

**COMPOSITION OF WTO DISPUTE SETTLEMENT PANELS-ABCNY**  
**INTERNATIONAL TRADE COMMITTEE PROPOSAL**

**Association of the Bar of the City of New York**  
**The Committee on International Trade**

**August, 2005**

*Introduction*

Panels chosen to hear disputes brought under the WTO's Dispute Settlement Understanding (DSU) adopted in the Uruguay Round are currently chosen with a high priority ascribed to independence of the panel members. The DSU incorporates several provisions limiting who may serve as a panel member to serve this end. However, in practice the methods chosen to reduce bias have drastically reduced the pool of qualified potential panelists. Nationality considerations rather than true concerns regarding independence have taken precedence in the selection process for panels. While the independence of panel members having the same nationality as parties to a dispute may have been a legitimate concern under the old GATT dispute settlement system, in which panel members were generally government officials, it should be less so under the DSU, which allows panels to be drawn from a more diverse group. Without reform, however, parties to WTO disputes have shown few signs that they will value expertise over nationality. In this paper, we examine the DSU provisions concerning panel selection, outline problems the system has revealed over time, discuss the proposals for reform that have been made to date, and outline the International Trade Committee's new proposal for a panel roster.

*I. The WTO Provision at Issue*

The Secretariat has the task of nominating panel members on which the parties agree. Article 8 of the DSU provides:

*Article 8*

### *Composition of Panels*

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 governments<sup>1</sup> are parties to the dispute or third parties as defined in paragraph 2 of Article 10 [as any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB] 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 [Dispute Settlement Body]. 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.

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<sup>1</sup> 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.

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.
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.

## II. *Problems with the Current System*

Article 10, para. 2 of the DSU defines “third parties” as “[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the DSB”. Since the adoption of the DSU, third parties, most often the United States and the European Communities (EC), have regularly intervened in disputes that did not involve

them as complaining parties or respondents initially. When the EC is a party or third party, nationals of all of the member states are disqualified. The result is that American and European panelists are not eligible to serve as panelists in most disputes, despite those members having a large pool of qualified individuals with the necessary expertise. On occasion, nationals of countries that have applied for EC membership have even been challenged. While this obstacle would be overcome if the parties to the dispute consented, this rarely occurs. Instead, appointment of panelists is a contentious process and in approximately seventy-five percent of cases, the Director-General must compose the panel<sup>2</sup>.

Most panelists have been government trade officials, often Geneva-based diplomats of member states not involved in the dispute, but in recent years there have been more academics and legal practitioners serving as panelists. Candidates have also been rejected based upon profession. While some WTO members have tended to prefer government officials, others prefer practitioners or academics.

The overall process of composing a panel has taken two months on average<sup>3</sup>. Many individuals are excluded right away because of nationality. It is exceedingly rare that parties agree to a panelist who is a national of one of the parties to the dispute. The grounds upon which the panelists have been challenged have included the objection that panelists have participated in past disputes (often panelists who have ruled against a party in previous disputes). Presumably, these challenges have occurred because those individuals have 'shown their colors', but excluding experienced panelists further narrows the pool of candidates.<sup>4</sup> Parties have frequently supported panel selection based upon geographic distribution. We believe that emphasis on geography rather than expertise is unwise when panels are hearing complex and often highly technical matters.

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<sup>2</sup> WTO Doc. TN/DS/W/7, p.2 (30 May 2002). Of 23 panels composed in 2001-2002, 16 were composed by the Director-General. The annex to this publication indicates that 14 out of 24 panels in 2000-April 2002 were composed by the Director-General, 4 out of 9 panels were composed by the Director-General in 2000, and since then, 10 out of 15 or two out of three have been composed by the Director-General.

<sup>3</sup> Paola Garzotti, *The Benefits of Moving from Ad Hoc to More Permanent Panellists*, DG Trade/D/3/PG D 2002 (July 10, 2002) at p. 2.

<sup>4</sup> Parties are not allowed to interview potential panel members.

