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SYMPOSIUM ON JOOST PAUWELYN AND KRZYSZTOF PELC, "WHO GUARDS THE 'GUARDIANS OF THE SYSTEM'? THE ROLE OF THE SECRETARIAT IN WTO DISPUTE SETTLEMENT"

THE MYTH OF THE LONE JUDGE: COMPARING INTERNATIONAL JUDICIAL BUREAUCRACIES

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In "Who Guards the 'Guardians of the System'? The Role of the Secretariat in WTO Dispute Settlement," Joost Pauwelyn and Krzysztof Pelc describe, in rich detail, the pervasive involvement of the World Trade Organization (WTO) Secretariat in the resolution of trade disputes.[1] The authors conclude, rather emphatically, that the Secretariat "exerts more influence over dispute settlement proceedings than the staff of any comparable . . . tribunal."[2] In my view, this conclusion is somewhat misleading, as it portrays the WTO as "exceptional" or "*sui generis*"[3] among international courts. In fact, the invisible army of legal bureaucrats (clerks, registry and secretariat lawyers, arbitral assistants, etc.) plays a "critically important"[4] part across the *whole* field of international adjudication. What is missing is a *comparative analysis* of the power those bureaucrats wield in different judicial regimes. In this Essay, I outline a basic framework for the comparison, focusing on two main factors: first, the organizational and contractual arrangements that govern the relationship of international judges and bureaucrats; second, the relative distribution of expertise and capital between the two.

The time is ripe for this analysis. The contribution of registries and secretariats to the activity of international courts has long been an "open secret" among insiders in the field—but one that was carefully guarded from outsiders.[5] Only recently have commentators begun to break the silence and recognize institutional bureaucracies as key actors in the judicial process. This recognition opens new research avenues and helps overcome the tensions and taboos that silence carries with it.[6] A growing literature discusses the extensive duties of judicial bureaucrats, which typically include conducting research and providing legal advice to the bench; helping prepare for key phases

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[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).

[2] *Id.* at 550.

[3] *Id.* at 550, 562.

[4] David Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 Berk. J. Int'l L. 401, 416 (2007).

[5] *See* Tommaso Soave, *The Politics of Invisibility: Why Are Judicial Bureaucrats Obscured from View?*, *in* Legitimacy of Unseen Actors in International Adjudication (Freya Baetens ed., 2019).

[6] Indeed, I wonder whether Pauwelyn, a former WTO Secretariat lawyer and current arbitrator, would have thought it possible to write the article fifteen or twenty years ago.

of proceedings, like hearings and deliberations; and drafting portions of judgments and awards.[7] So far, this literature has focused on the dynamics of specific institutions, without integrating its findings into a broader theory. As Pauwelyn and Pelc caution,[8] any cross-institutional comparison can be daunting given the diverse situational and cultural settings in which bureaucrats operate. Yet, as I am about to argue, the comparison may also reveal commonalities in terms of patterns of practice and "concentrations of power and interest."[9]

Institutional Design and Organizational Structures

The first factor to be considered when comparing international judicial bureaucracies relates to the organizational arrangements that tie those bureaucracies to their respective courts. A fundamental distinction can be drawn between, on the one hand, those systems where clerks are called to serve individual adjudicators and, on the other hand, those other systems where a registry or secretariat supports the whole bench in a collegial capacity. These two diverging models come with specific contractual conditions. Individual clerks are typically recruited on an ad hoc or temporary basis and have no hierarchical superiors other than their judges. Collective bureaucracies, by contrast, are more often hired through public competitions, hold permanent or long-term contracts, and are internally organized by tiers of seniority.

The assistants to investor-state dispute settlement (ISDS) tribunals are an example of the first model. Since investment arbitrators are in competition with one another,[10] many of them have created more or less stable legal teams to help them carry out their duties as efficiently as possible. Depending on the affiliation of each arbitrator, these teams may be drafted from specialized law firms, the secretariats of arbitral institutions (e.g., the Permanent Court of Arbitration), or the junior ranks of academia. A tribunal assistant is usually picked by and operates under the close supervision of the presiding arbitrator, who is in charge of coordinating the proceedings. If the parties agree, the assistant can be formally appointed as secretary of the tribunal and tasked with reviewing submissions and evidence, researching factual or legal issues, preparing initial drafts of orders and awards, and providing support during hearings or deliberations.[11] If the parties do *not* agree to the appointment, the arbitrators should in principle carry out all those tasks themselves. However, in practice, they sometimes still resort to "ghost" assistants without disclosing their role to the parties. In all cases, the duties of the tribunal assistant complement those of the relevant arbitral institution: the assistant takes care of substantive legal matters, while the institution's staff handles administrative work like the formatting of documents and correspondence with the parties.

