vetoed, while a third candidate, less well known, with no clear positions on existing WTO case law was more acceptable. Furthermore, the successful candidate was also judged as being independent from the European Commission, which, as one interviewee suggested, made him acceptable to many Members.<sup>93</sup>

### ***4.3.3 Most Recent Wave of Appointments***

The latest wave of appointment procedures started a bit earlier than anticipated when Lockhardt died in 2006, Taniguchi left early in 2007, and the American ABM did not seek a re-appointment.<sup>94</sup> There is no conclusive evidence on why Janow did not seek re-appointment. Some evidence from interviews suggests that USTR was concerned about cases where she was part of the three persons hearing the appeals where the AB ruled against the US.<sup>95</sup> A former USTR put it more generally: “We were not happy with US AB members who bend over backwards to show their independence by ruling against the US.”<sup>96</sup> In the reports written by the AB, she did not use the option of sharing an individual (usually dissenting) view.<sup>97</sup> Most importantly, she was involved in an AB recommendation that disagreed with a panel that found US AD practices (so-called zeroing methodology) to be permissible.<sup>98</sup>

In 2008 and 2009 the regular re-appointments started to fill another 4 seats. In terms of regional representation, Oceania was replaced by a Chinese Member, and the South American

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<sup>92</sup> He was a panelist on a WTO case that ruled against the US on safeguard.

<sup>93</sup> As the European Union is often present in disputes, other Members of the WTO preferred a candidate who had no strong working relations with the European Commission (Interview 28).

<sup>94</sup> They first two were replaced by David Unterhalter (South Africa) and Lilia Bautista (Philippines). Jennifer Hillman (US) replaced Janow.

<sup>95</sup> See AB reports Nr 268 US – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, Recourse to Article 21.5 of the DSU by Argentina; Nr. 296 US – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea; also interview 10, interview 20.

<sup>96</sup> (Interview 29).

<sup>97</sup> Art. 17.11 DSU foresees the possibility for individuals to express their views in AB decisions, but these must be anonymous.

<sup>98</sup> Zeroing is a specific technique used in the US to calculate dumping margins; it tends to overestimate the true effects. Nr 294 US – Laws, Regulations and Methodology for Calculating Dumping Margins US. However, there was a dissenting view (attributed to her) in a case where the US was on the losing side on Cotton subsidies to its farmers (Nr. 267 Subsidies on Upland Cotton).

seat went to Mexico (see below).<sup>99</sup> The Japanese continued to be represented by a former WTO Ambassador (Shotaro Oshima). The European seat went to Peter Van den Bossche (Belgium).<sup>100</sup>

Two key issues characterized this third wave of appointments in the context of WTO litigation (in times when negotiations were deadlocked). First, sparked by the discussions on anti-dumping and the zeroing cases, the US argued that the AB had overlooked the negotiation history when addressing issues such as the US's internal methodology for measuring dumping margins. Some matters were left deliberately ambiguous, in the US view, and the court should not engage in forms of gap-filling that would affect the members' balance on rights and obligations. Therefore, the US pushed the idea for promoting the use of dissenting views. While there was a strong view in the first group of ABMs that dissenting views should be avoided and consensus should be reached, this position has changed a little to allow for different views among the AB.<sup>101</sup> The US and other Members of the WTO argued that the AB was now mature enough to allow this practice (see also Kolsky Lewis 2006, Flett 2010). For the US in particular, views on this set of issues would emerge as a litmus test for AB candidates.

Second, the Membership started in 2002 (in parallel to the Doha Round) another attempt to discuss the reform of the DSU.<sup>102</sup> In this context, it was the US in particular (partially supported by Chile) that put forward a number of substantial suggestions (and even new treaty texts) between 2002 and 2007. While US proposals faced resistance from other Members on the issues of increasing transparency (e.g. open hearings) in panel and AB proceedings and addressing more explicitly the issue of Amicus Curiae briefs,<sup>103</sup> it attempted to create some consensus (and therefore growing support from the Membership) that would allow more control by Members over the DSU process. These proposals included the suspensions of procedures to

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<sup>99</sup> The Chinese seat was contested as a) Taiwan did not accept it until the last minute and b) the question was raised of how "autonomous" the Chinese candidate would be from the Chinese authorities. The Membership selected in the end Yuejiao Zhang.