Professor William J. Davey, the first Director of Legal Affairs for the WTO, has described the nationalities of the 119 individuals who had filled 186 panelist positions at the time he wrote on the subject<sup>5</sup>. He found that the majority were from Switzerland (19 positions filled), New Zealand (17), Australia (12), Brazil (11), Hong Kong (11), South Africa (9), Canada (7), Czech Republic (6), Poland (6), Chile (5), Egypt (5), Germany (5), India (5), Norway (5), Sweden (5) and Thailand (5). The EC has filled 26 positions, the United States 4 and Japan 2. Overall, 73 positions have been filled by panelists from developing countries (39%) and 17 by Eastern European panelists (9%). In terms of regions, the developing country panelists have come from Africa (14), Asia (28), Indian Ocean (1) and Latin America (30). Twenty percent of positions have been filled by women.

Article 8.9 of the DSU specifically prohibits a member from instructing or seeking to influence a panel member, and there has been no evidence that member states have attempted to instruct or influence panel members from their countries. Nevertheless the nationality of panel members has remained a prime concern in the composition of panels, with the result that the pool of panelists is inadequate, both in terms of numbers, and in terms of expertise and diversity. As the European Union keeps growing, potential panelists from Sweden, Finland, Poland, the Czech Republic, and perhaps still other countries will become *de facto* ineligible to serve on DSU panels.

### III. *The Proposal of the European Community*

The EC has been the only member that has gone further than mere rumination. In the 1998-1999 DSU review, the EC first proposed a standing Panel Body of 15 to 24 members<sup>6</sup>. The EC again raised the subject in a proposal in the Doha negotiations on

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<sup>5</sup> William J. Davey, 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?' in Daniel L.M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press 2002) at p. 500.

<sup>6</sup> Discussion paper from the European Communities (21 Oct. 1998), available at <http://europa.eu.int/comm/trade/issues/respectrules/dispute/improving/0212dstl>. (see Issue 9).

dispute settlement reforms<sup>7</sup>. The Panel Body proposed by the EC would be geographically representative, but with an independent membership that would serve for a fixed period. A majority would have a background in international trade law, with others having experience in specific sectors. On the basis of lottery (rotation), the Panel Body would form a chamber of three to deal with each new case as it arises. The Panel Body members would serve a six-year term. In the rotation, as in the Appellate Body since the founding of the WTO, there would be no restriction on nationality in any particular case. The members of the Panel Body could have no government affiliation. The EC contends that this system would allow better representation of the major disputing countries such as Japan, the EC, and the United States.

In its proposals tabled at the Doha negotiations, the EC stated why it considered that a permanent Panel Body would be superior to the current system. In advocating a permanent panelist system<sup>8</sup>, the EC pointed to the growing quantitative discrepancy between the need for panelists and the availability of *ad hoc* panelists. According to the EC, it has become clear that there are many more panels under the WTO than under the GATT and that the total duration of the cases is increasing, because of the frequent recourse to compliance panels and to arbitration on the suspension of concessions, procedures that are now normally handled by the original panelists. Further, it had proved more and more difficult to find qualified panelists who are not nationals of members states involved, be it as a complaining party, a respondent, or a third party. The EC concluded that the result of the discrepancy between demand and supply has been an increasing delay in the selection of panelists, and an increasing recourse to the Director-General of the WTO for the appointment of panelists. We essentially agree with the EC's critique of the present system, but in Part IV we propose a somewhat different solution.

The EC believed that the time that was spent in constituting the panel could be allocated to other parts of the procedure, and that recent developments concerning the

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<sup>7</sup> WTO Doc. TN/DS/W/1 (13 March 2002).

<sup>8</sup> WTO Doc. TN/DS/W/1 (13 March 2002).

actual consideration of cases by panelists has placed a greater strain on panelists selected on an *ad hoc* basis. The actual conduct of a dispute settlement procedure had become much more sophisticated than before, substantially increasing the work load of panelists, due to procedural complications, such as preliminary rulings and the handling of business confidential information, as well as of the increased complexity of the assessment conducted by panelists. Therefore, the EC concluded in its paper that moving to a system of permanent panelists would be likely to result in fewer reversals of panel reports by the Appellate Body than is currently the case, thereby reducing the total time frame of the procedure, the workload of the Appellate Body and the costs for all the parties.

The EC discussion paper suggested that a permanent panel system would enhance the legitimacy and credibility of the panel process in the eyes of the public, as the possibility of conflicts of interests would be eliminated and the independence of the panelists would be protected.