As an example of the second model, the Registry of the European Court of Human Rights (ECtHR) is an intricate bureaucracy comprising almost three hundred lawyers, in keeping with the Court's massive caseload. The five judicial Sections of the Court are aided by some thirty case-processing divisions, each handling applications originating in specific member states.[12] A division's staff is divided into temporary and permanent legal officers who help judges decide on the admissibility and the merits of disputes, respectively. Meanwhile, the Jurisconsult and his team assist the Court's highest instance, called Grand Chamber. Tasked with "ensuring the quality and consistency

[7] *See* Tommaso Soave, The Everyday Makers of International Law: From Great Halls to Back Rooms 113–16 (2022).

[8] *See* Pauwelyn & Pelc, *supra* note 1, at 549–52.

[9] Gregory Messenger, *The Practice of Litigation at the ICJ: The Role of Counsel in the Development of International Law*, *in* Research Handbook on the Sociology of International Law (Moshe Hirsch & Andrew Lang eds., 2018).

[10] *See, e.g.*, Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 7 (1996).

[11] *See, e.g.*, *Model Letter from Arbitral Tribunal to Parties on the Appointment of an Arbitral Secretary or Assistant*, *in* Gabrielle Kaufmann-Kohler & Antonio Rigozzi, International Arbitration: Law and Practice in Switzerland (3d ed. 2015).

[12] ECtHR, *Organisation Chart*.

of . . . case-law,"[13] the Jurisconsult can highlight discrepancies in jurisprudence, address recommendations to judges, and even request the stay of Section proceedings pending a Grand Chamber ruling on overlapping issues. Despite a much lighter docket, the Inter-American Court of Human Rights (IACtHR) works in similar ways. Its Secretariat, comprising around sixty lawyers, is divided into eight teams, who conduct research and prepare drafts for the seven judges on the Court.[14]

The International Court of Justice (ICJ) falls in between the two models. Up to the 1990s, the Court relied exclusively on the legal support of its Registry, whose Department of Legal Matters, acting collegially, carried out research and drafting tasks for the bench.[15] The department's monopoly ended in the early 2000s, with the introduction of a system of clerks assigned to individual judges. University clerks are selected among promising law school graduates and serve for ten months at the expense of their home universities. Associate legal officers (or simply "clerks") are recruited through UN job advertisements and serve for up to four years. Albeit formally affiliated with the Department of Legal Matters, all clerks report solely to the judges to whom they are assigned and sit with them in the annex of the Peace Palace. Hence, the ICJ's current functioning sees the coexistence of—and possibly competition between—a permanent collegial bureaucracy and temporary personal legal assistants.

As for the WTO, it is true that the Secretariat operates largely as an "unidentified collective."[16] However, the structure of the WTO's legal bureaucracy was not always meant to look like this. In the early days of the Appellate Body (AB) Secretariat, it was suggested that every AB member should have a personal clerk.[17] Eventually, the suggestion was scrapped in favor of Secretariat teams assisting the whole bench. Allegedly, the Multi-Party Interim Appeal Arbitration Arrangement, designed to replace ordinary appellate proceedings, follows a similar blueprint, with a handful of Secretariat lawyers reporting to arbitrators. These seemingly innocuous organizational choices can, in fact, affect the practices, professional allegiances, and power dynamics of the WTO judiciary.

Indeed, as this overview suggests, the institutional arrangements under which judicial bureaucrats operate have a major bearing on their role and influence. Under the ad hoc/clerk model, adjudicators who receive individual legal support may be better positioned to tailor the scope and nature of that support to their specific needs. Their assistants, whose appointment and terms of service are personally tied to those of single judges, may prove more deferential to their superiors and less inclined to steal the show. Conversely, under the collective/secretariat model, the court's bureaucracy may more easily develop its own institutional agenda, thus wielding greater power on the conduct of proceedings, the standardization of judicial practices, and the entrenchment of shared assumptions and dispositions. Thanks to their long-term tenure, collegial bureaucrats can master the intricacies of jurisprudence to a degree that rivals that of judges.

