Who Writes the Rulings of the World Trade Organization?
A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement

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Abstract

The figure of the judge or adjudicator in international tribunals has been garnering growing attention. Yet we know relatively little about how adjudicators actually produce their rulings. Anecdotal evidence suggests that for all the attention panelists and Appellate Body (AB) members at the World Trade Organization (WTO) receive, the Secretariat plays an overlooked and increasingly important role, from selecting panelists and writing an initial "issues paper" for the adjudicators, to participating in internal deliberations and assisting in the drafting of the actual ruling. We examine this role in greater detail, and ask who, of the Secretariat vs. adjudicators, exerts more influence over the drafting of WTO panel reports? We rely on two different text analysis approaches to attribute authorship. In both cases, the findings are unambiguous: the WTO Secretariat exerts significantly more influence over the writing of WTO panel reports than panelists themselves. We then examine what factors have led to the Secretariat's rise to prominence. Originally a response to "rogue" GATT panels in the 1980s, its functions grew over time as a result of the greater experience and expertise of its (permanent) staff, compared with (part-time) adjudicators, and its limited accountability. We also elaborate on how the Secretariat's role matters, affecting the role of precedent, the low number of dissents, and the increasing length of proceedings and scope of rulings. Designed to keep "rogue" panels in check, the Secretariat may thus have contributed to the very "overreach" that members like the US are lashing out against. Correcting this "overreach" and resolving the current crisis at the WTO may then, paradoxically, require a *greater* voice for adjudicators, and a *reduced* role for the Secretariat.

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1. Introduction

Who writes the rulings delivered by tribunals? The answer would seem self-evident. Just as the baker bakes the bread, and the bricklayer lays the brick, so does the judge write the ruling. And yet, the authorship of legal opinions has long been a matter of controversy, and one that has often carried significant implications.

In November 2015, Russia sought to annul an arbitral award ordering it to pay damages of $50 billion to investors of the oil and gas company Yukos. As grounds for the annulment, Russia argued that the tribunal had failed to fulfill its mandate, since arbitrators had delegated the drafting of large parts of the award to a tribunal assistant.[1] In making its case, Russia relied on the analysis of a forensic linguistics expert to demonstrate that it was "extremely likely" that tribunal assistant Martin Valasek was the author of "significant portions" of the Yukos awards.

Analogous claims have been made with regards to the role of tribunals' secretariats, which feature a permanent staff, whose mandate it is to assist in a tribunal's administrative tasks and record-keeping. Yet much anecdotal evidence suggests that secretariats often go beyond this mandate, exerting influence over the drafting of rulings. Allegations to this effect have even been made by the adjudicators themselves. As one arbitrator at the International Centre for the Settlement of Investment Disputes (ICSID), Jan H. Dalhuisen, put it in a dissenting opinion in the Vivendi case against Argentina in 2010,

> It is clear that the Secretariat wants to obtain for itself a greater role in the conduct of ICSID cases and in the process also wants to involve itself in the drafting of the decisions. [...] I believe this in general to be outside the Secretariat's remit and undesirable (Dalhuisen 2010).

Dalhuisen went on to assert that the ICSID Secretariat's attempts to insert itself into the drafting process of the award led to "great stress in the [arbitral] Committee, raising many fundamental issues of propriety, independence, open and direct communication between Committee

[1] The arbitral award was delivered under the rules of a United Nations Commission on International Trade Law (UNCITRAL) tribunal.

Members, and confidentiality." "In sum," Dalhuisen concluded, "the Secretariat is not the fourth member of ICSID Tribunals."[2]

In this article, we turn our attention to the role of the Secretariat in a dispute settlement system that may be on the brink of collapse: the World Trade Organization (WTO). Since 2017, the United States has been blocking the appointment of new Appellate Body members (ABMs), citing the Appellate Body's "overreaching and disregard for the rules set by WTO Members".[3] In the absence of new appointments, by the end of 2019, the AB will have only one member (instead of seven), less than the three needed to decide a given appeal (Pauwelyn 2019).

We begin by demonstrating how the increasingly sophisticated text analysis tools that exist today are capable of attributing authorship with a high degree of confidence. Going beyond anecdotal evidence (Blustein 2017 at p. 13; Hughes 2017; Steger 2015 at p. 447), we empirically confirm the important role played by Secretariat staff in the writing of WTO panel rulings. Our empirical contributions are set out in Section 4.

With these empirical findings, we aim to break the silence, or what one author has called "collective denial" (Soave 2019) that currently surrounds the crucial role of the Secretariat in WTO dispute settlement. Without divulging any confidential information, we outline what this role is (Section 3) and point at a number of relatively unique design features and practices that explain the importance of the WTO's Secretariat (Section 5). Next, and without questioning the professionalism and independence of WTO staff, we highlight why Secretariat influence on WTO rulings matters, listing a number of likely consequences, some of which overlap with the very US concerns that are now threatening to sink the AB (ranging from the role of precedent and *obiter dicta,* to the length of AB review) (Section 6). Rather than further threatening the legitimacy of WTO dispute settlement, we are convinced that an acknowledgment of, and debate

[2] Specifically, Dalhuisen claimed that in the Vivendi case, "Secretariat members approached individual [arbitral] Committee Members informally with a view to amending the text [earlier agreed by the Committee Members]". Dalhuisen's opinion went on, "it is clear that the Secretariat has no original powers in the dispute resolution and decision taking process. [...] For the Secretariat also to draft part or all of the decisions and reasoning would appear wholly inappropriate". The opinion spurred a broader debate, leading scholars to ask about both the ICSID Secretariat and the tribunal assistant's influence over the drafting of rulings. As e.g. Karamanian (2011, 559) asked, "is it desirable for arbitrators and committee members to rely on their associates or others under their direction to assist in crafting ICSID awards and opinions, particularly given the public importance of the decisions?"

[3] U.S. Mission, Geneva (2019).

about, the role of the Secretariat is a necessary step to overcoming the current crisis and can only benefit the long-term trust in, and robustness of, WTO dispute settlement. To this end, we conclude this contribution with a list of specific questions about the WTO Secretariat that may serve as a trigger for such debate (Section 7).

2. The debate over authorship in law

The question of the authorship of legal rulings has long attracted attention across different settings. The most developed version of this debate emerged in the context of the US Supreme Court. There, the question has been whether the clerks that each Justice employs have wielded undue influence over the drafting of legal opinions. Arguably, the starting point of this discussion was an article written in the 1950s by a young William Rehnquist, published 15 years prior to Rehnquist's accession to the Supreme Court, and his eventual appointment to chief justice. In the article, and basing himself on his own experience as a US Supreme Court clerk, Rehnquist worried about undue partisan influence by clerks, arguing that because most of the clerks were "to the 'left' of either the nation or the court," they would bias legal opinions towards their ideal points (Rehnquist, 1957).[4]

More recently, Peppers and Zorn (2008) offered empirical support for this view, finding that the partisanship of US Supreme Court clerks has a measurable influence on the direction of Supreme Court votes. Later, as he sat on the court himself, Rehnquist admitted that his own clerks wrote "the first draft of almost all cases", and that at times he left these "relatively unchanged" in the final opinion (Schwartz 1990, cited in Rosenthal and Yoon 2010). This gives credence to considerable anecdotal evidence which suggests that given the volume of cases judges have to deal with, their reliance on input from clerks is likely to be significant. In one estimate from 1995, "[US Supreme Court] clerks generate 'well over half' of the text in published opinions" (Donahue 1995, cited in: Rosenthal and Yoon 2010).

Yet the US Supreme Court is not the only tribunal that imposes enough of a burden on its judges to justify considerable delegation. Today, increasing attention is paid to the role of administrative

[4] As Rehnquist (1957) also noted, "in literary style, these opinions [which Justice Robert H. Jackson, for whom Rehnquist had clerked, had asked a clerk to draft] generally suffered by comparison with those which he had drafted."

secretaries or assistants, and permanent secretariat staff in the decision-making of international courts and tribunals (Baetens 2019; Soave 2018). That the WTO Secretariat plays a role in the adjudicative process is far from exceptional. If anything, across courts and tribunals, the role of support staff appears to have increased over time (Baetens 2019; Soave 2018). The question is, rather, where to draw the line between adjudicator and support staff. This line may be drawn differently depending on the adjudicative system. Yet, important consequences flow from this division of labour. At times, re-calibration may be needed.

3. Secretariat mandate and anecdotal evidence

The long-time director of the AB Secretariat has been described as "arguably the most powerful international civil servant that nobody has ever heard of".[5] WTO Members, via the DSU, bestowed a broadly defined role on WTO staff. In terms of supporting panels, 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] as well as experts in the substantive area at issue sourced from operational divisions, such as specialists in agriculture, sanitary measures or customs valuation.[7] 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).[8] The DG and DDGs do not normally get involved in specific disputes, with the exception of panel appointments, which we discuss below.

[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".
[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] In cases where economic evidence plays an important role, PhD level economists from the Economics and Statistics Division are added to the assigned staff.
[8] For an overview of the Secretariat structure, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org4_e.htm.

Article 17.7, in turn, 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 has its own Secretariat, composed exclusively of lawyers and administrative support staff, which is separate and independent from the broader WTO Secretariat. The Appellate Body Secretariat only reports 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 any formal role for WTO Members, panelists or the AB itself.[9] An AB division of three AB members, hearing a specific dispute, is assisted by a team leader and several more junior staff lawyers. Junior lawyers work under the supervision of the team leader who, in turn, reports to and is closely supervised by the Director of the AB Secretariat. As a result, any given WTO panel or AB division is assisted by anywhere between four and over ten WTO staff members, with one or more Directors in a supervisory role. Some Directors are known to control procedure and substance in every dispute; others take a more hands-off, managerial oversight approach.

