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‘JUDGES SHALT THOU MAKE THEE IN ALL THY GATES’: REFORMING JUDICIAL OFFICE IN THE WTO DISPUTE SETTLEMENT SYSTEM

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‘Judges Shalt Thou Make Thee in All Thy Gates’:^{*} Reforming Judicial Office

in the WTO Dispute Settlement System

Tomer Broude^{**}

Abstract

The design of judicial office is ostensibly a technical issue. Moreover, its component elements – seemingly procedural points such as the number of judicial decision-makers to a court, their term in office, eligibility for and methods of appointment to office, and procedures for dismissal – are important determinants of judicial independence, efficiency and credibility. The article critically examines the design of judicial office in the WTO dispute settlement system (Panels and Appellate Body) and proposals for its improvement within the Doha negotiations. Theoretical insights from political science are applied to a comparative study of judicial office in the WTO, the International Court of Justice (ICJ), and the European Court of Justice (ECJ). This analysis identifies many attributes of judicial office in which judicial independence and efficiency in the WTO are lacking, mainly in the Panels, but also in the Appellate Body. A blueprint for reform is offered on this basis, urging the creation of a permanent Panel Body, an increase in the number of Appellate Body Members, and several other finer points of reform. These changes must be implemented in order to enable the judicial element of the WTO to bear the burden that is placed upon it; they should neither await nor preclude the urgent, parallel need to strengthen the norm-creating capacities of the political organs of the WTO.

^{*} Deuteronomy 16:18. The verse concludes: ‘and they shall judge the people with just judgment’ (*Holy Bible*, King James Version).

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1 The Doha Context: Improving the WTO Dispute Settlement Understanding

In the Doha Ministerial Declaration of November 2001,¹ World Trade Organization (WTO) Members agreed to conduct negotiations ‘on improvements and clarifications’ of the WTO Dispute Settlement Understanding,² to be agreed upon not later than May, 2003.³ These negotiations have been excluded from the ‘single undertaking’ principle that otherwise guides negotiations under the Doha Declaration Work Programme.⁴

In the handful of formal contributions and proposals made by WTO Members regarding improvements to the DSU, the design of judicial office in the dispute settlement

¹ See Paragraph 30 of the Doha Work Programme of Multilateral Negotiations (WTO, Ministerial Conference, *Ministerial Declaration* (14 November, 2001), WTO Doc. WT/MIN(01)/DEC/W/1 (2001)) (hereinafter – the ‘Doha Declaration’).

² *Agreement Establishing the World Trade Organization* (hereinafter – ‘WTO’), *Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*, April 15, 1994, app. 1 in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1226 at 1244 (hereinafter – ‘DSU’).

³ The Doha negotiations on improvements and clarifications of the DSU are essentially the continuation of the DSU review that was established in 1994 by a WTO Ministerial Decision agreed upon as part of the WTO Uruguay Round results; see Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April, 1994, 33 I.L.M. 1125, 1259. That review was to have been completed after four years from the entry into force of the WTO Agreements, but the review period was extended by a 1999 Dispute Settlement Body decision; see WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 3 December, 1998), WTO Doc. WT/Dispute Settlement Body/M/52 (1999). For a discussion of issues that were on the review agenda at the time of the extension of review period, see K. van der Borght, ‘The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate’ (1999) 14 *American University International Law Review* 1223;

⁴ See Para. 47 of the Doha Declaration.

system – the Panels and the Appellate Body – is a prominent issue, although perhaps not the most intensely debated.⁵ The proposals in this regard include two main elements:

- Moving from *ad hoc* to more permanent Panelists;⁶
- Increasing the number of Appellate Body Members.⁷

The design of judicial office - the eligibility, appointment, re-appointment, removal from office, tenure, and the number of judicial decision-makers – is not merely a technical subject. As I point out elsewhere,⁸ these attributes of the judicial position may be regarded

⁵ Deliberations on the improvement of the Dispute Settlement System have been of notably low vigour, in spite of the current deadline of May, 2003; therefore the prospects of any meaningful amendments being made to the system in this time frame are unclear. In the opinion of one commentator, ‘the reforms to the DSU that will emerge as a result of the Ministerial Declaration review process will probably require a microscopic examination to allow their detection’ (R. MacLean, ‘The Urgent Need to Reform the WTO’s Dispute Settlement Process’, (2002) *International Trade Law Review*, Issue 5, 137 at 140). Other central dispute settlement topics dealt with in these contributions and proposals include, but are not limited to, implementation issues, transparency, regulation of *Amicus Curiae* briefs, amendments of certain time frames in the dispute settlement process and concerns of developing countries. See WTO, *Dispute Settlement Body*, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding - Communication from the European Communities (13 March, 2002), WTO Doc. TN/DS/W/1 (hereinafter – the ‘EC Contribution’); WTO, *Dispute Settlement Body*, Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes - Communication from the Thailand (20 March, 2002), WTO Doc. TN/DS/W/2 (hereinafter – the ‘Thai Proposal’); WTO, *Dispute Settlement Body*, India’s Questions to the European Communities and its Member States on their Proposal Relating to Improvements to the DSU - Communication from India (7 May, 2002), WTO Doc. TN/DS/W/5 (hereinafter – ‘India Questions Document’); WTO, *Dispute Settlement Body*, The European Communities’ Reply to India’s Questions - Communication from the European Communities (30 May, 2002), WTO Doc. TN/DS/W/7 (hereinafter – ‘EC Replies Document’); WTO, *Dispute Settlement Body*, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO - Communication from the Ecuador (8 July, 2002), WTO Doc. TN/DS/W/9; WTO, *Dispute Settlement Body*, Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency - Communication from the United States (22 August, 2002), WTO Doc. TN/DS/W/13; WTO, *Dispute Settlement Body*, Negotiations on Improvements and Clarifications of the Dispute Settlement System – Proposal by the LDC Group (9 October, 2002), WTO Doc. TN/DS/W/17; and WTO, *Dispute Settlement Body*, Negotiations on Improvements and Clarifications of the Dispute Settlement System – Proposal by Japan (28 October, 2002), WTO Doc. TN/DS/W/22 (hereinafter – the ‘Japanese Proposal’).

⁶ See EC Contribution *supra* note 5 at Para. 1. See also, subsequently, India Questions Document *supra* note 5, Questions 1-21, and EC Replies Document, *supra* note 5, Replies 1-21.

⁷ See the Thai Proposal and the Japanese Proposal *supra* note 5.

⁸ T. Broude, *Relative Judicial Power in the WTO Dispute Settlement System: A Study in International Comparative Judicial Politics* (forthcoming (tentative title)(Cameron May: London, 2003)).

as partial, non-exclusive, determinants of judicial independence,⁹ and hence of relative judicial power - the power of the judicial organ of an organization in relation to the power of its political-legislative branches and subjects.¹⁰ The design of judicial office may also have direct implications for the legitimacy and credibility of a judicial body and for the efficiency of its decision-making processes, as I explain below.

In this article, I approach the reform of the design of judicial office in the WTO from theoretical and comparative perspectives. In the next section, I provide a theoretical underpinning to several parameters that should be addressed in designing judicial office in international judiciaries in general. Then, I survey and compare the relevant attributes of judicial office in three international judicial bodies: the International Court of Justice (ICJ), the European Court of Justice (ECJ); and the WTO dispute settlement system. Then I critique the existing design of judicial office in the WTO with reference to the current reform proposals and on the basis of the prior theoretical and comparative insights, and

⁹ A conventional definition of judicial independence is the 'independence of judges from the interference of other governmental officials' (A.J. Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', (1999) 72 *Southern California Law Review*, 353 at 365. For theoretical linkages between judicial office and judicial independence see also R.C. Fried, *Comparative Political Institutions* (New York, NY: McMillan, 1966), listing judicial 'office' as a source of institutional power; J. Blondel, *An Introduction to Comparative Government* (New York, NY: Praeger, 1969) at 437-438, describing the independence of courts as a determinant of the role of judges in government; T.L. Becker, *Comparative Judicial Politics: The Political Functioning of Courts* (New York, NY: Rand McNally and Co., 1970) (conveniently surveyed in C.N. Tate, 'Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics' in J.R. Schmidhauser, ed., *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis, Vol. 6, Advances in Political Science: An International Series* (London: Butterworths, 1987), 7 at 12-13 and 15-16), noting judicial independence and the number of judicial decision-makers as important parameters influencing a court's capacity to undertake judicial review; and J.R. Schmidhauser, 'A Weberian Conceptual Framework for Comparative Judicial Research.' Paper presented to the annual meeting of the Southern Political Science Association, Atlanta, GA, 1978 (surveyed in Tate *supra*), citing tenure of judicial personnel and high selection standards of judges as attributes of judicial independence.

