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**Katia Fach Gómez,**  
LL.M.  
*University of Zaragoza*

[View profile](#)



**Weiwei Zhang,**  
LL.M.  
*The Graduate Institute,  
Geneva*

[View profile](#)

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## The Outsider as Insider: Profiling WTO Panelists for their Impact on World Trade Decisions by M.G. Sarmiento

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# The Outsider as Insider: Profiling WTO Panelists for their Impact on World Trade Decisions

Maria Gabriela Sarmiento<sup>1</sup>

Sarmiento Núñez Consulting, Main Office Caracas & Branch Office Zurich

## Abstract

*This article explores the implications and the impact of the composition of trade dispute panels on decision-making on global trade at the World Trade Organization (WTO). The main questions raised are:*

- *Would it influence the panels' decision to have adjudicators with or without a Law background?*
- *How much is the WTO Secretariat influencing the case-by-case analysis and outcome of adjudications?*

*The article focuses on International Trade Dispute Settlement Adjudicators, who do not possess a Law degree. Special emphasis is given to members of ad-hoc panels and the Appellate Body (AB), which are dispute settlement mechanisms in place within the WTO Dispute Settlement System (DSS). These panel members are appointed in accordance with the Rules and Procedures of the WTO DSS set out in the framework of the Dispute Settlement Understanding (DSU).*

*Panel and AB decisions, respectively, are not considered awards, and produce no res judicata effects, and are not meant to establish any kind of compensation. The settlement procedure is followed to establish whether there was a breach of the WTO Agreements, and nothing else. These decisions are merely reports, which contain recommendations to be adopted by the Dispute Settlement Body (DSB), formed by the representatives of all WTO Member States.*

*The ad-hoc tripartite panels are constituted of individuals who may or may not have pursued law studies. It has been affirmed that in numerous cases, panels are composed of a trade expert, a diplomat, and a lawyer. The panel may or may not be chaired by a panelist with a law degree. In the case of trade remedy cases, each panel is supported by a team of highly qualified lawyers employed at the WTO Secretariat, specifically, within the WTO Rules Division (RD) and the Legal Affairs Division (LAD).*

*The research objective is to arrive at a better understanding of the decision-making process at this multilateral organization through a frame of classification using the existing data on WTO panelists by subject matter and author. This process will lead to an analysis of the panelists' capabilities and characteristics, as well as the panelists' decision-making process. Which interrogations have been granted an answer and which ones remain open? Providing an approximate view to the latter questions is the main challenge of this article.*

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<sup>1</sup> Law degree, Universidad Central de Venezuela. Admitted to practice in Caracas (1996). LL.M in *Droit des affaires internationales*, Université de Bourgogne, Dijon, France (1998). ILO / IUSE International Trade Law Postgraduate Course Certificate, International Training Centre, Turin, Italy (2003) mg.sarmiento@snconsult.com <https://ch.linkedin.com/in/mgsarmiento/>

## I. Introduction

A tribunal established by the international community to exercise jurisdiction over disputes involving private parties, as well as State-to-State disputes, is designated by Helfer and Slaughter (1997)<sup>2</sup> as a “supranational” adjudicative body which acquires legal legitimacy from the moment the founding States or other nations consent to submit a dispute to that specific body, notwithstanding the existence of other jurisdictional or non-jurisdictional fora. The selected body limits its scope to the mandate of adjudicating a certain dispute. The WTO adjudicative system is formed of a Dispute Settlement Body (DSB) composed of all WTO Member States, and offers to settle disputes using two mechanisms: ad-hoc panels, a permanent Appellate Body (AB) with seven members and a Secretariat providing legal and administrative support to the Appellate Body.

The article pays attention to international trade dispute settlement adjudicators who do not possess a law degree. Special emphasis is given to members of ad-hoc panels and AB members. These panels and AB members are appointed following the Rules and Procedures set out in the framework of the Dispute Settlement Understanding (DSU) of the WTO Dispute Settlement System (DSS). (Part III below).

The ad-hoc panels are composed of individuals who may or may not have pursued law studies. It has been affirmed that panels in numerous cases constitute a trade expert, a diplomat, and a lawyer. The panel may or may not be chaired by a panelist with a law degree. (Part II.1 below)

Each panel is supported by a team of highly qualified lawyers employed by the WTO Secretariat to provide, among others, advice and support to the panelists and the DSB, who are distributed in divisions: The Legal Affairs Division (LAD) mainly providing legal advice and information to WTO Dispute Settlement Panels (DSP), among others, and the Rules Division (RD) generally providing legal advice and information on WTO agreements and other legal issues as they may arise to WTO DSP.

More specifically, the LAD is responsible for ‘*assisting members in the composition of dispute settlement panels, providing timely secretarial and technical support and legal assistance to WTO dispute settlement panels, providing legal advice to the Dispute Settlement Body and its Chairman on the operation of the Dispute Settlement Understanding, and providing legal advice to the Director-General, the Secretariat and members on all WTO agreements and on other legal issues as they may arise.*’<sup>3</sup> The RD is responsible for assisting members in the composition of dispute settlement panels, facilitating secretarial, technical support and legal assistance to DSP. The staff of the RD offers legal advice to the DSB and its Chairman on the operation of the Dispute Settlement Understanding (DSU), and assists as well, the panels dealing with disputes on trade remedies, including anti-dumping, subsidies and countervailing measures, and safeguards.<sup>4</sup> All other cases are LAD’s responsibility. 27 staff-members have been allocated to the LAD, while 26 staff-members have been allocated to the RD, according to the WTO 2016 Annual Report.<sup>5</sup> The said Report has established that 20 staff members have been allocated to the AB Secretariat (Part IV below).

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<sup>2</sup> Laurence R. Helfer & Anne-Marie Slaughter *Toward a Theory of Effective Supranational Adjudication* 107 Yale L J 273-290 (1997).

<sup>3</sup> [https://www.wto.org/english/thewto\\_e/secret\\_e/div\\_e.htm#legal](https://www.wto.org/english/thewto_e/secret_e/div_e.htm#legal) (Accessed on 20 March 2017).

<sup>4</sup> [https://www.wto.org/english/thewto\\_e/secret\\_e/div\\_e.htm#rules](https://www.wto.org/english/thewto_e/secret_e/div_e.htm#rules) (Accessed on 20 March 2017).

<sup>5</sup> WTO 2016 Annual Report (31.12.2015) at 169-170

Additionally, the Intellectual Property, Government Procurement and Competition Division (IPGPCD) provides services to the DSP in the TRIPS and government procurement areas, and the Trade in Services and Investment Division provides support to relevant DSP on trade in services.

This article seeks to provide a better understanding of the decision-making process through a review of the existing literature on panel members and members of the Appellate Body and on the frame of classification by author, year, and subject matter. This process will lead to the analysis of the panelists' capabilities and characteristics, as well as the panelists' decision-making process (Parts II, III, and IV). The above-mentioned investigation, review and classification will lead the author of this article to interrogations that have been granted an answer and the ones that remain open. Providing an approximate view to the later questions is the main challenge of this article.

Officially-verified information for the past two decades of research on the decision-making process of the DSS is regrettably not available to outsiders or to non-WTO related professionals. Not being based in Geneva, Switzerland, which is the headquarters of WTO, is already a disadvantage in performing a formal study on this topic through direct observation and investigation. Independent researchers affiliated or non-affiliated to a university or educational institute, if they lack strong ties to WTO insiders or to Geneva-based government mission of any WTO Member State, are restricted from undertaking investigation based on analytical data on ad-hoc panels. (Part V).

Basic documents, such as the panelists' curricula, are treated as confidential. Firsthand information could be provided by WTO employees, panelists, in-house and outsourced consultants. However, current and former panelists and other WTO civil servants are bound by oaths of confidentiality stipulated in the 11 December 1996 Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Rules include three annexes, the third being a Disclosure Form to be signed and dated by the staff, stating "*I have read...I understand my continuing duty...and... respect my obligations regarding the confidentiality of Dispute Settlement proceedings.*" Most importantly, the provision contained in Article VI.6 of the Rules of Conduct enforces the confidentiality principle not only during but after the procedure has come to an end: '*The Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.*' (Parts II.8, and V below).

On 16 April 2014, Post-Employment Guidelines adopted by the AB for former AB members, former Secretariat staff, and former interns at the AB Secretariat were circulated, and the cooperation of WTO Member States sought in facilitating compliance. The guidelines included non-disclosure and confidentiality provisions. (Part V).

WTO staffs and panelists exhibit characteristic caution when approached by WTO outsiders. It can thus be affirmed that WTO insiders' contribution to any external academic research is

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[https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep16\\_chap9\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_chap9_e.pdf) (Accessed on 28 Feb 2017) and 2015 WTO *Annual Report on Grading Structure and Promotions in the WTO Secretariat* No WT/BFA/W/395 (10.06.2016) mentioning that 11 Dispute Settlement Lawyers, two Paralegals, and one Technical Trade Specialist have been recruited in Rules, Legal Affairs, and Appellate Body Secretariat.

tangential to subject matter and related information the outsiders would like to become aware of. (Part V of this article).

Sociological research on the role of panelists in the decision-making ensuing from the reports has not been comprehensively produced. If such research exists, it is limited due to the referred confidentiality agreements and professional bias. Understanding what the relative competence of a trade expert, a diplomat and a lawyer is, and how they complement each other in the decision-making process to merge their findings set out in the Panel's report is simply a black box to any outsider. (Parts II and IV, V, below)

The principal questions raised in the article are:

- Would it influence the panels' decision to have adjudicators with or without a law background?
- How much is the WTO Secretariat influencing the case-by-case analysis and outcome in adjudications?

The supplementary questions raised during this research are:

- Is there an implicit qualification balance between members of WTO panels, and the very-well prepared Dispute Settlement Lawyers (DSLs) of the WTO RD and LAD?
- Do non-legal panelists and DSLs complement each other?
- Who is the driving force between the WTO Secretariat and the adjudicators?

Several research questions persist:

- What is the role, within a WTO Panel, of a governmental panelist, who has been working as civil servant for the WTO mission in Geneva, for example? Does the diplomat-panelist play the role of the mediator or is he/she defending some geopolitical agenda? How are they distributing the work?
- What methods or intuitive reading are the trade expert and the lawyer applying? Would the trade expert and the lawyer focus on different issues?
- Are the panelists in harmony with one another?
- Is the appointment of ad-hoc panelists a formality in providing a stamp of legitimacy to the panel and/or AB reports adopted by the DSB within the DSS? (See Parts III and IV, below)

The article will endeavor to respond to these questions while working on the WTO DSS literature review and data classification. A possible classification could be structured in the following manner:

- The attributes of the panelists<sup>6</sup> (Part II.1-8 below)
- The mandate of the ad-hoc panelists at the first instance panel, which establishes facts and applies WTO regulations (Part IV), and that of the four-year appointees to the permanent Appellate Body (AB), which deals only with legal aspects
- The weight and power of the WTO Secretariat when it comes to draft and issuance of the Panel Reports (Part IV)

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<sup>6</sup> Age, nationality, professional background, gender, language, reappointment, remuneration, impartiality, and independence.

- The permanent representation of US and EU panelists in the AB (Part II.3)
- The indicative roster of WTO panelists, which is rarely used (Part III)
- The process of establishment of the panels, designation of the ad-hoc panelists, and designation of the four-year mandated panelists of the AB (Part III)
- The level of satisfaction of WTO Member States with regards to the panelists' reports (Part VI)
- The participation of industrialized, developing, and less-developed countries (Part II) and
- The application of common law over civil law (Part II).

The duration of the procedure, the cost of the WTO dispute settlement mechanism and the length of the reports are not analyzed in this article.

Missing information on the WTO panelists cannot be extracted from existing articles, journals, statistics, reports, or books. To fill the information gap, scholars unable to find or give imaginative or probable answers to the issues referred above have carried out quantitative research, developed equations, formulated hypotheses and established statistics. The outcomes resulting from the application of such methodologies remain unconfirmed between experts, thereby generating unhelpful answers for the future. The questionable source of the data and lack of thoroughness in method puts the validity of the results into doubt.

From a lawyer's perspective, interpretation and analysis of text is the preferred approach. Having performed a four-month online and paper-based screening and carried out a few interviews with WTO insiders, WTO panelists, arbitrators, and political scientists, the author of this article deems that the proposed method of classifying the existing data, and authors on WTO panelists is the closest approximation to a content analysis tool within the reach of academia to open the podium for discussion.

The limited sources and dispersed data on the functioning of WTO panels has led the author to analyze the subject in depth by reviewing existing information on WTO panels and providing a classification. Focus on the main attributes of the panelists such as their age, nationality, country of origin, professional and academic qualifications, work position, location, gender, language, remuneration, and whether the panelist is a government-affiliated individual, provide the structural classification, which are indicators of their capability to adjudicate in global trade issues in the eyes of the WTO DSS.

This classification would prompt academia to approach WTO adjudication, as well as its decision-making process, on a more thorough grounding, opening the podium to identify what is missing and what are the reasons; and what could be done in future to offer greater transparency on the role of WTO adjudicators.

More clarity on the methods applied to the settlement process has the potential to provide for greater scrutiny of future panels and observation on their performance. To what degree the professional role of lawyers and experts on these panels is making a difference in the outcome of the decisions is at the core of this observation.

For international actors, the legitimacy of a tribunal, says Grossman (2009-2010), is measured by the core set of provisions the tribunal might have adopted to guarantee '(1) fair

*process; (2) impartial, competent, and independent individual adjudicators; (3) impartial and independent benches and panels and (4) unbiased secretariats and registries.’<sup>7</sup>*

This research has been guided by these criteria and has collected the ideas, arguments and suggestions of scholars specialized in the WTO DSU. The initial part of this article describes who these individual international adjudicators integrating ad-hoc panels as well as the AB members are (Part II.1-8). This first Part develops further what the bias of these individual international adjudicators might be (Part II.2), reproduces the results of the scholars’ discussion on the independence and impartiality of panelists and AB members (Part II.8), and provides a description of WTO staff supporting both panels and the AB, and how they complement the work of the appointed panelists and AB members (Part IV). Moreover, the findings of the scholars about WTO DSU’s Confidentiality and Transparency are set out towards the end of this article (Part V).

The first part of this article ‘Who are WTO Panelists and AB Members?’ (Part II) has been broken down into eight subparts, all related to the following characteristics of the panelists and AB members: professional background (II.1), ideology (II.2), nationality (II.3), gender (II.4), average age (II.5), reappointment (II.6), remuneration (II.7), and independence and impartiality (II.8).

Having analyzed the features of the WTO Panelists and AB members, this article then focuses on the appointment of WTO Panel-members (Part III), and on the preparation of Panel Reports and Appellate Body Reports (Part IV). The last two parts of this article are focused on the Confidentiality and Transparency of the Dispute Settlement System (V), and the Concluding Remarks (Part VI).

## **II. Who are WTO Panelists and AB Members?**

The decision-making process of trade law adjudication has been subject to widespread criticism by scholars. Relevant to our subject-matter is the exploration of such decisions by questioning the individuals who perform the role of trade law adjudicators. Who are these “kind of” judges and should they have the power to take decisions that would have an impact on national policies and sovereignty<sup>8</sup>, are some of the questions raised by scholars, as Schnyder and Pfisteres (2016) contend, referring to Brekoulakis (2013).<sup>9</sup> Along the same lines, Nadakavukaren Schefer (2016) affirms that the legitimacy of an international court or body relies on the legitimacy of the decision-makers, who are the guarantors of the accurate application of the substantive and procedural rules.<sup>10</sup>

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<sup>7</sup> Nienke Grossman *Legitimacy and International Adjudicative Bodies* 41 Geo Wash Int’l L Rev 107 (2009-2010) at 114, 116, 123-124.

<sup>8</sup> It is not only the adopted WTO DSB decisions that have an impact on national legislation, but also the rules adopted by WTO, which ‘indirectly affect national legal orders’. As Berman and Wessel affirm: ‘*International law is increasingly playing a role in national and regional legal orders*’. Ayelet Berman and Ramses A. Wessel *The International Legal Form and Status of Informal International Lawmaking Bodies: Consequences for Accountability* Pp. 35-62 at 38 in Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters (Eds.) *Informal International Lawmaking* Oxford (2012) Pp 549.

<sup>9</sup> Anton K. Schnyder and Stefanie Pfisteres *Features of Trade Law Adjudication and their impact on the development of legal concepts and precedents* in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (Eds.) *Establishing Judicial Authority in International Economic Law* Cambridge (2016) at 189-190.

<sup>10</sup> Krista Nadakavukaren Schefer *Judicial Ethics in International Economic Law: What Standards of Independence and Impartiality apply to Arbitrators and Panellists?* (2016) Pp 215-239 at 216.

Taking as its point of departure the criticism of the legitimacy of trade law adjudicators to adopt decisions having an impact outside the sphere of the parties in dispute, Chapter I zeroes in on the World Trade Organization (WTO) adjudicators or panelists, also referred to as panel-members of the ad-hoc composed panels, which is a sort of first instance court, as well as the permanent AB with member-adjudicators appointed for four years and organized in groups of three. Different features of WTO panelists are described in the following eight subchapters: the professional background of the appointed adjudicators (1); their ideology or bias (2); the nationality of the appointed panelists (3); the gender of these appointed individuals (4); average age (5); reappointment (6); remuneration (7); and independence and impartiality (8).

The WTO Dispute Settlement System (DSS) composed of adjudicating bodies serves to preserve the rights and obligations of WTO Member States under WTO agreements, and to interpret the provisions of those agreements according to Article 3.2 DSU. The adjudicating bodies are in practice case-by-case ad-hoc panels composed of three to five appointees to settle a dispute, and one permanent AB composed of seven members with a once renewable four-year term. In the case of the ad-hoc panels, which represent a first instance tribunal, panelists become appointed judges settling disputes between Member States by issuing recommendations in the form of a Report.

