

## DOES THE WTO NEED A PERMANENT BODY OF PANELISTS?

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### ABSTRACT

There is a longstanding debate over the need for a permanent body of panelists at the World Trade Organization (WTO). Put most starkly by the European Communities (EC), the argument is that only full-time jurists would have the experience needed to render ‘better and more consistent rulings’ that could stand up under appellate review. India and the African Group, among others, challenge the logic of Europe’s proposal and its empirical underpinnings. Our article weighs in on this debate, offering the first statistical test of the EC’s hypothesis, that conditional on being appealed, rulings handed down by less-experienced panelists are more likely to be reversed. We find that experience matters, but only with regards to the panel’s *chair*. Indeed, on appeal, panels led by experienced chairs are far less likely to have their rulings reversed by the Appellate Body; the experience of the other panelists, by comparison, is inconsequential. The implication is that rather than constituting a permanent body of panelists, the WTO would be better served by establishing a pool of permanent chairs. As for the timeliness of panel reports, which is Europe’s—and the literature’s—other outcome of interest, we find no evidence that judicial experience matters in the least.

### I. INTRODUCTION

In proposing reforms of the World Trade Organization’s (WTO’s) Dispute Settlement Understanding (DSU), few recommendations have been as hotly debated as the need for a permanent body of panelists. Indeed, triggered by a submission from the European Communities (EC),<sup>1</sup> members of the

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<sup>1</sup> WTO, Dispute Settlement Body Special Session Document, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (TN/DS/W/1, 12 March 2002). The most recent discussion among WTO Members over DSU reforms can be found in WTO DSB Special Session Documents TN/DS/W/1 ff.

multilateral trade regime have questioned whether the DSU is well served by relying on *ad hoc* panelists who typically lack much experience. In the EC's view, a permanent body of panelists would necessarily be more experienced, and thus more likely to render 'better and more consistent rulings'.<sup>2</sup> Others disagree. India, for one, counters that in cases where the Appellate Body (AB) has reversed many of the panel's findings, 'some of the panelists had experience...'.<sup>3</sup> For its part, the African Group simply calls the EC's concerns 'largely unsubstantiated'.<sup>4</sup> They are right. For all the debate over the need for a permanent body of panelists, there is no empirical evidence that experience yields higher quality rulings that stand up better under appellate review. We seek to fill in this important gap in the literature, offering the first statistical analysis of whether reversals by the AB, as well as the timeliness of panel rulings, are a function of panelists' experience. We find that experience does matter, but only with respect to the panel's *chair*, suggesting that narrower proposals aimed at creating a body of full-time chairs<sup>5</sup> might be more efficacious.

Measuring the quality of the panel rulings is not an easy feat, but the EC submission is unambiguous about its preferred measure; namely, the likelihood that panel rulings are *overturned* by the AB.<sup>6</sup> This is a more subtle indicator than it appears at first blush, since the issue is not simply whether the ruling is appealed, but whether it is reversed. To be sure, the EC explains that rulings are often appealed for reasons that have nothing to do with panelists' experience, most notably 'the complexities and novelty of the legal claims at issue'.<sup>7</sup> In this sense, Europe's hypothesis is that, *conditional* on being appealed, the panel's ruling is more likely to be overturned by less-experienced panelists. We test this hypothesis on data for all WTO disputes from 1995 to 2008. Our results indicate that the EC is right to argue that experience matters, but its proposal misses the mark, in that only the

<sup>2</sup> *Ibid* at 3.

<sup>3</sup> WTO, Dispute Settlement Body Special Session Document, India's Questions to the European Communities and Its Member States on Their Proposal Relating to Improvements of the DSU (TN/DS/W/5, 7 May 2002) para [8].

<sup>4</sup> WTO, Dispute Settlement Body Special Session Document, Negotiations on the Dispute Settlement Understanding – Proposal by the African Group (TN/DS/W/15, 25 September 2002) para [11].

<sup>5</sup> See, eg Michael Cartland, 'Comment on a WTO Permanent Panel Body' 6(1) *JIEL* (2003) 214–8; WTO, Dispute Settlement Body Special Session Document, Contribution to Clarify and Improve the Dispute Understanding: Panel System – Communication from Thailand (TN/DS/W/31, 22 January 2003).

<sup>6</sup> WTO, Dispute Settlement Body Special Session Document, Negotiations on the Dispute Settlement Understanding – Proposal by the African Group, above n 4.

<sup>7</sup> WTO, Dispute Settlement Body Special Session Document, The European Communities' Replies to India's Questions (TN/DS/W/7, 30 May 2002), at 3; As Lacarte explains, 'Members have repeatedly lodged appeals against panel rulings that have gone against them'. Julio Lacarte, 'Comment on a WTO Permanent Panel Body', 6(1) *JIEL* (2003) 227–30.

panel chair's experience matters; the experience of the two other panelists has no effect on the likelihood of a ruling being overturned. The timeliness of a panel report, which is Europe's other measure of quality, is not influenced by the experience of the panelists.