¹⁰ On relative judicial power, see Broude *supra* note 8 and T. Broude, 'International Judicial Bodies as Sources of Normativity: The WTO Dispute Settlement System in Comparative Context', forthcoming in I. Dekker and W. Werner, *Global Governance and International Legal Theory* (Dordrecht: Kluwer Law International, 2003).

propose a reformed blueprint for judicial office in the WTO. This blueprint includes the constitution of a standing ‘Panel Body’ and various improvements to the Appellate Body.

2 Theoretical Perspectives on the Design of Judicial Office

Judicial office can be broken down into several constituent elements; all of them may influence judicial independence, institutional legitimacy and judicial efficiency. In this article I address the following components of judicial office: the method of appointment of judicial decision-makers, their qualifications for office, their tenure and method of dismissal, and the number of judicial decision-makers in a judiciary.

The *method of appointment of judicial decision-makers and their tenure* are organizational characteristics of a judicial body that are important factors in judicial independence.¹¹ If judicial decision-makers are appointed to their post by a process that remains relatively independent of interested parties and actors, and their appointment is for an extended period (indeed, up to lifetime tenure), then the judicial body can be expected to maintain a high level of independence from the other political organs and membership of the international organization or system it serves. Theoretically, the ultimate level of independence is achieved where judges are appointed by judges - a phenomena that does not really exist even at the domestic level.¹² Lower levels of judicial participation in the appointment process, however, may also increase judicial independence. Judges that do

¹¹ See Tate *supra* note 9 at 19.

not owe the initiation or continuance of their office entirely to political decision-makers are freer to act independently of political will.

At the opposite extreme, if the appointment of judicial decision-makers is exclusively determined by other institutional organs or parties (or one of them), and is short-term, ad hoc, or subject to termination at the discretion of the appointing organ or parties, then the judiciary may accord greater consideration to political influence, for a variety of reasons, thus diminishing its independence.¹³

In this context, the *selection standards of judicial decision-makers* are also important.¹⁴ Highly qualified and professional judges will have greater confidence in their own knowledge and discretion, and rely less upon the output and advice of other organs and players. Conversely, lower level standards of qualification may imply political appointment and diminished independence.

The level of a court's independence directly influences that court's credibility and legitimacy. If a court is perceived as too powerful and independent, its rulings may lose legitimacy.¹⁵ Conversely, if a court is merely the executor of political fiat, it has by definition lost its legitimacy and identity as a judicial institution. Hence, the design of

¹² There are jurisdictions where judges partake in the appointment process, but they do not control it.

¹³ For discussion and empirical analysis that relates to the tenure and reappointment prospects of judges as factors in their judicial independence, see F.A. Hanssen, 'Is There a Politically Optimal Level of Judicial Independence?', Paper presented at the Annual Meeting of the American Law and Economics Association, May 4, 2002 (available online, Montana State University, <<http://www2.montana.edu/ahanssen/Papers/optimal%20level.pdf>> (last accessed: December 13, 2002).

judicial office, as a non-exclusive determinant of judicial independence, must help strike in each judicial body the correct balance between excessive independence and the lack thereof in order to establish the desired level of judicial legitimacy.

These factors may also affect the efficiency of a judiciary. Judges with better professional qualifications will not need to learn basic legal issues in order to address complex cases. Longer periods of tenure establish experience and additional professional capabilities, as opposed to short or even ad hoc appointments that prevent the acquisition of judicial knowledge.

The *number of judicial decision-makers* is an organizational attribute of judicial bodies that has a complex impact on judicial independence and efficiency. Fried, for example, has suggested that a court is more powerful when it has enough ‘manpower’ to ‘carry the case load’.¹⁶ Becker, too, has implied that the number of judicial decision-makers to a court is an important variable in designing courts.¹⁷ The relation between the number of judicial decision-makers and a judicial body’s independence, influence and efficiency is, however, more intricate. True, an understaffed judiciary faced with high workload may not be capable of producing qualitative and timely decisions in all the cases brought before it. As a result, some cases may be dealt with cursorily, without proper attention to detail, foregoing opportunities for normative influence. Alternatively, decisions

¹⁴ See Schmidhauser (1978) *supra* note 9 as reviewed by Tate *supra* note 9 at 19-21.

¹⁵ On the nexus of judicial independence, relative judicial power and legitimacy, see Broude *supra* note 8.

¹⁶ See Fried *supra* note 9 at 48.

¹⁷ See Tate *supra* note 9 at 12-13 and 15-16.

in hard cases may be held off indefinitely, 'buried' in the courts. Either way, a shortage of judges diminishes judicial independence and efficiency. It may also damage the credibility and legitimacy of the judiciary, if it results in decisions that lack sufficient quality or timely responsiveness.

Beyond a critical mass of judicial decision-makers, however, additional judges may, in fact, diminish judicial power and influence. The fewer decision-makers there are, the more consistent will the rulings of the judiciary be. If the ranks of judicial decision-makers are fixed over time, the judiciary develops a 'personality' of its own, with an institutional culture that breeds independence and relative power. If, on the other hand, there is a large number of judicial decision-makers, or if there is a rapid turnover among them, then decisions may be more dispersed and incoherent with each other, lowering the independent effect and the legitimacy of the judiciary as a whole.

Thus, the optimal number of judicial decision-makers to a judicial body is a matter of balance: a delicate equilibrium between power, independence, efficiency and legitimacy.

With these theoretical perspectives in mind, I now present a comparative discussion of the design of judicial office in the ICJ, ECJ and WTO, in order to gain some insight from the differences between them.

3 Appointment and Tenure of Judicial Decision-Makers

A *The ICJ*

The judges of the ICJ are appointed through a process of nomination by the United Nations (UN) membership and election by the UN General Assembly (UNGA) and UN Security Council (UNSC).¹⁸ First, ‘national groups’¹⁹ nominate persons and the UN Secretary-General prepares an alphabetical list of the nominees.²⁰ The UNGA and UNSC conduct simultaneous elections by ballots.²¹ Candidates who obtain absolute majorities in both the UNSC and UNGA are elected as judges.²²

The ICJ appointment process is undoubtedly political, with intense national competition. Permanent members of the UNSC, for example, have a distinct advantage over other states, and can ensure that at all times one of the judges is of their nationality.²³ Such a politicized process may, in theory and without adequate balancing elements, affect the independence of judges.

¹⁸ For a detailed review and assessment of the organization of the ICJ, see S. Rosenne, *The Law and Practice of the International Court 1920-1996*, 3rd ed. (The Hague, Boston, London: Martinus Nijhoff Publishers, 1997), Vol. I at 363-430.

¹⁹ The national groups are those of the Permanent Court of Arbitration (PCA), in addition to national groups of members of the UN who do not participate in the PCA, and of parties to the ICJ Statute that are not members of the UN; see *Ibid.* at 375.

²⁰ Articles 4-7 ICJ Statute.

²¹ Article 8 ICJ Statute.

²² Article 10(1) ICJ Statute. See also Rosenne *supra* note 18 at 64-65; and Conforti, *The Law and Practice of the United Nations*, 2nd rev. ed. (The Hague, Dordrecht, Boston, MA: Kluwer Law International, 2000) at 123.

Other aspects of the ICJ system, however, ensure the independence of its judges: ‘if political factors momentarily enter into play at the time of the election of the Members of the Court, once elected the Court is granted every facility to maintain the proper degree of judicial independence’.²⁴

ICJ Judges are appointed for nine-year terms, and are eligible for re-election for unlimited consecutive terms.²⁵ While ‘the view has been expressed that the system of re-election might indeed compromise independence, since any decision of a judge might tend to affect the likelihood of states to vote for him or her in the next election proceedings’,²⁶ this speculative notion has not been supported by any specific cases or other empirical evidence. Elections are held every three years, with a staggered replacement (or reappointment, as the case may be) of one-third of the judges at each election.²⁷

Moreover, while the process of actual appointment is in the hands of the political organs, the judges of the ICJ are exclusively responsible for other aspects of the membership and functioning of the ICJ. Importantly, judges cannot be removed from office by any other organ; only a unanimous vote by the members of the ICJ itself (not including

²³ See Rosenne *supra* note 18 at 395: ‘Provided that there exists the minimum of understanding between the (and there is no sign that this is not the case), each permanent member of the Security Council can ensure the election of a candidate of its nationality’. For more on the political aspects of appointment of ICJ judges, see E. McWhinney, ‘Law, Politics and ‘Regionalism’ in the Nomination and Election of World Court Judges’ (1986) 13 *Syracuse Journal of International Law & Commerce* 10.

