

Who Guards the Guardians of the System?

The Role of the Secretariat in WTO Dispute Settlement

Joost Pauwelyn[†] Krzysztof J. Pelc[‡]

Version October 2021

Abstract

Anecdotal evidence and recent empirical findings suggest that for all the attention panelists and Appellate Body (AB) members at the World Trade Organization (WTO) receive, its Secretariat plays an overlooked and increasingly important role, from selecting panelists and writing an initial “issues paper” for adjudicators, to providing economic expert advice and drafting the actual ruling. We claim that the WTO Secretariat has more influence over dispute settlement than the staff of any comparable tribunal. A creation of Member-States in the 1980s, it was always conceived of as an agent of states, rather than adjudicators. Yet several unanticipated factors led to an expansion of its mandate beyond what any government might have initially foreseen. This expansive role impacts the institution’s legitimacy and internal accountability, and has concrete legal effects, from elevating the status of precedent to lengthening rulings and proceedings. Originally designed to keep “rogue” panels in check, the Secretariat may thus have contributed to the very “overreach” that members like the US have denounced. Most broadly, our examination of the WTO Secretariat leads us to recast WTO dispute settlement in a new light. Rather than the “World Trade Court” that many of its early observers depicted it as, it appears instead as a *sui generis* process of international administrative review.

[†] Graduate Institute of International and Development Studies, Geneva and Georgetown University Law Center, Washington, DC. joost.pauwelyn@graduateinstitute.ch. This article was made possible thanks to funding from the Swiss National Science Foundation (SNF) in the context of the Project ‘Convergence versus Divergence? Text-as-data and Network Analysis of International Economic Law Treaties and Tribunals’.

[‡] Department of Political Science, McGill University. kj.pelc@mcgill.ca. We thank Sean Nossek for excellent research assistance as well as a number of readers and reviewers who preferred to remain anonymous for comments on earlier versions of this paper.

1. Introduction

From the moment of its inception in 1995, the WTO's Dispute Settlement Understanding has functioned as a first-rate scholarly specimen, serving the purposes of the various academic tribes studying it. Legal scholars held it up as the consummation of the ambitions of public international law: an independent tribunal with compulsory jurisdiction, tasked with adjudicating legal disagreements between sovereign states, and generating its own expansive jurisprudence.¹ Political scientists looking for cases of successful self-binding by democracies saw in it the rational delegation of power by sovereigns to an international body: a means of managing the demands of domestic interest groups, while defusing inter-state power politics.² Economists recognized it as a means of dealing with a necessarily incomplete contract, and rendering credible the threat of retaliation in a way that increased the odds of cooperation between trade partners.³

In this article, we present the WTO's "crown jewel" in a new light, by looking to the largely overlooked role played by its Secretariat, as compared to that of the appointed adjudicators themselves. Drawing on archival and anecdotal evidence, and on a set of recent empirical findings, we argue that the permanent staff of the WTO's Secretariat has played a more significant role within the organization's development than the staff of any comparable international tribunal. Looking to the history of the institution, we show how this was partly by design: following a series of problematic rulings in the 1980s, Member-States construed the Secretariat's Legal Affairs Division as a body tasked with holding "rogue" panels in check. Rather than an agent of *adjudicators*, akin to the role staff traditionally play in other tribunals, the WTO Secretariat was an agent of *governments* from its beginnings, guarding the system against the risk of egregious

¹ Petersmann, Ernst-Ulrich. 1994. The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948. *Common Market Law Review* 31: 1157–1244.

Peter van den Bossche, 'From Afterthought to Centerpiece: The Appellate Body and Its Rise to Prominence in the World Trading System', in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohannes (eds), *The WTO at Ten: The Contributions of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2016), 289–325.

² Gilligan, Michael, Leslie Johns, and B. Peter Rosendorff. 2010. Strengthening International Courts and the Early Settlement of Disputes. *Journal of Conflict Resolution* 54: 5–38. Davis, Christina. 2012. Why Adjudicate? Enforcing Trade Rules. Princeton, NJ: Princeton University Press. Busch, Marc and Krzysztof Pelc. 2015. "Dispute Settlement in the WTO", in *The Oxford Handbook of the Political Economy of International Trade*, edited by Lisa Martin. Oxford University Press.

³ Maggi, G. and Staiger, R.W., 2011. The role of dispute settlement procedures in international trade agreements. *The Quarterly Journal of Economics*, 126(1), pp.475-515. Bagwell, K. and Staiger, R.W., 2004. *The economics of the world trading system*. MIT Press.

rulings. Yet as we suggest, the agent may have outgrown that initial mandate, owing to a number of unanticipated structural features which over time, led to an increasing shift of power and responsibilities from adjudicators to Secretariat staff, in a way that governments could never have anticipated when they first established a Legal Affairs Division staffed with three lawyers back in the 1980s. Now counting more than 90 staff, of whom as many as a dozen may be assigned to a given dispute, the Secretariat's experience dwarfs that of the adjudicators they are tasked with "assisting." As we explain, this gap in expertise only keeps increasing with time with the accrual of WTO jurisprudence: permanent staff *in situ* in Geneva accumulate knowledge that adjudicators employed part time, and who most often fly in for hearings, cannot hope to match.

Whether intended or unanticipated, the WTO Secretariat's expansive role holds considerable implications both for practice and theory. We argue that it has left the organization open to concerns over legitimacy and a lack of accountability. It has also affected legal outcomes in several respects, from increasing reliance on precedent and *obiter dicta* to elongating proceedings and expanding the scope of rulings. These effects are especially notable, since they coincide with the chief criticisms recently directed at the dispute settlement system by the US and other Members. In this sense, the institution's current impasse can be linked back, in part, to the Secretariat's role in dispute settlement. While there has been scarcely any explicit criticism of the Secretariat by Member-States, the remarkable irony is that "the guardians of the system" may have contributed to the system's demise by the expansion of their influence.

As one prominent WTO practitioner recently put it: "[i]t would be wrong to blame the Appellate Body crisis on the Secretariat but to ignore its role in the functioning of the WTO dispute settlement system would not be correct either ... The role of the WTO Secretariat in WTO disputes cannot be underestimated and merits more attention than has been given to it" (Wauters, 2021). In this article, we give the Secretariat the attention it deserves. The result is a wholesale re-evaluation of what has often been described as the most successful international tribunal in existence, and of its partial demise.

Indeed, the broadest implication of our examination of the Secretariat's overlooked influence is to reassess the very nature of WTO dispute settlement. Rather than the "World Trade Court" that some of its earliest observers portrayed it as—an independent international judicial body that has

fallen on hard times following a claw-back of power by its original champion—our account recasts the DSU as something else entirely: a *sui generis* process of administrative legal review.⁴ One where a group of in-house experts on law and economics craft solutions that attempt to strike a balance between countries’ obligations and their political sensibilities. It is, ultimately, closer to a technocratic exercise than a strictly legal one. This is at once less and more than its conventional depiction. While it falls short of the epitome of an international court that students of the WTO often portray it as, it remains /// [a triumph of regulatory decision-making? A demonstration of governments’ willingness to delegate powers of review of national regulation to international agencies?]

2. The WTO Secretariat: Where We Are, and How We Got Here

The long-time Director of the AB Secretariat, who held his post from 2006 until recently, has been described as “arguably the most powerful international civil servant that nobody has ever heard of”.⁵ In the last days of the AB’s existence, in December 2019, the then AB chair openly called for the staff Director’s resignation, arguing that he “sought to guide appellate body members toward rulings that coincide with his views” (Baschuk, 2019). Elsewhere, it was reported that the Director of the AB Secretariat “personally oversees every dispute ... meaning he reads and revises all issue papers—identifying the issues at question based on disputing members’ submissions—and draft reports before they are sent to the Appellate Body members. He is involved in nearly all the discussions during the appeals” (Monicken, 2019). Shortly after the AB became dysfunctional following the blocking of new AB appointments by the US, the AB Secretariat was also dismantled, and all budget to the AB and its Secretariat frozen. The AB staff Director was moved and put in charge of a newly created Division for Knowledge and Information Management.

⁴ See, for instance, Claus-Dieter Ehlermann, ‘Six Years on the Bench of the ‘World Trade Court’. Some Personal Experiences as Member of the Appellate Body of the World Trade Organization’, 36 *Journal of World Trade* 605 (2002). The reference to a court and to adjudicators as “judges” was also prevalent among the AB members themselves. As A.V. Ganesan, a former AB member, recalls: “As an aside, I recollect that in all oral hearings of the Appellate Body, James Bacchus, another founding father of the Appellate Body, used to refer to his colleagues on the division as judges, much to the amusement and raised eyebrows of the participants, particularly the WTO diplomats.” Ganesan, A.V., 2015. “The Appellate Body in its formative years—A Personal Perspective.” In: *Gabrielle Marceau et al.*, fn 9.

⁵ See Blustein (2017), at p. 13, adding « having accumulated encyclopedic knowledge on the issues he is confronting ... he effectively ‘holds the pen’ in the drafting process for many decisions. Moreover, he participates in virtually every important discussion members have about cases”.

The above offers a glimpse of how things ended for the AB and its Secretariat. But where did they start? What explains the Secretariat's expansive influence over WTO dispute settlement? We work backwards through time to address this question, from the current status quo, back to the Secretariat's historical origins.

