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A Tribute to Professor Hans Smit

ARBITRATING TRADE DISPUTES (WHO'S THE BOSS?)

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I. INTRODUCTION

World Trade Organization (“WTO”) dispute settlement has attracted a lot of interest over the years and there is a plethora of academic papers focusing on various aspects of this system. Paradoxically, there is little known about the identity of the WTO judges: since, at the end of the day, the WTO has evolved into the busiest forum litigating state-to-state disputes. There are many writings regarding the appointment process in other international tribunals. At the risk of doing injustice to many papers on this issue, we should mention the following works: Terris et al.¹ look at various courts and especially those with opaque procedures regarding the appointment of international judges; Posner and Yoo² on the one hand, and Helfer and Slaughter³ on the other, reach opposite conclusions regarding the “independence” of courts the composition which does or does not depend on the will of the parties to litigation; Alter⁴ examines various fora and concludes that, contrary to domestic process where political branches dominate the process, international judges are less subject to appointment politics or so it seemed. And there is so much more. But there is almost nothing regarding appointments of WTO judges: Elsig and Pollack⁵ and Steinberg⁶ are, to my knowledge, the only notable exceptions to this effect; the former concentrate on the appointment of the Appellate Body (“AB”) members, while the latter’s focus is on theoretical inquiries regarding, inter alia, the appointment process.

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¹ DANIEL TERRIS, CESARE P.R ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* (2007).

² Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

³ Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

⁴ Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT’L REL. 33 (2008).

⁵ Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, EUR. J. INT’L REL., forthcoming (2012).

⁶ Richard H. Steinberg, *Judicial Law-Making in the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT’L L. 247 (2004).

WTO is the only genuine compulsory third-party adjudication forum in international relations dealing with government-to-government disputes and it does deal with some high profile cases such as the Boeing/Airbus dispute on state subsidies, the U.S. taxation scheme for overseas companies, the EU policy on food safety (imports of hormone-treated beef, genetically modified organisms, “GMOs”). And yet, the judges issuing these decisions which have an impact on the shaping of regulation at the domestic level are typically unfamiliar names, often unknown even to the Geneva crowd. True, with the exception of high-profile courts such as the International Court of Justice (“ICJ”), the European Court on Human Rights (“ECHR”) and similar institutions, international adjudication is left to dozens of arbitrators, few of whom make the headlines for their judicial functions. And yet, there is a body of international arbitrators and few if any of them are WTO judges as well. The typical WTO judge is a government official, not necessarily of high seniority, who is or has spent some time in Geneva representing his/her country before the WTO. Whether this is a conscious choice or an accidental by-product of a dispute adjudication system focusing on procedures rather than personalities is hard to establish.

The focus in this paper is on the selection process of WTO judges, the statutory constraints and relevant practice. In the next sections we first discuss the selection process for panelists and then for AB members. Section IV reflects the conclusions.

II. APPOINTING JUDGES AT THE PANEL LEVEL

A. *WTO Members Compile the List*

The Panel is the “first instance” court at the WTO, composed of three arbitrators (“judges”). WTO Panelists could be governmental or non-governmental and should be experts in the field of international trade: there is no statutory requirement for legal expertise, the Panelists could thus be economists, historians, political scientists and all that is required is expertise in international trade.⁷ The Secretariat keeps a roster of potential judges.⁸ The roster (or “Indicative List of Governmental and Non-Governmental Panelists”⁹ per its official name) includes the names of the proposed Panelists and their field of expertise (GATT, GATS, TRIPs). Footnote 1 to this document reads:

Curricula Vitae containing more detailed information are available to WTO Members upon request from the Secretariat (CTNC Division).

⁷ Dispute Settlement Understanding [hereinafter DSU], Art. 8.1.

⁸ *Id.* Art. 8.4.

⁹ WTO Doc. WT/DSB/44/ Rev. 17 reflects the roster. WTO Docs. WT/DSB/W/461 and 464 reflect the most recent additions to the roster.