²⁴ See Rosenne *supra* note 18 at 363-364.

²⁵ Article 13(1) ICJ Statute.

²⁶ See P. Sands and P. Klein, *Bowett’s Law of International Institutions*, 5th ed. (London: Sweet and Maxwell, 2001) at 354.

the member whose position is at stake) can result in a judge's dismissal.²⁸ The President of the ICJ and the Vice-President are elected by the judges of the ICJ every three years.²⁹ This is not merely a formal issue; the President has been granted a decisive casting vote in cases where a majority decision is not otherwise obtained, and presides over all meetings of the court.³⁰

In addition to the elected members of the ICJ, parties to a proceeding may each appoint one ad hoc judge.³¹ This practice is an obvious, if only cosmetic, blemish on the principle of judicial independence; its potential effect is mitigated by the fact that all parties may have such a national 'representative' on the bench,³² and because the vast majority of judges in any case will be elected judges and not ad hoc ones.

An additional element that balances the essentially political process of appointment of ICJ Judges is the high level of qualification required of them. Article 2 ICJ Statute requires ICJ Members to be persons 'of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law'. Indeed, these requirements are more declaratory than executory, and do not constitute an enforceable bar

²⁷ Article 13 ICJ Statute.

²⁸ Article 18(1) ICJ Statute.

²⁹ Article 21(1) ICJ Statute.

³⁰ Article 55 ICJ Statute and Article 12 of the Rules of the Court. On the role of the President of the ICJ see Rosenne *supra* note 18 at 401-407.

³¹ Article 31 ICJ Statute.

³² On the justification of the appointment of national ad hoc judges, see M. Lachs, 'Independence of Judges in the International Court of Justice' (1987) 25 *Columbia Journal of Transnational Law* 593; see also Cordon, 'Independence and Impartiality of Judges of the International Court of Justice (1987) 2 *Connecticut Journal of International Law* 397.

to appointment.³³ They do, however, dictate a high standard of qualification, and the record shows that this standard is normally met in ICJ appointments. The professional stature of ICJ Members serves the ICJ's independence, credibility and efficiency well.

Under Article 18 of the ICJ Rules, the composition of Chambers in the ICJ is done through election by secret ballot among the ICJ Members themselves. The parties to a dispute and the political elements of the UN have, therefore, no influence on the appointment of judges to specific cases (except for the appointment of *ad hoc* judges, as already discussed).

In the light of these attributes, the ICJ cannot be said to suffer from judicial weakness and dependence as a result of the methods of judicial appointment and tenure employed. It does not, nevertheless, enjoy absolute independence either. Judges are not, of course, appointed by the ICJ itself or even with its involvement, but exclusively by the political organs; they do not have guaranteed lifetime tenure, but a rather long term of nine years, and 'the independence of the judges is presumed to be reinforced by their security of tenure'.³⁴ The length of term also reinforces the professionalism of judges, as do their high qualifications at appointment, contributing to the ICJ's independence, efficiency and legitimacy.

³³ See Rosenne *supra* note 18 at 367.

³⁴ See Sands and Klein *supra* note 26 at 354.

Moreover, the independence of the ICJ in its internal organization serves to balance whatever loss of independence and relative power may flow from the appointment process. As Rosenne points out, the state of affairs of politically conducted appointment followed by complete independence ‘broadly corresponds with that commonly found in regard to the constitution and functioning of the courts within a State’.³⁵ Furthermore, while in many states judges may be impeached and dismissed by a political process, this is not possible in the ICJ. In this sense the ICJ therefore lies midway on the scale, leaning towards enhanced independence, efficiency and legitimacy.

B *The ECJ*

The judges³⁶ of the ECJ are appointed by ‘common accord’ of the governments of the Member States.³⁷ This means that each judge must be approved by consensus among all Member States. While there is no provision in the Treaties or the ECJ Statute³⁸ for the nationality of judges (in fact they may theoretically include non-EU nationals),³⁹ the

³⁵ Rosenne *supra* note 18 at 364.

³⁶ While it is impossible to ignore the second category of Members of the ECJ - the Advocates-General - I do not deal with the method of their appointment and operation in this part of the study; they may influence decisions and opinions of the ECJ, but they are not judicial decision-makers *per se*. For a comprehensive discussion of the role of Advocates-General, see L.N. Brown and T. Kennedy, *Brown and Jacobs - The Court of Justice of the European Communities*, 5th ed, (London: Sweet and Maxwell, 2000) at 64-74.

³⁷ Article 223 (ex Article 167) EC (reference to the EC Treaty is to the *Consolidated Version of the Treaty Establishing the European Community as Amended by the Treaty of Amsterdam*, with pre-Amsterdam Article numbers in brackets).

³⁸ Statute of the Court of Justice of the European Economic Community, 17 April 1957 as last amended by Article 6 III (3)(c) of the Treaty of Amsterdam; for the current consolidated version, see online: European Court of Justice, <<http://curia.eu.int/en/txts/acting/statut.htm>> (last accessed: 12 December, 2002).

³⁹ Indeed, Lord Mackenzie Stuart, a previous President of the ECJ, once remarked publicly that the ECJ could legally be composed entirely of Russians; See Brown and Kennedy *supra* note 36 at 48. See also T. Kennedy ‘Thirteen Russians! The Composition of the Court of Justice’ in A.I.L. Campbell and M. Voyatzee *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart* (London: Trenton Publishing, 1996).

requirement of consensus as a method of appointment has rather naturally brought about a one-judge-per-Member-State system,⁴⁰ as reflected in the growth in the number of judges with each enlargement of the EU.⁴¹ Quite simply, each government nominates a judge who is approved by all the Member States, following prior informal consultations.

The de facto allocation of the appointment of judges to Member States - the result of the conflicting need for both representativeness and independence⁴² - may be seen as reducing judicial independence, and has drawn criticism,⁴³ but nevertheless, the judges 'do not of course in any sense represent their governments or their countries but must, and do, reach their decisions (or deliver their opinions) with complete independence and impartiality'.⁴⁴

The qualifications required of a Member of the ECJ, as specified in Article 223 (ex Article 167) EC, are literally the same as those of ICJ Members, except that no reference is made either to international law or to EU law personal backgrounds. Nevertheless, the majority of ECJ Members have rich experience in EU law, in practice and academia, prior

⁴⁰ While this is currently an informal arrangement, it will be formalized by Article 27 of the Treaty of Nice which upon entry into force will amend Article 221 EC.

⁴¹ For a detailed examination of the growth of the ECJ, see Brown and Kennedy *supra* note 36 at 47-49.

⁴² See R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (New York, NY: St. Martin's Press Inc., 1998) at 14.

⁴³ Criticism has particularly come from the European Parliament, arguing that the appointment process is undemocratic. For surveys of criticism see A. Arnall, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 1999) at 12-13; and Brown and Kennedy *supra* note 36 at 48-49.

⁴⁴ See Brown and Kennedy *supra* note 36 at 21.

to appointment.⁴⁵ As in the ICJ, this promotes judicial confidence, independence, legitimacy and efficiency.

Like in the ICJ, certain rules balance the potential loss of independence due to politically controlled appointments to the ECJ. For example, a Judge-Rapporteur in a case will not be of the nationality of one of the parties to that proceeding.⁴⁶ A Member State may not object to the composition of the Court hearing a case.⁴⁷ Decisions and opinions are given as a collegiate body, with no dissenting opinions, either adopted unanimously or by simple majority;⁴⁸ the internal deliberations are kept secret, so judges are protected from the scrutiny and criticism of the governments that originally facilitated their appointment.⁴⁹

ECJ Judges are appointed for six-year terms, and are eligible for consecutive reappointment. Replacement of judges is staggered so that every three years, half of the judges (six or seven of them) are replaced (or re-appointed).⁵⁰ As in the ICJ, the possibility of reduced independence due to political pressure related to re-appointment is potentially worrisome, but there is in fact no evidence of real problems arising in this context.⁵¹ The

⁴⁵ For current biographies of ECJ Members, see online: European Court of Justice, <<http://www.curia.eu.int/en/pres/cvcj.htm>> (last accessed: December 12, 2002).

⁴⁶ The Judge-Rapporteur - not to be confused with the Advocate-General - is a judge of the ECJ assigned with the double task of reporting the facts of the case and parties' arguments and preparing a draft judgement. See Arnall *supra* note 43 at 13.

