

## Chapter 2

# Judging the Judges or Judging the Members?

### Pathways and Pitfalls in the Appellate Body Appointment Process

Arthur E. Appleton

**Abstract** The politicization of the WTO Appellate Body selection process is undermining the Appellate Body's legitimacy. Quasi-permanent seats, growing obstacles in the appointment and reappointment process, and the growing tendency of Members to appoint political as opposed to legal experts, are damaging the Appellate Body as an institution. Instead of choosing Appellate Body Members with strong legal backgrounds, Members are demonstrating a preference for judges with government experience, in particular ex-ambassadors. This development may erode respect for Appellate Body decisions. As Montesquieu noted, "there is no liberty, if the power of judging be not separated from the legislative and executive powers." Members would be wise to remember this as they ponder Appellate Body appointments and reappointments.

---

Arthur E. Appleton, JD, PhD, adjunct professor, Johns Hopkins School of Advanced International Studies (SAIS Europe).

The author is also a visiting faculty member at the University of Barcelona (IELPO), a faculty and board member of WTI (University of Bern), and a partner with Appleton Luff International Lawyers (Geneva). The author would like to thank the Editor, Dr Leïla Choukroune, for her very useful comments. He would also like to thank those who commented on earlier drafts and prefer to remain anonymous. The author states that all remaining errors are his own.

---

A.E. Appleton (✉)  
Appleton Luff, Geneva, Singapore  
e-mail: [appleton@appletonluff.com](mailto:appleton@appletonluff.com)

## 2.1 Introduction

Most agree that the WTO dispute settlement mechanism is a success. Much has been written about the virtues of the mechanism, but surprisingly little has been written about the politics behind it—the Appellate Body selection process.<sup>1</sup> Nevertheless, grumblings are often heard from Geneva-based individuals regarding the Appellate Body appointment/reappointment process and the qualifications of Appellate Body Members. Recent criticisms include the following:

- Increased politicization of the AB appointment and reappointment process;
- Quasi-attribution of permanent AB seats to the United States and EU, and concern that the China may be on its way to having a permanent seat;
- Appointment of Appellate Body Members who lack legal experience to satisfy geographic diversity; and
- The inability of certain Appellate Body Members to write well in at least one WTO official language.

This chapter examines the pathways to Appellate Body appointment in an attempt to judge the judges, or at least (i) their road to power and (ii) their possible judicial acumen. Because of the stalemate in the Doha negotiations, the difficulty that the WTO Members have in reaching an Article IX consensus to take a decision,<sup>2</sup> as well as the desire of Members to avoid reaching decisions by three-fourth majority, the Appellate Body enjoys unchallenged authority to interpret the WTO Agreements. None of these impediments are likely to change. As a result, the role of the Appellate Body will continue to remain strong and WTO Members need to pay more attention to the WTO Appellate Body appointment process. Of course, by judging the judges, this chapter implicitly judges the Members that appoint the Appellate Body.

For better or worse the WTO embodies the Westphalian system—or at least its remnants. Despite the fact that sophisticated products include components, intellectual property, capital, and labour from many different parts of the world, the trade system remains surprisingly State-centric, and the Members' view of the composition of panels and the Appellate Body remains State-centric as well. Sovereign equality of Members is given voice through the application of the consensus rule in the Appellate Body appointment process, even if some Members remain more equal than others.

Despite the State-centric nature of the system, WTO Members have foregone some of the trappings of State sovereignty by delegating substantial authority to the

---

<sup>1</sup>One notable exception is the work of Manfred Elsig. *See generally*, Manfred Elsig & Mark A Pollack, Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body, 20 *European Journal of International Relations* (June 2014) 391–415. This chapter provides interesting insights into the politicization of the Appellate Body nomination and approval process. An early draft is available online at: [http://wp.peio.me/wp-content/uploads/2014/04/Conf4\\_Elsig-Pollack-24.01.2011.pdf](http://wp.peio.me/wp-content/uploads/2014/04/Conf4_Elsig-Pollack-24.01.2011.pdf).

<sup>2</sup>Pursuant to the Agreement Establishing the World Trade Organization, at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

WTO Dispute Settlement Body (DSB), including the power to exercise compulsory jurisdiction and render decisions that have elements of enforceability.<sup>3</sup> This is to be expected in international legal regimes. However, not all Members are entirely equal. The United States, European Union, and increasingly China and India play a more important role than many Members in the Appellate Body selection process. Their importance may tend to undermine the sovereign equality of States (for better or worse). Does their influence pose a threat to judicial independence? That depends on how these Members exercise their influence. If they do not exercise their influence for the common good of the WTO regime, it is more difficult to judge the judges they help appoint from a neutral perspective.

Lord Thomas Bingham (former Lord Chief Justice and Senior Law Lord) quoted the 1994 United Nations Commission on Human Rights in an important essay that he published in 2000:<sup>4</sup>

Convinced that an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice....

Most people steeped in democratic traditions would agree on the importance of maintaining judicial independence—and would also agree that the competence of judges plays an important role in maintaining this independence—competent judges need not rely on others to formulate their decisions. Most people would probably also agree that, outside cases of corruption and intimidation, it is often the State that jeopardizes the independence of the judiciary—both in the selection process and by applying pressure on the judiciary. States can undermine what many believe to be a fundamental principle that has implications for the legitimacy of tribunals: “Not only must justice be done; it must also be seen to be done.”<sup>5</sup>

Lord Bingham was thinking about the administration of justice at the national level when he discussed judicial independence. This chapter focuses on the international level—and more specifically the WTO Appellate Body.

All is not well at the international level, and States are largely responsible for the problems faced by international tribunals, including the WTO Appellate Body. In part, this problem relates to how the States view the role of international judges. This will surprise those who place the international legal system, and international judges, on a judicial pedestal of righteousness.

---

<sup>3</sup>Gary Born refers to these as second-generation international tribunals. See Gary Born, A New Generation of International Adjudication, 61 *Duke L. J.* (2012) 775. WTO Members need not abide by Appellate Body rulings, but if they do not the prevailing Member in a dispute may eventually be able to pressure the losing Member by revoking concessions – most often tariff concessions.