It follows that the wider public has no access to the CVs of the WTO judges, the pronouncements on transparency at the WTO notwithstanding.¹⁰ Participation in the roster does not guarantee participation in Panel proceedings: 425 individuals had been included in the roster by the end of 2011, but less than 20% of them had actually served as Panelists.¹¹ The opposite is true as well: non-inclusion in a roster does not *ipso facto* lead to exclusion from Panel proceedings: there is not one single Filipino on the roster and yet five of them have adjudicated eleven disputes.¹²

B. *The Secretariat Proposes (Usually from the List)*

The Panel¹³ is composed of three Panelists assisted by the Secretariat. Note that the Secretariat is not an innocent bystander limited to “secretarial” work: it prepares the issues-paper (where the issues before a Panel and the relevant legal framework are explained), and advises the Panel throughout the process on the proper legal interpretation of the facts before it. The influence that the Secretariat can exercise in deciding the various legal issues is hard to ascertain. It is in any event an eminently under-researched issue: Nordström¹⁴ remains the only thorough study to this effect; the author advances some arguments in favor of the thesis that the Secretariat is quite influential in shaping the Panel reports, but there is nothing like conclusive evidence as to the precise impact of Secretariat influence: confidentiality requirements surrounding the process make it impossible for researchers to pronounce on this score.¹⁵ Anecdotal evidence suggests that there are few Panelists who insisted on drafting the Panel report themselves, but anecdote is the singular of data, and absent data, conclusions are baseless.¹⁶

¹⁰ The majority of roster Panelists are in government service.

¹¹ Horn et al., *The WTO Dispute Settlement System: 1995-2010, Some Descriptive Statistics*, 45 J. WORLD TRADE 1107 (2011). This actually raises the questions why not simply delete names that have never been chosen for many years, or why do some WTO Members keep adding to their list although their nationals are never chosen: political economy-type considerations might explain both inclusion as well as absence of exclusion.

¹² WTO Doc. WT/DSB/44/Rev. 17 and Horn et al., *supra* note 11, at 1112 ff.

¹³ On the workings of the WTO dispute settlement, see William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L. J. 51 (1987), and for a more detailed exposé, DAVID N. PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WTO: PRACTICE AND PROCEDURE* (2d. ed. 2004). On practice, see the account by Ernst-Ulrich Petersmann, *WTO Dispute Settlement Practice 1995-2005: Lessons from the Past and Future Challenges*, in *THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* 39 (Y. Taniguchi et al. eds., 2006).

¹⁴ Håkan Nordström, *The WTO Secretariat in a Changing World*, 39 J. WORLD TRADE 819 (2005).

¹⁵ DSU, Art. 8.

¹⁶ Pierre Pescatore, a former judge at the European Court of Justice (“ECJ”) and frequent Panelist in the GATT years (in some high profile cases such as U.S.-Section 337),

It is the Secretariat of the WTO that has the right to propose and Panelists to serve in any given dispute that can only be rejected by parties to a dispute for compelling reasons.¹⁷ There is absolutely no case law regarding the issue whether rejections routinely take place for “compelling reasons.” If at all, practice suggests that it is the nationality of the Panelist that holds the key to most nominations. This is of course a parameter that the Secretariat will factor in when proposing Panelists. Of course, the more sophisticated the Panelists are, the lesser the influence of the Secretariat will be. The key point here is that the Secretariat, an interested agent, is quite influential in defining the identity of its partner throughout the process.

C. *The Parties to a Dispute (Can) Reject*

We stated above that parties to a dispute can reject the proposals by the Secretariat of candidates to serve as Panelists for compelling reasons. They might have an incentive to collude in rejecting a name. The incentive to collude however, should not be exaggerated: first, there will be some names where no agreement exists between the parties (e.g., government officials of a WTO Member with regulation of the challenged measure similar to that of the defendant); moreover, they will have (less of an) incentive to delay the process since, other things equal, the complainant will be aiming at enforcing its rights and/or fending off other claims by the defendant, whereas the defendant will be aiming at procrastinating compliance. The defendant knows that, because of the prospective nature of remedies at the WTO, the later the Panel report will come, the more it will have profited from non-compliance.