Swigart and Terris (2014) undertook extensive research on who international judges are, all for a mixed, and found that almost 60% of all nations were, at least once, represented in an international court or decisional body; that the number of women-judges had substantially increased; and that the professional experience of international judges is, nowadays, diverse and varied, since these judges have fulfilled different roles, performed different activities, undertaken different responsibilities and worked in different fields, to mention a few grounds.<sup>11</sup>

Mavroidis (2014) contends that there is not much to say or assert on the characteristics of WTO adjudicators apart from the fact that a high number of panelists come from a governmental background.<sup>12</sup> On the same path, Pauwelyn (2015)<sup>13</sup> argues there is little known about the identity of the WTO judges, who, citing Mavroidis (2013): ‘*are typically unfamiliar names, often unknown even to the Geneva experts*’.<sup>14</sup>

Keeping in mind what some scholars think about trade adjudicators, WTO panelists, and AB members, the author of this article delves into details of what the professional background of appointed panelists and AB members within the WTO DSS was and continues to be, as follows.

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<sup>11</sup> Leigh Swigart and Daniel Terris *Who are International Judges?* in Cesare Romano, Karen Alter, and Yuval Shany (Eds.) *The Oxford handbook of International Adjudication* Oxford (2014) Pp 975 at 636-637.

<sup>12</sup> Petros C. Mavroidis *Justice is coming (From behind the closed doors: The WTO Judges)* in Marise Cremona, Peter Hilpold, Nikos Lavranos and others (Eds.) *Reflections on the Constitutionalisation of International Economic Law Liber Amicorum for Ernst-Ulrich Petersmann* NIJHOFF (2014) at 250.

<sup>13</sup> Joost Pauwelyn *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus* in *The American Journal of International Law*, Vol. 109, No. 4 (October 2015), pp.761-805 at 779.

<sup>14</sup> P. C. Mavroidis *Selecting the WTO Judges* in Huerta-Goldman. A Romanetti & F. Stirnimann (Eds.) *WTO Litigation, Investment and Commercial Arbitration – Cross-fertilization and Reciprocal Opportunities* Kluwer (2013) 103-114 at 103.



## II.1 Professional background:

Weiler (2001) affirms that it is becoming increasingly difficult to be a true specialist in all areas of substantive law covered by the WTO agreements, suggesting either that it is a difficult task to fulfill the job description of a panelist of AB member, or that the difficult task is to find the qualified individuals.<sup>15</sup>

Swigart and Terris (2014) affirm that the work of judges is conditioned by their personal and professional backgrounds and experience, and the quality of international justice depends mostly on the collective knowledge, wisdom, and effectiveness of these legal or non-legal judges. They studied how much the background of individuals matters in the decision-making process of judges at the domestic and international levels, and how the differences in background influence the outcome of a decisional process.<sup>16</sup>

Some of the relevant provisions of the WTO DSU on the panel members and AB members are the following:

Article 8.1 on the Composition of Panels of the WTO DSU<sup>17</sup> establishes that: '*Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.*'

Article 8.8 DSU stipulates that: '*Members shall ... permit their officials to serve as panelists.*' Article 17.3 DSU establishes that '*The AB shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally...*' As per the same article, the AB '*shall be broadly representative of membership*', meaning that panel candidates shall come from different *geographical areas, levels of development, and legal systems*'.<sup>18</sup>

*'Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute, according to paragraph 4 GATS Annex on Financial Services.'*<sup>19</sup>

It is worth comparing the theory with the practice, as observed by scholars.

Johannesson and Mavroidis (2015) were honest enough to share the difficulties of finding information about the educational background of panelists. They tried to gather information on the curriculum vitae and biographies of the panelists but they found out that the

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<sup>15</sup> Joseph H. H. Weiler *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *Journal of World Trade* (2001) 191-207 at 2.

<sup>16</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 619-620.

<sup>17</sup> The DSU is an agreement annexed to the agreement establishing the WTO.

<sup>18</sup> Manfred Elsig and Mark A. Pollack *Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization*, 20 *European Journal of International Relations* (2014) 20:391-415 at 403.

<sup>19</sup> WTO Chapter 6. *The process — Stages in a typical WTO Dispute Settlement Case* in WTO Dispute Settlement System Training Module [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm) (Accessed on 23 Feb 2017).

'disclosure of personal data is highly asymmetric across panelists,' that the lack of information could not fully be compensated with web-based information, and finally, that they were unable to clearly obtain the educational background of 33% of all panelists.<sup>20</sup>

For Malacrida (2015), a WTO panelist is a person 'entrusted with the task of administering world trade justice' and a dispute settlement mechanism is an adjudicative system, and panels shall be composed of panelists with diverse backgrounds and wide spectrum of experience.<sup>21</sup> To illustrate these backgrounds and experience, it is noteworthy to recall the link between scientific facts and WTO ruling applicable to disputes settled within the WTO forum, where science and law could converge, as stated by Foster (2011).<sup>22</sup> There is no doubt that in some cases, despite well-formed Panels, experts might be consulted to obtain their opinion on certain aspects of the matter, according to Article 13 DSU, which also provides that panels may request an advisory report from an expert review group, with respect to factual issues concerning technical matters. It is worth mentioning that AB members hear appeals covering all WTO Agreements, Trade Remedies, Trade in Services, Trade in Goods, Trade Relating to Intellectual Property Rights (TRIPS), among others.<sup>23</sup> It could be coupled with the citation made by Weiler (2001) above, where he refers to the increased difficulty of being a true specialist in all areas of substantive law covered by the WTO agreements.

There is no specific provision within the DSU requiring that panels be composed of members having prior experience as panelists, but in practice, one of the three appointed panelists has served at least once as panelist. There are cases where more than one or all candidates have been panelists before. The chairman of a WTO Panel is, in most cases, a person with more than one panel experience.<sup>24</sup> Horn (2013) argues that experienced panelists do not necessarily require less time to issue reports, and therefore believes that this is not a mitigating factor that will decrease the time required by panelists to issue the Panel Report.<sup>25</sup>

Hudec (1999) observed before the new millennium that panel members are usually well-versed in WTO policy and procedures, and are generally persons who have a reputation for good judgment among their fellow diplomats: but most lack the legal training or experience to render professionally competent judgments on complex legal issues.<sup>26</sup>

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<sup>20</sup> Louise Johannesson and Petros C. Mavroidis *Black Cat, White Cat. The Identity of the WTO Judges* in EU Working Papers. European University Institute. Robert Schuman Centre for Advanced Studies (RSCAS) 2015/17. Global Governance Programme-161 (March 2015) at 11.

<sup>21</sup> R. Malacrida *WTO Panel Composition: Searching far and wide for administrators of world trade justice*. in Gabrielle Marceau (Ed.) *A History of law and lawyers in the GATT/WTO. The development of the rule of law in the Multilateral Trading System*. WTO Cambridge (2015) Pp. 311-333 at 311, 314, 326.

<sup>22</sup> 'In WTO law, the exception in Article XX(b) of the General Agreement on Tariffs and Trade (GATT) is couched in terms of the necessity of measures to protect human, animal or plant life and health. A similar necessity test has been adopted also under Article 2.2 of the WTO Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement), as well as under Article 2.2 of the WTO Agreement on Technical Barriers to Trade.'. Caroline E. Foster *Chapter 4 The role of adjudicators and the role of experts in Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality* Cambridge (2011) Pp 136-182 at 139.

<sup>23</sup> Meredith Kolsky Lewis *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement* 48 *Stan J Int'l L* 1 (2012) at 8.

<sup>24</sup> 'The DSU does not specifically require that panels include members having previously served on a panel. Yet all panels have had at least one member with prior experience as a panelist.'. R. Malacrida *supra* fn 21 at 326.

<sup>25</sup> Henrik Horn *The Time WTO Panels Require to Issue Reports* CEPR Discussion Paper No. 9554 (July 2013) *International Trade and Regional Economics* at 3, 33.

<sup>26</sup> Robert Hudec *The new WTO Dispute Settlement Procedure: an overview of the first three years*, 8 *Minn J Global Trade* 1(1999) or *Minn J Global Trade* Vol:8:1 at 34

Weiler (2001) argues that ‘a prime objective would be to find those who would be acceptable to the parties and most suitable to resolving the specific dispute’ and mentions that very often, appointed ‘panelists were diplomats or ex-diplomats, belonging to the same internal WTO network’.<sup>27</sup> An important number of trade delegates of WTO Member States, capital-based trade officials, former WTO Secretariat officials, retired government officials and academics have traditionally served as appointed WTO panelists.<sup>28</sup>

Malacrida (2015) explains that panels tend to include one or two panelists with specialized knowledge or expertise in a relevant sector or subject matter of the covered agreement. They could be governmental officials involved in the negotiation of an existing WTO agreement, charged with applying domestic legislation implementing a WTO agreement or regulating the sector or subject matter in the country. Or they could be private sector individuals working on the relevant economic sector or subject matter, or consultants to the relevant industries or legal practitioners or academics.<sup>29</sup>

Pauwelyn (2015) recalls that Fontoura<sup>30</sup> found out that ‘a staggering 80% of WTO panelists have a governmental background, and only 19% come from the private sector’ but also that 72% or 18 ‘members of the constituted AB between 1995 and 2014 were formerly in the service of one of the WTO member governments, and that 29%, or seven, were either academics or former international civil servants’. As per Pauwelyn’s (2015) own data, ‘...fewer academics have been appointed on WTO panels (from 22% it dropped to 15%).’<sup>31</sup>

Johannesson and Mavroidis (2015) affirm further that the appointed panelists practitioners and academics are a minority of barely equal number.<sup>32</sup> Pauwelyn (2015) confirms Fontoura’s findings and affirms that over time the 80% average of ‘WTO panelists with a governmental background has stayed relatively stable’.<sup>33</sup> For Johannesson and Mavroidis (2015), the average of panelists with governmental background, at the time of the appointment or before, between 1995 and 2014, is 74%, or three quarters of all appointed panelists.<sup>34</sup>

Swigart and Terris (2014) observed that some of the international judges are national civil servants who have worked abroad for a long period as diplomats and/or representatives of their countries in a legal capacity in an intergovernmental organization; other civil servants

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<http://heinonline.org/HOL/LandingPage?handle=hein.journals/mjgt8&div=6&id=&page=> (Accessed on 23 Feb 2016).

<sup>27</sup> J. Weiler *supra* fn 15 at 5.

<sup>28</sup> WTO Chapter 6. *The process — Stages in a typical WTO Dispute Settlement Case* in WTO Dispute Settlement System Training Module [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c6s3p2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s3p2_e.htm) (Accessed on 23 Feb 2016).

<sup>29</sup> R. Malacrida *supra* fn 21 at 311, 323.

<sup>30</sup> Jose Augusto Fontoura Costa *Comparing WTO Dispute Settlement: a socio-legal analysis from Pierre Bourdieu’s perspective* in *Revista Direito GV São Paulo* 7(1) Pp 039-056 (Jan-Jun 2011) <http://www.scielo.br/pdf/rdgv/v7n1/a03v7n1.pdf> (Accessed on 23 Feb 2016) or J.A. Fontoura Costa *WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, *Oñati Socio-Legal Series* (2011) v 1 n 4 1-25 at 17, 21.

<sup>31</sup> J. Pauwelyn *supra* fn 13 at 773.

<sup>32</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 13.

<sup>33</sup> J. Pauwelyn *supra* fn 13 at 773. Updated source: ‘...Our own data (1995-2014) goes even further: an amazing 88% of WTO panelist appointments have a substantial governmental background and 57% of appointments were at some point in their careers Geneva-based diplomats...’ J. Pauwelyn *supra* fn 13 at 779.

<sup>34</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 10.

have served in international organizations, such as the UN or its regional bodies in the Americas or on the African continent or in its specialized agencies.<sup>35</sup>

The choice of diplomats with legal backgrounds offers, according to Fontoura (2011):

- *'a stabilization due to homogeneous profiles and experiences that may substitute, at least partially, for the sense of corporate cohesion of jurisdictional groups;*
- *relatively low pressures on panelists to seek to be reassigned; ...*
- *low temptation to be corrupted, since the public wages are generally stable and participation in international tribunals is no more than a complement, and...*
- *a reasonable balance between the political experience of diplomatic careers and the legal background that values positively formalist legitimating schemes.'*<sup>36</sup>

The DSU, Malacrida (2015) confirms, does not contain an explicit requirement that panels be composed exclusively of individuals with an educational or professional background in law. However, relevant legal expertise is highly desirable as per the mandate of panels Article 11 DSU, and panels are indeed composed of at least one lawyer, which reflects a preference for panelists with an educational or professional background in a field such as agriculture, economics, etc., or with know-how on a particular subject matter, as trained lawyers may lack such background and expertise, says Malacrida.<sup>37</sup> Along the same lines, Mavroidis (2015) explains that WTO agreements deal with questions which are mainly economic ones, such as what is a subsidy, how are dumping margins calculated, or how should injury be established, when recourse to contingent protection is made. Mavroidis (2007) further affirms that lawyers, who are not trained in economics are incapable of answering such technically-specific questions, because they simply lack expertise in this area or subject matter.<sup>38</sup> Moreover, the scholar believes that the lack of economic thinking when dealing and judging a case involving economic issues leads to failure or failed decisions.<sup>39</sup> Scholars concur, however, that the proportion of panelists with deep economic expertise involving extensive economic evidence and arguments is extremely low.

Werner (2001) who worked many years as commissioner of the Swiss Federal Competition Authority claims to have witnessed the absurdities that can result when lawyers, devoid of any understanding of what a market is and how it functions, deal with sensitive competition law cases.<sup>40</sup>

Based on parametric and non-parametric estimation techniques, Hsiang and Nyarko (2015) have found strong evidence that panels with legally-trained chairs rely on precedent

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<sup>35</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 627.

<sup>36</sup> J.A. Fontoura Costa *supra* fn 30 at 21.

<sup>37</sup> R. Malacrida *supra* fn 21 at 322.

<sup>38</sup> P. C. Mavroidis, *Legal Eagles? A look into 10 years of AB case-law*, Discussion Paper No. 49 APEC Study Center Columbia University (May 2007) at 29 <https://www8.gsb.columbia.edu/apec/sites/apec/files/files/discussion/49MavroidisEagles.pdf> (Accessed on the 23 Feb 2017).

<sup>39</sup> P. C. Mavroidis *Chapter 3: Licence to Adjudicate: A Critical Evaluation of the Work of the WTO Appellate Body So Far in Trade Dispute and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*. Published online (09.03.2015) Pp. 73-90 at 88.

<sup>40</sup> Jacques Werner *The New International Adjudicator for a Renewal of Arbitration by Peers in Investment Cases*. The Journal of World Investment & Trade, V. 2 Issue 2 (2001) Pp 277 – 282 at 279.

substantively and statistically significantly less than those panels on which the chair has not received formal legal training.<sup>41</sup>

Pauwelyn also expressed what Fontoura observed: that 45% of the WTO first instance panelists and 12% or three members of the AB had no legal background. More precisely, Fontoura said that only four of all 25 members of the AB until 2014 had prior court experience as judges. As per Pauwelyn's own data, *'The number of panelists that are or have been judges in their home country has remained consistently low, between 2% and 4%.'*<sup>42</sup>

Pauwelyn (2015) additionally commented that from Fontoura's investigation results, there was an increment in the number of appointed panelists with a legal background between 1996 and 2009; it went from 30% of the total number of appointees to 70%. As per Pauwelyn's (2015) own data, the appointment of WTO panelists with a private law background *'has increased considerably: from only 9% in the first five years to 25% between 2009 and 2014 and 'WTO panelists with legal backgrounds has been slowly increasing: from 47 percent in the first five years (1995–99), to 69 percent in the last five years (2009 –14).'*<sup>43</sup> In recent years, the number of WTO panels composed of non-lawyer members is close to zero, as pointed out by Malacrida (2015).<sup>44</sup> The number of diplomats with legal background that have been appointed as WTO panelists in recent years has considerably increased, as affirmed by Shaffer, Elsig, and Puig (2016), which they believe, reduces the number of competent individuals who can criticize WTO Panel Reports, at the same time empowering a closed and small group of practitioners, scholars and officials with technical knowledge on the WTO ruling.<sup>45</sup>

Between 1999 and 2014, only 56% of all appointed panelists are lawyers, as mentioned by Pauwelyn (2015) and, referring to Fontoura, 19% of those appointed panelists with a law degree are coming from the private sector.<sup>46</sup> After having analyzed more panelists' data, Pauwelyn (2015) reveals that *'...15% of WTO panelist appointments have substantial experience in a private law firm, ... 18% have an academic background and a mere 3% have judicial experience in their home country.'*<sup>47</sup>

Johannesson and Mavroidis (2015) point out that 40% of all composed panels had panelists with a legal background at different levels of education. Their findings show that 16% of all panelists have a background in economics, without a Master's degree or PhD, and that 12% of all panelists had degrees in history, political science, geography, or others.<sup>48</sup> In a more general research, Swigart and Terris (2014) found out that international judges obtained a first degree in law in their countries of origin, and a second or third degree, more frequently, a LL.M degree abroad, and that many of them also studied public administration, economics, political sciences, and/or philosophy.<sup>49</sup>

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<sup>41</sup> Jerome Hsiang and Julian Nyarko *Precedent Citation at the WTO Shifting the Empirical Focus to Panelists*. (15.01.2015) at 2.

<sup>42</sup> J. Pauwelyn *supra* fn 13 at 773.

<sup>43</sup> J. Pauwelyn *supra* fn 13 at 774.

<sup>44</sup> R. Malacrida *supra* fn 21 at 322.