<sup>4</sup>Tom Bingham (Lord Bingham of Cornwall, former Lord Chief Justice and Senior Law Lord), *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford, 2000) 55.

<sup>5</sup>Gordon Howard (7th Lord Chief Justice of England) paraphrasing his own decision in *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] *All ER Rep* 233.

The thesis of this chapter is that WTO Members need to take additional steps to protect the judicial independence of the Appellate Body. The Appellate Body selection process increasingly results in questions about the qualification of Appellate Body Members, and the reappointment process raises doubts about the judicial independence of Appellate Body Members and therefore jeopardizes the Appellate Body's legitimacy. This chapter concludes by proposing steps forward to assure greater judicial independence through changes in the selection process.

## 2.2 Criteria for Appellate Body Appointment

When one speaks of judicial independence at the WTO, one must first ask: independence from whom? The Members? Business interests? The WTO Director General? The Secretariat? While all of the above may threaten the independence of the Appellate Body, by far the greatest threat comes from the Members themselves.

Article 17:3 of the WTO Dispute Settlement Understanding sets forth the legal requirements for becoming a WTO Appellate Body Member. It provides:

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

A careful reading of Article 17.3 reveals rather vague criteria that colour the selection process:

1. An Appellate Body Member must be a person of *recognized authority* (the provision does not specify who must recognize their authority nor the domain of recognition);
2. An Appellate Body Member must have demonstrated *expertise* in law (the provision does not require that a candidate be a lawyer, but it does require demonstrated *expertise*—not just legal Professor experience—therefore this is a high standard);
3. An Appellate Body Member must have demonstrated *expertise* in international trade (again this is a high standard);
4. An Appellate Body Member must have demonstrated *expertise* in the subject matter of the covered agreements generally (as the WTO was new in 1995, only trade negotiators met this criteria, but now there is also a pool of attorneys, professors, WTO Secretariat Staff and government officials who may meet this criterion);
5. An Appellate Body Member must be unaffiliated with any government (this criterion applies during the term and not during the selection process—as demonstrated below many Appellate Body Members have come from government employment);

6. Appellate Body membership must be broadly representative of the WTO's membership (it is unclear how this provision is to be interpreted—should we look at trade volume, level of development, regional distribution, population, gender balance, etc.)<sup>6</sup>; and
7. The Appellate Body Member must be available at all times and on short notice (this criterion favours the financially independent, those working in independent professions such as attorneys, and those who are retired).

The requirements of 17.3 DSU should not be taken lightly. International economic law, and more specifically WTO law, are highly specialized and very technical fields. They are almost never a standard part of law school education, and most lawyers know little about these areas. This does not mean that lawyers (and non-lawyers) are incapable of understanding International Economic Law and WTO law, but it does mean that WTO Members tend to propose Appellate Body candidates with legal expertise. Alternatively, they propose candidates with experience handling trade matters, often acquired through government service. The result is that WTO Members must recruit Appellate Body Members from a relatively narrow pool of candidates.

Although there are usually about a dozen Appellate Body decisions in a year, over the course of the last 20 years a substantial amount of jurisprudence now exists, much of which is complicated. This jurisprudence involves many specialized trade law fields, including intellectual property law (TRIPs), regulatory matters (SPS and TBT issues), unfair trade practices (dumping and subsidies), customs matters, trade in services, dispute settlement rules, and public international law. The learning curve to enter the trade law field is high even for trained lawyers and growing higher every year.

Not all Appellate Body Members have met the selection criteria set forth in Article 17.3. Not all Appellate Body Members had demonstrated *expertise* in law and not all Members had *expertise* in the subject matter of the covered agreements (though this latter requirement is qualified by the word “generally” and it would have been unrealistic to hold the first batch of Members to this requirement,<sup>7</sup> even if they may have been the most capable). Of course, since Appellate Body Members are approved by consensus, there is no way for a WTO Member to challenge a sitting Appellate Body Member based on his or her qualifications. In other words, the putative criteria set forth above can be ignored by consensus.

The Appellate Body appointment process, being by consensus, leaves room for political meddling—in particular by the more influential WTO Members who have

---

<sup>6</sup>As noted below, there has always been a Member from the European Union and the United States. There has always been a Member from Latin America and Africa, and at least one Member (usually two) from Asia. At times, a majority of Appellate Body Members have come from developing countries. Only four of the 25 Members (Janow, Bautista, Hillman and Zhang) have been female. Three of the four female Members only served one term.

<sup>7</sup>Unrealistic in 1995 as WTO Members must have found it difficult to find Appellate Body Members with “demonstrated expertise” with the subject matter of the covered agreements before these agreements entered into effect.

the political strength to block a nomination more easily or to push through a difficult candidacy. Furthermore, as the tenure of an Appellate Body Member is only four years, renewable once for a total of eight years, the reappointment process also leaves room for political interference. Such meddling can compromise judicial independence as evidenced by the US decision to block the reappointment of Professor Seung Wha Chang, from South Korea, to a second term on the Appellate Body; the US decision not to support the reappointment of an eminently qualified Member from the United States—Jenifer Hillman; and possible EU involvement in the selection of Ricardo Ramírez-Hernández over two WTO insiders.<sup>8</sup>

Since Appellate Body Members serve such short terms, and since not all Appellate Body judges are lawyers with deep WTO experience, the role of the WTO Appellate Body Secretariat is extremely important.<sup>9</sup> The Secretariat's tasks range from drafting issue papers, assisting Appellate Body divisions, drafting questions, attending hearings, and drafting "the totality or parts of the Appellate Body report according to detailed instructions given by the division...."<sup>10</sup> Certain senior Members of the Appellate Body Secretariat have held their positions far longer than sitting Appellate Body Members and to some extent serve as the guardians of continuity. In many if not most disputes, the Appellate Body Secretariat has a much better understanding of WTO law and practice than sitting Appellate Body Members. The Secretariat understand the judicial history, the gradual evolution of judicial thinking on certain issues, and they often play an important role advising Appellate Body Members and, as already noted, drafting Appellate Body decisions. As the corpus of WTO jurisprudence increases, and with the growing politicization of the Appellate Body selection process, the role of the Secretariat will only grow in importance.

