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IFN Working Paper No. 1066, 2015

## **Black Cat, White Cat: The Identity of the WTO Judges**

Louise Johannesson and Petros C. Mavroidis

# **Black Cat, White Cat**

## **The Identity of the WTO Judges\***

Louise Johannesson<sup>†</sup> and Petros C. Mavroidis<sup>‡</sup>

### **Abstract**

WTO judges are proposed by the WTO Secretariat and elected to act as ‘judges’ if either approved by the parties to a dispute, or by the WTO Director-General in case no agreement between the parties has been possible. They are typically ‘Geneva crowd’, that is, they are either current or former delegates representing their country before the WTO. This observation holds for both first- as well as second instance WTO judges (e.g. Panelists and members of the Appellate Body). In that, the WTO evidences an attitude strikingly similar to the GATT. Whereas the legal regime has been heavily ‘legalized’, the people called to enforce it remain the same.

### **Keywords**

WTO, dispute resolution, panelists, judicial appointments

JEL Classification: K40

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## 1. Introductory Remarks

In his monumental study of 1993, Hudec made a very persuasive claim to the effect that the WTO dispute settlement system did not transition to compulsory third party adjudication overnight. The GATT started as a 'relational contract' among few, like-minded players. Years of pragmatic judgments that followed, developed a trade ethos of respecting the agreed deeds, while deviations would be tolerated in the short run.

The typical GATT Panelist would be a trade delegate usually present in Geneva when disputes arose. The advent of the WTO has not changed this picture. Both Panelists, as well as members of the Appellate Body (AB) are typically current or former national delegates. It is of course difficult to 'measure' the impact that similar profiles might have on the shaping of outcomes. It is quite telling though, that whereas the WTO has been hailed as a departure from GATT's pragmatism and the beginning of a new era—namely 'legalization'—it is the people who largely contributed to the shaping of the GATT-era that are called to shape the new, changed image.

In Section 2, we discuss the identity and function of WTO 'judges', and their selection process. In Section 3, we focus on the identity and role of clerks aiding them. It is in this Section where we present our thoughts regarding the incentive structure of WTO judges to dedicate time and effort in resolving disputes submitted before them. Section 4 recaps the main observations.

## 2. Appointing Judges at the WTO

### 2.1. Panelists

#### 2.1.1. Nomination

According to the DSU:

- (a) three Panelists will serve a Panel, unless parties agree to a Panel consisting of five Panelists (Art. 8.5);
- (b) it is the WTO Secretariat that has the initiative to propose Panelists (8.6);
- (c) it can propose Panelists from the indicative list ('roster') of Panelists which is kept at the WTO. WTO Members that can propose individuals for inclusion in the list, which divides the roster Panelists into 'governmental' and non-governmental (8.4);
- (d) if the parties agree with the Panelists proposed by the Secretariat, then the Panel will be established. Agreement of the parties is the sufficient condition to this effect. Nevertheless, if they disagree with respect to one or more Panelists proposed, then the complainant or the defendant can request from the Director-General (DG) of the WTO to

establish or complete the Panel (8.7). Disagreements with proposed names must be based on ‘compelling reasons’ (8.6);

- (e) the right to request the DG to establish/complete the Panel cannot be exercised before 20 days from the establishment of the Panel have lapsed, e.g. 20 days from the date when the Dispute Settlement Body (DSB) has agreed to establish a Panel to adjudicate a particular dispute (8.7);
- (f) the DG has discretion to establish the Panel. He must consult with the Chairmen of the DSB and the competent committee, but does not have to follow their advice (8.7).

In practice, all Panels established in the WTO-era so far have been composed of three Panelists, though a panel of five is an option.

The parties can reject the nomination of Panelists only for ‘compelling reasons’. Practice—which we visit *infra*—suggests that requests to the DG to ‘complete’ the Panel happen very frequently. This should mean that either ‘compelling reasons’ arise too often (and then maybe the legislator had underestimated the frequency of occurrence), or that this term has been interpreted in a rather relaxed manner.