<sup>100</sup> By 2007, the Commission had largely centralized the internal nomination process, where candidates first went to Brussels for formal interviews. The EU put forward (inspired by the US practice) two candidates. In addition, there was agreement among the EU candidates that no national lobbying should emerge. Both candidates had a similar profile. They were both experts in WTO law (one was a former negotiator of the DSU and worked for the legal division, the other a former staff member of the AB Secretariat). Similar to the 2001 EU selection an important factor was that the successful candidate had not worked for the European Commission and was not perceived as a "Commission candidate". (Interview 12; Interview 4)

<sup>101</sup> In particular one AB Member of the first group had no issue with dissenting views and threatened to use it on various occasions, but in the end he only drafted one concurring view (not reflecting substantive dissent) in EC – Asbestos (adopted 5 April 2001), Interview 25. In recent years, there have been three dissenting views in US – Upland-Cotton (21 March 2005), US – Zeroing (EC) (19 February 2009), and US – Zeroing (EC – Art. 21.5) (11 June 2009) (see Flett 2010).

<sup>102</sup> So far it did not produce any outcomes.

<sup>103</sup> TN/DS/W/13, 46, 79, 86.

allow bilateral discussions to resolve the issue, prescribing the rules of interpretation of treaties, the use of public international law, disallowing the “filling of gaps” where Members rights and obligations would be affected, and how to deal with constructive ambiguity.<sup>104</sup> The main concern was that the AB should not engage in making law.<sup>105</sup>

In this context, candidates’ views on reform questions became an important element during selection procedures. Screening became more intensive and specific, as Member States sought to determine candidates’ views on DSU reform and on other case-specific questions and limited their support to candidates whose views were not too distant from their own.<sup>106</sup> On some issues, there was near consensus among Members, namely that the AB should not engage in judicial law-making and should not do gap-filling. Of course, expectations of Members varied according to issue areas, but the above criteria favored candidates with non-controversial positions and those who had been careful in the past not to make enemies in Geneva. One member of the C6 put it as follows: (...) “it is clear if a country objects one candidate, the chances are slim that it will be accepted by consensus in the DSB.”<sup>107</sup> At the same time, candidates’ knowledge of the system and the member-driven character as well as experience as arbitrators has been valued more highly than experience as judges of national courts.<sup>108</sup> Furthermore, over time more members have been actively using the WTO dispute settlement system, therefore creating more interested parties and more potential veto players in the selection process.

As a result of these developments, the screening process intensified at the Geneva level (bilateral level) and at the domestic level. While originally, the CVs of candidates were available for consultation, candidates were now encouraged to meet as many Members as possible and envisage visits to Washington, DC and Brussels. As to the questions asked during the selection process, new topics have been added (e.g. dissent, reform proposals). A member of a recent Selection Committee recalled the increased number of topics. Members “quiz Candidates on the role of the DSB and WTO jurisprudence, about the role of AB vis-à-vis negotiated agreement, they have some strong concerns about filling gaps and the AB making law, they want to learn whether Candidates have experience in dispute settlement and they ask about specific issues,

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<sup>104</sup> TN/DS/W/28, 52, 74, 82, 82/Add.1, 82/Add.2, 89.

<sup>105</sup> Yet, other Members have less issue with law-making, including European states. Also many developing countries and smaller states with less influence on creating rules are more reluctant to constrain the AB (Interview 2).

<sup>106</sup> Interview 4.

<sup>107</sup> Interview 7; also interview 14.

<sup>108</sup> Academics have a difficult time to get support from the Ambassadors, interview 2.

including agricultural policy or zeroing (...). One issue that was also important for some members, were the issue of dissenting views, whether this should become more possible in the future.”<sup>109</sup> Yet, not all members are equally engaged as one Ambassador from a low-income developing country confirmed: “We are not users of the system, so we have less interest in the selection procedure, sometimes we invite AB candidates, sometimes not (we don’t always have the time). It’s up to the users of the system, they have much more interest; it does not concern us in the same way.”<sup>110</sup>

A legal advisor from a middle-sized country following recent AB selections described the Geneva Mission’s own process and criteria as follows:

The candidates come to the Mission and we discussed bilaterally (with the presence and the lead of the Ambassador) a predefined set of questions. We also look at their writings but we could do more as we don’t have sufficient personal capacities. As to criteria, we usually have a set of questions (...). We want to have a complete picture, see how they respond, how they rationalize. The most important ones include questions related to political aspects, such as development concerns (special and differential treatment) or emergency situations (contingency issues). We expect candidates to share the view that wider political issues should not impact on the rulings, the current system has sufficient “clarity”. We ask candidates about their views on the DSU reform proposals on the table? Usually candidates are well informed and avoid political statements. Generally they argue that the AB did well and there is no real need for adjustment. We also ask questions how they would decide when there are no provisions or the provisions are not clear? The question here for us is how do they see the role of the AB, what is their view, creating and making jurisprudence. We believe that they should be restrictive in interpretation (...). We ask similarly as to their view on the role of precedence, to what degree should the AB follow previous decisions? To what degree should decisions be taken in isolation from others, treating every case new as unique? Finally, we want to hear their views on transparency throughout procedures, should transparency be increased, on an ad-hoc basis or generally? Here we usually want to get a feeling of their views on publication

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<sup>109</sup> Interview 14

<sup>110</sup> Interview 13

to the public of the parties' submissions, their view on amicus curiae and their view on open hearings (on the last point we are less concerned).<sup>111</sup>

The intensive screening reflects the Member's ongoing difficulties in dealing with "adverse selection."<sup>112</sup> Interviews confirmed expected agent and principal behavior in respect to this challenge. For their part, potential candidates, as rational actors, seek to prepare for and adapt to Members' questions. They also get assistance from the Geneva-based national delegations which organize their interview process. One Ambassador supporting a candidate who was not particularly familiar with the WTO system confirmed that "we prepared the candidate for the talks; we explained to him the purpose of WTO law, dispute settlement history, and the preoccupation of members."<sup>113</sup> A successful candidate confirmed, "I worked on my opening statements which got better over time (...) and you adjust a bit depending on who you talk to."<sup>114</sup> Another successful candidate was aware that the Members were looking for a type of candidate who would be sensitive to the Membership's concerns. He recalled that the questions were not too technical. "It's important to show that the Candidate is experienced, balanced, sensitive for the political set-up of the system (...) as a candidate you take a neutral position on politically sensitive issues (not in favor, not against)."<sup>115</sup>

Ambassadors on their part rely on multiple sources of information to check the candidates. One Ambassador recalled that a "candidate gave a bad answer in a bilateral setting, the person later on when facing the chairs' group changed the answer (...), but that was too late, she was 'caught'."<sup>116</sup> A candidate, reflecting on the screening of principals, concluded that "if you want to become ABM, I would advise against writing on the subject matter".<sup>117</sup> To illustrate this increasing level of scrutiny undergone by AB candidates, we briefly examine two recent selection procedures below.

#### 4.3.3.1 The US Seat

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<sup>111</sup> Interview 3.

<sup>112</sup> Adverse selection exists when principals choose the wrong agent who was able to hide his true intentions before delegation took place.

<sup>113</sup> Interview 14.

<sup>114</sup> Interview 12.

<sup>115</sup> Interview 6.

<sup>116</sup> Interview 2.

<sup>117</sup> Interview 6.



In 2007 the US looked for a replacement for their ABM. In the US at that time there was growing discontent with the AB, the focal point being the zeroing cases (see above). “It was a very delicate situation,” the US coordinator of the internal process recalled; “there was this controversy in the US on zeroing; there was this concern that the AB had overstepped its mandate.”<sup>118</sup> The US had two main objectives when the internal nomination process started. The chosen person should share the concerns of the US on key issues and should be a strong personality able to influence others on the AB. The US selection was not influenced by party politics, but staffers of the key Congressional Committees (House Ways & Means Committee and the Senate Finance Committee) were consulted and USTR Susan Schwab was heavily involved.<sup>119</sup> Among the 8 or 9 candidates, “we were looking for someone who had strong understanding of WTO law, ideally worked for USTR and understood our positions, knew the role of the AB and had good persuasive skills to influence the AB decisions; (...) we needed someone who could sensitize others.”<sup>120</sup> One of the candidates recalled of the US internal nomination procedures that: “They wanted to know my views on the role of precedent, how to interpret public international law, how well the AB works, under what conditions dissenting should be allowed (...); of course they asked me on trade remedy cases (...) and they also wanted to see whether I could persuade others on the merits of arguments.”<sup>121</sup>

The US chose two candidates to be presented to the Membership, both with a similar profile.<sup>122</sup> As to the Geneva process one candidate recalled having met some 20–25 Ambassadors.<sup>123</sup> In these meetings and during the interaction with the C6, the questions on the role of dispute settlement and various reform issues took centre stage. With regard to reform questions, “I would usually tell them – which is also my view – that it’s not for me to provide new solutions or prefer one over the other issue in reform debates (...), it’s up to the members.”<sup>124</sup> As to positions on legal issues,

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<sup>118</sup> Interview 20.