While many non-lawyers may be inclined to think that the law is the law and judges merely apply the law, the reality is frequently different. This mischaracterization of the role of judges has been given voice in surprising circles (often for political gain). For example, John Roberts, Chief Justice of the US Supreme Court, stated in his confirmation hearing that:

Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.... I will remember that it's my job to call balls and strikes and not to pitch or bat.

This is a remarkable quote, not for its political astuteness given that Chief Justice Roberts was facing US Senate confirmation, but for its obfuscation of a

---

<sup>8</sup>See Elsig & Pollack, *supra* note 1.

<sup>9</sup>For a candid description of the importance of the Appellate Body Secretariat, see AV Ganesan, *The Appellate Body in Its Formative Years: A Personal Perspective*, in, Gabrielle Marceau (ed) *A History of Law and Lawyers in the GATT/WHO: The Development of the Rule of Law in the Multilateral Trading System* (CUP, Cambridge, 2015) 517, 545.

<sup>10</sup>Claus-Dieter Ehlermann, *Revisiting the Appellate Body: The First Six Years*, appearing in Marceau, *supra* note 9, 482, 495, 498 (*quoting* 495).

fundamental point: rules are not always clear and that by interpreting the rules, a judge defines them. This is particularly true in common law legal systems where *stare decisis* gives great precedential value to high court decisions. This is also true in international law, where treaties often contain vague language conceived by diplomats to patch over differences in negotiating positions. As a result, international judges are frequently called upon to interpret treaties, and considerable deference is shown to their pronouncements, in particular, decisions by the International Court of Justice and the WTO's Appellate Body.<sup>11</sup> As a result, the selection of international judges is particularly important—given that judges, through the process of interpretation, establish the meaning of the laws that treaty negotiators have often left ambiguous and given that the interpretation of international agreements can often have important political and economic implications.

In other words, while the role of the judiciary is certainly different from the rulemaking function of a legislator or treaty negotiators, international judges have an important role to play shaping law and policy. In the international trade law regime, which is now characterized by Member-deadlock on many important issues, the action of Appellate Body Members can have an important effect on business interests and, to the extent distinguishable, civil society interests. This is true despite the language in Article 19.2 of the Dispute Settlement Understanding prohibiting the Appellate Body from adding to or diminishing “the rights and obligations provided in the covered agreements.” From the Appellate Body's perspective, decisions do not add to or diminish rights and obligations of WTO Members—they clarify them. From the negotiators' perspective, Appellate Body pronouncements do not always give voice to their interpretation of provisions at the time they were negotiated.

## 2.3 Pathways to Becoming an Appellate Body Member

Because of the important “rule-interpreting” function (i.e., rulemaking role) that judges have, there is widespread recognition among US politicians that the selection of judges is politically important. The United States has carried this to an extreme in

---

<sup>11</sup>Luiz Olavo Baptista note that:

One cannot forget that the people who wrote the WTO agreements were predominately diplomats. It is of the essence of diplomacy that expressions are used that cater to a large number of people so that agreement can be reached. Consequently, the WTO agreements contain provisions that are not always the best example of lawyerly rigour and accuracy.

See, Luiz Olavo Baptista, A Country Boy Goes to Geneva, appearing in Marceau, *supra* note 9, 559, 566.

Julio Lacarte-Muró makes a similar observation referring to the “constructive ambiguity” of the WTO agreements. Julio Lacarte-Muró, Launching the Appellate Body, appearing in Marceau, *supra* note 9, 476, 480.

its Supreme Court selection process, where Supreme Court nominees are vetted by the Executive Branch, the Legislative Branch (the Senate), the American Bar Association, and party-affiliated political actors on a large variety of factors, including judicial acumen, probity, judicial philosophy, temperament and views on certain highly contentious issues. Not only must a justice be a qualified umpire, he or she must withstand political scrutiny at many different levels to ensure that the rules that he or she interprets (and thus helps formulate) do not interfere with the “ball game”. Arguably the US approach to the selection of Supreme Court justices has begun to influence the appointment of Appellate Body Members, at least with respect to US behaviour in the Appellate Body.<sup>12</sup>

Garrison Nelson, a Professor at the University of Vermont, charts four paths to US Supreme Court appointment that are also relevant for Appellate Body appointments<sup>13</sup>:

|                            |  |
|----------------------------|--|
| <b>Vertical path (V)</b>   | Supreme Court from another judgeship   |
| <b>External path (E)</b>   | Supreme Court from the private sector, including private practice, in-house counsel, and academia  |
| <b>Diagonal path (D)</b>   | Supreme Court from second-tier government positions  |
| <b>Collateral path (C)</b> | Supreme Court appointment through high-level government service: member of Congress, cabinet post or governorship (the political arena) <sup>a</sup> |

<sup>a</sup>Nelson places Cabinet posts in the Collateral path even though they do not face election. Elected officials nevertheless determine their appointments

Professor Nelson notes that US Supreme Court appointments now tend to come mostly from the Vertical path—experienced judges sitting on lower courts. In a politicized judicial-selection system, this is understandable as sitting judges have a track record of published decisions that illuminate their political views and judicial philosophy. They also have experience. Professor Nelson, however, notes that approximately half of *early* Supreme Court judges were drawn from political circles (what he terms the Collateral path—governors, congressmen, and cabinet Members). This is also understandable as judges with track records were scarce in the early days of the Supreme Court.

With two minor “tweaks” explained below, Professor Nelson’s methodology can be applied to WTO Appellate Body appointments. His methodology is useful as a way to view alternative routes to the Appellate Body and as a means to assess the competence and experience of Appellate Body Members.

<sup>12</sup>EU behaviour would appear to be somewhat more moderate, to the extent that the European Union normally nominates well-respected academics for the “EU seat.”

<sup>13</sup>See generally, Garrison Nelson, *Pathways to the US Supreme Court: From the Arena to the Monastery* (Palgrave Macmillan, New York, 2013) 52–53. Salient points of his work are summarized in a book review by Tim Johnson, “Supreme Choice: Monastery vs. Arena”, Burlington Free Press (9 March 2014).