Our findings thus constitute a limited endorsement of the EC's submission, lending weight, instead, to more narrow proposals advanced by the Members,<sup>8</sup> scholars<sup>9</sup> and the WTO's Consultative Board itself,<sup>10</sup> that the DSU should establish a body of permanent chairs. Rather, panel chairs are the key to sponsoring 'better and more consistent' rulings.

The article proceeds as follows. Section II frames the debate over permanent panelists in order to motivate our hypothesis. Section III explains our data and methodology. Section IV discusses our findings. Section V concludes.

## II. THE DEBATE

The process for selecting panelists is set out in Article 8 of the DSU. These guidelines establish the required qualifications of a panelist, but in fact the only binding requirement concerns nationality, in that a panelist cannot serve if they are a national of one of the main parties to the dispute (i.e. the complainant or respondent) *or* one of the third parties. Even this, however, is hard to uphold, given that the EC and the United States, for example, are involved in one of these capacities in nearly every dispute.

As per DSU 8.6, the formation of a panel begins with the Secretariat proposing panelists to the complainant and the respondent, either of which can *block* a nomination. Indeed, even though the DSU says that they can only do this for 'compelling reasons', blockings occur with great frequency. If, after a 20-day period, the litigants have not agreed on the panelists, the Director General (DG) must appoint the panelists himself. This, as it turns out, is becoming the norm; the DG has had to appoint panelists in 56% of all cases, highlighting the lack of consensus among the main parties in making these selections.<sup>11</sup> Not surprisingly, the process of composing the panel routinely goes beyond the time limits outlined in the DSU.<sup>12</sup>

<sup>8</sup> WTO, Dispute Settlement Body Special Session Document, Contribution to Clarify and Improve the Dispute Understanding: Panel System – Communication from Thailand, above (n 5).

<sup>9</sup> Thomas Cottier, 'The WTO Permanent Panel Body: A Bridge Too Far?', 6(1) *JIEL* (2003) 187–202; See Cartland, above (n 5), at 218.

<sup>10</sup> Peter Sutherland and others, *The Future of the WTO: Addressing the Institutional Challenges of the New Millennium* (The World Trade Organization, 2004, at 57).

<sup>11</sup> In nearly all of these cases, the DG has appointed all the three panelists.

<sup>12</sup> WTO, Dispute Settlement Body Special Session Document, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, above n 1; Paolo Garzotti, 'Non-Paper: The Benefits of Moving from ad hoc to more Permanent Panelists', The European Commission (DG Trade/D/3/PG, 10 July 2002).

More important still, the blocking of panelists is argued to undermine the prospects of putting together an experienced panel, since Members often object to some particular names from a previous panel, one that presumably led to an unfavorable ruling in the past.<sup>13</sup>

Whether or not the strategic selection of panelists is actually to blame, the literature is broadly of the view that the system of *ad hoc* panelists results in less judicial experience. The data confirm this suspicion; the average panelist has served on 2.2 panels, and fully 55% of all panels have two or more first-time members. Some observers argue that this lack of experience is one of the major weaknesses of the WTO's dispute settlement system. Reflecting on the DSU's first few years, for example, Robert Hudec suggested that *most* of the problems surrounding the panel process 'come back to problems centering on the panel members—their professional qualifications and part-time participation'.<sup>14</sup> Likewise, William Davey contends that the current system could be 'substantially improved' through more experienced panelists.<sup>15</sup> Paolo Garzotti adds that relying on panelists who have typically been on only one or two panels results in 'steep learning curves and constant revisiting of seemingly settled issues',<sup>16</sup> which has negative consequences for both the consistency and the quality of rulings.

Views of this sort have led to a series of proposals to move from *ad hoc* panelists to a smaller roster consisting of permanent, full-time jurists who, by virtue of serving on many panels over time, would quickly gain the experience needed to render better quality rulings. This idea for reform is by no means novel; at a time when the dispute settlement procedures under the General Agreement on Tariffs and Trade (GATT) were first being codified in the 1979 *Improvements*, John Jackson called for a 'panel list' consisting of 20 people available to serve on any GATT panel over a minimum period of 2 years.<sup>17</sup>

The literature, however, is far from unanimous in support of this reform. For example, Michael Cartland, a former WTO panelist, argues that previous exposure to WTO panels matters little as a predictor of the quality of rulings.<sup>18</sup> Since most panelists, regardless of their previous WTO experience, have considerable outside trade and legal expertise, Cartland contends that defining experience as the number of previous panels served is highly misleading, not least because panelists have access to expert opinions.