WTO staff play a substantive role in WTO panel and AB proceedings in at least six different ways, only one of which is drafting of the actual ruling. The Secretariat has influence in (i) the appointment of panelists; (ii) setting timetable and working procedures; (iii) writing of an "issues paper"; (iv) drafting of questions to the parties; (v) participation in hearings and internal deliberations; (vi) and finally, the drafting of reports.[10] Differences exist between the Secretariat's role during panel and AB proceedings[11], but these have eroded over time.[12] Today,

[9] 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.

[10] See Baker and Marceau (2019) and references in footnote 5 above.

[11] 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.

[12] As a result of both AB staff and AB members being "new on the job" (see footnote 11 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

generally speaking (and with the notable exception of adjudicator appointment, discussed below), "[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]".[13] We briefly 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).[14] Moreover, if no party agreement can be found, which, today, happens in more than two thirds of disputes (Busch and Pelc 2009), the DG is tasked to appoint panelists.[15] 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 WTO staff that propose and, in many cases, appoint panelists. WTO staff propose and appoint panelists after hearing the parties' preferences, instructions and red lines (Malacrida 2015). Yet, the role of WTO staff in panel appointment is undeniable. Once in place, panelists are supposed to control the WTO staff assisting them. And yet panelists are well aware that they owe their appointment at least in part to the WTO staff (or their supervisors) now helping them. This blurs the traditional principal-agent relation between adjudicator and staff. A panelist with an eye to re-appointment may thus have an incentive to avoid ruffling the WTO staff's feathers, and to gratefully receive Secretariat proposals and drafts. AB members, in contrast, are appointed by consensus of all WTO Members for a once-renewable term of 4 years.[16] The selection committee making proposals to the Membership is composed of

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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.

[13] Ibid., at p. 84. If anything, today, the role of the Secretariat in AB proceedings may be more prominent 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 60, 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.

[14] 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".

[15] 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".

[16] DSU Article 17.2.

committee chairs as well as the DG. AB staff play no formal role in the appointment of AB members. 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,[17] but this template has proven flexible.[18] Over the years, through a process of trial and error, additional working procedures have been developed.[19] Until recently, most of these adjustments were not made public.[20] 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[21], with fewer case-specific adjustments.[22] 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 (See Steger, 2015). The Secretariat also holds considerable influence over the setting of timetables, as it needs to coordinate with other ongoing cases and distribute available staff resources. 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. The time limits for panel and AB proceedings provided in the DSU are 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.[23]

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[17] Appendix 3 to the DSU.
[18] DSU Article 12.1.
[19] 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.
[20] For a recent example where all procedures and timetables were made public, see *Canada – Measures Governing The Sale of Wine*, WT/DS537.
[21] DSU Article 17.9.
[22] 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.
[23] 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

Writing of An "Issues Paper". The parties in dispute submit voluminous filings and exhibits to both panels and the AB. Adjudicators themselves are supposed to digest all of these documents. To assist them, WTO Secretariat staff write what is called an "issues paper". This paper 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, the "issues paper" identifies one or more ways in which the panel or AB could decide the matter. Nothing in the "issues paper" is in any way binding on the panel or AB. However, the influence exerted by way of identifying issues, rules and past cases, as well as suggesting ways to decide a dispute can be significant. This can be the case in particular for adjudicators whose native language is not English (and for whom it is much easier to read the "issues paper" rather than all of the parties' lengthy submissions). Importantly, WTO Secretariat staff write the "issues paper" *before* the panel or AB itself ever meet to discuss the dispute. In other words, it is not the adjudicators who first meet and deliberate, and then instruct staff. Quite the opposite: WTO staff digest the party submissions, write the "issues paper", and only then do adjudicators meet to start discussing the dispute on the basis of the "issues paper", with the Secretariat taking a leading role. "Issues papers" can run to hundreds of pages. Though crucially important in setting the agenda and influencing the adjudicators' minds and ultimate decision, "issues papers" are never shared with the parties and remain confidential.

Drafting of 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", also play a leading role in drafting questions. Adjudicators themselves have final control over what gets asked (at the hearing, they are the ones actually reading out the questions), and they can also add their own questions. That being

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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).

said, the initial list of questions is drafted by the Secretariat, giving it considerable agenda setting power.

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. WTO staff also attend and play an active role in all of the internal and confidential panel and AB deliberations.[24] Here as well, they literally sit at (not behind) the main table. Indeed, WTO staff normally take the first step in those deliberations, by way of presenting and discussing 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. Unlike, for example, the US Supreme Court, or the ICJ, where clerks are not privy to internal deliberations, WTO staff are present and take a leading role, at the main table, at every stage (See Blustein, 2017 at p. 13).

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".[25] No mention is made of WTO support staff. Yet, it is an "open secret" in Geneva trade circles that in most cases, it is the Secretariat that writes not only the "issues paper", but also the first draft of the actual ruling. Variation exists depending on the case, specific issue and adjudicators involved. And drafting a ruling is not the same as deciding the case. Adjudicators provide instructions before drafting, they 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. The names of WTO support staff are not even mentioned. Yet, by drafting the ruling, the Secretariat exerts considerable influence over the final outcome. Next, we attempt to empirically measure the extent of this influence.

[24] 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.
[25] DSU Article 14.2 and 17.10.

4. Empirical analysis

This section focuses exclusively on WTO panel reports, not reports by the AB.[26] In the previous section, we detailed how the Secretariat plays an outsized role at every stage of dispute settlement. Yet adjudicators formally have the final say over the content of each ruling. So how much actual influence does the WTO Secretariat exercise over the final WTO ruling? To address this question, we began by collecting data on the individual panelists and WTO Secretariat members assigned to each dispute. This is a straightforward exercise for panelists, who are readily identified at the start of every panel report, but it is a more difficult task when it comes to Secretariat staff. Up to DS302, the WTO communicated the staff assigned to each dispute[27], but the practice was then deliberately abandoned, and the WTO has since become less willing to publicize the identity of the Secretariat staff assigned to a given dispute.[28] We thus rely on the Horn and Mavroidis WTO Dispute Settlement System dataset,[29] which compiles over 3000 WTO documents to gather data on, among other dispute features, the Secretariat staff assigned to panels from DS2 to DS302. This roughly captures the first 10 years of the WTO's operation (1995-2005).

We then went through each panel report, and manually extracted the legal reasoning portion of the report, leaving aside all the preliminary sections, facts of the case, and arguments by the litigants and third parties. Our aim is to isolate the portions of text that are most likely to reflect authorship.

[26] Unlike panel reports, AB reports have never mentioned the names of WTO staff supporting a particular division. This makes an empirical analysis of AB reports more difficult. Recall, however, that the work of the AB Secretariat has been reported as traditionally "very similar" to that of WTO staff advising panels and that, today, if anything, the role of the Secretariat in AB proceedings may be more prominent than that of staff advising panels (see footnotes 11-13 above). We therefore feel confortable to generally extend our empirical findings in respect of panel reports also to AB reports.

[27] This was done either upfront in a Secretariat Note on Panel Composition, announcing both panelists and legal staff for the case, or *ex post* in an annex to the final panel report on document distribution listing the emails of relevant staff working on the case.

[28] 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."

[29] The dataset is hosted at <http://globalgovernanceprogramme.eui.eu/wto-case-law-project>. Last accessed September 25th, 2019.

Our overall approach reflects the assumption that rulings are likely the result of multiple authors offering input over a given text. Panelists may divvy up the task of writing various parts among themselves, while the Secretariat staff may separately provide more or less guidance. As a result, panel reports undoubtedly pass through a number of hands. Moreover, sections of text are regularly copied from prior reports—not only when invoking precedent, but also as a means of ensuring continuity in the way a given question is dealt with. We thus employ a probabilistic approach that amounts to asking, who is the most likely author of the opinion? Stated otherwise, who appears to have had the greatest influence over its wording? Importantly, our empirical results are thus not affected by the possibility of additional authors. More authors could increase the "noise" in our estimates. But given that we are able to attribute authorship with high confidence, the possibility of additional authors has no bearing on our results.

The attempt to deduce the authorship of a text from its writing style is called stylometry. Stylometry has long been around, but in recent years, it has benefited immensely from the advent of computational methods based on machine learning, which allow for faster and more precise attributions. There are many different methods for attributing authorship through stylometry. For instance, in an earlier application to the question of US Supreme Court clerks, Rosenthal and Yoon (2010) relied on the relative frequency of function words, such as "their", "then", "there"—the usage of which tends to be independent of subject matter, but suggestive of an individual's writing style. Their premise is that judges who rely on clerks to a greater extent will produce less consistent opinions, as proxied by greater variability in their reliance on these function words. Using this approach, Rosenthal and Yoon found that Supreme Court Justice have become more likely to rely on clerks over time.

4.1 Textual similarity between rulings

To assess the relative influence of the Secretariat over the content of rulings, we use two wholly distinct methods. In the first, we compare all panel reports to one another using Jaccard coefficients of similarity. This measure, which is the most commonly used means of comparing the similarity of two texts, corresponds to the amount of intersection between two sets (in this case, two panel reports) divided by their size. The higher the score, the more similar the two texts are. The result is a giant matrix that contains a similarity coefficient for every possible pair of

texts. We then omit the diagonal entries that compare a panel report to itself (with Jaccard coefficient=1). We also leave aside pairs of technically distinct reports that nonetheless relate to the same dispute, and are thus almost identical in content.[30] This leaves us with 5146 unique dispute-pairs.