<sup>45</sup> Gregory Shaffer, Manfred Elsig, and Sergio Puig *The Extensive (But Fragile) authority of the WTO Appellate Body* 79 *Law & Contemp Probs* 237 (2016) at 253.

<sup>46</sup> *'Updated data (1995-2014) show that slightly more panelist appointments – but still only 56% - have a law degrees'*. J. Pauwelyn *supra* fn 13 at 774.

<sup>47</sup> J. Pauwelyn *supra* fn 13 at 772-773.

<sup>48</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 11.

<sup>49</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 626.

On the other hand, Fontoura (2011) mentions that before the end of 2009, the typical profile of the appointed panelists for the AB was one of a 65-year old man who, in 89% of cases, studied law, in 88% of cases had a diplomatic career or a public career related to international trade in 65% of cases, was a university professor in 75% of cases, and studied abroad in 65% of cases. Study abroad is a key qualification to identify potential candidates. The fact that they have studied abroad could be related to better fluency in English and WTO studies, which were not part of the programme of universities in developing countries. Fontoura also added that between 1995 and 2009, all appointed panelists had two or three careers, except for the Japanese diplomat Shotaro Oshima.<sup>50</sup>

Having analyzed Fontoura's findings, Pauwelyn (2015) concludes that if, in recent years, WTO panels have benefited from the participation of at least one lawyer although 80% of panel members continued to possess a governmental background, the diplomats that have been appointed possess a law degree.<sup>51</sup> These diplomats are basically working at a WTO Member State's Embassy, Consulate, WTO or the UN Mission in Bern or Geneva or at a trade bureaucracy, as mentioned by Pauwelyn (2015), who also referred to these diplomats as '*mostly technocrats or political appointees operating in large bureaucracies, where team play and policy rather than individualism and honed legal skills are valued.*'<sup>52</sup> Having gathered data on adjudicator appointments since the creation of the GATT WTO, Pauwelyn (2015) observed that '*WTO panelists tend to be relatively low-key diplomats from developing countries..., with a governmental background, and often without a law degree or legal expertise...*'<sup>53</sup>

Mavroidis (2013)<sup>54</sup>, quoted by Pauwelyn (2015), states that the WTO panelists are generally governmental officials, not necessarily of high seniority, who are representing or have temporarily represented his/her country before the WTO in Geneva. Elsig and Pollack (2014)<sup>55</sup>, also quoted by Pauwelyn (2015), tracked the years between 2006 and 2011, and found that although at the beginning of the period, knowledgeable experts were sought to become members of the WTO AB, towards the end of this period, individuals '*with non-controversial positions,*' as well as individuals with similar views as the ones of the WTO members, were given preference.

It seems that the best candidates are the ones who have not openly expressed their opinion on the disputed subject-matter in writing or who have not made any enemies in Geneva. Interestingly enough, Pauwelyn (2015) expresses that when the DG of the WTO Secretariat appoints panelists, because a mutual agreement was not reached by the parties in dispute, the Secretariat would favor the candidates '*who agree with its perspective or are open to follow its proposals, rather than strong-minded individuals who will insist on making their own analysis...*'<sup>56</sup> Elsig and Pollack (2014)<sup>57</sup>, quoted by Pauwelyn (2015), suggest that panelist

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<sup>50</sup> J.A. Fontoura Costa *supra* fn 30 at 49.

<sup>51</sup> Appointment of WTO panelists with governmental background '*has slightly increased, from 87% in 1995-1999, to 90% in 2010-2014*' '*That said, given that the percentage of panelists in governmental service has remained stable (at around 88%), the increase in lawyers on WTO panels has mainly come from diplomats or government officials with a law degree.*' J. Pauwelyn *supra* fn 13 at 12.

<sup>52</sup> J. Pauwelyn *supra* fn 13 at 781.

<sup>53</sup> J. Pauwelyn *supra* fn 13 at 783.

<sup>54</sup> P. C. Mavroidis *supra* fn 14 at 104.

<sup>55</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 404, 407-408.

<sup>56</sup> J. Pauwelyn *supra* fn 13 at 788.

<sup>57</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 394, 402.

candidates with public international law expertise or court experience were disfavoured in comparison to candidates with trade policy and WTO system experience, mostly acquired through their participation in WTO ad-hoc panels and WTO negotiations.

Pauwelyn (2015) agrees with Elsig and Pollack who affirm that during the first six years of the millennium, most of the appointed members of the WTO AB (2000-2006) had an academic background. As of 2007, most of the appointed members of such Body had or have a governmental background, have trade law or negotiation experience, insider GATT or WTO knowledge or had prior work in the WTO Secretariat.<sup>58</sup>

Elsig and Pollack (2014) suggest that preference was shown for the appointment of AB candidates with '*extensive trade policy experience and familiarity with the WTO system,*' obtained from negotiation and previous panel activities, to the detriment of candidates with '*public international law background or court experience*'.<sup>59</sup>

Baetens (2016) refers to WTO panelists as a '*closed and elitist network*' and affirms that '*...nearly two thirds of the appointed adjudicators were at some point in time a Geneva-based diplomat*'.<sup>60</sup> Johannesson and Mavroidis (2015) declare that '*prior to their first panel appointment, between 66% and 76% of all panelists had previously been in contact with the WTO in some capacity and/or were current residents in Geneva.*' They included individuals that worked in the GATT and participated in GATT negotiations.<sup>61</sup>

AB members are persons of recognized authority, with demonstrated experience in law, international trade, and the topic of the agreement in dispute. Referring to Weiler's (2001) juridical framework or juridification of the WTO that meant to bring more lawyers into play, Pauwelyn (2015) argues that Weiler's (2001) prediction did not materialize and that '*Twenty years after the creation of the WTO, WTO panelists continue to be predominantly diplomats or ex-diplomats, often without a law degree and mostly with relatively little experience...WTO dispute settlement is successful not despite it being run by relatively inexperienced trade diplomats but because it is so run.*'<sup>62</sup>

The author of this article believes that having spent twenty or more years working in and around the WTO, these so called low-profile technocrats and trade diplomats from developing countries have acquired massive experience in questions related to trade negotiations, trade disputes, WTO ad-hoc panels, WTO DSS, trade "compensatory damages" or cash settlements or other settled-favors granted between parties in dispute, WTO trade agreements<sup>63</sup>, and so on. Her personal view is that panelists or individuals who can guide internal settlements with full awareness of the geopolitics involved, might be more useful in successfully solving disputes than lawyers trained in international trade, who are victims of

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<sup>58</sup> J. Pauwelyn *supra* fn 13 at 775 (Figure 3), 781.

<sup>59</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 402.

<sup>60</sup> F. Baetens *The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are under Fire and Trade Adjudicators are not: A Response to Joost Pauwelyn* (13 April 2016) at 3 <https://www.asil.org/sites/default/files/Baetens%20C%20The%20rule%20of%20law%20or%20the%20perception%20of%20the%20beholder.pdf> (Accessed on 23 Feb 2017).

<sup>61</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 11.

<sup>62</sup> J. Pauwelyn *supra* fn 13 at 763.

<sup>63</sup> '*It can be difficult even for legal experts, to evaluate whether a trade or trade related measure is actually a breach of the WTO Agreement...*' Henrik Horn, Petros C. Mavroidis, and Håkan Nordström *Is the use of WTO Dispute Settlement System biased?* in Petros C. Mavroidis and Alan O. Sykes (Eds.) *The WTO and International Trade Law / Dispute Settlement* (2005) EE Pp 697 at 467.

their own professional bias, who know little about geopolitics or geopolitical consequences, and are more willing to stick to the letter of a rule, rather than to consider, measure, and balance the global interests of parties in dispute, and the general interest of WTO Member States.

A concluding remark worth citing, is that by Fontura (2011) who said that *'The legitimating process...does not depend on the quality of the decision makers, but on the quality of the system as a neutral and technical one.'*<sup>64</sup>

As part of this research on WTO panelists, a couple of WTO officials, UN specialized agency officials, academics and former panelists were interviewed anonymously. A total of five interviews were considered relevant to the topic of this article. Interviewee No 5 considers that it is not necessary to be a lawyer to participate as WTO panelist. This fact has no implication in the decision making or the decision on itself, argued the person interviewed. To close the idea, my interlocutor asserts that WTO Secretariat's team substitutes the lack of knowledge, either legal knowledge, WTO knowledge, WTO agreements knowledge, and trade knowledge of the panel-members.<sup>65</sup>

Interviewee No 3 asked me the same questions: Does it really make a difference in the decision-making process, if the ad-hoc panelists are lawyers? Would the fact that ad-hoc panelists may or may not be lawyers, influence or impact the final report? His and my views were similar: negative.<sup>66</sup>

Interviewee No 4 is in favor of multi-disciplinary panels. He contends that lawyers are not required in every panel. Their participation will depend on the subject matter. For example, for TRIPS issues, lawyers are unavoidable; however, for subsidies and dumping issues, it is better to count on an economist. The participant in this interview affirmed further that Panel members are nominated based on their availability and experience, and that the appointment of panelists responds to pragmatic decisions, such as restricted available budget.<sup>67</sup> In sum, *'you can't always get what you want'*.<sup>68</sup>

In fifteen to twenty years, a range of scholars writing between 1995-2001 and 2016 have found almost the same information, with slightly different statistics percentage-wise. The common belief running through the studies is that before 1996, within the GATT era, and during the first years of the WTO DSU, panelists and AB members were simply bureaucrats with no legal background. With the maturity of the WTO DSU came a new era of better-prepared panelists and AB members; academics were part of the list of appointed individuals, as were trade specialists as before and government officials with a law degree. It can be affirmed that to date, almost no panel or AB is composed without the participation of a

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<sup>64</sup> J.A. Fontoura Costa *supra* fn 30 at 21.

<sup>65</sup> Interview No 5 from the 15 November 2016 with a WTO Secretariat staff-member. Notes on the interview are kept with the author of this article. The name and position of the official are confidential as per the expressed request of the official. Interview cannot be attributed.

<sup>66</sup> Interview No 3 from the 13 October 2016 with an official within the WTO Secretariat. Notes on the interview are kept with the author of this article. The name and position of the official are confidential as per the expressed request of the official. Interviewee cannot be quoted. Interviewees No 3 and 5 work in different divisions.

<sup>67</sup> Interview No 4 from the 7 November 2016 with a United Nation's Specialized Agency official. The interviewee has a law degree and specializes in intellectual property rights. Notes on the interview are kept with the author of this article. The name and position of the official are confidential as per the expressed request of the official. Interviewee cannot be quoted.

<sup>68</sup> Title of a song of The Rolling Stones.



lawyer, who can also be a government or non-government official, a trade specialist, or an academic. WTO adjudicators are much better prepared than before, but are they also free from professional or other bias? Let's examine that in the next subchapter.

## II.2 Ideology of WTO panelists:

Pauwelyn (2015) expressed that WTO panelists '*are not strongly partisan or ideological, but trade specialists steeped in practical policy experience and thereby sensitive to the need for policy space in favor of their government-employers*'.<sup>69</sup> WTO 'favors nomination of 'neutrals' e.g. from countries such as Switzerland or New Zealand.' The author affirms, moreover, that the appointments made in WTO exclude candidates '*with an outspoken view or track records in favor of either trade or trade protectionism*'.<sup>70</sup> This might be so, because '*parties must perceive a tribunal as fair and unbiased before they will agree to submit their disputes to it*'.<sup>71</sup>

Brutger and Morse (2015) maintain that in cases where the most powerful and active WTO Member States, such as EU and the US, are on the losing side of a dispute, WTO panelists may strategically exercise judicial economy – that is, very briefly, a practice by which panelists decide on ruling only on parties' legal argument required to settle the dispute and not ruling on unnecessary claims made by the parties - to protect their own career prospects and encourage compliance. The Reports of the panelists which might be against the views and interpretation of the Member States may not be reappointed.<sup>72</sup>

'*Much of the work of legal interpretation is carried out not by judicial but by political bodies*', affirmed Pollack (2014),<sup>73</sup> who included among the political bodies, the DSB of the WTO. WTO's General Council, acting as the DSB, is the decision-making body in charge of solving State-to-State disputes. Elsig and Pollack (2014) present a progressively and deeply politicized appointment process of the AB members and demonstrate that WTO Member States do influence it through a rigorous screening process, paying close attention to the views of candidates on specific issues of interest to those states.<sup>74</sup>

Lobbying and bargaining are part of the daily election process of the AB members among Member States, '*and final appointments are often the result of messy compromises among the members*'.<sup>75</sup>

No expert, and in our case, no appointed panelist comes free from bias or ideology, as mentioned by Shaffer and Trachtman (2012).<sup>76</sup> Aware of this situation, '*WTO member-States*

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<sup>69</sup> J. Pauwelyn *supra* fn 13 at 782.

<sup>70</sup> J. Pauwelyn *supra* fn 13 at 787.

<sup>71</sup> N. Grossman *supra* fn 7 at 123.

<sup>72</sup> Ryan Brutger and Julia C. Morse *Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement* in Rev Int Org (2015) 10 179-205 at 186, 201. See also: Marc L. Busch and Krzysztof J. Pelc *The Politics of Judicial Economy at the World Trade Organization* 64(2) (2010) Pp 257-279; and Alberto Alvarez-Jiménez *The WTO Appellate Body's Exercise of Judicial Economy* in J Int Economic Law (2009) 12 (2): 393-415.

<sup>73</sup> Mark A. Pollack *Political Science and International Adjudication* in Cesar P.R. Romano, Karen J. Alter, and Yuval Shany (Eds.) *The Oxford Handbook of International Adjudication* Oxford (2014) Pp 975 at 384.

<sup>74</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 393.

<sup>75</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 398.

<sup>76</sup> Gregory Shaffer and Joel Trachtman *WTO Judicial Interpretation* in Amrita Narlikar, Martin Daunton, and Robert M. Stern (Eds.) *The Oxford Handbook on the World Trade Organization* (2012) at 548.

*became far more concerned about judicial activism and more interested in the substantive opinions of AB candidates, supporting systematically candidates with similar or same views on key issues, and opposing candidates perceived to be activist or biased against their preferences,*’ as affirmed by Elsig and Pollack (2014).<sup>77</sup>

Just for the sake of comparison, the model profile of an international judge in December 2012 was delineated as an individual with significant experience in the public sector as a judge, civil servant, and/or member of one or more national or international bodies, according to Swigart and Terris (2014).<sup>78</sup>

It could be argued that prevailing political and economic realities drive the WTO dispute system rather than principles of law and justice.<sup>79</sup> ‘*Given the somewhat political nature of the appointments process for AB members,*’ the later might be selected and appointed as AB members for political or geographical or other strategic reasons that are far from being only related to the competence and expertise of the candidate in international trade.<sup>80</sup>

Interviewee No 4 expressed that candidates for panelists shall be neutral and reserved, not controversial. They should not have written or have published any comment, paper, work or book about the subject-matter of the dispute to settle. The interviewee mentioned further that candidates should normally have a very liberal vision of trade because WTO is all about liberalization of trade. My interlocutor in this interview described an anecdote he himself experienced: in an WTO arbitral proceeding composed of three members, one female diplomat, a male judge, and a male lawyer; the judge and the lawyer looked immediately at the value of evidence, while the diplomat was more concerned about political issues. This experience shows, said the interviewee, that the professional bias of each member will determine the conduct or attitude of the appointed candidates.<sup>81</sup>

The question that led to this subchapter could be thereby answered positively, ergo, panelists and AB members do take their role seriously, and follow WTO rules of conduct, and rules of procedure. We have become aware of the scholars’ opinion of the professional background and possible bias of WTO adjudicators, and in the next subchapter we examine the origins of these appointed individuals.

### *II.3 Nationality:*

Article 8.3 DSU on the composition of Panels provides that: ‘*Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10<sup>82</sup> shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.*’

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<sup>77</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 394.

<sup>78</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 621.

<sup>79</sup> Georgios I. Zekos *The case for giving to private parties access to the WTO DSS* in *The Journal of World Investment & Trade* v. 8, Issue 3 (2007) at 449.

<sup>80</sup> M. Kolsky Lewis *supra* fn 23 at 8.

<sup>81</sup> Interview No 4 *supra* fn 67.

<sup>82</sup> Article 10.2 DSU on Third Parties, states: ‘*Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.*’

The same article states that: *'In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.'* This is the case for the EU Member States. When an EU member State is party to a dispute to be settled through the composition of a WTO panel, nationals from any of the current EU Member States are proscribed from being appointed as panel-members.

Article 8.10 DSU on the Composition of Panels establishes that: *'When a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.'* Grossman (2009-2010) explains that if a developing country, party to a dispute, feels its perspectives are not understood by the three or five ad-hoc appointed panelists, this will undermine the authoritativeness of the Panel Report.<sup>83</sup>

Nationality largely determines the legal system in which an international judge has been trained, and shapes his or her thinking and practice, said Swigart and Terris (2014). These authors claim that individuals coming from mixed legal systems, either civil or common law, or one or the other mixed with customary and or religious law, are presumably well prepared for mixed civil and common law procedures and processes, which are predominant in many international *fora*, and that such features are found in countries like the Philippines, South Africa and, more generally, on the African continent and in South Asia.<sup>84</sup>

Horn et al. (2011) observed that based on 199 Panels composed by three panelists each, out of 597 panelists, 59 were citizens of the G-2, composed by the US and the 15 members of the European Union (EU-15) before the 2004 enlargement. More precisely, 2.34% or 14 were of United States (US) origin, while, 1.50% or nine came from Sweden, 1.17% or seven came from the United Kingdom (UK), and 0.33% or two were French.<sup>85</sup> The authors also identified that 54% of all panelists are from industrialized countries (New Zealand 57, Switzerland 48, Australia 34), and that 27.6% or 164.77 of all panelists are from developing countries (Chile 25, South Africa 22, Venezuela 18), 9% came together from India (30) and Brazil (22).<sup>86</sup>

Pauwelyn (2015) compared these results of Horn et al. (2011) with those from the Worldtradelaw.net, a portal owned by Simon Lester and Kara Leitner. The statistics of this portal were consulted by Pauwelyn in 2014. The portal states that little more than 50% of all 549 appointed panelists were nationals from developing countries, 2.2% or 12 were from the US, 12.9% or 71 were from the EU-28 Member States. The data also reveals that the most WTO appointed panelists are nationals from New Zealand (51), Switzerland (43), and Australia (43).<sup>87</sup> As per Pauwelyn's own data, a total of 313 or 52% of a total of 603 appointed panelists come from developing countries. *'Looking at 603 WTO panelist slots*

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<sup>83</sup> *'At the same time, it acknowledges that decisions are being made in a political context, where some players feel inherently disadvantaged.'* N. Grossman *supra* fn 7 at 140.