<sup>13</sup> Association of the Bar of the City of New York *Composition of WTO Dispute Settlement Panels* (The Committee on International Trade, 2005, at 4). See also Cottier, above (n 9), at 194.

<sup>14</sup> Robert E Hudec, 'The New WTO Dispute Settlement Procedures: An Overview of the First Three Years', 8(1) *Minnesota Journal of Global Trade* (1999) 1–53.

<sup>15</sup> William J Davey, 'The Case for a WTO Permanent Panel Body', 6(1) *JIEL* (2003) 177–86.

<sup>16</sup> Garzotti (n 12).

<sup>17</sup> John Jackson, 'Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT', 13(1) *Journal of World Trade Law* (1979) 1–21.

<sup>18</sup> Cartland (n 5).

To be sure, scholars argue that the considerable role played by the Secretariat, which provides ‘legal advice, specialist advice, and secretarial support’<sup>19</sup> to panels, likely means that the variation in the experience of panelists should have little independent effect.<sup>20</sup> Even Davey, one of the chief scholarly advocates of the reform, remains diffident in predicting the degree of improvement in the rate of AB reversals, stating that he ‘hesitate[s] to argue that the results of the panel process would be noticeably different’.<sup>21</sup>

Others carve out a slightly different argument, emphasizing the importance not of panelists in general, but of panel *chairs*. In this view, as Thomas Cottier explains, there is ‘a general feeling that most panelists lack experience’, but that most chairs are veterans of a good number of panels. Indeed, while the DSU does not include separate procedures for appointing panel chairs, many observers concur that they hold a privileged place on panels, and that their experience counterbalances the relative inexperience of their colleagues. For example, Davey notes that, while most panelists are first-timers, chairs are more seasoned, pointing out that of ‘the 61 WTO panels composed through 31 October 2000, all but 13 were chaired by persons with prior panel experience’.<sup>22</sup> Looking at all disputes through 2008, the proportion of panels with inexperienced chairs is even higher (34%). Yet the belief in the special role played by chairs has led a number of scholars and Members to propose creating a roster of chairs while retaining *ad hoc* panelists.<sup>23</sup>

The debate over panelists’ experience gained considerable attention in light of the EC’s 2002 submission on the need for permanent panelists. Indeed, the topic preoccupied an entire symposium featured in the pages of the *Journal of International Economic Law*.<sup>24</sup> Europe’s proposal is premised on the notion that the WTO’s caseload, and the complexity of the legal

<sup>19</sup> Ibid at 217.

<sup>20</sup> Such is the belief in the influence of the Secretariat that some scholars have gone so far as to suggest that one of the main benefits of a permanent panel body would be precisely to minimize the influence of the Secretariat, since presumably a permanent body would be less reliant on the Secretariat’s assistance. This greater independence of panels, it is argued, could increase the perceived legitimacy of the panel system. See, eg Ernst-Ulrich Petersmann, ‘WTO Negotiators Meet Academics’, 6(1) JIEL (2003) 1237–50, at 1241–2; Debra Steger, *WTO Dispute Settlement: Systemic Issues* (MS, University of Ottawa, Faculty of Law Roundtable, 2005), at 58.

<sup>21</sup> Davey (n 15) at 179.

<sup>22</sup> William J Davey, ‘A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?’, in Daniel L M Kennedy and James D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press 2002) 496–527.

<sup>23</sup> WTO, Dispute Settlement Body Special Session Document, Contribution to Clarify and Improve the Dispute Understanding: Panel System – Communication from Thailand (n 5); Cottier (n 9); Cartland (n 5).

<sup>24</sup> 6(1) JIEL (2003).

issues brought before it, demands a more experienced body of jurists.<sup>25</sup> The EC claims that this reform would lessen the concern over the nationality of panelists and speed up the process of constituting panels,<sup>26</sup> but argues, first and foremost, that the main effect would be greater consistency and an increased quality of panel rulings. The best proxy for the quality of rulings, according to the EC, is the rate of *reversals by the AB*, the argument being that more experienced panelists, with a better understanding of the AB's jurisprudence, would produce rulings that, on appeal, are less likely to be overturned. Importantly, the EC recognizes that judicial experience has little effect on the rate of appeals itself, which owes more to the parties' interests in the dispute at hand, and the relevant case law. Rather, the experience of panelists would limit the need for the AB to revisit findings, *conditional* on the dispute being appealed in the first place. Our article offers the first empirical test of this conditional hypothesis.