It is very difficult to indulge any further in this area, which belongs to the sphere of private information: proposals for Panelists take place behind closed doors. One thing is for sure. Nationality emerges as one ‘compelling reason’. There is only one case—US-Zeroing (EC)—where nationals of a litigating party served in a Panel. In this case, Bill Davey (US national) and Hans Beseler (German national) served together as Panelists in a dispute between the EU and the US.<sup>§</sup>

The DG customarily meets not only with the two Chairmen (Dispute Settlement Body, General Council), but also with the members of the WTO Legal Service, and/or Services or Rules Division (if the case concerns trade in services, or contingent protection) when establishing the Panel. The DG has to consult but does not need to agree with anyone when ‘composing’ the Panel. The DSU does not include any ‘checks and balances’ regarding the manner in which the DG will perform his/her choice. As a result, we can only go by ‘revealed preferences’ and observe the people that have eventually got the nod.

### 2.1.2. Who Gets the Nod?

We provide our Panelists’ classification in order to facilitate the discussion and provide some hopefully useful conclusions. We make a general division across Panelists depending on whether the Panelists’ main employer is governmental or non-governmental. We further

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<sup>§</sup> This happens routinely though before the AB. In the GATT years, nationals did serve on occasion on Panels. Bob Hudec for example, a US citizen, served as Panelist in US-Customs User Fee; Andy Lowenfeld (US), and Pierre Pescatore (Luxembourg) served as Panelists in US-Section 337, a dispute between the EU and the US.

subdivide non-governmental into academic or private practice. Finally, we check whether Panelists were or have been a Geneva resident (a longer stay) at the time of their appointment, for both categories.

We thus, try to capture not only the nature of their link—if any—to a particular WTO Member but also the nature of their link to the WTO. While we use employment as proxy for the former, we use ‘Geneva presence’ as proxy for the latter.

During the period 1995–2014 a total of 245 Panelists have served on 224 Panels. This number (245) defines our sample. We have a dispute-Panelist dyad (or ‘Panel appointments’) of 672 (since three Panelists serve on a Panel).

Only 30% of all Panelists have been chosen from the indicative list. Note though, that 77 Panelists were not on the indicative list at the time of appointment, but were added on afterwards.

Around 60% of the total number (245), were in the service of their government at the time of their appointment. This number needs correction though, as we detail in what immediately follows.

Non-governmental Panelists represent 40% of the total number, of which 25% were private sector employees at the time of their appointment (mostly private consultants or lawyers in private practices), whereas 15% were academics.

58% of the non-governmental Panelists have been formerly (e.g. before the time of their appointment) in the service of their government. Were we to control for this number, then roughly three quarters (74%) of all Panel appointments include government or former government officials.

Prior to their first Panel appointment, 66–76% of all Panelists had previously been in contact with WTO in some capacity and/or were current residents in Geneva. This includes Panelists that took part in GATT and its negotiations. We can only provide a range for this statistic, since it is unfortunately more unreliable than employment at the time of appointment.\*\*

What about the education of Panelists? We should state at the outset that the disclosure of personal data is highly asymmetric across Panelists, and correcting through web search is not a perfect substitute for official disclosures. We thus were unable to find out the educational background for 33% of all Panelists.

With this caveat, we note that 40% of all Panels have had Panelists with a legal background, albeit with various levels of legal education/law degree. 16% of all Panelists have an

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\*\* Unless they clearly state in their curriculum vitae, official biographies or if they have or had employment as a WTO delegate or similar it can't be conclusively determined what kind contact they have had with Geneva in general, WTO in particular. Undetermined are around 12% (78 panel appointments) for this variable.

economics background, the overwhelming majority being Economics majors in undergraduate studies, e.g. without a Master's or Ph.D. in economics. 12% of all Panelists have acquired other degrees, e.g. history, political science, geography etc.

