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## **1 ARTICLE 8**

### **1.1 Text of Article 8**

#### **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>6</sup> are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

*(footnote original)*<sup>6</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.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
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.

## **1.2 Article 8.1: individuals eligible to serve as panelists**

1. In *Chile – Price Band System*, the Panel noted that:

"Regarding the use of teleconference, this was not the first time this has been used in panel proceedings and is related to the constraints imposed by Article 8.1 of the DSU as regards the individuals eligible to serve as panelists, who, given their required seniority or expertise, may be expected to face scheduling conflicts more than once."<sup>1</sup>

## **1.3 Article 8.2: sufficiently diverse background**

2. In *Mexico – Telecoms*, the Panel noted that "the diverse backgrounds of the panellists" and the assistance granted by the Secretariat pursuant to Article 27.1 of the DSU ensured that it was fully aware of the legal and technical complexity of the regulation of telecommunications services, including their rapid technological evolution, and the drafting history of GATS provisions to which the disputing parties had referred extensively.<sup>2</sup>
3. As regards the impartiality and independence of panelists, see the Section on the Rules of Conduct for the DSU.

## **1.4 Article 8.3: citizens of Members who are parties or third parties**

### **1.4.1 General**

4. In *US – Wool Shirts and Blouses*, the Panel contrasted the role and function of the Textiles Monitoring Board (TMB), under the Agreement on Textiles and Clothing, with the role and function of DSU panels. In that context, the Panel noted that:

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<sup>1</sup> Panel Report, *Chile – Price Band System*, fn 559.

<sup>2</sup> Panel Report, *Mexico - Telecoms*, para. 7.2.

"[A] TMB member appointed by a WTO Member involved in a dispute before the TMB, participates in the TMB's deliberations, although such TMB member cannot block a consensus (Article 8.2 of the ATC). On the contrary, panelists under the DSU are not selected on the basis of constituencies and the citizens of any party to a dispute under the DSU cannot participate as panelists, absent agreement of the parties (Article 8.3 of the DSU)."<sup>3</sup>

#### **1.4.2 Whether original agreement under Article 8.3 can be revoked**

5. See interpretation and application of Article 8.7 below.

#### **1.5 Article 8.4: a panel composed of five panelists**

6. As of 31 December 2020, no panel has been composed of five panelists.

#### **1.6 Article 8.7: panel composition by the Director-General**

##### **1.6.1 Challenges to the Director-General's composition**

7. In *Guatemala – Cement II*, the Panel was composed by the Director-General pursuant to Article 8.7 of the DSU. Guatemala requested the Panel to rule that its composition was inconsistent with WTO and international law principles, and that therefore the Panel lacked competence to review the matter before it. Specifically, Guatemala considered that the presence on this Panel of a member who served on *Guatemala – Cement I* detracted from the objectivity and independence that a panel should have when reviewing a matter brought before it. Mexico disagreed arguing that the Panel was composed in conformity with the DSU. The Panel issued the following preliminary ruling rejecting Guatemala's preliminary objection as follows:

"In order to determine whether the substance of Guatemala's preliminary objection is an issue that is susceptible of a ruling by the Panel, we have carefully analysed the provisions of the DSU governing panel composition. It is clear that Article 8.6 of the DSU imposes primary responsibility for panel composition on the parties to the dispute. In cases where the parties are unable to agree on the composition of a panel, such as this one, Article 8.7 of the DSU imposes responsibility for panel composition on the Director General. According to Article 8 of the DSU, therefore, the composition of a panel is determined by the parties to the dispute and, in certain circumstances, by the Director General. Neither Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process. For this reason, we find that we are unable to rule on the substance of the issue raised by Guatemala.

Should Guatemala persist with its substantive concerns regarding the composition of the Panel, Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes."<sup>4</sup>

8. In *US – Upland Cotton (Article 21.5 – Brazil)*, Brazil made a request under Article 8.7 of the DSU for the composition of a compliance panel. In its request, Brazil asked the Director-General to nominate the three members of the panel in the original proceedings. In a letter to the Director-General following Brazil's request for composition under Article 8.7 of the DSU, the United States objected to the re-nomination of two of the original panelists, on the basis that they were nationals of third parties to the dispute. The Director-General elected to call only one of the panelists back to service, and to nominate two new panelists. The European Communities, a third party in the proceeding, raised this issue before the Panel. Specifically, the European Communities argued that the Director-General was obliged to reject the United States' attempt to withdraw its agreement under Article 8.3 of the DSU solely on the grounds that an existing panelist is a national of a third party. The Panel considered that:

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<sup>3</sup> Panel Report, *US – Wool Shirts and Blouses*, para. 7.19.

<sup>4</sup> Panel Report, *Guatemala – Cement II*, para. 8.11.

"[I]t is not within its authority under the DSU to make a 'finding or ruling' on an issue that has not been raised by any of the parties to the dispute and which concerns the application by the WTO Director-General of the DSU provisions regarding panel composition. The Panel fails to see how the 'finding or ruling' requested by the European Communities would contribute to a positive solution to this dispute within the meaning of Article 3.7 of the DSU."<sup>5</sup>

9. A very similar issue arose in *US – Zeroing (EC) (Article 21.5 – EC)*. In that case, and with the agreement of the parties pursuant to Article 8.3 of the DSU, the original panel included citizens of the Members whose governments were parties to the dispute. In the composition of the Article 21.5 panel, the United States withdrew its agreement to the service of citizens of Members whose governments were parties to the dispute. The European Communities argued that the original agreement under Article 8.3 DSU cannot be revoked at any stage of the dispute proceedings, including the compliance panel stage, and that the panel had therefore been improperly composed. The Panel concluded that it had no authority to rule on the propriety of its own composition:

"The EC claims and arguments raise the question whether a panel may rule on the propriety or consistency with the DSU of its own composition. It is surprising that it is the complaining party in this dispute that raises this issue. But in any event, we do not believe that we need to address this question comprehensively.

We note that this Panel was composed by the Director-General of the WTO pursuant to the provisions of Article 8.7 of the DSU. That paragraph provides:

'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.' (emphasis added)

The European Communities has failed to point to any provision of the DSU, and we know of none, that would give us authority to make a finding or ruling with respect to the application, by the Director-General of the WTO, of the provisions of the DSU regarding panel composition contained in Article 8.7.

Article 8.7 is clear that whenever there is no agreement between the parties, the ultimate power to compose the panel rests with the Director-General of the WTO. Consequently, we refrain from ruling on the substance of the EC claim with respect to the composition of this panel by the Director-General."<sup>6</sup>

10. The Appellate Body ruled that the Panel did not err in refraining from making a finding on whether the Panel was properly composed:

"On the substance of the European Communities' appeal, we note that, on 28 November 2007, the Director-General was requested to determine the composition of the compliance panel under Article 8.7 of the DSU. In our view, Article 8.7 confers on the Director-General the discretion to compose panels, which was properly exercised in this case. We therefore *find* that the Panel did not err in refraining, in paragraphs 8.17 and 9.1(a) of the Panel Report, from making a finding on whether it

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<sup>5</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 8.28.

<sup>6</sup> Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 8.14-8.17.

was improperly composed. In the light of this conclusion, we do not consider it necessary to address the other arguments made by the parties on this matter."<sup>7</sup>

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Current as of: December 2020

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<sup>7</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 172.