⁴⁷ Article 16 ECJ Statute.

⁴⁸ See Brown and Kennedy *supra* note 36 at 21.

⁴⁹ Article 32 ECJ Statute.

⁵⁰ Article 223 (ex Article 167) EC.

⁵¹ See D. Chalmers, *European Union Law*, Vol. I (Aldershot: Dartmouth Publishing Co. Ltd., 1998) at 138: 'In practice, this never seems to have been a problem'.

six-year term has been described as ‘relatively brief’,⁵² but this assessment does not seem to take into account the tempering effect of lengthy terms of office in practice due to re-appointment.

Judges in the ECJ may be dismissed from office only by a unanimous vote by their peers.⁵³ The President of the ECJ is elected by the judges of the ECJ every three years. The role of the President is reduced in comparison to the ICJ, because the President has no casting vote in any case. One duty carried out by the President is the assignment of new proceedings to a Chamber of the President’s choice, according to criteria laid out by the Court, under Article 9 of the ECJ Rules of Procedure; as in the ICJ, the parties and political elements have no sway over the appointment of judges to specific disputes.

In sum, from the perspective of these attributes of judicial office, the ECJ is quite similar to the ICJ, with a politically-based appointment process (with no judicial involvement) and renewability of terms in judicial office having no real effect on judicial independence. Concerns that may be raised by the appointment process are balanced by internal provisions of independence, high appointment qualifications, immunity from external dismissal, secrecy of deliberations and other elements. In the context of appointment and tenure of judges, the judicial independence of the ECJ therefore lies in a

⁵² S.E. Strasser, ‘Evolution and Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References’, Jean Monnet Working Paper No. 3/95, online: Jean Monnet Programme, <http://www.jeanmonnetprogram.org/papers/95/9503ind.html> (last accessed: December 12, 2002).

⁵³ Article 6 ECJ Statute.

similar position to that of the ICJ, as do its efficiency and legitimacy, insofar as these are affected by these elements of judicial office.

C *The WTO Dispute Settlement System*

Discussion of the appointment and tenure of judicial decision-makers in the WTO dispute settlement system must be divided between Panelists and Appellate Body Members.

1 *Panelists*

The selection and appointment process of Panelists in the WTO dispute settlement is currently far-removed from the models of judicial appointment established in the ICJ and ECJ, and indeed in the WTO Appellate Body. Many attributes of the Panel system have the effect of reducing the dispute settlement system's judicial independence credibility and efficiency.

First, when discussing the appointment of Panelists it is important to perceive that there is in fact no plenum of active Panelists that may be likened to a court at all. Panelists thus have no identifiable institution to be appointed to. Rather, Panelists are selected for service on specific Panels from a roster or 'indicative list' that is maintained by the Secretariat and based on proposals for inclusion of qualified individuals, as made by WTO

Members.⁵⁴ The indicative list is kept current by a requirement that the nomination of persons to the list be updated every two years.⁵⁵ Inclusion in the indicative list does not of itself bestow a judicial role, but it is a gateway to active office. The list is not, however, an exclusive source of Panelists: many Panelists enter the list only when they serve on a Panel for the first time.⁵⁶ The fluidity of the Panel system detracts from its independence. It could even be said that in its current form it lacks the institutional identity that is a prerequisite for the establishment of full independence.

Second, the requirements for inclusion in the indicative list of Panelists (and hence, for appointment to a specific Panel) are broad and not of the highest possible order of qualification. According to Article 8.1 DSU, Panels are composed of ‘well-qualified governmental and/or non-governmental individuals’; these include any person who has served on a Panel, or presented a case before one, served as a representative of a GATT 1947 contracting party or a WTO Member, to the Council or to any Committee or in the Secretariat. Also included are those who have taught or published international trade law or policy, or served as senior trade policy officials. Without detracting from the credentials of Panelists appointed in practice, it is clear that the requirements are considerably lower than those of ECJ, ICJ or WTO Appellate Body Members.

⁵⁴ Article 8.4 DSU.

⁵⁵ See WTO, Dispute Settlement Body, *Administration of the Indicative List – Note from the Chairman*, May 1995, WTO Doc. WT/Dispute Settlement Body/W/6 at item 5.

⁵⁶ See W.J. Davey, ‘A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?’ in D.L.M. Kennedy and J.D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Professor Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 496.

Strikingly, WTO Panelists need not have any legal training or experience. Indeed, they need only have passing experience in any field of international trade policy, as diplomats or academics, to qualify for the essentially adjudicative role of Panelist. This has been a constant of source of justified criticism, at least since the dispute settlement system became more judicialized.⁵⁷

Ultimately, inclusion in the list is subject to approval by the politically composed Dispute Settlement Body.⁵⁸ Although this is quite automatic, it may serve to prevent inclusion of unqualified persons, but could also provide potentially fertile ground for political deals on mutual acceptance of the inclusion of individuals suggested by different Members (although this is of limited value, since inclusion in the list does not guarantee active Panel service).

Third, as for the appointment of a specific dispute Panel, the general formal rule is that Panelists are appointed to a Panel with the consent of the parties to the dispute. Following a Dispute Settlement Body decision to establish a Panel, the Secretariat proposes nominations to the Panel; under Article 8.6 DSU, parties 'shall not oppose nomination except for compelling reasons'. In practice, parties may veto any nomination and this has become a frequent occurrence. If within 20 days of the establishment of a Panel its composition has not been agreed upon, any party may request that the Director-

⁵⁷ See, e.g., R.E. Hudec, 'The New Dispute Settlement Procedures: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1 at 34-39.

⁵⁸ *Ibid.*.

General determine appropriate Panelists and appoint the Panel (in consultation with the Dispute Settlement Body Chairman and the Chairman of the relevant Council or Committee). The Director-General has in this case full discretion in Panelist selection, subject to the proviso that citizens of Members who are parties or third-parties to a specific dispute may not serve on that Panel, unless the parties agree otherwise (Article 8.3 DSU). In practice, an increasing number of Panels are appointed under the alternative procedure, by the Director-General.⁵⁹

The important observation for our present purposes is that specific Panel appointment is, therefore, done by the parties or Director-General on an ad hoc, case-by-case basis. This is in contrast to the ICJ and ECJ and indeed most judicial systems (including the WTO Appellate Body), where the assignment of judicial decision-makers to a particular case is done by methods that are independent of the parties to the dispute and the political organization – by election, lottery, priority of judicial duty, or by a decision made by the president of the court.⁶⁰ As such, the Panel appointment system does not promote judicial independence.

⁵⁹ See EC Contribution, *supra* note 5 at 2; and EC Replies Document, *supra* note 5, response to questions 4-5 at 2.

⁶⁰ As already mentioned, under Article 9 of the ECJ Rules of Procedure, the President of the Court assigns new proceedings to the Chamber of the President's choice, according to criteria laid out by the Court. Under Article 18 of the ICJ Rules, the composition of Chambers in the ICJ is done through election by secret ballot among the ICJ Members themselves.

To be sure, the independence of Panelists in the sense of their impartiality is highly acknowledged in the WTO system as having critical importance;⁶¹ anyone associated with the dispute or the parties to it will not normally be appointed. Judicial independence in terms of separation from the political branch and Membership, however, is not served. Independent-minded Panelists whose Reports conflict with the views and interpretations of the Membership may not be re-appointed to future Panels, let alone gain appointment to the Appellate Body if nominated.⁶²

This method of specific Panel appointment may serve efficiency, insofar as efforts are made to appoint the most professionally suitable Panelists to a given case, in accordance with their particular knowledge and experience. Yet at the same time, judicial independence and credibility may be hampered.