<sup>84</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 623.

<sup>85</sup> *'Looking at 603 (oppose to 597) WTO panelist slots spread across a total of 251 different individuals (including panel appointments in compliance proceedings), one finds only fourteen US, one (not 2) French and six (not 7) UK panelist appointments.'* J. Pauwelyn *supra* fn 13 at 770.

<sup>86</sup> H. Horn, L. Johannesson and P. Mavroidis *The WTO Dispute Settlement System 1995-2010, Some descriptive Statistics* 45(6) J World Trade (2011) 1107 – 1138 at 1131 or H. Horn, L. Johannesson and P. Mavroidis *The WTO Dispute Settlement System 1995-2010, Some descriptive Statistics* IFN Working Paper No. 891, 2011 Research Institute of Industrial Economics, Stockholm, Sweden at 29.

<sup>87</sup> *'Only 2.3 percent (fourteen) of WTO panelist nominations were U.S. nationals...'* and seventy-two (not 71) or 11.9% (not 12.9%) of WTO appointed panelists were EU-28 nationals. J. Pauwelyn *supra* fn 13 at 770.

spread across a total of 251 different individuals (including panel appointments in compliance proceedings), one finds only fourteen US, one French and six UK panelist appointments. Combined, this is less than 3.5% ... Only 2.3% of WTO panelist nominations were US nationals (14); 11.9% EU-28 nationals (72) – combined a meager 14.2% ...’.<sup>88</sup>

In the so-called first instance composed panels, there are no US or EU panel members, but nationals of both can be found in all Appellate Bodies. EU panel members include all current 28 European Member States.<sup>89</sup> Johannesson and Mavroidis (2015) conclude that 14 WTO Members have dominated the panelist positions in all terms of the AB. According to them, ‘The EU, Japan, and the US have appointed three each; Egypt, India, and Philippines, two each; Australia, Brazil, China, Korea, Mexico, New Zealand, South Africa, and Uruguay have appointed one member each.’ They affirm further that there has never been an AB term without an EU or US national-member...or without a Japanese, as mentioned by several scholars.<sup>90</sup>

Australia, Canada, Chile, The EU, New Zealand, South Africa, and Switzerland are the seven WTO Member States who have provided more than 50% of all WTO panelists. Four of the above-listed seven WTO Member States are English-speaking<sup>91</sup>, which in Malacrida’s view means that native English speakers have had an advantage over other mother-tongue panel candidates, although the number of Spanish-speaking panelists has increased. The author also points out that these four Anglophone countries are significant exporting nations, with relatively small populations, who have participated as third parties in WTO disputes, and have not been regularly involved in WTO litigation.<sup>92</sup> As Shaffer (2006) contends, ‘most developing country officials must work in a foreign language in WTO proceedings within this ‘Anglophone organization’.<sup>93</sup>

As per Pauwelyn’s own data (2015), 68% of WTO panels involved cases initiated against developed countries, and 59% of those cases were filed by developed countries<sup>94</sup>. Due to the nationality requirement provided under Article 8.3 DSU, the members of these composed WTO panels were in many cases, nationals of developing countries. Moreover, according to Article 8.10 DSU, whenever a developing country and a developed country are party to a dispute, the former can request the WTO Secretariat to appoint at least one panelist from a

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<sup>88</sup> ‘All nationalities of the panelists are considered to be developing except Australia, Austria, Belgium, Canada, Czech Republic, Finland, Ireland, Italy, France, Japan, Germany, Iceland, Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, United Kingdom, United States, Bulgaria and Hungary. Although Bulgaria and Hungary are classified as “upper-middle-income economies” in the World Bank’s regional system, we consider them “developed” as they are now part of the EU-28 and the EU is as a WTO member ... and classified ... as developed...although 52% of appointments are from developing countries as the WTO defines them, only 36% are from middle or low-income countries as defined by the World Bank’. J. Pauwelyn *supra* fn 13 at 771.

<sup>89</sup> J. Pauwelyn *supra* fn 13 at 770.

<sup>90</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 13. See also: P. C. Mavroidis *supra* fn 14 at 108.

<sup>91</sup> ‘...the Oxford Shorter Dictionary is perhaps the most quoted title in the Appellate Body Reports...more than any covered WTO agreement...’ Georges Abi-Saab *The Appellate Body and Treaty Interpretation* in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (Eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties 30 years Queen Mary Stories in International Law* v 1 (2010) 1877-4822 Pp 382 at 106.

<sup>92</sup> R. Malacrida *supra* fn 21 at 328-329.

<sup>93</sup> Gregory Shaffer *The challenges of WTO law: strategies for developing country adaptation* in *World Trade Review* (2006) 5:02 Pp 177-198 at 182. See also: ‘As an Argentine representative relates: ‘it is tiring and time consuming to wait for the translation in panel audiences,’ which might take ‘ten days and so it happens that panelists arrive to audiences without having had time to read them.’ Diana Tussie and Valentina Delich *The Political Economy of Dispute Settlement: A Case from Argentina* 13 (August 2004) at 10–11.

<sup>94</sup> J. Pauwelyn *supra* fn 13 at 771.

developing country. Both previous rules might have been the reason why more than half of all appointed panelists come from developing countries.

The grounds for a high percentage of cases being filed by developed countries, might be found in Shaffer (2006). He contends that, with few exceptions<sup>95</sup>, WTO Geneva-based missions' *'lack of national legal expertise in WTO matters both within government and in the private bar'*, may discourage them, *'reducing their incentives to participate in the DSS because of lack of support from home'*.<sup>96</sup>

The nationality requirement was not always the same. Johannesson and Mavroidis (2015) explain that *'there is only one case-US-Zeroing (EC)-where nationals of...'* the parties to a dispute served in a panel. In the above-mentioned case, the North American Bill Davey and the German Hans Beseler served as panelists in a US-EU dispute. Both scholars express that this sort of situation occurred frequently before the creation of the AB, and remind the readers that during the GATT period, nationals of parties in conflict did occasionally serve on panels, as in the US-Customs User Fee where US citizen Bob Hudec served as panelist. Another North American, Andy Lowenfeld, served as panelist in an EU-US dispute, as did a national of an EU member State.<sup>97</sup>

These exceptions to the DSU's nationality requirements took place thanks to the application of Article 8.3 DSU stating that *'citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 DSU shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.'* It is entirely up to the parties themselves to decide the panel composition and it is not against the DSU provisions to appoint panel members from Member States involved in the dispute, but this practice is rather unusual.

It is unknown why the parties in the *US-Zeroing (EC)* dispute agreed upon this panel composition but seems they strived for a more balanced panel rather than an, ostensibly, neutral one. In the Panel Report 294R-00 WT/DS294/RW (17.12.2008 at 94), the European Communities (EC) notes that with the agreement of the parties pursuant to Article 8.3 of the DSU, the original panel included citizens of the Members whose governments are parties the dispute. Since nationality is frequently used as a mean to discard potential panelists, the exception in this case is that the parties managed to strike a deal. However, during the ensuing composition process, the United States withdrew its agreement pursuant to Article 8.3 to the service of citizens of Members whose governments are parties to the dispute, argued the EC.

Just as a comparison and following the United Nations Regional Classification, the most heavily-represented region in supranational jurisdictions was Europe, accounting for 50% of the total number of international judges, while the least represented region was Asia

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<sup>95</sup> Brazil is the most advanced developing country in this respect, having structured a special WTO dispute settlement division in Brasilia, which is coordinating WTO legal matters with Brazil's Geneva mission. It has also built relations with the private sector, and facilitated the training of young attorneys in WTO dispute settlement. G. Shaffer *supra* fn 93 at 183.

<sup>96</sup> G. Shaffer *supra* fn 93 at 182.

<sup>97</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 10.

accounting for 13% of all international judges in December 2012, observed Swigart and Terris (2014).<sup>98</sup>

It is interesting to compare the findings of scholars across different years; therefore, I would like to mention the result of the investigation of Busch and Pelc (2009) that the United States had supplied only 11 panelists by 2009; the EU supplied a total of 111 panelists, including several Swiss nationals<sup>99</sup>; New Zealand and Australia provided 37 and 35 panelists, respectively.<sup>100</sup>

For Leitner and Lester (2016) the top ten countries represented in terms of panelists positions between 1995 and 2015 are: New Zealand with 53; Australia with 46; Switzerland with 45; Canada with 33; Brazil and Chile with 25 each; South Africa 24; Hong Kong 20; Mexico 18; India and Venezuela with 17 each. They also contend that out of 585 total panelist positions, 251 were from seven countries: Australia, Brazil, Chile, Canada, New Zealand, South Africa, and Switzerland. Only 14 positions were taken by US citizens and 73 by the EU Member States.<sup>101</sup>

My interlocutor in Interview No 5 affirms that there is no issue between civil law and common law lawyers participating in a DSU procedure, since this is not fundamental. Lawyers from both systems can easily perform their duties as panelists.<sup>102</sup>

Attempting to synthesize in one paragraph what has been contended by the scholars about the nationality of panelists in the past fifteen to twenty years, we could affirm the following:

- 50% or more of the total number of panelists come from developing countries.
- All AB four-year terms have included at least one US citizen, one EU citizen, and one Japanese member<sup>103</sup>. Some scholars have also mentioned the importance of the Asian region, including Hong Kong, and not only Japan.
- Candidates from neutral countries, from Anglophone countries, and from common law or mixed civil and common law systems have been given preference over candidates with other characteristics.
- The top ten nationalities leading the position of panelists are from the Pan-American region (Brazil, Canada, Chile, Mexico, Venezuela), the Asian region (Australia, China, India, New Zealand), the African region (South Africa), and the European Region (Switzerland).
- Trailing the top 10 nationalities, we can identify candidates from Egypt, Korea, Mauritius, Singapore, Sri Lanka, and The Philippines.

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<sup>98</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 622. The following is the UN Regional Classification System page used by the authors: <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (Accessed on 3 April 2017).

<sup>99</sup> Since Switzerland is not a Member State of the European Union, it is not accurate to include the total number of Swiss nationals within the total number of panelists from the EU. It should rather say, if this is correct, that a total of 111 panelists come from Europe.

<sup>100</sup> Marc L. Busch and Krzysztof J. Pelc *Does the WTO need a Permanent Body of Panelists?* in *Journal of International Economic Law* 12(3) Pp 579–594 (9 June 2009) at 588.

<sup>101</sup> Kara Leitner and Simon Lester *WTO Dispute Settlement 1995–2015— A Statistical Analysis* in 19 *Journal of International Economic Law* (2016) 289–300 at 299–300.

<sup>102</sup> Interview No 5 *supra* fn 65.

<sup>103</sup> There has been no Japanese member since 2012. See [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (Accessed on 20 March 2017).

Reasons for these findings are variable and well described above. It is time to pay attention to the gender of panelists and AB members in the next subchapter.

#### *II.4 Gender:*

Following their investigation on international judges, Swigart and Terris (2014) observed that international jurisdictions have historically been dominated and filled with men, but that in recent years, the will and trend is to incorporate women-judges. They also claim that it is difficult to detect differences between the decision-making process and final judgment of men and women within the WTO AB.<sup>104</sup>

In WTO, 32 women (or 13.8% out of 232) have been appointed panelists as affirmed by Pauwelyn (2015). The WTO data for 2016 slightly differs from the above. According to a WTO source, only 8 or 5% of the 168 GATT panelists were women ‘*from Chile; Hong Kong, China; Japan; New Zealand; Singapore; Sri Lanka and Switzerland.*’ They served in 11 or 8% of 132 GATT disputes.

The trend changed somewhat with the WTO DSS. Since 1995, 90 or 43% of the appointed panel members within the 209 WTO panels composed (of 232 established) were women. Since 1995, following the same WTO source, 39 or 14%<sup>105</sup> of 277 WTO appointed panelists were women.

Women from Canada, Chile, Colombia, Israel, Mexico, Singapore, and South Africa have chaired fourteen panels. Canada is the source of five women panelists, which is the highest number, followed by Chile, Mexico, and Switzerland who have each provided three. The Colombian Claudia Orozco Jaramillo has served on 12 panels, while the Venezuelan Eni Neri de Ross has served on 10. Also since 1995, four or 16% of the 25 AB members have been women from China, the Philippines, and the United States (twice, but two different persons), three of whom have chaired the AB.<sup>106</sup>

Just for the sake of comparison, Swigart and Terris (2014) said that the model profile of an international judge in December 2012 was identified as a male.<sup>107</sup> Despite this comparison, in recent years, the participation of women in the WTO DSS has surprisingly increased and a constant trend. These women have even gone on to chair AB terms. Canada has provided the largest number of women adjudicators and two women, from Colombia and Venezuela respectively, have served not less than ten times as panelists. Again, the Pan-American region is relatively well represented, at least in a better way than the African or Arab regions.

Having observed the gender of the appointed WTO adjudicators, we will focus on the age of these individuals in the next subchapter.

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<sup>104</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 624.

<sup>105</sup> Two years before, Puig’s own data, quoted by Pauwelyn (2015), established that 15.6% of the WTO panelists were women. Sergio Puig, *Social Capital in the Arbitration Market*, 25 *European Journal of International Law* (2014) 387-424 at 404-405.

<sup>106</sup> WTO *Celebrating women in WTO Dispute Settlement* (21 June 2016) [https://www.wto.org/english/news\\_e/news16\\_e/disp\\_21jun16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/disp_21jun16_e.pdf) (Accessed on 23 Feb 2017).

<sup>107</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 621.

## *II.5 Average age of WTO panelists:*

International judges are in the later stage of their career, claim Swigart and Terris (2014). They also maintain that more recently, few younger judges have been appointed. The authors believe that young blood could bring fresh perspective and a different sensibility to the decision-making process. These scholars found out that in countries with mixed or pure civil law traditions, lawyers enter the judiciary system at an earlier stage of their career, while in countries based on common law, individuals with a law degree become judges, once they have acquired decades of experience.<sup>108</sup>

Between 1995 and 2000, the average age of WTO panelists was 67 years, as per the interpretation of the average age contended by Pauwelyn (2015). Twelve years after the beginning of the new millennium, the average age went down to 57, and two years later went up to almost 60.<sup>109</sup>

Between 1995 and 2009, Fontoura (2011) affirms that AB members were on average 65 years old, and that by the end of 2009, the average age of the AB members dropped down to 60 years. Fontoura believes that younger diplomats were appointed as members of the AB from 2009 and on.<sup>110</sup>

In the opinion of Johannesson and Mavroidis (2015), a typical member of the AB is a male former government official, with a tenure of around six years and 16 disputes during that time, and 60 years of age at the start of the term of office.<sup>111</sup> Elsig and Pollack (2014) contend that the average age of AB members declined from 65.4 years in 1996 to 58 years in 2010.<sup>112</sup>

Just for the sake of comparison, the model profile of an international judge in December 2012 was identified as an individual between 58 and 67 years old, said Swigart and Terris (2014).<sup>113</sup>

In the past twenty years, the average age of the WTO adjudicators has decreased, not dramatically, but it has gone from almost 70-year-old candidates, to 60 to 65-year-old candidates. To some degree, all scholars agree on this trend.

The following subchapter refers not directly to personal characteristics of the panelists or AB members, but to how many times they have served as such; the main question to answer is whether panelists and AB members are reappointed in their positions

## *II.6 Reappointment of WTO panelists:*

The average panelist has served on 2.2 panels, and fully 55% of all panels have two or more first-time members.<sup>114</sup>

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<sup>108</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 625-626.

<sup>109</sup> 'Average age ... grew from 1995 to 2000 starting at 65.4 and peaking at 69.5). Thereafter, a downward trend can be detected, with a low of 57.1 in 2012. In 2014, average age stands at 59.6.'. J. Pauwelyn *supra* fn 13 at 781.

<sup>110</sup> J.A. Fontoura Costa *supra* fn 30 at 49, 51.

<sup>111</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 14.

<sup>112</sup> M. Elsig and M. A. Pollack *supra* fn 18 at 403.

<sup>113</sup> Leigh Swigart and Daniel Terris *supra* fn 11 at 621.

<sup>114</sup> M. L. Busch and K. J. Pelc *supra* fn 100 at 582.



By 2014, WTO repetition rate of appointments in panels is of 2.4% or 230 individuals per 549 panelist positions, recalls Pauwelyn as per Worldtradelaw.net database. Pauwelyn researched the distribution of appointments with the following conclusions: 48.9% of panelists have been appointed once (which is also confirmed by Mavroidis); 43.3% of panelists have been appointed two to five times; 7.3% of panelists have been appointed six to 10 times; and 0.43% of panelists have been appointed more than 10 times.<sup>115</sup> 14.4% or 87 of the total 603 appointments are regrouped, in what Pauwelyn names as the “Top 10 WTO panelists”.<sup>116</sup> As per the Worldtradelaw.net database, at the top of the list is the Michael Cartland<sup>117</sup> from Hong Kong with 2% or 11 appointments, followed by the Swiss Christian Häberli (2014)<sup>118</sup> with ten appointments, and the Colombian Claudia Orozco Jaramillo<sup>119</sup>, the Polish Dariusz Rosati<sup>120</sup>, the New Zealander Crawford Falconer<sup>121</sup> with nine appointments each.