### 2.1.3. Remuneration

The DSU does not say much about remuneration of Panelists, other than (8.11):

Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

In practice, following an unofficial 'memorandum' dating from 1992, the following applies:

- (a) governmental Panelists do not get reimbursed for Panel work. They will get reimbursed for travelling, if they are not Geneva-based;
- (b) non-governmental Panelists will get reimbursed 600CHF/day of work. They will also receive a 437CHF/day per diem to cover expenses incurred when participating in Panel hearings in Geneva. Finally, they can request money for work done in preparation of meetings. In the overwhelming majority of cases, anecdotal evidence suggests that they do not request honoraria for more than 10 days per dispute, paid at 600CHF/day.<sup>††</sup>

### 2.1.4. Function

Panels have standard terms of reference, unless if agreed otherwise by the parties to a dispute, namely (Art. 7 DSU):

*To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).*

This is hardly a self-interpreting statement and it says nothing about sources of law they can use, standard of review etc. One thing is clear: Panelists are 'agents' with a limited mandate; they are not 'principals'. They must ensure the 'policy space' committed to the WTO by the 'principals', the WTO Members. Art. 3.2 DSU reads to this effect:

*Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*

To this effect, they will issue 'recommendations' when a violation has been established, and may issue 'suggestions' as well (Art. 19 DSU). The former have standardized content, namely (Art. 19.1 DSU):

*that the Member concerned bring the measure into conformity with that agreement.*

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<sup>††</sup> The WTO is non-transparent in this respect, and the information we have included here is based on interviews with former Panelists.

Suggestions do what their name indicates: they 'suggest' specific ways to achieve compliance, e.g. to bring measures into conformity with the WTO. They are optional, and non-binding. Although transaction costs could be heavily reduced if followed, WTO Members can lawfully disregard them. Practice evidences that they have been followed a few times only so far.<sup>‡‡</sup>

## 2.2. ABMs (Appellate Body Members)

### 2.2.1. Nomination

A Preparatory Committee was established (where delegates at the DSB could participate) in order to decide on the selection process for the members of the AB. Following a recommendation by this body, the DSB<sup>§§</sup> decided that an organ be established comprising the DG of the WTO, and the Chairmen of the General Council, the DSB, the CTG (Council for Trade in Goods), the CTS (Council for Trade in Services), and the TRIPs (Trade-related Intellectual Property Rights) Council. This organ would be receiving propositions for nominations by WTO Members and at the end, propose to the DSB its nominees. It is the DSB that would appoint the members of the AB.<sup>\*\*\*</sup> Individuals are nominated for a four year term, which is renewable once.

Art. 17.1 DSU states that three rotating members of the AB (a division) will hear a case. The formula for selection of a division is not reflected in the DSU or in the AB WP (Working Procedures), and is unknown to the wider public (Rule 6 WP).<sup>†††</sup> A presiding member for each division will be selected (Rule 7 WP). Although a division hears and decides a particular case (Rule 3 WP), a practice of collegiality has developed. In an effort to promote consistency and coherence in decision-making, Rule 4 WP reflects the so-called collegiality-requirement: according to its § 3, the members of a division will exchange views with members of the AB who do not participate in their division on the resolution of the dispute before them. The final decision of course will be taken by the members of the division alone.

### 2.2.2. Who Gets the Nod?

The following table is a complete list of former and current AB Members up until February 2015

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<sup>‡‡</sup> Mavroidis and Wu (2012) include a list of suggestions issued during 1995–2012. We discuss the precedential value of reports *infra*.

<sup>§§</sup> Elsig and Pollack (2014) discuss all this in detail.

<sup>\*\*\*</sup> WTO Doc. WT/DSB/1 of June 19, 1995.

<sup>†††</sup> Anecdotally, it seems that on its appointment, each member of the AB receives a number. A combination of three numbers, rotating according to a *secret formula*, will hear appeals as they are coming to the AB. For example, numbers 1, 2 and 5 will hear appeal against DS 1, numbers 2, 6 and 9 will hear appeals against DS2 and so on. What is unknown is the *formula* for rotating the divisions.