Tweak 1: Since Ambassadors to the WTO are usually political appointments, and since WTO Ambassadors often lose their posts when governments change (meaning that their posts are determined by elected officials), their pathway to appointment can be categorized as through a Collateral path (even if they have risen through the ranks as career civil servants and could fall under the Diagonal path heading).<sup>14</sup>

Tweak 2: The vertical path can be expanded to include Appellate Body Members who have served on WTO panels, as this experience is analogous to serving (on a much smaller scale) as a lower court judge. As the WTO Appellate Body Secretariat is crucial to the Appellate Body's work, the Vertical path can also reasonably be expanded to include former WTO Appellate Body Secretariat staff who, due to their length of service and institutional understanding, plays a role that is far more important than a US law clerk in Appellate Body decision-making.

The revised classification methodology applied in this chapter to Appellate Body Members looks like this:

|                            |   |
|----------------------------|---|
| <b>Diagonal Path (D)</b>   | An Appellate Body appointment from second-tier government positions, including service in trade and economic ministries, <i>except</i> Permanent Representatives/Ambassadors to the WTO. (The non-political government service path)                    |
| <b>External Path (E)</b>   | An Appellate Body appointment from the private sector, including academia, private practice (usually in a law firm practicing trade law) and in-house counsel (usually as a Professor teaching international economic law or international law)         |
| <b>Collateral Path (C)</b> | An Appellate Body appointment through high-level government service: member of Congress or Parliament, cabinet post or former Ambassadors/Permanent Representatives to the WTO (the political path—officers who serve at the pleasure of the Executive) |
| <b>Vertical Path (V)</b>   | An Appellate Body appointment from another judgeship, including service on GATT and WTO panels, or from the WTO Secretariat (Appellate Body or Legal Division)  |

While some may object that applying this methodology to Appellate Body appointments only serves as window dressing to veil criticism of their appointments, this is not the case. The methodology provides a simple means to assess their legal acumen, their trade knowledge, and whether their appointment is merely political in nature or in accord with the selection criteria set forth in Article 17.3 of the DSU.

As of August 2016, there have only been 25 Appellate Body judges,<sup>15</sup> so it is a relatively simple task to provide information on past and sitting WTO Appellate Body Members, including their nationality, education, approximate age when appointed, and work experience, including trade law experience. Abbreviations

<sup>14</sup>Nelson would place Ambassadors in the Diagonal path.

<sup>15</sup>Ms Yuejiao Zhang's second term expired on 31 May 2016. Professor Seung Wha Chang's first and only term also expired on 31 May 2016. Both are completing appeals assigned to them prior to 31 May 2016. For purposes of this chapter, they are treated as sitting Members.

(D, E, C, and V) indicate the various pathways described above. A small letter indicates a route that may be less important than the first. As many Appellate Body Members have taken multiple routes, usually involving government service handling trade matters, these Members are sometimes identified with more than one letter.

The goal of this rather simple classification process is not to indicate all positions held, nor is it possible to provide an entirely accurate perspective of the relative importance of positions held. This would be difficult without talking to each and every judge or their close colleagues. Instead, the intent is to provide relevant background information indicative of a Member's qualifications, including legal training which might indicate potential judicial acumen, and to develop a common classification system that demonstrates in a general manner the changing paths to Appellate Body membership, and the likely implications of these changes for Appellate Body decision-making and for the WTO as an institution.

Classifications are based on CVs published on the WTO website. Where information is absent from the WTO website, an effort was made to fill gaps based on publicly available information. The age when an Appellate Body Member began service may be off by one year as in some cases only the year of birth and the year service began is readily available.

### ***2.3.1 First Seven Appellate Body Members (Batch 1)***

Table 2.1 sets forth pertinent information on the first seven Appellate Body Members:

Looking at the data on the first seven Appellate Body Members, one finds that six of the seven original appointees had strong legal backgrounds and many had trade law experience. The seventh Member, Julio Lacarte-Muró, while not a lawyer, was a Permanent Representative to the GATT, and present in Havana for the negotiations that eventually led to the creation of the GATT. He also served on several GATT panels.<sup>16</sup> His experience suggests that he possessed considerable legal acumen.

In an unattributed interview with one of the first Appellate Body Members the authors of a book on international judges note the importance of lawyers to the success of the WTO appellate process:

Many also agree that had the first Members of the Appellate Body not been mostly lawyers, but instead diplomats, as in the GATT system, the WTO process would have probably remained much closer to its diplomatic roots. One of the first Members of the WTO AB recalls the seminal period when the first group drew up the rules of procedure. "These three

---

<sup>16</sup>*German Exchange Rate Scheme for Deutsche Airbus (SCM/142), United Kingdom Waivers – Application in Respect of Customs Duties on Bananas (L/1749), Japan – Trade in Semi-Conductors (L/6309 – 35S/116), and United States – Measures Affecting Alcoholic and Malt Beverages (DS23/R – 39S/206).*

Table 2.1 Batch 1

| Member                 | Nationality/year of birth | Term/age       | Areas of study                 | GATT panel experience                       | Background   | Route |
|------------------------|---------------------------|----------------|--------------------------------|---|--|-------|
| Christopher Beeby      | New Zealand 1935          | 1995–2000 (60) | Law                            | No  | Ambassador, career diplomat                              | D     |
| Mitsuo Matsushita      | Japan 1933                | 1995–2000 (62) | Law                            | No  | Professor  | E     |
| Said El-Naggar         | Egypt 1920                | 1995–2000 (75) | Economics/law                  | No  | Professor, international civil servant                   | E/D   |
| Julio Lacarte-Muró     | Uruguay 1918              | 1995–2001 (77) | Trade and economics background | Yes<br>SCM142<br>L/1749<br>L/6309<br>DS23/R | Minister, Ambassador, career diplomat                    | C/D/v |
| Claus-Dieter Ehlermann | Germany (EU) 1931         | 1995–2001 (64) | Law                            | No  | Professor, Director General Legal Services EU Commission | E/D   |
| Florentino Feliciano   | The Philippines 1928      | 1995–2001 (67) | Law                            | No  | Supreme Court Judge, private practitioner                | V/E   |
| James Bacchus          | USA 1949                  | 1995–2003 (46) | Law, history                   | No  | Congressman, Special Assistant to the USTR               | C/D   |

weeks probably were the germ,” he recalls, “the seed from which the rest then grew.... We were basically a group of pure lawyers. None of us had been involved in the previous system, except our chairman, Julio Lacarte Muró, who had been there since day one of the GATT and thus was an extremely influential man because of his experience, personality and age. But Lacarte underwent a fundamental change of outlook and was won over by the lawyers’ side. Had he said, “No, all this is impossible and politically unacceptable,” *et cetera*, we would probably not have gone as far. He would have had, I believe, the authority to say, “You are totally missing the goal.” We might have done the same thing anyway, but it would have been much more difficult.”<sup>17</sup>

This quote is revealing as it demonstrates two points:

1. the importance of “pure lawyers” who were responsible for the development and “judicialization” of the WTO appellate process, and
2. the perceived value of outside voices to the appellate process in order to overcome the diplomatic and political roadblocks that characterized the GATT.