Garzotti (2002) argues that relying on panelists who have been on only once or twice results in ‘steep learning curves and constant revisiting of seemingly settled issues’, having negative consequences for the consistency and the quality of rulings.<sup>122</sup> However, Cartland (2003), mentioned above, contends that since most panelists have considerable outside trade and legal expertise, defining experience by the number of previous panels served is highly misleading, not least because panelists have access to expert opinions.<sup>123</sup> Thomas Cottier, cited by Busch and Pelc (2009), explains that there is ‘a general feeling that most panelists lack experience,’ but that most chairs are veterans of a good number of panels whose experience counterbalances the relative inexperience of their colleagues.<sup>124</sup>

After having observed that most panelists serve only once, Baetens (2016) comments that ‘*the WTO Secretariat is the only source of continuity*’.<sup>125</sup>

One of the reasons for such a small percentage of reappointment of panelists could be that in a single case there might be, for instance, 60 parties to the dispute, who are nationals of 60 different WTO Member States, which leads to the exclusion of panel candidates from all 60 represented nations. This limits the pool of available candidates to very few individuals. Representatives from these 60 nations cannot be appointed as panelists, which reduces the

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<sup>115</sup> Updated source: 54% of ‘WTO panelists have been appointed more than once’; ‘If one does not count ties, but rather number of panels served on, 46.2% (116 out of 251) served on one WTO panel only, excluding compliance panels as a second panel served on, 53% of WTO panelists served on only one case.’. J. Pauwelyn *supra* fn 13 at 775-776.

<sup>116</sup> J. Pauwelyn *supra* fn 13 at 783.

<sup>117</sup> [https://en.wikipedia.org/wiki/Michael\\_David\\_Cartland](https://en.wikipedia.org/wiki/Michael_David_Cartland) (Accessed on the 23 Feb 2017).

<sup>118</sup> <http://www.wti.org/institute/people/44/haberli-christian/> (Accessed on the 23 Feb 2017).

<sup>119</sup> [http://caracol.com.co/radio/2016/12/06/economia/1481033191\\_147431.html](http://caracol.com.co/radio/2016/12/06/economia/1481033191_147431.html) (Accessed on 23 Feb 2017). As per a recent WTO document, the Colombian Orozco Jaramillo has served 12 times as panelist, and the Venezuelan Neri 10 times. *Celebrating women in WTO Dispute Settlement* (21 June 2016) [https://www.wto.org/english/news\\_e/news16\\_e/disp\\_21jun16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/disp_21jun16_e.pdf) (Accessed on 23 Feb 2017).

<sup>120</sup> <http://www.rosati.pl/> (Accessed on the 23 Feb 2017).

<sup>121</sup> <http://www.lincoln.ac.nz/About-Lincoln/Staff-Profiles/?StaffID=Falconer%20Crawford> (Accessed on the 23 Feb 2017).

<sup>122</sup> 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).

<sup>123</sup> Michael Cartland *Comment on a WTO Permanent Panel Body* 6(1) JIEL (2003) 214–218 in 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) at 216-217.

<sup>124</sup> M. L. Busch and K. J. Pelc *supra* fn 100 at 583.

<sup>125</sup> F. Baetens *supra* fn 60 at 5.

choice of panelists, says Interviewee No 5.<sup>126</sup> The author of this article agrees with this viewpoint, but also shares the opinion of Grossmann (2009-2010) who believes that an adjudicator nominated by the same party-State, and appointed in more than one dispute involving the same party-States, may be considered to have developed a bias, in particular if the said adjudicator has been nominated several times by the same party-State. Therefore, WTO Member States may be taking the precaution of not nominating and re-appointing panelists.<sup>127</sup>

The number of times a panelist or AB member is re-appointed is considerably low. The average of repeat appointments is reduced to approximately two times. Individuals from China, Colombia, Poland, New Zealand, and Switzerland represent the most re-appointed panelists. Having observed the scarce number of times panelists are reappointed, therefore, we can answer the introductory question to this subchapter in the negative.

The ongoing scarce repetition rate of appointments in panels might continue being the rule, particularly after a recent restriction: The AB 2014 Post-Employment Guidelines limit indefinitely the ability of WTO adjudicators to serve as panelists in disputes in which they were previously involved, or disputes in which the same measures are challenged and the same claims are raised (Paragraph 1.a). Former AB members are as well unable to accept any appointment as a panelist for a period of two years following their term of office (Paragraph 1.c).

The next criteria to be explored are the fees of panelists and AB members.

## *II.7 Remuneration:*

Article 8.11 DSU on the Composition of Panels, states that: *'Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.'*

Article 17.8 DSU on the Appellate Review stipulates: *'The expenses of persons serving on the AB, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.'*

As per Article 4.12 of the Recommendations by the Preparatory Committee for the WTO approved by the DSB on 10 February 1995: *'The amount of a retainer/fee package would have to be large enough to offset a member's opportunity cost of work foregone because of potential conflicts of interest, or incompatibility with sporadic trips to Geneva. This cost would also include the disruption of a member's career due to the uncertain but limited length of the AB assignment (two or four years initially, with a possibility of one further period...) and...of the total remuneration actually received...the compensation should be high enough to provide an incentive for a member not to take on work which might create a conflict of interest...the retainer should be set at a minimum of CHF 7'000 per month, plus a fully-adequate daily fee, travel expenses and a per diem. The actual amounts should be set on*

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<sup>126</sup> Interview No 5 *supra* fn 65.

<sup>127</sup> N. Grossman *supra* fn 7 at 132-133.

*the basis of further research on current rates for equivalent services under similar conditions. The contractual conditions for each member of the AB should be the same...*<sup>128</sup>

Baetens (2016)<sup>129</sup> expresses that it is not easy to write about the remuneration of panelists due to the lack of transparency related to this payment issue. Johannesson and Mavroidis (2015) mention in their paper that the WTO is non-transparent in relation to the panelists' remuneration, thereby the gathered information is based on interviews with former panelists. Both authors additionally mentioned that the final yearly remuneration of the members of the AB is, because of lack of transparency, highly unclear.<sup>130</sup>

Pauwelyn (2015) explains that there is a WTO budget to remunerate WTO panelists; the parties to a dispute do not compensate panelists; a fixed sum of CHF/USD 600 and a Daily Subsistence Allowance (DSA) of CHF 437 as sustained by Johannesson and Mavroidis below, is offered as daily remuneration to non-government-related WTO panelists, in addition to the reimbursement of their travel and other panel-related expenses.<sup>131</sup> As mentioned before, Johannesson and Mavroidis (2015) affirm that the Daily Subsistence Allowance (DSA) for non-governmental panelists '*to cover expenses incurred when participating in Panel hearings in Geneva*' is CHF 437 per day. These panelists can additionally request a remuneration for work performed before and in preparation of meetings and hearings, declared both authors.<sup>132</sup>

WTO ad-hoc panelists who are governmental officials obtain no remuneration whatsoever for their work. The time spent by governmental officials appointed as panelists on each case is borne by the respective local administrations. However, these officials serving as panelists do receive probably the same sum mentioned above as per diem or DSA and are as well reimbursed for their travel and other-related costs.

The DSA of CHF 437 per day for WTO panelists is higher than the UN DSA of a non-local international civil servant in Geneva, which is set around USD 404.<sup>133</sup>

AB members receive at least CHF/USD 7,000 as monthly retainer. They are not full-time employed by WTO nor are they working only for the WTO. In parallel to their WTO duties, AB members usually live and pursue a professional activity outside Switzerland.

As mentioned before, AB members are part-time adjudicators, thus they do not enjoy a 12-months retainer fee. Instead, they are compensated only for the exact number of months they work in the case assigned to them, and receive a *per diem* for the length of their journey in Geneva. They are thus not entitled to a retainer fee or *per diem* for the period they are not working.

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<sup>128</sup> WTO *Establishment of the Appellate Body*. Document WT/DSB/1 (19 June 1995) [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch) (Accessed on the 23 Feb 2017).

<sup>129</sup> F. Baetens *supra* fn 60 at 4.

<sup>130</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 11, 15.

<sup>131</sup> J. Pauwelyn *supra* fn 13 at 790.

<sup>132</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 11.

<sup>133</sup> International Civil Service Commission *DSA Circular Report* Reference ICSC/CIRC/DSA/479 (1.04.2015) at 45. [http://moic.gov.np/upload/documents/DSA\\_Apr\\_2015\\_1438152091.pdf](http://moic.gov.np/upload/documents/DSA_Apr_2015_1438152091.pdf) (Accessed on 23 Feb 2017).

Measuring the adequacy of the compensation to AB members in exchange of their knowledge, expertise, and duties, is a very subjective task. To cover such task, let's compare the monthly retainer of AB members with the net monthly salary of UN and WTO high-ranked professional staff members. The monthly retainer fee of the members of the Appeal Tribunal, suggested in the EU Transatlantic Trade and Investment Partnership (TTIP) Proposal, explained below, is also part of the comparison. The purpose of the comparison is to confirm whether in similar high-level positions, highly qualified experts get around the same compensation.

At least USD 7'060 is the net monthly salary of a United Nations (UN) high-ranked professional P-5 level step I.<sup>134</sup> The latter is a full-time UN international civil servant. Meanwhile, the AB member works for a certain period and not only for the WTO. AB members receive as well, a *per diem* for the time spent in Geneva, that the UN staff might not receive. Yet, UN staffs might enjoy other compensations, i.e. *indemnité de poste*.

At least CHF 7,535.75 is the net monthly salary of a WTO Grade 7 staff, according to a WTO Dispute settlement lawyer vacancy.<sup>135</sup> The job description required at least three years of relevant experience as a lawyer specialized in either international trade or public law; including government, academic or private sector experience in national or international trade-related litigation or within judicial institutions or quasi-judicial agencies. Needless to recall that these staff members work full-time at and for the WTO and might enjoy other types of supplementary compensations compared to the ones AB members receive.

WTO salaries are generally exempt from income tax. WTO staffs enjoy an exemption from national income taxation in most Member States.<sup>136</sup> Should this not be the case; the retainer will be free of income tax in case Swiss authorities equate foreign non-governmental AB members to international civil servants. The latter, are not subject to pay income tax in Switzerland. Foreign nongovernmental AB members may pay taxes in their country of origin.

EUR 7,000 (approximately CHF 7,495.60) is the suggested monthly retainer fee for the Appeal Tribunal members established in Article 10.12 section 3 of the EU TTIP Proposal (November 2015), contends Titi (2017). She also mentions, the EU recommends that members of the Appeal Tribunal '*be paid a monthly retainer fee and receive a fee for each day worked*'.<sup>137</sup>

The threshold resulting from the comparisons here with is equal to a monthly compensation of at least CHF/USD 7,000. No lawyer, whether from a developing country or LDC, would complain about such a monthly retainer fee. Not to mention the extra travel costs and DSA compensations, i.e. charges for lodging, meals, gratuities, transport cost, and others.

Members of the AB are supposed to obtain the same type of retainer. However, the time that panelists dedicate to their duties as members of the AB divisions is not the same, therefore,

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<sup>134</sup> Salary scale for the professional and higher categories showing annual gross salaries effective as of 1 January 2017. There are five levels of professionals from 1 to 5, and two levels of directors going from 1 to 2. [http://www.un.org/Depts/OHRM/salaries\\_allowances/salaries/salaryscale/professional/base01-2017.xls](http://www.un.org/Depts/OHRM/salaries_allowances/salaries/salaryscale/professional/base01-2017.xls) (Accessed on 27 March 2017).

<sup>135</sup> WTO Appellate Body Secretariat, Legal Affairs and Rules Divisions. Title: Dispute Settlement Lawyer. Vacancy Notice No EXT/F/14-33 (24 November 2014) <https://unjobs.org/vacancies/1414173190327> (Accessed on 5 April 2017).

<sup>136</sup> [https://www.wto.org/english/thewto\\_e/vacan\\_e/comp\\_package\\_e.pdf](https://www.wto.org/english/thewto_e/vacan_e/comp_package_e.pdf) (Accessed on 27 March 2017).

<sup>137</sup> Catherine Titi *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead* TDM 1 (2017). Also: The exchange rate applied to convert EUR into CHF was extracted from XE Currency Converter [www.xe.com](http://www.xe.com) (Accessed on 5 April 2017).

panelists might be compensated differently. Johannesson and Mavroidis (2015) sustain that *'the formula for appointment in a Division is unknown.'* As per the data gathered by the authors, some members of the AB have been appointed more often than others. Additionally, these members can request compensation for work done at home on any given case at a rate of around CHF 780 per day of work, and, the authors further explain that *'the amount of compensation requested depends on...factors ranging from the complexity of the case to the personal ethics of individuals involved.'*<sup>138</sup> At the end of the day, nobody can guarantee what is the exact yearly compensation of the panel-members of the AB.

The WTO's Annual Budget for 2016 for the AB and its Secretariat was of CHF 7,490,900. The consolidated expenditure as of 31 December 2016 was for Temporary assistance (including short-term staff, consultants, panelists and AB member fees) was of CHF 18,700,855 with a budget of CHF 17,167,050.<sup>139</sup>

There are several major premises to define, as Pauwelyn (2015) and other scholars did: both the WTO Secretariat and the parties to a dispute are more likely to appoint government officials as ad-hoc panelists to avoid any monthly remuneration. The WTO Secretariat might be willing to cut the reimbursement of expenses by choosing government officials located in Geneva, Bern or elsewhere in Europe. Pauwelyn (2015), comments that private high-ranked lawyers earn more than USD/CHF 600 per hour, rather than per day, hence the above-described budget is unappealing to them. He also asserts that these lawyers may accept an appointment as WTO panelist once for the sake of the curriculum vitae, to boost reputation, but that they might not accept several appointments, since the remuneration is nominal.<sup>140</sup>

The author of this article believes the attitude may be reversed when it comes to recognized lawyers located in developing countries or LDC. These lawyers, even if they work under the name of or are associated with international law firms, may be partially paid in their local currency, which might be devalued and might not be convertible into foreign currency, possibly because of exchange controls. In other cases, these lawyers might not find it easy to obtain a Schengen Visa for travelling to Europe, but will get one easily with an official letter from the WTO.

Moreover, the author of this article believes these lawyers will be more than honored or overjoyed to be offered a flight ticket to Geneva from Delhi, Quito, Ouagadougou, Caracas or Beirut, to mention some examples, to spend a week or two in Europe. Not only to do they stand to receive gross payment in foreign currency, they can also use the opportunity to meet up with existing or potential business partners and/or clients, go back home with new skills to justify raising his/her legal fees.

On the same page, Brutger and Morse (2015) mention that serving as panelist within the DSS is a career advantage for those professionals looking to demonstrate that they have a high

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<sup>138</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 14.

<sup>139</sup> WTO Annual Report 2016 Pp 182 at 175  
[https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep16\\_chap9\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_chap9_e.pdf) (Accessed on 23 Feb 2017).

<sup>140</sup> According to Article 8.11 DSU, *'to compensate even governmental panelists somewhat, a practice has developed allowing payment of 600 CHF/day also to governmental panelists who certify that they are doing their panelist work outside normal office hours, e.g. during weekends.'* See also: *'Private lawyers may accept a panel appointment to gain the reputational experience (or once they are comfortably retired). They are less likely to accept repeat appointments (unless they are already retired from private practice), as time spent on a WTO case cannot be dedicated to more lucrative client work. This issue of compensation partly explains both the relatively low number of private sector appointments in the WTO ...'* J. Pauwelyn *supra* fn 13 at 791.

level of expertise in international trade, and, in the case of lawyers, appointments as WTO panelists are considered as a prestigious value-added feature to generate business. Former panelists confirm these incentives. Both authors also mention that over 70% of panelists, when publicizing their own business and services, do promote their WTO experience.<sup>141</sup>

The author of this article believes, judging whether panelists and AB members are offered a fair, good or sufficient remuneration is a very subjective task and will be biased by the judge's own experience and sociocultural context. Depending on which latitude of the world, the interpreter of such remuneration was born and raised, he/she might consider it to be insufficient, adequate, or more than enough. The author of this article further believes that the interpretation above might be directly influenced by the race and gender of the evaluator. If the interpreter is a white male attorney from the North, we can deduce from most scholars referred above what the interpretation would be. If the interpreter is a traditional male or woman attorney from the South, that would yield another outcome.

Subjective comments related to the remuneration of panelists and AB members should be produced within a certain socio-geo-political context, making a wide scan of the global situation. Attorneys coming from opposite latitudes enjoy a different quality of life, different incomes, a probably not comparable *pouvoir d'achat*, different opportunities, different duties and responsibilities, jobs, different expectations, although they might share similar qualifications and capabilities, as well as educational background.

Although we do not have a definitive answer on whether the remuneration to serve as WTO adjudicator is sufficient, the next subchapter below focuses on whether panelists and AB members can perform their duties in an independent and impartial manner, also when they might not receive a well-deserved remuneration.

## *II.8 Independence and impartiality of WTO Panelists and AB members:*

Article 8.2 DSU on the compositions of Panels establishes that: '*Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.*'

Article 8.9 DSU on the composition of Panels establishes that: '*Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.*'

Article 17.3 DSU on Appellate Review rules that persons comprising the AB '*shall be unaffiliated with any government...They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.*' Rule 2.2 and 2.3 of the consolidated Working Procedures for Appellate Review of 16.08.2010 (AB WP)<sup>142</sup> provide that '*During his/her term, a Member shall not accept any employment nor pursue any professional activity that is inconsistent with his/her duties and responsibilities.*' Further, '*A Member shall exercise his/her office without accepting or seeking instructions from any international, governmental, or non-governmental organization or any private source.*'

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<sup>141</sup> R. Brutger and J.C. Morse *supra* fn 72 at 185-186.