This similarity index becomes our dependent variable of interest in an ordinary least squares regression. Our unit of analysis is a dispute-pair. In other words, we estimate what determines the variation in similarity between two panel reports. We have two explanatory variables: the number of panelists in common in the two panel reports (which varies from 0 to 3), and the number of Secretariat members in common (which varies from 0 to 5). This amounts to asking, how much does having a common panelist vs. a common Secretariat member influence the similarity between two panel reports? If Secretariat members exert greater influence over the drafting of the report, then we expect the coefficient on the Number of Common Secretariat Members to be higher.

Table 1. Effect of Common Panelists vs. Secretariat Members on Similarity Between Rulings

	(1)	(2)
Number of Common Panelists	0.012*	0.012*
	(0.007)	(0.007)
Number of Common Secretariat Members	0.036***	0.036***
	(0.006)	(0.006)
Time Indicator		0.000
		(0.000)
Observations	5146	5146

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

As an additional check, we also test for convergence in the drafting of rulings over time. Indeed, it might be that as jurisprudence has developed, WTO panel reports have converged on a common legal rhetoric, reflecting an emerging common practice. To capture this possible trend, we need to capture the sequence of panel reports, rather than the passage of time—that is, we

[30] For instance, disputes DS50 and DS79 were both filed against India by the EU and the US, respectively. The two disputes produced two separate panel reports, delivered nearly a year apart, and the US appealed its panel report, while the EU did not appeal its own. Yet these both relate to the same challenge of India's patent protection for pharmaceutical and agricultural chemical products. Accordingly, the Jaccard coefficient between the two panel reports is 0.953. We thus leave such dispute-pairs out of the analysis.

would not expect much convergence to occur over even a long period, if it did not see any rulings. To proxy for this, we simply sum the dispute settlement numbers of each dispute in the dispute-pair. High (low) numbers indicate dispute-pairs where both disputes occur late (early) in dispute settlement history.

The results are shown in Table 1. The first takeaway is that having either panelists or Secretariat members in common does appear to increase the similarity of reports. But what is interesting is the relative magnitude of these coefficients. On average, sharing an additional Secretariat member increases the similarity between two reports by a factor three times greater than sharing an additional panelist. The effect of common Secretariat members is also more statistically significant, at the 1-percent level, whereas the effect of a common panelist is significant only to the 10-percent level.

4.2 General Imposters method using external texts

Our similarity-between-rulings approach allows us to use all relevant dispute ruling-pairs. But it remains imperfect. Both panelists and Secretariat members may be assigned on disputes with common topics (say, cases under the WTO's SPS Agreement), and this could skew our measures of similarity. And although we have attempted to account for a trend over time, other factors may be driving similarity, increasing the noise in our estimates.

To address these potential issues, we test the same proposition using an entirely different stylometric approach. Instead of comparing panel reports to one another, we now compare panel reports to external texts which we can be certain were written by the potential candidates. And rather than relying simply on similarity scores, we use our external texts to build stylometric profiles for our candidate authors. A typical toy application for this technique, called the General Imposters method (Kestemont et al. 2016), which we implement using the imposter() function in the R package Stylo (Kestemont et al. 2016; Eder et al. 2019), tries to deduce the most likely author of the unsigned Federalist Papers (which either James Madison or Alexander Hamilton could have written), by using those Federalist Papers which we can confidently attribute to one author, and for which we can thus (just as importantly) rule out the other author.

We can apply this method to our setting, since a number of panelists and Secretariat members have also written and published such external texts, especially as academic articles. We thus collected such external texts for as many panelist and Secretariat members as possible.

In collecting the external texts for this analysis, we kept to the following coding rules: (i) we required a minimum of two texts per author, to ensure that the author profile would not be driven by some idiosyncrasy, either of style or subject matter, of a given text; (ii) we relied on academic texts, to avoid a bias resulting from e.g. op-eds, which might be too stylistically different from legal rulings to attribute authorship; (iii) we used only single-authored texts, to avoid "diluting" the author traits of a text and adding noise to our author profiles; (iv) when having more than two texts to choose from, we aimed for as much subject-area variety as possible, to obtain greater stylistic representativeness; (v) for a dispute to be included in the analysis, we needed to be able to construct author profiles for at least the panel chair and the lead Secretariat member (who is identified in panel reports by being listed first among the Legal Affairs Division officers);[31] (vi) finally, we steered clear of external texts that pertained directly to the WTO dispute under consideration. For instance, Gabrielle Marceau, a Secretariat member, is the author of an academic article on US Steel Safeguards. Since she was also a Secretariat member assigned to that case, we would not use this text to create her profile.[32] Whenever we could not satisfy all these requirements, we did not include the relevant author or dispute in our analysis. Conversely, we included all the authors and disputes that met these requirements.

We then extracted the relevant portions of each external text, leaving aside appendices and bibliographies that would not be indicative of the author's writing style. We were not able to find external texts for all panelists or all Secretariat members. However, our search produced texts that met our criteria for 237 candidate authors, across 23 disputes.

[31] The premise is that of the three members of the panel, panel chairs are the ones most likely to exert greater influence over the drafting of the ruling. This assumption is borne out by findings in Busch and Pelc (2009), who find that panel chairs have greater experience on average than the remaining two panel members, and that only the panel chair's experience appears to matter to the quality of the panel report, as proxied by its odds of being appealed. Similarly, Daku and Pelc (2017) find that panels with more experience are less susceptible to influence from the litigants in the drafting of the final ruling. That is, more experienced panelists appear less prone to outside influence—this could extend to influence from the Secretariat.

[32] As it happens, the issue did not arise, since the panel chair for that case, Stefan Johanesson, did not have enough external texts that met our requirements, and so we could not include the US Steel Safeguards case in our analysis, given our fifth coding rule.

The authorship attribution we implement focuses on commonly used strings of words or characters. Following common usage for these methods, we rely on strings of 3 or 4 characters, and strings of 1 or 2 words. For each of these, the General Imposters method returns a score between 0 and 1, which represents the proportion of times the ruling was closer to a given candidate author than all other candidate authors. A score of 0 would reflect certainty that the candidate did not author the text; 1 would indicate certainty that the candidate did author the text. Scores between these two extremes indicate classifications with some uncertainty.[33]

As compared to other author classification methods, the General Imposters method thus offers the benefit of providing a measure of uncertainty for each attribution, which corresponds to a margin within which the classifier for that specific set of texts would be wrong on average. This reflects the fact that some authors might exhibit distinctive stylometric features which would produce a strong signal, while others may prove to be "stylometrically blurry" (Eder, 2018). Similarly, input from additional potential authors may also increase the noise in the estimates. If classification scores for a candidate author fall within this margin of uncertainty, one cannot confidently make an attribution.

We applied the General Imposters method to each of the disputes for which we had sufficient external texts. The findings are shown graphically as a series of bar plots in Figures 1 through 4. Each dot corresponds to a candidate author for a given dispute, and is identified with the candidate author's initials. The blue dots correspond to Secretariat members, the red dots to panelists. Circled red dots correspond to panel chairs. The higher (lower) the score for a candidate author, the more (less) likely s/he is an author of the ruling. Candidates that score higher appear as are more likely to be the author. In each case, the vertical band represents the zone of uncertainty, which is determined by how stylometrically distinct (narrower band) or similar (wider band) the different candidate authors' writing styles are: attributions within this

[33] Specifically, the imposters() function relies on a popular authorship attribution method called "Burrow's Delta" (Burrows, 2002), which computes a distance metric ("Delta") between a test text and each class within a training set (e.g. different authors). The class with the minimal Delta is classified as author. Delta is a "scaled distance" which is built by averaging absolute differences in word "z-scores" across sets. The z-score is constructed by subtracting from a word's frequency in a text (or class) the mean frequency of that word across classes, and dividing it by the standard deviation of that word's frequency. Delta is built by subtracting the frequency of word i in the candidate set from its frequency in the test set, and normalizing it by the standard deviation across all classes. This default distance is sometimes referred to as "Manhattan distance."

zone remain uncertain, both as positive attributions of a candidate's authorship, and negative attributions that rule out the possibility that a given candidate is an author.

