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Are the Fingerprints of WTO Staff on Panel Rulings a Problem? A Reply to Joost Pauwelyn and Krzysztof Pelc

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Abstract

By employing stylometric data analysis, Joost Pauwelyn and Krzysztof Pelc underpin the narrative of a power-mongering World Trade Organization (WTO) Secretariat. As 'holder of the pen' in writing WTO rulings, the Secretariat would absorb control over WTO adjudicators and the dispute settlement procedure. This reply disagrees. First, with stylometric analysis informing style rather than substance, this technique does not encrypt the intellectual ownership of WTO rulings, nor does it offer account of the deliberation between bureaucrats and adjudicators. Second, with public power typically deriving legitimacy from both political or judicial accountability as well as rational and de-politicized bureaucracies, an assertive WTO Secretariat under the direction of panellists is normatively desirable. Third, a WTO Secretariat pursuing consistent application of the growing WTO acquis *does not impair the members-driven adjudication process.*

The merits of text-as-data techniques for the study of international law are beyond doubt. Not only have they improved our understanding of international law,[1] but they also allow previously unfeasible glimpses into the inner workings of tribunals and enhance the legal prediction of court judgments.[2] The tempting fruits of data mining, however, lie in giving a quantitative underpinning to a qualitative claim. The

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1 Alschner, 'The Computational Analysis of International Law', in R. Deplano and N. Tsagourias (eds), *Research Methods in International Law: A Handbook* (2021) 203; Sadl and Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts', 30 *Leiden Journal of International Law* (2017) 327.

2 Katz, Bommarito II and Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States', 12 *PLoS One*(2017) 4.

interpretative risk of this endeavour is that quantitative analysis then serves to make an otherwise shaky qualitative claim appear solid. The qualitative core claim put forward by Joost Pauwelyn and Krzysztof Pelc is that an increasingly influential World Trade Organization (WTO) Secretariat and its 'faceless bureaucrats' have abandoned their initial intention to serve the interests of member states by absorbing control over adjudicators and, thus, over the dispute settlement procedure itself. Their quantitative claim is that stylometric analysis offers proof to that narrative by showing that the WTO Secretariat, rather than panellists, 'hold the pen' in panel reports and are thus the actual authors of panel reports.[3]

I disagree with both claims on three grounds: (i) the quantitative analysis informs about the style of writing but not about intellectual control or legal authorship, and it fails to gauge the deliberative interaction between bureaucrats and adjudicators materializing in the panel reports; (ii) the assertive and impactful contribution of WTO staff to panel reports under the auspices and direction of panellists is not a violation of legitimacy concepts but, rather, normatively desirable; and (iii) with panellists who are non-legal actors from the world of diplomacy and trade policy, members' interests are not undermined by a 'rule of law'-driven WTO Secretariat that pursues consistency with the WTO *acquis*.

1 Stylometric Analysis Informs Style, Not Substance

Stylometry allows the attribution of authorship, for example, by classifying a corpus of texts as being authored by a probable author based on the varying stylistic features found in the corpus.[4] It has been instructively employed to study the influence of litigants' language on a case's final outcome[5] or the degree to which US justices rely on their clerks to write opinions.[6] The strength of stylometric analysis is indeed to offer insight on the potential author of a panel report, as the technique allows for the identification of the authorship of the writing. But it is not suitable to identify the source of intellectual reasoning and originality that informs the writing. Put differently, since it only checks for the stylistic identity of a text corpus, it cannot say much about the legal substance that is merely manifested by that style.

Pauwelyn and Pelc's methods consist in identifying consecutive strings of characters or words – in this case, strings of three or four characters and strings of one or two words – in order to compare panel reports with the academic writings of WTO staff compared to panellists' writings.[7] As such, the technique uncovers stylistic patterns

[3] Pauwelyn and Pelc, 'WTO Rulings and the Veil of Anonymity', 33 *European Journal of International Law* (2022), 527, at 536.

[4] Charlotin, 'Identifying the Voices of Unseen Actors in Investor-State Dispute Settlement', in F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019) 392, at 403.

[5] Pelc, 'Who Holds Influence over WTO Jurisprudence', 20 *Journal of International Economic Law* (2017) 233.

[6] Rosenthal and Yoon, 'Judicial Ghostwriting: Authorship on the Supreme Court', 96 *Cornell Law Review* (2016) 1307.