Either way, the principal-agent issues arising from the interplay of adjudicators and legal assistants are not unique to the WTO but pervade the whole spectrum of international courts. For Pauwelyn and Pelc, these issues come "at a high price to external legitimacy," that is, the perception of judicial institutions by domestic constituencies and public opinion.[18] This concern may be overblown, for principal-agent dynamics are found in *all* governance systems. For instance, voters know that members of congress do not personally write—and seldom read—the bills that shape national life, but this knowledge does not necessarily undermine public trust in lawmaking bodies.[19] Yet, the point

[13] ECtHR Rules of Court, Rule 18(b).

[14] Soave, *supra* note 7, at 128–29.

[15] *See, e.g.*, Hugh Thirlway, *The Drafting of ICJ Decisions: Some Personal Recollections and Observations*, 5 Chinese J. Int'l L. 15, 20 (2006).

[16] Pauwelyn & Pelc, *supra* note 1, at 563.

[17] *See* Debra Steger, *The Founding of the Appellate* Body, *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).

[18] Pauwelyn & Pelc, *supra* note 1, at 553.

[19] Soave, *supra* note 5, at 339.

remains that the internal division of labor between international judges and legal bureaucrats deserves further analysis, as it is capable of "totally redefin[ing]" the official authority of international courts by way of "unwritten practice."[20]

Expertise, Capital, and Authority

The second factor bearing on the impact of international judicial bureaucracies concerns the distribution of expertise and authority between the bureaucracy and the bench. Ostensibly, judges and their assistants are bound by a relationship of mutual trust and cooperation. In practice, however, their interactions often entail a silent *confrontation* for control over proceedings and the definition of judicial outcomes. Judges and bureaucrats deploy various "species of power" or "capital"[21] to gain the upper hand. Judicial capital stems primarily from symbolic authority, that is, the official power vested in judges to interpret and apply international norms in order to resolve cases. As the most visible actors in the process, judges are expected to project an image of impartiality, fairness, and responsiveness to the needs of the parties and external constituencies. Bureaucrats, by contrast, draw capital from what Weber described as "technical superiority"—"[p]recision, speed, unambiguity, knowledge of the files, continuity, discretion," etc.[22] Their invisibility shields them from external contestation and perpetuates their ability to exert influence behind the scenes.

This competition marks the interplay between the judicial and the bureaucratic team. The amount of each team's capital determines its "relative force in the game" and "the moves" it makes.[23] Given their subordinate position, judicial assistants must show a measure of deference and flattery, speak only when given the floor, and avoid gestures that may betray impatience or contempt. At the same time, their command of practice and precedent, their mastery of the record and, often, their long-term service at the court make them a force to be reckoned with.

Take, for instance, the legal advice that bureaucrats provide to the adjudicators. In this regard, the "issues papers" circulated by the WTO Secretariat[24] are by no means unique. Some ICJ judges regularly rely on clerks when preparing their "notes"—that is, written pieces that express each judge's "views on the case."[25] Likewise, ECtHR Registry and IACtHR Secretariat lawyers work together with judge-rapporteurs toward the preparation of internal drafts that contain a preliminary factual and legal analysis of each dispute.[26] Once ready, the drafts are submitted to the whole judicial formation for deliberation. Arbitral assistants, too, are often asked by tribunal presidents to write internal memoranda that summarize the litigants' arguments, list the issues to be resolved, identify relevant precedents, and provide an initial assessment of the case.[27]

In their capacity as *consiglieri*, bureaucrats play a pivotal role in the resolution of disputes. By pre-digesting the files, selecting the salient points of fact and law, compiling jurisprudence, and suggesting potential solutions, they delimit the decision horizon of adjudicators and narrow the range of possible outcomes. The pervasiveness of bureaucratic advice may be inversely proportional to the technical competence of the judges. Here too, WTO "diplomat-panelists"[28] are nothing new. Some judges sitting on the ECtHR are leading legal experts, while others

[20] Myres McDougal, Harold Lasswell & Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. Leg. Educ. 253, 260 (1967).