D. *The Secretariat Decides*

If parties cannot agree on proposals by the Secretariat, it is the Director-General (“DG”) of the WTO who will nominate the Panel, following consultations with the parties to the dispute.¹⁸ Hence, the ball goes back to the court of the Secretariat. The DSU does not spell out one word on the criteria that the DG will use, other than his/her obligation to consult (as opposed to agree) with the parties to the dispute. And the DG is at the head of the pyramid hence he/she will in all likelihood be cooperating with the WTO Division (usually, the Legal Affairs or the Rules Division) in charge of the process: the people whose suggestions have been turned down are the same people who will be advising the DG on the names of Panelists that can now be appointed (as opposed to suggested). Their incentive remains the same: the stronger the Panelists, the weaker the position of the Secretariat throughout the process.

notoriously insisted in holding meetings without participation of the GATT Secretariat and even presented, himself, a Panel report to the GATT contracting parties. His attitude remains nevertheless an outlier.

¹⁷ DSU, Art. 8.6.

¹⁸ *Id.* Art. 8.7.

E. *The Panelists Selected*

Horn et al.¹⁹ offer the most comprehensive data on selection of Panelists, and provide data on the nationality of individuals who have served as Panelists (in the 199 Panels in their data set, that is on 597 Panelists in total), as well as on other issues such as the number of repeat Panelists, etc. They divide the world of Panelists into five categories: G2 (EU, U.S.); IND (industrialized countries members of the OECD, Organization for Economic Cooperation and Development); BIC (Brazil, India, China); DEV (developing countries); and LDCs (least developed countries, the countries that are featured in the U.N. list).

Individuals originating in IND and DEV have appeared as panelists 489/597 times, that is, almost 82% of the time. Fifty-one different nationalities have been represented, which means that more than two-thirds of all WTO Members have never had a Panelist. On 59 occasions, a G2 citizen has acted as Panelist: this is less than ten percent of all Panelists used. The U.S. tops the list in this category with 14 times. Fifty-four percent of all Panelists come from IND, the largest representation in this context. New Zealand tops the list with 57, and Switzerland comes second with 48. Australia is third with 34. Twenty-seven percent of all Panelists come from DEV. Chile tops the list with 25, followed by South Africa with 22, and Venezuela with 18. Nine percent of all Panelists come from India or Brazil (BIC), and Indians have been most frequent Panelists between them with 30, closely followed by Brazil with 22.

The composition of Panels has been decided exclusively by agreement between the parties to the dispute on 73/199 occasions. The DG appointed at least one Panelist on 126 occasions.

A total of 269 individuals have served as Panelist in 199 Panel proceedings, and 133 of them served only once, whereas 138, twice; hence, more than 50% of the Panelists have served more than once. Only 24 only out of a total of 269, that is, nine percent, have served five times or more. The record is held by Mohan Kumar from India, who served on 14 occasions, followed by Michael Cartland (Hong Kong, China, 11) and Wilhelm Meier (Switzerland, 11). Panelists who have served ten times are Claudia Orozco (Colombia), Crawford Falconer (New Zealand), Enie Neri de Ross (Venezuela), Maamoun Abdel-Fattah (Egypt), Margaret Liang (Singapore), Ole Lundby (Norway), and Peter Palecka (Czech Republic).

III. APPOINTING ARBITRATORS FOR THE APPELLATE BODY

The Appellate Body (“AB”) is the second instance WTO court. It hears appeals against Panel reports and has the power to uphold, reject or modify the findings made. It is composed of seven members who serve for four years (renewable once) and who are assisted by a secretariat, a team of lawyers who work exclusively with the members of the AB and help them draft their reports.

¹⁹ *Supra* note 11.

A. *The Selection Process*

The DG of the WTO and the Chairmen of some WTO bodies (the General Council, the Council for Trade in Goods, the Council for Trade in Services, the Council for Trade Related Intellectual Property Rights, and the Dispute Settlement Body) will decide on the members of the AB following proposals by various WTO Members, who nominate their candidates. The members selected will adjudicate disputes even when the countries where they originate are parties. This can be the case with respect to Panelists as well,²⁰ although it has never happened in practice so far.