Figure 1. Detection of Panelists vs. Secretariat Authors Using One-Word Strings

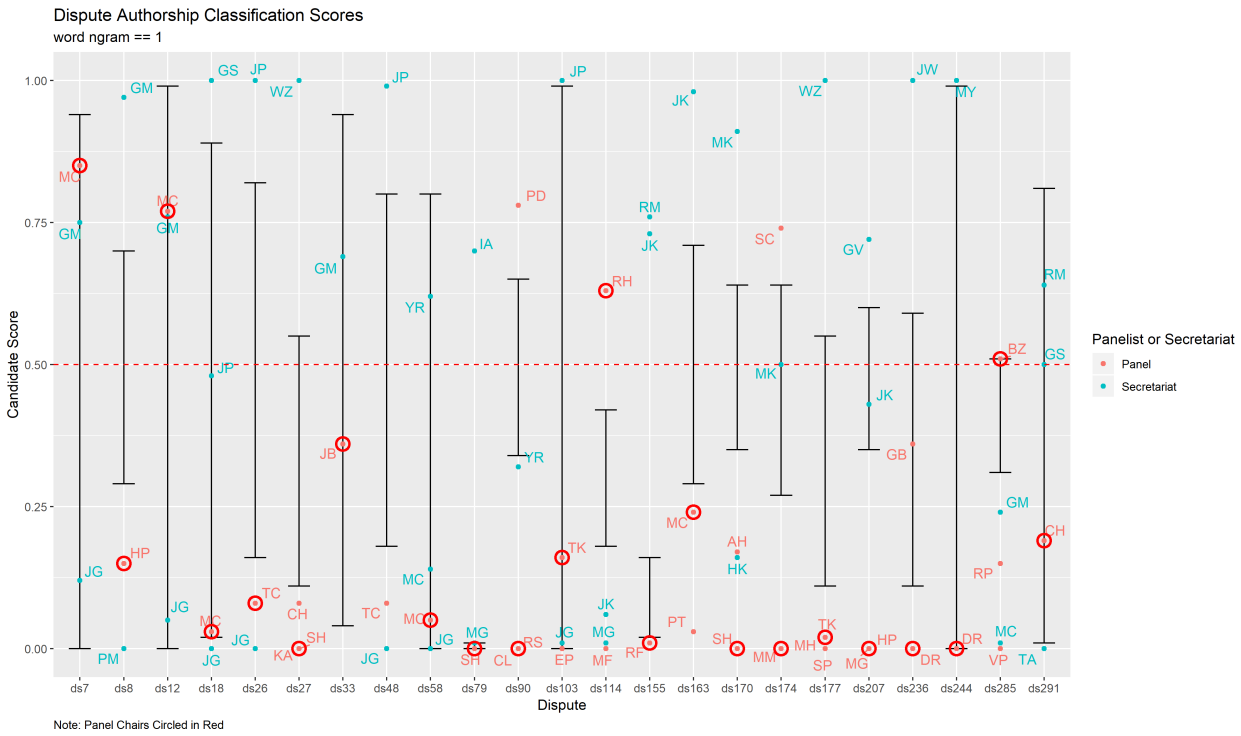


Figure 2. Detection of Panelists vs. Secretariat Authors Using Two-Word Strings

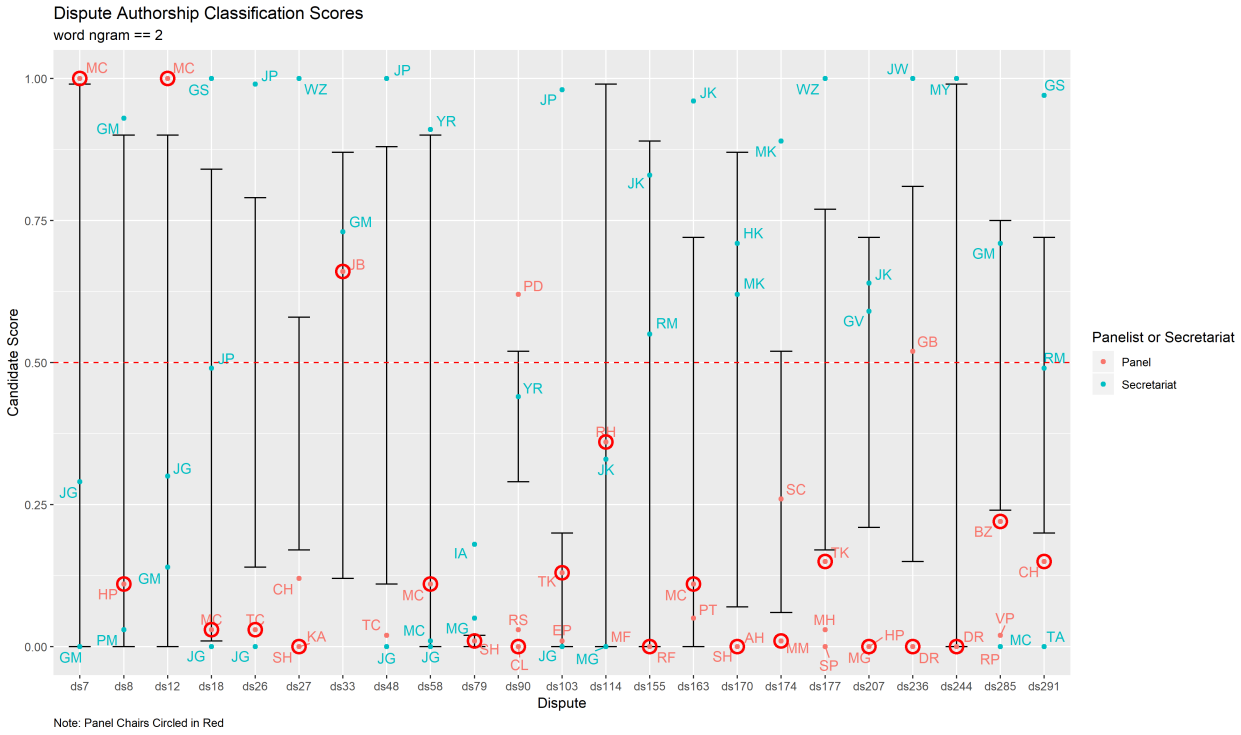


Figure 3. Detection of Panelists vs. Secretariat Authors Using Three-Character Strings

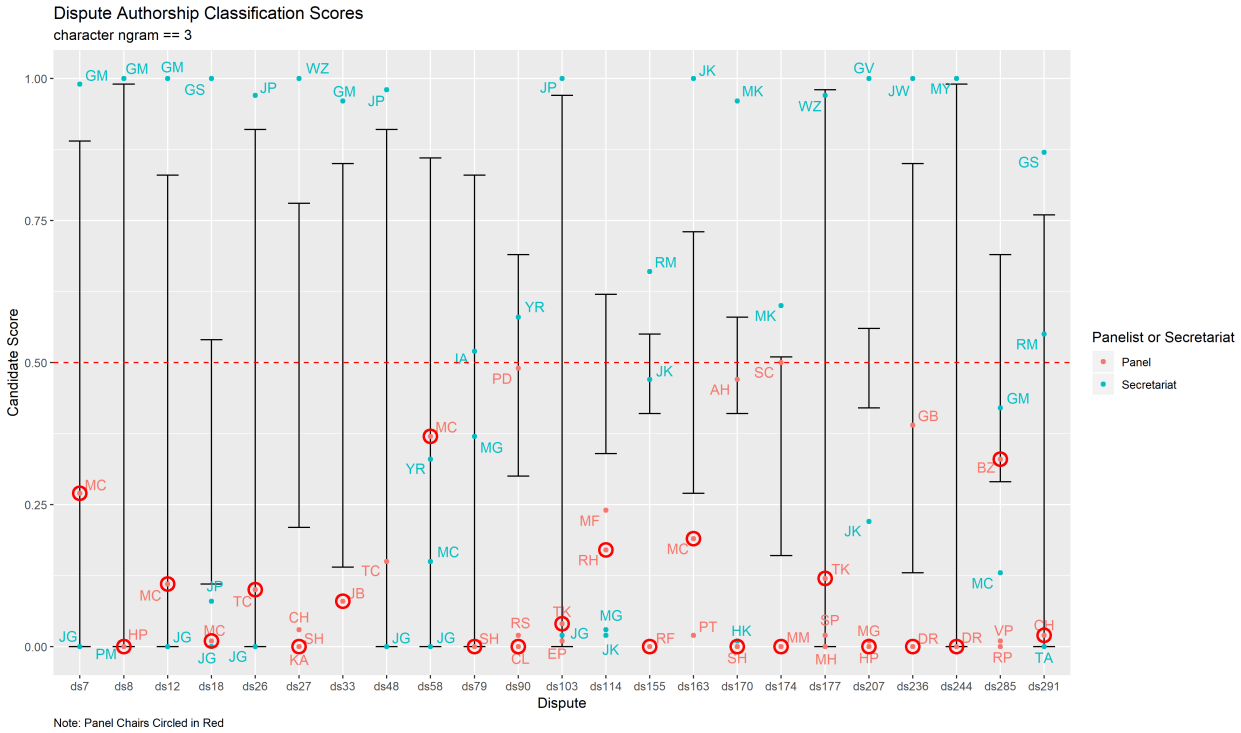
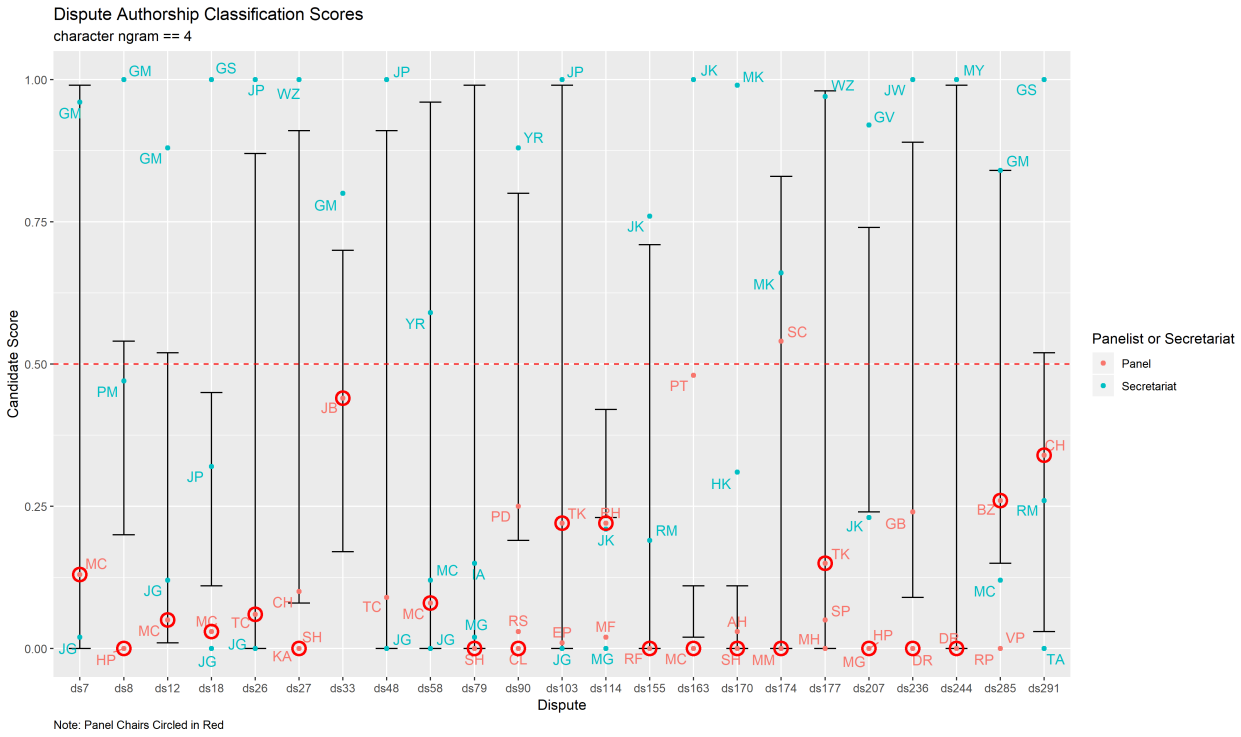


