

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

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Into the midst of the widely acknowledged crisis of international trade and multilateralism, represented sharply by the breakdown of the World Trade Organization (WTO) Appellate Body, comes a provocative perspective by Joost Pauwelyn and Krzysztof Pelc, in “Who Guards the ‘Guardians of the System’? The Role of the Secretariat in WTO Dispute Settlement,” published in the *American Journal of International Law*.¹ Pauwelyn and Pelc suggest that the crisis of the WTO dispute settlement system (DSS) stems not only from external shocks, but also from cracks in its foundation. They argue that the WTO Secretariat operates in a way that has expanded far beyond providing research and logistical support to WTO panelists and Appellate Body judges as they resolve disputes among WTO states parties. Rather, the Secretariat has amassed a great deal of influence over the substantive analyses that WTO panels and the Appellate Body produce. Some of this influence has arisen as an unanticipated outcome of institutional features that were themselves intentionally put into place, such as the contrast between the full-time and ongoing presence of Secretariat officials, and the time-bound, and therefore less stable, participation of individual WTO adjudicators. Other forms of influence have arisen from developments whose explicit institutional mandate is less clear, such as the emergence of precedent, which the Secretariat is better placed to manage due to its long-term institutional memory than are WTO adjudicators.

Pauwelyn and Pelc describe eight distinct administrative functions that the Secretariat performs that contribute to its outsized influence in WTO dispute settlement proceedings.² These functions combine with asymmetries they identify in training and expertise, as well as with various forms of institutional controls exerted by the Secretariat over adjudicators.³ When taken together, Pauwelyn and Pelc assert, the influence of the Secretariat renders the WTO dispute settlement system less a judicial forum than a “*sui generis* process of international administrative review.”⁴

With bracing clarity through this analysis, Pauwelyn and Pelc show that the “judicialization” of the dispute settlement system that had been so celebrated in many ways never existed in its perceived form. Rather,

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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 538–39 (listing “(1) the appointment of panelists; (2) control over the ad hoc financial compensation of panelists and AB members; (3) setting timetable and working procedures; (4) writing the ‘issues paper’ that adjudicators see before they ever meet to discuss the case; (5) drafting the questions adjudicators ask the parties; (6) providing expert advice on non-legal issues (e.g., econometric evidence); (7) actively participating in hearings and internal deliberations; and (8) drafting of reports”).

³ *Id.* at 550.

⁴ *Id.* at 536.

governments tried to achieve the “outward appearance of ‘strictly judicial’ proceedings,”⁵ gaining the legitimacy boost related to the appearance of independent expertise, while actually retaining political accountability by minimizing the institutional authority of the panelists and Appellate Body judges. The entity that was set up to mediate between these different forms—the WTO Secretariat, which Pauwelyn and Pelc describe as a second agent put into place to control the first (the adjudicators of the panels and Appellate Body)—became neither an effective agent of governments nor of the adjudicators. Instead, the Secretariat became a “free agent,”⁶ accountable to no one.

Global governance literature problematizes the loss of control by governments to international decision-making bodies in various ways. Even within national legal systems, the judiciary creates a “countermajoritarian difficulty,” a tension arising from the fact that, while independent judges are deemed necessary to the rule of law, they also will produce decisions that are less reflective of popular will.⁷ Once transferred to the international level, the counter-majoritarian difficulty becomes a democratic deficit, which creates pressure on international systems to remain accountable to national political processes.⁸ This vexed domain also features the political economy trilemma in which economic globalization is not possible if member states seek to maintain both sovereignty and democratic decision-making.⁹

In Pauwelyn and Pelc’s telling, these difficulties, deficits, and trilemmas arose with the WTO—but not directly because of its panels or its Appellate Body. In a bid to retain control, and arguably to stave off some of these problems of democratic legitimacy, governments engineered a system in which the “outward appearance” of judiciality masked an interior effort to minimize adjudicators’ power. Achieving this calibration necessitated significant delegation to the WTO Secretariat. What resulted, Pauwelyn and Pelc state, is “the remarkable irony . . . that ‘the guardians of the system’ may have contributed to the system’s demise by the expansion of their influence.”¹⁰ The *sui generis* form of administrative review that resulted, they imply, seems to combine the worst of both worlds—neither the independence that justifies the lack of political accountability of judges, nor the transparency that ensures a sufficient degree of accountability for agencies.