[7] Pauwelyn and Pelc, *supra* note 3, at 550.

reflected in the combination of these strings by an individual author. Yet style is not conclusive in determining the author of legal reasoning or intellect. An obvious example of this would be the judge dictating a legal clerk the outline of a legal opinion, which is the intellectual substance of the legal reasoning, and then asking the assistant to write out this structure into a full text. Stylometric analysis would identify the legal clerk as the most impactful author of this text simply by identifying the idiosyncratic patterns of style, although she did not contribute intellectual input into the substantial content.

Some legal scholars claim that writing is tantamount to deciding,[8] yet I disagree for there is a structural disconnect between form and substance and between the pen holder and the intellectual authority, which remains unencryptable by Pauwelyn and Pelc's approach. Stylistic features must be distinguished from substantive authorship, if one considers the peculiarity of bureaucratic work streams. Key is the iteration between bureaucrat and decision-maker in which the decision-maker draws from the knowledge and experience of the legal assistant to shape her own legal view.[9] A ministerial adviser presents an outline for a new law to political bureaucrats or parliamentarians to seek approval, yet it is widely practised and accepted that ministerial advisors draft the laws, not parliamentarians.[10] Applying stylometric analysis to the documentation offering reasoning for a given bill would reveal the style of unelected junior ministerial staff. Similarly, a regulator's junior official collects facts and presents the legal opinion to the ultimate decision-maker and drafts the final decision, and law clerks submit to national judges a structured outline of facts and an assessment of legality. At the Court of Justice of the European Union (CJEU), for instance, the role of the *référendaire* goes well beyond mere auxiliary tasks. After the oral proceedings, the advocate general's référendaire assists in preparing his or her opinion according to the working style of the individual member; the reporting judge's référendaires help draft the report for the hearing, the preliminary report and the draft judgment.[11] Ultimately, however, judges maintain control over the draft, notably through interaction and upfront guidance given to the legal assistant; by deliberation among judges themselves; by giving direction on the outcome of the case while letting the legal reasoning be drafted by the assistant; or by approval after review and modification of the draft.[12]

Similarly, the WTO Secretariat exercises strong agenda-setting functions, notably through proposing and selecting panellists, by drafting questions for the parties and

[8] Gageler, 'Why Write Judgements', 36 *Sydney Law Review* (2014) 189.

[9] Kenney, 'Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court', 33 *Comparative Political Studies* (2000) 593.

[10] See, e.g., Gailmard, 'Accountability and Principal-Agent Theory', in M. Bovens *et al.* (eds), *The Oxford Handbook of Public Accountability* (2014) 95.

[11] Solanke, '"Stop the ECJ"? An Empirical Analysis of Activism at the Court', 17 *European Law Journal* (2011) 764, at 778; Kenney, *supra* note 9, at 611; Cahill, 'The Référendaire as Unseen Actor', in Baetens, *supra* note 4, 496, at 503.

[12] On the central role of *référendaires* at the Court of Justice of the European Union (CJEU), see also Vauchez, 'Translated from French by Jack Murphy', 60 *Revue française de science politique* (2010) 247.

by participating in the hearings. In particular, drafting the issues paper for discussion with the panellists gives procedural control over the internal proceedings, as this paper identifies the main legal points and issues of the case. Yet information asymmetries are ubiquitous in relationships between clerks and judges, often simply because clerks serve longer terms than judges, leading to situations where an experienced clerk assists an inexperienced judge. Being inexperienced in legal drafting does not prevent them from developing reasoned judgments that feed into the ultimate drafting process that is delegated to the clerks.

What remains hidden from stylometric analysis is the extent to which panellists, prior to, or on the basis of, an issues paper and other supportive documentation, offer guidance, approval or disapproval on the direction of the legal argument and thus seize control of the ultimate product. With the WTO Secretariat formally in a supportive function (Article 27.1 of the Dispute Settlement Understanding [DSU]), panellists determine the legal reasoning, request changes to the legal analysis and raise new issues or supplant others.[13] Even if the Secretariat is involved in drafting the ruling, it does so pursuant to the panel's instructions.[14] The extent to which panellists engage with WTO staff and use their managing rights over the proceedings is a question to be answered in the specific case and a function of the individual panellist, just as it is the case in any other tribunal.[15] But the degree to which intellectual ownership and writing authorship diverge is not discoverable through stylometry. Importantly, in addition to the instructions given by panellists to the Secretariat upfront for the drafting of the report, the panel ultimately meets internally to discuss the draft and finalize it (just as the judges at the CJEU ultimately deliberate among them without the presence of the *référendaires*) – the panel's authorship of the report is thus secured throughout the process. In this regard, Pauwelyn and Pelc's quantitative analysis misses essential information on legal authorship that predates the drafting of the final version of a panel report.

