

SYMPOSIUM ON JOOST PAUWELYN AND KRZYSZTOF PELC, “WHO GUARDS THE
‘GUARDIANS OF THE SYSTEM’? THE ROLE OF THE SECRETARIAT IN WTO
DISPUTE SETTLEMENT”

UNMASKING THE PHANTOM OF THE OPERA: IS THERE A HIDDEN SECRETARIAT IN
THE WTO DISPUTE SETTLEMENT SYSTEM?

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In their article “Who Guards the ‘Guardians of the System’? The Role of the Secretariat in WTO Dispute Settlement,” Joost Pauwelyn and Krzysztof Pelc recharacterize the World Trade Organization’s Dispute Settlement System (DSS) as a *sui generis* administrative review system wherein the “Guardians of the System,” i.e., the Secretariat, no longer merely “assists” panels and the Appellate Body (AB) in their reports, but also exerts influence and control over adjudicators. For them “the guardians of the system’ may have contributed to the system’s demise by the expansion of their influence.” This Essay attempts to illustrate that Pauwelyn and Pelc’s fatalistic view of the DSS is overstated, by providing some comments into the practical functioning of the DSS. We argue that, first, the “guardians of the system” are also restrained by suitable accountability mechanisms in their functions relating to appointment and financial “oversight” of adjudicators. Second, while acknowledging that the Secretariat retains a much stronger institutional memory than adjudicators, we suggest that this asymmetry between the staff and adjudicators’ familiarity with World Trade Organization (WTO) law and policy is not as stark and irredeemable as painted by the authors. Rather, the Secretariat’s contribution to consistency and predictability in institutional decisions is ultimately desirable. For governments who established and make use of the WTO dispute system, the balance between ensuring legal coherence and preventing over-judicialization is at the core of the DSS. The participation of diplomats as panelists and the simultaneous creation of an office of Legal Affairs within the Secretariat was intended to ensure consistency in resolution of the members’ disputes to preserve a rules-based system. Finally, we contend that there is a strong internal legitimacy to Secretariat roles.

Pauwelyn and Pelc’s critique focuses on the systemic evolution of the Secretariat’s work and not just on stray actions of a few Secretariat staff. Our response to Pauwelyn and Pelc’s article attempts to tease out the core elements of the Secretariat’s role in dispute settlement, which make it a unique institution worth preserving.

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The Secretariat's Influence and Control

In tracing the Secretariat's functions, Pauwelyn and Pelc argue that Secretariat staff has control over panels and AB members through the appointment of panelists, the remuneration of adjudicators, and provision of legal advice to adjudicators through referral to past cases and drafting the report. Yet, they argue, there is no oversight over the Secretariat itself.

However, the ability to choose panelists in the DSS is the prerogative of the parties to the dispute. Indeed, panelist selection is one of the most crucial aspects of dispute settlement which ensures that once a complainant has initiated a dispute, the process is not stalled due to the unwillingness of the other party to appoint panelists. This brings an automaticity to the dispute settlement process, which has been critical for the system's success thus far. The Secretariat, as mandated in Article 8 of the Dispute Settlement Understanding, proposes names of potential panelists to the parties, but it does not itself select the panelists. Instead, the parties are involved in every step of the process, including when the director-general appoints panelists. Parties are also free to oppose a proposed panelist at any time (although in theory only for compelling reasons). If agreement is not reached by day twenty-one, any party can request the director-general to appoint the panel. Parties can choose to bypass this entire process, by agreeing *inter se* to not involve the Secretariat and may instead agree to the composition of the panel between themselves. Panelists do not control the appointment of Secretariat staff. They are also not beholden for their appointment to the Secretariat staff who are assisting them in such disputes. The Secretariat plays no role in the appointments of AB members—they are chosen or not chosen directly by the WTO membership.

The second concern that Pauwelyn and Pelc raise is the "control" exercised by the Secretariat over the finances of the panelists and AB members. The Secretariat's involvement and assistance in the administrative tasks of processing invoices, signing timeslips, and providing fee calculations, etc. do not confer any real or substantial decision-making power or control over the finances of the panel and the AB. The costs of dispute settlement processes are part of the WTO regular budget decided by WTO members. It is WTO members, and not the Secretariat staff, who set out the fees for both government and non-governmental panelists. The decision on the budget allocated to the AB and its members (their daily remuneration and other compensation) is also a WTO member-driven decision, as is evidenced by the blocking of the budget allocation for the AB by the United States, which has frozen appointments to the AB.

Finally, the extent of the Secretariat's influence through the assistance it provides during the dispute settlement process depends on the adjudicators hearing the dispute and the needs of each dispute. It therefore varies from case to case.¹ Unlike clerks in other dispute resolution systems such as the International Court of Justice, lawyers of the WTO Secretariat are not agents of the panels. Yet, the appointed staff lawyers must and do carry out the instructions of the panel, even if they personally may not agree with them.

Staff-Adjudicator Asymmetry

Pauwelyn and Pelc observe that the growing asymmetries "between staff and adjudicators in terms of appointment terms and expertise . . . have contributed to expanding the role of the Secretariat beyond anything Members might have anticipated at its outset."² We make two observations on this conclusion drawn by the authors.