Yet efficiency is also not optimal because of an additional problem in the appointment process. Article 8.3 DSU essentially precludes service on a Panel by a national of one of the parties without the parties' consent. This provision is broadly interpreted to prevent the appointment to a Panel of a national of the regional trade group in which a party is member. The nationality of Panelists has thus become an issue of concern

⁶¹ See Article 8.2 DSU. In more detail, see WTO, *Dispute Settlement Body*, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (11 December, 1996), WTO Doc. WT/Dispute Settlement Body/RC/1, providing detailed rules regarding conflicts of interests. Also, Article 11 DSU makes it clear that a Panels is required to make 'an objective assessment' of the matter before it.

in the Panel system, particularly due to the shortage in expert Panelists in some fields: it may be difficult to find suitable experts who are not linked by national ties, in broad terms, to a party to the dispute in question.⁶³

Fourth, problems of legitimacy and independence are compounded in practice by the professional identity and affiliation of the Panelists themselves. As noted above, in stark contrast to most other judicial bodies, Panelists need not be qualified jurists. While some Panelists are indeed distinguished legal scholars or practitioners, many others – the majority, in fact - are current or former trade diplomats, sometimes holding diplomatic office in national delegations to the WTO in Geneva at the same time.⁶⁴

It would not be prudent to ignore the possibility that Panelists who are diplomats – and who may indeed be highly qualified in the field - are in an inherent conflict of interest in that they are simultaneously members of both the legislative-political branch and the judicial element of the WTO.⁶⁵ For example, a Panelist considering a case involving environmental measures affecting market access may at the same time be involved in multilateral negotiations on the same issue, or working closely with colleagues who are, or

⁶² Some support for this view can be found in C.-D. Ehlermann, 'Experiences from the Appellate Body', contribution to the Symposium of the Texas International Law Journal on Judicialization and Judicial Globalization, Austin, Texas, 56 September, 2002 (on file with author), text preceding note 19: '...consider that being appointed as a Panelist is an honour and a personal distinction. It is therefore not astonishing that a Panel member might be interested in being re-appointed, and in serving again as a Panelist. Is it not conceivable that a Panelist could be influenced by this wish while serving on a given Panel?'

⁶³ see Van der Borgh *supra* note 3 at 1239; and EC Contribution, *supra* note 5 at 2: 'On the supply side, it has proved more and more difficult to find qualified panelists who are not nationals of Members involved'.

⁶⁴ See W. J. Davey, 'The World Trade Organization's Dispute Settlement System', (2001) 42(4) *Southern Texas Law Review* 1199 at 1201: 'Who are these individuals chosen for Panel service? The overwhelming majority, eighty-five percent or so, are current or former government officials'.

have been in that position in the not distant past. It would be extremely difficult for such a Panelist to disregard personal or generally political prescriptive views on the desirable content of the law, and to avoid their influencing his or her application of the law as it stands with regard to the case being adjudicated. This is not to say that such structural conflict of interest necessarily translates into bias. Moreover, at the very least, the potential conflicts of interest damages the dispute settlement's credibility. Beyond that, the introduction of hidden political agendas to judicial decision-making due to the diplomatic vocation of many panelists hampers judicial efficiency. At the extreme, the judicial independence of the Panel system may be curtailed.

Indeed, Article 8.9 DSU provides that Panelists shall serve in their individual capacity and not as government representatives, and shall not be given instructions or be influenced by governments. Yet this is aimed at maintaining the Panelists' impartiality, preventing their siding with a particular party to proceedings due to national bias. The provision does not in any way ensure the Panelists independence from the Membership as a whole and from the political organs of the WTO.

In short, the entire design of the Panel system with regard to appointment to position of Panelist, qualification, and appointment to specific Panels, is rife with elements that diminish judicial independence, efficiency and legitimacy. This is all the more striking when the Panel system is compared with the ICJ and ECJ.

⁶⁵ According to Davey *supra* note 56, such a conflict of interest 'typically exists on a Panel'.

2 *Appellate Body Members*

With regard to the appointment and tenure of its Members, the Appellate Body is much closer to the ICJ or ECJ models than the WTO Panel system, being itself a permanently established judicial organ.

The appointment of standing Appellate Body Members is at least as politically charged as in the ICJ and ECJ. The seven Members are appointed by the Dispute Settlement Body - in practice, by consensus. Appellate Body Members must be unaffiliated with any government, and the Appellate Body membership should be 'broadly representative' of the WTO Membership. The appointment process is orchestrated by a selection committee composed of the Director-General, the Dispute Settlement Body Chairman, and the respective Chairmen of the Goods, Services, TRIPS and General Councils.⁶⁶ The selection committee has a double role: first, it must screen (by interview and other means) the candidates proposed by Members (in the first round of appointments in 1995, over 30 candidates were considered from 23 countries), essentially to select the most suitable and qualified candidates; second, it must consult with WTO Members to ensure that the appointments are politically representative. In effect, the latter means that

⁶⁶ See WTO, *Dispute Settlement Body*, Establishment of the Appellate Body - Recommendations of the Preparatory Committee for the WTO (Approved by the Dispute Settlement Body on 10 February, 1995), WTO Doc. WT/Dispute Settlement Body/1, at Para. 13.

the selection committee has the additional, less official role of consensus-building. In other words, the selection committee will ultimately select and present to the Dispute Settlement Body those candidates who stand the best chance of being appointed by consensus in the Dispute Settlement Body, having been 'pre-approved' by WTO Members.

The seven founding Appellate Body Members were appointed only eleven months after the WTO came into existence - indicative of political difficulties encountered by the selection committee in fulfilling its complex roles. The bulk of efforts were directed at developing a formula of regional allocation of seats on the Appellate Body bench.⁶⁷, an issue on which a status quo has been reached, for the time being. Nevertheless, it is conceivable that the political considerations of a more personal nature also entered into play, in the initial appointment and in subsequent ones. Regardless, it is clear that at least the potential for such personal political selection exists in the current system.

Of course, as we have seen, appointments to the ICJ and ECJ are also political affairs. The main difference between the respective appointment procedures, however, lies in the personal screening process conducted by the selection committee in consultation with Members. In the ICJ, appointment is by straightforward nomination and election; in the ECJ, it is by automatic election following national selection. The WTO Appellate Body is the only one of the three judicial bodies examined here where nomination by a Member of the organization is not sufficient to qualify, and potential judicial decision-makers are

⁶⁷ See Ehlermann, *supra* note 62 at footnote 30.

personally examined by a political body (the selection committee), that is entrusted not only with the verification of the professional qualifications of candidates, but also with the scrutiny of their political acceptability.

This runs on to the question of professional qualification requirements. The conditions for appointment to the Appellate Body would seem to be, formally at least, lower in one sense and higher in another, than those in force in the ICJ and ECJ. Under Article 17.3 DSU, the Appellate Body shall comprise of ‘persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally’. When compared with the ECJ and ICJ, that require that their judges be qualified for ‘appointment to the highest judicial offices, or jurisconsults of recognized competence in ... law’, the requirements of Appellate Body Membership seem less stringent, because they do not include the criteria of qualification for highest judicial or jurisconsultary office in the candidate’s own country. Rather more vaguely, candidates need only be persons of some ‘recognized authority’.⁶⁸ This is a distinctly broader criterion.

Yet in another sense, formal requirements for Appellate Body Membership are stricter than those for ICJ and ECJ Membership, because Appellate Body Members must have expertise in the subject matter of the Appellate Body’s decisions: international trade in general and the WTO covered agreements in particular. This is in contrast to the ICJ and

ECJ, where no particular expertise in international law or EU law, respectively, is a formal requirement.

In practice, the professional qualifications of Appellate Body Members appointed so far have been unquestionably high, and they would have qualified even if an ICJ/ECJ form of requirement were in effect. Nevertheless, the potential for dilution or ‘downgrading’ of Appellate Body Member stature in the future exists in the current formal requirements.

In this context, returning to the actual system of Appellate Body Member appointment, to the credit of this system it could be said that the personal screening process of candidates is essentially conducted to ensure that the Appellate Body Member qualification requirements are enforced – something that does not exist in the ICJ where qualification requirements are deemed unenforceable⁶⁸ (and by extension, not in the ECJ either). Thus, it may be argued, the best candidates are presented to the Dispute Settlement Body, subject to regional allocation. This system of screening by political bodies and Membership group-representatives may, however, also allow for the non-transparent elimination of candidates who are perceived as being too independent by the political organs and Membership. Thus, the system may decrease the judicial independence of the

⁶⁸ Theoretically, this criterion could embrace non-jurists; however, an expertise in law is one of the additional requirements for Appellate Body Membership.

⁶⁹ See *supra*, text accompanying note 33.

WTO Appellate Body, even if the Appellate Body Members selected in practice are of high qualifications (as indeed they currently are).

Appellate Body Members are appointed for four-year terms only - the shortest term, in comparison to the ICJ (nine years) and ECJ (six years). They may be re-appointed only once.⁷⁰ Shorter terms imply lower independence and efficiency, as we have seen.