Without gauging the distinction between style and substance, it is not surprising that Pauwelyn and Pelc find that academically experienced WTO staff members with a publication record (which is the reference group of their study[16]) leave their fingerprints on the final panel report. They are adept at legal drafting and have mastered the presentation of legal arguments. By contrast, the role of a panellist, by design, is rooted both in the political sphere of trade diplomacy and related areas, on the one hand, and in the part-time and ad hoc engagement of an adjudicator, on the other hand. In this dual role, while legal judgment should rest with the panellist, the technique of drafting is not as obviously intertwined with this position compared to a

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.

[14] Baker and Marceau, 'The World Trade Organization', in Baetens, *supra* note 4, 70, at 84.

[15] In relation to the CJEU, subject to substantial differences in working style among members, *référendaires* assume much responsibility for drafting the report for the hearing and the judgment. See Kenney, *supra* note 9, at 610.

[16] Pauwelyn and Pelc, *supra* note 3, at 549.

full-time adjudicator rendering judgments as a core professional exercise. With panellists coming from different professional backgrounds, their exposure to the WTO's legal context, including the peculiar way of drafting panel reports, falls outside their professional exposure and habits. Leaving the final drafting to experienced writers is then a matter of sensible workload sharing.

Finally, even on the basis of Pauwelyn and Pelc's own findings, there are doubts concerning the consistency of the Secretariat's influence on dispute settlement. Their stylometric analysis lifts the veil of anonymity of the dissenting votes of Appellate Body members,[17] thus offering proof that it is not the WTO Appellate Body staff drafting these opinions but the individual Appellate Body member herself. This finding stands in contrast with the influence hypothesis, particularly as there is no reason to believe that the WTO Appellate Body division would be less influential, less competent or composed of less experienced lawyers than their colleagues from the Legal Affairs Division and the Rules Division.[18] In any case, even if one would reckon that a dissenting Appellate Body member relies less heavily on WTO staff resources than the main Appellate Body ruling, there remains an inconsistency that suggests that the alleged influence of the WTO Secretariat is not one that prevails consistently across all spheres of dispute settlement alike. It suggests that it is more up to each individual Appellate Body member or panellist whether and to what extent she relies on the Secretariat's resources.[19]

2 Rational-legal Bureaucracies Enhance (One Dimension of) Legitimacy

The assertive role of the WTO Secretariat has raised concern among some observers for some time already.[20] While descriptive evidence has been put forward to demonstrate this influential role, the criticism has not offered a convincing normative benchmark that would reveal a lack of legitimacy of the Secretariat's contribution to dispute settlement. Admittedly, legitimacy issues would arise where panellists, as the expected decision-makers, would overtly or covertly delegate their work to the Secretariat in

[17] *Ibid.*, at 556.

[18] Indeed, the authors emphasize elsewhere that the World Trade Organization (WTO) Secretariat has played an analogous role in assisting the Appellate Body, such as in providing guidance to panellists and even holding sway over the Appellate Body. See Pelc, 'Sausage-Making at the WTO: Looking behind the Curtain of Dispute Settlement Procedures over Time', in M. Elsig, R. Polanco and P. van den Bossche (eds), *International Economic Dispute Settlement* (2021) 47, at 53.

[19] Also, claiming the uniform influence of WTO staff on WTO rulings is not compatible with judicial conflicts between panel rulings and the Appellate Body as they occurred in the field of safeguards. Ahn and Kim, 'Judicial Conflicts between Panels and the Appellate Body in the WTO Safeguard Jurisprudence', 54 *Journal of World Trade* (2020) 961.

[20] Baetens, 'Unseen Actors in International Courts and Tribunals Challenging the Legitimacy of International Adjudication', in Baetens, *supra* note 4, 217; Soave, 'The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?', in Baetens, *supra* note 4, 323.

breach of the rules and the expectations of the members.[21] However, there is no normative impediment that would reserve the final stage of drafting to panellists as the nominal authors of the report and those individuals ultimately accountable for it. Rather, a legitimacy standard must spell out the degree to which the exercise of public authority may rely on different sources of contributions. Depending on the view of what grounds the legitimacy of international dispute settlement bodies such as the WTO, delegating the drafting of a decision appears not only to be valid, but it could also be desirable.