WTO rules bestow a broadly defined role on its staff. DSU Article 27.1 provides that “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”. Notice how this provision explicitly includes assistance on the “legal ... aspects” of a case. In practice, WTO panels are assisted by an increasing number of various WTO staff: lawyers from the Legal Affairs Division (LAD), or the Rules Division when the dispute concerns so-called trade remedies;⁶ experts in the substantive area at issue sourced from operational divisions, such as specialists in agriculture, sanitary measures or customs valuation; and economists from the Research Division, who play an advisory role on economic questions and provide econometric evidence. In each dispute, one or more junior lawyers report to the lead lawyer who, in turn, reports to the Director of the relevant division. As several divisions are involved, multiple Directors supervise staff work and need to coordinate among themselves. Four Deputy Director-Generals (DDGs) are each in charge of three to five divisions. Traditionally, the same DDG oversees both the LAD and Rules Division. At the head of the Secretariat is the WTO Director-General (DG).⁷ The DG and DDGs do not normally get involved in specific disputes, with the exception of panel appointments, which we discuss below.

As pertains to the AB Secretariat, DSU Article 17.7 provides that “[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires”. Here, too, the staff's mandate explicitly includes “legal support.” The AB thus has its own Secretariat, composed exclusively of lawyers and administrative support staff, which is separate and independent from the broader WTO Secretariat. It reports only to the DG for non-dispute-related administrative matters. Yet, all staff, including that of the AB, are appointed (and promoted) by the DG, without

⁶ When disputes relate to trade in services or intellectual property, one or more lawyers from those operational divisions are added to the LAD staff.

⁷ For an overview of the Secretariat structure, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org4_e.htm.

any formal role for WTO Members, panelists or the AB itself.⁸ An AB division of three AB members, hearing a specific dispute, is assisted by a team of junior staff lawyers led by a senior lawyer, who in turn reports to the Director of the AB Secretariat. When a dispute involves complex economic arguments or econometric evidence, the AB has also sought advice from economists in the Research Division. As a result, any given WTO panel or AB division is assisted by anywhere from four to more than ten WTO staff members, with one or more Directors in supervisory roles.

2.1 Overlooked by Design

The view that WTO insiders have of the Secretariat's role in dispute settlement is aptly summarized by Thomas Cottier's recent assessment: "There is absolutely nothing wrong with the role of the Secretariat, albeit many (including the Secretariat itself) prefer to hide such involvement." This preference for opacity matches our own assessment: whereas the WTO has opened itself up to the public in most respects, it has actually grown more circumspect about the role played by the Secretariat, especially as pertains to dispute settlement.⁹ The intent, as per Cottier himself, who served as a panelist on a number of WTO disputes, is to maintain the "fiction" of rulings being delivered from on high by independent adjudicators, whereas in fact, a large team of permanent staff is devoted to handling growingly complex disputes.

The sheer extent of this involvement is thus known to Geneva insiders, but comes as a surprise even to scholars who closely study the trade regime.¹⁰ It is in every way an open secret. Soave (2019) has described it as an instance of "collective denial". Below, we outline the extent of this involvement, before examining its far-reaching implications.

2.2 What Does the WTO Secretariat Actually Do?

⁸ Operationally, however, AB staff is "answerable to the Appellate Body". See Recommendations by the Preparatory Committee to the WTO, PC/IPL/13, Sub-Committee on Institutional, Procedural and Legal Matters, "Establishment of the Appellate Body," approved December 6, 1994, and agreed to by the DSB in WT/DSB/M/1, Minutes of Meeting Held in the Centre William Rappard on February 10, 1995, circulated February 28, 1995, para. 17.

⁹ For example, Secretariat staff assigned to disputes used to be identified; this ceased around DS302, about ten years into the WTO's existence. As Johannesson and Mavroidis (2017) put it, "Originally, the various documents issued in disputes mentioned the name of WTO officer acting as law clerk in disputes. Subsequently, nevertheless, the WTO Secretariat discontinued this practice."

¹⁰ As Soave (2019, 326) puts it, "commentators and scholars remain almost entirely oblivious to the expert communities in which adjudicators are embedded." This matches our own experience.

Drawing on a review of formal and informal working procedures, written testimonies from the relevant actors, and conversations with both former and current Secretariat members and adjudicators at both the panel and the AB level, our analysis reveals that WTO staff play a substantive role in WTO panel and AB proceedings in seven major respects. These include: (i) the appointment of panelists; (ii) setting timetable and working procedures; (iii) writing the “issues paper” that adjudicators see before they ever meet to discuss the case; (iv) drafting the questions adjudicators ask the parties; (v) providing expert advice on non-legal issues (e.g. econometric evidence); (vi) actively participating in hearings and internal deliberations; and (vii) drafting of reports.¹¹ Some differences exist between the Secretariat’s role during panel and AB proceedings¹², but these have eroded over time.¹³ With the exception of adjudicator appointment, discussed below, it can be said that “[t]he work of the Appellate Body Secretariat has traditionally been very similar to that of LAD [Legal Affairs Division] and the Rules Division [advising panels]”.¹⁴ We outline these functions below.

Appointment of Panelists. First-instance panelists must be agreed upon by both disputing parties. Yet, it is the WTO Secretariat (the Director and one or two senior lawyers in the LAD or Rules Division) that initially proposes names to the parties (Malacrida 2015).¹⁵ Moreover, if no party agreement can be found, which, today, happens in more than two thirds of disputes, the DG is

¹¹ See Baker and Marceau (2019) and references in footnote 5 above.

¹² Most importantly, adjudicators on panels are appointed for a given case; AB members for four years (renewable once). One might thus expect that *ad hoc* panelists would be guided more by staff lawyers—most of whom were already employed under the GATT—while AB members, given their longer terms, would take more control, especially since the AB Secretariat was created at the same time as the AB itself.

¹³ As a result of both AB staff and AB members being “new on the job” (see footnote 12 above), AB members initially did most of the drafting themselves, relying less on “issues papers” prepared by the Secretariat, and spending long days in Geneva to work on the report themselves, while staff took a backseat (literally, sitting behind, rather than at the famous AB oval table) in internal deliberations. Yet, rather quickly, even AB members, pressed for time given their 90-day constraint, started to increasingly rely on Secretariat staff: “issues papers” were requested; drafting was handed over; AB members spent fewer days in Geneva; and staff participated more actively in internal deliberations, literally taking a seat at the main table. As time progressed, and AB members came and went, while AB staff stayed and accumulated experience, asymmetries between AB members and their staff increased and eventually became as important as those between *ad hoc* panelists and the staff lawyers assisting panels.

¹⁴ *Ibid.*, at p. 84. If anything, today, the role of the Secretariat in AB proceedings may be more prominent (and it certainly has been more controversial) than that of staff advising panels: the AB staff is uniformly controlled by one single Director and tends to consider itself as the main guardian of AB consistency (see text at footnote 61, below). Staff assisting panels, by contrast, are dispersed over several divisions, with multiple Directors, and may be more at ease with divergences between panel reports, as the AB remains above them to keep things in check.

¹⁵ DSU Article 8.6: “The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons”.

tasked to appoint panelists.¹⁶ The DG makes his decision on the recommendation of, or at least in close consultation with, senior LAD/Rules Division lawyers. This is the opposite of, for example, the US Supreme Court, where the judges themselves appoint their clerks. In the WTO, it is the Secretariat staff that propose and, in many cases, appoint panelists, taking into account the parties' preferences, instructions and red lines (Malacrida 2015).

In principle, panelists are supposed to control the WTO staff assisting them. Yet panelists are aware that they owe their appointment at least in part to the WTO staff now helping them. This blurs the traditional principal-agent relation between adjudicator and staff present in other tribunals. A panelist with an eye to re-appointment thus has an incentive to avoid ruffling the WTO staff's feathers, and to follow the guidance received in Secretariat proposals and drafts. AB members, in contrast, are appointed by consensus of all WTO Members for a once-renewable term of 4 years.¹⁷ The selection committee making proposals to the Membership is composed of committee chairs as well as the DG. AB staff play no formal role in the appointment of AB members, yet the Director of the AB Secretariat does attend the hearings of the selection committee.

Setting Timetable and Working Procedures. The first task of WTO panels is an organizational meeting where timetable and working procedures are fixed. The DSU provides a template,¹⁸ but this template has proven very flexible.¹⁹ Over the years, additional working procedures have been developed through trial and error.²⁰ Until recently, most of these adjustments were not made public.²¹ As a result, the WTO Secretariat serves as the repository of best practices, and panelists—who are appointed to decide only one given dispute—rely heavily on its guidance. AB working procedures are publicly available and fixed *ex ante* by the AB itself,²² with fewer case-specific

¹⁶ Busch and Pelc 2009. DSU Article 8.7: “If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel”.

¹⁷ DSU Article 17.2.

¹⁸ Appendix 3 to the DSU.

¹⁹ DSU Article 12.1.

²⁰ Additional working procedures, which are now standard practice for most panels, address questions such as preliminary rulings, evidence, the role of third parties, open meetings, business confidential information and panel questions to the parties.

²¹ For a recent example where all procedures and timetables were made public, see *Canada – Measures Governing The Sale of Wine*, WT/DS537.

²² DSU Article 17.9.

adjustments.²³ Since many AB staff have been with the WTO for much longer than AB members themselves, here too, Secretariat staff played a crucial role in the original design of AB procedures in 1995 and continue to exert influence as institutional memory and conveyor belt of best practices (Steger, 2015). The AB Secretariat also holds considerable influence over the setting of timetables, as it needs to coordinate with other ongoing cases and distribute available staff resources. The time limits for panel and AB proceedings provided in the DSU are most often exceeded. In another illustration of the essential role of the Secretariat during adjudication, the availability of the Secretariat staff is often invoked as one of the core causes of these delays.²⁴ As adjudicators work and get paid part-time, setting hearing dates and oversight over the number of days allocated to each case also ends up determining the number of days that adjudicators devote to each dispute, and thus how much they get paid. Indeed, whereas WTO staff are paid a fixed annual salary with no oversight by adjudicators, payment requests by adjudicators are scrutinized by and need approval from WTO staff.