<sup>142</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm#20](https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#20) (Accessed on 20 March 2017).

The WTO DSU Rules of Conduct safeguard the impartiality, confidentiality, and independence of those involved in the dispute settlement process, according to the Preamble or Article I of the Rule of Conduct.<sup>143</sup> The persons covered by the Rules of Conduct shall be independent and impartial, avoid any foreseeable conflicts of interest, and respect the confidentiality status of all DSU proceedings, as per Article II of the Rules of Conduct.

According to Article IV *Ejusdem*, establishing the scope of the Rules of Conduct, the persons covered by the Rules are the members of all AB, arbitrators, expert-members of the WTO Secretariat, the AB support staff, the Chairman and Secretariat members of the Textiles Monitoring Body and other members.

As provided in Article VI.1(a) *Ibidem*, the WTO Secretariat shall distribute a copy of the Rules of Conduct and a non-exhaustive list of the matters to be disclosed to future panel-members, AB-members, experts, and arbitrators, and all members of the WTO Secretariat shall be familiar with the provisions of these Rules, as stated in Article VI.1(b).

As per Article III of the said rules, all persons covered by the Rules shall disclose all information they can reasonably know which could influence their independence and impartiality, or which may raise any doubts about their judgement.<sup>144</sup> The obligation to disclose information set out in the previous mentioned article, does not extend to matters which are not directly connected with the proceeding, according to Article VI.3 of the Rules of Conduct. According to Article VI.5 of the same rules, the covered persons shall disclose all new significant information relevant to the case as soon as they become aware of it.

Following Article VI.4 of the Rules of Conduct, if there is a problem with the panelists, parties are informed so that they can also observe whether there is a problem with the appointment and the disclosed information. Any information disclosed by the members of the AB is to be shown to the AB, but is not shared with the parties to a dispute. The same happens with information disclosed by members of the Secretariat, which is only shared with the DG.<sup>145</sup>

The covered persons are forbidden to delegate responsibilities, as per Article III.2 of the Rules of Conduct.

All deliberations and proceedings are confidential, and no personal advantage shall be obtained from the confidential information disclosed in such deliberations and proceedings, according to Article VII of the Rules in question.

*Impartiality forbids any bias, personal prejudice, and lopsidedness* says Seibert-Fohr (2014). Article 18 of the WTO DSU Rules and Procedures and Article VII.2 of the Rules of Conduct restrict *ex parte* communications to other bodies and forbids such communications between

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<sup>143</sup> Jochem Wiers *The WTO's Rules of Conduct for Dispute Settlement. Leiden Journal of International Law* 11 (1 Sep 2016) Pp 265-274 at 266.

<sup>144</sup> Panelists, arbitrators, experts, members of the AB receive the Rules of Conduct when requested to serve in the DSU together with a non-exhaustive list of matters subject to disclosure, which are summarised under Annex 2. These matters can be financial, professional, employment, and/or family-related to the proceeding. J. Wiers *supra* fn 143 at 267, 270. See also: Schefer explains that potential panelists shall disclose information on significant personal opinions relevant to the dispute, that might compromise their appointment as panelists, and which could be perceived as a lack of impartiality and independence of the candidate to a panel. K. N. Schefer *supra* fn 10 at 236.

<sup>145</sup> J. Wiers *supra* fn 143 at 273.

an ad-hoc panel and the AB.<sup>146</sup> The covered persons shall not make any public statements concerning the proceedings.

Any party to a dispute who becomes aware of evidence of material violation of the obligations of independence, impartiality, and confidentiality or of a conflict of interest of covered persons shall submit the evidence including relevant facts and circumstances in writing to the Chair of the DSB, as per Article VIII.1 of the Rules of Conduct. When there is a material violation of the provisions set out in the Rules of Conduct, the person in question shall be disqualified.

Not having disclosed significant information which may be relevant to the proceeding, is not sufficient ground to disqualify any covered person, as per Article VIII.2 of the Rules ‘...unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.’ Decisions on whether there was indeed a conflict of interests are solved in fifteen working days, as per Article VIII.4 of such Rules. In case the concerned person is revoked, excused or dismissed, a replacement will be found.<sup>147</sup>

To preserve impartiality and independence, Article I.2(2) of the AB WP stipulates that a WTO member shall not accept any employment or pursue professional activity that is inconsistent with his/her duties and responsibilities. Article I.19 of the AB WP provides that the members of a division shall not have contact with any party to the dispute, third parties, participants, etc.

A Disclosure Form is to be signed by all parties involved in a dispute settlement, including panelists, AB-members, WTO staff, experts, arbitrators, and other related parties. For every signatory, the form includes binding obligations, such as the duty not to disclose information that might affect the independence and impartiality of a signatory during the length of the dispute settlement procedure or that could ‘...give rise to justifiable doubts as to the integrity and impartiality of the DS mechanism...’

Since 2014, former AB members, former Secretariat staff, and former interns at the AB Secretariat are additionally bound by the AB adopted Post-Employment Guidelines. ‘*The guidelines seek to safeguard the independence of the Appellate Body and secure its reputation by guarding against actual and perceived conflicts of interests and risks of bias...*’<sup>148</sup>

Reflecting the comments of scholars and extensively interpreting Article 17.3 DSU, a panelist should not be intellectually or otherwise associated with a theory or argument sustained by one party or the other. Relevant grounds to identify whether a panel-candidate is associated with the ideas supported by one party to a dispute, could include: the region where the candidate comes from, the affiliation of the candidate with certain WTO negotiating

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<sup>146</sup> Anja Seibert-Fohr *International Judicial Ethics* in C. Romano, K. Alter, and Y. Shany (Eds.) *The Oxford Handbook of International Adjudication* (2014) Pp 975 at 766.

<sup>147</sup> J. Wiers *supra* fn 143 at 271.

<sup>148</sup> WTO Appellate Body Communication *Post Employment Guidelines* WT/AB/22 (16 April 2014) Pp. 2 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/wt/ab/22.pdf> (Accessed 11 March 2017).



coalitions, whether the candidate is a signatory of a specific non-WTO agreement or if the candidate is a significant exporter or importer of a product relevant to the dispute, etc.<sup>149</sup>

The reason for the parties in a dispute to rely on the DSS of a third party is, among others, that this third-party decision-maker is considered as an independent body with independent judges. Independence, says Nadakavukaren Schefer (2016), is a crucial factor in Dispute Settlement Systems. She contends further that the only way for a DSS to remain independent, is to maintain an organizational autonomy reached through the separation of competencies, of personnel and of operations.<sup>150</sup> From this viewpoint, the situation described below might lead us to the conclusion that WTO panelists regrettably lack independence.

The WTO Secretariat has employed high-qualified lawyers who assist the panels in drafting the Reports as well as the AB. The lack of panel-members with a law degree or lack of expertise of WTO appointed panelists is compensated by the WTO lawyers working at the WTO Secretariat. Scholars have frequently affirmed that the lawyers designated by the WTO Secretariat to assist the panels influence their legal reasoning and decision-making process, as well as the outcome of the discussion and final consensus.

Pauwelyn (2015) believes the WTO Secretariat might be inclined to appoint panelists who are in a weak position to refute the ultimate solid and legally armored arguments of the Secretariat. This might jeopardize the legitimacy of the Panel Reports, and of the WTO DSS. Moreover, Pauwelyn (2015) is of the opinion that it is not only the WTO Secretariat's bunch of highly-skilled lawyers who compensate for the lack of knowledge of weaker appointed WTO panelists, but also the fact that *ad-hoc* panels have an AB above them, and that there is a continuous interaction between the panel-members and diplomatic representatives of WTO Member States.<sup>151</sup> Impartiality of WTO adjudicators comes at the expense of expertise and experience, says Pauwelyn (2015).<sup>152</sup>

Nadakavukaren Schefer (2016) develops different characteristics that describe an independent DSS as well as an independent decision-maker, detached from personal immediate or potential pecuniary interests in a case and from previous or present relationship with any of the parties. Among them, she refers to both the duration of the appointment and the remuneration of adjudicators. Schefer believes that a long term of office and a secured salary should be offered to all international adjudicators, which is not the case, at least with WTO ad-hoc appointed panelists, who as scholars have repeatedly affirmed, are badly remunerated and rarely re-appointed.

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<sup>149</sup> R. Malacrida *supra* fn 21 at 325-326.

<sup>150</sup> K. N. Schefer *supra* fn 10 at 218-219.

<sup>151</sup> 'Yet, in the WTO, lack of expertise and experience of WTO panelists is compensated by (1) a strong secretariat, (2) the existence of a standing appellate body (albeit, itself, composed of mainly ex-diplomats rather than experienced jurists), and, most importantly, (3) dispute settlement deeply embedded in a broader diplomatic trade community in Geneva.' and 'The relative inexperience or lack of status of WTO panelists is compensated by the existence of an appellate body, a skilled secretariat, and the overall control of, and continuous interaction of adjudicators with, WTO members through WTO diplomatic channels.' . J. Pauwelyn *supra* fn 13 at 801.

<sup>152</sup> 'The predominant "symbolic capital" of ICSID arbitrators—a high level of expertise and experience—tends to come at the expense of their representativeness and impartiality. In the WTO, it is quite the opposite: representativeness and impartiality constitute the key "symbolic capital" of WTO adjudicators, but they risk coming at the expense of expertise and experience.' . J. Pauwelyn *supra* fn 13 at 800-801.

Shaffer, Elsig, and Puig (2016), refer to David Unterhalter, a former AB member, who evoked the threat to the independence of AB members from the appointment process thus questioning ‘*the legitimacy and authority of the WTO DSS.*’ Unterhalter had to be replaced by a new AB member. WTO Member States could not reach an agreement on one of the two African candidates that had the support of almost all WTO membership. The US blocked the appointment of both candidates. One of them, who had the support of most WTO members including the EU, was domiciled in the US and was working as a professor at a US University. During the last quarter of 2014, a Mauritian diplomat without a law degree, Mr. Shree Baboo Chekitan Servansing, was appointed AB member.<sup>153</sup> Certainly, if one country could block the justifiable appointment of an AB member in favor of a diplomat with no legal background, the independence of the appointment of AB members is under threat.

Nadakavukaren Schefer (2016) maintains that impartiality in adjudicators is a mental feature, which is the state of mind of the decision-maker that can influence him/her to adopt a decision in one direction or the other. The scholar specifies that the judge’s impartiality is related to their emotions, their intimate *préjugés* and intangible feelings towards someone or something and their predisposition, which is different from the definition of independence, which relies on the lack of personal pecuniary interests in a certain result.<sup>154</sup> The aforementioned author points to the strange lack of DSB decisions on the impartiality and independence of adjudicators who, above all, are human beings not excepted from errors.<sup>155</sup>

My interlocutor in Interview No 5 contends that the WTO DSU is based on the impartiality principle of the system, which he affirms is a total success. The interviewee believes cases where unethical or non-deontological behavior of lawyers serving as panelists or AB members could be raised, are less immediate and realistic as they are in private practice. Finally, the interviewee No 5 sustains there is less danger of external influence by the panelists or AB members than there is for adjudicators in other types of alternative dispute resolution.<sup>156</sup>

With this last criterion, we conclude the examination of the characteristics of WTO adjudicators. The second part of this article is focused on how WTO adjudicators are appointed and by whom.

### III. Who Appoints WTO Panel- and AB-Members?

Article 8.4 of the DSU on the composition of the panel establishes that: ‘*To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each*

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<sup>153</sup> G. Shaffer, M. Elsig, and S. Puig *supra* fn 45 at 271.

<sup>154</sup> K. N. Schefer *supra* fn 10 at 220-224.

<sup>155</sup> The European Union questioned once the independence of a panelist. K. N. Schefer *supra* fn 10 at 238.

<sup>156</sup> Interview No 5 *supra* fn 65.

*of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.'*

Article 8.6 of the DSU on the composition of the panels stipulates that: *'The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.'*

Article 8.7 of the DSU on the composition of the panels stipulates that: *'If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.'*

Panels are composed of three persons unless the parties to the dispute agree, within ten days from the establishment of the panel, to compose a panel of five panelists, as per Article 8.5 DSU. Schnyder and Pfisteres (2016) concluded that even when the parties to a dispute are selecting and appointing the adjudicators, *'there is no guarantee of a pluralistic and democratic adjudication.'*<sup>157</sup>

Little or almost nothing has changed at the WTO DSU: the WTO Secretariat still holds and performs the key role in selecting panelists. Although rarely used, the Roster or Indicative List of Candidates has been updated from time to time. As Baetens (2016) points out in the first part of this article, the WTO Secretariat is the only body that is permanent. The AB is a permanent adjudicating body, but the members composing it are appointed for a four-year mandate, and the Panels are still today formed on an ad-hoc basis with case-by-case panelists, who, in general, will only be appointed to serve once.<sup>158</sup>

The parties mutually agree on the selection of WTO panel-members. This mutual agreement has been on the rise over time (37% of the appointed panel-members).

There is an environment of mutual distrust, maintains Malacrida (2015). Parties might view with suspicion the candidates proposed by the other. If a party insists on favoring a certain candidate, that candidate might share the views of such party, says Malacrida, who also affirms that parties will insist on the appointment of their candidate and the rejection of the one proposed by the other party. Malacrida says that an independent body such as the secretariat can break deadlocks among the parties, or prevent them.<sup>159</sup>

Rejection of the nomination of panel candidates by complainant and defendant are made based on compelling reasons according to Article 8.6 DSU. These compelling reasons, scholars affirm, have a very wide spectrum. In practice, many Members make quite extensive

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<sup>157</sup> Schnyder and Pfisteres *supra* fn 9 at 193.

<sup>158</sup> J. Weiler *supra* fn 15 at 10.

<sup>159</sup> R. Malacrida *supra* fn 21 at 313.

use of this clause; there is no review regarding whether the reasons given are truly compelling, and the Secretariat simply proposes other names.<sup>160</sup>

Should parties not reach an agreement, by default, the DG of the WTO Secretariat will select all three panel-members. About 64% of the panel-members of the composed panels between 1995 and 2014 were appointed by the DG, as affirmed by Pauwelyn (2015)<sup>161</sup>. Although the WTO Secretariat has not necessarily followed the Indicative List<sup>162</sup> of candidates, it takes into consideration the candidates proposed by the parties or the considerations they share with the Secretariat *à propos* the appointment of panelists.<sup>163</sup>

The DSU requires that the indicative list initially include ‘*the roster of governmental and nongovernmental panelists established on 30 November 1984 (BISD 31S/9) and other rosters and indicative lists established under any of the covered agreements, and shall retain names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement*’.<sup>164</sup>

The DSU does not specifically provide for the regular updating of the indicative list. To maintain the credibility of the list, it should however be completely updated every two years. Within the first month of each two-year period, Members would forward updated Curricula Vitae of persons appearing on the indicative list. At any time, Members would be free to modify the indicative list by proposing new names for inclusion, or specifically requesting removal of names of persons proposed by the Member who were no longer able to serve, or by updating the summary Curriculum Vitae.<sup>165</sup>

A suggested format for the Summary Curriculum Vitae form for the purposes of maintaining

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<sup>160</sup> WTO Chapter 6. *The process — Stages in a typical WTO dispute settlement case* in Dispute Settlement System Training Module [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm) (Accessed on 23 Feb 2017).

<sup>161</sup> J. Pauwelyn *supra* fn 13 at 785.

<sup>162</sup> WTO Dispute Settlement Body *Indicative List of Governmental and Non-Governmental Panelists*. Revision WT/DSB/44/Rev.34 (04/05/2016) 16-2563 Pp 19 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S007.aspx?AllTranslationsCompleted=1&Id=228651&PageAnchorPosition=228651&SearchPagePageNumber=10&SearchPageCurrentIndex=0&SearchPageViewStatePageIndex=0&SearchPageStartRowIndex=0&returnedPage=FE\\_S\\_S006.aspx&IsNotification=False&LeftTabFieldText=&NumberOfHits=37&DreReference=&Query=\(%40Symbol%3d+wt%2fdsb%2f44+or+wt%2fdsb%2f44%2f\\*\)&Context=FomerScriptedSearch&btsType=&IsEnglishSelected=&IsFrenchSelected=&IsSpanishSelected=&IsAllLanguageSelected=&SearchPage=&SourcePage=&Language=&](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S007.aspx?AllTranslationsCompleted=1&Id=228651&PageAnchorPosition=228651&SearchPagePageNumber=10&SearchPageCurrentIndex=0&SearchPageViewStatePageIndex=0&SearchPageStartRowIndex=0&returnedPage=FE_S_S006.aspx&IsNotification=False&LeftTabFieldText=&NumberOfHits=37&DreReference=&Query=(%40Symbol%3d+wt%2fdsb%2f44+or+wt%2fdsb%2f44%2f*)&Context=FomerScriptedSearch&btsType=&IsEnglishSelected=&IsFrenchSelected=&IsSpanishSelected=&IsAllLanguageSelected=&SearchPage=&SourcePage=&Language=&). The list has been reviewed at least one time per year between 2007 and 2016: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/dsb/44%20or%20wt/dsb/44/\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/dsb/44%20or%20wt/dsb/44/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) (Both accessed on 23 Feb 2017).

<sup>163</sup> ‘*Before the WTO Secretariat proposes candidates or the DG appoints panelists, the desiderata of the parties are heard and carefully taken into account. The secretariat and DG certainly have some freedom to propose and appoint, but this freedom is curtailed by the wishes ... of the parties.*’. J. Pauwelyn *supra* fn 13 at 785.