<sup>119</sup> Ibid., Interview 29.

<sup>120</sup> Ibid.

<sup>121</sup> Interview 9.

<sup>122</sup> In comparison with the 2003 selection of a US nominee, the similar profile did not leave much choice for the Membership. Blocking all candidates from the US (and the EU) would be very difficult, therefore giving the EU and the US substantial discretion to put forward their candidates.

<sup>123</sup> She also went to Brussels to meet Commission officials.

<sup>124</sup> Interview 9.

“They checked my judicial temperament. When I used the words precedent or jurisprudence, they would ask me again and ask additional question what I mean exactly (...) yet the consensus-dissent question was discussed a lot. They wanted to know whether I thought that the judicial system was mature enough to allow dissenting view. (...) They also wanted to see whether I was a team player, would fit in, get along with others, and would not be too strongly opinionated, not too hard to move and change views (if needed).”<sup>125</sup>

From the two similar candidates, the members finally picked Jennifer Hillman.<sup>126</sup>

In considering the potential effects of this selection on subsequent case law, it is noteworthy that there was a dissenting view in the AB where Hillman sat alongside Bautista and Oshima in a case on anti-dumping.<sup>127</sup> The separate opinion (259-270) which was very detailed on US zeroing practice and sought “to emphasize the differences as opposed to the similarities between different types of zeroing (...) further the opinion does not comport with prior and subsequent panel and Appellate Body jurisprudence (Flett 2010).” It is fair to assume that ABM Hillman drafted this statement, which, if true, would suggest that the US had influenced the exogenous preferences of an ABM through the selection process, with notable (if not determinate) impact.

#### 4.3.3.2 The Latin or South American Seat?

For the replacement of Baptista, there were four candidates in the race, from Brazil, Argentina, Costa Rica and Mexico. All four had sharply differing profiles. The Brazilian candidate, a highly respected constitutional judge, was an outsider to the system. The other three were better known in Geneva and had trade policy expertise gathered through trade negotiations. The Brazilian candidate was strongly supported by the Brazilian government. The empirical evidence on this selection suggests that a key factor played against the candidate: the perception of her being an “activist judge”. An Ambassador recalled: “[T]he candidate signalled that she didn’t know much about WTO, but had experience as a judge and had developed jurisprudence in Brazil.”<sup>128</sup> A legal

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<sup>125</sup> Ibid., both candidates had similar views and positions, the preference of one over the other was more influenced by Ambassadors’ judgments on candidates’ personalities.

<sup>126</sup> Interview 2.

<sup>127</sup> US – Zeroing (EC – Art. 21.5) (11 June 2009).

<sup>128</sup> Interview 2.

advisor to the Ambassador continued: “(...) the Brazilian candidate mentioned that she helped introduce into the Brazilian system more judicialism; that was a red flag for many.”<sup>129</sup> In addition, as Brazil realized that its candidate was facing powerful opposition, it started an aggressive campaign. A closely involved observer recalled: “The campaign backfired and actually helped members to gather support for another Spanish-speaking candidate instead”.<sup>130</sup> Similarly, an Ambassador argued: “We didn’t like this, we opposed this approach (...) they tried to use the same tool they use in other instances of international politics.”<sup>131</sup>

The two candidates from Argentina and Costa Rica were Geneva insiders.<sup>132</sup> Yet, both faced opposition: “one had attacked some time ago the EC Ambassador over Bananas in a Council meeting after the deal was done. You don’t do that, he lost all support from the membership!”<sup>133</sup> Another candidate had confronted the EU by criticizing EU subsidies to fisheries and agriculture during post-UR negotiations.<sup>134</sup> In the end Members had fewest issues with the Mexican candidate and elected Ricardo Ramirez from Mexico, a former deputy general counsel for trade negotiations in the Mexican ministry, who was somehow familiar with the WTO system without having made “enemies” in Geneva.