Adjudication of international law as a transnational emanation of the separation of power can be likened to the two sources through which public power derives legitimacy.[22] First, political election or appointment is an act of direct delegation of public authority, typically based on trust (legislative or executive bodies), competence (judiciary) or a combination of both and, in all cases, through the formal, often time-limited delegation of power; appointments of this kind vest the persons concerned with political or judicial accountability. Second and by contrast, legitimacy also originates in the notion of a rational, neutral, de-politicized and objective conduct of public affairs, one that is de-coupled from political and opportunistic decision-making, often hierarchically subordinate to the bearer of political accountability. This second pillar of power typically lacks direct accountability and builds on a body of civil service recruited through formal procedure pertaining to merit-based competence and personal reliability. Hence, public power typically emanates as a couple, with one visible holder of political accountability (the legislator, judge or executive) and one faceless background entity contributing neutral expertise in a technical manner to the mandate held by the accountable office holder.[23]

There are various theoretical strands to make this bureaucratic work stream fit into a framework of legitimacy. In political science, the two-fold legitimacy sources have been likened to the differentiation between input legitimacy – the political accountability accorded by, and traceable to, majoritarian institutions or electoral representation – and output legitimacy – the quality and effectiveness in achieving the mandated goal, particularly the problem-solving quality of laws and rules.[24] Input and output legitimacy may complement each other, justifying WTO-like designs of having a panellist accountable and sensitive to member states' interest (but of limited substantive rationality), on the one hand, and a technical and neutral Secretariat that ensures legally sound panel reports, on the other hand.

A multi-sourced notion of legitimacy is also evinced from the rich legitimacy literature that has explored international law,[25] where the legitimacy of international

[21] Douglas, 'The Secretary to the Arbitral Tribunal', in B. Berger and M.E. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* (2014) 88.

[22] Duran, 'Legitimacy, Law, and Public Action', 59 *L'Année sociologique* (2009) 303.

[23] G.B. Peters, *The Politics of Bureaucracy: An Introduction to Comparative Public Administration* (2018), at 193–226.

[24] F.W. Scharpf, *Governing in Europe* (1999), at 7–21.

[25] Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *American Journal of International Law* (1999) 596, at 596–597; Tasioulas, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 97; Thomas, 'The Uses and Abuses of Legitimacy in International Law', 34 *Oxford Journal of Legal Studies* (2014) 729, at 731.

organizations has been recognized as a layered, multi-dimensional concept.[26] Constitutive or legal legitimacy figures as one dimension of legitimacy and relates to the legality of the authority exercised by an international organization.[27] A legitimacy notion focusing on legality supports the conduct of the WTO Secretariat that ensures law abidance of the panel report, such as structuring the relevant legal material and facilitating the panellists' handling of an increasing amount of case law – hence, facilitating, in particular, those elements of sound decision-making that include the preparation of draft reports, which cannot be mastered by panellists who possess predominantly diplomatic and political expertise.

Similar to output legitimacy, sociological legitimacy concepts view international courts and tribunals as gaining legitimacy in line with the outcomes of a court's decisions. This effectiveness standard relates to the ability of the institution in question to meet the goals for which it was created.[28] Proxies for outcome compliance are, *inter alia*, the degree to which the court's judgments are perceived to be sound and well reasoned, whether the court addresses all arguments raised by the parties or whether it ensures consistency with earlier case law.[29] It is hardly straightforward to turn this legitimacy dimension against the WTO Secretariat, whose efforts during the panel proceedings are directed towards consistency with international law and precedents, and to ensure that panel reports withhold scrutiny at the appellate stage.

Lastly, the procedural dimensions of international courts' legitimacy typically focus on the method by which these outcomes are achieved.[30] Basic elements that are typically referred to as determinants of procedural legitimacy are transparency and the fairness of procedures, the procedure in appointing tribunals and their judges, safeguards of impartiality and the type of expertise required of judges.[31] The WTO is a peculiar subject of procedural legitimacy, with panellists deliberately drawn from the diplomatic corps rather than from the judiciary, with the director-general entitled to appoint panellists and the DSU's explicit preference for 'mutually agreed solutions' to avoid final rulings. These treaty-based arrangements strengthen the procedural responsibilities of the WTO Secretariat in the production of a panel report, while permitting non-legalistic avenues to remain pursuable. This special role of the WTO Secretariat needs not result in the marginalization of panellists by power-hungry staff members, as Pauwelyn and Pelc suspect.[32] As long as panellists make use of the

[26] Baetens, 'Unseen Actors', *supra* note 20, at 5; Langvatn and Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', in N. Hayashi and C.M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (2017) 41.

[27] Thomas, *supra* note 25, at 735.

[28] Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations', in R. Wolfrum and V. Roben (eds), *Legitimacy in International Law* (2008)1, at 6–7.