Figure 4. Detection of Panelists vs. Secretariat Authors Using Four-Character Strings



The results are striking, and unambiguous. All specifications, whether using strings of characters or words, attribute a supermajority of rulings to Secretariat members. Aggregating all tests that yield a definite attribution across all four specifications, 62 out of 69 (90%) panel reports are attributed to Secretariat members, and 7 out of 69 (10%) to panelists. Looking more closely, all author attributions using character strings point to Secretariat members as the most likely authors, with six disputes producing scores that do not allow for a confident attribution in the case of 3-character strings. Conversely, the tests actually rule out a number of panelists as having any observable influence over the writing of the reports.

Interestingly, scores attributed to panelists, especially using word strings (which yield more variation), appear to decrease over time, indicating a potential increase in the relative influence of the Secretariat staff over the dispute settlement system's history. In fact, the only two panel reports that are confidently attributed with high confidence to a panelist, rather than a Secretariat staff member, occurred in the dispute settlement system's first year.

Authorship attribution remains a probabilistic exercise, and no test is definitive. Yet the preponderance of the evidence, using two distinct methods—comparing reports to one another, and then comparing reports to external texts written by our candidate authors—strongly suggests that the Secretariat exerts a stronger influence over the writing of WTO rulings than the panelists themselves.

5. 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 since the WTO's inception. 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.[34] By the end of 2018, this number had increased to 90, counting only permanent positions.[35] 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 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.[36]

At the same time, 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).[37] The one number that is peaking is pending cases per month: an average of 20 cases in 2000; and 42 in 2018.[38] This high number of pending cases before panels, the AB, or compliance related arbitrations, is mostly explained by major delays in panel and AB proceedings which, in turn, are often blamed on… a lack of WTO support staff. Disputes may have become more complex, requiring more staffers per case. Yet what these numbers suggest is more WTO staff are needed today to service the same number of new cases. These statistics provide further evidence of the growing role of WTO staff (compared to WTO adjudicators,

[34] 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).
[35] 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).
[36] 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.
[37] 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).
[38] WTO Annual Report, 2019, at 121.

whose number has remained the same: 3 panelists and 3 ABMs per dispute) in WTO dispute settlement.

The contrast with (pre-WTO) GATT dispute settlement 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 (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). How things have changed. 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). In 1982, this pushed GATT parties to task the GATT Secretariat to "assist" panels including on the "legal… aspects of the matter dealt with" (Roessler, 2015). As noted earlier, in 1994, this language was copied almost verbatim in Article 27.1 of the DSU.[39] In other words, the emergence of the Secretariat was initially an attempt by Members to ensure some oversight of the proceedings, to prevent decisions from getting out of hand, especially in the legal-technical sense.

"Rogue" GATT panels, making egregious mistakes of law, and an explicit treaty mandate for WTO staff to provide "legal support", may have prompted the beginning of the rise of WTO staff lawyers in WTO dispute settlement. However, a number of other factors, some related to provisions in the WTO treaty itself, others based on WTO staff and panel/AB practices, further explain the rise in influence of WTO staff lawyers post-1995. Below, we identify four such factors: (i) relative appointment terms, (ii) relative legal and language expertise, (iii) staff

[39] 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.

independence from (and limited accountability to) panelists and AB members, (iv) staff assignment to panels/the AB as a whole (instead of individual adjudicators).

Relative appointment terms. In the US Supreme Court, Justices are appointed for life; their clerks are appointed for one term only. In the WTO, the opposite is true: staff lawyers have a permanent contract whereas panelists are appointed *ad hoc*, for one dispute only, and AB members for a relatively short term of four years (renewable once). In addition, WTO staff work full-time, live in or around Geneva, receiving a relatively generous monthly salary and full, UN-style benefits. WTO panelists and AB members, in contrast, are devoted to their task on a part-time basis only, fly into Geneva for hearing days from around the world and are paid as consultant, relatively low amounts, without benefits such as pension.[40] This creates an asymmetry of experience and time allocation: staff with many years of experience and detailed knowledge of procedure and past rulings, devoted and paid full-time, based in Geneva; panelists and AB members often new on the job and with many other, often better-paid, demands on their time, most of whom need to travel to Geneva, and adjust to time differences, to attend hearings.[41] This double asymmetry must at least partly explain the enhanced role of WTO staff, increasingly operating as the "institutional memory" of the organization and prime "expert" on WTO treaty rules and jurisprudence (more so than many adjudicators themselves). The *de facto* rule of precedent adopted by panels and the AB (discussed below in Section 6) further accentuated this advantage of WTO staff over adjudicators and may have intensified the delegation from adjudicator to expert staff. As WTO jurisprudence grew and became more diverse and complex, the relative advantage of Secretariat staff increased and with it, the inclination of adjudicators to rely on, and defer to their guidance.

Relative legal and language expertise. Related to the point above, the WTO continues to frequently nominate diplomats or non-lawyers as WTO panelists.[42] Many AB members also lack experience in a judicial function or legal practice; some do not even have a law degree, but have

[40] Panelists: 900 CHF per day, or 300 CHF per day if they work for a member government, plus per diem; AB members: a monthly retainer of 9'000 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 in, for example, ICSID or the ICC is a multiple of these amounts. See Pauwelyn, (2015).
[41] As discussed in footnote 12 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.
[42] See Pauwelyn (2015), supra note 40.

a distinguished career in diplomacy or civil service. WTO staff lawyers, in contrast, must have a law degree (with, in effect, a Master's, if not PhD-level specialization in WTO law) and are competitively selected among increasingly large pools of highly qualified and experienced applicants. Most WTO proceedings and rulings are in English. While almost all WTO staff are comfortable drafting in English, many adjudicators speak another language and are not. Like the asymmetry of experience and time allocation described above, the relative legal and language expertise of WTO staff compared to that of many WTO adjudicators thus explains why the former has taken on larger and more important roles in what can only be described as increasingly "legalized" WTO dispute settlement. Here, too, the practice of *de facto* precedent granted to AB reports has likely contributed to increased reliance on the Secretariat.

Staff independence and limited accountability. The WTO DG appoints, evaluates and promotes WTO staff, be it lawyers working for panels or the AB. WTO panelists and AB members have no formal role in the staff appointment process. On the contrary, as 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 (e.g. the director of the AB Secretariat, LAD or Rules Division). 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. These factors enhance the independence and bolster the relative power of staff vis-à-vis adjudicators. Less adjudicator control over WTO staff weakens the principal/agent relation and increases the WTO staff's relative influence. This means that also the accountability of WTO staff is limited, essentially to the internal hierarchy within the Secretariat.[43] 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.

[43] 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).

S*taff are assigned to panels/the AB as a whole (not individual adjudicators)*. In many courts and tribunals, assistants work for individual judges (think of the US Supreme Court, ICJ or CJEU). Lawyers assisting WTO panels or the AB, in contrast, work for a broader division and secretariat and are assigned to a particular case or appeal, working for the panel or AB division as a whole. Panelists or AB members do not have their "individual clerks". For the AB, this has been reported as a conscious choice, in order to promote collegiality and consensus decisions[44], as well as to enhance oversight by the AB Secretariat Director.[45] When WTO staff draft an "issues paper" or parts of the ruling, they do so at the request of, and (when it comes to the ruling) with the task of representing the views of all three members on, the panel or AB division. This reduces individual adjudicator direction and control over WTO staff. It also elevates the status of WTO staff lawyers (and, in particular, of the staff director): their task is seen as the work of an independent "neutral", not formulating or defending a particular adjudicator's view, but that of the collective. In this capacity, staff seek to forge a consensus ruling; adjudicators, in turn, who often have far less experience, may be inclined to adopt a more deferential role.