B. *The AB Members Selected*

The EU, Japan and the U.S. have always had a seat in the AB. The remaining member rotates. Originally, there was a more or less equal divide between academic and non-academic members, but by now the majority of members has definitely tilted towards non-academics. The CVs of the AB members are available on the internet and prominently figure in the official WTO webpage.²¹

IV. AN EVALUATION

A. *The Selection Process*

Hudec²² described the legalization process that the GATT was gradually undergoing and that culminated with the advent of the WTO and the DSU. Legalization does not necessarily mean that more powers are conferred on the judiciary;²³ it simply means that we enter a phase where its practice is being crystalized in statutes.²⁴ Paradoxically, key issues like the criteria for selecting Panelists that the DG must employ, have been totally neglected. Other issues, such as what are the criteria that the Secretariat uses when proposing Panelists, are expressed in vague, uninformative terms.²⁵ Further, we do not know whether rejections are indeed for compelling reasons and what kind of reasons WTO Members consider to be compelling. It is also unclear what the legal basis is for not making the CVs of Panelists available to the wider public; in the absence of a

²⁰ DSU, Art. 8.3.

²¹ www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

²² ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990).

²³ Barfield, however, holds that this has indeed been the case with the advent of the WTO. CLAUSE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001).

²⁴ Henrik Horn & Petros C. Mavroidis, *International Trade: Dispute Settlement*, in *RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW* 177 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

²⁵ DSU, Art. 8.

statutory requirement to this effect it is puzzling why practice has evolved towards less rather than more transparency.²⁶

The overwhelming majority of all Panelists are governmental, that is, individuals employed by a WTO Member. Since the basic obligation of the WTO contract is non-discrimination, they are not totally disinterested parties since one way or the other their employer will be profiting from the eventual outcome. There are three other factors that support the line of thinking advanced by Nordström regarding the influence of the Secretariat:

- (a) A Panel process takes a substantial amount of time and government officials might find it hard to dedicate the amount of time needed; WTO Members with “small” delegations might find it even harder since their already reduced size will be further reduced because one member of the delegation will need to “put in the hours” at the service of the Panel process. This is typically the case for delegations of DEV who, as suggested above, constitute the majority of Panelists;
- (b) Remuneration for Panelists is quite low by any reasonable standard and this factor in and of itself would argue that Panelists would have little incentive to invest a lot of their time in the Panel process. Members of the Secretariat on the other hand, are paid a fixed amount for performing similar tasks;
- (c) Expertise in international trade matters is more widespread in G2 and yet G2 Panelists are quite scarce. In most DEV, WTO is not taught at all, and yet DEV provide the highest number of Panelists.

The AB selection process is better organized. Still, we know very little about the criteria for selecting one over the other candidate and (some of us) are still looking for explanations why some candidates with expertise in the field have been discarded while others with much less expertise have been preferred. But here, contrary to the Panel process, it is diplomats who control the process and it is not the DG who will ultimately (if need be) decide on the AB composition. This allows for bargains to be struck across the stakeholders (less of a possibility in the Panel process).²⁷

²⁶ There is no argument, however, that other aspects of dispute settlement, like Panel deliberations, should remain confidential (compare Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court,”* 36 J. WORLD TRADE 605 (2002) and James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence,* 13 J. INT’L ECON. L. 287 (2010).

²⁷ But keep in mind that the AB will only hear appeals against Panel reports, hence its role is constrained.

B. *Government Service and its Discontents*

Elsig and Pollack²⁸ reach two conclusions: the WTO Selection process is deeply politicized and has become worse over the years; there has been a shift towards diplomats (bureaucrats) after 2000, in the sense that now more than ever they compose the AB, and the committee selecting them has been interviewing bureaucrats increasingly over the years. As already noted, Panelists (both on and outside the roster) are overwhelmingly governmental.