Sui or Eiusdem Generis? The Contributors Weigh in

Influential secretariats have been identified as both a common feature of international decision making, and as a potential threat to their legitimacy.¹¹ While acknowledging that the rise of international secretariats constitutes a feature of contemporary governance, Pauwelyn and Pelc argue that, “even amidst this general trend toward greater delegation of power to legal bureaucracies, the WTO remains exceptional: all things considered, its Secretariat exerts more influence over dispute settlement proceedings than the staff of any comparable state-to-state tribunal.”¹²

Is this level of influence in fact exceptional, and, if so, does it raise the legitimacy concerns that Pauwelyn and Pelc identify? Tommaso Soave, of Central European University, and Guy Fiti Sinclair, of the University of Auckland, agree with Pauwelyn and Pelc’s analysis of increased influence, and accompanying legitimacy concerns,

⁵ *Id.* at 557.

⁶ *Id.*

⁷ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986).

⁸ J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

⁹ DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2010).

¹⁰ Pauwelyn & Pelc, *supra* note 1, at 535.

¹¹ See, e.g., *LEGITIMACY OF UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION* (Freya Baetens ed., 2019).

¹² Pauwelyn & Pelc, *supra* note 1, at 550.

but depart from Pauwelyn and Pelc with respect to the claim of WTO exceptionalism. Rather, they see the WTO Secretariat as of a piece with a more general rise of secretariats noted in emerging scholarship. Tommaso Soave offers a framework for comparative analysis of secretariats, for example assessing secretariat institutional design according to whether it is closer to a model of “individual clerks . . . called to serve individual adjudicators,” or of “collective bureaucracies” that support adjudicators as a whole “in a collegial capacity.”¹³ The WTO Secretariat in its current configuration exemplifies the bureaucratic collective model, Soave agrees; but he declines to see the WTO as particularly unique. Instead, he argues that the agency issues that Pauwelyn and Pelc explore not only “pervade the whole spectrum of international courts,” but to one or another degree can be “found in *all* governance systems.”¹⁴

Guy Fiti Sinclair also situates Pauwelyn and Pelc within a broader assessment of international secretariats, and the ways in which their “unseen” or “hidden” qualities seem to have accompanied their expansion. Sinclair encourages an ethnographic lens that would yield more granular understandings not only of the “everyday practices” through which this influence has arisen, but also of the “contingencies” and “contestations” that continually stand to make or unmake it.¹⁵ Sinclair also notes that Pauwelyn and Pelc do not devote much attention to whether the procedural and institutional dimensions of the Secretariat’s influence that they identify yield a particular set of substantive outcomes. He notes that the question goes unanswered whether “the Secretariat’s unseen influence on DSS proceedings has infused trade law doctrine with any ideological or normative bias, or led to any particular distributive consequences.”¹⁶

Another set of essays, one by Olabisi Akinkugbe and Morris Odeh, both of Dalhousie University, on the African Court of Human and People’s Rights, and one by Pablo González Domínguez, of the Inter-American Court of Human Rights, do not so much contest the Pauwelyn and Pelc thesis with respect to the WTO, as they seek to show that those claims do not characterize the secretariats of the tribunals they analyze. Additionally, they provide a more global view of international tribunals, broadening the scope of the brief comparative analysis that Pauwelyn and Pelc offer, that, as Akinkugbe and Odeh point out,¹⁷ only discusses tribunals in the Global North.

Through a close examination of the African Court Registry and Legal Division staff, Akinkugbe and Odeh note that, although the staff perform some tasks that are comparable to those of the WTO Secretariat, key differences mean that African Court staff “influence in the dispute settlement process is . . . limited.”¹⁸ Akinkugbe and Odeh indicate that the African Court staff wield no control over either the appointment or the remuneration processes of African Court judges, a “critical difference” from Pauwelyn and Pelc’s descriptions of the WTO Secretariat; nor do they provide non-legal expert advice.¹⁹ Additionally, Akinkugbe and Odeh report that the asymmetries that Pauwelyn and Pelc note in the WTO Secretariat case, in which WTO Secretariat staff often possess deeper legal expertise and also accumulate far greater institutional knowledge than judges, do not pertain to the African Court. Instead, the judges of the African Court, with whom the staff work in individual relationships rather than collectively, maintain overall control over the staff rather than vice versa.

In assessing the secretariat of the Inter-American Court on Human Rights, Pablo González Domínguez similarly points to the appointment and remuneration functions as key differences between the Inter-American Court

¹³ Tommaso Soave, *The Myth of the Lone Judge: Comparing International Judicial Bureaucracies*, 116 AJIL UNBOUND 373 (2022).