6. Why does the role of the Secretariat matter?

In Section 3 and 4 above, we described the WTO Secretariat's functions, and empirically confirmed its influence in writing WTO panel reports. In Section 5, we outlined some of the factors that have led to the Secretariat's increased prominence in WTO dispute settlement. In this section, we turn to the question of why any of this matters? Why should anyone care that WTO staff write "issues papers", are actively involved in internal deliberations and draft reports, or that the role of WTO staff vis-à-vis that of adjudicators has shifted over time? After all, the Secretariat is widely lauded for its expertise and high levels of professionalism and independence.[46] Staff can improve the adjudicative process and keep "rogue" adjudicators in

[44] Collegiality is not set out in the DSU itself, but in the AB Working Procedures, drafted by the AB itself (on the advice of the AB Secretariat), Rule 4(1) : « To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure". As a result, in each case, the three AB members on a given case have a so-called "exchange of view" with the other four AB members.

[45] See Steger (the first director of the AB Secretariat), Steger (2015) (« In the beginning, some of the original Appellate Body members … suggested that they would like to each have a law clerk. However, the model adopted for the Appellate Body Secretariat was similar to that used by the GATT Secretariat in the past in serving panels … staff worked as a team … The lawyers, who were few in the early days, reported to me, the Director, and we worked for the Appellate Body members on the appeals as they were filed").

[46] See, for example, Peter Van den Bossche, Farewell Speech to the WTO DSB, 28 May 2019 ("As for the Appellate

check, which as we outlined above, was the original intent behind the Secretariat's creation. In fact, WTO Members have not voiced any concerted complaint about the role of the Secretariat in WTO dispute settlement. On the contrary, most Members and observers are more likely of the view that it is the Secretariat who ensures the success of WTO dispute settlement.

Yet what we show to be the outsized role of the Secretariat matters for three main reasons. First, it matters who "holds the pen", especially in a legal regime that pays close attention not only to the reasoning but also the actual words used in past rulings. Secondly, WTO Members and the wider public should care about "who does what" as the legitimacy, trust and compliance pull of WTO rulings may eventually depend on it. Finally, and of most immediate relevance, a greater role for the Secretariat may have an impact on substantive outcomes, in particular: an increased role for precedent; longer and more convoluted reports and proceedings; rulings that are more ambitious and expansive in scope; and a lower number of dissents, because of pressure to reach consensus decisions.

Interestingly, many of these effects overlap with the very US concerns that are now threatening to sink the AB. The US' "systemic concerns" focus on the AB "overreaching and disregard for the rules set by WTO Members".[47] A first set of US concerns relate to AB rulings on substantive questions under the WTO treaty which according to the US "have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards".[48] A second set of US concerns relate to "agreed dispute settlement rules", more specifically, (i) the AB making "advisory opinions on issues not necessary to resolve a dispute", (ii) the AB reviewing "panel fact-finding [in particular, on the meaning of domestic law] despite appeals being limited to legal issues", (iii) the AB asserting that "panels must follow its reports although Members have not agreed to a system of precedent in the WTO", (iv) the AB "continuously disregard[ing] the 90-day mandatory deadline for appeals" and (v) the AB permitting "ex-Appellate Body members to continue to decide appeals even after their term of office" (the so-called Rule 15 issue).[49] We

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").

[47] U.S. Mission, Geneva (2019) at p. 14.

[48] *Ibid.*

[49] *Ibid*.

steer clear of taking a position on the US criticisms,[50] and recognize that they may stem from a variety of factors (including how the parties themselves litigate cases). Yet what we describe below as an inclination to write rulings that are ambitious and expansive in scope may, indeed, lead to what at least some Members have viewed as (i) activist interpretations that go "beyond the text"; (ii) advisory opinions on issues not necessary to resolving the dispute; and (iii) an expansive position on "legal issues" subject to AB review (e.g. including panel findings on the meaning of domestic law). Convoluted writing style and longer reports and proceedings, in turn, may partly explain why the AB has struggled to decide within the prescribed 90 days which, in turn, has necessitated many outgoing AB members to continue working on appeals even after their term ended (pursuant to Rule 15 of the AB Working Procedures). In other words, the outsized role of the Secretariat matters; adjusting it may even help save the overall system. In Table 1, we summarize the importance of the Secretariat, the factors that explain it, why it matters and how it may be linked to current US concerns.

[50] Other WTO Members have vigorously disagreed with the US on many of these issues.

Table 1: The Role of the Secretariat in WTO Dispute Settlement

Importance of the Secretariat	**Factors Explaining the Rise of the Secretariat**	**Impact of the Secretariat's Role**	**US Concerns with the AB**
1. From 37 staff (in 1999) to 90 staff (in 2018)	1. "Rogue" panels of the 1980s leading to explicit legal mandate in the DSU	1. "Holding the pen" matters especially in a system with *de facto* precedent	
2. Proposes/(DG) selects panelists	2. Short-term, part-time, low-paid adjudicators v. permanent, full-time, well-paid staff	2. Legitimacy, trust and compliance pull of rulings may suffer	
3. Role in timetable & working procedures	3. Staff often have more legal background & language expertise than adjudicators	3. Enhanced reference and strict adherence to precedent/past rulings	Objects to a system of precedent
4. Writes "issues paper"	4. Staff is not appointed, promoted or paid by adjudicators, nor accountable to Members	4. Convoluted writing style & exceedingly lengthy reports and proceedings	Wants 90 days rules complied with; Objects to carry-over under Rule 15
5. Drafts questions to the parties; participates in hearings & internal deliberations	5. Staff is assigned to panel/AB as a whole not individual adjudicators	5. Expansive scope and ambition of rulings	Certain rulings "far beyond the text" of the treaty or scope of AB review; Objects to "advisory opinions"
6. Drafts final ruling		6. Pushback against dissents to maintain collegiality	Objects to a system of precedent

The importance of "holding the pen". How significant is it that WTO staff prepare detailed "issues papers" and regularly draft the final ruling? After all, WTO panelists and AB members remain the ones making the final decision. 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 a 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" (Thirlway, 2006). Yet Thirlway also 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). Or as Partasides puts it 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] Similarly, Chief Justice Rehnquist of the US Supreme Court is reported as cautioning that each "Justice must retain for himself control not merely of the outcome of the case, but of the explanation of the outcome" (Rosenthal and Yoon, 2010 at p. 1310, quoting Schwartz, 1996). 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).

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 (Busch and Pelc, 2019). As things stand today, panel and AB decisions not only offer a resolution of the dispute for the parties (Kucik and Pelc 2016). 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 countries' interests over others (Daku and Pelc 2017). As a result, who "holds the pen" matters, nowhere more so than in the current WTO system.

[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 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".

The fact that WTO staff draft rulings not on behalf of an individual panelist or AB member, but at the request of the entire panel or AB division of three (discussed in Section 5 above) adds to the Secretariat's power. The WTO staff seek to produce a draft that will be acceptable to all three members of the panel or AB division. The fact that an impartial writer, rather than one of the adjudicators themselves (or staff working for one of the adjudicators) drafts the ruling may facilitate collegiality and consensus, and avoid unnecessary suspicion of the drafter trying to push her own opinion.[52] Yet it also puts more decision-making power in the hands of the WTO staff drafter: It will be for the drafter to identify common ground, and identify and express the fine-grained line of reasoning. To go back and ask guidance or explicit approval on every turn taken, or every expression or word selected, would slow down the process and risk unearthing differences of opinion between the adjudicators.[53] Adjudicators, in turn, knowing that a neutral expert drafted the text, may paper over some details, in the interest of not disturbing what may be a fragile consensus on the ultimate decision reached. As Justice Wald concluded in the context of the ICTY,

> I have never belonged to the 'A judge must write every word herself' school, but I have recognized the risk of losing control of the process if the judge does not define the issues, work out the reasoning and responsibility in advance with law clerks, and meticulously analyze, revise and edit any draft presented to her. That close monitoring task becomes monumental, however, when parts of the judgment are produced in one language not spoken or understood by all three judges and by legal assistants who do not 'belong' to individual judges but rather to the Chambers as a whole, reporting primarily to the President of the Chambers or to the senior legal assistant whom he selects (Wald 2001).

Legitimacy, trust and compliance pull. The WTO treaty painstakingly defines the qualifications, independence, geographical distribution and appointment process and terms of panelists and AB

[52] See Alvarez-Jimenez (2009) at 315, who explains the efficiency of the AB process inter alia with the reference to the fact that "the decision-making process at the Division level is quite flexible and not based on drafts previously prepared by Division Members or by the presiding Member they have to defend". Thirlway (2006) equally stresses the advantages of a "neutral drafter", at p. 21: "it is easier for the detached Registry draftsman, on the basis of his notes of the discussion, to plan a text that will attract the maximum support. A Member of the Court may (I say only, may) be so enamoured of his own solution of the case that his draft will represent nothing else, and may even conflict unnecessarily with another approach favoured by members of the majority", and at p. 20: "There is also advantage in not having responsibility for the decision, but only for putting it into words: it is easier for an impartial writer, in the sense of one who has no interest in the case being decided one way or the other, to see the difficulties of the course that has been decided on, and devise ways of resolving them".

[53] Thirlway (2006) puts it as follows: "I have frequently found that at some point a question will arise, needing to be settled in the course of the reasoning, that has not been explicitly decided, nor sometimes even discussed, by the Court. It is not practicable to go back and ask for instructions every time this happens; the course I have followed is myself to devise a reasoning that fits in with the overall construction".

members.[54] WTO Members delegated limited adjudicative powers to those panelists and AB members, 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-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." 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 authors of the rulings handed down by the tribunal, rather than WTO staff whose names are no longer found in the final report.