¹ Joost Pauwelyn & Krzysztof Pelc, *Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement*, 116 AJIL 534 (2022); see also Petros Mavroidis, *Taking Care of Business: The Legal Affairs Division from the GATT to the WTO*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM* (Gabrielle Marceau ed., 2015).

² Pauwelyn & Pelc, *supra* note 1, at 564.

First, the full-time permanent Secretariat, which has assisted in multiple disputes through the WTO's lifetime, has accumulated institutional memory of WTO law and procedure. This institutional memory can be a powerful tool to ensure consistency and coherence in the resolution of disputes. While the standard adopted by the AB in *US—Stainless Steel (Mexico)*³ to not deviate from past decisions “absent cogent reasons” has been criticized, that is not to say that a measure of consistency with past outcomes is undesirable. As noted in a report to the highest governing body of the WTO on reforms to the AB, “[c]onsistency and predictability in the interpretation of rights and obligations under covered agreements is of significant value to Members. . . . Panels and AB should take previous panels/AB reports into account to the extent they find them relevant in the dispute they have before them.”⁴ The Multi-Party Interim Appeal Arrangement, which was set up by some fifty WTO members as an appeal arbitration mechanism under Article 25 of the Dispute Settlement Understanding after the Appellate Body suspension, also explicitly calls for maintenance of coherence and consistency by the pool of arbitrators.⁵ Ensuring consistency while remaining flexible and allowing for distinctions when the need arises is evidence of an advanced and sophisticated DSS.

Second, while the Secretariat staff's familiarity with WTO substantive and procedural law is significant, this does not necessarily indicate that AB members and panelists do not have expertise in the subject matter of the dispute. Admittedly, unlike arbitrators in investor-state disputes or judges of the International Court of Justice, WTO panelists or AB members are not formally required to have a legal degree. However, in practice, most WTO panels, particularly in recent years, have included at least one lawyer. At least twenty-two of the twenty-seven AB members appointed have had a legal background or law degree.⁶ Panels include government officials with familiarity and experience in diplomacy or domestic legislative processes and issues, and government as well as private sector experts in the technical issues in dispute.⁷

If in specific situations there is an asymmetry between the capacity and expertise of the adjudicators and the assisting staff, members may choose to re-evaluate the process of nominating adjudicators. Qualifications in law or technical subjects are of course not dispositive of familiarity with WTO law and practice. There are, therefore, several ways to enhance the adjudicators' expertise. WTO members may consider requiring specific expertise as is the case in other adjudication processes like the International Court of Justice, arbitration under the International Centre for Settlement of Investment Disputes, or even the Multi-Party Interim Appeal Arrangement, which goes as far as explicitly requiring the chosen pool of arbitrators to continuously stay abreast of WTO developments.⁸ In that context, the so-called “issues papers” and other research papers, which Pauwelyn and Pelc refer to, are intended to primarily serve the purpose of bringing WTO panelists up to speed on relevant legal issues. The Secretariat's role and functions vary from case to case, often depending on the adjudicators' needs, their familiarity with WTO law and procedure, and the dispute. Limiting the support and legal expertise offered by the staff without improving the standards for legal and trade expertise of nominated adjudicators will weaken an

³ [United States—Final Anti-Dumping Measures on Stainless Steel from Mexico \(U.S.—Stainless Steel \(Mex.\)\)](#), WT/DS334/AB/R, para. 160 (May 20, 2008).

⁴ [Annex of Report, H.E. Dr. David Walker \(New Zealand\) and Draft Decision on the Functioning of the Appellate Body](#), JOB/GC/225 (WT/GC/W/791), paras. 16–17.

⁵ World Trade Organization, [Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes](#), JOB/DSB/1/ADD.12 (Apr. 30, 2020) (MPIAA Statement).

⁶ Joost Pauwelyn, [The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus](#), 109 *AJIL* 761 (2015).

⁷ *Id.*

⁸ [MPIAA Statement](#), *supra* note 5.

institution that has enabled WTO members in resolving disputes successfully. It is therefore vital to ensure adjudicator expertise in order to balance the roles of the Secretariat and the adjudicators.

Pauwelyn and Pelc argue that asymmetry between adjudicators and legal staff has contributed to several “legal consequences” such as the creation of precedent, suppression of dissent, delays in dispute resolution, and expansion in the scope of reports. However, one must distinguish between conceptual issues that have led to discussions on the reform of the DSS, and the role and functions of the Secretariat. Concerns of some WTO members, such as the creation of precedent in WTO jurisprudence, or expansion of the AB’s legal reach, are not merely outcomes of the Secretariat’s functions. Other factors, including the increasing complexity of litigation, and growing reliance on technical and legal expertise by members themselves, have played a role in these issues.⁹ In fact, due to shortage of staff, the Secretariat has recommended in several disputes that they should proceed without staff assistance. However, in each of these instances, WTO members have preferred to defer the dispute settlement process until such time as the necessary Secretariat staff were available. It is thus evident that WTO members benefit from and prefer to have the support and institutional memory of the Secretariat.