The data also reveal that during the Appellate Body’s formative years, Members had a preference for older, well-established figures with legal training, trade experience, and considerable work experience. Six of the seven original Members were 60 or more, with the average age of the first Appellate Body Members being almost 65.

Reverting to Garrison Nelson’s methodology (above), the first Appellate Body Members were largely drawn from the External and Diagonal paths, with academics and second-tier (non-political) government officials figuring prominently. Two Members (Jim Bacchus and Julio Lacarte-Muró) came from the Collateral path (a Congressman and a Minister), with each having considerable trade experience. Several of the appointees lacked international trade (GATT) experience, but all had either legal training, or sound trade law experience that helped develop their judicial acumen.

### **2.3.2 Other Former Appellate Body Members (Batches 2 and 3)**

The same exercise can be performed for the eleven other former Appellate Body Members (Tables 2.2 and 2.3):

The data reveal that the second batch of Appellate Body Members (Taniguchi through Janow) were also almost all lawyers. Ganesan was the only exception, but he too had panel experience, and his writing demonstrate his ability to think like a

---

<sup>17</sup>Daniel Terris, Cesare PR Romano & Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (Brandeis University Press/University Press of New England, Waltham, Massachusetts, 2007) 107.

Table 2.2 Batch 2

| Member                      | Nationality/year of birth | Term/age                    | Areas of study                    | GATT panel experience | Background   | Route |
|-----------------------------|---------------------------|-----------------------------|-----------------------------------|-----------------------|--|-------|
| Yasuhei Taniguchi           | Japan 1934                | 2000–2007 (66)              | Law                               | No                    | Professor  | E     |
| Georges Michel Abi-Saab     | Egypt 1933                | 2000–2008 (67)              | Law, economics, political science | No                    | Professor of Law, international judge                      | E/v   |
| A.V. Ganesan <sup>a</sup>   | India 1935                | 2000–2008 (65)              | Chemistry                         | Yes DS160             | Commerce Secretary, trade negotiator, career civil servant | D/v   |
| John S. Lockhart            | Australia 1935            | 2001–2006 (66) <sup>c</sup> | Law, arts                         | No                    | International civil servant, judge                         | E/v   |
| Luiz Olavo Baptista         | Brazil 1938               | 2001–2009 (63)              | Law, Business administration      | No                    | Professor, Attorney  | E     |
| Giorgio Sacerdoti           | Italy (EU) 1943           | 2001–2009 (58)              | Law                               | No                    | Professor  | E     |
| Merit E. Janow <sup>a</sup> | USA 1958                  | 2003–2007 (45)              | Law                               | Yes DS231             | Professor, Deputy Assistant US Trade Representative        | E/D/v |

<sup>a</sup>Indicates that a Member only served one term<sup>b</sup>Arumugamangalam Venkatachalam Ganesan<sup>c</sup>Mr Lockhart passed away in 2006, shortly after his reappointment

**Table 2.3** Batch 3

| Member                        | Nationality/year of birth  | Term/age          | Areas of study | GATT panel experience | Background   | Route |
|-------------------------------|----------------------------|-------------------|----------------|-----------------------|--|-------|
| David Unterhalter             | South Africa<br>18/11/1958 | 2006–2013<br>(48) | Law            | Yes<br>DS322<br>DS244 | Professor, private practitioner                                    | E/v   |
| Lilia R Bautista <sup>a</sup> | Philippines<br>16/08/1935  | 2007–2011<br>(72) | Law, business  | No                    | Career civil servant, senior undersecretary, Ambassador to WTO     | C/D   |
| Jennifer Hillman <sup>a</sup> | USA<br>29/01/1957          | 2007–2011<br>(50) | Law, education | No                    | Member US International Trade Commission; Chief USTR Legal Counsel | V/D   |
| Shotaro Oshima <sup>a</sup>   | Japan<br>20/09/1943        | 2008–2012<br>(65) | Law            | No                    | Ambassador to WTO, career diplomat/civil servant                   | C/D   |

<sup>a</sup> Indicates that a member only served one term

lawyer.<sup>18</sup> Almost all were in their 60s or near 60, with the average age being almost 61.5. Again the preference for older, well-established figures with legal training and considerable work experience, but seldom trade experience, is clear. The major exception in terms of age was the US Member, Merit Janow, who was relatively young at 45, but already had a distinguished career in academia, previously served in the USTR, and sat as a WTO panellist. Again, most appointees came from the External paths, with some Diagonal entries. Although two appointees had judicial experience (the Vertical path) their judicial experience was not in international economic law.

The third batch of appointees (Unterhalter through Oshima) demonstrates the Members' shift in attitude towards appointment, away from External path candidates without trade experience and toward Ambassadors and trade insiders (Collateral and Diagonal path candidates). In fact, all four appointees had considerable trade experience. Bautista and Oshima had served as Ambassadors/Permanent Representatives to the WTO; Hillman had served as Chief Legal Counsel to the USTR; and Unterhalter had sat on two WTO panels. All four appointees had studied law. Although appointees came from all paths (External, Diagonal, Vertical and Collateral), it is the increase in Collateral appointees (ex-WTO Ambassadors) that is most striking.

<sup>18</sup> See, for example, Ganesan's excellent legally oriented chapter, *supra* note 9. See also Baptista, *supra* note 11, 566, where Baptista pays tribute to Ganesan's ability to interpret and apply the law.

### 2.3.3 *Sitting Appellate Body Members*

The same classification exercise can be performed for sitting Appellate Body Members and it confirms trends identified in the analysis of Batch 3 (Table 2.4).