Of course, it would not be much of a debate if all Members agreed with the merits of the EC's proposal. But they do not. India, for example, has expressed grave reservations, as has the African Group, which has been unambiguous in its views: 'There is no case for establishing a permanent body of panelists'.<sup>27</sup> Specifically, it has questioned any link between the quality of rulings and judicial experience in the sense understood by the EC: 'Improving the quality of panel reports is not a question of tenure of the panelists'.<sup>28</sup> The African Group has gone further, however, pointing out that the EC's claims, as well as its suggested reforms, rest on a set of 'largely unsubstantiated' premises.<sup>29</sup> This last criticism is entirely accurate; for all the like-minded proposals and critiques by other Members, as well as the considerable scholarship that has been brought to bear on the issue, there is no empirical evidence showing *any* link between judicial experience and the quality of rulings, however defined. We seek to correct this,

<sup>25</sup> WTO, Dispute Settlement Body Special Session Document, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (n 1).

<sup>26</sup> Interestingly, some view these limitations due to nationality as a great benefit of the current system, which 'contributes to the balance of the system', since having smaller countries contribute their nationals as panelists confronts the perception that the WTO is 'a de facto directorate of large trading nations'. Cartland (n 5), at 192.

<sup>27</sup> WTO, Dispute Settlement Body Special Session Document, India's Questions to the European Communities and Its Member States on Their Proposal Relating to Improvements of the DSU (n 3); WTO, Dispute Settlement Body Special Session Document, Negotiations on the Dispute Settlement Understanding – Proposal by the African Group (n 4), at 6.

<sup>28</sup> WTO, Dispute Settlement Body Special Session Document, Negotiations on the Dispute Settlement Understanding – Proposal by the African Group (n 4) at 6.

<sup>29</sup> WTO, Dispute Settlement Body Special Session Document, India's Questions to the European Communities and Its Member States on Their Proposal Relating to Improvements of the DSU, above (n 3); WTO, Dispute Settlement Body Special Session Document, Negotiations on the Dispute Settlement Understanding – Proposal by the African Group (n 4) at 6.

evaluating the influence of judicial experience on the odds of reversal by the AB, as well as the timeliness of a panel ruling. Importantly, we disentangle the role of chairs from that of other panel members, separating out their impact on these indicators.

### III. DATA AND METHODOLOGY

Our data includes every panel report issued from the WTO's inception in 1995 to the end of 2008, covering 119 panel reports, on which a total of 189 individual panelists have served. We collected data on the prior experience of panelists and chairs, their nationality, their role as panelist or chair, as well as a number of characteristics of the disputes at hand. These data are derived from the World Bank-sponsored WTO dataset, compiled by Horn and Mavroidis,<sup>30</sup> and updated to the most recent panel rulings. All data are available from the authors upon request.

The main hypothesis we test comes directly from the EC's proposal: namely, that *conditional on being appealed, the ruling of a more experienced panel is less likely to be reversed by the AB*. This conditional hypothesis requires some elaboration. The EC is of the belief that there are a variety of factors that are likely to result in a panel ruling being appealed, few (if any) of which relate to the experience of the panelists per se. Rather, dispute-specific attributes, such as whether the case centered on politically fraught issues, such as sanitary and phytosanitary (SPS) standards, for example, may contribute to this. Thus, the EC argument is more nuanced than simply that inexperience results in more reversal. Rather, the hypothesis is that, *conditional on its ruling being appealed* (i.e. given that certain dispute-specific attributes make this more likely in the first place), the lack of experience of panelists should increase the odds of reversal by the AB. To test this hypothesis, we thus need to estimate a *selection model*,<sup>31</sup> where we begin by estimating the chances of appeal, and, conditional on this, the likelihood that the inexperience of panelists increases the odds of reversal by the AB. In other words, to look just at whether inexperienced panelists are more likely to have their rulings reversed would fail to get at the logic of the EC's hypothesis, since some rulings are more likely to be appealed because of the dispute-specific attributes, and this needs to be controlled for in attributing a greater likelihood of reversal to the inexperience of panelists.

Our outcome of interest, owing to the importance it is given in the EC proposal, is whether the AB overturns the panel's ruling. The variable is coded 1 if the panel's decision has been 'substantively overturned', that is, reversed on one or more points by the AB, which occurs in roughly half the

<sup>30</sup> Henrik Horn and Petros C. Mavroidis, 'The WTO Dispute Settlement Data Set' <<http://go.worldbank.org/X5EZPHXJY0>> accessed 9 January 2009.

<sup>31</sup> Specifically, we estimate a Heckman selection model.

cases in our data, and 0 otherwise. This constitutes an admittedly low threshold of reversal, since we are interested not as much in the overall direction of rulings as in identifying the AB's interventions in modifying the content of those rulings. We model the probability of this taking place as being conditional on appeal, which is coded 1 if either of the main parties appeals a decision by the panel, and 0 otherwise.