Writing the “Issues Paper”. The parties in dispute submit voluminous filings and exhibits to both panels and the AB. Adjudicators are expected to digest all of these documents, yet the sheer volume of submissions makes this difficult in practice. To assist them, WTO Secretariat staff write an “issues paper,” which summarizes the facts and arguments of the parties and, crucially, identifies the issues to be decided. It also offers what WTO staff consider to be the applicable WTO treaty rules and past panel or AB rulings that may be on point. Importantly, adjudicators receive this report *before* they ever meet to discuss the facts of the case. In other words, it is not the adjudicators who deliberate among themselves, and then instruct staff; quite the opposite.

Nothing in the issues paper is in any way binding. Yet since it effectively sets the agenda, identifying the possible ways in which the case may be resolved, its influence is significant. As

²³ The latest AB Working Procedures for Appellate Review are available at https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm. The AB has amended its working procedures six times since 1995.

²⁴ See, for example, Communication from the Appellate Body, 22 February 2019, in *India - Certain Measures on Imports of Iron and Steel Products*, WT/DS518/10, announcing that the AB will not be able to meet the 90 days deadline set out in DSU Article 17.5, invoking, amongst other reasons, that “it will not be possible to staff this appeal for some time”. Similarly, in *EU – Antidumping Measures on Biodiesel from Indonesia*, the panel was established in August 2015 and composed in November 2015. However, in April 2016, the panel announced that it expects to issue its final report to the parties only by mid-2017. The sole reason offered for this delay was that “[t]he beginning of the Panel’s work was delayed as a result of the lack of available experienced lawyers in the Secretariat” (Communication from the Panel, 22 April 2016, WT/DS480/4).

one Geneva source reportedly put it, in respect of the AB Secretariat's Director: his oversight of issues papers "allows him to control the flow of information to Appellate Body members by prioritizing certain issues or not addressing others. He is able to direct a large portion of the work before the members even get involved" (Monicken, 2019). This is especially likely for the many adjudicators whose native language is not English. Though crucially important in setting the agenda for deliberations, issues papers are never shared with the parties or the public.

Drafting the panel/AB questions to the Parties. Besides written submissions, panels and the AB also hold one or more hearings with the parties. Adjudicators can ask questions of the parties and third parties both before and after these hearings. These questions play an important role in identifying the issues and focusing the parties' attention to certain matters that the adjudicators consider to be important. WTO staff, who often have the deepest knowledge of the parties' submissions, and who wrote the issues paper, play a leading role in drafting questions. Adjudicators themselves are the ones who actually read out the questions, and they are free add their own. Yet here too, the fact that the initial list of questions is drafted by the Secretariat offers it considerable agenda-setting power.

Providing expert advice on non-legal issues. WTO adjudicators also receive technical help from non-legal WTO staff on substantive questions in dispute. This may range from input on negotiating history and recent committee practice, to help with understanding technical terms such as "risk management" (under the SPS Agreement) or modern telecom regulations (under GATS),²⁵ and the increasingly complex econometric evidence submitted by the parties. The staff providing this assistance come not from the legal divisions (LAD, Rules or the AB Secretariat) but from operational divisions (where staffers also assist WTO Members in ongoing committee work and negotiations or training and capacity building) and economists from the Research Division. Input from staff economists has proven particularly controversial, raising legal concerns of its own.²⁶ In

²⁵ See, for example, the Panel in *Mexico – Telecoms*, noting that the diverse backgrounds of the panelists "and the assistance granted by the Secretariat pursuant to Article 27.1 of the DSU" ensured that it was fully aware of the legal and technical complexity of the regulation of telecommunications services, including their rapid technological evolution, and the drafting history of GATS provisions to which the disputing parties had referred extensively (Panel Report, *Mexico – Telecoms*, para. 7.2), quoted in Wauters (2021) at p. 84.

²⁶ See Joost Pauwelyn, *The Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement*, in *WTO Litigation, Investment and Commercial Arbitration – Cross-fertilization and Reciprocal Opportunities*, Goldman, Romanetti & Stirnimann (eds.), Kluwer, 2013, 169-197 at 190 ("to the extent staff economists provide new facts or evidence that may influence the legal outcome without disclosure to the parties, standard rules of due process

its very last report, the AB in *Australia – Plain Packaging* found that the underlying panel had violated due process by (i) raising highly technical objections in an Appendix of over 150 pages to the evidence presented by claimants, even though the defendant had not raised those objections and (ii) by failing to provide the parties with an opportunity to respond to those objections.²⁷ As Honduras, one of the claimants, put it in its Notice of Appeal, instead of relying on its authority to appoint outside, technical/economic experts, the panel relied on a “ghost expert”, apparently from within the WTO Secretariat.²⁸

Participation at Hearings and in Internal Deliberations. WTO staff attend all the hearings with the parties and third parties. In most cases, they sit right next to the panelists or AB members themselves, on the main podium, to enable the passing of notes and other communications. Crucially, WTO staff also attend and play an active role in all of the internal and confidential panel and AB deliberations.²⁹ Here too, they literally sit at the main table, not behind it. In fact, WTO staff normally take the first step in these deliberations, by presenting the issues paper at an internal meeting right before the first hearing with the parties. After the hearing, the panel or AB hold further deliberations to discuss the issues, prepare rulings and go over drafts. WTO staff are present and take a leading role at every stage.³⁰

Compared against other international tribunals, such attendance and active participation in internal deliberations by staff is exceptional. At the ICJ, clerks are not privy to internal deliberations. The same is true in the US Supreme Court. In international commercial arbitration, active participation in internal deliberations by Tribunal secretaries could be seen as a reason to set aside or annul the arbitral award. The 2016 UNCITRAL *Notes on Organizing Arbitral Proceedings* draw a clear line in this respect: “it is recognized that secretaries are *not involved and do not participate in the*

are violated. Arguably, also Article 18:1 of the DSU – ‘[t]here shall be no ex parte communications with the panel or Appellate Body’ – is violated”); Marion Jansen, Joost Pauwelyn & Theresa Carpenter (eds.), *THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES* (Cambridge University Press, 2017), and Wauters (2021) (“in the area of providing economic expert advice, there appears to be a problem of legitimacy and due process as a result of the non-transparent role played by the WTO Secretariat”).

²⁷ Appellate Body Report, *Australia – Tobacco Plain Packaging*, para. 6.257.

²⁸ WT/DS435/23, p. 6. Honduras argued that this “rais[ed] alleged ‘robustness’ concerns not identified by any of the parties without even offering the parties an opportunity to comment”.

²⁹ DSU Article 14.1 provides that « [p]anel deliberations shall be confidential ». DSU Article 17.10 provides that “[t]he proceedings of the Appellate Body shall be confidential”. Presence of WTO staff is not explicitly addressed.

³⁰ See Blustein, 2017 at p. 13.

*decision-making of the arbitral tribunal, except in certain rare, specialized types of arbitration.*³¹ Similarly, the recent USMCA explicitly provides that “[o]nly panelists may take part in the deliberations of the panel. Assistants, Secretariat personnel, interpreters, or translators may be present if the panel determines they are necessary”.³² The EU-Ukraine Association Agreement provides for similar limitations and also distinguishes between being “present”, and actually “taking part” or participating in, deliberations. Only the former is permitted if the tribunal so decides.³³ In sum, the WTO appears as an outlier in the extent to which support staff actively participate in a panel’s confidential, internal deliberations.

Drafting of the Panel/AB Report. The DSU provides that the reports of panels and the Appellate Body “shall be drafted without the presence of the parties to the dispute”.³⁴ No mention is made of WTO support staff. Yet, it is an “open secret” in Geneva trade circles that in most, if not all cases, it is the Secretariat that writes not only the issues paper, but also the first draft of the actual ruling.³⁵ Recent empirical work has taken up this question explicitly. Relying on two different text analysis approaches for authorship attribution, Pauwelyn and Pelc show that the WTO Secretariat exerts significantly more influence over the drafting of WTO panel reports than the panelists themselves.³⁶ There is variation depending on the case, the specific legal issues raised, and the

³¹ These include cases “where the specific arbitration rules provide that secretaries are expected to provide legal advice in relation to the decision of the arbitral tribunal if and when the arbitral tribunal is composed only of non-lawyer, subject matter specialists.” UNCITRAL, *Notes on Organizing Arbitral Proceedings* Notes, UN, New York, 2016, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf>, para. 36 (italics added). See also International Council for Commercial Arbitration [ICCA], *The ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries*, 2014, available at https://www.arbitration-icca.org/media/3/14235574857310/aa_arbitral_sec_guide_composite_10_feb_2015.pdf, at p. 14: “while the arbitral secretary may be present during the deliberations, care should be taken by the tribunal not to allow the arbitral secretary to participate in the deliberations” (underlining added).

³² USMCA, Rules of Procedure for Chapter 31, Article 9, underlining and italics added.

³³ EU-Ukraine Association Agreement, Rules of Procedure for Dispute Settlement, paragraph 13 (“Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may permit its assistants to be present at its deliberations”) (underlining added).

³⁴ DSU Article 14.2 and 17.10.

³⁵ As a former Director of LAD pointed out in a blog comment on an earlier draft of our empirical paper proving the role of staff in the drafting of panel reports: “the conclusion that panel and AB staff wrote large parts of these reports was ... already known from interviews with and writings of staff, panel and AB members. Still, it is good to have a confirmation” (Pieter Jan Kuijper, Guest Post: Some Remarks on Who Writes the Rulings of the World Trade Organization?, IELP Blog, 9 October 2019, available at <https://ielp.worldtradelaw.net/2019/10/guest-post-some-remarks-on-who-writes-the-rulings-of-the-world-trade-organization-a-critical-assessm.html>

³⁶ Pauwelyn, Joost and Krzysztof Pelc. 2021. *WTO Rulings and the Veil of Anonymity*. Working Paper.

adjudicators involved. Yet on average, looking at the text of the final ruling, it is the Secretariat staff's fingerprints that are discernible.