Finally, the EC discussion paper stated that a permanent panelist system would increase the involvement of developing countries in the panel process. Under the current system, only 35% of the panelists since 1995 have come from a developing country. This total could be increased with a more permanent roster of panelists broadly representative of the WTO Membership, as is the case with the Appellate Body<sup>9</sup>.

A number of advantages of this proposal have been considered by commentators<sup>10</sup>. First, the time saved on panel selection, which currently takes about two months; second, a Panel Body would be able to gain significant experience and presumably, better decision-making would result; third, the United States and EC would

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<sup>9</sup>Of the 47 reports issued by the Appellate Body, 45 or 96% were issued by a division containing at least one member from a developing country, and 24 or 51% were issued by a division containing two of its three members from a developing country.

<sup>10</sup> See, William J. Davey, *Mini-Symposium On The Desirability Of A WTO Permanent Panel Body*, 6(1) JIEL 175 *et seq.* (2003) for various commentators' views on the subject. The EC proposal has attracted support from John Kingery, senior legal officer at the WTO, who has written on the parties' universal unhappiness with the current system and says the current system "is not working well at all". See, John Kingery, *PART I: REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU): Panel 1 B: Stage II--Operation of Panels: Commentary: Operation of Dispute Settlement Panels*, 31 Law & Pol'y Int'l Bus. 665 (2000).

be better represented in a Panel Body. One other advantage might be that remand from the Appellate Body to panels, which is not presently authorized, could be introduced together with the introduction of a permanent panel, as time pressures would be less burdensome on permanent panel members<sup>11</sup>. Commentators have noted that the possible application of adverse inferences in panel decisions was discussed but not decided in *Canada-Aircraft*<sup>12</sup>. It is possible that more experienced panelists would be more comfortable with judicial concepts such as the application of adverse inferences if a party fails to present evidence on a certain point. The attractiveness of the permanent Panel Body proposal rests upon the proposition that the Panel Body would be chosen for expertise rather than for political considerations.

In response to a number of pointed questions posed by India, the EC reiterated in a written response that a permanent Panel Body would be superior to the current system<sup>13</sup>. The reasons cited were the difficulty currently encountered in finding experienced panelists, increased work load for panelists due to level of inexperience, less likelihood of a permanent panel body being overruled by the Appellate Body, enhanced legitimacy and credibility of the process in the eyes of both member states and the public due to decreased conflicts of interest, coherence through collegial consultation, time saved, and modest additional costs<sup>14</sup>. The EC also rejected the criticism that the proposal was a departure from the basic principles of the DSU<sup>15</sup>.

However, commentators have also pointed out the negative implications of a permanent Panel Body: that members are less likely to criticize panels for bias when they have been deeply involved in the selection process, that a permanent body of panelists would put a face on the panel system more vulnerable to attack by opponents, and that a permanent Panel Body might be perceived as more ideological and more given

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<sup>11</sup> See, William J. Davey, *Mini-Symposium On The Desirability Of A WTO Permanent Panel Body*, 6(1) JIEL 175 *et seq.* (2003).

<sup>12</sup> *Id.*

<sup>13</sup> WTO Doc. TN/DS/W/7, p.2 (30 May 2002).

<sup>14</sup> WTO Doc. TN/DS/W/7, p.2 (30 May 2002), at pp. 2-4.

<sup>15</sup> WTO Doc. TN/DS/W/7, p.2 (30 May 2002), at pp. 4-5.



to predispositions, leading to concerns that panels are making law rather than leaving that task it to trade negotiations.

#### *IV. The Committee Proposal*

Our proposal does not contemplate a permanent Panel Body, but rather a roster of panel members who are not employed full-time by the WTO but who serve when they come up in the roster rotation. The panel roster would be relatively large – say 75 participants -- more than the 15-24 names envisaged for a permanent Panel Body, thus allowing a greater diversity of expertise. Further, the panel roster would be set up so that individual panels would be chosen without regard to geography, randomly from the panel roster. However, each panel should have one member with experience in the specific sector in dispute (separate rosters or ‘wheels’ being maintained for this purpose), the other two having general experience in trade law. Further, the fact that a dispute might involve a panelist’s home country as a party or third party should not disqualify that panelist, unless the panelist elects to recuse him or her-self on the ground that he or she cannot be impartial. Each member of the panel should have a different nationality. However, there should be a proviso that if either the complaining party or the respondent is a developing country, then at least one of the panelists must come from a developing country. Of the 75 members of the panel roster, 25 should come from developing countries.