In addition to looking at whether the AB reverses the panel, we test a secondary hypothesis. The two benefits of reform outlined at the outset of the EC proposal are, on the one hand, an increase in the quality of rulings, which we have addressed above and, on the other, 'faster [panel] procedures'.<sup>32</sup> As Europe explains in its submission, 'it is not only because of procedural developments... that cases take more time to handle. It is also due to the increased complexity of the substance of the cases brought before the panels...'.<sup>33</sup> In other words, the hypothesis is that more experienced panelists would be better able to handle complex matters in a timely manner, and this would, in turn, reduce the time needed for panels to render a verdict. Garzotti echoes this sentiment, insisting that panels over the first 6 years of the WTO took 3 months longer on average to produce verdicts than the allotted time stipulated in the DSU.<sup>34</sup> Davey similarly emphasizes timeliness, citing it as the *first* reason behind the need for reform. Indeed, he predicts a decrease in the time between panel formation and the circulation of reports under a permanent roster by as much as 'three, even four months on average'.<sup>35</sup>

Given the importance attributed to fast and efficient panel procedures, and the link made by the EC between timeliness and judicial experience, we test this effect empirically. In particular, we code for the number of days elapsed between the formation of the panel and the circulation of its report, and examine to what extent, if any, it is influenced by judicial experience.

Our main explanatory variable is the experience of the panel. We take two cuts at this question. First, we code for the total number of previous panels that *all* three panelists have served on. Second, we code this variable individually for each panelist, and separate the experience of the panelists from that of the panel chair.

Throughout our analysis, we control for a number of dispute-specific characteristics that might be correlated with a higher degree of legal complexity or political sensitivity, since both could bear on our indicators of

<sup>32</sup> WTO, Dispute Settlement Body Special Session Document, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (n 1) at 2.

<sup>33</sup> Ibid.

<sup>34</sup> Garzotti (n 12) at 2.

<sup>35</sup> Davey (n 15) 177.

ruling quality. These include indicators for SPS cases, agriculture cases and non-violation nullification or impairment cases, all of which are considered proxies for politically sensitive issues.<sup>36</sup> We also control for the number of countries joining a dispute as a third party, which not only indicates the degree of interest in the case by the wider membership but may also have an independent effect, since previous research shows that third parties may affect both the direction<sup>37</sup> and the content<sup>38</sup> of panel rulings.

As a measure of both the complexity and legal merits of disputes, we include a count variable indicating the number of articles cited by the complainant(s). Whether or not, as some of the literature claims, a high number of articles cited denotes a 'kitchen sink' strategy typical of complainants arguing a *weak* case, the number of articles cited has the unquestionable effect of increasing the panel's work. Indeed, as Davey observes, the increasing number of articles cited from the inception of the WTO is, in itself, a good reason for moving away from *ad hoc* panelists, suggesting that the institution's greater workload might be better handled by more experienced panelists.

Because some of the past literature has indicated that the market power of countries, and their importance within the dispute settlement system, may affect the behavior of panels, and because the type of cases brought by these countries may differ from the norm, we include indicators for all cases in which either the EC or the United States is the complainant or respondent in a dispute.

Finally, we control for the exercise of judicial economy in all our tests. Indeed, previous work suggests that judicial economy is *the* means by which panels respond to the wider membership's concern about the case law that results from a dispute.<sup>39</sup> We also control for cases where the panel speaks of the possibility of exercising judicial economy, but refrains from doing so, usually by citing concerns about 'finishing the analysis' for the sake of the AB. This practice is usually referred to as 'judicial cooperation'. Since judicial economy affects the content of the agreement, it may also conceivably affect the likelihood that the parties to the dispute appeal parts of the panel decision, and the time necessary for the panel to render its verdict.

<sup>36</sup> Marc L Busch and Eric Reinhardt, 'Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement', in Ernst-Ulrich Petersmann and Mark A Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (OUP, Oxford 2003) 465–86; Marc L Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', 58(3) *World Politics* (2006) 446–77.

<sup>37</sup> Marc L Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', *ibid.*

<sup>38</sup> Marc L Busch and Krzysztof J Pelc, 'The Politics of Judicial Economy at the World Trade Organization,' *International Organization* (forthcoming).

<sup>39</sup> *Ibid.*

Before proceeding to our analysis, two sets of statistics merit attention. First, one aspect of the reforms that commentators draw attention to is the representation of developing countries on panels under the *ad hoc* system, and how the EC's proposed reform might affect this representation. One striking fact, in this regard, is that, despite representing 21% of the WTO membership, least-developed countries have not contributed a *single* panelist to any dispute proceedings since the WTO's inception. The only exception to this is an individual from Bangladesh who served on a 21.5 panel but was not part of the original panel in that dispute.<sup>40</sup> By comparison, developing countries on the list of recipients benefiting from the Generalized System of Preferences (GSP) provide about 30% of panelists, which, as Davey remarks, is in keeping with their level of participation as complainants and respondents,<sup>41</sup> although less than their representation in the membership.