To be sure, drafting a ruling is not the same as deciding the case. Adjudicators may provide instructions before drafting, they may revise and edit drafts and they must, ultimately, approve the draft as their own, final ruling. It is the three panelists or AB members who sign the report, since as we note above, the Secretariat staff's input is no longer mentioned anywhere. Yet by drafting the text of the ruling itself, the Secretariat exerts considerable influence over the way in which legal interpretations and rulings are worded and argued, a point to which we return below.

2.3 What Explains the Central Role of the Secretariat?

In reflection of its role within WTO dispute settlement, the size of the Secretariat has grown significantly over time. At the end of 1999, about five years into WTO dispute settlement, a total of 37 staff worked in the LAD, Rules and AB secretariat divisions combined.³⁷ By the end of 2018, this number had increased to 90, counting only permanent positions.³⁸ Staff in the three legal divisions also represented a growing share of the overall staff numbers: 7% in 1999, increasing to 14% of total staff in 2018. The AB budget has increased in parallel, from 2.3 million CHF (1.8% of total) in 2000, to 7.6 million CHF (3.9% of total) in 2019.³⁹ What these numbers suggest is that more WTO staff are needed today to service a number of cases that has in turn remained relatively stable over time.⁴⁰

The contrast with the days of the GATT could not be starker. The ambivalence, if not distrust, of GATT negotiators and diplomats toward lawyers, from the 1940s to the 1980s, is well documented

³⁷ See WTO Annual Report, 2000, at p. 104, 9 in the AB Secretariat, 15 in LAD, and 13 in Rules (out of a total of 539 WTO staff members).

³⁸ See WTO Annual Report, 2019, at p. 172, 25 in the AB Secretariat, 34 in LAD, and 31 in Rules (out of a total of 627 WTO staff members).

³⁹ Compare: WTO Annual Report, 2000, at p. 112 to WTO Annual Report, 2019, at p. 179. No separate budget numbers are available for the LAD or Rules divisions.

⁴⁰ Indeed, the number of new cases filed and panel or AB reports issued per year has remained relatively stable—if anything, with the exception of 2018, a downward trend can be detected. (See Pauwelyn and W. Zhang (2018) and WTO Annual Report, 2019, at 116 and 125 (in 1999, 30 new requests for consultations were filed ; in 2017, only 17 ; in 2018 requests increased considerably to 38 as a result of, in particular, US trade policies ; the last time more than 30 requests were filed dates from 2002 ; in 1999, the AB issued 10 reports, in 2017 only 7, in 2018, the AB issued 9 reports). The one number that is peaking is pending cases per month, due to accumulation: an average of 20 cases in 2000; and 42 in 2018 (WTO Annual Report, 2019, at 121). The accumulation is explained mostly by major delays in panel and AB proceedings which, ironically, are often blamed on a lack of WTO support staff. Disputes may have

(Marceau, 2015). Until the mid 1980s, the GATT Secretariat did not even have a formal legal division. Pragmatism was the leitmotiv (Long 1983). As one of the first “legal officers” ever hired by the GATT Secretariat put it, “[d]uring my first contacts inside the GATT Secretariat [in the early 1980s], most colleagues... told me that—in their view—the Secretariat should never have an Office of Legal Affairs; lawyers should not participate in GATT dispute settlement proceedings so as to avoid undue ‘legalisation’; and... the GATT should never become a tribunal” (Petersmann, 2015). It would be an understatement to say that things have changed.

The change has a precise origin. In the early 1980s, a number of GATT panel reports, composed mainly of diplomats and non-lawyers, made what many considered “legally unsustainable” rulings (Roessler, 2015). Hudec (1999) described these as “embarrassingly poor decisions.” In particular, an errant 1981 panel ruling on Spain’s discriminatory treatment of imported soybean oil, containing plain errors of law, proved decisive. In 1982, GATT parties tasked the GATT Secretariat with “assisting” panels including on the “legal... aspects of the matter dealt with” (Roessler, 2015). As noted earlier, in 1994, this language was copied almost verbatim into Article 27.1 of the DSU.⁴¹ In other words, the Secretariat’s role in dispute settlement resulted from an attempt by Members to exert additional oversight on the proceedings. In this sense, the Secretariat was, from the start, designed as an agent of Member-States, rather than adjudicators. Its purpose was to serve as a check on adjudicators.

A subsequent event reinforces this view. Shortly before the inception of the WTO, the United States pushed to create a separate secretarial body to deal uniquely with trade remedies cases, the Rules Division. The US was, and remains, a frequent user of these remedies. In effect, the US thus created a specialized advisory division of permanent staff to exercise oversight over the area of

become more complex, requiring more staffers per case. Yet these numbers provide further evidence of the growing role of WTO staff (compared to WTO adjudicators, whose number has remained the same: 3 panelists and 3 ABMs per dispute) in WTO dispute settlement.

⁴¹ Contrast this to, for example, the 1995 ICC *Note concerning the Appointment of Administrative Secretaries by Arbitral Tribunals* (quoted in Partasides, at p. 151) which explicitly precludes secretaries from doing substantive legal work: “The duties of the administrative secretary must be strictly limited to administrative tasks. The choice of this person is important. Such person must not influence in any manner whatsoever the decisions of the arbitral tribunal. In particular, the administrative secretary must not assume the functions of an arbitrator, notably by becoming involved in file decision-making process of the tribunal or expressing opinions with respect to the issues in dispute”. Since then, the role of ICC administrative secretaries has, however, been defined more broadly, see *Note To Parties And Arbitral Tribunals On The Conduct Of The Arbitration Under The ICC Rules Of Arbitration*, 1 January 2019, at paras. 183-188.

law that it cared about most deeply—the same area of law that is arguably at the heart of the current impasse in the institution.⁴² Here too, the intent was plainly to exercise political oversight, rather than to provide additional assistance to adjudicators.

The Secretariat was thus a strategic creation of governments, intended to serve as their agent, with a view to acting as a check on adjudicators. Yet it bears asking how much of the current institutional power of the Secretariat results from this original decision by Member-States, and how much has been an outgrowth of its initial mandate. In other words, how much of the Secretariat's expansion was intended?

2.4 How Much of the Secretariat's Expansion Was (Un)Intended?

A series of “rogue” GATT rulings containing egregious mistakes of law, and a resulting need to increase Members' oversight of panels were the initial reasons for the appointment of WTO staff lawyers to disputes. Yet a number of unforeseen factors have likely contributed to the Secretariat's rise in influence beyond what any Member-States had initially anticipated.

The first of these is a growing gap in sheer legal expertise. Governments continue to frequently nominate diplomats or non-lawyers as WTO panelists.⁴³ Many AB members also lack experience in a judicial function or legal practice; some have a distinguished career in diplomacy or civil service, but no law degree. WTO staff lawyers, in contrast, must have a law degree, and are competitively selected among increasingly large pools of highly qualified and experienced applicants. Despite the increasingly “legalized” nature of WTO dispute settlement, Members continue to rely on *ad hoc* panelists who are often pulled from the ranks of trade policy officials. As Hudec pointed out as early as 1999, the criticism of the Secretariat having “no mandate to perform this quasi-decision-making role ... is well-founded,” but he went on, it is unlikely to change given panelists' frequent lack legal expertise, which means that “the Secretariat has been, and will remain, the only available source of legal expertise” in most disputes (Hudec, 1999). Little has changed in the intervening years.

⁴² The US points principally to a series of AB and panel decisions related to zeroing, a methodology involved with antidumping investigations, as evidence of the “systemic problems” with WTO dispute settlement.

⁴³ See Pauwelyn (2015), *supra* note 44.

This difference in experience would only have grown over time, given the many structural asymmetries between WTO staff and adjudicators. Consider the contrast: WTO staff work full-time, live in or around Geneva, and receive a relatively generous monthly salary and full UN-style benefits. WTO panelists and AB members, on the other hand, are devoted to their task on a part-time basis; they fly into Geneva for hearing days from different time-zones; and they are paid relatively low amounts effectively as consultants, without benefits such as pensions.⁴⁴ This leads to an asymmetry of experience and time allocation. On the one hand, *in situ* staff paid full time, with years of experience and detailed knowledge of procedure and past rulings. On the other, adjudicators often new on the job, who have (better-paid) competing demands on their time, and who need to travel to Geneva to attend hearings.⁴⁵ As a result, it is WTO staff who increasingly operate as the “institutional memory” of the organization and prime experts on WTO treaty rules and jurisprudence.

The *de facto* recognition of precedent over the DSU’s history has given further weight to the comparative advantage of WTO staff over adjudicators, and may have further added to the delegation from adjudicator to expert staff. As Thomas Graham, former AB chair, put it: “adherence to precedent ... made it more important to know the past than to think anew. It empowered those who best knew the past, such as staffs” (Graham, 2020). In this way, the practice of buttressing current reasoning with citations to past cases has elevated the status of the Secretariat staff, who have more familiarity with WTO case law than anyone. Given the cumulative nature of jurisprudence, the relative advantage of Secretariat staff only increased over time: as WTO jurisprudence grew and became more diverse and complex, encompassing tens of thousands of pages of legal reasoning, so would the adjudicators’ inclination to rely on, and defer to, the staff’s guidance.