<sup>164</sup> Article 8.4 DSU and Article 2 in a WTO document WT/DSB/44/Rev.34 annex on the administration of the Indicative List. A suggested format for the Summary Curriculum Vitae form for the purposes of maintaining the Indicative List is also part of the document. The author of this article would add to the mentioned Summary information on: trade law and policy related speeches, work as speaker in conferences, seminars, workshops, locally and internationally; all nationalities, when a candidate possesses more than one national passport; current location; trade-related experience in the ICSID: a. Served as an arbitrator year, dispute details (parties, year, dispute name), role as chairperson/member; and b. Presented a case to an arbitral tribunal under the ICSID year, dispute name, representing which party-member?.

<sup>165</sup> Article 5 in a WTO document WT/DSB/44/Rev.34 annex on the administration of the Indicative List.

the Indicative List is enclosed.<sup>166</sup>

The Indicative List of Candidates (See **Table 1** Candidates classified per region, country and type of expertise in annex) to become members of an ad-hoc WTO panel is a Roster of Candidates rarely used either by the parties to a dispute or the DG of the WTO Secretariat when it comes to appoint a panel-member. The Roster is filled with names proposed by WTO Member States with the approval of the WTO DSB. These proposals have never been rejected. However, less than 20% of candidates listed on this Roster have served as WTO panelists, according to data from Horn et al. (2011)<sup>167</sup> quoted by Pauwelyn, who is indeed listed in this Roster as a Belgian candidate. As part of Pauwelyn's (2015) findings, more than 60% of the appointed WTO panelists are not listed in the Roster.<sup>168</sup>

Johannesson and Mavroidis (2015) agree on this when stating that only 30% of all panelists have been chosen from the Indicative List. They also concluded that 77 appointed panelists were not on the Indicative List before the appointment took place.<sup>169</sup>

Johannesson and Mavroidis (2015) illustrate that when *establishing* the WTO Panel, the DG of the WTO Secretariat customarily meets with the chairmen of the DSB and General Council, and members of the WTO Legal Service and the Rules Division; the latter in the case concerns trade in services or contingent protection. When composing the WTO Panel, the DG also consults with the parties, but the feedback he may get has a facultative character.<sup>170</sup>

The WTO Secretariat has expanded knowledge and acquired experience in identifying qualified lawyers, as per Malacrida (2015), as well as making proposals of candidates that fulfill both parties' expectations, with a high degree of consensus. The lack of trust disappears. Malacrida affirms that decisions of panelists chosen by the DG have had more acceptance than the decisions taken by panelists nominated by the parties. Malacrida measured this upon the number of decisions that were adopted without appeal.<sup>171</sup>

Busch and Pelc (2009) look at the data content of panels where the DG appointed panelists and find that they do, in fact, have a slightly higher proportion of developing country participation, though this difference is not statistically significant.<sup>172</sup>

Article 17.1 DSU provides that, I cite: '*A standing AB shall be established by the DSB. ... It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the AB shall serve in rotation. Such rotation shall be determined in the working procedures of the AB.*' in accordance with Rules 6.1 and 6.2 AB WP, which stipulate that in conformity with the previous article, '*a division consisting of three Members shall be*

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<sup>166</sup> Article 8 in a WTO document WT/DSB/44/Rev.34 annex on the administration of the Indicative List. Summary Curriculum Vitae for Persons proposed for the Indicative List as an annex to document WT/DSB/44/Rev.34.

<sup>167</sup> H. Horn, L. Johannesson and P. C. Mavroidis *supra* fn 86.

<sup>168</sup> 'Strikingly, 63 percent of panelist appointments were *not* from the indicative list ...'. J. Pauwelyn *supra* fn 13 at 785.

<sup>169</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 10.

<sup>170</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 10.

<sup>171</sup> R. Malacrida *supra* fn 21 at 314, 319.

<sup>172</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.*' M. L. Busch and K. J. Pelc *supra* fn 100 at 588-589.

*established to hear and decide an appeal.’ and ‘The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.’*

Article 17.2 DSU establishes that: *‘The DSB shall appoint persons to serve on the AB for a four-year term, and each person may be reappointed once... Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor’s term.’*

Before closing this section of the article, it would be relevant to mention that there is currently a battle heating up at the WTO regarding the reappointment of a South Korean AB-Member. The US is opposed to the reappointment, not because Mr. Seung Wha Chang lacks any legal competencies or criteria, but rather because he has been involved in decisions against the United States. This move from the US is certainly compromising the body’s independence and impartiality. Although the US has always and systematically made use of the WTO DSS to enforce rules and regulations on other Member States, and has succeeded more times than it has lost, it has now put in jeopardy the whole DSS by questioning an AB-member and reappointment.<sup>173</sup> In Interview No 3, my interlocutor mentioned that although decisions of the AB are collegial, it is possible to identify which panel member has a certain opinion, because for example, he/she was the author of a particular interrogation or insisted on precise issues that might have raised the party’s awareness of the adjudicator’s position.

Having analyzed the literature of the past two decades on this subject matter, this author would affirm that the WTO Secretariat and its DG do play the most important role in the nomination and appointment of panelists and AB members. The DG and its Secretariat do take into consideration the candidate proposals made by the parties to a dispute, however, the DG is not obliged to follow these proposals. Other candidates can be nominated and appointed, and the parties have the right to oppose the nomination for compelling reasons or grounds that have been left “open” or ambiguous, as observed by scholars.

The nominated and appointed panelists are not necessarily listed in the Roster of governmental and non-governmental candidates. Only 30% of the appointed panelists appear in the Roster (e.g. Johannesson and Mavroidis, 2015). It has been affirmed that the decisions of panelists nominated and appointed by the DG have rather received more acceptance than decisions issued by panels composed by panelists who were nominated by the parties to a dispute (e.g. Malacrida, 2015). Moreover, it has also been affirmed that as a proportion, the DG has nominated more candidates from developing countries than the parties. Indisputably, the DG and WTO Secretariat exert great power when it comes to the nomination and appointment of adjudicators.

The third part of this article is focused on whether the WTO Secretariat has the power to influence the Panel- and AB Reports or, in the contrary, if this has evolved with time.

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<sup>173</sup> G. Shaffer *Will the US Undermine the World Trade Organization?* in Huffington Post (24 May 2016) Pp 5 [http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the\\_b\\_10108970.html](http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html) (Accessed on 30 October 2016).

#### IV. Who Drafts the Panel and AB Reports?

A plaintiff might complain about a trade measure adopted by a defendant, which is regulated by WTO Agreements. The panel oversees the investigation and hearing procedure about a dispute between two or more Member States. As result of the investigation and dispute settlement process, the ad-hoc panel issues a decision, namely, a Report to which the panel applies the concerned WTO Agreement and decides whether there is a violation of WTO rules.

As per Article 11 DSU, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Referring to the above-mentioned article, Malacrida expresses '*that specific sectoral or subject matter expertise may be desirable to ensure panels make sound and informed factual findings, as panelists are mandated to function as the triers of facts.*'.<sup>174</sup>

As per Weiler (2001), during the GATT times, both the draft of the Panel Reports, including the decision's legal fundamentals were left to the WTO Secretariat. Friendly and speedy settlement of disputes and acceptability of the report were given priority, both reached through a process resulting from the combination of diplomatic skills of panel members and legal expertise of the Secretariat. Weiler (2001) affirms that '*the legal deliberation will often have taken place between the legal secretary and other members of the Secretariat and not in any meaningful sense within the Panel.*'<sup>175</sup>

Weiler (2001) considers that the WTO Secretariat plays the role that panels, as first instance tribunals within the DSS, should. He comments that the Secretariat is the single permanent body within the DSS, with relatively permanent staff, safeguarding and preserving the historic memory, and enjoying insight of all precedents before and after the creation of the WTO in 1996. According to the DSU, the Secretariat performs the role of legal adviser and assistant of the ad-hoc appointed panels, whose members lack continuity and deep knowledge of WTO ruling and AB precedents. However, let's face it, the WTO Secretariat has a certain view on a dispute and will do whatever it takes to see this view clearly expressed and developed in the Panel Report. Weiler referred to a panelist experience where the ad-hoc panel noticed that it was of no use to challenge the legal point of view of the Secretariat.<sup>176</sup>

Grossman (2009-2010) affirms that '*...secretariats are an extension of the tribunals themselves, and they play important roles in ensuring that states receive equal treatment and equal information.*'<sup>177</sup>

Hudec (1999) mentions that the alternative to legal rulings based on Secretariat legal advice is a panel composed of panel members who themselves have enough legal expertise to

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<sup>174</sup> R. Malacrida *supra* fn 21 at 322.

<sup>175</sup> J. Weiler *supra* fn 15 at 6.

<sup>176</sup> J. Weiler *supra* fn 15 at 13.

<sup>177</sup> N. Grossman *supra* fn 7 at 141.

employ their own legal judgment.<sup>178</sup>

Gregory Shaffer (2001) '*likens the professional staff to an epistemic community, since its members share similar beliefs about the validity of neo-classical economics and the importance of trade liberalization*', as per a citation made by Cortell and Peterson (2006). Shaffer sustains that the Secretariat members can, at the margin, affect the outcome of a Panel Report by facilitating coalition-building, identifying interests, framing issues and helping shape knowledge.<sup>179</sup>

Ehlermann (2003) contends that panel-members are depending on the services of the WTO Secretariat's officials, who have a different professional training, experience, and commitment, and asserts that '*it is this safe to assume that the influence of these officials on the work of the panels can be considerable.*'<sup>180</sup> This official is referring in his comment to the members of the Secretariat. Ramirez (2011) says that Prof. Hudec identified the support provided by the WTO – 'eleven extraordinary lawyers' - to the AB as one of the main pillars of the DSS to facilitate the task of the AB members. However, Hudec also contends that the AB does not '*discuss its reports but always listen to the views, comments, and critiques of others.*'<sup>181</sup>

The Secretariat shall assist panels, especially on the legal, historical and procedural aspects of the matters dealt with, and shall provide secretarial and technical support, as per Article 27.1 DSU.

According to Article 27.2 DSU, '*While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.*'

Mavroidis (2014) shares the existing general doubt about the level of influence that the Secretariat has over the decision-making process of WTO adjudicating bodies. He further mentions an anecdotal experience of panel members, referring to Pescatore, who has tried unsuccessfully to draft the Panel Reports without the assistance of the Secretariat.<sup>182</sup>

Johannesson and Mavroidis (2015) express that depending on the subject matter and administrative capacity, different divisions will assist WTO Panels. As a routine, Panels will receive the support and assistance of a Secretary and a Legal Officer member of the WTO Legal Affairs Division unless the dispute concerns a contingent protection instrument, in which case the Legal Officer is a member of the WTO Rules Division. If the dispute is

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<sup>178</sup> '*A separate concern about using Secretariat legal officers as the legal staff for panel members is a conflict-of-interest, or a conflict-of-function problem that occurs when Secretariat staff who have given legal advice to governments about a particular matter find themselves, a year later, advising a panel asked to rule upon the same or a similar issue.*' R. Hudec *supra* fn 26 at 35.

<sup>179</sup> Andrew P. Cortell and Susan Peterson *Dutiful agents, rogue actors, or both? Staffing, voting rules, and slack in the WHO and WTO* in Darren G. Hawkins and others. (Eds.) *Delegation and agency in international organizations*. Political economy of institutions and decisions. Cambridge (2006) Pp 406.

<sup>180</sup> Ibid A. P. Cortell and S. Peterson *supra* fn 179.

<sup>181</sup> Ricardo Ramirez *Professor Hudec and the Appellate Body* 20 Minn J Int'l L 265 (2011) at 273.

<sup>182</sup> P. C. Mavroidis *supra* fn 12 at 244-245.



related to trade in services, the assisting Legal Officer is a member of the WTO GATS Division.<sup>183</sup> Kolsky (2012) contends that the AB receives assistance from the AB Secretariat; and that the panels obtain it from either the Rules Division or the Legal Affairs Division, depending on the subject-matter of the dispute to settle.<sup>184</sup>

Pauwelyn (2015) asserts that WTO Secretariat influences the selection of panelists, the decision-making process, as well as the outcome or Panel Report.<sup>185</sup> Johannesson and Mavroidis (2015) go a bit further, insinuating that appointed panelists outsource the work they have been assigned.<sup>186</sup>

A WTO official who took part in the Interview No 5 explained that the WTO Secretariat's team shares with the WTO-composed panel, the fundamental questions one should formulate when studying the case in dispute. Moreover, the said WTO team shares with the WTO panel the main issue the panel should concentrate on, to finally reach a common decision presented in the form of a report. To give an example, WTO's team could assert that a dispute should be decided on a technical regulation or on a trade violation, among others. However, the core element to be assessed is defined by the WTO panel, argues Interviewee 5. The decision is the result of a consensus among all parties involved, because the recommendations incorporated in the Panel Report are those agreed upon by the three panelists.<sup>187</sup>

Interviewee No 4 expressed that appointed members can define things, tell the other members and the WTO Secretariat what their opinion is; however, they cannot go into details. It is up to the team of lawyers supporting the WTO Secretariat to draft the Panel Report, said the interlocutor. This team is the one who should develop the ideas, and suggestions of the panelists by providing the arguments. The WTO Secretariat does suggest to the panelists where the decision should go. The WTO Secretariat knows the jurisprudence, while the appointed panelists may lack this knowledge, noted the participant to the Interview No 4.<sup>188</sup>

The longest-serving WTO adjudicator replied to my enquiry (Interview No 2) via email by commenting that the present article on WTO panelists '*would indeed need some other challenges, however, the problem is that the most pressing questions e.g. on who is in the driving seat between the WTO Secretariat and the adjudicators, or why is there not more deference to non-WTO law,*<sup>189</sup> *can only be answered by insiders. This explains the problems*

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<sup>183</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 15.

<sup>184</sup> M. Kolsky Lewis *supra* fn 23 at 10.

<sup>185</sup> '*The Secretariat not only proposes panelists in all disputes (for approval by the parties), it also appoints 64 percent of WTO panels (when the parties cannot agree on panel membership). Importantly, in neither case is the WTO Secretariat bound by the indicative list of panelists established by WTO members. On its face, this situation gives the WTO Secretariat considerable flexibility to pursue its own agenda, both in the type or caliber of people that are appointed and in terms of repetition rates.*'. and '*...the WTO Secretariat (Legal Affairs Division or Rules Division, depending on the type of case) plays an important role in the preparation, deliberation, and drafting of panel reports.*'. J. Pauwelyn *supra* fn 13 at 793, 795.

<sup>186</sup> L. Johannesson and P. C. Mavroidis *supra* fn 20 at 15.

<sup>187</sup> Interview No 5 *supra* fn 65.

<sup>188</sup> Interview No 4 *supra* fn 67.

<sup>189</sup> Stephanie Hartmann *Recognising the Limitations of WTO Dispute Settlement – The Peru – Price Bands Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes* 48 *Geo Wash Int'l Rev* 617 (2015-2016). See also: Boisson and Heathcote contend that adjudicators might be brought to solve a case, which implies the coordination of different types of norms related to trade but also to environment. In many cases judges fail to apply the latter due to political pressures or lack of political will. Laurence Boisson de Chazournes and Sarah Heathcote *The role of the new international adjudicator in 95<sup>th</sup> Annual Meeting of The American Society of International Law* (2001) Pp. 129-138 at 134.

*Shaffer, Elsig, or even Howse have faced in their own research*'.<sup>190</sup>

The introductory question to this third part of this article can be answered positively. The WTO Secretariat does continue playing an important role in the decision-making process of the ad-hoc panels and Panel Reports. Referring to these Panel Reports, the next and fourth part of this article focuses on how these Reports are adopted.

This article began with an examination of the characteristics of WTO DSS panelists and AB members; an idea of these servants' professional and educational background, sociocultural context, age, nationality and gender emerges. We also know whether they receive a remuneration, and are reappointed as WTO adjudicators. By now, we can be reasonably certain of the fact that, contrary to conservative political party members, these civil servants fully support trade liberalization, and have probably never written anything that may compromise their opinion on the 'greatness' of WTO Agreements or on any case settled in the WTO forum.

In the second part of this article, the investigation focused on the body responsible for nominating and appointing panelists and AB members, and the level of influence that DG of the WTO Secretariat exercises in this process.

The third part of this article dealt with a long-standing unsolved dispute on who writes the panel and AB reports: the panelists and AB members independently of the WTO Secretariat, the WTO Secretariat, or the panel and AB members with the assistance of the WTO Secretariat, more specifically, with the assistance of the Rules Division.

The adoption and legal effects of panel and AB reports has been elaborated in the author's previous paper<sup>191</sup>, hence the fourth part of this article approaches two hotly debated antagonisms of the WTO DSS: confidentiality and transparency within WTO DSS. The following section addresses the confidentiality to which all parties and individuals involved in a dispute settlement procedure are bound, as well as the much-sought transparency. Both aspects seem to be internally fighting against each other for predominance.

Scholars have argued that the appointment of panelists and AB members is not transparent, that the biography or background of the panel- and AB-candidates is also not transparent, that the rejection of nominated candidates lacks transparency. The draft and content of panel and AB Reports, as well as, the integrity of the WTO Dispute Settlement System have also been challenged with the same discourse on lack of transparency.

However, the next section argues that scholars have availed of the increased transparency of the WTO Dispute Settlement process by providing some irrefutable examples of such openness. It also stresses that the confidentiality duty of all parties involved in a dispute settled through an ad-hoc panel procedure is not overshadowing the transparency principle.

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<sup>190</sup> Enquiry No 2 with a former reappointed WTO Panelist. Email from the 21 September 2016 is kept with the author of this article. The name and position of the official are confidential.