Dismissal procedures of Appellate Body Members are not provided for in any legal source. From this statutory silence It is not clear whether Appellate Body Members cannot be removed from their position in any circumstances, or if, quite conversely, the Dispute Settlement Body may simply decide to remove them by political decision – both possibilities do not conform to accepted practice in other legal systems. Moreover, as outrageous as it may seem, it is not inconceivable that the WTO General Council or Dispute Settlement Body could, in extreme circumstances, reach a decision on the removal of a specific Member of the Appellate Body. Under current conditions this is a highly improbable scenario, yet there would be no option for judicial overruling of such an act, because the WTO dispute settlement system essentially has no power of direct judicial

⁷⁰ Article 8.2 DSU. In the WTO, as elsewhere, the notion of contingent re-appointment raises concerns for judicial independence. Various proposals have been raised for amending the DSU so that Appellate Body Members would be appointed for one, non-renewable term, ostensibly promoting their independence. This would, however, shorten their term in office, reducing their judicial power. See e.g., WTO, *Dispute Settlement Body*, Term of Appointment of Appellate Body Members - Proposal by India (November, 1999), WTO Doc. WT/Dispute Settlement Body/W/117: 'This situation in which the Appellate Body members are dependent on the WTO Membership for getting a second four-year term is not keeping in with the dignity of the high office the Appellate Body members hold. India also believes that the present system is not conducive for the absolute independence the Appellate Body members are required to exercise in the discharge of the duties. It is India's view that in order to enable Appellate Body members to discharge their duties independently, WTO Members have a responsibility to ensure that the Appellate Body members, after having been appointed to their high office, are not dependent on the indulgence of the WTO Members for securing a second term'.

review of the acts of WTO organs. This possible threat to the judicial position, however miniscule it is in practice, has obvious implications for judicial independence.

As in the ICJ and ECJ, the assignment of specific appeals to Appellate Body Members is done within the Appellate Body, without the influence or knowledge of the parties and political elements.

While most of these factors tend to diminish the independence and legitimacy of the Appellate Body, as in the other judicial bodies, Appellate Body Members assert their independence once appointed. For example, the Appellate Body has its own staff and legal counsel (in contrast to the Panels, that use the services of the Secretariat).⁷¹ The Appellate Body Members carry out their judicial duties and deliberations in secret. The Chairman of the Appellate Body (who has no casting vote or similar powers) is selected by the Appellate Body Members themselves.

In short, the Appellate Body is much closer to the ICJ and ECJ in these aspects than the Panel system. Its Members, however, are appointed for relatively short terms, and their entire appointment process has elements – particularly the non-stringent formal

⁷¹ The fact that the Panels do not have separate and independent administrative and research facilities but rather, in accordance with Article 27.1 DSU, rely on the services of the Secretariat, that is simultaneously involved in the political processes of the WTO, is a deficiency in the independence of the Panels and hence of the dispute settlement system in general. See Ehlermann *supra* note 62: ‘The independence of Panels would be strengthened if they were assisted by staff, which worked exclusively for them’. See in greater detail M.E. Janow, ‘The Role of the Secretariat in Dispute Settlement’, Paper presented at the World Trade Forum 2002 on ‘Dispute Settlement and Decision-Making in the Multilateral Trading System: Current Operation and Options for Reform’, World Trade Institute, Bern, August 16-17, 2002 (on file with author). This issue, however, does not relate directly to judicial office, but rather to the greater issue of functional separation of the judiciary from the other organs of an organization. On functional separation, see Broude *supra* note 8.

qualification requirements and the individual screening by political functions - that may diminish judicial independence.

When examining the Panel and Appellate Body systems jointly, it appears that the design of judicial office in the Panels is a weakness in the WTO dispute settlement system. The ad hoc nature of Panel appointments (and the governmental-diplomatic background of many Panelists) diminishes their judicial independence, efficiency and legitimacy. The Appellate Body is in a considerably better situation, but in relation to the ICJ and ECJ, the appointment process has greater potential for political involvement, with a screening process that may curtail independence. The term of service on the Appellate Body is also relatively short, damaging independence and efficiency as well. Thus, insofar as these issues affect judicial independence, efficiency and legitimacy, the WTO dispute settlement system is in a weaker position than the ICJ and ECJ.

4 Number of Judicial Decision-Makers

A *The ICJ*

The ICJ is composed of 15 elected judges.⁷² Due to the staggered election process,⁷³ it could be possible for one-third of the judges to be relatively newcomers to the court (with zero to three years of experience) at all times. However, there is a strong record of judge re-election. For example, at the time of this writing,⁷⁴ only three judges have been members of the ICJ for less than three years.⁷⁵ Almost half of the judges have been re-elected at least once; four have been members of the ICJ for more than the nine-year term.⁷⁶ Indeed, the average experience of current judges in office is over eight years.

This suggests a high level of continuity in the composition of the ICJ. To this one must add that the majority of cases are heard by all or most of the elected judges.⁷⁷ The ICJ therefore displays a high level of concentration and a relatively fixed number of judicial decision makers, in the sense that the same group of persons jointly decides all cases over

⁷² Article 3(1) ICJ Statute. As described previously (see note 31 *supra* and accompanying text), in contentious cases, ad hoc judges may be added.

⁷³ Article 13 ICJ Statute.

⁷⁴ For information on the current composition of the ICJ, see online: International Court of Justice, <<http://www.icj-cij.org/icjwww/igeneralinformation/igncompos.html>> (last accessed: December 12, 2002).

⁷⁵ Judges N. Elaraby, T. Buergenthal and A.S. Al Khawasneh were appointed in the year 2000.

⁷⁶ President G. Guillaume was appointed in 1987; Judge S. Oda was appointed in 1976; and Judge R. Ranjeva was appointed in 1991.

⁷⁷ Article 25 ICJ Statute provides that 'the full court shall sit except when it is expressly provided otherwise' in the Statute. Under certain conditions, one judge, in rotation, may be dispensed from sitting. Nine judges constitute a quorum. Under Article 26, the ICJ may establish Chambers of three or more judges for particular categories of cases or particular cases. Relatively little use has been had of these provisions. See Rosenne *supra* note 18 at 421-426.

an extended period of time. This, in turn, implies a high level of consistency and quality in decisions.

Given the low caseload of the ICJ – only a handful of cases a year⁷⁸ - the capacity of the ICJ to adjudicate efficiently its workload is not an issue of great concern. As already has been mentioned, most cases are heard by a plenary or near plenary composition of the ICJ, reflecting the fact that there is no need to establish a division of labour among judges. In these circumstances it therefore appears that the number of judges in the ICJ strikes a good balance between efficiency and independence.

One caveat is in order here. Although the composition of the ICJ is indeed relatively fixed over time and is also highly concentrated with respect to judicial decision-making, the election system has brought about, over the years, a non-homogeneous membership. This has ‘undoubtedly made it more difficult for the Court to reach decisions, or, perhaps more accurately, to formulate a coherent and satisfying statement of the reasons upon which a decision was based’.⁷⁹ As a result, in many cases there is an abundance of dissenting and separate opinions, making it sometimes difficult to identify general legal implications of a ruling that transcend the specific case itself.⁸⁰ This to some extent

⁷⁸ For a list of ICJ decisions arranged chronologically by year, see online: International Court of Justice, <http://www.icj-cij.org/icjwww/idocuments.htm> (last accessed December 12, 2002).

⁷⁹ *Ibid.* at 398.

⁸⁰ See, for example, *Arrest Warrant of April 11, 2000 (Democratic Republic of Congo v. Belgium)*, judgement of 14 February, 2002, available online at International Court of Justice, <<http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>> (last accessed: December 12, 2002). In this case there were five separate opinions, 3 dissenting opinions, and one declaration by a judge.

diminishes the benefits of fixed and concentrated composition of the judicial decision-making body.

B *The ECJ*

The ECJ, like the ICJ, currently has 15 judges - but this is only a contemporary figure, reflective of the number of Member States.⁸¹ Under Article 27 of the Treaty of Nice (which has yet to enter into effect at the present time), Article 221 EC will be amended so that the ECJ 'shall consist of one judge per Member State', formally linking the number of judges to the number of Member States.

The staggered appointment of judges⁸² means that at any given moment half of the judges may have less than three years experience at the ECJ, the remainder having no more than six years of experience. However, as in the ICJ, there is a tradition of re-appointment. At the time of this writing,⁸³ only six ECJ judges have less than three years experience at the Court.⁸⁴ The remainder have had more than the regular six year tenure;⁸⁵ the average tenure is over five years.

⁸¹ See Brown and Kennedy *supra* note 36 at 47-49 for a detailed account of the reflection of the number of Member States in the composition of the ECJ.

⁸² Article 223 (ex Article 167) EC.

⁸³ For information on the current composition of the ECJ, see online: European Court of Justice, <<http://curia.eu.int/en/pres/cvcj.htm>> (last accessed: December 12, 2002).