In sum, the appointment of Secretariat staff as agents of government to oversee the dispute settlement process was a rational response to the growing complexity of cases and lessons learned

⁴⁴ Panelists 900 CHF per day, or 300 CHF per day if they work for a member government, plus per diem; AB members earn a monthly retainer of 9000 CHF per month plus 900 CHF per day and per diem. See 2018-2019 Budget Proposals by The Director-General, 19 September 2017, WT/BFA/W/427, para. 3.2.1. Arbitrator compensation at ICSID or the ICC is a multiple of these amounts. See Pauwelyn, (2015).

⁴⁵ As discussed in footnote 13 above, for AB members and AB staff, this asymmetry may not have existed in the early days, but gradually developed over time, thereby increasing the role of AB staff as time progressed.

in the early 1980s. Over time, however, owing both to structural asymmetries and emerging practices that Member-States could not have anticipated, the role of the Secretariat may have evolved beyond anything governments had initially imagined.

3. How the Role of the Secretariat Matters

We have argued that WTO's Secretariat exerts more influence over dispute settlement proceedings than the permanent staff of any comparable international tribunal. This is the result of a combination of deliberate decisions taken early on by governments and unanticipated factors that arose subsequently. And as we argue next, the Secretariat's expansive role holds considerable implications for the institution itself, as well as for its study.

We place these effects under three banners: institutional legitimacy, accountability, and legal outcomes. More broadly, we argue that the sheer extent of the Secretariat's role within the WTO should lead us to reassess the established view of what the WTO's dispute settlement mechanism actually *is*. Rather than a traditional binding adjudicatory mechanism operating at the international level, a full appreciation of the Secretariat's role recasts WTO dispute settlement as a *sui generis* process of administrative review.

One might argue that the empowerment of a Secretariat that is widely lauded for its expertise and high levels of professionalism and independence is all to the good.⁴⁶ After all, the presence of “guardians of the system” suggests that the long-term interests of the institution are duly protected, and reflected in rulings. Staff improve the adjudicative process and keep “rogue” adjudicators in check, as intended. In this way, the existence of the Legal Affairs Division has been offered as one explanation for the puzzling practice of states consistently turning to the WTO to resolve disputes arising within regional agreements, rather than using the dedicated dispute settlement systems in those agreements, most of which are modelled on the WTO. As Cottier (2021) argues, this may be due precisely to the unparalleled “in-house expertise and experience” of the WTO Secretariat,

⁴⁶ See, for example, Peter Van den Bossche, Farewell Speech to the WTO DSB, 28 May 2019 (“As for the Appellate Body Secretariat, I can but say that its Director, its senior and junior lawyers (past and present), and its support staff (past and present) are the most accomplished and dedicated professionals that I have ever worked with”).

which leads to more predictable outcomes, which then become more likely to shape subsequent practice.⁴⁷

In fact, while powerful WTO Members like the US have heavily criticized countless aspects of dispute settlement, they have voiced no complaint about the Secretariat's role or its influence. In the USTR's 174-page-long *Report on the WTO Appellate Body* in 2020, the role of the Secretariat is never criticized. If anything, the US praises the experience and expertise of the Legal Affairs Division, as compared to that of the AB Secretariat.⁴⁸ Tellingly, the only open criticism of the Secretariat's role and influence in dispute settlement has come from developing country members and LDCs. Their view has been that a powerful, non-transparent Secretariat is likely to negatively affect the interests of less powerful states, especially.⁴⁹

3.1 Effects on Legitimacy

The aforementioned concerns of developing countries point to the first implication of an uncommonly powerful Secretariat, which is that it leaves the WTO open to *legitimacy* critiques, and as a result, risks weakening the institution's compliance pull.

The WTO treaty painstakingly defines the qualifications, independence, geographical distribution and appointment process and terms of panelists and AB members.⁵⁰ WTO Members delegated limited adjudicative powers to those panelists and AB members *intuitu personae* ("according to the person"), not to WTO Secretariat officials. No analogous vetting of Secretariat members exists for every dispute—in fact, the names of the relevant staff have ceased appearing on the final report, just as their influence over the proceedings has grown. The staff are mandated to "assist" and "support" adjudicators, but the line between such "support" and involvement in final decision-

⁴⁷ On the choice between regional and multilateral judicial venues, see Busch, M.L., 2007. Overlapping institutions, forum shopping, and dispute settlement in international trade. *International Organization*, 61(4), pp.735-761.

⁴⁸ USTR, *Report on the Appellate Body of the WTO*, February 2020, at p. 120: "there is no basis to assume that individuals appointed to the Appellate Body will be more qualified than those serving on panels. Indeed, individuals appointed to panels often have had more experience in the WTO system, including with disputes, and with the types of issues involved in disputes, than those appointed to the Appellate Body. And the WTO Secretariat supporting the work of the panelists generally is deeply engaged in the activities of the WTO, including the work in WTO Committees monitoring WTO Members' trade regimes and the negotiations for new WTO rules, whereas the Appellate Body Secretariat does not engage in those functions and has more limited experience".

⁴⁹ See comments over a lack of transparency in WTO doc TN/DS/W/18, no V (by Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe) and WTO doc TN/DS/W/43, no XIII (by Jordan).

⁵⁰ See DSU Articles 8 and 17.

making is tenuous, especially since much of the process takes place behind closed doors. This matters for the legitimacy and trust in the system. As Rosenthal and Yoon (2010) at p. 1310 put it, “delegation, if taken too far, can threaten the integrity of the Court.”

Much of the system’s legitimacy is tied to the image of independent judge-like figures impartially applying international law to deliver rulings from on high. The figure of the judge (or, in our case, panelist or AB member) has a unique claim to what Max Weber described as a “rational-legal” authority, or what Thomas Franck later termed law’s “compliance pull,” in a way that technocrats applying the same law to the same cases may lack (Finnemore, 1999). A tribunal’s authority and its ability to compel the behavior of sovereign states may thus rest on the litigants having sufficient confidence that the appointed adjudicators are the full authors of the rulings handed down by the tribunal, rather than WTO staff whose names are no longer found in the final report.

Such concerns over legitimacy and compliance pull are especially likely to arise around the question of “who holds the pen”. As we outline above, both anecdotal evidence and empirical evidence confirms the extent to which the Secretariat staff play a bigger role in drafting the final ruling than the adjudicators themselves. Combined with their key task of preparing the detailed issues papers, this gives WTO staff an uncommon degree of influence over the final ruling, as compared with staff in other tribunals. And yet, WTO panelists and AB members remain the ones making the final decision. So how much of a concern is the Secretariat’s role in drafting?

One might argue that WTO staff are merely involved in giving words to that decision. Writing in the context of Registry staff assisting ICJ judges, Thirlway draws an analogous distinction “between the decision on the issues in a case, and the expression of that decision in the best words possible” (Thirlway 2006). In his view, “[t]he first task is for the judges alone; but the Registry staff can and do help in the performance of the second”. Yet he immediately cautions that “[l]aw is a matter of words; and it may be said that the choice of words to convey a legal point is in itself the decision of, or a decision on, that point” (Thirlway, 2006 at p. 21). Partasides puts it similarly in the context of international arbitration: “[t]he act of writing is the ultimate safeguard of intellectual control. An arbitrator should be reluctant to relinquish it”.⁵¹ In the context of the US

⁵¹ See Partasides, 2006. Elsewhere, at p. 157, he paraphrases a more categorical position objecting against the idea that one can separate actual decision-making from the process or expression of a decision: “... [some] might argue

Supreme Court, Chief Justice Rehnquist is reported to caution that each "Justice must retain for himself control not merely of the outcome of the case, but of the explanation of the outcome".⁵² Indeed, the very act of drafting a legal decision forces the author to detail, in logical steps, the reasoning toward and expression of that decision. This process may raise new questions that need answering, or raise obstacles that may force the author to re-think the final outcome. Judge Richard Posner put it most bluntly: "Most of the law clerks are very bright, but they are inexperienced; and judges fool themselves when they think that by careful editing they can make a judicial opinion their own" (Liptak 2010). This concern is often explicitly inscribed into treaty texts: in arbitration proceedings under the EU-Ukraine Association Agreement, for example, the rules of procedure explicitly provide that "[t]he drafting of any ruling shall remain the exclusive responsibility of the arbitration panel and shall not be delegated".⁵³

In a legal system like the WTO, with a form of *de facto* precedent, where earlier reports are almost religiously quoted, dissected and most often followed, the exact words and reasoning used in reaching the decision matter as much as the direction of the ruling itself.⁵⁴ As things stand today, panel and AB decisions not only offer a resolution of the dispute for the parties. They also interpret or give meaning to terms in the WTO treaty that will impact future cases. National treatment under the TBT Agreement has, for example, been read as including an obligation of "calibration"; "public body" in the Subsidies Agreement has been defined with reference to "governmental functions". The words "calibration" and "governmental function" have no textual support in the WTO treaties themselves. They were included in the drafting process of particular rulings. Yet, they take on a life of their own and in subsequent cases, panels and the AB further apply and imbue meaning into these words. These interpretations, in turn, have distributional consequences: they favor some

that the distinction between assisting in the decision-making process and assuming the decision-making function is specious: that by involving a secretary in the process, you inevitably give him influence over its outcome. Any piece of legal research and any summary of argument or evidence will, so the argument would go, necessarily bear a secretary's spin and therefore improperly influence the decision-maker's own evaluation. Introduce a secretary into the process and, inevitably, you introduce his views into the award".

⁵² See Rosenthal and Yoon, 2010 at p. 1310, quoting Schwartz, 1996.

⁵³ EU-Ukraine Association Agreement, Rules of Procedure for Dispute Settlement, paragraph 13.

