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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"

OLD & NEW DISPUTE SECRETARIATS

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What are secretariats for in international dispute settlement bodies? The question is implicit in much of what Joost Pauwelyn and Krzysztof Pelc have written in their important article, "Who Guards the 'Guardians of the System?' The Role of the Secretariat in WTO Dispute Settlement," but is one that they do not ask outright.[1] Pauwelyn and Pelc thoughtfully describe what the World Trade Organization (WTO) dispute settlement secretariat (WTO Secretariat) *does* as part of their call to determine what the WTO Secretariat is *for*. Asking what secretariats ought to be for advances the valuable work that has been done on these institutions with an eye to new secretariats that states are now constructing. This Essay makes two points. First, it argues that the work of the WTO Secretariat is typical of many international adjudicatory secretariats, especially those assisting with disputes over matters of international economic law. Seeing those similarities helps us understand how dispute settlement constituencies view the purpose of such secretariats: to carry out the activities highlighted by Pauwelyn and Pelc. Second, the essay picks up where Pauwelyn and Pelc left off and maintains that our collective attention ought to turn to newly envisioned and recently constructed trade dispute secretariats, and their substitutes. The authors provide a platform for examining what experimental designs of secretariats in upcoming trade agreements might look like, and, more important, what we think those secretariats are for.

The Ordinariness of the WTO Secretariat's Work

Pauwelyn and Pelc canvas the literature on alternative designs for the WTO Secretariat, much of which is intended to be responsive to a handful of complaints raised by WTO members. The commentaries seek reform either to satisfy those WTO members or to correct a set of flaws observers identify in the way the WTO Secretariat does its work. While those criticisms and alternatives may have merit, one could draw the mistaken conclusion that the WTO Secretariat is somewhat unique in its operations.

Upon closer examination, the work of the WTO Secretariat greatly resembles the work carried out by its peer international adjudicatory secretariats, and particularly those that support arbitrations over international economic disputes.[2] They are alike along at least four dimensions: (1) their ordinary activities, including drafting and guiding

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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] *See generally* Kathleen Claussen, *Gatekeeper Secretariats*, *in* LEGITIMACY OF UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION (Freya Baetens ed., 2019) (setting out a typology of secretariats and reviewing their activities).

dispute outcomes, and appointing and paying arbitrators; (2) the considerable power they wield; (3) the general lack of oversight applied to them; and (4) their confidentiality. Recognizing the consistency of these features among similarly situated secretariats yields a different lesson from the criticisms other scholars have raised regarding the WTO Secretariat. These common attributes suggest that the purpose of these secretariats, as foreseen by those that created them, may be to serve the very functions identified by Pauwelyn and Pelc, even if not expressly articulated, and that to do so, these secretariats require a degree of authority, independence, and anonymity.

First, arbitral panel members across a spectrum of institutions rely on the assistance of secretariats for the same tasks as the ones to which Pauwelyn and Pelc refer in the WTO context.[3] Staff from these secretariats participate in deliberations, write legal memos and decision drafts, and bring legal expertise that may surpass or complement that of arbitrators. They have likewise increased their influence and size in recent years.

Take, for example, the oldest, continuously operational secretariat of state-to-state disputes: the International Bureau of the Permanent Court of Arbitration (PCA).[4] At the time of the PCA's creation, states debated the secretariat's purpose and how much oversight it should have. Ultimately, the PCA's founding conventions provided for a secretariat headed by a secretary-general who would also act as registrar. That secretariat was designed to be relatively weak as a compromise among those delegates who wanted an active body to contribute to jurisprudence and those who preferred a system without any institutional support where members would have greater control over individual disputes.[5] The original vision of the founders was that a small group of six staff would facilitate the PCA's work.[6] Today, the PCA secretariat employs thirty-five legal counsel and twenty-three administrative staff to accommodate its burgeoning caseload, and those staff are heavily involved in case management.[7]

Consider also the International Centre for Settlement of Investment Disputes (ICSID). The ICSID secretariat, like the WTO Secretariat and the PCA secretariat, serves multiple functions: appointment authority, financial responsibilities, procedural support and legal expertise, institutional memory, hearing and deliberation participation, and drafting. Some but not all of these tasks are set out in the ICSID Convention and related instruments. The PCA and ICSID secretariats also carry out tasks that the WTO Secretariat does not. For instance, both serve a case screening function that the WTO Secretariat lacks.[8]

In our search for a purposive narrative for secretariats, founding documents and recent practice demonstrate that states often intend for them to serve at least a dual purpose: to be clerks to the adjudicators and to be clerks of the court. The latter is an important management function that, while not always expressly articulated, is not contested. Basic functions like paying arbitrators are not always written but they are announced or implied in institutional annual reports and widely accepted as appropriate tasks for secretariat staff.

Second, most secretariats wield considerable power—by design. To preserve the legitimacy of the arbitrations that they manage, secretariats benefit from a threshold level of independent authority. Just as clerks in a domestic

[3] The International Court of Justice and the European Court of Justice are also influenced by their secretariats in many of the same ways, though they are distinct in important respects as well. Space does not permit an elaboration of their similar qualities.