[29] Baetens, 'Unseen Actors', *supra* note 20; Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals', in R. Wolfrum and V. Roben, *Legitimacy in International Law* (2008) 169, at 171–173.

[30] Grossman, 'The Normative Legitimacy of International Courts', 86 *Temple Law Review* (2013) 61.

[31] Baetens, 'Unseen Actors', *supra* note 20, at 7–8.

[32] Pauwelyn and Pelc, *supra* note 3, at 529, 536, 559.

independence and responsibility assigned to them by the DSU – that is, to interactively develop the panel report with the assistance of the WTO Secretariat – there is no peril to procedural legitimacy, nor a risk to the equilibrium between the judicial autonomy of the panellist and the substantive influence of the Secretariat. Procedural legitimacy concerns eventually only arise when the Secretariat members fully or partially draft a judgment without being checked and guided by other staff and panellists through the multiple channels and fora of interaction that permeate the dispute settlement process.

3 Running against a Member-driven WTO?

Based on their stylometric analysis, the authors claim that the WTO Secretariat has turned into an independent actor largely operating beyond the control of its membership. They wonder: 'Why would governments nonetheless empower these permanent staff members who lack direct accountability?'[33] A simple answer to this question could be that members have given consent to a new legal order with the knowledge that, with the growth and maturity of the dispute settlement system, a complex legal *acquis* would emerge, giving rise to the Secretariat's pre-eminent function in complementarity to the political and diplomatic orientation of the dispute settlement. Member states have not objected to the growth of the three relevant divisions (Legal Affairs, Rules, Appellate Body), nor do they pre-empt the director-general's right to appoint panellists, and the increasing appeal rate is not indicative of member states' dissatisfaction with the panel process. What Pauwelyn and Pelc lament as the alienation of the WTO Secretariat from its intended role as a mere servant of the dispute settlement process[34] seems in fact to be in line with the members' interest. Two reasons may play a role here. First, there is no such thing as a homogenous member's interest that could be undermined by the assertive role of the WTO Secretariat in the proceedings. As under constitutional practice described above, technical and neutral bodies are key to ensuring that appointed or politically accountable decision-makers take rational and well-reasoned decisions. The absence of large-scale dissatisfaction indicates that the services provided by the WTO Secretariat seem credibly motivated to ensure consistency with case law and rules in order to help panellists to comprehensively assess factual and legal claims and to streamline the procedure.

Second, there is no indication of a lack of impartiality that would systematically discriminate between members in the way in which the Secretariat supports panels or influences the jurisprudence. In fact, institutional safeguards exist ensuring the impartiality of legal services. Similar to recruitment systems of civil services, hiring WTO staff is merit based; the formal application requirements (such as the staff members' legal competence) and additional requirements (for example, that permanent

[33] *Ibid.*, at 536.
[34] *Ibid.*, at 562, 559.

staff members cut off their ties with governments) aim at securing professional independence. If the legal divisions were pursuing their own agendas (and public choice theory suggests that they may do, like all bureaucracies[35]), their striving for prestige, extending competences, stabilizing the WTO's legal and institutional system and maintaining consistency with WTO rulings would not necessarily challenge their legal competence and independence.

4 Conclusion

Legitimacy concerns surrounding faceless bureaucrats have loomed prominently for some time. In 1957, the US News and World Report referred to clerks as 'ghostwriters' of opinions, the 'second justices' on the Court, 'not subject to the usual security or loyalty checks'.[36] Their fingerprints on final products emerged from the more general phenomenon of the specialization of bureaucracies described by Max Weber.[37] It connects to the outreach and power-mongering of institutions as a well-documented phenomenon in public choice theory. The influential role of the Secretariat appears to be ushered by the bureaucratization of the WTO. With the growing *acquis* of rules and case law, the assertive involvement of the Secretariat emanates from its commitment to the rule of law and its efforts to enable panels to cope with an increasing workload of complex cases. With the recent advances in text as data offering fertile methodologies across areas of international law, future empirical research should further dive into the 'black box' of the inner workings of tribunals, especially to explore the interaction between bureaucrats and appointed decision-makers in the run-up to final decisions and rulings, for this insight could inform the legitimacy debate and the permissible scope of the delegation of tasks from appointed adjudicators to faceless bureaucrats.

[35] S. Richardson, *The Political Economy of Bureaucracy* (2011).

[36] Newland, 'Personal Assistants to Supreme Court Justices: The Law Clerks', 40 *Oregon Law Review* (1961) 299, at 311.

[37] M. Weber, *Grundriß der Sozialökonomie III. Abteilung: Wirtschaft und Gesellschaft* (1922), at 124–130.