⁸⁴ Judges V. Skouris, F. O'Kelly Macken, N. Colneric, S. von Bahr, J. Narciso da Cunha Rodrigues, C.W.A. Timmermans and A. Rosas.

⁸⁵ Judges G.C. Rodríguez Iglesias, C.C. Gulmann, D.A. Ogilvy Edward, J.-P. Puissechet, P. Jann, M. Wathelet and R. Schington; Judge A.M. La Pergola was initially appointed as Judge in October, 1994, but following the Norwegian rejection of the Maastricht Treaty, took office as Advocate-General between December, 1994 and December, 1999, resuming his position as Judge in October, 1999. He has therefore been a member of the ECJ since 1994.

These figures imply a lower level of judicial stability than in the ICJ. The term of judicial office in practice, however, is nevertheless longer than the terms of most political leaderships. In addition, the majority of cases are heard not by the full Court but rather by Chambers of three or more judges,⁸⁶ ostensibly reducing further the level of concentration of judicial decision-making. The most important cases, however, are heard by the plenary of eleven judges or more.⁸⁷ Most importantly, decisions - rulings and opinions - are collegiate, i.e., there is no expression of dissenting or separate opinions. This means that decisions are the result of an internal negotiation process, or of a majority decision. The ECJ 'speaks with one voice'⁸⁸ - enhancing its judicial independence.

With regard to judicial efficiency, however, the ECJ is severely challenged by a tremendous caseload – 503 cases in the year 2000 (in addition to 398 cases before the Court of First Instance (CFI)).⁸⁹ This caseload has resulted in delays and longer timeframes in proceedings. In this regard the number of judicial decision-makers in the ECJ is not sufficient to prevent a lapse in judicial efficiency.

⁸⁶ On the operation of the Chambers, see Brown and Kennedy *supra* note 36 at 39-41.

⁸⁷ The ECJ rarely convenes in full force - the *grand plenum* of all fifteen judges. Rather, a *petit plenum* of eleven judges qualifies as full court. See Arnulf *supra* note 43 at 11.

⁸⁸ Brown and Kennedy *supra* note 36 at 21.

⁸⁹ See P. Jeney, 'Victim of Its Own Success – The EU Court in Need of Reform', online: EU Accession Monitoring Programme, <<http://www.eumap.org/articles/content/80/801>> (Last Accessed: December 12, 2002). On the growing caseload over the last few decades see Strasser *supra* note 52.

In sum, the ECJ displays a mixed model of the number of judicial decision-makers, with elements of power – primarily in terms of independence - and weakness – primarily in terms of efficiency.

C *The WTO Dispute Settlement System*

Again it is necessary to distinguish between the Panels and the Appellate Body.

1 *Panelists*

The Panel system is based on a highly dispersed ‘bank’ of judicial decision-makers. The indicative list of Panelists may include several dozen Panelists, although the number of Panelists actually called upon, and among those, the Panelists who in fact contribute to judicial decision-making, may be considerably smaller. Nevertheless, over time, many different Panelists are involved in adjudication of separate disputes, and only a fraction of Panelists serve on more than one Panel. Perhaps the only tie that binds all Panelists together is the services and legal counsel they receive from the Secretariat; but the Secretariat is not part of the judicial system as such.

2 *Appellate Body Members*

The Appellate Body, on the other hand, has a relatively small number of judicial decision-makers (seven,⁹⁰ compared to fifteen in the ICJ and ECJ). In addition, although appeals are heard by divisions of three Appellate Body Members, and not by the full Appellate Body,⁹¹ a practice of collegiality is followed, requiring Appellate Body divisions to consult with the entire Appellate Body before issuing decisions and Reports.⁹² Reports are issued as in the ECJ, without dissenting or separate opinions. All these aspects of Appellate Body work have a positive influence on its judicial independence and efficiency.

On the other hand, the small number of Appellate Body Members, their short term in office, and the limit on re-appointment beyond one additional term, combine to reduce the continuity of Appellate Body Membership or at least to create a variable level of continuity. During 1999, all seven Members of the Appellate Body were original appointees, and were nearing four years of experience. At the time of this writing, however, despite several re-appointments, only one Appellate Body Member has more than three years of experience on the Appellate Body;⁹³ the average is about two years experience. When the remaining original appointee completes his second and final term in

⁹⁰ Article 17.1 DSU.

⁹¹ See *Ibid.* and Article 6, Appellate Body Working Procedures (The Working Procedures for Appellate Review have undergone a few amendments. The current version is WTO, Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/Appellate Body/WP/4 (2002)) (hereinafter – ‘Appellate Body Working Procedures’).

⁹² See Article 4, Appellate Body Working Procedures, *Ibid.*.

⁹³ Chairman of the Appellate Body, J. Bacchus.

2004, the average experience on the Appellate Body will range between less than one year and three years - dependent on the number of Members who will be re-appointed. These figures are significantly lower than their parallels in the ICJ and ECJ.

In addition, the Appellate Body appears to be an increasingly overburdened judicial body. The number of Panel Reports appealed has generally risen incrementally since the establishment of the Appellate Body, with the number of Reports issued each year ranging from five to ten. The DSU requires Appellate Body Reports to be circulated within ninety days of the notice of appeal, at the most, placing tremendous pressure on the judicial process.⁹⁴ This is particularly strenuous when appeals are in process simultaneously – indeed, with only seven Appellate Body Members it is difficult to attend to more than two cases at once.⁹⁵

In short, in this aspect the WTO dispute settlement system is relatively weak when compared to the ICJ and ECJ, in terms of both independence and efficiency. The dispersed Panel system contributes greatly to this conclusion, but an examination of the Appellate Body also shows that the turnover of judicial decision-makers at the WTO is greater than in other judicial bodies and that it faces a great caseload.

⁹⁴ Article 17.5 DSU.

⁹⁵ This problem has led to proposals to increase the number of Appellate Body members. See WTO, *Dispute Settlement Body*, Proposal to Review Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes - Communication from the Thailand (20 March, 2002), WTO Doc. TN/DS/W/2.

5 Conclusions: A Blueprint for Reform

The comparison between the attributes of judicial office in the WTO, on the one hand, and those of the ICJ and ECJ, on the other, leads to the general conclusion that the WTO dispute settlement system is generally less judicially independent than its comparator judicial bodies (insofar as independence is determined by the design of judicial office). In some respects (although by no means all), judicial efficiency in the WTO is also hampered by certain elements of judicial office. This is caused by the following principal attributes of the WTO dispute settlement system:

- (a) Panels
- Relatively broad and diluted qualification requirements for Panelists;
 - Trade diplomats serving concurrently as Panelists;
 - Political control (i.e., by Parties, Membership and/or Director-General) of ad hoc Panel appointment;
 - Dispersed judicial decision-making in Panel system;
 - Shortage of qualified Panelists in specific issue-areas, combined with nationality requirements of Panel composition;
- (b) Appellate Body
- Potential for ‘downgrading’ of Appellate Body Member professional stature due to non-stringent formal qualification criteria;
 - Political screening and control of Appellate Body Member appointment;

- Short term of Appellate Body Members' tenure;
- Limit on re-appointment of Appellate Body Members beyond one additional term;
- Lack of established Appellate Body Member dismissal mechanism;
- Insufficient number of Appellate Body Members.

When considering the reform of judicial office in the WTO in response to these weaknesses, it is legitimate to first ask whether the potential for relatively low independence and efficiency – in comparison with the ICJ and ECJ – does in fact provide sufficient cause for introducing changes in the WTO dispute settlement system. In other words, it should not be taken for granted that further judicialization of the WTO system is an entirely positive development. Most of the weaknesses of judicial office in the WTO are the result of the GATT's diplomatic heritage. They demonstrate that the WTO dispute settlement system was not conceived by WTO Members as a fully judicial body – indeed it has been depicted as a 'quasi-judicial' body.⁹⁶ The tension between diplomatic and judicial dispute settlement traditions in the WTO is acute. Introducing changes to the system that would tip the scales in favour of judicial decision-making is not a step that many would take lightly.

⁹⁶ See Ehlermann *supra* note 62. To be sure, the main justification Ehlermann presents for the use of this term is the existence of 'the prerequisite of adoption of Panel and Appellate Body Reports by the Dispute Settlement Body', an important issue that goes to the heart of inter-institutional balance in the WTO, but that is not directly related to judicial office.