Along these lines, it is interesting to ask whether the disputes where the DG has appointed panelists have led to more developing country panelists than those disputes where parties were able to agree on the choice of panelists. Looking at the data, panels where the DG had to appoint panelists do, in fact, have a slightly higher proportion of developing country participation,<sup>42</sup> though this difference is *not* statistically significant.

Second, there has been much discussion about the breakdown of panelists by nationality, though data have seldom been brought to bear on this issue. Table 1 yields a stark picture. The United States, despite its disproportionate presence in most aspects of the DSU, has supplied only 11 panelists to WTO proceedings. By comparison, the EC accounts for 111 panelists, a plurality of whom are Swiss nationals. New Zealand and Australia are also strongly represented on WTO panels, having provided 37 and 35 panelists, respectively. The point is that, as is true of virtually everything else argued about panelists (and their experience), the data belie much of the conventional wisdom.

#### IV. FINDINGS

In our model, we are careful to differentiate the dispute characteristics that are likely to affect the likelihood of appeal (the selection equation) from those affecting reversal by the AB (the outcome equation). Since the decision

<sup>40</sup> See WTO Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5* (WT/DS264/RW, adopted 3 April 2006). Note that the data we rely on in our analysis do *not* include 21.5 panels.

<sup>41</sup> Davey, above n 15; Jacques HJ Bourgeois, 'Comment on a WTO Permanent Panel Body', 6(1) *JIEL* (2003) 211–4.

<sup>42</sup> The statistic is 0.94 developing country panelists per panel, as opposed to 0.82 developing country panelists per panel in disputes where the parties arrived at a choice themselves, though this difference is not statistically significant at the 95% level.

Table 1. Breakdown of WTO Panelists, by Country

Top 10 providers of panelists		Top 10 providers of panelists within the EC	
Country	Number of panelists	Country	Number of panelists
EC	111	Switzerland	33
New Zealand	37	Poland	14
Australia	35	Germany	13
Canada	20	Sweden	9
Brazil	20	Norway	7
India	17	Belgium	5
Chile	15	Finland	4
South Africa	15	Iceland	2
Mexico	12	Hungary	2
United States	11	Bulgaria	2

Time period: 1995–2008.

over appeal falls on the Members themselves, we control for the presence of powerful states as parties to a dispute in the selection equation by including controls for the EC and the United States as either complainant or respondent. Judicial economy is included in both the selection and the outcome equation, since it is often exercised in anticipation of AB behavior, and since it is often the grounds for appeal by the parties.<sup>43</sup> By comparison, judicial cooperation is included in the outcome equation because it, too, reflects concern over the behavior of the AB, yet since its use is rarely, if ever, appealed, we do not include it in the selection equation.

The first thing to note about our findings is that the correlation between the selection equation and the outcome equation is negative and statistically different from zero, thus confirming the need to follow the EC proposal's lead and model this hypothesis as a conditional one. Put another way, a simple one-stage test, which would have disregarded the conditional aspect of the model and looked directly at the likelihood of AB reversal (Table 2), would have been subject to selection bias. We avoid this pitfall by formally taking it into account.

The results of our model are compelling. Controlling for dispute-specific attributes, and conditional on being appealed, a ruling is far more likely to be overturned by the AB when the panel is relatively inexperienced. Indeed, this finding is highly significant.<sup>44</sup> We can interpret the substantive effect of this finding. Keeping all other variables at their sample mean, an entirely inexperienced panel—which is hardly a rare occurrence—faces a likelihood

<sup>43</sup> See, eg WTO Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* (WT/DS294/AB/R, adopted 18 April 2006), para [26].

<sup>44</sup> In particular,  $p < 0.001$ .

Table 2. Heckman Probit Model of Panel Experience on AB Reversals

	Appeal		AB overturn	
	Coefficient	SE	Coefficient	SE
Total judicial experience	–	–	–0.115***	0.020
SPS cases	0.512	0.652	0.416	0.599
Agriculture cases	0.066	0.272	–0.271	0.289
Non-violation cases	0.140	0.457	0.361	0.476
Number of third parties	0.007	0.029	0.035	0.029
Number of articles cited	–0.031**	0.013	0.050***	0.010
Judicial economy	0.116	0.258	–0.382*	0.232
Judicial cooperation	–	–	0.520	0.472
US complainant	0.346	0.296	–	–
US respondent	0.776***	0.276	–	–
EC complainant	0.320	0.285	–	–
EC respondent	0.443*	0.263	–	–
Constant	0.136	0.293	0.162	0.198

$n = 115$  observations, 33 censored. Model  $\chi^2 = 65.97^{***}$  (8).