¹⁴ *Id.* at 375.

¹⁵ Guy Fiti Sinclair, *Unseen and Everyday: International Secretariats Under the Spotlight*, 116 AJIL UNBOUND 378 (2022).

¹⁶ *Id.* at 380.

¹⁷ Olabisi D. Akinkugbe & Morris Odeh, *The Role of the Registry and Legal Division of the African Court of Human and People’s Rights in Dispute Settlement*, 116 AJIL UNBOUND 384 (2022).

¹⁸ *Id.* at 386.

¹⁹ *Id.* at 386.

and the WTO DSS. González Domínguez stresses that judicial appointment is within the “exclusive competence of states acting within the framework of the Organization of American States.”²⁰ González Domínguez contemplates that the human rights focus of the Inter-American Court may explain why more institutional emphasis has been placed on ensuring judicial independence, though he also describes the judicial appointment process as “mainly political and diplomatic.”²¹ Although González Domínguez differentiates the Inter-American Court secretariat in key respects from the WTO, he notes that “material circumstances,” such as the fact that judicial appointments are part-time while secretariat positions are full-time, might in the end lead to some, if not all, of the asymmetries that Pauwelyn and Pelc describe.²²

A final set of essays neither disputes the WTO exceptionalism claim on its own terms, nor accepts (at least provisionally) the exceptionalism claim while showing that other secretariats differ. Rather, this final set of essays questions the accuracy of the description that Pauwelyn and Pelc offer as the basis for their analysis.

For Gabrielle Marceau and Akshaya Venkataraman, of the University of Geneva and the Geneva Graduate Institute, the Secretariat that Pauwelyn and Pelc portray is more “phantom” than reality.²³ With respect to appointments, Marceau and Venkataraman point out that the parties to the dispute “are involved in every step of the process” in panelist appointments and that the Secretariat plays “no role” in Appellate Body appointments, which instead are “chosen directly by the WTO membership.”²⁴ With respect to remuneration, the Secretariat’s involvement is more clerical than substantive. Moreover, Marceau and Venkataraman argue that the Secretariat fulfills a role that is both important and actively sought by the WTO membership—that of institutional memory and legal stability. The Secretariat’s presence constitutes a “powerful tool to ensure consistency and coherence in the resolution of disputes.”²⁵ The value that Secretariat capacity affords is demonstrated by the fact that, in instances where the Secretariat faced a shortage of staff and recommended that disputes proceed without these staff, members “preferred to defer the dispute settlement process until . . . necessary Secretariat staff were available.”²⁶

Kathleen Claussen, of the University of Miami, picks up on this proposition that the Secretariat’s role is both valuable to and sought after by the membership. Like Soave and Sinclair, she first asserts that the WTO Secretariat resembles other international secretariats in many of the qualities that Pauwelyn and Pelc identify.²⁷ Like Marceau and Venkataraman, Claussen’s essay also questions the Pauwelyn and Pelc thesis that these qualities represent unintended consequences and that they lack legitimacy. Claussen surmises that the fact that secretariats “operate as bureaucracies does not necessarily make them administrative reviewers or judicial surrogates.”²⁸ Rather, particularly when understood to be shared across a variety of secretariats, “these common attributes suggest that the purpose of these secretariats, as foreseen by those that created them, may be to serve these very functions and to operate in these ways, even if not expressly articulated.”²⁹ Whereas Marceau and Venkataraman note that states parties have overwhelmingly chosen the WTO DSS over regional trade agreement systems, Claussen sees a potential future where regional systems are ascendant. Although one might take the rise of regional systems as an implicit

²⁰ Pablo González Domínguez, *The Role of the Secretariat in the Inter-American Court of Human Rights: A Comparative Analysis*, 116 AJIL UNBOUND 390 (2022).

²¹ *Id.* at 393.

²² *Id.* at 393.

²³ Gabrielle Marceau & Akshaya Venkataraman, *Unmasking the Phantom of the Opera*, 116 AJIL UNBOUND 395 (2022).

²⁴ *Id.* at 396.

²⁵ *Id.* at 397.

²⁶ *Id.* at 398.

²⁷ Kathleen Claussen, *Off-the-Rack Secretariats*, 116 AJIL UNBOUND 400 (2022).

²⁸ *Id.* at 402.