Table 1: Appellate Body Members

<b>Name</b>	<b>#Disputes</b>	<b>Nationality</b>	<b>Term of Office</b>	<b>Property</b>	<b>Former Panelist</b>	<b>Panelist after AB</b>
Abi-Saab	28	Egypt	2000–2008	A		
Bacchus	34	US	1995–2003	FG/P		
Baptista	17	Brazil	2001–2009	P		Yes
Bautista	8	Philippines	2007–2011	FG	Yes	
Beeby	12	New Zealand	1995–2000	FG		
Ehlermann	27	EU	1995–2001	FG		
El-Naggar	14	Egypt	1995–2000	A/P		
Feliciano	25	Philippines	1995–2001	A/FG		
Ganesan	25	India	2000–2008	FG	Yes	
Hillman	13	US	2007–2011	FG		
Janow	9	US	2003–2007	A/FG	Yes	
Lacarte-Muró	27	Uruguay	1995–2001	FG	Yes	Yes
Lockhart	19	Australia	2001–2006	FG/P		
Matsushita	16	Japan	1995–2000	A		
Oshima	8	Japan	2008–2012	FG		
Sacerdoti	24	EU	2001–2009	A		
Taniguchi	20	Japan	2000–2007	A		
Unterhalter	10	South Africa	2006–2013	P	Yes	
Graham*	4	US	2011–	FG/P		
Ramírez-Hernández*	20	Mexico	2009–	FG		
Chang*	7	Korea	2012–	A		
Bhatia*	11	India	2011–	FG		
Van den Bossche*	11	EU	2009–	A		
Zhang*	16	China	2008–	FG	Yes	
Servansing*	0	Mauritius	2014–	FG		

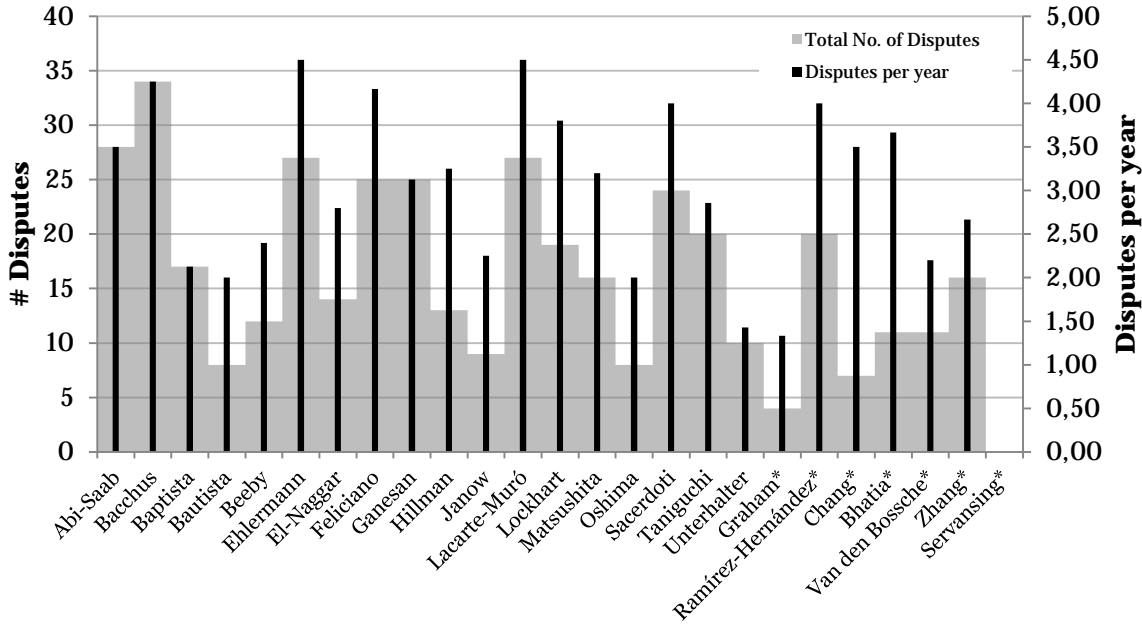
\*Current AB Members.

A few observations seem warranted:

- (a) the preference for former government officials (over 60% of all appointments) is clear and it cuts across trading partners, in the sense that all of them share this preference;
- (b) practitioners and academics are more or less of equal number, and definitely a minority across all appointments;
- (c) fourteen WTO Members have shared all AB members. 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;
- (d) there has never been an AB term without an EU or US member.

The typical AB Member is male, with tenure of around 75 months (6 years) with 16 disputes during that time. Most likely, he/she is a former government official and 60 years of age at the start of the term of office.