Looking at the current Appellate Body Members one finds the External path is now on the decline as a route to the Appellate Body. Even appointees who have taken a somewhat External route have previous ties with their respective governments and with the trade system. Five of the seven sitting Members are insiders with substantial experience working on trade issues for their governments (Diagonal and Collateral path appointees). Two of these Members are ex-WTO Ambassadors (Collateral path). The result is that, not unlike US Supreme Court judges, Appellate Body Members are increasingly coming from positions where their trade philosophies are well known or readily ascertainable. The two relative outsiders (Chang and Van den Bossche) are not really outsiders. Chang has served as a WTO panellist more than any other Appellate Body Member and Van den Bossche not only worked for the Secretariat, he teaches trade law and has published extensively on trade issues (including one of the leading textbooks), meaning that his trade law philosophy is also well known.

Reviewing the education of the current Appellate Body Members, one also finds that only five out of seven have formal legal training—the lowest number of legally trained Members in the history of the Appellate Body. Of those without formal legal training, Ambassador Bhatia served on a WTO panel; Ambassador Servansing did not have this opportunity. However, each was a respected WTO Ambassador and thus came from the Collateral path, suggesting that the Members are developing a preference for appointing politically experienced diplomats (in particular ex-WTO Ambassadors), even if they lack formal legal training.

Finally, one finds a very significant drop in the age of the Appellate Body at the time of appointment. The average age at appointment for sitting Appellate Body Members is just under 55.6 years. As many sitting Appellate Body Members have a substantial number of work years ahead they may be reticent to issue reports that would alienate government officials who could open employment opportunities for them. Older appointees usually have greater economic latitude to act independently.

Beyond the above concerns, there are also certain other points that bear notice:

- Appellate Body Members from developed countries have always had formal legal training. In other words, Appellate Body Members without formal legal training have *always* come from developing countries.
- Both Appellate Body Members from India (Ganesan and Bhatia) did not have formal legal training, but both sat on WTO panels and appear to have a legal temperament.
- Appellate Body seats tend to be filled by individuals from major trading countries (the United States, the European Union, Japan, Korea, and increasingly the BRICs).
- Since Batch 3, there have always been two ex-WTO Ambassadors on the Appellate Body.

**Table 2.4** Sitting Appellate Body Members (as of August 2016)

| Member                          | Nationality/date of birth  | Term began age   | Areas of study                           | Prior WTO panel experience  | Background  | Route |
|---------------------------------|----------------------------|------------------|--|-----------------------------|---|-------|
| Yuejiao Zhang <sup>a</sup>      | China<br>25/10/1944        | 01/06/08<br>(63) | Law                                      | No                          | Professor of Law, Director-General of Law and Treaties Ministry of Foreign Trade and Economic Cooperation | D/E   |
| Ricardo Ramírez-Hernández       | Mexico<br>17/10/1968       | 01/07/09<br>(40) | Law                                      | No                          | Private practice, Deputy General, Counsel for Trade Negotiations Ministry of Economy                      | D/E   |
| Peter Van den Bossche           | Belgium (EU)<br>31/03/1959 | 12/12/09<br>(50) | Law                                      | No                          | Trade law professor, Appellate Body Secretariat   | V/E   |
| Thomas R. Graham                | USA<br>23/11/1942          | 11/12/11<br>(68) | Law, inter national relations, economics | No                          | Private practice, Deputy General Counsel USTR   | D/E   |
| Ujal Singh Bhatia               | India<br>15/04/1950        | 11/12/11<br>(61) | Economics                                | Yes<br>DS339,340,342        | Ambassador to the WTO, career civil servant   | C/D/v |
| Seung Wha Chang <sup>a</sup>    | Korea<br>1/03/1963         | 01/06/12<br>(48) | Law                                      | DS108<br>DS174,290<br>DS222 | Trade law professor, judge and private practitioner   | V/E   |
| Shree Baboo Chekitan Servansing | Mauritius<br>22/04/1955    | 01/10/14<br>(59) | Sociology, foreign affairs               | No                          | Ambassador to WTO, career civil servant   | C/D   |

<sup>a</sup> Term expired on 31 May 2016, but completing existing appeals

- No ex-Ambassadors from the United States or the European Union have ever sat on the Appellate Body.
- All three Appellate Body Members from the European Union were drawn from academia (Ehlermann, Sacerdoti, and van den Bossche). Even Professor Ehlermann, who enjoyed a distinguished career with the EU Commission's Legal Service beginning in 1961, has held academic posts since 1972.
- All Appellate Body Members from the United States previously worked for the US Government in a trade-related position.
- Almost all Appellate Body Members from the United States were relatively young (making them more open to external influence): Bacchus (46), Janow (45), and Hillman (50). Graham is the exception at 68 years of age.

Legal acumen and a sound judicial temperament, coupled with knowledge of trade law should be the most important elements in the selection of Appellate Body Members. The charts above demonstrate that the vast majority of appointees have indeed had legal training, but they also demonstrate a worrying trend—appointment of ex-ambassadors (i.e., politically experienced individuals) as opposed to individuals with more legal experience as Appellate Body Members.

The appointment by the Members of WTO diplomats with less legal experience may be the Members' way of expressing a preference for politically-oriented as opposed to legally-oriented Appellate Body Members. It may also reflect what Ehlermann calls "the progressive politicization of the selection process of Members of the Appellate Body during the last years."<sup>19</sup> In addition, it may demonstrate a preference for the devil the Members know, as well as a realization that an established body of jurisprudence and an intelligent Secretariat is all that is now required to keep most Members of the Appellate Body in check. Nevertheless, the preference for ex-WTO Ambassadors, and the growth of non-lawyers on the Appellate Body may lead to some unintended results. Appellate Body Members without formal legal training are likely to be less at ease with technical issues; are less likely to be good legal drafters; are more likely to be dependent on the WTO Appellate Body Secretariat for legal research and drafting; and are more likely to be influenced by their colleagues on the Appellate Body who have formal legal training and trade law experience. Thus, given the importance of a rule-based system for WTO Members, in particular for developing countries that can rely on rules to resist political pressure from other Members, it is somewhat surprising that Appellate Body Members without formal legal training have *always* come from developing countries.

