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The nationality of the international judge: Policy options for the Multilateral Investment

Court*

by

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It is a view generally held that the nationality of judges on the international bench can impact their decisions by making them partial to their home countries. This presumption of partiality attaches especially to judges who arrive on the bench after a career in government as legal advisors, administrators or politicians. Concerns are also voiced about ad hoc judges selected by disputing parties—much like arbitrators—when the disputing parties lack a judge of their nationality (“national judge”) on the bench. But if national and ad hoc judges are met with suspicion, nationality also legitimizes international courts. Courts must be representative of their membership, which entails including diverse nationalities in their ranks. The presence of national and ad hoc judges can be an important consideration when countries submit to a court’s jurisdiction.

In light of the efforts to establish a Multilateral Investment Court (the Court), this *Perspective* considers policy options in relation to the nationality of judges, focusing on two issues.

First is the issue of geographical representation in the composition of the Court as a whole. Since the Court is likely to start out as plurilateral, its statute should account for the fact that its membership will evolve and that ultimately not all countries will have a national judge on the bench. In particular:

- The drafters of the Court statute should consider limiting representation to the Court’s membership. This is consistent with most international court statutes and ensures better representation of the Court’s membership, since all available seats are reserved for members’ judges. In order to obtain initial momentum, it is possible to entice new members by promising seats on the Court, although this is a perilous enterprise that requires the utmost care and screening of judges’ qualifications.

- The Court statute must decide on the desired type of geographical representation. While the International Court of Justice’s representation of the “main forms of civilization” is an unlikely candidate, representation of “the principal legal systems of the world” is a plausible alternative.¹ Further options include a stipulation that the Court be “broadly representative” of its membership, as in the WTO,² or that “equitable,”³ “reasonable,” “so far as is reasonable,” or “fair” geographical representation be assured.
- Ultimately, the statute should accommodate two sometimes conflicting objectives: representativeness and the guarantee that judges possess the necessary personal and professional qualities and qualifications. Both representativeness and qualifications broadly understood are essential to the credibility and success of the Court. However, while representation is relative (“broad,” “equitable,” “fair”), the need for qualified judges is absolute.

Second is the question of national and ad hoc judges in the composition of particular divisions constituted to hear a dispute.

Generally, international courts settling interstate disputes permit national judges to hear a case when their home country is a disputing party. In the absence of national judges, these courts’ statutes typically allow countries to choose a judge ad hoc (irrespective of nationality).⁴ By contrast, in cases involving individual applicants, human rights courts—with the exception of the European Court of Human Rights—exclude national and ad hoc judges.⁵ Remarkably, in this case, victims often have the nationality of the offending country, so that the country’s national judge is also the victims’ national judge.

As with human rights courts, the Court’s principal workload will involve disputes initiated by private parties against states—although, since the claimant is a *foreign* investor, the state’s national judge will not be the investor’s national judge. Docket pressures and considerations of efficiency will probably require that cases be decided by divisions of three judges (or even by single judge formations). This implies the following:

- If national and ad hoc judges are allowed, respondent countries will often lack a national judge in the division of three, and ad hoc judges will be selected. Ad hoc judges in multiple small divisions will make the process redolent of arbitration and a logistical burden on the Court.
- If countries are entitled to choose a judge ad hoc, investors will claim the same right. If both countries and investors are granted this right, the operational challenge becomes greater.
- National judges in single judge formations are even more difficult to explain.

In short, the likely function of the Court (mixed disputes heard by small divisions) makes national and ad hoc judges inapposite to investor-state disputes. It may therefore be desirable for the statute to disallow national judges and ad hoc judges.

The drafters of the Court statute should consider limiting the Court's composition to its membership and employ a formula such as "fair geographical representation" or equivalent without compromising on judges' qualifications. For the composition of particular divisions, the better arguments are in favor of doing away with national judges and ad hoc judges. Ultimately, however, concrete policy options can be identified once the Court's probable overall design is known.

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¹ [Statute of the International Court of Justice, Art. 9.](#)

² [WTO Dispute Settlement Understanding, Art. 17\(3\).](#)

³ [Statute of the International Tribunal for the Law of the Sea, Art. 2\(2\); Rome Statute for the International Criminal Court, Art. 36\(8\).](#)

⁴ [ICJ Statute, Art. 31; ITLOS Statute, Art. 17.](#)

⁵ E.g., Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (Sept. 29, 2009).

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