Internal and External Accountability

Pauwelyn and Pelc place much emphasis on the fact that the “external legitimacy” of the DSS suffers due to the behind-the-scenes involvement of the Secretariat. Yet they do not articulate why an internal accountability mechanism, one that allows the parties to the dispute and the members of the WTO to exercise ultimate oversight over the Secretariat, is not sufficient to lend external accountability to the DSS as well.

The role of the Secretariat in providing technical assistance to panels, especially on the legal, historical and procedural aspects of the matters dealt with, is enshrined in the Dispute Settlement Understanding. Article 27(1) of the Understanding states that the Secretariat has “the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with.” The Secretariat’s role is a matter of public knowledge and well known to WTO members more broadly.¹⁰ The staff involved in dispute settlement are also subject to the Rules of Conduct applicable to the adjudicators and bound by the same obligations of confidentiality and impartiality.¹¹ Furthermore, the director-general has the authority to review disclosures made by staff and decide on conflict-of-interest issues in the assignment of staff to a particular dispute.¹²

That the WTO DSS has maintained its legitimacy is perhaps most notable when compared to dispute settlement mechanisms under Regional Trade Agreements. Despite the existence of over three hundred such agreements, trade disputes between parties have typically come to the WTO, and not to the dispute resolution mechanisms under these agreements. Members have, time and again, demonstrated a clear preference for the WTO’s DSS.¹³ Interestingly, in many Regional Trade Agreements, the selection process for adjudicators is inspired by the WTO process. For example, if parties to such Regional Trade Agreements cannot agree on the selection of panelists, it is often mentioned that the director-general of the WTO could be asked to make the selection.

⁹ Alan Yanovich, *Outside Looking in, after Many Years on the inside Looking Out*, in [A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM](#), *supra* note 1.

¹⁰ Daniel Baker & Gabrielle Marceau, *The World Trade Organization*, in [LEGITIMACY OF UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION](#) (Freya Baetens ed., 2019).

¹¹ [Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes](#), WT/DSB/RC/1 (Dec. 11, 1996).

¹² *Id.* Art. VI(4)(c).

¹³ Valerie Hughes, *Working in WTO Dispute Settlement: Pride without Prejudice*, in [A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM](#), *supra* note 1.

Furthermore, the DSS's external legitimacy is supported by a robust online platform, which publishes nearly all relevant WTO documents and processes. In addition, the Secretariat also maintains a publicly available digest of WTO panel and AB Reports. The Analytical Index is periodically updated to provide insights into legal trends in interpretation and decision making. The Secretariat also carries out outreach programs designed to increase transparency about WTO activities and conducts training programs in Geneva and in the territories of WTO members to equip them with a better understanding of the DSS.

The Secretariat staff is as such less of an "unseen" actor and more of a fundamental element in the DSS, whose duties and functions could, of course, be improved. Additional efforts to clarify that the Secretariat is merely an assistant in the DSS and making public the names of those who work on specific disputes would certainly help with the public perception and legitimacy of the DSS. While Pauwelyn and Pelc take issue with adjudicators' inability to dismiss the Secretariat staff, it is worth noting that staff are subject to detailed performance reviews, including feedback by panelists and AB members. The Secretariat's work is thus subject to oversight from both adjudicators and internally.

Concluding Remarks

As we noted at the outset, while the issues highlighted by Pauwelyn and Pelc in their article are overstated, it is nevertheless valuable to consider if reform proposals could mitigate further crises that may arise in the DSS. This may be the right time for the WTO membership to consider how best the DSS and the Secretariat could evolve.

We conclude with some observations on the proposals put forward by Pauwelyn and Pelc, among others, on ways to strengthen the balance between the Secretariat and the adjudicators. The authors propose the appointment of panel-specific law clerks to supplement the work of a standing Secretariat, as well as increased transparency about the role of the Secretariat's advice in the dispute settlement process. Members may decide such action would serve to strengthen the DSS by balancing the experience of a standing Secretariat with the new perspectives of panel-specific clerks. At the same time, it may be essential for WTO members and the disputing parties to play an active role in choosing experienced panelists and AB members that best serve the needs of the DSS.

It is also critical to recall that the Secretariat is divided into different divisions, each with a director, and with its own area of expertise, and that in the context of a specific dispute, staff from several divisions may have to work collectively. Commentators have raised the question of whether complexities in the formal structure between different divisions, and between directors of divisions and the staff assisting the panels, have a role to play in how the panels work with the Secretariat. Some commentators have proposed changes to the system to allow a more flexible distribution of lawyers according to the needs of different panels and disputes, such as limiting the seniority of staff assisting the panels, or the creation of an independent Office of Legal Counsel. Periodically rotating the WTO staff involved in dispute settlement or limiting their tenure of involvement in disputes are other possibilities that have been proposed.

By drawing on the past case law and experiences of the Dispute Settlement Body to maintain legal coherence in dispute settlement, the Secretariat staff carries out the important function of ensuring a balance between member-driven pragmatic resolution of disputes and respect for the rule of law. This balance is a core element of the DSS put in place for the WTO. The Secretariat thus performs a crucial role in ensuring a well-functioning and accessible DSS for all WTO members.