My opinion, however, is that these steps are inescapable if the WTO dispute settlement is to be sustained as a legitimate judicial arbiter of trade disputes. The WTO dispute settlement system may have attributes that make it seem like a hybrid creation (or a ‘quasi-judicial’ body). Yet it inevitably bears the full weight of judicial and normative responsibility in the cases brought before it. In this sense it is an international judicial body of the first order; it functions, nevertheless, under an imposed fiction that it is non-judicial. The burden of judicial responsibility in the WTO dispute settlement system is perhaps even greater than is bearable, because of the inability of the political WTO process to reach consensus on key issues. In order to bear this burden, the WTO dispute settlement system must be given full judicial and institutional resources to succeed. The fiction that the WTO dispute settlement system is less than judicial is perpetuated by harmless semantics (such as the use of the word ‘body’ rather than ‘court’ in the title of the highest judicial authority in international trade law, the Appellate Body) but more importantly, by institutional deficiencies, such as the ones identified above, in the context of the design of judicial office.

Rather than strip the dispute settlement system of its judicial character,⁹⁷ I contend that it is rather the non-judicial fiction that should be discarded. This is best done by addressing the institutional deficiencies that are the product and expression of this fiction, making the dispute settlement system more independent, efficient, legitimate and indeed, judicial.

Importantly, and here I digress from this article’s focus on judicial office, this call for the reform of judicial office in the WTO dispute settlement system should in no way be misconstrued as implying what may be mistaken as a similar position on the greater question of adjusting the ‘balance of power’ between the judicial and the political in the WTO. It does not necessarily follow from an advocacy of improvements to judicial office that the particular trait of the dispute settlement system that most severely curtails its full judicial character – its subservience to the political Dispute Settlement Body, that must adopt all dispute settlement reports – should be abolished or mitigated. Indeed, the reform of judicial office – and the resultant strengthening of the WTO judiciary - should not in any manner preclude the even more pressing and complex necessity of enabling efficient decision-making in the political organs of the WTO,⁹⁸ nor await its address. Hence my recommendations for reform of judicial office set out below, that reflect the theoretical and comparative conclusions above.

A *Standing Panel Body*

In my analysis, the Panel system should be structurally redesigned as a permanent, lower judicial body - a standing Panel Body. I do not find that the second possibility for reform, currently advocated by the EU – the establishment of a list of permanent Panelists –

⁹⁷ For example, in the manner suggested in C.E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: The American Enterprise Institute Press, 2001).

⁹⁸ As presented in Broude, *supra* note 8, and in Ehlermann *supra* note 62, who submits that an important issue to be addressed in the WTO is ‘the strengthening of the political decision-making process of the WTO’.

remedies all the problems of judicial office in the current Panel system, unless it is actually tantamount to the creation of a standing Panel Body. Another alternative that has been talked of, whereby Panel chairs would be sourced from a permanent grouping, while additional Panel members would not, is similarly lacking in its capacity to address the problems that currently exist – unless it presumes that it is the Panel chair that controls judicial decision-making in the Panel.

Unlike the EU-model CFI, the Panel Body would have full jurisdiction over all disputes arising from the covered agreements, rather than restricted jurisdiction. The Panel Body would provide Panels with full administrative and research services, similar to those of the Appellate Body, preventing Panelist reliance on the WTO Secretariat.⁹⁹

Qualification requirements for appointment to the Panel Body would focus on (a) the eligibility of candidates for judicial office in their home country; and (b) experience and knowledge of international trade law and policy in general and the WTO covered agreements in particular. Panelists in the standing Panel Body would be subject to the same restrictions on concurrent occupation as currently apply to Appellate Body Members. Needless to say, this would exclude diplomats in service from being Panelists at the same time.

⁹⁹ Ehlermann *supra* note 62, points out that a standing Panel Body would involve additional expenditure. This may be balanced by savings at the Appellate Body level, if the establishment of a standing Panel Body reduces the number of appeals, for example.

Considering the strenuous and labour-intensive role of Panels in fact-finding, the standing Panel Body should be more robust than the Appellate Body. In order to concentrate judicial decision-making in the Panels, the Panel Body should consist of at least twenty Panelists (equivalent to seven separate Panels), allowing for broad regional representation, and the principle of collegiality would apply, in the manner that standing Panelists would see fit. The administration of the Panel Body would be entrusted with the organization of specialized training programmes for Panelists, to ensure that a high level of professional knowledge is maintained in all the fields of WTO law.

The appointment of Panelists to the standing Panel Body would be done by Dispute Settlement Body approval of nominees selected by a Panelist selection committee from among candidates presented by WTO Members. This selection committee would be composed of the WTO Director-General (acting as committee chair), representatives of two WTO Members (acting on behalf of the Dispute Settlement Body), the Appellate Body Chairman, and the Chairman of the standing Panel Body – giving the judicial element a near equal voice in Panelist nominee selection, but retaining the final decision in the hands of the Dispute Settlement Body.

The appointment of Panelists to specific Panels would be done by the Panel Body itself, according to rules established by the Panel Body – for example, by lottery, by the

Chairman of the Panel Body or by secret ballot among Panelists.¹⁰⁰ Just as in the Appellate Body there is no provision governing the permitted nationality of Appellate Body Members hearing a particular case, so should the composition of specific Panels be freed of this consideration,¹⁰¹ subject to the regular prohibition on conflicts of interest and the assurance of increased participation of Panelists from developing countries – an assurance that could be achieved a priori by balanced regional composition of the Panel Body Membership.¹⁰²

The tenure of Panelists would be of six years (with staggered appointment and account taken of replacement of Appellate Body Members) and allow for unlimited re-appointment. Dismissal of Panelists from specific Panels and/or from the Panel Body would be done by secret ballot among all Panelists.

B *Appellate Body*

In comparison to the reform required in the Panel system, amendments to the design of judicial office in the Appellate Body are relatively low-key, but important nonetheless.

The high qualifications of Appellate Body Members in practice should be expressed in an amendment to Article 17.3 DSU, whereby Appellate Body Members

¹⁰⁰ The current system of Panel appointment was designed in order to enable the participation of the parties to a dispute in the appointment process. Since the current trend is towards appointment by the Director General, there is little sense in maintaining the original design. See also EC Replies Document, *supra* note 5, at 3.

¹⁰¹ Here I propose to cut the Gordian knot tied by the dilemma of finding Panelists of sufficient professional knowledge and distanced national affiliation by disregarding nationality in Panel appointment.

would be required to qualify for ‘appointment to the highest judicial offices, or jurisconsults of recognized competence, with demonstrated expertise in international trade law and the subject matter of the covered agreements’.

Appointment to the Appellate Body would be done by Dispute Settlement Body approval of nominees selected by an Appellate Body Member selection committee, from among candidates presented by WTO Members. This selection committee would be composed of the WTO Director-General (acting as committee chair), representatives of two WTO Members (acting on behalf of the Dispute Settlement Body), the Appellate Body Chairman, and an additional Appellate Body Member. This would retain the current level of enforcement of qualification requirements, but at the same time equalize or neutralize the ‘political screening’ element of the contemporary selection committee.

The term of Appellate Body Member tenure should be extended from four years to six, with unlimited eligibility for re-appointment. Given that experience in other judicial bodies shows that the option of re-appointment has virtually no negative effect on judicial independence, I see no advantage in discarding the option of re-appointment.¹⁰³ Quite to the contrary, allowing re-appointment opens the door to judicial continuity and increased coherence over time.

¹⁰² See EC Contribution at 3. A reasonable representation of developing countries has been maintained in Appellate Body division composition. There would seem to be no reason to expect that such a representation could not be reached in a standing Panel Body, in the same mode.

The number of Appellate Body Members should also be increased, from seven to eleven,¹⁰⁴ with flexibility allowing for additional Members¹⁰⁵ (for example, temporary appointments to the Appellate Body of Panel Body Members, in times of increased caseload). The premature dismissal of Appellate Body Members, as in the Panel Body, should be regulated and administered by the Appellate Body Members themselves.

One general remark in conclusion. The reform of judicial design in the WTO dispute settlement system will never be high on the agenda of trade negotiators. Immediate economic interests will always take precedent over long-term construction. This is quite evident in the low intensity of work under the Doha Declaration Work Programme with regard to the improvement of the dispute settlement system. Nevertheless, one hopes that this issue will be included in the Doha negotiations results or beyond. The making of judges ‘in all our gates’ – in a balanced and independent manner – is vital for the achievement of governmentally sound judgements that will be, and be perceived as, truly just.

¹⁰³ Ehlermann *supra* note 62 suggests replacing the once-renewable four-year term with a single, non-renewable term of eight years.

¹⁰⁴ In line with the Thai Proposal, *supra* note 5.

¹⁰⁵ In line with the Japanese Proposal, *supra* note 5.