There is one area where individuals with governmental service distinguish themselves from those without it: they are much more aware of the “political” risk²⁹ associated with legal findings that might decisively influence the acceptability of the final report; even if, from a pure legal perspective all reports are being adopted (and hence have a legal value), legal acceptance does not necessarily guarantee *de facto* implementation. There is a trade-off here: in the name of acceptability one might be eager to sacrifice the intellectual integrity of the legal construction that led to findings. What is acceptable in Seoul might be unacceptable in Brussels or Washington DC. The judge might, consequently, be sacrificing consistency in the reasoning depending on who is on the receiving end. But even if the judge is consistently deferential, he/she might end up interpreting the contract against its spirit and deprive the beneficiaries of trade liberalization (consumers, who typically have no voice) from expected benefits. This is not to say that the WTO adjudicating bodies have always yielded similar results; indeed, similar conclusions can only be reached by analyzing individual cases and on this basis establishing trends regarding the standard of review. The point here is simply that the rational expectation of those appointing similar persons should be that the appointees show extra care when dealing with politically “sensitive” issues: it is the job of the academic after all, not of the bureaucrat, to “rock the boat” by re-visiting past orthodoxies, questioning them and moving to more informed conclusions.

There is also an issue with respect to conflicts of interest. It is quite easy to detect such conflicts for academics (especially those unaffiliated with law firms) since the only question to ask would be whether they have served or currently serve in cases that involve similar issues, or if they are (or have been) on the payroll of one of the parties involved. Detecting potential conflicts for government officials might be trickier: what if, for example, the country at the service of which the official serves has legislation identical to or similar with that of the defendant? Or what if his/her country is planning to negotiate a treaty (trade or otherwise) with one of the parties to the dispute but the information to this

²⁸ Elsig & Pollack, *supra* note 5.

²⁹ How far individual WTO Members might go to insure themselves against potential negative findings is difficult to discern. Elsig and Pollack, based on dozens of interviews that they conducted with people in and around the WTO, state that the attitude towards zeroing (a practice whereby dumping margins are inflated by discounting negative values) dictated the U.S. choice in two successive AB formations. Elsig & Pollack, *supra* note 5.

effect is still private? And yet, counter-intuitively so, the majority of Panelists selected have been governmental.

C. *The Math is Complicated, but . . .*

Some might raise the issue whether there is an issue here: the system seems to work; speakers around the world refer to the WTO dispute settlement as the crown jewel of the system; it is the only genuine example of compulsory third-party adjudication in international relations; the only time WTO Members were displeased with their judges was for a rather innocuous issue, the possibility for *amici curiae* to send their briefs to the WTO.³⁰ It ain't broken so what is there to fix in the first place? Or, there is no need to look for a shelter in the absence of a storm.

Scrutiny nevertheless is not the exclusive privilege of the WTO Membership. Academia more and more pays attention to the output of WTO adjudicating bodies and skeptical voices increase. The WTO judge is an agent with substantial discretion (in light of the fact that he/she is called to interpret one incomplete contract, the Agreement Establishing the WTO, through another, the Vienna Convention on the Law of Treaties) and it is only normal that scrutiny extends to the identity of the judges, their appointment process, etc. and this is where we hit the stumbling blocks described in this article. Again, it is difficult to show that a particular outcome is the direct consequence of the properties of a particular judge since there are many other contributing factors in this process (the claims by the parties, the time devoted to studying the cases, the incentives to do so, the assistance by the Secretariat, the relationship between the judges, the quality of the law etc.). But the identity of the judges holds one of the keys in this context, and the purpose of this paper has been to shed some light on the appointment process.

Unfortunately, for the reasons described above, not much light can be shed on the characteristics of Panelists other than that they are overwhelmingly in government service. There are some obvious candidates to move the discussion forward: there is no reason why the CVs of Panelists should remain confidential; an explanation of the compelling reasons justifying rejection of proposed Panelists should be made in writing and should be made publicly available; the DG should explain why particular judges are appropriate to deal with a particular case; detailed information regarding the CVs of all proposed members for the AB should be made available. Unless the WTO starts moving in this this direction, it is likely that the banners with the faceless bureaucrats will re-appear all over again.

³⁰ Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION, STUDIES IN TRANS-NATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 317 (Armin von Bogdandy, Petros C. Mavroidis & Yves Meny eds., 2002).

Annex 1: Composition of Panels, DSU Article 8

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
3. Citizens of Members whose governments³¹ are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.
4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.
5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.
6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

³¹ In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.
8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.
9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.
10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.
11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Annex 2: Composition of the AB, DSU Article 17

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.