²⁹ *Id.* at 401.

rebuke of the qualities that both Marceau and Venkataraman, and Claussen, suggest are supported by states parties, Claussen argues that these regional systems may need to incorporate more of the infrastructure that the WTO system features. In foregrounding the proliferation of regional dispute settlement systems that vary markedly from the WTO, Claussen adds a further comparative dimension to the Symposium's assessment of trade dispute settlement.

Blind Spots and Stakes

The Symposium essays offer a rich and fine-grained analysis of "Who Guards the Guardians?" by examining the claims that Pauwelyn and Pelc make both about the WTO DSS itself, and about its exceptionalism in comparison to other secretariats. Across the essays, a range of views arises that sheds light on the nuanced and complex institutional and normative questions that "Who Guards the Guardians?" so skillfully raises.

Overall, "Who Guards the Guardians?" persuasively shows the vital importance of developing these questions further, and the Symposium essays show how much both analytically and normatively remains to be interrogated. Future research would benefit from attending to some of the blind spots, and the stakes, highlighted by these essays. As analysis of international secretariats moves forward, it should avoid regional blind spots that might reinforce narratives emphasizing the hegemony of the Global North. The study presented by Akinkugbe and Odeh references Africa's seven international tribunals and offers a promising avenue for further research by suggesting directions that other research paths might take.

Moreover, the distributive consequences—the stakes—of these various arrangements should be centered further. Pauwelyn and Pelc refer only in passing to the substantive crux of the United States' disagreement with a series of WTO DSS rulings on trade remedies issues, which rulings seem at least partially to have been attributed to the influence exerted by the Director of the Appellate Body Secretariat at the time, Werner Zdouc.³⁰ Himself a noted trade law scholar, Zdouc is not mentioned by name in "Who Guards the Guardians?" and the analysis of his involvement in the outcomes of trade remedy disputes between the United States and China is incorporated only indirectly through sources that Pauwelyn and Pelc cite.³¹ If indeed Zdouc's office, or any other particular official or set of officials, exerted an identifiable influence on the outcomes of these disputes, that fact by itself raises a set of rich and complicated questions. Should this influence be deemed, as Pauwelyn and Pelc do, a purely "technocratic exercise"?³² If so, the normative question that arises pertains to the legitimacy of technocracy over national sovereignty and/or democratic political processes. On the other hand, if the putative objectivity of "technocracy" actually tracks a particular ideological orientation—along the lines of the genealogies of Quinn Slobodian and others that Sinclair cites³³—the debate must consider the implications not only of "technocracy" but also of institutional capture.

Yet another perspective would consider this fact in relation to the historical and current role of the United States, in particular, in first shaping and then undermining the DSS. Was U.S. antagonism toward the DSS, as Pauwelyn and Pelc suggest, a result of valid objections to a Secretariat that had overstepped its bounds along the lines of the criticisms that the United States raised, relating to the interpretation of covered agreements, the establishment of

³⁰ [Pauwelyn & Pelc](#), *supra* note 1, at 536 (referring to the "long-time director of the AB Secretariat, who held his post from 2006 until recently, [and] has been described as 'arguably the most powerful international civil servant that nobody has ever heard of'").

³¹ *Id.* (citing Paul Blustein, [China Inc. in the WTO Dock: Tales from a System Under Fire](#) (Centre for International Governance Innovation Papers No. 157, 2017)).

³² *Id.* at 536.

³³ [Sinclair](#), *supra* note 15, at 380 (citing QUINN SLOBODIAN, [THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM](#) (2018)).

precedent, and other issues?³⁴ If so, then U.S. objections would appear aligned with the reassertion of an international rule of law and, along with it, a more expansive role for national sovereignty and democracy, by constraining the Secretariat to the role initially set out for it. Such a recalibration then gestures toward the need to re-“embed” trade liberalization within national policy and political constraints such as those afforded by trade remedy provisions. An entirely different interpretation of the U.S. objections, however, would portray them as a reassertion of aggressive unilateralism, and a reaction to the U.S. loss of control over a dispute settlement system that it perhaps had anticipated maintaining in one form or another.

These and many other questions flow from the excellent analysis offered by “Who Guards the Guardians?” As the contributions to this Symposium indicate, Pauwelyn and Pelc have both provided important insight, and pointed to vital questions for future research and dialogue.

³⁴ These are described in [Pauwelyn & Pelc](#), *supra* note 1, Sec. III.C.