Figure 1: Average number of disputes adjudicated by AB Member



1.2.3. Remuneration

The lack of transparency that we observed with respect to the remuneration of Panelists is evident here as well. WT/DSB/1, the Decision Establishing the AB cited supra, reads in §12: 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. ... 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. Accordingly, it would appear that the retainer should be set at a minimum of SF 7,000 per month, plus a fully-adequate daily fee, travel expenses and a per diem. The actual amounts should be set on the basis of further research on current rates for equivalent services under similar conditions.

The wording might suggest that members of the AB will be paid asymmetrically, since the opportunity cost cannot be the same say for a practicing attorney in a leading law firm, and a mid-level bureaucrat. In practice though, they are paid the same amount for work done. Work done however, can be asymmetric for two reasons:

- (a) the formula for appointment in a Division is unknown. Empirically however, we know that some AB members have been appointed more often than others, as our Table 1 shows;
- (b) besides the 7,000 Swiss francs per month (which have been adjusted since 1995), AB members can request compensation for work done at home on any given case. The compensation is fixed at around 780CHF/day of work. The amount of compensation requested depends on various factors ranging from the complexity of the case to the personal ethics of individuals involved.

It seems that they are paid on yearly basis more than the stated supra statutory sum, but it is highly unclear (because of lack of transparency) who gets paid what.<sup>###</sup>

#### 1.2.4. Function

The AB decides in last resort. It hears appeals against Panel reports (Art. 17.1 DSU), can uphold, modify or reject appealed Panel findings (Art. 17.13 DSU) and in doing that must be limited to issues of law (Art. 17.6 DSU). Panels are the trier of facts; the AB cannot revisit facts in order to re-establish de novo the factual record.

Since its review is based on issues of law—almost by construction—its function is to provide interpretations of the provisions that could—in principle—apply across cases. There is nothing binding *stare decisis* in the WTO legal system. De facto nevertheless, the system comes close to that. In US-Stainless Steel (Mexico), the AB re-visited all prior case law and held that it expected Panels to follow prior AB findings dealing with the same issue (§158):

It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in

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<sup>###</sup> WTO Doc. WT/DFA/W/115 mentions in p. 88 that AB expenditure for that year was 624,000 Swiss francs. This sum exceeds the statutory amount by at least 40,000 Swiss francs. Take into account that this was the budget for 2005. The budgetary prediction for 2015 is 2,000,000 Swiss francs that have been committed to the AB.

previous Appellate Body reports that have been adopted by the DSB. In *Japan—Alcoholic Beverages II*, the Appellate Body found that:

[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. (italics in the original)

In US-Shrimp (Article 21.5-Malaysia), the AB clarified that this reasoning applies to adopted AB reports as well.

### 3. Support Mechanism: WTO Clerks

#### 3.1. Panel-Stage

Art. 27.1 DSU reads:

*The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.*

Panels are aided by law clerks. Contrary to the US tradition, clerks are not assigned to individual judges but to the Panel as such. Law clerks have to pass a competition to this effect and join the WTO. That is, law clerks' allegiance is to the WTO, its case law so far etc., and not to particular judges as is the case for example of clerks to the US Supreme Court.

Practice suggests that—depending on the subject-matter and administrative capacity—different divisions will assist Panels. Typically, a Legal Officer and a Secretary assist Panels. The Legal Officer will be a member of the WTO Legal Affairs Division unless the dispute concerns a contingent protection instrument. In this case, the Legal Affairs Officer will be a member of the WTO Rules Division. A similar arrangement is in place whenever litigation focuses on trade in services. In such a case, a member of the WTO GATS Division will act as Legal Officer.

Secretaries are chosen from the *ratione materiae* competent Division, e.g. a member of the WTO Agriculture Division will act as Secretary in cases involving interpretation of the WTO Agreement on Agriculture.

#### 3.2. AB-Stage

The AB as well, has its own Legal Service. The conditions for recruitment are identical to those for the WTO Secretariat.

## 4. Black Cat, White Cat

A famous Chinese proverb goes like this:

Black cat, white cat, all that matters is that it gets the mice.