Impact on outcomes. More directly, the various roles played by WTO staff, in particular, writing of the "issues paper", active participation in internal deliberations and drafting of the actual report, may (albeit unconsciously) leave their imprint on substantive interpretations and outcomes. Existing work has examined the background of WTO panelists and AB members.[55] If WTO staff plays such an important role, the obvious next question is: who actually works for the WTO Secretariat? What are the background, worldview, ideology and preferences of WTO staff lawyers? For example, the argument has been made that "European sensibilities" or "the legal culture of EU institutions" have, *inter alia*, via the influence of AB staff members, contributed to "the discourse, ethos, and judicial style of the WTO Appellate Body" (Soave, draft manuscript). WTO staff lawyers may also be trained in a small number of law schools where a particular view or approach to the WTO treaty is taught or promoted. Staff members may also have ideological predispositions when it comes to, for example, the legitimacy or economic justification of trade remedies or free trade in general. As permanent staff, paid and employed by the WTO, staff

[54] See DSU Articles 8 and 17.
[55] See, for example, Pauwelyn (2015), supra note 40.

lawyers may also have incentives to preserve or even aggrandize the image and powers of the WTO, its secretariat and their own jobs.

Adherence to precedent. We have already alluded to the *de facto* rule of precedent in WTO dispute settlement. Although they are not formally legally binding on future cases, panel and AB reports pay close attention to past rulings. They spend pages summarizing and referring back to past reports and further interpreting, distinguishing and developing the precise sentences and words used in previous rulings. The AB, in particular, has stated that "absent cogent reasons" its rulings are to be followed by panels and future AB divisions alike.[56] The US, in contrast, considers that this practice "[u]surp[s] the authority expressly reserved to [WTO] Members"[57] and risks that "errors [in AB rulings] will become locked in, and persuasive interpretations are less likely to arise from the dispute settlement system".[58] 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 collegiality[59] and the way parties and litigators have argued cases (Pelc, 2014). Yet the increased role of WTO staff in the process may be another contributing 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—will be inclined to refer back to past decisions. They may be especially likely to refer to those past decisions they were themselves part of, or wrote the crucially important "issues paper" for. 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

[56] Appellate Body Report, *US - Stainless Steel*, WT/DS344/AB/R, para. 160.
[57] U.S. Geneva Mission (December 2018)
[58] Ibid., at p. 11 (para. 16), adding (at para. 17): «To think otherwise would require one to consider that *the first time* the Appellate Body considers an interpretive issue, it will necessarily render not only a *correct* interpretation, but the *best* interpretation. The United States considers that proposition to be contrary to experience and human nature" (emphasis in the original).
[59] See note 44 above.

WTO jurisprudence.[60] 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 goal, in other words, is that the Appellate Body should be consistent (Blustein, 2017 at p. 13).

An interesting example 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.[61] As the panelists were different in the two cases, and it is highly unlikely that the findings of the first panel were publicly available when the second panel drafted its report (drafting of the second report must have happened many weeks before the first report was publicly circulated), it was most likely Secretariat staff that cross-checked these panels' findings to ensure coherence.[62] Reference to past rulings, in turn, increases the role and influence of WTO staff: They become the "institutional memory" as they have been intimately involved in the history, internal deliberation and drafting of past decisions. Adjudicators themselves, who often lack experience or detailed knowledge of the "case law" and as "part-timers" face a variety of competing demands on their (limited) time, may feel they have no choice but to rely, and rely more extensively, on WTO staff. In this sense, an enhanced role for WTO staff and increasing reference to precedent are mutually reinforcing.[63]

Convoluted writing style and lengthy reports and proceedings. Detailed reference back to past decisions makes "issues papers" and eventual rulings longer. As the number of past rulings

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[60] As noted in footnote 13 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.

[61] 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.

[62] The WorldTradeLaw.net DSC on the case, referred to in footnote 61 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 of for worse, depending on your viewpoint)".

[63] 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.

increases, reports tend to be longer over time, as has happened in the WTO.[64] When WTO staff, especially younger, less experienced staff, draft reports (instead of seasoned adjudicators themselves), language may become more technical and convoluted. This effect may be heightened when staff are assigned to, and draft for, the panel or AB division as a whole, instead of individual adjudicators. As Justice Wald put it in the context of the ICTY, where staff are similarly assigned to a Chamber as a whole (instead of individual judges), this makes "ICTY judgments sometimes seem stilted, bureaucratic, and insufficiently reasoned, making them largely inaccessible to the reader and frustrating to the press and even legal scholars who try to analyze them".[65] When WTO staff write the first draft—already a product of compromise and correction between junior and senior staff lawyers—and various adjudicators subsequently add to it, often under time pressure and with the overall goal of consensus reports, rulings risk being longer, with unnecessary overlaps and repetitions.[66] As a result, clarity may suffer, which may increase compliance problems, and thus the need for post-ruling implementation procedures.

Paradoxically, this implies that increasing the role of WTO staff may lengthen and complicate the process and rulings, rather than making the process faster and more efficient. That, today, both panels and the AB consistently exceed DSU prescribed timeframes may, indeed, be partly due to a mutually reinforcing, snowball effect: the Secretariat's involvement in rulings results in a more bureaucratic style, where "no stone is left unturned", and in hypertrophic reports replete with references back 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, requiring yet more staff input.

[64] See Pauwelyn and Zhang (2018), supra note 37.
[65] Wald (2001) at p. 94. She adds : « If I could, I would opt for legal assistants assigned to individual judges and for giving the judges specific responsibility for drafting the entire or at least significant parts of the judgment, which could be profitably much shorter than they are now".
[66] See, in the context of the ICJ, Thirlway (2006) at p. 26 : «One of the reasons (there are others) for the generally increased length of Court decisions over the last ten or twenty years … is a tendency to use all the material to hand, i.e. to build on the existing Registry material. Apart from the risk of including what is unnecessary … a member of the Drafting Committee, in preparing the material entrusted to him, may prefer to begin with his own statement of the relevant facts, or to summarise in his own way the arguments that he has to deal with. This is of course highly desirable in itself; but the consequence is—or ought to be—an adjustment of the existing material to avoid duplication. Most decisions nowadays are prepared under considerable pressure of time, and it may not be possible to take the long hard look at the overall text that is necessary to detect, and adjust, overlappings of this kind".

Expansive scope and ambition of rulings. Experienced adjudicators, especially in state-to-state cases, have often come to realize the importance of sticking to party claims and deciding cases narrowly and incrementally, with a serious dose of humility. They make their own selection of the salient issues and arguments they wish to rule on, and focus their reasoning on certain elements, while relegating others to the margins of the analysis, exercising a type of "selection prerogative". WTO staffers, especially younger ones or those academically inclined, may, however, fall victim to what Justice Rehnquist, in the context of US Supreme Court clerks, called "youthful exuberance".[67] They may feel compelled to dissect every issue and argument to the fullest extent, leaving "no stone unturned". They may be tempted to write extensive background paragraphs, broadly state the law, and venture opinions on matters that need not be decided in the pending dispute or that parties may not even have submitted to the panel or AB. As permanent employees involved in case after case, WTO staff may be inclined to think more about the broader system, coherence with past rulings, and clarity for future cases, rather than the resolution of the specific case before them. 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, and actually drafting the ruling (see Section 3 above), provides ample opportunity to act on these temptations. And since Members have no control over staff (only over adjudicators), a shift away from the preferences of WTO Members is harder to correct. In response, and with the overall role and input of the Secretariat increased, panelists and AB members themselves may be less inclined to exercise their "selection prerogative", thereby making reports longer and more unwieldy. Limited accountability, especially at the AB level, also puts fewer brakes on the temptation to be expansive, painstakingly comprehensive and ambitious in one's findings and analysis. After all, the AB has "the final word", since no further appeal exists, and post-ruling scrutiny is limited to often-stale debates at the DSB, where panel and AB reports are automatically adopted anyhow. This often means that a closed circle of WTO academics and professional law firm lawyers are the only people with the time and resources to actually fully read, analyze and critique ever longer and more complicated panel and AB reports. As this closed circle largely benefits from more

[67] Rehnquist, p. 92-93: "Most of the clerks [at the US Supreme Court] are recent honor graduates of law schools, and, as might be expected, are an intellectually high-spirited group. Some of them are imbued with deeply held notions about right and wrong in various fields of the law, and some in their youthful exuberance permit their notions to engender a cynical disrespect for the capabilities of anyone, including Justices, who may disagree with them".

complexity (with complexity, the value of their expertise goes up), they are unlikely to push back. As Justice Wald put it, in the context of the ICTY, the importance of humility and scrutiny "is increased by the Tribunal's institutional isolation as an international court" (Wald, 2001 at p. 114). She adds the following, which may apply also to WTO panels and especially the AB:

> Unlike the U.S. federal and state courts and those of most other national systems, the ICTY is not a part of any integrated judicial system. There are no lower courts to feed it and screen its cases. There are no sister courts, except the ICTR, to provide a point of reference or comparison and no higher courts to curb its errors … There is a sense of humility that reversals by a higher court brings to our U.S. judges, which is not always appreciated in the rarefied atmosphere of international jurisprudence (Wald, 2001 at p. 114).