[4] The 1899 Convention for the Pacific Settlement of International Disputes established the Permanent Court of Arbitration. Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779.

[5] Rules Concerning the Organization and Internal Working of the International Bureau of the Permanent Court of Arbitration (1900), Art. I.

[6] *Id.* Art. II.

[7] PCA, *Staff*.

[8] *See* Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 Yale J. Int'l L. 279, 301, 342 (2017); Sergio Puig & Chester Brown, *The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention*, 27 ICSID Rev. 172, 173 (2012).

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legal system, they have some modicum of agenda setting power. They sometimes control the selection of arbitrators where the parties are unable or unwilling to do so. The secretariat staff at these institutions act as the intellectual partners of the panel members and gatekeepers to the dispute settlement system.

In their recent expansions, these institutions have come under review for what I have elsewhere called "secretariat mandate creep."[9] But this extension of their power and influence is not limitless. There are bounds secretariats generally respect, and which preserve their legitimacy. For instance, these secretariats neither possess nor provide access to information that is otherwise not available to the parties or arbitrators. To maintain their neutrality and impartiality, they do not provide legal advice to the parties.

Fundamentally, secretariats are bureaucratic dispute settlement systems, and ought to be viewed in that light. That they operate as bureaucracies does not necessarily make them administrative reviewers or judicial surrogates. A bureaucratic secretariat may even enhance the authority of the arbitrators.

Third, Pauwelyn and Pelc raise meaningful questions about what type of oversight should be in place for the WTO Secretariat. The same issues concerning oversight—whether from the arbitrators or the states that created these institutions—arise with other secretariats as well.[10] None of the secretariats discussed here has a particularly effective accountability mechanism, although member states maintain some oversight by controlling secretariat budgets and in the selection of secretariat leadership. The member states of these institutions could do more, such as by requiring staff to participate in certain trainings or by conducting audits—and some institutions have done so—to ensure the secretariats do what the members wish them to do. Their respective assemblies of states parties could issue statements to instruct the secretariat as to the bounds of the secretariat's authority.

The WTO Secretariat does not benefit, however, from one form of "oversight," broadly defined, from which its peer secretariats benefit. One check on these other institutions is their commercialization and the reforms they must undertake for their own survival as parties may choose among secretariats in disputes outside the WTO. The WTO, by contrast, does not compete for its caseload, at least until recently when non-WTO trade agreements have become venues for dispute settlement as discussed in the next section.

Fourth, confidentiality is a common feature in these secretariats. Improving public-facing transparency may be valued by certain users of the system while others may view the system's discretion and secrecy as a useful feature. Often critics refer to the lack of transparency in secretariats to draw attention to the outsized influence of certain individuals within the organization. To be sure, secretariats are not single units. An individual staff member tasked with assisting a panel can make a difference to the procedure deployed in and even the merits of some disputes. This element of secretariat work is familiar to those who practice in these arbitral contexts and has both benefits and drawbacks. Suffice it to say for now that a renewed look across institutions reveals that these characteristics are standard practice in this limited data set.

The absence of organized intervention by states and other users into secretariat work may reflect that these secretariats are doing what most users want most of the time. Moreover, much of what secretariat staff do is demanded by their institutional users rather than self-initiated. Imposing additional scrutiny on these institutions would have benefits such as those noted above but it also risks creating another inefficient administrative layer where there may not be any broad demand for change.

[9] Claussen, *supra* note 2, at 162.

[10] Others have addressed at length the topic of oversight by and relationships with the panel members. *See, e.g.*, Petros Mavroidis, The WTO Dispute Settlement System 426 (2022).

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The Need for Secretariats in Other Trade Disputes

As states increasingly commence dispute settlement proceedings under trade agreements outside the WTO,[11] we can now study how parties and panels manage their proceedings in the absence of robust secretariat support. The traditional dispute settlement chapter in regional and bilateral trade agreements makes no reference to any permanent institution for dispute management. Instead, some trade agreements provide for the administration of state-to-state dispute settlement through a quasi-ad hoc secretariat with limited authority. These trade agreements require each party to maintain a government office, separate from the office representing the government in the dispute, to be ready to manage a case should one arise.[12] In U.S. trade agreements, the office of the responding party to the dispute picks up this role. The staff are charged with providing administrative assistance to the panel, serving as the panel's contact point, arranging payment, organizing and coordinating logistics, and performing "all other tasks" as established under the agreement, the rules, or by the parties.[13] A similar model establishes a standing secretariat comprised of national sections across the parties. The national sections collaborate and may cooperatively provide administrative assistance to panels.[14]

Other approaches to dispute settlement management include those that permit panelists to hire assistants to conduct research as a complement to a separate office that provides logistical support.[15] In recent practice, panelists have not often hired assistants. Roughly half the panelists in the six panel reports available from the last ten years have relied on assistants. Only one of the six panel reports makes mention of the functions those assistants served.[16] Although some agreements create a secretariat or joint body to administer the agreement, that secretariat is not usually charged with rendering assistance to dispute panels.[17] Still other dispute chapters are silent entirely on assistance to panels.[18] Similar questions about the purpose and intended activities of dispute settlement support bureaucracies have arisen in the development of the WTO's Multi-Party Interim Appeal Arrangement (MPIA). The founding document for the MPIA provides that "arbitrators will be provided with appropriate administrative and legal support."[19]

Arbitrators in different trade agreement disputes have expressed concerns about the minimal support they have received in their dispute settlement experiences. Two panelists in a dispute between the European Union and South Korea have raised alarm about having to re-invent "from scratch" the support system for the dispute

[11] *See* Geraldo Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes:* Korea—Labor Commitments *and* Ukraine—Wood Export Bans, 116 AJIL 567 (2022).