\* $p < 0.10$  (two-tailed); \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

of reversal of 80%.<sup>45</sup> If the experience of the panel were set to the sample mean, corresponding to one previous panel per panelist, the odds of reversal by the AB would fall by 12%, to 68%.<sup>46</sup> But if the experience of the panel were set one standard deviation above the mean, corresponding to two previous disputes per panelist, or six panels over all three panelists, this would further decrease the likelihood of reversal by another 13%, to 55%.<sup>47</sup> In short, looking at the experience of the panel, in aggregate, the EC's hypothesis would appear to be borne out. We return to this below.

Moreover, the EC's insistence that the odds of appeal trace to factors other than the panel's experience is confirmed as well. Most notably, and corroborating the view that the number of articles cited is an indicator of weaker legal merits, this variable has an opposite effect in the two stages of the model. The greater the number of articles cited, the *lower* the likelihood of appeal, but the *higher* the likelihood of being overturned by the AB, conditional on the case being appealed in the first place. Substantively, an otherwise average dispute with only one article cited leads to a likelihood of appeal of 48%.<sup>48</sup> Raising the number of articles cited to the mean, which corresponds to about 10, increases the probability of AB reversal by 17%.<sup>49</sup>

<sup>45</sup> The 95% confidence bands around this estimate are [0.69, 0.88].

<sup>46</sup> The 95% confidence bands around this estimate are [0.60, 0.73].

<sup>47</sup> The 95% confidence bands around this estimate are [0.49, 0.62].

<sup>48</sup> The 95% confidence bands around this estimate are [0.37, 0.59].

<sup>49</sup> Corresponding to a likelihood of 66%. The 95% confidence bands around this estimate are [0.57, 0.74].

It is also worth noting that the exercise of judicial economy seems to hold some negative effect on the likelihood of the AB reversing the panel's findings. While this effect appears to be on the limit of significance,<sup>50</sup> it is interesting that the exercise of judicial economy and judicial cooperation consistently demonstrate opposite effects on the odds of reversal across all our tests. In other words, the decisions that are skipped through judicial economy appear to be decisions that are highly likely of being overturned by the AB, which may offer some insight into the incentives facing the panel in choosing to exercise this issue-avoidance technique. In substantive terms, when the panel exercises judicial economy, it is 14% less likely to see some of its decisions reversed by the AB.<sup>51</sup> Finally, and as per the EC proposal, when we rerun this model with judicial experience in the selection equation as well, it has strictly *no* effect on the likelihood of appeal.

But the question remains: is it the experience of the panel *in toto*, or does it all boil down to the chair's experience? We can get at this question by separating the effect of the experience of each of the three panelists. This is worth doing, since, as mentioned above, much of the literature assigns special importance to the experience of the chair in relation to the two other panelists. The disaggregated results are shown in Table 3, and are unambiguous: *all of the effect of judicial experience identified in the previous model is attributable to the chair of the panel.* Indeed, the impact of the experience of the other two panelists is statistically insignificant; only the chair's experience matters. To get a sense for the weight of this result, consider the substantive effect of varying the chair's experience from the sample mean, which is one previous panel, to one standard deviation over the mean, which is three previous panels. This change, holding all other variables in the model at their sample mean, leads to a decrease in the likelihood of reversal by 14%, a finding that is highly statistically significant.<sup>52</sup> Looking at the model's first stage, for which the outcome is the likelihood of appeal, the variable with consistently significant effect is the presence of the United States as a respondent. In particular, the United States seems to render appeals 25% *more* likely when it is the defendant,<sup>53</sup> an effect equaled neither in terms of substantive nor statistical significance by the EC. Once again, the model's two equations are negatively correlated, confirming the need for the

<sup>50</sup> In particular,  $p = 0.10$ .

<sup>51</sup> This corresponds to a change from 61% [0.48, 0.74] to 75% [0.64, 0.84].

<sup>52</sup> In particular,  $p < 0.01$ . More extremely, going from the minimum chair experience (no previous panels) to the maximum observed in our data (eight previous panels) results in a reduction of 48% in the likelihood of reversal by the AB.

<sup>53</sup> This is the substantive effect for the disaggregated judicial experience model presented in Table 3, corresponding to a change from 57% [0.45, 0.69] to 82% [0.71, 0.90]. The equivalent effect for the aggregated judicial experience is slightly *higher*.