[21] Pierre Bourdieu & Loïc Wacquant, An Invitation to Reflexive Sociology 97 (1992) (emphasis added).

[22] Max Weber, Economy and Society: An Outline of Interpretive Sociology 973 (Guenther Roth & Claus Wittich eds., 1978).

[23] Bourdieu & Wacquant, *supra* note 21, at 98.

[24] *See* Pauwelyn & Pelc, *supra* note 1, at 541–42.

[25] ICJ Note on Judicial Practice, Art. 4.

[26] *See* Nina-Louisa Arold, The Legal Culture of the European Court of Human Rights 44 (2007).

[27] Soave, *supra* note 7, at 163–65.

[28] Pauwelyn & Pelc, *supra* note 1, at 547.

may be less skillful;[29] some ICJ judges are more diligent, experienced, or fluent in the Court's working languages than others;[30] etc. Also, personalities matter. A resolute, hands-on adjudicator may be better equipped to take ownership of their work, whereas a more insecure one may be readier to delegate. Finally, the seniority of bureaucrats may affect the extent to which adjudicators follow their advice. For instance, it is likelier for an ECtHR section judge to heed the Jurisconsult's recommendations than for an ICJ judge to accede to the views of a newly recruited clerk.

Similar considerations apply to the drafting of judgments and awards. The "choice of words"[31] to convey a decision does not result from abstract legal reasoning, but from a material "struggle between professionals possessing unequal technical skills and social influence."[32] The bench and the bureaucracy deploy their relative capital to vie for control of the court's "pen." In some places, like the ECtHR and the WTO, the pen is firmly in the hands of registry and secretariat lawyers, who are in charge of both early drafts and subsequent revisions. In other institutions, like the ICJ and ISDS tribunals, the drafting effort is more evenly divided between adjudicators and their assistants, with continuous exchanges between the two. In all cases, the writing of international judgments does not respond to the overarching rationality of a single "author," but is a collective and labor-intensive process involving a plurality of voices.

Retracing these internal struggles is not easy: the conclusory, syllogistic texts of decisions are meant to obscure the communications, hesitations, and competition that led to their formation. Some tell-tale indicators, however, can be spotted by a keen eye. Dull, technocratic writing may reveal the predominant role of the bureaucracy in the drafting process, while "stronger, livelier language"[33] is more easily attributable to the bench; abridged or cryptic reasoning may signal deep-seated disagreements between adjudicators and their assistants; footnotes that contradict the main text may reflect frictions among drafters; and so on. Such minor discrepancies, *non sequiturs*, and logical leaps may appear insignificant, but in fact capture the essence of international judicial writing.

Conclusion

Inspired by Pauwelyn and Pelc, in this Essay I have begun to compare the relative influence exerted by judicial bureaucracies on various international courts and tribunals. Such a rich topic cannot be exhausted in a few pages, and further research will be required to fully flesh out the general factors I have indicated here. However, I see promise in unravelling the dynamics that tie together—and sometimes pit against each other—international adjudicators and their legal assistants. At the empirical level, this analysis would illuminate the inner processes and the everyday interactions through which international judgments are produced,[34] for the benefit of scholars and practitioners alike. At the theoretical level, it would help dispel the myth of the lone judge—or, as Pauwelyn and Pelc call it, the "fiction" whereby adjudicators "single-handedly rule on complex issues."[35] Indeed, unearthing the hidden world of judicial bureaucracies means digging past the surface of "foreground deliberation"[36] and recasting international courts as the sites of competition among multiple social agents.

[29] *See, e.g.*, Kanstantsin Dzehtsiarou & Donal Coffey, *Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights*, 37 Hastings Int'l. & Comp. L. Rev. 271, 308 (2014).

[30] Soave, *supra* note 7, at 282–83.

[31] Thirlway, *supra* note 15, at 21.

[32] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L. J. 814, 817 (1987).

[33] Claus-Dieter Ehlermann, *Revisiting the Appellate Body: The First Six Years*, *in* A History of Law and Lawyers in the GATT/WTO, *supra* note 17, at 498.

[34] *See* Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 Mich. J. Int'l L. 47, 49 (2018).

[35] Pauwelyn & Pelc, *supra* note 1, at 554.

[36] David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 Syd. L. Rev. 5, 7 (2005).