⁵⁴ See Busch and Pelc, 2019, Kucik and Puig 2021.

countries' interests over others.⁵⁵ In sum, who “holds the pen” matters for the perceived legitimacy of the system, nowhere more so than in the current WTO system.

3.2 Effects on Accountability

The WTO DG appoints, evaluates and promotes WTO staff. WTO panelists and AB members have no formal role in the staff appointment process. On the contrary, as we noted earlier, when it comes to panelists, it is WTO staff that propose and often appoint panelists, not the other way around. In addition, when working on a specific dispute, and although panelists and AB members can instruct and direct staff, WTO staff, first and foremost, report to their team leader or senior lawyer who, in turn, follows orders of the staff Director. Moreover, unlike in commercial arbitration, where arbitrators often pay their assistants out of their own budgets, the WTO staff is paid exclusively out of the overall WTO Secretariat budget, and it is instead adjudicators who need to get their payment requests approved by WTO staff.

These factors enhance the independence and bolster the relative power of staff vis-à-vis adjudicators. Less adjudicator control over WTO staff weakens what one would expect to be a principal/agent relation (with adjudicators being “principals”; staff “agents”) and increases the WTO staff’s relative influence. The accountability of WTO staff is essentially limited to the internal hierarchy within the Secretariat.⁵⁶ When a WTO Member considers that a panelist or AB member has “overreached”, that Member may blacklist the person for the next panel or block her re-appointment on the AB. WTO staff have permanent contracts. Neither adjudicators nor WTO Members have direct control over WTO staff, let alone the power to terminate their contracts (as was illustrated in December 2019, when the AB chair wanted to fire the director of the AB Secretariat, but could not).

Whereas the Secretariat’s formal role “assisting” panelists and AB members might at first paint it an agent of the adjudicators—the traditional role of permanent staff in other tribunals—these considerations explain why it is more accurately seen as an agent of WTO Members. Specifically,

⁵⁵ See Daku and Pelc 2017 for an empirical test of how some countries are better able to insert their preferred wording into case law than others.

⁵⁶ Secretariat staff advising panels or the AB are also bound by the Rules of Conduct, adopted by the DSB on 11 December 1996 (WT/DSB/RC/1, available at https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm).

it is a case of one agent (Secretariat staff) checking another (WTO adjudicators).⁵⁷ This is consistent with the institutional history we outlined above. The creation and subsequent empowerment of LAD and later the Rules Division was a deliberate effort by GATT/WTO Members to oversee the work of panelists and prevent flagrant mistakes. As time passed, however, staff grew in number, settled into permanent contracts, and expanded their role. Meanwhile, the AB issued rulings that were automatically adopted by the DSB and was subsequently relied on as *de facto* precedent. As a result, WTO Members progressively lost control over both of their “agents”.⁵⁸

⁵⁷ See Hawkins et al (2006, 30). Hawkins, D.G., Lake, D.A., Nielson, D.L. and Tierney, M.J. eds., 2006. *Delegation and agency in international organizations*. Cambridge University Press.

⁵⁸ Soave describes this evolution and the ongoing struggle over the AB as “a confrontation between, on the one hand, the ‘outer circle’ of trade diplomats and political stakeholders in the system and, on the other hand, the ‘inner circle’ of legal practitioners [including ABMs, Secretariat staff and private lawyers] that run the adjudicative machinery in its routine operations”, with the former group intent on regaining control over the latter (T. Soave, Who Controls WTO Dispute Settlement? Socio-Professional Practices and the Crisis of the Appellate Body, 29 *IYIL* 2019, pp. 13-31, at p. 13).

Table 1. The Role of the Secretariat in WTO Dispute Settlement: Causes and Effects

Importance of the Secretariat	Factors Explaining the Rise of the Secretariat	Impact of the Secretariat's Role	US Concerns with the AB
From 37 staff (in 1999) to 90 staff (in 2018)	“Rogue” panels of the 1980s leading to explicit legal mandate in the DSU	“Holding the pen” matters especially in a system with <i>de facto</i> precedent	
Proposes/(DG) selects panelists	Short-term, part-time, low-paid adjudicators v. permanent, full-time, well-paid staff	Legitimacy, trust and compliance pull of rulings may suffer	
Role in timetable & working procedures	Staff often have more legal background & language expertise than adjudicators	Enhanced reference and strict adherence to precedent/past rulings	Objects to a system of precedent
Writes “issues paper” & provides expert advice on non-legal issues	Staff is not appointed, promoted or paid by adjudicators, nor accountable to WTO Members	Convoluting writing style & exceedingly lengthy reports and proceedings	Wants 90 days rules complied with; Objects to carry-over under Rule 15
Drafts questions to the parties; participates in hearings & internal deliberations	Staff is assigned to panel/AB as a whole, not to individual adjudicators	Expansive scope and ambition of rulings	Certain rulings “far beyond the text” of the treaty or scope of AB review; Objects to “advisory opinions”
Drafts final ruling		Pushback against dissents to maintain collegiality	Objects to a system of precedent

3.3 Impact on Legal Outcomes

Beyond concerns over legitimacy and accountability, the Secretariat’s expansive role also has a concrete impact on outcomes. We outline four such effects, relating to (i) the status of precedent, (ii) the length of reports and proceedings, (iii) the expansive scope and ambition of rulings, and (iv) the suppression of dissenting opinions. These effects are all the more notable, since as we lay out in Table 1, they happen to coincide to a large degree with the “systemic concerns” the US raised around WTO dispute settlement.

Status of legal precedent. Although they are not formally legally binding on future cases, it has become standard practice for panel and AB reports to pay close attention to past rulings, giving rise to a form of *de facto stare decisis*. Rulings spend pages summarizing and referring back to past reports and further interpreting, distinguishing and developing the precise sentences and words previously employed. The AB, in particular, has stated that “absent cogent reasons” its rulings are to be followed by panels and future AB divisions alike.⁵⁹ The current practice is likely a result of a series of factors, including the very creation of a second-level AB, the AB’s principle of collegiality⁶⁰ and the way parties and litigators have argued cases (Pelc, 2014). Yet the increased role of WTO staff in the process is another likely factor.

It should come as no surprise that WTO staff, formally tasked with providing “legal support”, and which has been “advising” past panels or AB divisions—including involvement in internal deliberations and drafting of past rulings, in some cases, for over a decade—are more inclined to refer back to past decisions. They may be especially likely to refer to those past decisions they were themselves part of, or for which they wrote the crucially important issues paper. Recent empirical work supports this expectation. As Pauwelyn and Pelc (2021) demonstrate using text analysis tools, those disputes where the Secretariat appears to have most input in drafting rulings are also those that are subsequently most highly cited.

As permanent staff, paid and employed by the WTO, secretariat lawyers may also be predisposed to defend the WTO and its “jurisprudence” as an institutional value and, in that context, pursue “consistency” and respect for “precedent” (and, at times, refuse to admit or correct mistakes) as an independent goal. This may be the case especially for AB staff, which tends to consider itself as the main guardian of WTO jurisprudence.⁶¹ Blustein, referring to the Director of the AB secretariat, reports the following:

... his arguments are generally perceived as stemming from a passion to safeguard institutional respectability—in particular, ensuring that new rulings follow principles set forth in prior cases—rather than pursuing some political agenda. His overriding

⁵⁹ Appellate Body Report, *US - Stainless Steel*, WT/DS344/AB/R, para. 160.

⁶⁰ See note **Errore. Il segnalibro non è definito.** above.

⁶¹ As noted in footnote 14 above, staff assisting panels, in contrast, is dispersed over several divisions (most notably LAD and Rules), with multiple Directors in control, and may be more at ease with divergence between panel reports as there is always the AB above them to keep things in check.

goal, in other words, is that the Appellate Body should be consistent.⁶²

Even defenders of the AB Secretariat Director recognized that his “aims are consistency in Appellate Body rulings and protecting the institution’s integrity” (Monicker, 2019). Another source stated that “[t]he secretariat has placed an emphasis on collegiality and consistency, but overshot the target when the Appellate Body's culture no longer allowed it to openly reconsider its jurisprudence” (Monicker, 2019).

A striking demonstration of panel staff pursuing “consistency” is a 2005 panel report that copies almost *verbatim* (but without reference) the findings of a panel report circulated only two weeks earlier, on the same issue of "entrustment or direction" under the SCM Agreement.⁶³ As the panelists were different in the two cases, it is highly unlikely that the findings of the first panel were publicly available when the second panel drafted its report (drafting occurs weeks before the a is publicly circulated). The implication is that it was most likely Secretariat staff that cross-checked these panels’ findings, to ensure coherence.⁶⁴

Reference to past rulings, in turn, increases the role and influence of WTO staff: since they are intimately involved in the history, internal deliberation and drafting of past decisions, they become the organization’s “institutional memory”. Adjudicators themselves, who often lack experience or detailed knowledge of case law, may feel they have no choice but to rely on the staff’s guidance. In this sense, the WTO staff’s enhanced role and the elevation of precedent are mutually reinforcing.⁶⁵

Length of reports and proceedings. Panel and AB reports have grown longer, as has the time required to deliver them.⁶⁶ One reason is the aforementioned practice of making detailed reference

⁶² Blustein 2017 at p. 13.

⁶³ This congruence was first noted in the WorldTradeLaw.net Dispute Settlement Commentary (DSC) on Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels (WT/DS273/R)*, last updated 6 September 2007, at p. 26 (referring to paras. 7.368-372 of the report), available at [http://www.worldtradelaw.net/dsc/panel/korea-vessels\(dsc\)\(panel\).pdf.download](http://www.worldtradelaw.net/dsc/panel/korea-vessels(dsc)(panel).pdf.download).