These last two cases, we suggest, are particularly striking examples of how the WTO appointment process has become politicized, in very specific ways, which emphasize the distance between Alter’s ideal type of the international judge as trustee, on the one hand, and the political realities of today’s WTO, on the other. Whereas Alter suggests that principals appointing international judges are guided almost exclusively by expertise and eminence, and lack the ability to influence judicial appointments decisively, these cases suggest almost the opposite. 15 years after the creation of the AB, WTO Members have developed both general concerns about “judicial activism” and specific concerns about individual AB decisions, and have dramatically increased the level of scrutiny of AB candidates, who are now subjected to extensive screening and detailed questioning both internally (within the states that nominate them) and in Geneva to

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<sup>129</sup> Interview 3, Reuters reported that the Brazilian Candidate has led a number of reforms to make Brazil’s justice system more efficient, “WTO top court attracts strong nominations”, 9 April 2009.

<sup>130</sup> Interview 1.

<sup>131</sup> Interview 3.

<sup>132</sup> One was an Ambassador and one was a former Appellate Body Secretariat official with substantial legal expertise.

<sup>133</sup> Interview 1. There have been a number of cases against the EU related to their restrictions of banana imports from Latin American countries.

<sup>134</sup> Interview 27.

determine their judicial temperaments and views on controversial questions likely to come before the AB.

Furthermore, *pace* Alter, the consensus rule for AB selections means that, far from being powerless to block potentially activist judges, individual Members have, and deploy, a *de facto* veto against candidates perceived to be unhelpful to their own interests. The result is a system that resembles nothing so much as the process of appointment to the US Supreme Court, where successful candidates are likely to be those who have – like Elena Kagan in her recent Supreme Court appointment – said little or nothing controversial that might alienate the principals (US Senators in the Supreme Court, Member delegations in the WTO) who hold the keys to judicial appointment and reappointment.

## **5. Conclusion**

This paper explored the usefulness of principal-agent theory in analyzing the politics of international courts, focusing in particular on the judicial appointment process as a source of potential member-state influence on international judges. By contrast with trusteeship models that depict international courts as essentially beyond the influence of their member-state principals, PA models predict that member-state principals can and will utilize their individual right to nominate and their collective right to appoint judges in order to influence *ex ante* the endogenous preferences of international judges. Based on the “domestic” literature on the selection of judicial candidates, we derived five hypotheses about the behavior of states and of judicial candidates in the appointment process, which we tested in the context of a particularly powerful court, the WTO AB.

The empirical evidence strongly supports our five hypotheses. We have found ample evidence that WTO Members seek to support candidates whom they consider close to their own positions on salient issues. Moreover, Members (particularly larger Members with greater legal resources) scrutinize with some care the preferences of other Members’ nominees, supporting or blocking them accordingly. We have seen how individual Members do indeed condition their support for potential judicial candidates on their views on important contemporary issues, particularly those of interest to them and likely to come before the AB in its coming session (e.g., the United States and zeroing) (H1 supported).

Looking more closely at strategic interaction over the two-stage process, we find that nominating states have behaved, much like US presidents, as strategic agenda-setters, putting

forward candidates whose positions are close to their own but who are likely to secure the support of the membership as a whole (H2 supported). Indeed, we have seen evidence of WTO Members actively coaching and preparing their candidates to run the gauntlet of ambassadorial interviews prior to their appointment.<sup>135</sup> Similarly, we have also seen that institutional features (selective representation, informal rights for some members to a seat and the consensus rule) affect the influence of various parties. Holding an informal right given selective representation allows the US and the EU greater agenda-setting power in nominating their candidates, yet the US is more able to do so. This difference can be explained by internal competition between Member States and the Commission to influence the process and outcome of nomination within the EU (H3 partially supported). Given increasing control by the Commission, the EU is likely to behave more like the US in the future.