Has the change in the make-up of the Appellate Body affected the quality of Appellate Body decisions? This is difficult to determine, but for now the answer appears to be no. In large part this could be because of the quality of the Appellate Body Secretariat which, as already mentioned, serves to a large extent as a guardian of the system. This may also be due to the quality of the early Appellate Body Members who set a clear course for the Appellate Body, as well as the quality of

---

<sup>19</sup>Ehlermann, *supra* note 10, 502.

subsequent and existing Members who have stayed the course. Nevertheless, at least one former Appellate Body Member has recognized the potential fallibility of the Appellate Body and has proposed establishment of a ten-member expert group to review and publish occasional reports on Appellate Body decisions.<sup>20</sup>

Despite the Appellate Body's overall record of success, there are reasons to be concerned about the future. The increasing politicization of the selection process by the United States in particular, and the European Union to a much lesser extent, risks bringing the legitimacy of Appellate Body decisions into question. Reports of pressure from the United States on Appellate Body Members (especially Members from the United States) to write dissenting opinions; allegations that the European Union opposed qualified Appellate Body candidates based on perceived diplomatic slights; the growing tendency of developing country Members to nominate ex-ambassadors without formal legal training to the Appellate Body; and the growing realization that Members (in particular the United States) are using the *reappointment* process as a means to pressure Appellate Body Members,<sup>21</sup> all risk jeopardizing confidence in the system. If confidence in the Appellate Body is lost, its decisions will lose legitimacy, and the effectiveness of the WTO regime will be undermined.

## 2.4 Conclusion: Possible Ways Forward

Professor Steve Charnovitz noted presciently that:

“Ultimately, however, the vitality of a system of international law that derives, in whole or in part, from the articulation of the law by judges and arbitrators must rest with the confidence of States.” That political fact complicates the role of the WTO judge and may give him less freedom to issue an unpopular opinion than a national judge enjoys. The problem is not the robust exercise of the judicial function by the Appellate Body. Rather, the problem is that the WTO legislative function remains too cumbersome and inefficient.<sup>22</sup>

Indeed, WTO Members, in addition to civil society, must retain confidence in the Appellate Body for this organ to continue to be effective. This raises the obvious

---

<sup>20</sup>Mitsuo Matsushita, Reflections on the Functioning of the Appellate Body, appearing in Marceau, *supra* note 9, 547, 558.

<sup>21</sup>These concerns are described in detail by Elsig and Pollack, *supra* note 1. In an article appearing in the 6 June 2016 edition of *The Washington Post*, Elsig, Pollack and Shaffer describe the controversy caused by the US decision to block the reappointment of Professor Chang, and the problems this decision poses for the WTO system. See The U.S. is Causing a major controversy in the World Trade Organization. Here's what's happening <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/>

<sup>22</sup>Steve Charnovitz, Judicial Independence in the World Trade Organization appearing in *International Organizations and International Dispute Settlement: Trends and Prospects* Boisson de Chazournes, Romano and Mackenzie (eds), (Transnational Publishers, Ardsley NY, 2002) 239, quoting Patrick M Norton, A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation, 85 *AJIL* (1991) 474, 505.

question for the conclusion of this chapter—what should Members do to preserve confidence in the Appellate Body and the legitimacy of the rule-based international trade regime? The following suggestions, some of which would require a consensus among Members to implement (an unlikely occurrence at the present time), may provide a helpful basis for discussion.

1. Although very unlikely to occur in the present environment, Members should agree to do away with quasi-permanent seats. The United States and the European Union have historically played a crucial role in the WTO regime, but possessing an automatic slot on the Appellate Body gives them too much leverage and lends a sense of impropriety to the decision-making process. Although the domestic political rationale for these seats is obvious, permanent seats mean that a holder can bloc a candidate (block achievement of a consensus) without fear of losing its slot in retaliation. A permanent US and EU slot also makes it unlikely for reasons of geographic balance that Canada and non-EU European Members (such as Norway and Switzerland) will have nationals on the Appellate Body.<sup>23</sup> This undermines the legitimacy of the Appellate Body as a tribunal.
2. Appellate Body Members should be individuals trained in the law or have very substantial knowledge of the covered agreements, cases interpreting these agreements, as well as other aspects of international law. Appellate Body Members should also be capable of excellent legal drafting in at least one official WTO language. They should also have an understanding of economics and the diplomatic traditions of the WTO, as well as comprehension of the international political and economic constraints facing the WTO and its Members. When Appellate Body appointments are drawn from trained legal professionals skilled in trade law who are capable legal writers, it is less likely that appointees will be dependent upon the Secretariat, or dependent upon other Appellate Body Members when exercising their functions. Independence, impartiality, legal training, drafting skills, and a sincere interest in the effectiveness of the covered agreements should be a prerequisite for appointment.
3. Closely related to the previous point, in order to preserve the legitimacy of the Appellate Body and to maintain the right environment for collegiality, appointments should be based on merit not politics. Technical knowledge of trade law, judicial acumen, and a judicial temperament should be decisive characteristics. The appointment of seasoned trade diplomats without legal training or legal skills should be discouraged, particularly given that the Director General frequently draws WTO panellists from this grouping. Appellate Body credibility will remain stronger if Appellate Body Members possess experience, legal knowledge, and drafting skills beyond the knowledge possessed by panellists.<sup>24</sup>

---

<sup>23</sup>Article 17.3 of the WTO dispute settlement Understanding requires that “The Appellate Body membership shall be broadly representative of membership in the WTO.”

<sup>24</sup>The role of WTO panellists is beyond the scope of this chapter.

4. Members should refrain from influencing appointees through the reappointment process.<sup>25</sup> The US decision to block Professor Chang's reappointment is likely to undermine the independence of Appellate Body Members from both the United States and abroad. Appellate Body Members that intend to seek reappointment are likely to be more circumspect when deciding appeals. The suggestion that the United States blocked Jennifer Hillman's reappointment also undermines the perception that Appellate Body Members are impartial and not affiliated with any government.<sup>26</sup> Suspicion, as yet unconfirmed, that the United States was not happy with Merit Janow's performance and may have discouraged her reappointment could also undermine confidence in the system.<sup>27</sup> If anything, Members should welcome Appellate Body Members who are willing to rule against their country of origin as this demonstrates respect for Article 17.3 of the DSU.<sup>28</sup> Officials from WTO Members should treat Appellate Body Members like judges and avoid post-appointment *ex parte* communication, not just in on-going cases, but during their entire tenure, including the reappointment process.