The members of a given panel should choose the presider as among themselves, with the understanding that it is most desirable for the panel member with the greatest experience serving on panels to preside. If the panel members cannot agree on the presider, then the Secretariat would choose the presider.

Where there are parallel cases proceeding in front of panels, the current practice that the same panel hears both disputes need not be disturbed. In the past, this practice has resulted in harmonious decision-making on related disputes, as well as harmonious timing (panel decisions on related disputes having often been released on the same day).

In order to preserve the independence, as well as the appearance of independence, persons on the roster would not be members of any current government of member states. They need not be lawyers, but all should possess appropriate trade-related experience, as set out in the current version of Article 8.1. Further, it should be specified that to sit on a particular dispute, they cannot have been involved in the controversy being heard, whether as government officials or as private lawyers or advisers. The panel roster members should be paid, at rates approximating those paid to ICSID arbitrators, for the time that they actually spend on the case.

As under the proposal of the European Union, amendment to the DSU providing for a permanent roster of panel members might be accompanied by an amendment allowing the Appellate Body to remand cases where the Appellate Body finds the evidence before it to be unpersuasive and further factual determinations are found to be required.

Additionally, it might be appropriate, though not necessary to the proposal, to allow separate written opinions from individual panel members if they so desire. Currently, Article 14.3 of the DSU stipulates that opinions expressed in the panel report by individual panelists shall be anonymous. However, given the panel roster system, there is less reason to hide the identity of any separate opinions as they cannot be excluded from being chosen again due to expressed views. The African Group proposed in 2003 that Article 14.3 be amended to require fully reasoned, separate opinions from each panelist, clearly stating which party has prevailed, with joint opinions allowed where one or more panelists are in agreement and the majority opinion prevailing<sup>16</sup>. While we do not believe that requiring authored opinions is necessary, it should be an option left open to individual panels.

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<sup>16</sup> *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, TN/DS/W/42 (24 Jan. 2003).

We believe that a permanent panel roster would have all the advantages of a permanent panel---greater panel expertise, greater participation by the United States, Japan, and the European Communities, broader group of panelists by profession and area of expertise, and shortening of the panel process as months of haggling over the selection of panelists is reduced. It would also have none of the above-enumerated disadvantages of a permanent panel---internalization, overreliance on support staff, parties' perception of decreased legitimacy because they are not involved in the selection process. There is also likely to be less concern about a panel roster usurping 'law-making' functions that the parties would prefer to leave to negotiation. Instead, having agreed on a panel roster of well-qualified individuals willing to make that time commitment, and who the parties believe can put aside geographic bias, parties could eliminate squabbling over panelists and be able to focus immediately on the substance of panel proceedings.

Finally, a permanent panel roster rather than a permanent panel body would be less likely to attract political appointees. Doubtless, persons seeking political advancement would be far more interested in a permanent full-time position of influence in a smaller group of 15-24 Panel Body member than part-time participation in a roster of 75 individuals. In the long-run, an increase in panel expertise such as we believe a permanent panel roster would bring, without any increase in politicization of the panels, can only enhance the authority and legitimacy of the WTO dispute settlement process.

### *Conclusions*

1. The present system of choosing members of WTO panels is unsatisfactory, and is likely to become more unsatisfactory as the caseload grows and the disqualification of potential panelists by reason of nationality increases.
2. The Dispute Settlement Understanding of the WTO would be greatly improved if some kind of permanent system of for selecting members of panels were introduced.

3. Of the two proposals under discussion---one for a small permanent fulltime roster of panelists, the other for a larger roster of panelists on call---the Committee favors the latter proposal.
4. In any event, we believe that the United States Trade Representative, either alone or in collaboration with other active participants in WTO dispute settlement, should urge early consideration of the panel selection process, either on its own or in conjunction with other proposals for amendments to the Understanding on Dispute Settlement.

## The Committee on International Trade

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