The case study has also shown that over time candidates are no more chosen as a group (but individually) which further disadvantages those candidates who are too far from positions defined by the majority of members. We have also seen that such scrutiny has increased progressively over the 15 years since the establishment of the WTO, with Members looking for evidence of candidates' positions on judicial activism in general, and controversial issues likely to come before the AB in particular (H5 supported). Indeed, some characteristics that were acceptable in the selection for the original seven (e.g. views on filling gaps) have become a decisive factor against nomination and appointment in subsequent waves in light of evolving WTO case law. Turning from WTO Members to candidates, we have demonstrated how – much like candidates for domestic courts – candidates to the AB have behaved strategically, providing selective information to national delegations about their judicial preferences and their views on hot-button issues of interest to particular Members (H4 supported).

We should of course be cautious about declaring support for our hypotheses based on a relatively brief experience of judicial nomination to a single international court, but the pattern of findings in this case, and the remarkable consistency of views among a wide range of participants in the process, reinforces our view that member-state principals seek to shape the preferences of international jurors in much the same way that political principals within states seek to shape the preferences of domestic judges, and for the same reasons.

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<sup>135</sup> In addition, some pre-selection processes in the capitals have changed in ways that eliminate some of the more contentious candidates prior to the Geneva process (e.g. in the most recent EU contest a candidate did not pass internal screening due to particular positions). Interview 18.

We conclude with three additional observations. First, above cases suggest that re-appointment is less an issue, even though at the beginning Members were reluctant to rubber stamp candidates' requests to serve for a second term and wished to keep this option available. What interviewees clearly indicated is that blocking individual re-appointments is diplomatically difficult (and only few Members could take recourse to this sanctioning mechanism). Yet, as principals started increasing *ex ante* control, the likelihood also decreased that ABMs would test the willingness of principals to use the re-appointment option. Nevertheless, the requirement to be re-appointed by consensus still creates unease among Members of the AB.<sup>136</sup>

Second, the empirical evidence clearly indicates that Ambassadors in Geneva play an important part in the selection. In many cases, the capitals are not involved, leaving significant discretion to these proximate principals who often play a pivotal role, signaling discomfort with some candidates and reminding successful candidates that the member-driven nature of the organization should guide the litigation function of the WTO (see Elsig 2011).

Third and last, the interview evidence also suggests that the first group of ABMs, who were at the end of their career (with one notable exception: Jim Bacchus), were able to cope with the unique working conditions of the AB. ABMs have to be available at all times, the work load differs from year to year and payment is moderate (compared with the remuneration of judges in other courts or in commercial arbitration, and in relation to other professional activities). Now, as ABMs are increasingly appointed at mid-career, incentives are created to spend less time on actual cases, and as a consequence overall quality of work within the AB and consistency of case-law is likely to be affected.<sup>137</sup>

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<sup>136</sup> Interview 12.

<sup>137</sup> Interview 25.

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**Table 1: Domestic and International Judicial Appointments Compared**

	<b>Interests</b>	<b>Interactions</b>	<b>Institutions</b>	<b>Information</b>
<b>Domestic (US)</b>	President and Senators have complex preferences, mix of partisan, ideological, interest-group, electoral, patronage concerns. Strong evidence, however, that ideological and partisan considerations have strong influence on both presidential nominations and Senate confirmation.	Strategic agenda-setting interaction: President selects nominee closest to own preferences capable of Senate confirmation (subject to uncertainty). Senators vote to approve or reject nominees as function of preferences, constraints.	Constitution determines President's agenda-setting power, need for Senate confirmation. Senate formal and informal rules empower Judiciary Committee, create possibility of filibuster, Senatorial courtesy for lower-court nominations.	President and Senators make choices on the basis of imperfect information about candidates true preferences. All actors have incentives to use information strategically: candidates selectively release information, President and Senate screen carefully. Information about judicial preferences and behavior increases with time, informing subsequent appointments
<b>International (IC)</b>	States have complex preferences re: nominations and elections, including norms about qualifications, need for credible commitment, concerns about policy (distributive implications of judicial rulings), patronage, etc.	Agenda-setting interaction: nominating states (decentralized) put forward preferred candidates capable of approval by other states (subject to uncertainty). States vote to approve or reject nominees as function of preferences, constraints.	IC statute determines key institutional rules: (1) full representation vs. selective representation; (2) rules on geographical or other allocation of seats among states; (3) voting rule (e.g., majority, consensus) for election of judges	States make choices on the basis of imperfect information. Candidates use information strategically, states (especially powerful states with resources and large stakes) screen carefully. Information about judicial preferences and behavior increases over time, informing subsequent appointments.