<sup>191</sup> See Maria Gabriela Sarmiento *Adoption and legal effects of WTO Panel and Appellate Body Reports* (14 March 2017) <https://ssrn.com/abstract=2931449>. The latter is focused on the adoption of the reports issued by WTO Panels and the AB.

## V. Confidentiality and Transparency of the DSS

Grossman (2009-2010) believes parties might grant preference to confidentiality when damaging allegations could be kept private to prevent third parties from becoming aware of, for example, trade secrets, as pointed out by Buys (2003)<sup>192</sup>. The first of the two scholars assert that '*complete transparency may occasionally aggravate conflict and prevent negotiated dispute settlement,*' as declared by Bernard Finel and Kristin Lord (1999)<sup>193</sup> when stating that '*transparency can exacerbate crises...*'<sup>194</sup>

The above might be some of the grounds for the adoption of the following WTO provisions on confidentiality:

Article 14.1-3 of the DSU on Confidentiality, rules that: '*1. Panel deliberations shall be confidential. 2. The reports of panels shall be drafted without the presence of the parties to the dispute 3. Opinions expressed in the panel report by individual panelists shall be anonymous.*' According to this article, Panel meetings are closed.

Article 17.10 DSU on Appellate Review establishes: '*The proceedings of the AB shall be confidential. The reports of the AB shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.*' Article 17.11 DSU on Appellate Review states: '*Opinions expressed in the AB report by individuals serving on the AB shall be anonymous.*' Article 18.2 DSU on Communications with the Panel or AB provides that: '*Written submissions to the panel or the Appellate Body shall be treated as confidential.*'

WTO provisions on confidentiality are established under the DSU in accordance with the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, which under Article I provide that these Rules have been adopted to maintain the integrity, impartiality, and confidentiality of the proceedings conducted under the DSU. Articles II and III.2 *Ejusdem* provide that all persons covered by the Rules *in commento*, 'shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism.'

Article VI.6 *Ibidem* stipulate that '*the Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.*' The confidentiality principle prevails during the procedure and after the procedure has come to an end.

Articles VII.1 and VII.2 on confidentiality set out in the Rules of Conduct provides that '*each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential...*' and '*during the proceedings, no covered person shall engage in ex parte contacts concerning matters under consideration...*' and shall not '*...make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing AB has been derestricted.*'

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<sup>192</sup> Cindy G. Buys *The Tensions Between Confidentiality and Transparency in International Arbitration* 14 Am Rev Int'l Arb 121 (2003) 134-138.

<sup>193</sup> Bernard I. Finel & Kristin M. Lord *The Surprising Logic of Transparency* 43 Int'l Stud. Q (1999) at 315.

<sup>194</sup> N. Grossman *supra* fn 7 at 159.

Article VIII.1 on subsequent disclosure and material violations of the obligations set out in the Rules of Conduct, such as the obligation for the covered persons to keep confidential any information related to the dispute settlement procedure, establish that if any party to the dispute becomes aware or receives evidence of a material violation of the confidentiality obligation, among others, he/she shall submit such evidence in writing including the relevant facts and circumstances to the Chair of the DSB or the DG of the AB. While Article VIII.2 of the same Rules provides that the failure to have disclosed some information on a timely manner is not enough ground to disqualify a covered person, unless the evidence shows that there has been indeed a material violation of the obligations of confidentiality, or a manifest conflict of interests that might raise doubts that the covered person will respect his/her confidentiality obligation, among other duties.

The aforementioned provisions of the DSU and the Rule of Conduct, coupled with the WTO Staff Regulation 1.7 provide for the comprehensive protection of confidential information relating to appellate proceedings.

Since 2014, former AB members, former Secretariat staff, and former interns at the AB Secretariat are additionally bound by the AB adopted Post-Employment Guidelines. *‘The guidelines seek to safeguard the independence of the Appellate Body and secure its reputation by guarding against actual and perceived conflicts of interests and risks of bias...’*.<sup>195</sup>

Weiler (2001) contends that civil servants have always considered that power, empowerment, and self-importance strictly depend on confidentiality and secrecy, and this might be the reason for keeping both as features of the DSS.<sup>196</sup> He made this affirmation in 2001, however, we are aware that the situation has positively evolved towards a more transparent and open system.

Pauwelyn (2015) manifested the WTO Dispute Settlement has become somewhat ‘privatized’ and that the success of the WTO DSS is attributable to internal trade settlements between WTO Member States, where cash compensation and other types of compensations are negotiated, instead of adjudicators enacting and complying with WTO trade agreements and established rules.<sup>197</sup>

Roessler (2015) concedes a lack of transparency of the AB in relation to the modification of its own jurisprudence, because on occasions, it does correct or modify a precedent but it does not clearly state it, and adopts confusing texts that do not openly establish a change in the jurisprudence.<sup>198</sup>

Ramirez (2011) asserts that transparency has indeed increased substantially over the last years in the WTO, and as an example, he recalls that by 2011, panels have held public hearings in fourteen disputes, the AB participating in eight of them. At the time Ramirez

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<sup>195</sup> WTO Appellate Body Communication *Post Employment Guidelines* WT/AB/22 (16 April 2014) Pp. 2 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/wt/ab/22.pdf> (Accessed on 11 March 2017).

<sup>196</sup> J. Weiler *supra* fn 15 at 12.

<sup>197</sup> *‘...what we have is a relatively ad hoc, party-driven mechanism to settle disputes under the cautious control of government members, based on lengthy, often impenetrable rulings that only insiders can understand and where politically sensitive cases against big players result in diplomatic, give-and-take settlements with trade or cash compensations rather than rule compliance.’* J. Pauwelyn *supra* fn 13 at 802.

<sup>198</sup> Frieder Roessler *Changes in the jurisprudence of the WTO Appellate Body during the past twenty years* Journal of International Trade Law and Policy Vol 14 Iss 3 (2015) Pp. 129 – 146 at 143.

wrote his article, ‘*an open hearing relating to an aircraft dispute between the United States and the European Union was taking place before the AB*’, and the WTO had made most of the DS documents public and available to the public via its website, where it has also published most of the party communications with the DSB, between the parties themselves, with the panels, and the AB. WTO Member States have made public submissions to WTO Panels and the AB for the sake of transparency.<sup>199</sup>

By the way, as Ramirez affirms above, Schnyder and Pfisteres (2016) recall that WTO Panel Reports as well as those issued by the AB ‘*are published, circulated, and available as public documents.*’<sup>200</sup>, but also ‘*disputes are publicized and hearings are live-streamed*’, which is the reason why N. Schefer (2016) expresses that the WTO DSS enjoys a high level of transparency.<sup>201</sup>

The main reason why hearings are public, as observed by Ramirez (2011), can be grounded on what Grossman (2009-2010) contends: ‘*Transparency mechanisms may take the form of requiring open hearings and published opinions in accessible languages...*’<sup>202</sup>

Writing about transparency within the DSS, Mavroidis (2013) says that the curricula vitae of WTO ad-hoc appointed panelists are not available to the public, although the ones of the AB-panel members are widely publicized on WTO’s website.<sup>203</sup>

Grossman (2009-2010) affirms that ‘*transparency plays an important role in allowing international actors to assess whether courts are implementing rules in a fair and unbiased manner.*’<sup>204</sup>

As a guarantee for the legitimation of the decision-making process of the DSS, the procedure has become much more transparent and less confidential and private than in the first decade. Transparency is described through empirical cases referred by scholars.

Despite the positive findings, one cannot deny that many of the interrogations listed in the introduction to this article remain unanswered or partially answered through hypothetical results, and statistics of WTO specialized scholars.

Having explicated all four subjects, the last part of the article is dedicated to the conclusions.

## **VI. Concluding Remarks**

This research was conceived to identify the literature on WTO panelists and AB members of the past two decades, with emphasis on recent years. More particularly, the article focused on the non-legal educational background of these WTO international adjudicators. Once

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<sup>199</sup> R. Ramirez *supra* fn 181 at 268.

<sup>200</sup> Schnyder and Pfisteres *supra* fn 9 at 200.

<sup>201</sup> K. N. Schefer *supra* fn 10 at 234.

<sup>202</sup> Open hearings allow the observer to appreciate the implementation of procedural rules, ‘*such as how much time each party is given to present its case and whether both parties are treated with respect by the judicial panel.*’, and access to WTO’s interim review and DSB Reports, their reasoning, among others, allows determining whether the adjudicative body issued a Report ‘*based on legally sound reasoning in the predominant legal discourse, pure bias, or by flipping a coin.*’ N. Grossman *supra* fn 7 at 142, 155.

<sup>203</sup> P. C. Mavroidis *supra* fn 14 at 105.

<sup>204</sup> N. Grossman *supra* fn 7 at 124, 143.

targeted, the literature on WTO DSS was classified within a self-structured model. The still-open questions were identified in parallel to the above-mentioned exercise.

As Alvarez (2016) has claimed, today's Dispute Settlement System secures the continuing compliance by WTO Member States' to its own WTO treaty obligations,<sup>205</sup> and despite the general impression of WTO's negotiation crisis, due to the failure of the Doha and previous Rounds, coupled with the increasing adoption of Partnership Trade Agreements outside WTO's trade club, the WTO DSU has matured and evolved to a dispute settlement arena that many envy, as Howse (2016)<sup>206</sup> affirms.

Trade negotiators who created the AB during the Uruguay Round can be proud of the outcomes, and current independence of the AB from WTO DSS. The AB has evolved in the eyes of Howse (2016) and other reputable scholars into what has been called a World Trade Court. The system has such a wide acceptance by WTO Member States that, nowadays, nations are also using the WTO DSS to resolve policy issues.<sup>207</sup>

Due to this development, some WTO Member States fear the judicial activism the AB might become involved in.<sup>208</sup> The overwhelming influence of the WTO Secretariat on the Panel Reports during the initial era of the WTO DSS seems to be receding into history. To date, open hearings exert a real control function and accountability over WTO panels, which did not exist before. The trendy WTO DSS puts an end to secrecy as the general rule of conduct and proceedings. The hotly controversial decision of the AB to open WTO DSS to amicus curie is the most patent evidence of such change towards transparency and legitimacy of WTO's decision-making process and outcome.

With all this success, it is difficult to maintain that the ad-hoc appointed panelists are just some bureaucrats lacking the required knowledge to perform their duties or that the AB is a puppet of the WTO Secretariat to legitimise self-produced Panel and AB Reports.

The support of the Rule Division and the Legal Affairs Division to both adjudicatory bodies, embraced by the double instance system guarantees the legality of the decisions adopted by the DSB. Scholars from different horizons have affirmed that currently almost all panels are composed of at least one individual with a legal background, with a chairman who has previous panel experience.

Regarding the heterogeneity and expertise of panelists and AB members, it was observed that this heterogeneous feature requires more work and effort from the side of the WTO Secretariat. The nationality of panelists should somehow become more variable or less predictable, although it is a *fait notoire* that the task might not be easy to fulfil, and lack of or limited human recourses should not be considered as the only excuse to systematically propose and appoint the same type of candidates.

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<sup>205</sup> José E. Alvarez *To Court or Not to Court?* MegaReg Forum Paper 2016/2 IILJ NYU Law (15 July 2016) Pp. 5 at 2-3 [https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/07/Alvarez\\_IILJ-MegaRegForumPaper\\_2016-2.pdf](https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/07/Alvarez_IILJ-MegaRegForumPaper_2016-2.pdf) (Accessed on 23 Feb 2017).

<sup>206</sup> Mary Guest *New EJIL:Live! Joseph Weiler and Robert Howse Discuss The World Trade Organization 20 May 2016* <http://www.ejiltalk.org/new-ejillive-joseph-weiler-and-robert-howse-discuss-the-world-trade-organization-20-years-on-global-governance-by-judiciary/#comment-243463> (Accessed on 23 Feb 2017).

<sup>207</sup> However, Boisson and Heathcote contend that the AB is not the appropriate organ to harmonize trade, environment, and social standards. L. Boisson de Chazournes and S. Heathcote *supra* fn 189 at 135.

<sup>208</sup> See Lorand Bartels *The Separation of Powers in the WTO: How to avoid Judicial Activism* in *International and Comparative Law Q* 53 (October 2004) Pp 861-895.

Efforts are recognized when it comes to the increased number of women that have in recent years served as WTO adjudicators, and numbers should continually augment. The age of adjudicators has dropped to the years when professionals are usually about to go or have gone on pension. Although personally differing from this position, the remuneration is considered insufficient by professors in the US and EU. Some of them claim that the unstable position – because of the rare occurrence of reappointments - and limited amount of resources could negatively influence the independence of the appointed adjudicators or the time adjudicators might dedicate to a case. Due to the above, Ehlermann, Malacrida, and Mavroidis<sup>209</sup> -to mention a few scholars, have proposed incorporating judges to the DSS on a permanent or more permanent basis, suggesting longer mandates for panel-members and AB members, as well as longer reappointment mandates. Additionally, Busch and Pelc defined the need for a permanent body of panelists as the most debated recommendation to reform WTO's Dispute Settlement System.<sup>210</sup>

Three more issues that were observed proceed as follows:

The Roster or Indicative List of Governmental and non-Governmental Candidates for Panelists and AB members is a useless tool to select candidates from, since less than one third of the appointed panelists were listed in the Roster.

The curricula vitae of the appointed panelists and AB members for some undisclosed reason is kept confidential<sup>211</sup>, making it difficult for a WTO outsider to become aware of the professional and educational background of WTO adjudicators.

The appointment of panelists and AB members has been politicized in recent years. In the eyes of some scholars, the politicization of the selection and appointment of WTO adjudicators has affected the legitimacy of the DSS. As a further measure of transparency, it would be pertinent as Mavroidis (2013)<sup>212</sup> suggests, making public the compelling reasons of the parties to a dispute for rejecting the nomination of a panelist. As for AB candidate members, the lobby of regional blocks do most of the work, although in some cases, one single powerful country and WTO major contributor member could veto the appointment despite the support of most WTO Member States.

Finally, when missing qualifications of first instance WTO panelists are duly filled by WTO staff or not-that-often-appointed experts, it does not matter if the panelists have no legal background or are not trained in WTO trade agreements.

In the final analysis, it is the way the WTO staffs perform their duties that it is somehow disturbing, because the Secretariat's position is indeed shared with panels and AB members on a closed-door basis, which means that there is no transparency in what the opinion of the Secretariat is and how different it is from the views of the panelists or AB members.

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<sup>209</sup> Claus-Dieter Ehlermann *Experiences from the WTO Appellate Body* 38 *Tex Int'l L J* 469 (2003) at 475-476; R. Malacrida *supra* fn 21 at 323; and P. C. Mavroidis *supra* fn 38 at 30.

<sup>210</sup> M. L. Busch and K. J. Pelc *supra* fn 100 at 579-580.

<sup>211</sup> Mavroidis suggested eliminating the confidential character of ad-hoc panelist's Curricula Vitae. P. C. Mavroidis *supra* fn 14 at 110.

<sup>212</sup> P. C. Mavroidis *supra* fn 14 at 110.

It is worth mentioning at this stage that Weiler (2001) suggested the Rules Division submit official facultative opinions to ad-hoc panels and the AB, which would free the process from the secrecy and mystery surrounding the views or positions the WTO Secretariat's staff might share with, suggest to or impose on panelists and AB members.<sup>213</sup> In the modest opinion of this author to do so might generate conflicts between the WTO Secretariat or the Rules Divisions Staff and some WTO Member States. It is likely to create enemies and, of course, parties involved would claim that the DSS is partisan. Sometimes more transparency for, in the case in question, more "semi-judicial" legitimacy could become counterproductive.<sup>214</sup>

Moreover, the State-to-State disputes settled within the DSS are on a variety of subject-matters, which traditional attorneys cannot cope with. This professional limitation points to the need to constitute multidisciplinary panels, which might cover any type of subject matter from subsidies to intellectual property, passing through environmental affairs, trade in services and goods. Non-legal adjudicators are as useful - or more - than lawyers sticking word *per* word to the rules. However, it is worth keeping in mind what Häberli (2014)<sup>215</sup> advises: that WTO law must be read in conjunction with, and 'not in clinical isolation', from other international environmental law and from public international law since many cases now concern measures taken at least partly in response to non-trade concerns, and this legal analysis can be undertaken only by specialized attorneys. Maybe, what it is needed is simply a balance between the professional backgrounds of panel-members.

The author recommends a strategy to improve the diversity and origin of adjudicators with legal background: Could local bar associations the world over or international bar associations<sup>216</sup> having representatives from most WTO Member States, undertake to train non-government related international trade law or international public and private law lawyers on WTO law, and commit to provide two to three candidates every 'certain' period to the WTO DSS? Bar Associations are professional bodies of lawyers independent from the government of a country. Lawyers could commit, as part of their duties and responsibilities towards the bar association, to work at least one time pro bono as panelists.<sup>217</sup>

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<sup>213</sup> J. Weiler *supra* fn 15 at 11.

<sup>214</sup> See: Jenny de Fine Licht *Do We Really Want to Know? The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy* Scandinavian Political Studies (2011) 34 at 183–201.

<sup>215</sup> Christian Häberli *Seals and the need for more Deference to Vienna By WTO Adjudicators* in Society of International Economic Law Online Proceedings Working Paper No 2014/22 (8 July 2014) at 19.

<sup>216</sup> E.g. IBA [http://www.ibanet.org/About\\_the\\_IBA/About\\_the\\_IBA.aspx](http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx) (Accessed on 11 March 2017).

<sup>217</sup> Lawyers could work pro-bono during the regular length of a panel proceeding, 18 to 20 months. If a longer period is required by the ad-hoc panel to decide, lawyers should be remunerated as from month 19<sup>th</sup> or 21<sup>st</sup>, accordingly. WTO DSB shall cover travel and other related as well.