[12] *See, e.g.*, United States-Korea Free Trade Agreement, U.S.-Kor., *entered into force* Mar. 15, 2012, Art. 22.5.

[13] *Id.*, Model Rules of Procedure, Rules 1, 88.

[14] *See, e.g.*, United States-Mexico-Canada Agreement, *entered into force* July 1, 2020, Art. 30.6. Beyond the scope of this short Essay are standalone secretariats created under trade agreements that serve an active role in specialized areas such as the secretariat for the Commission for Environmental Cooperation in North America.

[15] *See, e.g.*, Comprehensive Economic Trade Agreement (CETA), Can.-EU, *entered into force* Sept. 21, 2017, Rules of Procedure of the Joint Committee, Rule 3.

[16] Final Report of the Arbitration Panel, Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union, para. 8 (Dec. 11, 2020) ("substantial inputs, research, translation, and logistics support"). The panel noted that there was no secretariat to assist with the dispute.

[17] Regional Comprehensive Economic Partnership Agreement, *entered into force* Jan. 1, 2022, Art.18.3.

[18] *See, e.g.*, EU-Korea Free Trade Agreement, EU-Kor., *entered into force* July 1, 2011, Sustainable Development Chapter. By contrast, the African Continental Free Trade Agreement (AfCFTA) empowers the secretariat to intervene in arbitrator appointments where the members seek to block such appointments. AfCFTA, *entered into force* Jan. 1, 2021, Dispute Settlement Protocol, Art. 20(6).

[19] Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12 (Mar. 27, 2020).

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and have called for the contemplation of standing administrative bodies to manage future disputes.[20] The panel report in a dispute between the United States and Guatemala highlighted how the "responsible office" for the dispute, an office in the Guatemalan Ministry of Economy, contributed to delays and discrepancies in the management of the dispute.[21]

These early comments suggest that trade agreement disputes may suffer from the inverse problem to that raised by Pauwelyn and Pelc: not enough help. These panels' complaints indicate that more is needed both in terms of available personnel and direction on working procedures. To address these issues, in future agreements, states could consider setting up specialized secretariats or elaborating guidance for ad hoc staff. Such changes could: (1) better facilitate the management of the dispute; (2) clarify and delineate roles and responsibilities; and (3) likely yield financial savings to the extent those staff can assist with management issues presently imposed upon the panel members with their high hourly rates. Another alternative is for parties to write in to the agreement an option for them to use an existing institution, such as the PCA, as a case manager for the dispute, much like what is done in trade agreement investor-state dispute settlement chapters.[22] Although relying on a professionalized secretariat to manage a dispute comes at a cost, some secretariats may be willing to lower their usual rates to accommodate state needs.

It ought not to be surprising that states have followed a course in trade agreements dissimilar from that adopted in the WTO. Bilateral and regional trade agreements create very different structures in which members engage and tend to foster more cooperative interactions. States have greater visibility in the workings of the dispute even at arm's length. But to the extent that dispute settlement panels operating under trade agreements have the same needs as in the WTO, a less bespoke institutional design and a more organized or professionalized secretariat may benefit all participants.

Conclusion

While there is no archetypal model for dispute settlement secretariats, reviewing this landscape confirms that participants in international economic adjudication regularly rely on secretariats to carry out a wide range of duties, including those not explicit in a secretariat's mandate. Indeed, these tasks appear to be what many participants have generally considered these secretariats to be for.

Asking what secretariats are for is important for their future design and for our evaluation of the successes and failures of secretariats as increasingly visible participants in international adjudication. We do not have a normative lodestar for our evaluation of secretariats. Nor is there a robust literature on their success or failure in achieving their aims. That work remains to be done in a comprehensive way. It likewise remains to be seen whether the absence of standing secretariats under trade agreements will produce better or worse outcomes. States may start to gravitate to standing institutions as they have in investor-state and other state-to-state disputes for the professional training and added value that these institutions might provide.

What is clear is that most participants in international economic dispute settlement want the secretariat to facilitate productive dispute settlement in an impartial and efficient manner. That is the least common denominator in our ongoing reflections as to what these secretariats are for.

[20] *See* Laurence Boisson de Chazournes & Jaemin Lee, *The European Union—Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute*, 23 J. World Inv. & Trade 329, 345 (2022).

[21] Final Panel Report, In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, para. 6 (June 14, 2017).

[22] *See, e.g.*, CETA, *supra* note 15, Art. 8.27 (referring to ICSID).

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