⁶⁴ The WorldTradeLaw.net DSC on the case, referred to in footnote 63 above, concludes that “the similarity of the findings could be an indication of the strong role played by the WTO Secretariat in assisting the panels (for better or for worse, depending on your viewpoint)”.

⁶⁵ Note that reference to precedent is rampant, whereas reference to the negotiating history of the WTO treaty, a process where most WTO staff lawyers were not personally involved in, is almost non-existent. There are other reasons for limiting references to negotiating history (such as Articles 31 and 32 of the Vienna Convention on the Law of Treaties). Yet, the role of WTO staff in WTO dispute settlement may be one of them.

⁶⁶ See Pauwelyn and Zhang (2018), *supra* note **Errore. Il segnalibro non è definito.**

back to past decisions. When WTO staff write the first draft—already a product of compromise and correction between junior and senior staff lawyers—and then various adjudicators add to it, with the overall goal of consensus reports, rulings inevitably become longer, with unnecessary overlap and repetition. As a result, clarity may suffer, which may increase compliance problems, and thus the need for post-ruling implementation procedures. As one outgoing AB member put it in his farewell speech, “an excessive striving for consensus decisions coupled with a discouragement of dissents ... led to excessively long and unclear compromise reports. It also encouraged over-reach, gap filling, and advisory opinions, as a way of accommodating conflicting views” (Graham, 2020).

Paradoxically, this implies that increasing the role of WTO staff may, at times, lengthen and complicate the process and rulings, rather than make the process faster and more efficient. The fact that both panels and the AB now consistently exceed DSU prescribed timeframes may be partly due to a mutually self-reinforcing effect: the Secretariat’s involvement in rulings results in a more bureaucratic style where “no stone is left unturned,” and hypertrophic reports replete with references to earlier rulings. These, in turn, invite longer and more articulate party submissions, which, in turn, call for more detailed and time-consuming examination by panels and the AB, all of which requires yet more staff input.

Expansive scope and ambition of rulings. The formal objective of WTO dispute settlement is to resolve the particular matter at issue in the dispute at hand. Experienced adjudicators have reason to focus their reasoning on certain elements, while relegating others to the margins of the analysis, exercising a type of “selection prerogative”. WTO staff, by contrast, have more incentives to consider a ruling’s impact on the broader system, rather than merely resolving the specific case before them. They have more reason to care about coherence with past rulings, with the other eye on future cases. Staff may thus see greater value in “completing” the incomplete contract than rotating panelists and AB members. The central role of WTO staff in writing the issues paper, asking questions of the parties, actively participating in deliberations, and drafting the actual ruling all provide ample opportunity to act on these temptations.

Suppression of dissents. For the same reason that high staff involvement enhances the likelihood of reference to past rulings, WTO staff, assigned to a panel or AB division as a whole and in many

ways representing the “institutional memory” and “consistency” of the WTO as an institution, has reason to deter dissents by individual adjudicators, and support consensus outcomes.⁶⁷ The dissent rate in the WTO is unusually low, occurring in less than 10% of AB rulings.⁶⁸ The role of WTO staff and its conscious, or unconscious, defence of the system and of its coherence may be among the factors behind this rate of dissent.

In the DSU’s early years, especially, collegiality and consensus were seen as means of ensuring the perceived credibility and predictability of the AB. In this context, the Secretariat’s ability to provide a common starting point through its write-up of the issues paper, and the way it served as a “neutral” advisor and natural focal point, made its guidance a good means of arriving at consensus opinions.

Such a search for consensus is thought to come at the expense of clarity. Consensus decisions based on multiple rounds of compromise—first, within the staff hierarchy, then between staff and the three AB members, and finally with the remaining four AB members, in a way that must also align with past rulings—make proceedings and rulings longer and more complex, as they must accommodate the lowest common denominator. Empirical work shows support for this association between compromise decisions and lower clarity. Using text analysis, Owens and Wedeking show that “all justices [on the US Supreme Court] write clearer dissents than majority opinions”, and argue that this “is likely due to majority opinion writers’ needs to accommodate justices to secure their votes... with larger coalitions creating less clear (i.e., more complex) opinions.”⁶⁹

These legal effects are notable in and of themselves, yet they appear especially so in the light of the US’ recent “systemic concerns”, which have led to the system’s current paralysis. Among these

⁶⁷ See Blustein (2017) at p. 12 : « following selection, an Appellate Body member undergoes a sort of indoctrination process, often including a retreat with colleagues — perhaps at a Swiss or French resort — the purpose being to instill a strong ethos of fidelity to the WTO and the international community without regard to citizenship ... Collegiality and consensus are also heavily stressed; the Appellate Body prides itself on deciding most cases without dissenting opinions”. The AB Secretariat also prepares and updates background papers on cross-cutting issues for the benefit of incoming AB members, who are often new to much of the WTO “jurisprudence”. In support of the Secretariat pushing against dissents, see Howse (2015).

⁶⁸ Dissents in panel reports have also been relatively rare, but occurred prominently in disputes involving so-called zeroing in anti-dumping investigations.

⁶⁹ In contrast, “dissenters are free to state exactly what they desire, without the moderating encumbrances of coalition building”; they enjoy “the ability to throw off the yoke of coalition building and let loose with a sharp dissent” (Owens and Wedeking 2011).

concerns, the US has pointed to the misguided invocation of precedent, over-reliance on *obiter dicta*, a tendency to lock-in past mistakes, and overly lengthy rulings and proceedings.⁷⁰ Echoing many of these concerns,⁷¹ the last remaining US AB member then denounced “an excessive striving for consensus decisions coupled with a discouragement of dissents”, along with a “prevailing ethos” “created and maintained over many years by the Appellate Body staff leadership” according to which the AB was “a self-anointed international court”.⁷²

While the Secretariat itself never came in for explicit criticism by the US, it is hard to overlook how many of the US criticisms are related to tendencies that can be brought back to the Secretariat’s expanded role in dispute settlement. The implications are noteworthy: the “guardians of the system” may have contributed to several trends that have ultimately led to the system’s demise. Whether normatively desirable or not, the unanticipated aspect of the Secretariat’s expansion appears to have had system-wide consequences.

3.4 A New Lens onto the WTO Dispute Settlement System

Our examination of the role of the Secretariat leads us to recast the WTO dispute settlement system as altogether different from what legal scholars and political scientists have portrayed it as.

///

Cottier (2021) argues for a similar re-envisioning of WTO panels as “a particular *sui generis* or hybrid type of fully legal procedures in determining facts, the law, and the settlement of a dispute between the Parties.” By contrast, he continues to view the AB as “more like a court of law.” Given what we now know about the AB Secretariat, we would extend Cottier’s description of the panel system as a process of administrative law to encompass the AB, as well ?? ///

⁷⁰ The US has thus claimed that the practice of invoking precedent, in particular, “[u]surp[s] the authority expressly reserved to [WTO] Members”⁷⁰ and risks that “errors [in AB rulings] will become locked in, and persuasive interpretations are less likely to arise from the dispute settlement system. On the length of proceedings, the US noted how the AB “continuously disregard[s] the 90-day mandatory deadline for appeals”. U.S. Mission, Geneva (2019) at p. 14.

⁷¹ As Graham put it, “I mostly agreed with the US critique of the Appellate Body’s departure from that proper role.” Farewell speech of Appellate Body member Thomas R. Graham. 5 March 2020.

⁷² Ibid.

6. Conclusion

We spent the first part of this article outlining the expansive role the WTO Secretariat exerts in dispute settlement. Its influence, as we argue, appears greater than that of any other international tribunal's staff. The WTO Secretariat is involved not only in setting timetables and working procedures, drafting questions to the parties, and appointing panelists, but it also has the key tasks of writing of "issues papers", actively participating in internal deliberations, and drafting the eventual ruling. New empirical tools have recently provided more clarity into the question of who drafts the rulings of the WTO, confirming how the permanent staff appear to have more influence over the final text of rulings than the adjudicators themselves.⁷³ We then offered possible explanations for why Secretariat support staff—whose numbers have grown rapidly since the WTO's creation—play such a prominent role today. These have both a deliberate and a less foreseeable aspect. The Secretariat's role arose from an explicit treaty mandate to provide "legal support" following a series of problematic GATT rulings in the early 1980s. But then growing asymmetries between staff and adjudicators in terms of appointment terms and expertise, and the relative independence and limited accountability of staff, have contributed to expanding the role of the Secretariat beyond anything Members might have anticipated at its outset.

We then lay out the implications of this unique and expansive role. Crossing the line between adjudicator and staff tasks may threaten the legitimacy, trust and compliance pull of WTO rulings. Looking specifically to the question of drafting, the question of who "holds the pen" takes on special significance in a legal regime that pays as close attention to past rulings as the WTO does. Concretely, drawing on empirical findings and evidence from other courts, we argue that a greater role for the Secretariat is likely to contribute to four key outcomes: increased reliance on precedent; the lengthening of reports and proceedings; the expanding scope and ambition of rulings; the deterrence of dissents. Strikingly, these overlap with the very US concerns that have led to the demise of the AB: the role of precedent and *obiter dicta*; the expansive interpretations of the AB's mandate; the AB's usage of Rule 15; and frequent flouting of the 90-day period for AB review.

⁷³ Pelc and Pauwelyn 2021.

From a force to keep “rogue” panels in check, the Secretariat may therefore have contributed to the very factors that have brought about the dispute settlement current paralysis.

We end with a far-reaching claim concerning taxonomy. An appreciation for the full role of the WTO Secretariat should lead us to re-evaluate what we understand the WTO legal system to be. Neither a bird nor a plane, in light of our examination, the dispute system understanding appears as more of a domesticated terrestrial animal. It is perhaps best seen as a process of administrative review, along the lines of what domestic regulatory agencies are involved in, which has been successfully transferred to the international level, where a group of dedicated experts review the national regulations of Member-States, bearing their political sensibilities high in mind.