---

<sup>25</sup>Despite what is indicated in the following two notes, Baptista recently wrote that Janow and Hillman did not want to be reappointed. See *Baptista, supra* note 11, 563.

<sup>26</sup>Gary Hufbauer commented on a leading trade law blog that:

The office of the US Trade Representative has taken the little noticed but highly unfortunate step of blocking Jennifer Hillman's second term on the WTO Appellate Body. This is a bad omen, both for the World Trade Organization and the United States....

The United States has never before blocked its Appellate Body appointee from serving a second term. Since the USTR has offered no explanation for blocking Hillman, suspicions are bound to arise that the United States is displeased with her decisions on the AB and wants to name a judge who is more attentive to US positions in future cases.

These suspicions are bound to erode confidence in the WTO judicial system, and create a chilly reception for Hillman's successor appointee. (13 June 2011) [http://worldtradelaw.typepad.com/elpblog/appellate\\_body/](http://worldtradelaw.typepad.com/elpblog/appellate_body/).

<sup>27</sup>Elsig and Pollack note that:

There is no conclusive evidence on why Janow did not seek re-appointment. Some evidence from interviews suggests that USTR was concerned about cases where she was part of the three persons hearing the appeals where the AB ruled against the US. A former USTR put it more generally: "We were not happy with US AB Members who bend over backwards to show their independence by ruling against the US." In the reports written by the AB, she did not use the option of sharing an individual (usually dissenting) view. Most importantly, she was involved in an AB recommendation that disagreed with a panel that found US AD practices (so-called zeroing methodology) to be permissible. Elsig & Pollack, *supra* note 1, at 52 (footnotes omitted), (internet version).

<sup>28</sup>Article 17.3 of the WTO Dispute Settlement Understanding provides that Appellate Body Members "shall be unaffiliated with any government."

5. Stronger WTO Members should take steps to reduce the influence, or the perception of influence that they have over Appellate Body Members. Ideas to consider include:

- (a) Amending the Dispute Settlement Understanding to allow for one non-renewable term of six or eight years (thereby eliminating the influence of Members in the reappointment process). David Unterhalter and Debra Steger both note that the reappointment process makes a member vulnerable to pressure from a Member or Members;<sup>29</sup>
- (b) Making Appellate Body Members full-time employees during their term so that external influences are minimized.<sup>30</sup>

As Montesquieu remarked, and as Charnovitz repeated:

When the legislative and executive powers are united in the same power, or in the same body of magistracy, there can be then no liberty.... Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.<sup>31</sup>

The Members are the legislative power in the WTO, and like some legislatures they are deeply involved in the appointment and reappointment of judges—in this case the Members of the Appellate Body. When the Members sit as the DSB they are not sitting as judges as strictly speaking they do not craft rulings. Nevertheless, they do play an intrusive role in the judicial function of the trade system that is somewhat different from what one finds with other legislative organs. The Members not only appoint judges, they review and criticize their decisions, and as the *EC—Asbesto* case demonstrated with respect to *amicus* submission, Members can have an influence on Appellate Body behaviour.<sup>32</sup> Members also have the power, even if it is very unlikely ever to be exercised, to reject adoption of an Appellate Body report by consensus.

The Members' role in the dispute settlement system raises the question of whether the Appellate Body is a "pure" judicial body. In fact it is not. While its rulings bind parties to a dispute, strictly speaking parties can ignore Appellate Body

---

<sup>29</sup>David Unterhalter, "The Authority of an Institution: The Appellate Body under Review," appearing in Marceau, *supra* note 9, 466, 469; Debra P Steger, "The Founding of the Appellate Body," appearing in Marceau, *supra* note 9, 447, 463.

<sup>30</sup>Debra Steger also makes this point. *Ibid.* 463. An exception could perhaps be crafted for academics as they are less likely to have a conflict of interest. Nevertheless, if the justification for a permanent Appellate Body is related to the time commitment of judges, such an exception would need to be considered carefully.

<sup>31</sup>Charnovitz, *supra* note 22, 220 (quoting Montesquieu, *The Spirit of Laws*).

<sup>32</sup>Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R), DSR 2001:VII, 3243 (adopted 5 April 2001). The scolding that some Members gave the Appellate Body when it decided to issue guidelines for acceptance of *amicus* submission appears to have had a chilling effect on the Appellate Body's willingness to State that they were influenced by *amicus* submission. For a description of this matter, see Victoria Donaldson, *The Appellate Body: Institutional and Procedural Aspects*, in: Appleton and Plummer (eds) *The World Trade System: Legal, Economic and Political Analysis* (Springer, New York, 2005) 1333.

rulings if they are willing to accept a potential suspension of concessions. Furthermore, as Appellate Body reports are subject to Member scrutiny at DSB meetings, and as Appellate Body judges must tow the political and diplomatic line if they are to be reappointed, Appellate Body Members only occupy a quasi-judicial role. Nevertheless, as Ehlermann, a former Appellate Body Member noted, the “strong quasi-judicial structure set up by the DSU functions well, particularly when compared to the “inefficiency of the political decision-making process....”<sup>33</sup>

While the WTO dispute settlement system does indeed function well when compared to most international legal tribunals, greater distance between the legislative branch and the judiciary, that is, between the Members and the Appellate Body, particularly in the reappointment process, would increase independence and thus legitimacy of the Appellate Body. Likewise, greater willingness among Members to reject nominees who do not fulfil the selection criteria enunciated in Article 17.3 of the DSU would provide everyone with greater confidence in the Appellate Body as an independent organ, with well-qualified judges, free of untoward influence.

---

<sup>33</sup>Ehlermann, *supra* note 10, 595.

Judging the State in International Trade and Investment  
Law

Sovereignty Modern, the Law and the Economics

Choukroune, L. (Ed.)

2016, XIX, 222 p., Hardcover

ISBN: 978-981-10-2358-3