Table 3. Heckman Probit Model of panel chair experience on AB reversals

	Appeal		AB overturn	
	Coefficient	SE	Coefficient	SE
Chair experience	–	–	–0.187***	0.066
Panelist2 experience	–	–	–0.043	0.116
Panelist3 experience	–	–	0.035	0.127
SPS cases	0.563	0.672	0.401	0.649
Agriculture cases	0.041	0.274	–0.154	0.288
Non-violation cases	0.141	0.476	0.297	0.482
Number of third parties	0.007	0.029	0.031	0.030
Number of articles cited	–0.029**	0.015	0.052***	0.017
Judicial economy	0.129	0.286	–0.410	0.288
Judicial cooperation	–	–	0.519	0.460
US complainant	0.289	0.323	–	–
US respondent	0.749***	0.275	–	–
EC complainant	0.294	0.279	–	–
EC respondent	0.414	0.332	–	–
Constant	0.149	0.348	0.051	0.257

$n = 115$  observations, 33 censored. Model  $\chi^2 = 61.54^{***}$  (10).

\* $p < 0.10$  (two-tailed); \*\* $p < 0.5$ ; \*\*\* $p < 0.01$ .

selection model, and the number of articles cited is significant in both stages, with opposite effects in each. The bottom line is that the chair's experience is the key to whether a ruling holds up under appellate review, conditional on the dispute being appealed in the first place. This result endorses the recommendation that the WTO constitute a permanent body of panel chairs, rather than replace the *ad hoc* rosters of panelists more generally.

Next, we move to our secondary hypothesis, which aims to assess the link between judicial experience and the timeliness of reports. We control for factors which may affect the complexity, and thus length, of deliberations, and this by including controls for SPS cases, agriculture cases and non-violation cases; the number of third parties, since their submissions add to the proceedings; the exercise of judicial economy (cooperation), since this reduces (increases) the task faced by the panel; and the number of articles cited, which is perhaps the clearest proxy for the panel's workload. Looking at Table 4, neither the experience of the panel as a whole nor the experience of the chair has any significant effect on the length of deliberations. In fact, the only factor of any consequence in this regard is the number of articles cited. All other variables are insignificant. In view of the hypothesized effect in the EC proposal, as well as scholarly opinions on the subject, this null finding is interesting in its own right. While the switch from *ad hoc* rosters to a permanent list may reduce the delays in the formation of panels, these results cast doubt on the prevalent belief that the increased judicial experience resulting from permanent panelists would significantly cut the time needed to render a verdict.

Table 4. OLS of the effect of judicial experience on timeliness of WTO panel reports

	(1) Total panel experience		(2) Chair experience	
	Coefficient	SE	Coefficient	SE
Total experience	5.361	6.115	–	–
Chair experience	–	–	6.266	8.816
Panelist2 experience	–	–	5.603	12.949
Panelist3 experience	–	–	12.497	17.925
SPS cases	35.266	34.859	35.250	36.375
Agriculture cases	64.343	55.357	63.474	56.476
Non-violation cases	–12.144	27.384	–14.195	27.426
Number of third parties	3.310	2.464	3.156	2.504
Number of articles cited	2.522**	1.268	2.592**	1.253
Judicial economy	–0.104	24.665	0.240	24.953
Judicial cooperation	10.179	40.050	11.887	40.854
US or EC complainant	6.202	24.639	7.740	24.827
US or EC respondent	–7.433	26.094	–8.207	26.268
Constant	331.715***	30.456	330.995***	30.491

$n = 115$  observations.  $r^2 = 0.12$  for (1) and 0.13 for (2).

\* $p < 0.10$  (two-tailed); \*\* $p < 0.5$ ; \*\*\* $p < 0.01$ .

## V. CONCLUSION

There has been much debate over the need for a permanent body of panelists at the WTO to deliver quality verdicts in a timely manner. Framing the issue most boldly, the EC insists that only full-time jurists would have the experience needed to render ‘better and more consistent rulings’<sup>54</sup> that could stand up under appellate review. Others dissent from this view, India and the African Group foremost among them. Echoing sentiments in the scholarly literature, they question the logic of Europe’s proposal and challenge its empirical underpinnings. Our article weighs in on this debate, offering the first statistical test of the EC’s hypothesis that, conditional on being appealed, rulings handed down by less-experienced panelists are more likely to be reversed. We find that experience does, in fact, matter, but only that of the panel’s chair. Indeed, on appeal, panels led by experienced chairs are far less likely to have their rulings reversed by the AB, regardless of how many previous disputes the other panelists have served on. This result constitutes a limited endorsement of the EC’s proposal for a permanent body of panelists, suggesting, instead, that the WTO would be well served establishing a pool of permanent chairs. Finally, in terms of the timeliness of a panel report, which is Europe’s (and the literature’s) other outcome of interest, we find no evidence that the experience of panelists, including

<sup>54</sup> WTO, Dispute Settlement Body Special Session Document, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (n 1) at 3.

chairs, matters. Taken together, our findings caution against taking too broad a perspective on panelists' experience at the WTO, since only the chair's experience figures prominently in this respect. Our findings also warn against conflating different measures of 'better and more consistent rulings', given that factors such as the chair's experience, which make reversals by the AB less likely, have no bearing on the timeliness of panel reports.