References

- Alvarez-Jimenez, Alberto. 2009. "The WTO Appellate Body's Decision-Making Process: A Perfect Model For International Adjudication?". *Journal of International Economic Law* 12: 289-331.
- Baetens, Freya. 2019. "Legitimacy Of Unseen Actors In International Adjudication". Cambridge: Cambridge University Press.
- Baker, Daniel Ari, and Gabrielle Marceau. 2019. "The World Trade Organization". 70-91 at p. 83 in *Legitimacy Of Unseen Actors In International Adjudication*, edited by Freya Baetens. Cambridge: Cambridge University Press.
- Baschuk, Bruce. 2019. "WTO Faces Cliff-Edge Crisis Next Week as Mediator Eyes Departure". Bloomberg, 2 December 2019, available at <https://www.bloomberg.com/news/articles/2019-12-02/wto-faces-cliff-edge-crisis-next-week-as-mediator-eyes-departure>.
- Blustein, Paul. 2017. "China Inc. in the WTO Dock, Tales from a System under Fire", *Centre for International Governance Innovation Papers*. 157.
- Burrows, John. 2002. "'Delta': a measure of stylistic difference and a guide to likely authorship." *Literary and linguistic computing* 17(3): 267–287.
- Busch, Marc L and Krzysztof J Pelc. 2009. "Does the WTO need a Permanent Body of Panelists?" *Journal of International Economic Law* 12(3): 579–594.
- Busch, Marc L. and Krzysztof Pelc. 2019. "Words Matter: How International Courts Handle Political Controversy". *International Studies Quarterly* 63(2): 464–476.
- Daku, Mark and Krzysztof Pelc. 2017. "Who Holds Influence Over WTO Jurisprudence?". *Journal of International Economic Law* 20(2): 233–255.
- Dalhuisen, Jan H. 2010. Additional Opinion Under Article 48(4) of the ICSID Convention, in Annulment Decision, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007 (Aug. 10, 2010), at Oxford Rep. Int'l Inv. Claims [IIC] 446 (2010), <http://ita.law.uvic.ca/>
- Donahue, Sean. 1995. "Behind the Pillars of Justice: Remarks on Law Clerks." *The Long Term View* 3(1): 77–84.
- Eder, Maciej. 2018. "Authorship verification with the package stylo." URL: <https://computationalstylistics.github.io/docs/imposters>

Eder, Maciej, Jan Rybicki and Mike Kestemont. 2016. “Stylometry with R: a package for computational text Analysis.” *R journal* 8(1).

Eder, Maciej, Jan Rybicki, Mike Kestemont and Maintainer Maciej Eder. 2019. “Package ‘stylo’”

Finnemore, Martha. 1999. “Are legal norms distinctive.” *NYUJ Int’l L. & Pol.* 32:699.

Johannesson, Louise and Petros C. Mavroidis. 2017. “The WTO Dispute Settlement System 1995-2015: A Data Set and its Descriptive Statistics.” IFN Working Paper No. 1148.

Graham, Thomas. “Farewell Speech of Appellate Body member Thomas R. Graham”, 5 March 2020, available at https://www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm.

Howse, Robert. 2015. “Does the Appellate Body Need a Senior Judicial Officer?”, 26 November 2015, IELP Blog, <https://worldtradelaw.typepad.com/ielpblog/2015/11/does-the-appellate-body-need-a-senior-judicial-officer.html>

Hudec, Robert. 1999. ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’, *Minnesota Journal of Global Trade*, p. 35.

Hughes, Valerie. 2017. “The Role of Legal Advisers in the World Trade Organization”. P. 251 in *The Role of Legal Advisers in International Law*, edited by A. Zidar and J. Gauci. Brill Nijhoff.

Karamanian, Susan L. 2011. “ICSID-anulment proceeding-improperly constituted tribunal-serious departure from fundamental rule of procedure-arbitrator independence.” *The American Journal of International Law* 105(3):553.

Kestemont, Mike, Justin Stover, Moshe Koppel, Folgert Karsdorp and Walter Daelemans. 2016. “Authenticating the writings of Julius Caesar.” *Expert Systems with Applications* 63:86–96.

Kucik, Jeffrey and Krzysztof Pelc. 2016. “Do International Rulings Have Spillover Effects? The View from Financial Markets”. *World Politics*. 68(4): 713-751.

Liptak, Adam. 2010. “Justices Are Long on Words but Short on Guidance” *New York Times*, November 11.

Long, O. 1983. “La Place du Droit et Ses Limites dans le Système Commercial Multilatéral du GATT”. Vol. 182 of *Receuil des Cours*, The Hague : Martinus Nijhoff,

Malacrida, Reto. 2015. “WTO Panel Composition: Searching Far and Wide for Administrators of World Trade Justice”, P 311-333 in *A History of Law and Lawyers in the GATT/WTO*, edited by Gabrielle Marceau. Cambridge: Cambridge University Press.

Marceau, Gabrielle. 2015. "A History of Law and Lawyers in the GATT/WTO". Cambridge: Cambridge University Press.

Monicken, Hannah. 2019. "Appellate Body's future could depend on whether its Director keeps his job". World Trade Online, 5 December 2019, available at <https://insidetrade.com/share/167773>.

Owens, Ryan J. and Justin P. Wedeking. 2011. "Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions" *Law & Society Review*. 45 (4): 1027-1061, at p. 1028 and 1032.

Pauwelyn, Joost. 2013. "Use, Non-use and Abuse of Economics in WTO and Investor-State Dispute Settlement". 169-197, at p. 190-191 in *WTO Litigation, Investment and Commercial Arbitration – Cross-fertilization and Reciprocal Opportunities* edited by Goldman, Romanetti & Stirnimann. Kluwer.

Pauwelyn, Joost. 2015, October Issue. "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus" *American Journal of International Law*, 109: 761-805 at 790-1.

Pauwelyn, Joost. 2019. "WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?" *Journal of International Economic Law* 22 (3),

Pauwelyn, Joost and W. Zhang. 2018. "Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload". *Journal of International Economic Law* 21(3): 461-487

Partasides, Constantine. 2002. "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration". *Arbitration International*. 18: 147-163 at p. 158.

Pelc, Krzysztof. 2014. "The Politics of Precedent in International Law: A Social Network Application". *American Political Science Review* 108(3): 547-564.

Peppers, Todd C and Christopher Zorn. 2008. "Law clerk influence on Supreme Court decision making: An empirical assessment." *DePaul L. Rev.* 58:51.

Petersmann, Ernst Ulrich. 2015. "The Establishment of a GATT Office of Legal Affairs and The Limits of « Public Reason » in the GATT/WTO Dispute Settlement System". 182-207, at p. 185 in *A History of Law and Lawyers in the GATT/ WTO*, edited by Gabrielle Marceau. Cambridge: Cambridge University Press..

Rehnquist, William H. 1957. "Who writes Decisions of the Supreme Court?". U.S. News & World Report.

Rosenthal, Jeffrey S and Albert H Yoon. 2010. "Judicial ghostwriting: authorship on the Supreme Court." *Cornell L. Rev.* 96:1307.

Roessler, Frieder. 2015. “The Role of Law in International Trade Relations and the Establishment of the Legal Affairs Division of the GATT”, 161-174, at p. 166 in *A History of Law and Lawyers in the GATT/ WTO*, edited by Gabrielle Marceau. Cambridge: Cambridge University Press.

Schwartz, Bernard. 1990. *The Ascent of Pragmatism: The Burger Court in Action*. Vol. 30 Addison-Wesley Longman.

Schwartz, Bernard. 1996. *Decision: How The Supreme Court Decides Cases*. Vol 52.

Soave, Tommaso. 2019. , “The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?”. 323-346 at p. 327 in *Legitimacy Of Unseen Actors In International Adjudication*, edited by Freya Baetens. Cambridge: Cambridge University Press.

Soave, Tommaso. 2018. “The Judicial Backstage: The Power of Unseen Practices in International Adjudication”, Phd Thesis, Graduate Institute, Geneva, on file with the authors.

Soave, Tommaso. 2020. “European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva”, *The Law and Practice of International Courts and Tribunals*, 2020, p. 107 ff.

Steger, Debra. 2015. “The Founding of the Appellate Body”. *A History of Law and Lawyers in the GATT/ WTO*, edited by Gabrielle Marceau. Cambridge: Cambridge University Press.

Thirlway, Hugh. 2006. “The Drafting of ICJ Decisions: Some Personal Recollections and Observations”. *Chinese Journal of International Law*. 15(5): 20.

U.S. Mission Geneva. October 29 2018. “Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB”. URL: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf

U.S. Mission Geneva. December 18 2018. “Statements by the United States at the Meeting of the WTO Dispute Settlement Body” p. 9-35, at p. 35 (para. 114). URL: https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf

U.S. Mission Geneva. June 24 2019. “Statements by the United States at the Meeting of the WTO Dispute Settlement Body”. P.14-15, URL: <https://geneva.usmission.gov/2019/06/25/statements-by-the-united-states-at-the-june-24-2019-dsb-meeting/>

U.S. Mission Geneva. July 22 2019. “Statements by the United States at the Meeting of the WTO Dispute Settlement Body”. P. 31, URL: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jul22.DSB_.Stmt_.as-deliv.fin_.public.pdf

Wald, Patricia. 2001. “The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court”, *Washington University Journal of Law and Policy* 5: 93-94.

Wauters, Jasper. 2021. “The Role of the WTO Secretariat in WTO Disputes – Silent Witness or Ghost Expert?”, *Global Policy* Volume 12, Suppl. 3, April 2021.