Indeed, another US critique currently launched against the AB is that it decides issues too broadly, and writes so-called advisory opinions or *obiter dicta*.[68] As is the case with the current practice of heavily referring to past "precedent", some of the *obiter dicta* concerns may find root in the prominent role played today by WTO staff.

Push back against 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, may be inclined to push back against dissents by individual adjudicators and support consensus outcomes.[69] As noted earlier, the dissent rate in the WTO is surprisingly low, occurring in less than 10% of AB rulings.[70] A variety of reasons may account for this fact. Among these is probably the role of WTO staff and its conscious, or unconscious, defence of the system and of its coherence. Moreover, if WTO staff routinely draft rulings, and dissents must normally be drafted by the adjudicator herself, the daunting task of having to write one's own dissent may further inhibit dissents, especially in cases where the majority opinion is drafted and

[68] U.S. Mission Geneva (2018).
[69] 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).
[70] Dissents in panel reports have also been relatively rare, but occurred prominently in disputes involving so-called zeroing in anti-dumping investigations.

fully backed by the (often more expert and experienced) WTO staff. Fewer dissents may protect the principle of collegiality. Collegiality and consensus decisions may have cemented the credibility and predictability of the AB in its early years, especially. Today, pressure to compromise and the suppression of dissents may stymie un-orthodox views and mute objections or novel insights from new AB members, while elevating the role of staff. 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 align also with past rulings—risk undermining legal clarity and making proceedings and rulings longer and more complex.

Empirical work shows some support for this association between compromise decisions and lower clarity. Owens and Wedeking use text analysis to 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" (Owens and Wedeking 2011). 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). As one commentator on AB practice put it, collegiality "may come at the cost of a lack of transparency, and indeed basic clarity about the underlying jurisprudential stances of the appellate judges" (Howse 2015). Having to find a consensus decision may also leave gaps in the reasoning or conflicting statements in the same report, at times leading to an "incoherent almost unreadable opinion" (Howse 2015). Closing the door to dissents also tends to carve past rulings in stone. It makes it more difficult for future AB members to disagree with past rulings, thereby strengthening the rule of *de facto* precedent, inhibiting course corrections in the case law and ultimately creating a false sense of AB infallibility.

7. Conclusion and Questions for Debate

In this article, we have described and empirically confirmed the important role of the Secretariat in WTO dispute settlement. The Secretariat is involved not only in setting timetables and working procedures, drafting questions to the parties, and attending hearings, but also in the

appointment of panelists and writing of "issues papers" and actively participates in internal deliberations and the eventual drafting of rulings. New empirical tools add transparency, in particular, to the question of who writes the rulings of the WTO, shedding light on both the division of labour between Secretariat staff and panelists/AB members. We have also offered possible explanations for why Secretariat lawyers—whose numbers have grown exponentially since the WTO's creation—play such a prominent role today, ranging from an explicit treaty mandate to provide "legal support" (inspired by GATT panels "gone rogue" in the early 1980s) and asymmetries between staff and adjudicators in terms of appointment terms and expertise, to the relative independence and limited accountability of staff, and the fact that staff is assigned to panels/the AB as a whole instead of individual panelists or AB members. Turning to the normative implications of our findings, we offered several reasons why WTO Members and the wider public should care about the Secretariat's role in WTO dispute settlement: (i) who "holds the pen" takes on special significance in a legal regime that pays close attention to past rulings; (ii) crossing the line between adjudicator and staff tasks may threaten the legitimacy, trust and compliance pull of WTO rulings; (iii) and finally, a greater role for the Secretariat may have an impact on substantive outcomes, in particular: an increased (some would say, excessive) reliance on precedent; convoluted writing style and length of reports and proceedings; expansive scope and ambition of rulings; collegiality and low number of dissents.

Paradoxically, this implies that increasing the role of WTO staff may lengthen and complicate the process and rulings, rather than making the process faster and more efficient. Intriguingly, some of these impacts also overlap with the very US concerns that are now threatening to sink 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. From a force to keep "rogue" panels in check, the Secretariat may therefore have evolved into an agent of more expansive dispute settlement. Correcting this "overreach" may then, paradoxically, require *more* voice for adjudicators (e.g. more experienced panelists, full-time AB members and more scope for dissents), and a *reduced* role for the Secretariat (e.g. minimalist "issues papers" and less involvement in internal deliberations and drafting; adjudicator rather than division director oversight of Secretariat staff). This, in turn, highlights how the role of the Secretariat matters; adjusting it may even help save the overall system.

We end our analysis with a list of concrete questions about the role of the Secretariat and practical ways in which it could be changed. When blocking the appointment of new AB members, the United States has consistently ended its DSB statements with the following question:

> Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to … Without further engagement from WTO Members on the cause of the problem, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns that the United States and other Members have raised.[71]

We take no position here on whether US allegations of AB "overreaching and disregard for the rules set by WTO Members" are justified. What we do want to stress is that AB rulings and practice are driven not only by individual AB members themselves, but also by the Secretariat advising and supporting the AB (as well as WTO Members litigating cases before the AB, law firms working with those Members, the broader WTO Membership, and even commentators and academics teaching and writing on WTO dispute settlement). Any responsibility or "blame" is shared. When it comes to the Secretariat's role, the following six questions deserve attention:

1. *Realizing that some case-by-case variation is unavoidable, what tasks can be delegated to the Secretariat as opposed to tasks that panelists/AB members must themselves complete?* For example, should Secretariat "issues papers" be prepared without any prior input from adjudicators, run in the hundreds of pages and propose specific outcomes? Or should they rather be limited to a brief listing of the core issues, main positions of the parties and most significant past panel/AB statements, without staff proposing outcomes and maximum 25 pages? Should staff lawyers be allowed to take a leading role or even to attend internal deliberations? Or should their input be limited to answer questions and provide clarifications? Should staff be allowed to draft entire rulings or should drafting be assigned to individual adjudicators, who could be assisted by staff? Where staff does draft parts of the report, should there be a transparent process with strict instructions, guidelines and oversight?

2. *Who should appoint and control staff lawyers and what should be their "chain of command" and accountability?* For example, should panelists and AB members play a greater

[71] U.S. Mission Geneva (July 2019).(emphasis in the original).

role in staff appointment, promotion and possible termination? Should staff working on a case primarily (or only) report to the panel/AB division they work for, with a reduced (or purely managerial) role for division directors? Should staff in dispute settlement be paid from the overall WTO budget or out of a budget allocated to individual panelists/AB members?

3. *What should be the appointment terms of Secretariat staff assisting panels or the AB?* For example, should they be appointed for short terms only, to allow for regular rotation and avoid asymmetries of expertise and institutional bias? Should they be assigned, more like clerks or assistants in arbitration, to individual panels or individual AB members (as opposed to permanent staff working for the AB as a whole)[72]?

4. *What elements related to the work of the Secretariat should be made public?* For example, should the WTO revert to the practice of publicly communicating which Secretariat staff will assist a specific panel? Should the names of AB staff assigned to a particular case be made public? Should practice guidelines on the role of the Secretariat be developed and made public? Should "issues papers" or other staff communications to the panel or AB (e.g. advice from staff economists (Pauwelyn 2013)) be allowed to go beyond a summary of the facts or arguments? If so, should these not be shared with the disputing parties?

5. *How should the pool of Secretariat staff supporting panels and the AB be structured?* For example, should Secretariat staff involved in the panel appointment process be "walled off" from staff lawyers actually supporting panels? Should the same pool of lawyers/clerks be available to assist either panels or the AB (without, obviously, having the same staff assisting both the panel and the AB in the same dispute)? Should panel/AB support staff even be part of the WTO Secretariat or be appointed (and terminated) *ad hoc* by individual panels/AB members? Where a team of staff assists a panel or AB division, should there be an internal hierarchy within the team (junior and senior lawyers, with oversight by a director)? Or should staff instead report directly to (individual) adjudicators, with division directors reduced to non-substantive case managers?

[72] For an early US proposal to have a clerk assigned to each AB member, see USTR, U.S. Proposes Appellate Body Reforms, 14 January 2019, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/january/us-proposes-wto-appellate-body-reforms. More recently, see Hoekman and Mavroidis, Party like it's 1995: Necessary but not sufficient to resolve WTO Appellate Body crisis, Vox, 26 August 2019, https://voxeu.org/article/party-it-s-1995-resolving-wto-appellate-body-crisis.

6. *In case the tasks, appointment terms or chain of command of support staff were altered, with more responsibility for adjudicators, what impact would this have on the adjudicators themselves and the broader process of dispute settlement?* For example, should more experienced panelists and AB members be appointed who must also commit to devoting more time to each case? Without changing term length (four years, renewable once), should more AB members be appointed, or should they be appointed full-time (instead of the current part-time, retainer-based position)[73]? Instead of merely shifting requirements of "legal expertise" from the Secretariat back to the adjudicators, should also the very task and practice of dispute settlement be simplified, limited and less "legalized" so it can be completed faster, with less reference to precedent and less need for "legal support" in the first place?

Most of the suggestions above can be implemented without amending the WTO treaty. It would suffice to alter current practices or internal WTO policies. At one level, this makes change easier: no consensus of 164 WTO Members is needed. At another level, disrupting long-standing, unwritten practices, embedded in a relatively large bureaucracy, can be hardest of all. Yet as our discussion highlights, these changes to the WTO dispute settlement system may be more pressing than ever.

[73] For a proposal to make AB members full-time, in the hope also of attracting a "wider range" of "high caliber" candidates, see USTR, U.S. Proposes Appellate Body Reforms, supra note 72.

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