'Getting the mice' is a whole new ball game in WTO dispute settlement system. Detailed rules regarding adjudication have been introduced, the legal framework has expanded exponentially as a result of the successful conclusion of the Uruguay round, and yet the identity of Panelists remains the same.

This is counter-intuitive to say the least. The amount of case law produced by the WTO is quite substantial and keeping up with it is a full-time job. Since—as argued above—knowledge of case law is quintessential—as Panels are expected to follow it— one would expect that Panelists would be well versed in the intricacies of case law ranging from rules of origin to public health measures to intellectual property rights. How many members of national delegations can honestly claim expertise in the field as described above?

We do not know the criteria of the Secretariat for selecting Panelists. Nordström (2005) hints that the influence of law clerks in drafting reports should not be under-estimated, although recognizes the limits of the factual record he has established.

As stated above, it is the WTO Secretariat that has the incentive, the legal right indeed to propose Panelists. It is quite immaterial whether proposed Panelists are members of the roster or not, the right of the Secretariat is not circumscribed by similar concerns. Indeed, the Secretariat can disregard the expressed will of WTO Members by proposing non-roster Panelists. It is true that Panelists will not be appointed unless the parties agree to the proposals. Yet recall that in the lack of agreement it is the Secretariat again (this time the DG) that chooses who the Panelists in a given dispute will be and this time, agreement by the parties is not required for an appointment to be made.

WTO Panelists are either unpaid for the service they provide or paid a modest—compared to market prices in the private sector—honorarium (600CHF/day). The majority of Panelists are government officials, who do the work for free. The WTO has not put in place any pecuniary incentive for Panelists that much is for sure.

Think in terms of the opportunity cost as well. Government officials give up on their government work in order to resolve disputes. It is of course easier for large delegations to 'take one for the team' and distribute the work of the missing delegate between them. It is more difficult for smaller delegations. Horn et al. (2011) provide the numbers showing that delegates from EU, US (the large delegations) become Panelists about 10% of the time. Delegates from smaller delegations should thus have even less of an incentive to work as Panelists. And yet, they represent the 'bulk' of Panelists. Why not refuse then? Probably, they

do not refuse because the appointment as Panelist is good for their career development. The best of both worlds for them is to accept nominations while ‘outsourcing’ the work associated with the nomination.

Consistency—assuming one is not consistently incorrect—is an incentive compatible structure for any adjudicating forum, since this is the best proxy for ‘independence’ and ‘impartiality’. For consistency to be thus served, expertise is necessary input. Expertise nevertheless, should not be taken for granted and it is more likely that it resides with members of the WTO Secretariat than with ‘amateur’ judges.

In ‘The Go-Between’, L.P. Hartley’s 1953 classic novel, the past is likened to a foreign country; ‘they do things differently there’. When it comes to adjudication, the past is close to the Holy Grail. There are of course good arguments in favour of constant rotation of judges such as abating institutional bias. But there are equally good arguments in favour of consistency, although consistency is not a value per se. The key to the past is in the hands of the WTO Secretariat and not in the hands of one- or two time Panelists, as the majority of them are.<sup>§§§</sup> The quest to be consistent will be highly aided by those who are not prepared to question the past, and this is an area where government officials have comparative advantage over doubting academics.

Taking all this on board would suggest that the interests of amateur judges are best served when:

- (a) They can pride themselves that they have served as Panelists;
- (b) Panel time has not been too much of a distraction from their day to day occupation;
- (c) They have ‘outsourced’ the work associated with the preparation of the ‘issues paper’ that serves as basis for Panel deliberations, the drafting of award, the consistency of the award with prior rulings on the same issue to those with the expertise to do a good job, e.g. the members of the WTO Secretariat.

The situation is probably a bit different with respect to members of the AB. Much of our discussion supra nevertheless, finds application there as well. All this to suggest that, while the Secretariat has no authority to interpret the various provisions in the WTO Agreement and should serve rather than lead the Panel, there are good arguments to suggest that the line between ‘serve’ and ‘lead’ is more a line in the sand rather than set in stone.

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<sup>§§§</sup> Horn et al. (2011).

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