

Appointment of Adjudicators to a Multilateral Investment Court

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December 14, 2016
Experts Meeting - Geneva**

Vital to Success of the Court

- Nomination and selection process implements the qualifications established for adjudicators
 - Personal Qualifications: high moral character; independence & impartiality
 - Experience Qualifications: legal experience (academic, judge, counsel); other professional experience
 - Knowledge Qualifications: related to specialized mandate of court: public international law, international investment law, case management skills, language requirements

Basic Questions

- Number – How many adjudicators?
- Nomination & Selection – How are they named?
- Duration – How long do they serve on the Court?
- Case assignment – How are they named to individual cases?

...No “Magic” Number

- Same number of judges as Contracting Parties
 - ECtHR: 47 judges
 - ECJ: 28 judges
- Smaller number of judges than Contracting Parties
 - ITLOS: 21 judges
 - ICJ: 15 judges
 - Iran-US Tribunal: 9 arbitrators
 - WTO AB: 7 members

Number – Criteria to Consider

- Expected workload
 - Number of cases; timeline; divisions; tasks; and support
- Flexibility
 - Absences; language; conflict; nationality; administrative tasks;
Full-time vs Part-time
- Cost
- Representativeness

Number – Representativeness

- Equitable geographic distribution
- Principle legal systems of the world
- Gender distribution

Indicia from the Current System

- Caseload: around 70 new cases per year, with 75% based on IIAs (52 cases)
- Rate of settlement or discontinuance before award: 34%
- Average length of case: 3 years
- Usual tribunal size: 3 persons
- Arbitrator time spent per case: average of 53 days a year per case
- Rate of applications for review: about 41% for ICSID annulment and 68% for WTO AB

Factors Affecting Number of Adjudicators Needed

- Number of cases initiated per year
- Size of divisions (1, 3, 5...)
- Mandatory time frames for completion of cases
- Rate of settlement
- Scope of review mechanism (grounds and standard of review)
- Extent of Secretariat support
- Administrative duties of adjudicators

How Are They Chosen? Nomination

- Usually a 2 step process: (1) nomination, then (2) selection
- Nomination Methods:
 - By Contracting States: directly (ITLOS)
 - By other groups: “National Groups” (ICJ)
 - By an independent body: Regional Judicial and Legal Services Commission (RJLSC) (Caribbean Court of Justice) or screening process by an independent body (Art. 225 TFEU Panel)

How Are They Chosen? Selection

- Selection Methods:
 - By Contracting States: vote (ITLOS) , common accord (CJEU), or by consensus (WTO AB)
 - By a separate organ: UN General Assembly and Security Council for the ICJ
 - By an independent body: Regional Judicial and Legal Services Commission (RJLSC) of Caribbean Court of Justice

Duration – How Long Do They Serve?

- **Length of tenure – no magic number**

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|---------------------|------------|----------------|
| • ECtHR: | 9 years | non renewable |
| • ICJ: | 9 years | renewable once |
| • ECJ: | 6 years | renewable once |
| • Iran-US Tribunal: | indefinite | |
| • WTO AB: | 4 years | renewable once |

- **Rotation process**

- **Renewability**

Case Assignment

- Usually, the Rules of the Court or its working procedures provide how to allocate specific adjudicators to a specific case
 - Decision of the Court (ICJ)
 - Distribution by lot – Drawing list (Iran-US Tribunal, CJEU, ECtHR)
 - Rotation (WTO AB)

Conclusions

- No uniform number in international courts
- Traditionally, States are primarily/exclusively involved in the nomination and selection procedures
- Recent trend to independent body for candidate screening
- Terms generally between 4 to 9 years; rotation and re-election must be factored in
- Important to decide whether smaller divisions will hear cases/certain stages and if so, how these are determined